List of frequently cited authorities in WRC jurisprudence

As part of the WRC's mandate to provide information to the public and facilitate effective access to justice in relevant employment and equality matters, the following is a list of the case authorities from other tribunals and courts which are most frequently cited before the WRC.

The list below was generated by a tailored AI-based search of over 10,000 WRC decisions to establish the most commonly cited decisions from other courts and tribunals.

Please note that all of the WRC's own jurisprudence is available on the WRC's fully searchable website database.

In order to reduce the environmental impact of printing and sending large files to the WRC, Parties no longer need to send the WRC copies of cases upon which they rely if they appear in the list below which will be reviewed periodically. The full text of each case appears below and the index is hyperlinked.

However, parties must still explain why a case is relevant to their arguments and cite the relevant sections of the case authorities upon which they rely.

Please note that the list of authorities was last reviewed on the 6th June 2023

Supreme Court Decisions

1. *Tomasz Zalewski v. Workplace Relations Commission & Ireland & AG* [2021] IESC 24.
    a. *Judgment of Charleton J.*
    b. *Judgment of MacMenamin J.*
    c. *Judgment of McKechnie J.*
2. *Berber v. Dunnes Stores Limited* [2009] IESC 10.
3. *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] IR 34.
4. *Barry v. Minister for Agriculture and Food* [2015] IESC 63.
5. *Re: Haughey* [1971] IR 217.
6. *Glover v. BLN Ltd* [1973] IR 388.
7. *Nano Nagle School v. Daly* [2019] 3 IR 369.
8. *Louth VEC v. The Equality Tribunal* [2016] IESC 40.
9. *McKelvey v. Iarnród Eireann* [2019] 1 IR 573.
10. *Ruffley v. Board of Management of St Anne's School* [2017] IESC 33.

11. *Halal Meat Packers (Ballyhaunis) Ltd v. Employment Appeals Tribunal* [1990] WJSC-SC 731.
12. *Burns v. Governor of Castlerea Prison* [2009] 3 IR 682.
13. *Minister for Education and Skills v. Anne Boyle* [2018] IESC 52.
14. *Mooney v. An Post* [1998] 4 IR 288.

Court of Appeal Decisions

15. *Culkin v. Sligo County Council* [2017] 2 IR 326.
16. *Karshan (Midlands) Limited t/a Domino's Pizza v. The Revenue Commissioners* [2022] IECA 124.
    a. *Judgment of Whelan J.*
    b. *Judgment of Costello J.*
    c. *Judgment of Haughton J.*

High Court Decisions

17. *O'Reilly v. Irish Press* [1937] ILTR 194.
18. *Bank of Ireland v. James Reilly* [2015] IEHC 241.
19. *Stasaitas v. Noonan Services Group Ltd and the Labour Court* [2014] IEHC 199.
20. *County Louth VEC v. the Equality Tribunal and Pearse Brannigan* [2009] IEHC 370.
21. *Frizelle v. New Ross Credit Union Ltd* [1997] IEHC 137.
22. *Health Service Executive v. McDermott* [2014] IEHC 331.
23. *Minister for Agriculture and Food v. Barry* [2009] 1 IR 215.
24. *Barry & Ors* v. *Minister for Agriculture and Food* [2011] IEHC 43.
25. *JVC Europe Limited v. Jerome Panisi* [2011] IEHC 279.
26. *Bolger v. Showerings (Ireland) Limited* [1990] ELR 184.
27. *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 30.
28. *O'Higgins v. The Labour Court & University College Dublin* [2013] IEHC 508.
29. *Minister for Finance v. Civil and Public Service Union & Ors* [2006] 1 IR 254.
30. *P Elliot and Co v. Building and Allied Trade Union* [2006] IEHC 340.
31. *Doyle v. Asilo Commercial Limited* [2008] IEHC 445.
32. *Donnellan v. Minister for Justice, Equality and Law Reform* [2008] IEHC 467.
33. *Lyons v. Longford Westmeath Education and Training Board* [2017] IEHC 272.
34. *Dunnes Stores (Cornelscourt) v. Lacey and Nuala O'Brien* [2007] 1 IR 478.
35. *Re Sunday Tribune* [1984] IR 505.

36. *Cleary & Ors v. B & Q Ireland Ltd* [2016] 1 IR 276.
37. *Sunday Newspapers Ltd v. Stephen Kinsella and Luke Bradley* [2007] IEHC 324.
38. *Histon v. Shannon Foynes Port Company* [2006] IEHC 292.
39. *Trinity Leisure Holdings t/a Trinity City Hotel v. Sofia Kolesnik & Natalia Alfimova* [2019] IEHC 654.
40. *Cunningham v. Intel Ireland Ltd* [2013] IEHC 207.
41. *Morgan v. Trinity College Dublin* [2003] 3 IR 157.
42. *O'Coindealbhain (Inspector of Taxes) v. Mooney* [1990] 1 IR 442.
43. *G v. Department of Social Protection* [2015] 4 IR 167.
44. *Petkus & Ors v. Complete Highway Care Ltd* [2017] IEHC 12.
45. *The Board of Management of Malahide Community School v. Conaty* [2020] 2 IR 394.
46. *Balans v. Tesco Ireland Limited* [2020] IEHC 55.
47. *Burke v. An Adjudication Officer & The Workplace Relations Commission* [2021] IEHC 667.
48. *Capital Food Emporium (Holdings) Ltd v. Walsh & Employment Appeals Tribunal & Stewart* [2016] IEHC 725.

Circuit Court Decisions

49. *Allied Irish Banks plc v Purcell* [2012] 23 ELR 189.
50. *Hurley v Royal Cork Yacht Club* [1977] ELR 225.
51. *Humphreys v Westwood Fitness Club* [2004] 15 ELR 296.
52. *Atkinson v Carty* [2005] ELR 1.

Labour Court Decisions

53. *Valpeters v. Melbury Developments Ltd* [2010] ELR 64.
54. *Mitchell v. Southern Health Board* [2001] 12 ELR 201.
55. *Cementation Skanska (Formerly Kvaerner Cementation) v. Carroll* DWT0338.
56. *Tribune Printing and Publishing Group v. Graphical Print and Media Union* DWT046.
57. *Westwood Fitness Club v. Humphreys* EED037.
58. *Dyflin Publications Limited v. Ivana Spasic* EDA0823.
59. *Toni & Guy Blackrock Limited v. O'Neill* HSD095.
60. *Irish Water v. Patrick Hall* TED161.
61. *DHL Express (Ireland) Ltd v. Michael Coughlan* UDD1738.
62. *Cork County VEC v. Hurley* EDA1124.

63. *Gino's Italian Ice- Cream Ltd v. Ewelina Gacek* DWT1627.
64. *McGrath Partnership v Monaghan* PDD162.
65. *Paris Bakery & Pastry Limited v. Mrzljak* DWT1468.
66. *Allianz Worldwide Care S.A. v. Ranchin* UDD1636.
67. *Beechside Company Limited t/a Park Hotel Kenmare v. A Worker* LCR21798.
68. *Salesforce.com v. Leech* EDA1615.
69. *Bord Gais Eireann v. Thomas* PWD1729.
70. *Viking Security Ltd v. Valent* DWT1489.
71. *Cementation Skanska (Formerly Kvaerner Cementation) v. Carroll* DWT0425.
72. *Auto Depot Ltd v. Mateiu* UDD1954.
73. *Geoghegan T/A Taps v. A Worker* INT1014.
74. *An Employer v. A Worker (Mr O) (No. 1)* EDA0419.
75. *An Employer v. A Worker (Mr O) (No. 2)* EED0410.
76. *Department of Finance v. IMPACT & Ors* EET042.
77. *A Government Department v. A Worker* EDA094.
78. *Trailer Care Holdings Ltd v. Deborah Healy* EDA128.
79. *Connaught Airport Development Limited v. John Glavey* EDA1710.
80. *Terminal Four Solutions Ltd v. Rahman* DWT11104.
81. *Travelodge Management Ltd v. Wach.* EDA1511.
82. *Nutweave Ltd t/a Bombay Pantry v. Kumar* DWT1537.
83. *Citibank v. Ntoko* EED045.
84. *Sword Risk Services Ltd v. Sheahan* DWT1435.
85. *P J Personnel Ltd v. Maguire* CA-00019947.
86. *Public Appointments Service v. Kevin Roddy* EDA 1019.
87. *Earagail Eisc Teoranta v. Richard Lett* EDA1513.
88. *Cementation Skanska (formerly Kvaerner Cementation) Ltd v. McGrath* DWT0342.
89. *Transdev Light Rail Limited v. Michael Chrzanowski* EDA1632.
90. *Dublin Bus v. McCamley* EDA164.

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91. *Conway v. Ulster Bank Limited* UDA 474/1981.
92. *Looney & Co. Ltd. v. Looney* UD 843/1984.
93. *McCormack v. Dunnes Stores* UD1421/2008.
94. *Liz Allen v. Independent Newspaper* [2002] 13 ELR 84.

95. *Travers v. MBNA Ireland Ltd* UD720/2006.
96. *Sheehan v. Continental Administration Co Ltd* UD 858/1999.
97. *Hennessy v. Read & Write Shop Ltd* UD192/1978.
98. *St Ledger v. Frontline Distributors Ireland Ltd* UD56/94.
99. *Lennon v. Bredin* M160/1978.
100. *Noritake (Ireland) Limited v. Kenna* UD88/1983.
101. *O'Hanlon v. Ulster Bank Ireland Limited* UD1096/2014.
102. *Donegan v. County Limerick VEC* UD828/2011.
103. *Reid v. Oracle EMEA Ltd* UD1350/2014.
104. *O'Riordan v. Great Southern Hotels* UD1469-2.
105. *Bunyan v. United Dominions Trust* [1982] ILRM 404.
106. *Bigaignon v. Power Team Electrical Se rvices Ltd* UD939/2010.
107. *Coad v. Eurobase.* UD1138/2013.
108. *Boucher v. Irish Productivity Centre* R92/1992.
109. *Sullivan v. Department of Education* [1998] ELR 217.
110. *Tierney v. DER Ireland Ltd.* UD866/1999.
111. *Gillian Free v. Oxigen Environmental* UD206/2011.
112. *Harrold v. St Michael's House* UD1123/2004.
113. *Steffan Chmiel & Ors v. Concast Precast Limited* PWA725,726,727/2012.
114. *Zabiello v. Ashgrove Facility Management Ltd* UD1106/2008.
115. *Burke v. Superior Express Ltd* UD1227/2014.
116. *Murray v. Rockabill Shellfish Ltd* UD1832/2010.

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117. *Margetts v. Graham Anthony & Company Limited* DEC-E2002-050.
118. *Tom Barrett v. Department of Defence* DEC-E2015-017.
119. *McCarthy v. Cork City Council* DEC-E2008- 016.
120. *Doyle v. ESB International* E2012/086.
121. *Wach v. Smorgs ROI Management Ltd t/a Travelodge Waterford* E2016-045.

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122. *Ville de Nivelles v. Rudy Matzak* C-518/15.
123. *Spijkers v. Gebroeders Benedik Abbatoir* CV C-24/85.
124. *Landesshauptstadt Keil v. Jaeger* C-151/02.

125. *Süzen v. Zehnacker Gebäudereinigung GmbH* Krankenhausservice C-13/95.
126. *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana* C-303/98.
127. *Bilka-Kaufhaus GmbH v. Weber Von Hartz* C-170/84.
128. *Dekker v. Stichting Vormingcentrum voor Junge Volwassenen* C-177/88.
129. *Ahmed Mahamdia v. People's Republic of Algeria* C-154/11.
130. *Brown v. Rentokil Ltd* C-394/96.
131. *Felix Palacios De La Villa v. Cortefiel Servicios* C-411/05.
132. *Fuchs and Kohler v. Landhessen* C-159/10.
133. *Kurz v. Land Baden-Wurttemberg* C-188/00.
134. *Lawrie-Blum v. Land Baden-Wurttemberg* C-66/85.
135. *Redmond Stichtung v. Bartol* C-29/91.
136. *Berg v. Besselsen* C-144/87.
137. *Georgiev v. Tecnicheski Universitet* C-250/09.
138. *Schultz-Hoff v. Deutsche Rentenverisherung Bundand Stringer v. Her Majesty's Revenue and Customs* C-350/06.

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139. *Western Excavations v. Sharp* [1978] ICR 221.
140. *Hughes v. Corporation of Commissionaires Management Ltd* [2011] EWCA Civ 1061.
141. *British Leyland UK Ltd v. Swift* [1981] IRLR 91.
142. *Gallagher and others v. Alpha Catering Services Limited* [2005] ICR 673.
143. *The Post Office v. Foley* [2000] ICR 1283.
144. *Madrassy v. Nomura International plc* [2007] ICR 867.

High Court (England and Wales) Decisions

145. *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173.
146. *Henderson v. Henderson* [1843] HARE E100.
147. *Ready Mixed Concrete Ltd (South East) v. Minister of Pensions* [1968] 2 QB 497.

Employment Appeals Tribunal (England and Wales) Decisions

148. *The Royal Bank of Scotland Group v. Lindsay* UKEAT/0506/09.
149. *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.
150. *Barton v. Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205.

AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000066

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

Between/

TOMASZ ZALEWSKI

Applicant/Appellant

— AND —

AN ADJUDICATION OFFICER

AND

THE WORKPLACE RELATIONS COMMISSION

AND

IRELAND

AND

THE ATTORNEY GENERAL

Respondents

— AND —

BUYWISE DISCOUNT STORE LIMITED

Notice Party

Judgment of Mr. Justice O'Donnell delivered on the 6th day of April, 2021.

I – Introduction

A. Background

1. These proceedings concern the constitutionality of the adjudicative process established under the Workplace Relations Act 2015 ("the 2015 Act"). The central issues raised are: whether that process amounts to the administration of justice required under the Constitution to be administered in courts; and, whether the statutory framework adequately vindicates a claimant's rights under the Constitution and the European Convention on Human Rights ("E.C.H.R.").

2. In a determination of the 28th of July, 2020, this court granted the appellant leave to appeal directly from the decision of the High Court (Simons J. – [2020] IEHC 178 (Unreported, High Court, Simons J., 21st of April, 2020)). The respondents cross-appeal in respect of certain findings of the trial judge and against the decision to award the appellant his costs ([2020] IEHC 226 (Unreported, High Court, Simons J., 21st of May, 2020)).

B. The Judgment of the High Court: [2020] IEHC 178

i. Facts

3. This case originated in the purported dismissal of the appellant by his former employer. The appellant then instituted two statutory claims:

(i.) a claim for unfair dismissal pursuant to the Unfair Dismissals Act 1977 ("the 1977 Act" or "the Act of 1977"); and

(ii.) a claim for payment in lieu of notice pursuant to the Payment of Wages Act 1991 ("the 1991 Act").

Although each of these Acts provides for claims to be made for reliefs, the procedure for such claims is now provided for in the 2015 Act. It is that procedure which is challenged in this case.

4. The appellant's claims were referred by the Director General of the Workplace Relations Commission ("W.R.C."), pursuant to s. 41 of the 2015 Act and s. 8 of the 1977 Act, to an adjudication officer with a hearing scheduled for the 26th of October, 2016. The hearing commenced on that date, and the adjudication officer received written submissions and other documentation from the parties. An application for an adjournment was then made on behalf of the employer. Before the High Court, the parties disagreed as to the precise purpose of such; the State respondents submitted that the adjournment was to allow a witness on behalf of the employer to attend and be cross-examined whilst the appellant maintained that the adjournment was to merely allow the witness to attend with no decision having been made on cross-examination. Simons J. noted that this disagreement was significant in relation to the appellant's contention that cross-examination was not available under the 2015 Act.

5. It is not in dispute that the hearing on the 26th of October only lasted for a few minutes with a further hearing scheduled for the 13th of December, 2016. The parties attended at the W.R.C.'s premises on that date but were informed by the adjudication officer that a decision had already issued in respect of the claim and that the hearing date had been scheduled in error. The adjudication officer informed the parties that the decision had already issued and the parties subsequently received a decision dated the 16th of December, 2016, which appeared to record that a full hearing did take place, after which a decision had been made dismissing the appellant's claim. The extraordinary circumstances have been set out in the judgment in the court below and in a previous judgment of this court on the *locus standi* issue, but it is necessary to repeat them here as they form an essential backdrop to the legal issues raised on this appeal.

6. Tomasz Zalewski worked in a Costcutter convenience store in North Strand, Dublin, between 2012 and April, 2016. He started as a security man and then became a supervisor. The shop was subject to regular shoplifting and was, on occasions, robbed.

In October, 2014, a most serious incident occurred when the shop was robbed with the use of pepper spray and a gun which was discharged. Mr. Zalewski commenced personal injury proceedings against his employer arising out of the incident. Later, in April, 2016, the manager of the shop, Mr. Brady, reprimanded Mr. Zalewski because he considered that there was a known shoplifter on the premises and that Mr. Zalewski ought to have excluded her. The conversation was heated. Mr. Zalewski went home and sought medical advice the following day. The management of the shop considered this to be misconduct.

7. Later, Mr. Zalewski was contacted by the owner's son, who apologised — and then asked him in for a meeting with him and the manager — and then, at the meeting, both apologised. However, when Mr. Zalewski returned from sick leave he was called to another meeting and told it was a continuation of the first meeting. He was informed that he was not doing his job acceptably, had not prevented shoplifting, and had organised legal and medical advice for other members of the staff in relation to the violent robbery incident. He was formally called to a disciplinary meeting. In a letter of the 26th of April, 2016, he was informed that he had not followed correct robbery prevention procedures, had undermined staff members' attempts to follow the procedures, and had denigrated the work ethic of other members of staff. Most seriously, he was informed that he had "associated with and used monies removed from the tills". He was summarily dismissed on grounds of gross misconduct. He appealed the decision, which was upheld by the shop owner, himself. He was told that there was no accusation of stealing, but that the accusation contained in the letter was something asserted by another member of staff. Otherwise, the dismissal was affirmed.

8. Mr. Zalewski consulted a solicitor and commenced proceedings for unfair dismissal, and a claim for pay in lieu of notice under the 1991 Act. Mr. Zalewski and his solicitor attended at Tom Johnson House on the 26th of October, 2016, and met a representative of a professional firm representing the employer. There was a brief hearing, and the

adjudication officer enquired as to whether Mr. Zalewski was in receipt of social welfare payments and asked the solicitor to confirm that he was not in receipt of any illness benefit and to provide her with a letter or certificate from the Department of Social Welfare. The employer's representative then sought to hand in a booklet of documents to the adjudication officer. Mr. Zalewski's solicitor had emailed a brief submission to the Workplace Relations Commission relating to procedures. The submission objected to the taking of any evidence by written documentation, and sought to insist that any evidence would be given by witnesses. Accordingly, Mr. Zalewski's solicitor objected to the handing in of the booklet and stated that any factual evidence should be proved through an appropriate witness. At that point, the employer's representative requested an adjournment of the hearing because one of the witnesses needed was not present. Mr. Zalewski's solicitor indicated that he would not object to any such application, and the adjudication officer adjourned the hearing. The entire hearing took no more than ten minutes.

9. By letter of the 1st of November, the Workplace Relations Commission informed Mr. Zalewski that a hearing date of the 13th of December, 2016, had been assigned to the case, and that the hearing would take place at the W.R.C. offices at Lansdowne House, Ballsbridge. Mr. Zalewski's solicitor had obtained correspondence from the Department of Social Protection confirming that he had not been in receipt of any illness or occupational benefit during the relevant period. Mr. Zalewski attended at Lansdowne House together with his solicitor on the 13th of December. The solicitor then met the representative of the employer, who told him that she had been informed by the adjudication officer's receptionist that the adjudication officer had already issued her decision in relation to the complaints, and that the hearing had been scheduled in error. At that point, the adjudication officer walked into the corridor and met the solicitor and the employer's representative. She apologised and said that the hearing date had been

assigned in error and that she had issued her decision the previous week. She appeared to consider that she had heard and determined the case on the previous occasion. The solicitor received a letter dated the 16th of December, 2016, from the W.R.C. containing a copy of the adjudication officer's decision dismissing the complaints. The decision stated that the adjudication officer had "enquired into the complaints and [*given*] the parties an opportunity to be heard … and to present … any evidence relevant to the complaints". The decision contained a summary of the employer's position which appeared to be extracted from the documentation submitted by the employer's representative and to which the solicitor had objected. The decision also stated that the applicant had been requested to provide a statement from the Department of Social Protection and had failed to do so.

10. An *ex parte* application for leave to apply for judicial review was made on the 20th of February, 2017, seeking a wide range of declaratory reliefs, including declarations that the 2015 Act was repugnant to the Constitution, together with an order of *certiorari* quashing the decision of the adjudication officer. The State respondents conceded that the defects in procedure meant that the decision of the adjudication offer was invalid and offered to consent to the making of an order of *certiorari*. When the appellant did not agree that this would resolve the matter, the State respondents issued a motion seeking to have the appellant's claim for declarations pursuant to the Constitution and the E.C.H.R. dismissed. The High Court agreed, but the decision was reversed by this court (*Zalewski v. Adjudication Officer and The Workplace Relations Commission* [2019] IESC 17, [2019] 2 I.L.R.M. 153). The matter then proceeded to a hearing on the broader issues.

ii. Legislative Overview

11. Prior to the 2015 Act, there was a range of statutory bodies having functions in relation to the field of industrial relations and employment law, and which had developed piecemeal, such as the Labour Court, the Labour Relations Commission (including the Rights Commissioners service), the Employment Appeals Tribunal ("E.A.T."), the Equality Tribunal, and the National Employment Rights Authority. In the specific field of adjudication alone, the Labour Court had functions under the Industrial Relations Act 1946, the E.A.T. had jurisdiction in relation to claims under the Redundancy Payments Acts 1967 to 2003, the Minimum Notice and Terms of Employment Act 1973, the 1991 Act, and claims for unfair dismissal under the 1977 Act, and the Equality Tribunal had jurisdiction to hear and determine claims under the Employment Equality Act 1998 and the Equal Status Act 2000. The 2015 Act reduced the number of bodies having functions in the area to a W.R.C. having general jurisdiction and the Labour Court. In the specific field of adjudication and determination of statutory claims, with which this case is concerned, the 2015 Act streamlined the adjudicatory mechanism, providing for hearings in all cases under the legislation set out above before adjudication officers with a right of appeal thereafter to the Labour Court. This was essentially a procedural change and the substantive rights are still largely to be found in the original legislation. As Simons J. noted, however, the "procedural/substantive dichotomy" is not always observed.

12. Simons J. concluded that the appellant could not advance arguments on specific features of other pieces of legislation, such as the Employment Equality Act 1998, in respect of which he had not brought a claim before the W.R.C., and that he was confined to the operation of the statute insomuch as it concerned claims under the 1977 and 1991 Acts. However, any limitations arising from this approach to *locus standi* appeared to have had little practical effect on the determination of the constitutional challenge. Simons J. explained that this was because a claim under the 1977 Act is one of the more significant type of claims which can be brought within the jurisdiction of the decision-makers

concerned and that the legislative history of the 1977 Act was directly relevant to the administration of justice question raised in this case. The argument in relation to *locus standi* loomed large in the High Court and was repeated in the written submissions, but did not figure strongly in oral argument. The appellant argued that it was necessary to consider the breadth of jurisdiction conferred by or collated in the 2015 Act in order to consider both whether it was an administration of justice under Article 34 and, if so, whether the W.R.C. could be said to be exercising limited powers and functions of a judicial nature under Article 37. However, it is not necessary to resolve the question of *locus standi* here. The Act of 1977 is a substantial piece of legislation and formed, perhaps, the most important aspect of the jurisdiction of the E.A.T. and the issues in this Act can be addressed, in principle, by reference to that Act in particular. It is necessary to keep in mind, however, that the W.R.C. and the Labour Court on appeal exercise jurisdiction in respect of claims in respect of redundancy and equality as well.

13. Simons J. set out the relevant aspects of the Act of 1977 (as amended):

(i.) First, a determination by the Employment Appeals Tribunal could not be directly enforced: under s. 10 of the 1977 Act, the Minister for Labour applied to the Circuit Court for an order that the employer make the appropriate redress to the employee. An express right to make such an application has since been conferred on an employee by s. 11 of the Unfair Dismissals (Amendment) Act 1993 ("the 1993 Act"). Originally, the application for enforcement under s. 10 of the 1977 Act involved a rehearing in the Circuit Court. However, s. 11 of the 1993 Act altered this to an *ex parte* application to the Circuit Court which, on proof that the determination had not been complied with, was obliged to make an enforcement order. If the relief granted was reinstatement or reengagement, the court could substitute an order for compensation (this was the model later

adopted in the 2015 Act, albeit that application for enforcement under that Act is to be made to the District Court).

(ii.) Second, there was a statutory right of appeal from a decision of the Employment Appeals Tribunal to the Circuit Court, pursuant to s. 10(4) of the 1977 Act, which, again, took the form of a full rehearing on oral evidence. There also appeared to be a further right of appeal to the High Court in accordance with the Courts of Justice Act 1936 (see *J.V.C. Europe Ltd. v. Panisi* [2011] IEHC 279 (Unreported, High Court, Charleton J., 27th of July, 2011)).

(iii.) Third, the Act did not remove the right of an employee to make a claim at common law for wrongful dismissal. However, once an employee gave notice in writing of a claim under the 1977 Act, s. 15 provided that he or she was not thereafter entitled to recover damages at common law.

14. Simons J. then considered how these provisions had been amended in subsequent legislation, culminating in the 2015 Act:

(i.) The manner in which parallel claims for unfair dismissal and wrongful dismissal were regulated was amended by the 1993 Act. Parallel claims could be pursued until such time as the hearing before either the Employment Appeals Tribunal or the court had commenced, but then the employee was confined to that specific remedy (s. 10 of the 1993 Act). By s. 80(1)(l) of the 2015 Act, an employee is now precluded from pursuing a claim of wrongful dismissal once a decision has been made by an adjudication officer under the 1977 Act and precluded from pursuing a claim for unfair dismissal once a hearing by a court of a claim for damages at common law has commenced.

(ii.) The 2015 Act transferred the jurisdiction exercised by the Rights Commissioners and Employment Appeals Tribunal — which had been carried out pursuant to s. 8 of the 1977 Act — to the adjudication officers and the Labour Court

respectively, and removed the right of appeal to the Circuit Court. There is a right of appeal to the High Court on a point of law with no further appeal therefrom. However, Simons J. did note that an application to the Supreme Court for leave to appeal may be possible (*Pepper Finance Corporation v. Cannon* [2020] IESC 2, [2020] 2 I.L.R.M. 373).

(iii.) The enforcement mechanism of the decision is by application to the District Court pursuant to s. 43 of the 2015 Act. However, the powers of the court are limited. Under s. 43(2), where reinstatement or reengagement was ordered, the court could substitute an order for compensation. The application is made *ex parte* and the employer is not on notice of the application. Once it is established that the adjudication officer has made a determination and that it has not been satisfied within 56 days of the date of notification, then (subject only to the power to substitute damages for an award of reinstatement or reengagement) enforcement is mandatory:-

> "the District Court *shall* … without hearing the employer or any evidence … make an order directing the employer to carry out the decision in accordance with its terms." (*Emphasis added.*)

15. Simons J. then considered the development of the procedure in respect of claims under the 1991 Act:

(i.) Under s. 5 of the 1991 Act, as defined by s. 1(1) of the 1991 Act, the employer is required to pay a sum in lieu of the appropriate prior notice of the termination of employment. Under the 2015 Act, a claim is now made in the first instance to an adjudication officer with a right of appeal thereafter to the Labour Court. Originally, a decision of a Rights Commissioner or a determination of the Employment Appeals Tribunal under the 1991 Act could be enforced as if it were a court order. Now, a decision of an adjudication officer or the Labour

Court must be enforced through an application to the District Court under s. 43 of the Act.

Simons J. then turned to the features of the 2015 Act that were common to claims under both Acts:

(ii.) Under the 2015 Act, an employee who wishes to advance a claim for unfair dismissal or the payment of wages in lieu of notice is required to present the claim to the Director General of the Workplace Relations Commission. The Director General will then refer the claim to an adjudication officer pursuant to s. 8 of the 1977 Act in the case of a claim for unfair dismissal or pursuant to s. 41 of the 2015 Act for a claim for payment of wages in lieu of notice.

(iii.) Adjudication officers are appointed by the Minister for Jobs, Enterprise and Innovation (as defined in s. 2 of the 2015 Act) pursuant to s. 40 of the 2015 Act, with no formal qualifications prescribed. However, s. 40(2) of the 2015 Act provides that appointments as adjudication officer can only be made pursuant to the selection of that person for the role following a competition. The principal functions of an adjudication officer are set out in s. 41(5) of the 2015 Act. An adjudication officer has the power to compel the attendance of witnesses, but does not have an express power to administer an oath or affirmation.

(iv.) There is a right of appeal against the decision of an adjudication officer to the Labour Court under s. 44 of the 2015 Act. The Labour Court can take evidence on oath (s. 21 of the Industrial Relations Act 1946 (as amended by s. 74(a)(ii) of the 2015 Act)) and proceedings are conducted in public unless the Labour Court, upon the application of a party, determines that the proceedings should be conducted otherwise due to special circumstances (s. 44(7) of the 2015 Act). The Labour Court may refer a question of law to the High Court for determination (s. 44(6) of the 2015 Act). Under s. 45, decisions of the Labour

Court can be enforced *via* an application to the District Court in the same way as determinations of an adjudication officer; failure to comply with an enforcement order made under either s. 43 or s. 45 is a criminal offence under s. 51.

iii. Administration of Justice

16. The appellant argued that the procedure under the Act amounted to the administration of justice as *per* Article 34.1 of the Constitution, which could only be carried out by a court. The starting point was the five-point test for the administration of justice set out in *McDonald v. Bord na gCon* [1965] I.R. 217 ("*McDonald v. Bord na gCon*" or "*McDonald*"), recently applied by this court in *O'Connell v. The Turf Club* [2015] IESC 57, [2017] 2 I.R. 43 ("*O'Connell*"):

(i.) a dispute or controversy as to the existence of legal rights or a violation of the law;

(ii.) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;

(iii.) the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;

(iv.) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;

(v.) the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country.

17. The parties accepted that the determination of the two relevant claims exhibited the first three characteristics, but disputed whether the fourth and fifth characteristics were fulfilled.

18. Simons J. held that the fifth limb of the test required a consideration of whether the claims for redress which the appellant made were of a type which have historically been determined by a court. He reviewed the case law (*In re The Solicitors Act 1954* [1960] I.R. 239 ("*Re Solicitors Act 1954*"); *Cowan v. The Attorney General & Ors.* [1961] I.R. 411 ("*Cowan v. A.G.*"); *Keady v. Commissioner of An Garda Síochána* [1992] 2 I.R. 197 ("*Keady*"); and *O'Connell*) and concluded that that the fifth characteristic of the *McDonald* test will only assume importance in a small category of cases where there is a long-established tradition of a particular type of decision-making falling within or outwith the courts' jurisdiction. Determining claims for wrongful dismissal was the business of the courts for decades before the 2015 Act and the argument that such were matters of "industrial relations" was contradicted by the legislative history of the 1977 Act and the previous involvement of the Circuit Court. Employment legislation generally implied statutory terms into contracts of employment, and thus the issues for adjudication are not dissimilar to those that would arise in proceedings for breach of contract. The State respondents placed reliance on the jurisdiction in respect of equality claims discussed in *Doherty v. South Dublin County Council (No. 2)* [2007] IEHC 4, [2007] 2 I.R. 696 ("*Doherty*") and argued that, in effect, the 1977 Act created a new self-contained statutory jurisdiction which had never been part of the jurisdiction of the High Court. Simons J. rejected this argument. He did not consider that it was necessary to decide if the fifth limb in *McDonald v. Bord na gCon* could permit the State to put any newly created statutory right beyond the reach of the courts without infringing Article 34, although he doubted it. However, he considered that the very fact that, for almost 40 years, the Circuit Court had jurisdiction to hear and determine claims of unfair dismissal showed that the orders made by the W.R.C. were orders of a type historically made by courts. He considered that *Doherty* was addressed to a different point; in that case, it had been sought to be argued that it was permissible to circumvent the statutory jurisdiction created by the

Equal Status Act and commence a claim for relief under the Act in the High Court. The issue was whether the full and original jurisdiction of the High Court could be invoked notwithstanding the exclusive jurisdiction conferred under the Act. That did not address the question whether the orders made by the Equality Tribunal were of a type which, as a matter of history, were made by courts — indeed, the claim that the High Court had jurisdiction implied that such orders were orders capable of being made by the High Court.

19. Simons J. concluded that the hearing and determination of a claim for unfair dismissal and for the payment of wages in lieu of notice fulfils the fifth limb of the test in *McDonald*: the making of orders determining such claims was characteristic of the business of courts as carried out under the 1977 Act and the type of orders made pursuant to the common law jurisdiction for claims of wrongful dismissal.

20. In relation to the fourth limb, Simons J. noted that the ability of a decision-maker to enforce decisions is one of the essential characteristics of the administration of justice (*Lynham v. Butler (No. 2)* [1933] I.R. 74 ("*Lynham v. Butler (No.2)*")). It was not necessary that the decision-maker must be able to enforce its decisions itself; the executive power of the State may be called to aid in such enforcement. However, a decision to impose financial penalties was not the administration of justice where there is no process for converting such a decision into a judgment and the decision cannot be enforced of its own right and the monies must be recovered in litigation (*O'Connell*).

21. The legislative history of the 1977 and the 1991 Acts indicated that the Oireachtas intended a range of legislative devices to give effect to determinations of statutory bodies in respect of employment disputes. At one end, a determination may be enforced as if it were an order of the Circuit Court made in civil proceedings (s. 8 of the 1991 Act), and, at the other, a requirement to apply to the Circuit Court to enforce a determination where the Circuit Court has full jurisdiction to consider the merits of the underlying claim (s. 10

of the 1977 Act). Simons J. considered that the approach under the 2015 Act lay between these positions: an *ex parte* application must be made to the District Court to enforce a decision of an adjudication officer or the Labour Court and a failure to comply with the District Court order is an offence under s. 51 of the 2015 Act. Simons J. concluded that the necessity of having to make such an application for enforcement deprived the determinations of one of the essential characteristics of the administration of justice. Section 43(2) of the 2015 Act allowed the District Court to modify a determination if the redress ordered was reinstatement or reengagement by making an order that the employer pay compensation fixed by the court, but not exceeding 104 weeks' pay. Simons J. came to the conclusion on this issue "[*w*]ith some hesitation" at para. 77 of the judgment that:-

> "Whereas the function to be exercised by the District Court is a narrow one, it cannot be dismissed as a mere rubber-stamping of the earlier determination."

His reasoning on this aspect of the case was encapsulated at paras. 218 and 219 of his judgment:-

> "218. Crucially, however, the decision-making under the [*2015 Act*] lacks one of the essential characteristics of the administration of justice, namely the ability of a decision-maker to enforce its decisions. The necessity of having to make an application to the District Court to enforce a decision of an adjudication officer or the Labour Court deprives such determinations of one of the essential characteristics of the administration of justice. Whereas the function to be exercised by the District Court is a narrow one, it cannot be dismissed as a mere rubber-stamping of the earlier determination. The District Court's discretion to modify the form of redress represents a significant curtailment of the decision-making powers of the adjudication officers and the Labour Court. The District Court can, in effect, overrule their decision to direct that the employee be re-instated or re-engaged.

219. A decision-maker who is not only reliant on the parties invoking the *judicial power* to enforce its decisions, but whose decisions as to the form of relief are then vulnerable to being overruled as part of that process, cannot be said to be carrying out the administration of justice." (*Emphasis in original.*)

Accordingly, the fourth limb of the test was not satisfied.

iv. Relevance of Access to a Court of Law

22. Simons J. also considered the impact of a scheme not being exclusive in that it did not oust the right of access to the courts for claims in respect of wrongful dismissal. He noted that the orthodox position was that the existence of an appeal to the courts cannot restore constitutionality to a tribunal whose decisions, if unappealed, amount to an administration of justice (*Re Solicitors Act 1954*). Simons J. then referred to *Lynham v. Butler (No. 2)*, holding that it appeared to be concerned with the division of administrative and judicial functions in a situation different to that under the 2015 Act where all issues in dispute are to be determined by an adjudication officer and the Labour Court.

23. Simons J. noted that it was anomalous that requiring the intervention of the District Court to enforce a determination of the Labour Court was sufficient to deprive it of one of the characteristics of the administration of justice but the existence of a full right of appeal against it to the Circuit Court would not. However, it may be that recourse to judicial power was always necessary to obtain an enforcement order, whereas a first-instance decision became final and conclusive in the absence of an appeal. With other statutory schemes, the legislation provided an alternative to legal proceedings, but did not displace a right of action. The 1977 Act did not oust the jurisdiction of the courts; the statutory right to make a claim for unfair dismissal was parallel to the common law right of action for wrongful dismissal.

24. However, the existence of a parallel jurisdiction under statute inhibits the common law. This is known as the "*Johnson* exclusion area" (*Johnson v. Unisys Ltd.* [2001] UKHL 13, [2003] 1 A.C. 518 ("*Johnson*")) where the House of Lords concluded that, by enacting the Employment Rights Act 1996, the Westminster Parliament had set up an entirely new system outside the ordinary courts and that to develop the common law in the area would run contrary to Parliament's intention. Both *Johnson* and the subsequent decision of *Eastwood v. Magnox Electric p.l.c.* [2004] UKHL 35, [2005] 1 A.C. 503 were applied by the High Court in this jurisdiction by Laffoy J. in *Nolan v. Emo Oil Services Ltd.* [2009] IEHC 15, [2010] 1 I.L.R.M. 228. Simons J. concluded, in this regard, that even if the preservation of a parallel right of action before the courts might be an answer to an allegation that a statutory decision-maker was carrying out the administration of justice, this could not apply in the context of employment legislation. He concluded, however, that the failure to satisfy the fourth limb of the *McDonald* test meant that the decision of the W.R.C. did not constitute the administration of justice for the purposes of Article 34.

v. Article 37 of the Constitution

25. In light of the finding that the determination of a claim for unfair dismissal and for the payment of wages in lieu of notice did not involve the administration of justice within the meaning of Article 34 of the Constitution, Simons J. found it unnecessary to consider arguments under Article 37. Having concluded, therefore, that the jurisdiction exercised by the W.R.C. did not amount to the administration of justice confined to courts under Article 34, Simons J. then turned to the arguments that the procedure adopted by the W.R.C. offended the Constitution.

vi. Article 40.3 of the Constitution

26. The appellant made four complaints under Article 40.3 of the Constitution:

(i.) there was no requirement that adjudication officers or members of the Labour Court have any legal qualifications, training, or experience;

(ii.) there was no provision for an adjudication officer to administer an oath or affirmation. There was no criminal sanction for a witness who gave false evidence before an adjudication officer;

(iii.) there was no express provision made for the cross-examination of witnesses; and

(iv.) the proceedings before an adjudication officer were held otherwise than in public.

27. The argument in relation to legal qualifications was made by analogy to the qualifications for appointment to judicial office. Simons J. held that this type of comparison was inappropriate; the argument started by assuming that the role of an adjudication officer was equivalent to that of a judge, but that could not be so given that he had held that decision-making under the 2015 Act did not involve the administration of justice.

28. The appellant presented affidavit evidence from a barrister and solicitor with wide experience in the field of employment law who pointed to the complexity of many of the issues of national and E.U. law that can arise in employment disputes. Both stated that, while it would be inappropriate to refer to individual cases, it was their experience that a number of adjudication officers and ordinary members of the Labour Court simply did not understand some of the more difficult questions that arise and that each had appeared in cases where they firmly believed the adjudication officer involved "quite simply did not have sufficient understanding to deal with the important matters before them". The appellant's solicitor referred to a published article which conducted a survey of users of the new system — including lawyers, representatives of employers' organisations, and trade union representatives, and others — which found that 49% were dissatisfied or very dissatisfied with the new system. It was argued that the evidence demonstrated that the absence of legal qualifications led to systemic problems with the use of adjudication

officers to hear claims. Simons J. considered, however, that the generalised and vague nature of the evidence was such that it was not possible to find that there had been a systemic failure in the hearing and adjudication of claims. Whilst the circumstances in which the present appellant's claim came to be dealt with were regrettable, it was not possible to draw wider inferences of systemic failure from this particular set of circumstances.

29. Simons J. held that the structure of the 2015 Act indicated that it was a deliberate legislative choice that evidence would not be required to be given on oath. At one end of a spectrum requiring fair procedures was the criminal trial: close to the other end were disciplinary procedures against professionals where the final decision to strike off such a professional is reserved to the High Court. However, the heightened safeguards for professional persons whose capacity to earn a livelihood was at risk (*Law Society of Ireland v. Coleman* [2018] IESC 80 (Unreported, Supreme Court, McKechnie J., 21st of December, 2018)) could not necessarily be read across to other employment contexts. While procedures against other classes of employee can have great consequences, and it may be appropriate for there to be the hearing of evidence on oath or affirmation, appropriateness was not the same as a constitutional requirement.

30. When analysing decision-making, the full range of procedures open to a party must be examined (*Crayden Fishing Co. v. Sea Fisheries Protection Authority* [2017] IESC 74, [2017] 3 I.R. 785) and whilst the scheme under the 2015 Act was not unitary, a party who wishes to avail of evidence on oath or affirmation must take the trouble to bring an appeal to the Labour Court or the decision of the adjudication officer remains final. However, the existence of the safeguard of an appeal was an important factor.

31. Simons J. concluded that there was no constitutional requirement that decision-making of the type arising in a claim for unfair dismissal or for the payment of wages in lieu of notice must be performed on the basis of sworn evidence.

32. Simons J. considered that the complaint in respect of cross-examination reduced itself to one predicated on the absence of an express statutory power or duty to allow cross-examination. He considered that a power to allow cross-examination arose from the provisions of s. 41 of the 2015 Act and an adjudication officer was required to give the parties an opportunity to be heard and to present any relevant evidence. The appellant's argument that there should be an express requirement to allow cross-examination in all cases could not be reconciled with the presumption in *East Donegal Co-Operative Livestock Mart Limited v. The Attorney General* [1970] I.R. 317. In those cases where cross-examination was required, the adjudication officer was to be presumed to allow it; if there was a failure in this regard, then it would represent a good ground for judicial review.

33. The appellant also objected to the fact that that proceedings before an adjudication officer are held otherwise than in public (subss. 13 and 14 of s. 41 of the 2015 Act). However, Simons J. noted that the same subsections contained an express obligation to publish every decision and that proceedings in the Labour Court on appeal were conducted in public unless it determines otherwise upon the application of a party to the appeal pursuant to s. 44(7) of the 2015 Act. The appellant relied, variously, on Articles 34.1, 37, and 40.3 of the Constitution for a constitutional right to a public hearing before a statutory decision-maker, but no authority was cited in support. The appellant cited a number of cases illustrating the values underlying Article 34.1 (*In Re R. Ltd.* [1989] I.R. 126; *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359; and *Gilchrist v. Sunday Newspapers Ltd.* [2017] IESC 18, [2017] 2 I.R. 284). However, Simons J. held that it was not immediately apparent that such values could immediately be read across to non-judicial decision-makers. There were even exceptions to the constitutional requirement that justice be administered in public in the exercise of judicial power. Even if there was a presumption in favour of a public hearing, the requirements of the 2015 Act struck a balance when it

was considered that employees may be disincentivised from bringing proceedings if first-instance hearings are in public and they could be perceived by prospective employers as troublemakers. Even if this was incorrect, Simons J. found that the provisions governing the Labour Court satisfied any requirement of a public hearing.

vii. E.C.H.R. (Article 6(1))

34. The determination of claims under the 1977 and 1991 Acts was the determination of civil rights under Article 6(1) of the Convention. However, a number of judgments of the European Court of Human Rights (*Malhous v. The Czech Republic*, App. No. 33071/96; *Buterlevičiūtė v. Lithuania*, App. No. 42139/08; and *Ramos Nunes de Carvalho E Sá v. Portugal*, App. Nos. 55391/13, 57728/13, and 74041/13) confirmed that a public hearing before an appellate court may remedy what would otherwise be a breach of Article 6(1) at a lower level subject to the requirement that the appellate court have "full jurisdiction". Appeals to the Labour Court are conducted *de novo* and thus this requirement was met.

II – Discussion

A. Development of Jurisprudence

35. While this case raises a difficult conceptual question as to the nature of the administration of justice, it might be thought the essential issue involves a consideration of a limited number of well-known cases (principally: *Lynham v. Butler (No. 2*); *Re Solicitors Act 1954*; and *McDonald v. Bord na gCon*) and a relatively narrow dispute about the application to this case of only two of the five criteria set out in *McDonald*. The appellant argues that the High Court was incorrect to hold that the fourth limb of the test (the enforcement of rights and liabilities or the imposition of penalties by the court or by the executive power of the State) was not satisfied. The State denies this and, also, argues that the High Court was wrong to conclude that the fifth limb of the test (the making of

an order which, as matter of history, is an order characteristic of courts in this country) was satisfied. It will be necessary to consider the case law and legislation in closer detail, but it is useful, in my view, to try and locate this dispute in a wider context in relation to both history and jurisprudence.

36. Since the enactment in 1922 of Article 64 of the Irish Free State Constitution, it has been a fixed point in the constitutional order that justice is administered in courts by judges. Ireland has, since independence, been committed to a constitutional structure which recognises a separation of powers. The judicial power, although the weakest branch, is essential to the maintenance of that balance, particularly, perhaps, in a structure which provides for a parliamentary democracy in which the executive branch is part of, and largely controls, the legislative branch. In that sense, the independent existence of the judicial power which administers justice can be said to be the lynchpin of the constitutional order created first in 1922, and developed in 1937. But, the case law and commentary since 1922 have struggled to provide a satisfactory definition, or even description, of the field of the administration of justice. This is not, as it may be in other jurisdictions, a difficult though somewhat academic jurisprudential issue. As has been observed, "belief in the importance of protecting the judicial power from encroachment by the legislature or executive must at least invoke the idea that there is an appropriate area for its operation" (G. Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971), p. 120, quoted in J. Casey, *Constitutional Law of Ireland* (Dublin: Round Hall, 2000), p. 255). The provisions of both the 1922 and 1937 constitutions make it clear that the administration of justice is consigned to courts as a matter of constitutional law which the courts are bound to uphold and enforce.

37. Ireland is by no means the only jurisdiction to struggle with the analysis of dispute resolution by administrative bodies outside courts in a system that distinguishes, even imperfectly, between executive, legislative, and judicial power. This issue has posed

problems in many common law countries, particularly those with constitutions assigning the administration of justice to judges or courts or, perhaps, providing for the administration of justice in a federal system. A.V. Dicey's insistence that the common law did not conceive of any separate system akin to the civil law *droit administratif* was very influential within the common law world and meant that the burgeoning role of the administration in legal matters had to be addressed within the traditional structures and patterns of the common law.

38. The Industrial Revolution led to a significant increase in the role of the state and a demand for adjudication and resolution by bodies other than courts. In some cases, this was driven by the simple desire to have bodies with expertise in specific areas, as was the case in relation to issues such as the developing law of taxation or the rapid expansion of the railway system, which gave rise to novel and complex disputes thought to require particular expertise. In other cases, perhaps most notably in the field of industrial relations, there was a desire for resolution by bodies other than courts (which, particularly in the late 19th and early 20th centuries, were perceived as hostile to employees, trade unions, and collective action) and a preference for a system of low-cost, relatively informal non-judicial dispute resolution.

39. The expanded role of the State and the proliferation of administrative bodies outside the executive government led to concerns among some lawyers as to these developments. Perhaps most notably, the then Lord Chief Justice of England and Wales, Lord Hewart, a former government minister, published in 1929 a controversial, if somewhat intemperate, book entitled *The New Despotism* (London: Ernest Benn Limited, 1929). It criticised as constitutionally subversive the burgeoning practice of delegated legislation which, it was argued, allowed ministers, and therefore civil servants, to bypass Parliament, and the practice of assigning judicial power to specialist tribunals in breach, it was said, of Dicey's first principle of the Rule of Law. This uneasiness among lawyers was reflected

in other jurisdictions and may be seen, perhaps, in the almost contemporaneous approach of the U.S. Supreme Court to the creation of a proliferation of administrative agencies under the New Deal. In the U.K., a high-powered Committee on Ministers' Powers, which included among its members Sir William Holdsworth and Harold Laski, reported on these matters in 1932. The Committee recommended that judicial decisions should "normally" be entrusted to the ordinary courts, but also considered there was nothing radically wrong in the practice of Parliament permitting the exercise of judicial powers by tribunals, recommending, however, that reasons should be given for decisions and there should be a right of appeal to the High Court on a point of law.

40. In the United Kingdom, the practice of creating administrative tribunals increased apace and led to a further review in the Franks Report in 1957 which rejected the contention that the tribunals were purely administrative in nature. It recognised that the functions performed were judicial, and, therefore, the tribunals should be considered to be provided by Parliament for adjudication rather than administration. Accordingly, the Report set out general principles for their operation by reference to familiar court-like concepts of openness, fairness, and impartiality. In the year 2000, the Leggatt Review reported on the further development of the tribunal system and recommended a comprehensive reorganisation. Subsequently, a two-level tribunal system was established with a first-tier tribunal and an upper tribunal both divided into specialist chambers by subject-matter and incorporated within the structure of the administration of justice. In this case, indeed, counsel for the appellant argued that this is the course which ought to have been taken, at least in the field of employment law, in the 2015 Act, and which, it was contended, was, moreover, constitutionally required. It was said that the logic of the judicialising of the employment relationship should lead to the conclusion that the decision-making body should have the role and status of judges under the Constitution, however unwieldy such a solution might be. One noteworthy feature of these developments is that,

notwithstanding the concerns expressed by lawyers such as Hewart, the effect of the development of administrative bodies and tribunals was not the bypassing of the role of the courts. Instead, the development of robust judicial review has meant that the expansive role of the State has markedly increased the role and influence of the courts and the significance and impact of administrative law.

41. During this period, there were repeated attempts to establish a more precise definition of the judicial power and the concept of justiciability. This was not, it appears, an attempt to identify the essence of the judicial power in itself since, *pace* Hewart, there was little concern about legislative subtractions from the jurisdiction of the courts, but rather to cast light on the concept, popularised by the 1932 Committee, of administrative bodies carrying out "quasi-judicial" functions. This proved, however, a dispiriting (if revealing) exercise. In judicial terms, it resulted in a series of negative conclusions, most notably in the judgment of Lord Sankey L.C. in *Shell Company of Australia v. Federal Commissioner of Taxation* [1931] A.C. 275 ("*Shell*"), quoted by Haugh J. in *Cowan v. A.G.* at pp. 422 to 423 of the report of the latter case:-

> "It may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to the Court. 6. Nor because it is a body to which a matter is referred by another body."

42. In his 1957 Hamlyn Lectures, published as *Protection from Power under English Law* (London: Stevens & Sons Ltd., 1957), Lord MacDermott, the then Lord Chief Justice of Northern Ireland, acknowledged the difficulty of drawing any clear line but suggested, at p. 52, that:-

"[*a*] judicial decision implies the presentation of their case by the parties to the dispute, the ascertainment of the relevant facts and of the relevant law and a decision which is reached by applying the relevant law to the relevant findings of fact".

Slightly later, however, in an essay, "Justiciability", in *Oxford Essays in Jurisprudence* (A.G. Guest ed., Oxford: Oxford University Press, 1961), the noted constitutional scholar Geoffrey Marshall asserted, bluntly, at pp. 277 to 278 that:-

"there are two interlocking questions involved in the notion of 'justiciability' when it functions as an appraising term: (1) How far is it possible to make the concept of 'judicial' methods precise? and (2) How far is it possible to specify situations or disputes which are inherently suitable to such methods? To the first question one answer seems clear: namely that it is not possible to construct from judicial materials a single set of reasonably unambiguous criteria for calling a procedure 'judicial'. Moreover many of the tests historically enunciated by the courts are now insufficiently precise to discriminate within a large *penumbra* of doubtful cases, and too great an element of chance enters into the question of classification where there is no specific guidance from by the Legislature. To the second question there seems an equally plain answer. No dispute is inherently justiciable or suited to judicial solution".

43. He concluded the essay with the clear, if bleak, observation at p. 287 that:-

"the characterisation of … issues as 'justiciable' or 'non justiciable' is a legislative job".

44. Nevertheless, Dr. Marshall did recognise that "a constitutional separation of powers raises the problem of characterising the judicial function in a direct and fundamental way". This neatly captures the difficulty which the courts must address in "the *penumbra* of doubtful cases" such as the present. There is no clear definite test capable of being constructed to

distinguish the administration of justice from an administrative decision-making function bound to act judicially, but the Constitution assumes the distinction, asserts its importance, and requires the legislature to respect it and the courts to uphold it. In Ireland, and in any other jurisdiction which mandates the separation of powers, the characterisation of issues as justiciable, and falling within the province of the administration of justice, is, unavoidably, a judicial task. Even if it is true that there is no dispute that is inherently justiciable, the Constitution provides and requires that there be an area known as the administration of justice to be carried out by judges, subject only to Article 37. The courts have been appropriately cautious and have refrained from making overbold assertions of the proper scope of the administration of justice and have proceeded, instead, by way of part broad definition, part analogy, and part description.

45. The development of administrative law in Ireland has tended to reflect some of these influences, albeit with some significant differences. Dicey's teachings were, perhaps, never received as reverently here and, indeed, the constitutional developments of the early 20th century were a direct repudiation of some of the views he espoused. Nevertheless, the administration of justice required under Article 64 of the 1922 Constitution to be carried out in courts was the common law system and, therefore, the conceptual difficulties of fitting the development of adjudicative administrative bodies into the constitutional system remained. At the same time, large-scale administrative bodies did not meet with the same suspicion or scepticism in Ireland. The pre-independence land purchase schemes which were continued post-independence were massive administrative undertakings which transformed land ownership in Ireland in a way which was broadly successful. The major State enterprises established by statute in the aftermath of independence and given extensive statutory powers, like the Electricity Supply Board and Bord na Móna, tended to be viewed positively as symbols of the new State rather than as the encroachment of the administration in the field of individual enterprise. The field of

industrial relations was certainly smaller than that in the neighbouring jurisdiction, and perhaps less fractious. It was, nevertheless, also affected by international developments and the increasing trend towards providing individuals with legally enforceable protection of employment. Irish law therefore showed some of the same strands as were discernible in other jurisdictions: the development of administrative agencies; the increased role of the State; a move towards individual dispute resolution in the industrial relations sector; and a significant expansion of the role of the judicial review. Nevertheless, there were differences of both detail and emphasis. More importantly, Ireland — in common with jurisdictions such as Canada and Australia — had adopted a constitution which required the administration of justice to be carried out in courts. The question, therefore, of how the proliferation of administrative agencies which required bodies to resolve disputes was to be reconciled with the fact that the administration of justice was to be carried out in courts and, at least by implication, nowhere else was something that had to be resolved as a matter of law rather than abstract theory. The foregoing is a necessarily broad-brush sketch of a number of complex developments in Ireland and elsewhere, but it may provide a useful backdrop against which to consider the developing case law and legislation.

46. While the question of the essential function of the administration of justice takes on a particular significance with the coming into force of the 1922 Constitution, a convenient starting point may be a decision in 1902: *R. (Wexford County Council) v. Local Government Board for Ireland* [1902] 2 I.R. 349. The case concerned the question of whether a body was amenable to *certiorari*, but in the course of his judgment, Palles C.B. said:-

> "I have always thought that to erect a tribunal into a "Court" or "jurisdiction," so as to make its determinations judicial, the essential element is that it should have power, by its *determination* within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the

determination only, and not by the fact determined, so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power." (*Emphasis in original.*)

47. This passage was much-quoted in a number of Australian cases on the judicial power, and captures one element, at least, of the administration of justice: the ability to make binding determinations affecting rights and imposing liabilities. Article 64 of the Irish Free State Constitution, enacted in 1922, provided:-

> "The judicial power of the Irish Free State (Saorstát Éireann) shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided. These Courts shall comprise Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also Courts of local and limited jurisdiction, with a right of appeal as determined by law."

48. These provisions fell to be analysed in *Lynham v. Butler (No. 2)*, which was a further round in the bitter struggle between the parties which had already generated a number of judgments of the Superior Courts and given rise to a real political crisis. The plaintiff was entitled to the fee simple estate in extensive lands at Mount Seskin, County Dublin, subject to a life estate in favour of one Mary MacInerney. Mrs. MacInerney had let the property to the Reverend Michael Butler at an annual rent for the duration of her estate, namely for her life. She died in 1924, and the plaintiff sought possession of the lands. The Reverend Dr. Butler contended, however, that as of the date of the passing of the Land Act 1923 — which was August, 1923, and thus predated the death of Mrs. MacInerney — he held the lands under a tenancy within the meaning of the Land Act 1923 and, accordingly, was entitled to the benefit of the Act which had the effect of

divesting the landlord of his estate in favour of the occupying tenant. The Judicial Commissioner of the Land Commission (Wylie J.) had made an interim ruling that the lands constituted a holding to which the 1923 Act applied. The High Court dismissed the plaintiff's claim for ejectment, which decision was upheld by the Supreme Court ([1925] 2 I.R. 82 (High Court) and [1925] 2 I.R. 231 (Supreme Court)).

49. The plaintiff then sought to appeal to the Privy Council, which granted leave to appeal. This decision caused public consternation because it appeared inconsistent with the understanding of the Irish government of the terms of the Treaty negotiations and the circumstances in which appeal to the Privy Council would be permitted. The potential crisis was only averted by the stratagem of securing the passage by the Oireachtas of the Land Act 1926, confirming the interpretation of the 1923 Act adopted by the Supreme Court with the effect of rendering the appeal to the Privy Council moot. Viscount Cave L.C. was forced to acknowledge that the tactic was "ingenious and effective" and the appeal was withdrawn.

50. This much of the litigation has its own place in Irish history of the early 20th century (see *e.g.* T. Mohr, *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Dublin: Four Courts Press, 2016)). However, the dispute between Mr. Lynham and the Reverend Dr. Butler continued to rage. The Land Commission had published a provisional list of lands, including the lands in question, and Mr. Lynham had given notice of objection. The Lay Commissioners disallowed his objection. Mr. Lynham's appeal to the Judicial Commissioner was then postponed pending the outcome of the appeal to the Privy Council. In the aftermath of that episode, Mr. Lynham then raised an additional ground of objection: that the letting was one for temporary convenience and was not captured by the Land Act of 1923. In the words of Kennedy C.J. in the Supreme Court, Mr. Lynham had, up to this point, been uniformly unsuccessful in all his proceedings, but now a complete reversal of his fortunes took place. The Judicial Commissioner, Wylie

J., upheld the objection that the tenancy was a letting for temporary convenience, and that decision was, in turn, upheld by the Supreme Court. At that point, the Reverend Dr. Butler relinquished possession of the lands to Mr. Lynham.

51. However, even then, the dispute between the parties was not over. Mr. Lynham initiated further proceedings, *Lynham v. Butler (No. 2)*, which sought to recover the sum of £1,600 being damages for trespass and mesne rates in respect of the occupation by the Reverend Dr. Butler of the lands between the expiration of the tenancy and the date upon which he had relinquished possession of the property. The Reverend Dr. Butler presponded by erecting a barrage of defences to this claim. For present purposes, however, the significance of the case is the claim made on his behalf that the Land Commission, other than the Judicial Commissioner, was an "illegal and unconstitutional tribunal and that the adjudication referred to was made wholly without jurisdiction and in violation of the Constitution of Saorstát Éireann" on the grounds that a decision of the Lay Commissioner was an administration of justice required under Article 64 to be carried out by a court. If so, it was contended, there could not be a valid appeal from an unconstitutional tribunal so that the orders of the Judicial Commissioner and the Supreme Court on appeal were also void.

52. It is of some significance that counsel advancing this argument was George Gavan Duffy S.C., a member of the Treaty delegation, and later to become President of the High Court. The argument of counsel is set out in some detail in the report. The exercise of judicial power and the administration of justice in Saorstát Éireann depended on the Constitution, and Article 64 imposed a personal and inalienable trust upon the judges appointed under Article 68 and they alone were authorised to exercise the judicial power of the State in the public courts established by the Oireachtas. The Lay Commissioners of the Land Commission could not be considered to be judges and, accordingly, could not exercise judicial power. Before the creation of Saorstát Éireann, the Land Commission was a court

of record under the Land Law (Ireland) Act 1881 with full power to hear and determine all matters whether of law and fact, and was moreover immune from restraint by any court and from *certiorari*. The exercise of power by the Land Commission prior to the coming into force of the Free State Constitution had been described as an "exercise of judicial power" in *R. (Lord Rossmore) v. Irish Land Commission* [1894] 2 I.R. 394, and s. 24 of the Irish Land Act 1903 had been stated by Palles C.B. in *In Re Talbot Crosbie's Estate* [1905] 1 I.R. 570 to have conferred "a jurisdiction eminently judicial". Gavan Duffy argued that the Constitution of Saorstát Éireann created a wholly new constitutional position as regards the judiciary and the exercise of judicial power; the powers and duties of the Land Commission were merely transferred to commissioners appointed under the Land Law (Commission) Act 1923 and it became unconstitutional and illegal for the Land Commission to exercise many of their former powers. A divisional court of the High Court held that the plea was inadmissible on the grounds that the defendant could not be heard to impeach the validity of the order of the Supreme Court. The matter was appealed to the Supreme Court, which addressed the central argument in much greater detail, with each member of the court delivering a separate judgment.

53. The judgment most commonly cited is that of Kennedy C.J. He referred to Article 64 of the Free State Constitution and Article 3, s.1 of the U.S. Federal Constitution which provides that "[*t*]he judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish" which was, in turn, reflected in the Commonwealth of Australia Constitution Act (1900) 63 & 64 Vict. c. 12, s. 71 of which provided that "[*t*]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". Kennedy C.J. referred to some of the definitions of the judicial power contained in the decisions of the U.S. Supreme Court

and of the High Court of Australia. He put forward his own synthesis of the definitions which, nevertheless, he stated were "by way of description rather than of precise formula". A central passage of his judgment occurs at pp. 99 to 100:-

> "In the first place, the Judicial Power of the State is, like the Legislative Power and the Executive Power, one of the attributes of sovereignty, and a function of government. (See Article 2 of the Constitution.) It is one of the activities of the government of a civilised state by which it fulfils its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over person and property. The controversies which fall to it for determination may be divided into two classes, criminal and civil. In relation to the former class of controversy, the Judicial Power is exercised in determining the guilt or innocence of persons charged with offences against the State itself and in determining the punishments to be inflicted upon persons found guilty of offences charged against them, which punishments it then becomes the obligation of the Executive Department of Government to carry into effect. In relation to justiciable controversies of the civil class, the Judicial Power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens or the State, or between any parties whoever they be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. Its characteristic public good in its civil aspect is finality and authority, the decisive ending of disputes and quarrels, and the avoidance of private methods of violence in asserting or resisting claims alleged or denied. It follows from its nature as I have described it that the exercise of the Judicial Power, which is coercive and must frequently act against the will of one of the

parties to enforce its decision adverse to that party, requires of necessity that the Judicial Department of Government have compulsive authority over persons as, for instance, it must have authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property. So much towards a definition of the term — "Judicial Power"."

54. It is of some importance that the approach taken by Kennedy C.J., while descriptive, drew upon the decisions of other common law jurisdictions. Thus, he quoted with approval, and echoed, the opinion of the United States Supreme Court in *Kansas v. Colorado* (1907) 206 U.S. 46, 27 Sup. Ct. Rep. 655, that the judicial power "must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties". He also referred with approval to a then-recent opinion of the Privy Council delivered by Lord Sankey L.C. in *Shell Company of Australia Limited v. Federal Commissioner of Taxation* [1931] A.C. 275, noting that the Chief Justice of Canada had been a member of the panel. Kennedy C.J. also quoted a number of decisions of Griffith C.J. in the Australian High Court, including the statement (itself approved in *Shell*) in *Huddart, Parker & Co v. Moorhead* (1908) 8 C.L.R. 330, 357:-

> "[*T*]hat the words "judicial power" … mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

55. Kennedy C.J. also quoted the observations of the same judge in *The Waterside Workers' Federation of Australia v. J.W. Alexander Limited* (1918) 25 C.L.R. 434 that, without attempting an exhaustive definition of the term "judicial power", it nevertheless "includes

the power to compel the appearance of persons before the tribunal in which it is vested to adjudicate between adverse parties as to legal claims, rights, and obligations, whatever their origin, and to order right to be done in the matter".

56. On the other hand, Kennedy C.J. also adopted the famous language of Lord Sankey L.C. that there may be ancillary bodies, tribunals, and even juries, who, even though they assume the style of tribunals or courts and sit on a dais adorned with the "trappings of Courts", nevertheless do not pretend to the judicial determination of "justiciable controversies". It is clear from these observations that Kennedy C.J. considered that the administration of justice involved the exercise of "the judicial power" and the determination of "justiciable controversies", and that his description of the judicial power under the Free State Constitution was consistent with the approach he discerned in other common law countries. His approach, admittedly descriptive, emphasised the determination of justiciable controversies in accordance with law by definitive and binding adjudication enforceable by the State and, for that purpose, a court must have the capacity to compel attendance of parties and witnesses and to order the execution of its judgments.

57. Turning then to the case at hand, Kennedy C.J. considered that the Land Commissioners performed functions which were largely administrative in nature. They were "primarily" administrative bodies with ministerial (administrative) duties to perform. Some duties may require to be performed judicially in such a way as not to offend the canons of natural justice, but that did not convert a ministerial (administrative) act into a judicial one. The judicial power of the State was only invoked when there was an appeal to the Judicial Commissioners, and it was irrelevant if that was described as an appeal or case stated, as Kennedy C.J. noted at p. 105:-

> "The Land Commissioners (other than the Judicial Commissioner) are, then, an administrative body of civil servants who are not Judges within the meaning of

the Constitution and do not constitute a Court of Justice strictly so-called but who, in the performance of some of their duties, must act judicially, and who are always subject, in respect of any justiciable controversy arising in the course of their business, to the exercise of the Judicial Power of the State for the determination of such controversy by one of the Judges of the High Court that the State assigned to act as Judicial Commissioner for the purpose."

58. In later years Kennedy C.J.'s judgment has been regularly cited, but it is worth noting both FitzGibbon and Johnston JJ. delivered concurring judgments. FitzGibbon J. acknowledged Gavan Duffy's "devastating argument". FitzGibbon J. considered, in the first place, and somewhat controversially, that it was possible that the Land Act of 1923 could be deemed an implicit amendment of the Treaty permissible by way of ordinary legislation within eight years after the coming into force of the Constitution, as provided for by Article 50. However, he concluded that he was not satisfied that there was anything in the Act of 1923 which was repugnant to the Constitution; the distinction between the administrative functions of the Land Commission and the exercise of judicial power when the necessity for it arose was sufficiently observed by the legislation. The Land Commission must, of necessity, make decisions upon objections, but the safeguard of judicial authority was preserved by the right of appeal to the Judicial Commissioner. This was the exercise of giving a judicial decision upon a question which had been decided by the Land Commission and the exercise of its administrative functions. This bluntly pragmatic approach, that the judicial power is what the legislature says it is in any given case and it only arises in the context of the exercise of powers by the Land Commission when there is an appeal to the Judicial Commissioner, is nevertheless consistent with Kennedy C.J.'s conclusion.

59. Johnston J., for his part, laid emphasis on the fact that the adjudicative function of the Land Commission was only a part of its broader functions. He considered that the Land

Commission was primarily and essentially an administrative body constituted for the purpose of carrying out great social work of the highest importance. It had, he considered, quasi-judicial powers merely ancillary to the administrative duties which it had been constituted to carry out. Having described the work of the Land Commission as "national work of creating a peasant propriety", he considered it to be "administrative work of the highest importance and of the greatest responsibility" and that the quasi-judicial powers which had been conferred upon the Commission as ancillary to and in aid of the main work were quite negligible in importance.

60. Johnston J. considered Article 64 as a provision which would be very useful in the future as a check on encroachments by the legislature and executive upon popular rights and was, he thought, derived from the provisions of the U.S. Constitution embodying, in turn, Blackstone's famous observation that "[*i*]n the distinct and separate existence of the judicial power … consists one main preservative of the public liberty, which cannot subsist long in any State, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power". Johnston J. observed that Blackstone could not have foreseen "the enormous increase in the administrative work of the executive power which was come in the nineteenth and twentieth centuries". While the Constitution of the Irish Free State followed closely the concept of separation of powers, it had been found that this division of government functions could not "as a matter of practical polity, be carried out to its logical conclusion and can only take place as an approximation". He referred to Professor C.K. Allen, a writer "who is the most skilful of the assailants of the system or tendency in politics which is incorrectly and rather unfairly called "bureaucracy"", but who was, nevertheless, forced to admit that it was "quite illusory" to ask courts to judge, at first instance, every minor matter of dispute, arising out of our "greatly extended and reticulated administration". Johnston J. was clearly aware of the contemporary debate occurring in the United

Kingdom in which Hewart and Allen were participants, and, while acknowledging the importance of maintaining the separate function of the judicial branch, nevertheless took a more nuanced view which sought to emphasise that the exercise of the powers of the Land Commission which involved the determination of legal disputes was ancillary to the overall project which was, undoubtedly, administrative in nature. This was a somewhat different approach to that taken by Kennedy C.J.

61. Johnston J. concluded that the work of carrying out the Land Purchase Code was an administrative task of national importance and of colossal magnitude. Part of that procedure required a form of ascertainment of lands to which the Acts applied. This must necessarily be left in the hands of the body or tribunal which was constituted to perform the entire task. He did not think that any other course was possible and was "absolutely satisfied that such ascertainment of the land is not, in any sense, an exercise of judicial power within the meaning of Article 64 of the Constitution. Any other result would have a most paralysing effect upon the whole work of Land Commission".

62. There was, of course, little merit in the contentions made on the Reverend Dr. Butler's behalf which involved a challenge to a jurisdiction which he had willingly invoked, participated in, and been prepared to benefit from, and in which he had even gone to the length of acquiescing in an unfavourable decision without raising any objection until the point when damages were sought. Furthermore, if his challenge was upheld, it would have led to another round in the already extended, bitter, and decade-long litigation between the parties, while significantly disrupting the work of the Land Commission. The judgments are important and useful attempts to address a difficult problem not unique to Ireland. However, it is possible to detect some uneasiness in the judgments with the analysis. In particular, there seems to be a tension between the suggestion in Kennedy C.J.'s judgment that all justiciable controversies are the preserve of the judicial power (p. 97) and his acknowledgment that a justiciable controversy may arise in the course of the

business of the Land Commission (p. 105), and his later assertion that the issue only becomes a justiciable controversy when it is appealed to the Judicial Commissioner, thus invoking the jurisdiction of the courts (p. 105). The particular issue in the case involved the nature of the tenancy between the Reverend Dr. Butler and the life tenant. It is true that it was addressed for the first time before the Judicial Commissioner, but that was merely a consequence of the procedural development in the case. There was no doubt that it could have been raised before the Land Commissioners and have been determined by them. In any event, the fundamental issue of whether the land in question fell within the scope of the Land Commission's powers was determined by the Land Commission and appealed to the Judicial Commissioners. It might be thought that there is some difficulty in reconciling the expansive definition of judicial power, and justiciable controversies, with the conclusion that these issues may be determined by the Land Commission, and which is not necessarily resolved by observing that it is a small part of the general business of the Land Commission. Of course, such a tension would not have posed a particular difficulty prior to 1922 since, as Johnston J. pointed out, there was no equivalent constitutional provision in the unwritten British constitution and, in any event, that constitution was capable of encompassing a number of anomalies such as the curial power of Parliament or the position of the Lord Chancellor. It was however, a more difficult question under the terms of the 1922 Constitution.

63. The uneasiness with the task of reconciling the rigid terms of a constitution which distinguished sharply between judicial and administrative powers and consigned the former exclusively to judges, with the practical requirements of a developing administrative state, could be detected in the inclusion of Article 37 in the new Constitution providing for the exercise of limited functions and powers of a judicial nature in non-criminal matters by persons other than judges or courts. This was widely understood as being directed towards settling the doubts in relation to the Land

Commission, itself, and other substantial state bodies, such as the Revenue Commissioners, which exercised important functions in the new State (see, G. Hogan *Origins of the Irish Constitution* (Dublin: Royal Irish Academy, 2012) pp. 41 to 42). Indeed, Gavan Duffy appears to have had some involvement in the discussions on the new Constitution, and may have expressed views on this issue as well.

64. While the objective of Article 37 may have been clear, the language is not entirely helpful. It does not suggest a different category of power, but implies, instead, the continued existence of a distinction between the executive and judicial power, and merely provides, negatively, that nothing in the Constitution will invalidate the exercise of limited functions and powers of a judicial nature. However, the breadth and significance of the powers of the Land Commission itself, "a task of national importance and of colossal magnitude", might suggest that Article 37 was of potentially broad application. Even if the powers and functions of a judicial nature exercised by the Land Commission which were henceforth to be validated by Article 37 were viewed only as a decision on the application of the relevant legislation, then such decisions were still of enormous significance for those involved, as the lengthy dispute between Mr. Lynham and the Reverend Dr. Butler, itself, testified.

65. Article 37 was applied at first instance in the decision *Re Solicitors Act 1954*. The Solicitors Act of 1954 had set up a new system for the disciplining of solicitors. A disciplinary committee of the Incorporated Law Society was to be established, whose members were to be approved by the Chief Justice, with power to strike off a solicitor and to order the solicitor to make restitution and satisfaction to an injured party as the committee should think fit. Traditionally, the power to strike off a solicitor had been a power exercised by the High Court in exercise of its supervisory jurisdiction over the profession. The High Court retained the power to strike off a solicitor in the aftermath of the 1954 Act. Maguire C.J., sitting in the High Court, held that the decision to strike off

a solicitor was the determination of a justiciable controversy. However, as the power was limited in scope to the solicitors' profession, and there was an appeal to the High Court, he considered the powers could be said to be of a limited nature and permissible under Article 37.

66. The Supreme Court reversed this decision, upholding the decision that the disciplinary committee was, indeed, exercising powers of a judicial nature, but concluding that they were not limited and saved by Article 37. While, as a matter of history, the discipline of members of the solicitors' profession had traditionally been a matter for courts — and this, indeed, was the basis upon which later courts and commentators considered that the decision could be justified — the judgment of Kingsmill Moore J. took a notably broader approach. The power to strike off was a disciplinary and punitive power with the consequence that a struck-off solicitor committed a criminal offence if he or she practised thereafter. Striking off was, he considered, a more severe penalty, therefore, than imprisonment. By the same token, restitution and satisfaction could only be made in respect of something in the nature of misconduct which could include fraud and negligence. To that extent, Kingsmill Moore J. considered that it was impossible to distinguish the powers and functions of a committee to determine whether such misconduct had taken place and to order restitution and satisfaction from those of a court trying an action for fraud and negligence, unless, indeed, it was that the functions of the committee were broader. Accordingly, he considered that the committee was exercising a judicial power.

67. Moreover, Kingsmill Moore J. disagreed that the power of the committee could be saved by the provisions of Article 37. In an important passage in the judgment, at pp. 263 to 264, he said:-

> "What is the meaning to be given to the word "limited"? It is not a question of "limited jurisdiction" whether the limitation be in regard to persons or subject-

matter. Limited jurisdictions are specially dealt with in Article 34, 3, 4°. It is the "powers and functions" which must "limited," not the ambit of their exercise. Nor is the test of limitation to be sought in the number of powers and functions which are exercised. The Constitution does not say "powers and functions limited in number." Again it must be emphasised that it is the powers and functions which are in their own nature to be limited. A tribunal having but a few powers and functions but those are far-reaching effect and importance could not properly be regarded as exercising "limited" powers and functions. The judicial power of the State is by Article 34 of the Constitution lodged in the Courts, and the provisions of Article 37 do not admit of that power being trenched upon, or of its being withdrawn piecemeal from the Courts. The test is to whether a power is or is not "limited" in the opinion of the Court, lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as "limited"."

He concluded:-

"Eventually the question whether any particular tribunal is unconstitutional must depend on whether the congeries that the powers and functions conferred on the tribunal or any particular power or function is such as to involve the pronouncement of decisions, the making of orders, and the doing of acts, which on the true intendment of the Constitution are preserved for judges as being properly regarded as part of the administration of justice, and not of the limited character validated by Article 37."

Thus, the decision gave a broad reading to the judicial power under Article 34 in considering that the court should have regard to the nature of the power being exercised, rather than its form, but a very narrow reading to Article 37.

68. *Cowan v. A.G.* concerned an election petition which was brought in respect of a member of Dublin City Council. Under the Municipal Corporations Act 1882 and the Municipal Elections (Corrupt and Illegal Practices) Act 1884, judges nominated a practising barrister to be the election court to try the petition. The plaintiff sought a declaration that such an assignment was unconstitutional. Haugh J. referred to the provisions of the Adoption Act 1952, the Social Welfare Act 1952, the Air Navigation and Transport Act 1936, and the Tribunals of Enquiry (Evidence) Act 1921, all of which had authority to compel the attendance of witnesses and determine issues in accordance with law. He considered that there were many other tribunals of a similar nature. That was bound to be so, he considered, as "Article 37 of the Constitution expressly allows the existence of such tribunals provided they do not adjudicate on criminal matters", and acknowledged that if it had it not been for the decision in *Re Solicitors Act 1954*, then the Disciplinary Committee of the Incorporated Law Society might also have been referred to as an example of an Article 37 tribunal. Haugh J. considered that, following the decision in *Re Solicitors Act 1954*, however, an election court could similarly be said to exercise far-reaching powers affecting the lives, liberties, fortunes, or reputations of those against whom they were exercised and, accordingly, could not be considered as limited functions and powers allowable by Article 37. The significance of this finding is, however, lessened by the fact that Haugh J. acknowledged that the election court could, at any point, investigate and try a person on a charge of an illegal or corrupt practice. Thus, it was a body which exercised powers in criminal matters assigned to it, which was something expressly prohibited by Article 37. Accordingly, he concluded that the election court,

when presided over by a practising barrister, was unconstitutional as the administration of justice by a body other than a court, and by a person other than a judge.

69. The decisions in *Re Solicitors Act 1954* and *Cowan v. A.G.* might have been expected to raise further questions in relation to the compatibility with the Constitution of a range of statutory bodies, and to suggest that the courts would take a much stricter approach to the provisions of Article 34 of the Constitution. However, as it transpired, the decisions marked a high-water mark from which subsequent cases have retreated.

70. In *State (Shanahan) v. Attorney General* [1964] I.R. 239 ("*State (Shanahan)*"), Davitt P. returned to the general question of the definition of the judicial power and observed, at p. 247:-

> "I have certainly no intention of rushing in where so many eminent jurists have feared to tread, and attempting a definition of judicial power; but it does seem to me there can be gleaned from the authorities certain essential elements of that power. It would appear that they include 1, the right to decide as between parties disputed issues of law or fact, either of civil or criminal nature or both; 2, the right by such decision to determine what are the legal rights of the parties as to the matters in dispute; 3, the right, by calling in aid the executive power of the State, to compel the attendance of the necessary parties and witnesses; 4, the right to give effect to and force such decision, again by calling in aid the executive power of the State. Any tribunal which has and exercises such rights and powers seems to me to exercising the judicial power of the State."

This approach did not, however, gain traction in the decided cases. Instead, a somewhat different test was formulated in the decision of *McDonald v. Bord na gCon* and which has tended to be the focus of subsequent cases.

71. The Greyhound Industry Act of 1958 ("the 1958 Act") empowered the newly established Bord na gCon with the consent of the Irish Coursing Club, after the making of an inquiry,

to make an exclusion order in relation to any person. That had the effect of excluding a person from being at a greyhound race track or authorised coursing meeting or any public sale of greyhounds. In the High Court, Kenny J. held that the effect of such an exclusion order was to give to the licensee of a racecourse the powers of an occupier, and to override the terms of the contract under which the person had gained access and prohibit entry upon a greyhound race track or authorised coursing meetings or of public sales of greyhounds. In form, it corresponded to an injunction which was a form of order made by courts as a matter of history, although it was not enforced by the executive power of the State. It deprived the person against whom it was made of the contractual right which he acquired otherwise by paying for admission to the track or meeting and imposed a penalty which Kenny J. considered was similar to that which the courts may impose, for it seemed there was a similarity between an exclusion order and a disqualification order made under the Road Traffic Acts.

72. Turning to the argument that the making of an exclusion order constituted an administration of justice, he said at pp. 230 to 231:-

> "It seems to me that the administration of justice has these characteristic features:
>
> (1) a dispute or controversy as to the existence of legal rights or a violation of the law;
>
> (2) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
>
> (3) The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
>
> (4) The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;

(5) The making of an order by the Court which is a matter of history is an order characteristic of Courts in this country."

This formulation has obvious points of similarity to that offered by Davitt P. in *State (Shanahan)* and, indeed, the earlier discussion in *Lynham v. Butler (No. 2)* but has some points of difference. *McDonald v. Bord na gCon* introduces the question of the historical usage of the courts as a test of the judicial function, which is not mentioned in *State (Shanahan)*, whereas the latter case includes consideration of the power to compel the attendance of witnesses as a feature of the administration of justice, which was also referred to in *Lynham v. Butler (No. 2)* and the cases considered therein, but does not figure in the *McDonald v. Bord na gCon* formulation.

73. Returning to the facts of the case, Kenny J. concluded that an exclusion order under s. 47 of the 1958 Act possessed all of the characteristics of the administration of justice. An exclusion order was made only when Bord na gCon was satisfied that some violation of the code of conduct had occurred. It was in the nature of the imposition of a liability and involved a determination that the person was guilty of some disreputable behaviour or conduct. Finally, an exclusion order seemed similar in form and effect to an injunction against trespass, and such an injunction was an order characteristic of the courts. Kenny J. acknowledged that the powers of the board were limited in the sense that it had no power to summon witnesses or administer an oath, and the refusal of witness to attend was not a contempt matter. Its functions were limited to those specified in the Act, but those considerations were irrelevant because of the test set out in *Re Solicitors Act 1954*: namely, that the question of whether a power was limited or not was determined by the effect of the assigned powers and if the exercise of those powers was calculated, ordinarily, to affect in the most profound and far-reaching way the lives, liberties, fortunes, or reputations of those against whom they are exercised, then they could not be described as limited.

74. The approach taken by Kenny J. in *McDonald v. Bord na gCon* is consistent with that taken in *Re Solicitors Act 1954* in that it is broad in its approach to the question of whether the functions and powers exercised are judicial in nature. The many evident differences of power and procedure between proceedings under the Act and court proceedings were not considered relevant. By contrast, a narrow view of Article 37 was taken. Instead, the effect of an exclusion order was considered to be far-reaching and akin to an order of a civil court. However, the Supreme Court took a different view. While accepting the characteristics of judicial function set out by Kenny J., the Supreme Court concluded that the 1958 Act did not satisfy any of the requirements. At p. 244, Walsh J. said:-

> "In the Court's view the bodies or persons conducting the investigations under ss. 43 or 44, while bound to act judicially, are not constituted judicial persons or bodies nor do they exercise powers of a judicial nature within the meaning of Article 37 of the Constitution. This is an essential difference between the judgment of this Court and the judgment of Mr. Justice Kenny. Accepting the characteristic features of a judicial body set out by Mr. Justice Kenny these investigating authorities do not satisfy any of those requirements. In particular it is to be noted that the investigating authorities do not themselves by virtue of anything in ss. 43 or 44 affect any right or impose any penalty or liability on anybody. So far as the Board is concerned in the exercise of its powers under s. 47, or the Club in the exercise of its powers under the section, they are not constituted judicial bodies or do not exercise powers of a judicial nature as they would only satisfy one of the tests referred to. In the opinion of the Court the submissions that the Act in s. 47 violates the provisions of Articles, 34, 37, and 38 of the Constitution fails."

75. It is somewhat surprising that the five-part test outlined by Kenny J. in *McDonald v. Bord na gCon* has come to be treated as a canonical checklist for the identification of the

administration of justice to the exclusion of the discussion in the prior case law. The endorsement by the Supreme Court of the test in the judgment of Walsh J. did not involve any extensive consideration of it, or the case law, and, moreover, involved the paradox that the application of the test in the Supreme Court led to an almost polar opposite conclusion to that to which it had led the court which had advanced and constructed it. Indeed, it appears that Kenny J., as the chairman for the Report of the Committee on the Price of Building Land (1974), participated in the majority report, expressing the view that a function need not satisfy the *McDonald* test, but could still be the administration of justice under Article 34. This view appeared to underpin the recommendation in the report that the decision on inclusion of land in a designated area was a function which was required to be performed by the High Court.

76. Nevertheless, the five-part test in *McDonald v. Bord na gCon* has been repeated in a number of subsequent cases, albeit that there are few (if any) examples of legislative provisions which have fallen foul of it. Indeed, it may be that the decision of Kenny J. on the 1958 Greyhound Industry Act, so rapidly overturned by the Supreme Court, is one of the very few. It may be that the merit of the test (if it is such) was found to lie in its restrictive effect rather than any jurisprudential precision. It is, moreover, significant that this was not the only issue decided in *McDonald v. Bord na gCon* nor the proposition for which it is most commonly cited. In the Supreme Court, Walsh J. held that the exercise of the statutory power carried with it the obligation that the investigation be objective and carried out in accordance with the dictates of natural justice. This illustrates the fact that the development of the law in relation to the nature of the judicial power must be seen against the background of the increasing extent to which the law found that, even if the procedure fell outside the area of the administration of justice, the actions of administrative bodies in question were subject to judicial review which, over the succeeding decades, has become increasingly searching.

77. A further important case in the sequence is *Keady*. The plaintiff was subject to disciplinary proceedings under the Garda Disciplinary Regulations 1971, and the Commissioner decided to dismiss him from the force. The plaintiff challenged the decision on a number of grounds, including an argument in reliance on the decision *Re Solicitors Act 1954* and the far-reaching effect test. It was argued that the decision to dismiss the plaintiff was a judicial function. Counsel argued that the decision to dismiss the plaintiff amounted to the administration of justice within the meaning of Article 34 and Article 37 and, because of its far-reaching consequences, it could not be considered to be the exercise of a limited function or power under Article 37. Only the State, by means of the courts being an organ of the State, could dismiss a member from An Garda Síochána. Significantly, counsel for the State argued in reply that such an argument would put at risk a number of bodies, *e.g.*: the Valuation Tribunal; the decision-making procedures within the Department of Social Welfare; the decisions of the Legal Aid Board; and, notably in the present context, the decisions of the Employment Appeals Tribunal. The Supreme Court unanimously dismissed the claim. McCarthy J. considered that dismissal from An Garda Síochána did not satisfy the *McDonald v. Bord na gCon* test. He also observed that it was hardly intended by the court in *McDonald v. Bord na gCon* to exclude the matters identified by Kennedy C.J. in *Lynham v. Butler (No. 2)*, or indeed Davitt P. in *State (Shanahan)*. He was reluctant to attempt a definition of judicial power and considered it easier, if less intellectually satisfying, to say in a given incidence whether or not the procedure was an exercise of such power rather than to identify a comprehensive checklist for that purpose save, however, that the requirement to act judicially was not an indicator of an exercise of the judicial power. This approach harked back to the descriptive approach of Kennedy C.J. in *Lynham v. Butler (No. 2)*. McCarthy J. referred, in this regard, to the role of the court as a matter of history in the supervision and disciplining of solicitors. O'Flaherty J., concurring, went further. He considered that

the case of solicitors "must be regarded as exceptional and, perhaps, anomalous and owes a great deal to the historic fact that judges were always responsible for the decision to strike solicitors off the roll".

78. *Keady* represents, therefore, a significant retreat from the rigorous and demanding approach exemplified by *Re Solicitors Act 1954* and the judgment of Kenny J. in *McDonald v. Bord na gCon*. The *McDonald v. Bord na gCon* test was treated as one guide to the identification of the judicial function which was, in any event, largely a matter of impression. The decision in *Re Solicitors Act 1954* was confined to its own facts and treated as somewhat anomalous. Part of the justification for this more relaxed attitude to the significant decision-making functions of non-judicial bodies may, perhaps, be detected in the reference by O'Flaherty J. to the line of authority establishing that:-

> "there is now in place a well-charted system of administrative law which requires decision-makers to render justice in the cases brought before them and sets out the procedures that should be followed, which procedures will vary from case to case and from one type of tribunal to another; and which, of course, are subject to judicial review".

B. <u>The Act of 1977</u>

79. While *Keady* post-dates the enactment of the Unfair Dismissals Act 1977, it represents a point in the trajectory of the law that was already discernible in 1977. The question of employment law dealt with in that statute, and the wider context of industrial relations law, raises, in particular, issues in the context of the distinction between judicial bodies and administrative tribunals. The history of the interaction of the common law and the field of industrial relations is particularly strained. The individual, contractual, focus of what was at one time called the Law of Master and Servant was not easily reconciled with the collectivist approach of the developing trade union movement. Trade unions, with

some justification, were resentful of the decisions of the common law courts in the U.K. of the late 19th and early 20th century, and tended to favour the use of their developing political power to obtain statutory amendments designed to reverse unfavourable decisions and strengthen the role of unions and their capacity to protect workers by collective action. In that respect, the Trade Disputes Act of 1906 was a response to and reversal of cases like the Taff Vale Case (*Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] 1 K.B. 170) and others. The difficulties caused by industrial disputes were to be addressed by negotiation, arbitration, and conciliation, and if the law was to be involved, it was to establish specialist bodies to assist in that task, such, indeed, as the Labour Court established by the Industrial Relations Act 1946.

80. However, during the 20th century, there was an increasing international trend towards providing individual remedies for employees in respect of disputes concerning employment which would be binding and enforceable as a matter of right. This was obviously in the interest of employees, but was perceived as of general benefit to employers, and the public also, in that it tended to reduce the possibility that individual disputes about employment could create damaging general industrial disputes. As D. Ryan, *Redmond on Dismissal Law* (3rd edn., Dublin: Bloomsbury Professional, 2017) pp. 267 to 270 noted, recommendations of the International Labour Organisation and developments in the law of what was then the E.E.C. influenced the development of Irish law towards providing individual legally enforceable remedies for employment disputes, particularly relating to redundancy and dismissal.

81. The development of statutory bodies for the resolution of disputes, and the particular question of bodies having powers to provide remedies for individual employees in respect of redundancy and dismissal, poses obvious problems with the common law which distinguishes sharply between the judicial function for the determination of individual disputes and the performance of functions described as administrative, albeit that such

functions may have been required to be performed judicially. Many of the cases from common law countries, including the Australian cases, some of which were noted in the judgments in *Lynham v. Butler (No. 2)*, that considered the extent to which certain industrial relations bodies could be considered to exercise judicial power arose in this precise context.

82. Two cases which reached the Judicial Committee of the Privy Council during this period illustrate the type of issues which arose, and the developing international trend towards remedies provided by statute which could be enforced before non-judicial tribunals. In *Saskatchewan Labour Relations Board v. John East Ironworks* [1949] A.C. 134, the Privy Council reversed the finding of the Court of Appeal of Saskatchewan and held that a labour board empowered to order reinstatement of an employee, but to do so not just by the application of legal principles to ascertained facts, but by considerations of policy, was an administrative tribunal rather than a court. The Privy Council considered that there was "no better approach than to ask whether the dispute was of the sort that required determination by judges". This was to find an echo in McCarthy J.'s observation in *Keady* that the matter is really one of impression rather than definition. Later again, in *United Engineers Workers' Union v. Devanayagam* [1968] A.C. 356, the Privy Council, by a narrow majority, overturned the decision of the Supreme Court of Ceylon that a labour commissioner with power to order reinstatement of a dismissed employee was exercising the judicial power and ought to have been appointed by the judicial services commission. In significant contrast to the provisions of the Act of 1977, the commissioner was empowered to make such order as he considered just and equitable and the majority, while acknowledging the matter was not free from difficulty, considered that the general function of the Act was the resolving of industrial disputes rather than to give effect to legal rights. In an interesting judgment, the minority (Lord Guest and Lord Devlin) considered that judicial power was a concept capable of clear delineation and had to be

since it was the basis of a constitutional requirement. Relying in part on the Australian cases of *Huddart, Parker & Co v. Moorhead* (1908) 8 C.L.R. 330 and *The Waterside Workers' Federation of Australia v. J.W. Alexander Limited* (1918) 25 C.L.R. 434, referred to in *Lynham v. Butler (No. 2)* set out at paras. 54 and 55 above, they concluded that the judicial power was concerned with "the ascertainment, declaration and enforcement of the rights and liabilities as they exist or are deemed to exist at the moment the proceedings are instituted", whereas the arbitral power in industrial disputes was to enforce what, in the opinion of the arbitrator, ought to be the respective rights and liabilities of the parties, which test they considered was satisfied. These cases illustrate the fact that the resolution of employment disputes in the field of industrial relations poses particular difficulties of definition and, moreover, that no clearer approach has emerged in the international jurisprudence than is to be found in the Irish case law.

83. The Unfair Dismissals Act 1977 was a significant development in Irish law. While it followed the precedent of the Redundancy Payments Act 1967 and, indeed, transferred the jurisdiction of the Redundancy Appeals Tribunal created by that Act to the Employment Appeals Tribunal created by the 1977 Act, it was of much wider impact. The Rights Commissioners and the Employment Appeals Tribunal had power to resolve disputes under the Redundancy Payments Act 1967, the Minimum Notice and Terms of Employment Act 1973, and the 1977 Act itself. The Act defined unfair dismissal and provided for redress by way of reinstatement, reengagement, or compensation not exceeding 104 weeks' remuneration. Regulations could be made governing the procedure to be followed before the tribunal, the representation of parties attending, and the making of an award by the tribunal of costs and expenses. Section 10(4) of the Act provided for an appeal to the Circuit Court from a determination of the tribunal. Section 15 of the Act maintained the right of a person to recover damages at common law for unfair dismissal, but also provided that the initiation of a claim under the Act barred an entitlement to

recover damages at common law and that proceedings at common law, similarly, precluded a claim for redress under the Act. Proceedings before a Rights Commissioner were to be conducted other than in public (s. 8(6)) but the E.A.T. was to sit in public. By the incorporation of the provisions of s. 21(2) of the Industrial Relations Act 1946, and s. 39(17) of the Redundancy Payments Act 1967, the E.A.T. was given power to summon witnesses and to order them to produce documents and was given power to take evidence on oath, and a failure or refusal to give evidence was an offence. Witnesses before the E.A.T. had the same privileges and immunity as a witness before the High Court.

84. For present purposes, the most noteworthy feature of the Act was its procedure for enforcing the determinations of the tribunal. Section 10(1) of the 1977 Act provided for the procedure that, if an employer failed to carry out a determination of the tribunal within six weeks from the date the determination had been communicated, the Minister for Labour could, if he or she thought it appropriate, institute and bring proceedings to the Circuit Court for redress under the Act. Such proceedings would be a *de novo* hearing, and the Circuit Court was free to make such order as it thought fit within the jurisdiction created by the Act. Subsequently, however, s. 11(3) of the Unfair Dismissals (Amendment) Act 1993 provided for enforcement of a determination of the tribunal by application to the Circuit Court, by either the employee or the Minister and it was provided that the court:-

> "shall, on application to it in that behalf … without hearing the employer or any evidence (other than in relation to the matters aforesaid) make — (I) an order directing the employer to carry out the determination in accordance with its terms".

If the determination directed reinstatement or reengagement, and the court considered it appropriate to do so, the court could make an order of compensation in lieu. The "matters aforesaid" referred to were that a determination had been made and had not been complied

with within the statutory period. This mechanism, with the substitution of the District Court for the Circuit Court, appears to be the precedent for the procedure applicable generally under the 2015 Act.

85. It should be noted that, since its enactment, questions have been raised about the compatibility of the 1977 Act with the Constitution, both in the terms of the Act as originally drafted, and as amended in 1993. Thus, the most recent edition of *Kelly: The Irish Constitution* (5th edn., G.W. Hogan, G.F. Whyte, D. Kenny, & R. Walsh eds., Dublin: Bloomsbury Professional, 2018) ("*Kelly*"), at para. 6.4.100, states:-

> "The former Employment Appeals Tribunal (which was not composed of judges) was established by s 39 of the Redundancy Act 1967 as an amended by s 18 of the Unfair Dismissals Act 1977. Under the latter Act, the Tribunal was empowered, inter alia, to award compensation to dismissed employees up to a maximum sum of an amount representing two years' salary. The tribunal would appear to have been administering justice and it must be an open question as to whether its powers were 'limited' within the meaning of Article 37. In *Government of Canada v Employment Appeals Tribunal*, McKenzie J drew attention to these potential constitutional difficulties and given that the powers of the Employment Appeals Tribunal are now exercised by adjudication officers pursuant to the Workplace Relations Act 2015, it might be thought that similar constitutional concerns may exist in relation to the powers of these officers."

86. Professor James Casey's *Constitutional Law of Ireland*, noted that the possible constitutional difficulties appear to have influenced the form of the Unfair Dismissals Act 1977. He considered that the power conferred on the E.A.T. appeared judicial, and plainly analogous to the courts' traditional jurisdiction over contracts, and that it was open to question that it could be said to be limited. However, the machinery for enforcement involved an application to the Circuit Court. The Circuit Court was not bound by the

E.A.T.'s determination either as to entitlement to redress or the form it should take. These observations, it should be said, do not appear to have taken account of the terms of the Unfair Dismissals (Amendment) Act 1993. However, he went on to consider the jurisdiction of the Labour Court under the Employment Equality Act 1977. The Labour Court was empowered to make an order for the enforcement of an earlier determination and failure to carry out such an order was a criminal offence. He commented that it was yet to be determined if the limitation on the power of the E.A.T. to make binding orders rendered it constitutional.

87. A similar analysis was offered in D.G. Morgan, *The Separation of Powers in the Irish Constitution* (Dublin: Round Hall Sweet & Maxwell, 1997). Professor Morgan considered that the provisions of s. 10 of the 1977 Act requiring enforcement by the Circuit Court at the suit of the Minister where the Circuit Court was free to make its own decision, after a full hearing, was sufficient to "probably make it constitutional". Again, this passage does not address the effect of the amendment made in 1993. By contrast, however, he considered (at p. 106) that the Labour Court's authority under the Employment Equality Act 1977 may fail the essential test (which is whether the non-court's initial decision is final or whether it can be re-agitated or reheard before a court) and concluded that it was quite possible that the making of an order such as that authorised by the Employment Equality Act 1977 by a body other than a court was unconstitutional.

88. It is somewhat puzzling that different methods of enforcement were provided for under closely-related legislation operating in the same field, and more surprising, perhaps, that the evolution of the legislation has been towards reducing almost to vanishing point the degree to which the determinations of the respective tribunals in the field of labour law were capable of review or appeal to a court, even though those features had been identified as probably essential to the constitutional validity of the structure. The view expressed by these distinguished authors has not been doubted in any of the subsequent

case law, and no decision can be pointed to which suggests a different analysis. Nevertheless, the legislative evolution has been consistently to expel from the structure any possibility of review or confirmation by a court until, eventually, the 2015 Act adopted a single minimalist structure of a decision by an authorised officer capable of appeal to the Labour Court (with an appeal on a point of law to the High Court), enforceable by *ex parte* application to the District Court, whose powers were limited to considering if the determination had indeed been made and not complied with within 56 days of notification and, in cases of where reinstatement or reengagement had been ordered, considering whether compensation should be ordered instead. It is this feature of the Act, however, alone, which the High Court found meant that the procedure did not satisfy the fourth limb of the *McDonald v. Bord na gCon* test and thus was not repugnant to the Constitution.

C. The *McDonald v. Bord na gCon* Test

89. Much of the recent case law has involved a close, if unrewarding, analysis of the five-part test in *McDonald v. Bord na gCon*, and this case was argued both in the High Court and in this court by reference to it. But it is, I believe, helpful to look at the issue in a much broader perspective. The Irish Constitution has, since 1922, entrenched a tripartite separation of powers. However, although Montesquieu drew on what he believed to be the example provided by the British system, that system, large elements of which we inherited in 1922 and maintained thereafter, did not have a clear-cut separation between the powers of the executive, legislative, and judicial branches, and the system established under the Irish Constitution, although more rigorous, has nevertheless provided for an interaction and interdependence between the branches. In our system, where the executive sits in parliament, the executive normally controls the legislature and has the power of appointment of the judiciary. Legislation, for its part, can alter the common law

and amend or abolish causes of action or create new ones. Neither the 1937 Constitution nor its predecessor contained any definition of the judicial power (or, indeed, the executive or legislative powers) and has not been interpreted in such a way that each branch may only exercise powers defined as appropriate for that branch. Courts sometimes perform tasks which can be considered administrative, such as licensing, or wardship, or certain functions under the Companies Acts. For example, under s. 54(7) of the Fisheries Act 1980, it was possible to appeal to the High Court from an order of the Minister for the Marine designating an area as suitable for aquaculture if he considered it in the public interest to do so, which does not appear to be an intrinsically judicial task or one which gives rise to any issue of law: *Courtney v. Minister for the Marine* (Unreported, High Court, O'Hanlon J., 21st of December, 1988). On the other hand, bodies established by legislation or by the executive may be required to perform functions apparently judicial in nature, or at least be required to act judicially in certain circumstances. There are areas which move between the branches. Originally, the questions of restrictive practices and monopolies were seen as administrative functions requiring economic and policy expertise. With the passage of the Competition Act 1991, such matters have become justiciable.

90. In *Lynham v. Butler (No. 2)*, Kennedy C.J. stated that the constitutional assignment of the administration of justice of the courts and judges would be jealously guarded. However, the subsequent decisions of the courts have produced few examples of legislation being struck down as a wrongful exercise of or interference with the judicial power, and the case law has shown little enthusiasm for an expansive reading of that power. Increasingly, the decision in *Re Solicitors Act 1954* appears as an outlier rather than establishing a principle. By the same token, the fears expressed, even in *Lynham v. Butler (No. 2)*, that the other branches would seek to remove or whittle away the courts' jurisdiction have not been realised either. As counsel for the Attorney General pointed

out, the 20th century has seen a steady expansion of the reach of the law and, accordingly, of the courts. The great expansion in the role of the State in the 20th century, and the transfer by the legislature of functions, which previously might have been considered to be matters for the executive branch alone, to newly-created statutory bodies, and the concurrent general expansion of the power of judicial review of administrative action, has meant that the boundaries of law's empire, as it were, extend much further than might have been contemplated in 1922 or 1937. Looked at functionally, therefore, rather than from the perspective of legal theory, the decisions of the courts in this field have tended to a pragmatic outcome in which the assignment of the administration of justice to the judicial branch has not operated to hinder these developments, even if that has not been achieved by reasoning which, to borrow the language of McCarthy J. in *Keady*, is not always necessarily intellectually satisfying or elegant, although, in that regard, it must be said that the approach of the case law is firmly in line with international comparators.

91. It is worth recalling that Kenny J., in setting out the test in the High Court in *McDonald v. Bord na gCon*, would have applied it in a very broad way to find that the powers of Bord na gCon to investigate complaints and make an exclusion order enforceable by a racecourse operator nevertheless constituted the administration of justice. However, almost from the time of the decision of the Supreme Court in that case, the test, while remaining in a form identical to that advanced by Kenny J., has been interpreted and applied narrowly, with the effect that few, if any, provisions have fallen foul of it. To that extent, it perhaps owes its longevity to the fact that, by emphasising the historical, it tends to exclude novelty and thus achieves a desired balance and avoids any undue restriction on the capacity of the State to provide for a range of decision-making functions with particular expertise, or informal procedures, or both. However, the treatment of the criteria in *McDonald* as a checklist which must be minutely and precisely complied with risks missing the wood for the trees. It also encourages an approach to drafting that could

remove proceedings from the field of the administration of justice because of some small, and in truth insignificant, deviation from the checklist. That would be a triumph of form over substance. But, whatever the conceptual difficulties of delineating the precise borders of the judicial function, the Constitution requires that there be an area that is and will remain the exclusive domain of the administration of justice in courts by judges, or in Article 37 tribunals. It is important to apply any test, therefore, with an understanding of the substance it is meant to determine.

92. It may be preferable, therefore, as indicated by McCarthy J. in *Keady*, to treat *McDonald v. Bord na gCon* as part of a general approach to the issue alongside, rather than replacing, the observations in *Lynham v. Butler (No. 2)* and those in *State (Shanahan)*, and as indicating general features which tend to show the administration of justice, rather than as a definite and prescriptive test. As one commentator observed of the test, it:-

> "provides only a descriptive summary of the everyday workload of the contemporary court. An *ex post facto* overview of the average judicial caseload, it does not offer a suitably prescriptive analysis of the core concepts of the judicial function. The logic of Kenny J.'s position is hopelessly circular, relying on the current nature of the court's activities to define its function into the future. The *McDonald* criteria reflect the judge's estimation only of what the courts do, rather than what they ought to do. In this, it owes more to historical happenstance than conceptual coherence." (E. Carolan, *The New Separation of Powers: A Theory for the Modern State*, (Oxford: Oxford University Press, 2009)).

93. The features in *McDonald v. Bord na gCon* are closely linked and, to some extent, overlap. They do identify something central to the administration of justice and may be understood as indicating features of importance rather than establishing a statutory checklist. Some, indeed, of the features may be more important than others, and it may

also be relevant to consider not merely whether the provision satisfies the particular heading, but also to assess the extent to which it does so.

94. The first, second, and third features are closely related since they identify a dispute about legal rights, its resolution, and determination. The fourth is a logical extension of the third, since the resolution of the dispute must not be dependent upon the agreement of the parties, but must be capable of enforcement in cases of refusal of the losing party to comply. The fifth feature is, however, quite different. Viewed and applied narrowly, it has the effect of confining judicial power to the areas of the traditional causes of action and proceedings and fossilising the administration of justice in the form of the business of courts in the mid-20th century. The novelty of any new provision (which is, after all, the *raison d'être* of any new scheme) becomes a shield against challenge, no matter how completely the provision might fit the preceding limbs of the test. This feature can give rise to a rather sterile debate as to the extent to which it is necessary that the order made must be characteristic of the courts of this country. In this case, for example, it might be argued that an order for reinstatement is merely a type of order of specific performance, which is a characteristic feature of the courts of equity. On the other hand, it is argued that such an order is a clear departure from the traditional law, which held that, almost without exception, a contract of service could not be made the subject of an order for specific performance. It is difficult to see either argument as compelling.

95. I think this feature is best understood in a broader sense and as emphasising the importance of the existing jurisdiction of the courts, and that any provision subtracting from that jurisdiction, or creating a parallel jurisdiction which might render the courts' traditional jurisdiction defunct, is one which should be closely scrutinised by the courts for compatibility with the Constitution. A distinctive feature of the courts system established by the Irish Constitution is that there is no structural distinction between administrative courts and the ordinary courts. The ordinary courts system, moreover,

deals with every type of dispute, whether as to breaches of the criminal law, public law, or private law issues. It is noteworthy that, although in 1937 there were Continental models which were considered and available, the Constitution did not create a constitutional court to exercise the jurisdiction explicitly conferred under the Constitution to declare acts of legislation void, but — deliberately, it seems — assigned that role to the ordinary courts, which dealt with the full range of disputes, both public and private, and which, indeed, had full and original jurisdiction. It may be speculated that this assignment of jurisdiction in respect of possible repugnancy was, in part, a recognition that the legal and analytical skills, and courtroom procedures, utilised to resolve disputes of public and private law were considered to be beneficial, and that respect for the decisions of the courts on such common law matters cross-subsidised, as it were, the constitutional adjudication and, perhaps, *vice versa*. There is, moreover, a critical mass required for the functioning of the courts system, which normally involves a breadth of subject matter. It is not surprising, therefore, that subtraction from such jurisdiction would be scrutinised closely, not just because of the fear of the incremental whittling away of the jurisdiction of the courts, and thus the administration of justice, to which Kennedy C.J. alluded in *Lynham v. Butler (No. 2)*, but also because of the possible limitation of the capacity of the courts to perform the role assigned to them by the Constitution and which involves a range of jurisidictions. While there has never been a suggestion that the whittling away of court jurisdiction was desired by the legislative or executive branches, constitutional provisions, like constitutional rights, as Ó Dálaigh C.J. put it in *McMahon v. A.G.* [1972] I.R. 69, are established not merely to deal with the problems of the past, but also to guard against the improbable — but not to be overlooked — perils of the future.

96. The administration of justice is not, however, to be defined by, or limited to, those areas traditionally dealt with by the courts. The proper scope of the administration of justice is

not determined simply by analogy with what was done by the courts as a matter of history, and still less by the form of orders traditionally made by them. It may be possible to say, even if no single test can be advanced, that an area is something intrinsically within the scope of the administration of justice. The existence of boundary disputes does not prevent agreement that some areas are definitively within one country or another. In any event, the Constitution establishes an area which is the administration of justice, and the courts must uphold that command. Even if it is considered an impossible task, as a matter of pure theory, to define with precision the exact boundaries of the administration of justice or to offer a single infallible litmus test, we can still identify areas which can be agreed to be part of the administration of justice. That is what the first four features of the *McDonald v. Bord na gCon* test, and the broader observations in *Lynham v. Butler (No. 2),* and *State (Shanahan)* are directed towards. It would be a narrow and self-defeating approach, however, to find that a provision that comprehensively satisfied these features was nevertheless not the administration of justice because the form of order made in the proceedings was something novel. I would, therefore, be reluctant to give decisive weight to this feature, and would, in any event, take a reasonably broad view of what it requires.

97. Turning to this case, it is appropriate to deal, at this point, with the cross-appeal of the Attorney General, which sought to overturn Simons J.'s finding that the fifth limb of the *McDonald v. Bord na gCon* test was satisfied in this case. It was argued that the reliefs available under the 2015 Act incorporating the Unfair Dismissals Act 1977 left intact the traditional common law action for wrongful dismissal, and created a remedy that was entirely novel and independent of the contract of employment. The relief available was not merely innovative but included reliefs which, as a matter of common law, could not be ordered in the context of an employment relationship.

98. This issue is one of focus and degree. Looked at up close, the differences between a claim for unfair dismissals in the W.R.C. and an action in court are significant. But, this risks elevating the unsurprising fact that new legislation effects a change in the pre-existing law into a decisive test. If we view the picture with some distance and perspective, it appears to me that Simons J. was correct. First, it is necessary to recall that the parties agree that the first three limbs of the *McDonald v. Bord na gCon* test are satisfied. A jurisdiction is established to make binding determinations of legal disputes between private parties according to law. That, in itself, is normally a core business of the courts. Once invoked by a claimant, the jurisdiction is established. An employer is not free to decline to participate, and if he or she refused to participate, that does not prevent the case proceeding or a decision being made. The adjudication officer is, by statute, independent in the performance of his or her functions (s. 40(8)), has power to compel the attendance of witnesses to give evidence (s. 41(10)), or provide documents, and failure to comply is an offence (s. 41(12)). The adjudication officer gives the parties an opportunity to "*be heard*" and to "present … any *evidence relevant* to the complaint or dispute" (s. 41(5)), and makes "a *decision*" in relation to the complaint "*in accordance with the relevant redress provision*" (s. 41(5)). A complaint may be either that there has been a "*contravention of a provision*" specified in Part 1 or 2 of Schedule 5 or a dispute as "to the *entitlements* of the employee *under an enactment* specified in Part 3 of Schedule 5" (s. 41(2)). (*All emphases added.*) The decision of the adjudicating officer is binding on the parties, and there is mechanism for enforcement under s. 43(1) to which it will be necessary to return. These provisions create a machinery for the determination and decision by an independent body of complaints seeking relief, as a matter of law, and which permits the adjudication officer to make a binding decision on such complaint which can be enforced against the losing party. In these respects, the process is indistinguishable from the determination of a legal dispute before a court. Indeed, it was

accepted in these proceedings that the proceedings in the W.R.C. amounted to a "determination of … civil rights and obligations" for the purposes of Article 6 of the E.C.H.R. In that context, the fact that the Unfair Dismissals Act 1977, for example, provides for the remedy of reinstatement and reengagement does not take this procedure outside the category of administration of justice. In the first place, an order of compensation under the Act is an order which, as a matter of history, was made by courts, and redress by way of reinstatement or reengagement is akin to an order of specific performance which is a familiar type of order made by the courts, even if, as a matter of common law, it would rarely — if at all — be made in the context of an employment relationship. If, for example, the 1977 Act had merely implied into all contracts of employment an entitlement not to be unfairly dismissed, and permitted a court to make orders of reinstatement or reengagement, such proceedings could not be said to be incompatible with or alien to the functions of a court. The form of order made by a decision pursuant to the 2015 Act is a final order determining the dispute and awarding redress of a kind known to the courts. That is, in my view, sufficient to comply with what is addressed under the fifth limb of the *McDonald v. Bord na gCon* criteria.

99. I would not, however, place much reliance on the fact that, under the 1977 Act, all these orders may be made by the Circuit Court on appeal, or by the District Court on an application for enforcement. This, perhaps, does show that there is nothing fundamentally incompatible with the traditional forms of court procedure in permitting such orders to be made. But, it does not show that these orders were orders which, as a matter of history, were traditionally made by courts. I think that inquiry must be made outside the Act giving power to make the orders. Otherwise, it would lead to the somewhat curious conclusion that the Act did not satisfy this aspect of the test in 1977 just after it was enacted, but did at some later point. As already indicated, I do not think this aspect of the criteria should be applied with undue precision. In *Cowan v. A.G.*,

Haugh J. was prepared to find that provision satisfied by the fact that the election court hearing a claim under the Municipal Corporations Act 1882 was doing the same work as the High Court had when hearing election petitions prior to 1882. However, as has been pointed out, jurisdiction to hear and determine election petitions was, itself, only conferred on the High Court in 1868; prior to that, all claims were heard by Parliament itself. The historical test is not, therefore, an infallible guide to what is or is not intrinsically a judicial function and the test must be applied with some flexibility. I consider that Simons J. was correct to conclude that it was satisfied here.

100. This brings us to the ground upon which Simons J., not without some doubt, found that a proceeding such as a claim for unfair dismissal under the 2015 Act did not constitute the administration of justice because of the provisions of ss. 43 and 45 in relation to enforcement. Section 43, it will be recalled, provided that if an employer failed to carry out the decision of the adjudication officer within 56 days from the date on which notice of the decision was given to the parties, the District Court, on the application to it by either the employee or the commission or with the consent of the employee, shall:-

> "without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the decision in accordance with its terms".

The only matters to be established before the District Court in such an application would be the making of the decision and the fact that such a decision had been made and notified in writing to the parties more than 56 days before the application. If these matters were established, then the District Court is obliged to make the order sought. The only discretion available to the court is that under s. 43(2), whereby in a case where reinstatement or reengagement had been made, the District Court could, in lieu of an order directing the employer to carry out that decision in accordance with the terms, make an

order directing the employer to pay compensation of such amount as was just and equitable having regard to all the circumstances.

101. It is clear that this procedure is quite different from the enforcement mechanism available in relation to a court judgment. The decision of the authorised officer/W.R.C. is not enforceable of its own force. An application must be made to another entity — the District Court — to render the decision an order capable of being enforced, and it becomes enforceable, then, as an order of that court. Furthermore, the application for enforcement can be made by someone other than the party who obtains the decision, such as a trade union or, indeed, the Commission itself. While the decision of the authorised officer/W.R.C. becomes enforceable almost automatically, it is still necessary to satisfy certain proofs and, in the case of redress in the nature of reinstatement or reengagement, the District Court has certain discretion, although normally, it seems, in ease of an employee dealing with a recalcitrant employer, rather than designed to provide any assistance to the defaulting employer, who, after all, does not receive notice of the proceedings, and cannot attend or make submissions. Nevertheless, such an application may involve some evidence and independent decision-making, although the District Court cannot alter the determination of liability but may only select a different method of redress and assess that compensation. These are important features, although it must be said that the procedure is very far removed from the original enforcement provisions in the 1977 Act which required, in effect, a full rehearing before the Circuit Court. This, it will be recalled, was the feature which, at least in the view of academic commentators, was important in saving the provision from unconstitutionality.

102. Sections 43 and 45 can be usefully compared with the original procedure provided by s. 10 of the 1977 Act. The superficial structure of enforcement by separate court proceedings is retained, but in substance almost all capacity for independent decision-making has been removed, and, instead, an enforcement mechanism established that is as

close to automatic as possible. Indeed, in doing so, the Act may create a certain problem. If the proceedings in the W.R.C. are not an administration of justice, then the proceedings in the District Court under ss. 43 and 45 may be viewed as a separate and distinct administration of justice. It is not impossible to have proceedings where the issues to be determined are narrow, and where, on proof of a very limited number of matters, an order may even be mandatory. For instance, in *Dublin Corporation v. Hamilton* [1999] 2 I.R. 486, Geoghegan J. found s. 62 of the Housing Act 1966 — which limited District Court intervention in an eviction from a local authority property to verifying that the local authority had furnished the requisite proofs — to be constitutional. However, it is unusual to permit such an order to be made adverse to another party on an *ex parte* basis with no capacity for the party affected to challenge or dispute the claim, or even know about it. See, in this regard, the judgment of this court in *D.K. v. Crowley* [2002] 2 I.R. 744, where the court held that the provisions of s. 4(3) of the Domestic Violence Act 1996 were unconstitutional in that the section permitted barring orders to be made *ex parte* and continued without a hearing, a system which breached the subject of the barring order's constitutional rights to fair procedures. In *V.P.G. Inc. v. Insurco International Ltd.* [1995] 2 I.L.R.M. 145, McCracken J. held that a power under the Rules of the Superior Courts to make an order *ex parte* had to be understood as giving a right to the affected party to seek to set it aside, even if there was no express provision in the Rules to that effect. See also: *Adams v. D.P.P.* [2001] 1 I.R. 47; and *Adam v. Minister for Justice* [2001] 3 I.R. 53. The *ex parte* nature of the enforcement procedure is certainly problematic, but the Act was not challenged on that basis. Instead, reliance was placed on the fact that the procedure was so automatic that, although a court procedure was provided for, that did not permit the affected party to participate.

103. If this issue was whether the enforcement procedures under ss. 43 and 45 were analogous to the method of enforcement of a court decision, then the distinctions identified above

could be of importance and, perhaps, decisive. However, the issue to which this heading of the criteria is addressed has to be seen in the broader context of the function sought to be defined, or at least described, by it. The question of enforceability of a decision is, indeed, a significant clue to its legal nature, since a decision which depends for its enforcement on the agreement of the parties, or on the decision of another body (indeed, a court) which can, moreover, decide whether or not to enforce it depending on whether it is, itself, satisfied that the decision is correct is a significant distance from the type of automatic enforceability a litigant achieves when they succeed in court. Even then, a pragmatist might observe that the vast majority of E.A.T. decisions pre-1993 determined disputes and were complied with without any formal enforcement, and, to that extent, were similar — if not indistinguishable — from court decisions.

104. The enforcement procedure provided under ss. 43 and 45 requires careful analysis. Structurally, it maintains the feature of resort to court for enforcement of the decision in the case of a failure to comply. However, enforcement is almost automatic, does not permit involvement by the losing party, and, on the presentation of formal proofs, is mandatory. While a court is the vehicle for enforcement, it is not employed for its capacity to administer justice fairly between opposing parties by reference to the law, but, rather, for access to the enforcement mechanism. The court process is conscripted in aid of enforcement of the decision of the W.R.C. In *In Re Haughey* [1971] I.R. 217 ("*Re Haughey*"), the Supreme Court had to address provisions of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970 which appeared to permit the Dáil Public Accounts Committee to find a witness guilty of contempt and send him forward to the High Court for punishment. The Supreme Court held that such a reading of the Act could not be consistent with the Constitution because, in the words of Ó Dálaigh C.J., "under the Constitution the Courts cannot be used as appendages or

auxiliaries to enforce the purported convictions of other tribunals" and the same must apply to non-criminal determinations by other tribunals.

105. Looked at in this broader context, I do not think that anyone other than a lawyer, and perhaps a pedantic one at that, would consider the details of the process significant in understanding the nature of the proceedings before the W.R.C. An unsuccessful party who had received an adverse decision from the W.R.C. would, I think, consider themselves in no different a position to a party emerging from the District Court or Circuit Court having lost a case. They would consider that, unless appealed, they would have to comply with the decision, and nearly all would. The evidence on behalf of the respondents was, indeed, that 90% of W.R.C. orders were complied with and only 10% were appealed. A losing party would know that if they did not comply of their own volition, they could be forced to do so by the power of the State. Most importantly of all, they would know that the legal consequences of their actions had been determined and that, unless appealed, that determination was the definitive decision by a body provided by the State and backed by it and which, as a matter of law, had determined their rights and responsibilities in respect of the matter in dispute. The fact that the decision of the W.R.C can be described accurately as a determination is of importance here. The State acknowledges that it is, moreover, a "determination of...civil rights and obligations" to which Article 6 of the E.C.H.R. applies. Determination here connotes decision-making which is definitive. It is the decision of the W.R.C. which is decisive of the legal rights of the parties.

106. I appreciate that Simons J. considered himself bound by precedent to conclude, albeit with evident reluctance, that the limited discretionary power available to the District Court to substitute an award of compensation for an award of reinstatement or reengagement meant that the decision of the W.R.C. was not to be considered an administration of justice but rather, presumably, an administrative function, although one

bound to be performed judicially. The separation of powers is a vital feature of the Constitution and has shown its values in the years since independence. It is, nevertheless, a difficult concept and both the borderline between the respective powers and the area of overlap between them is sometimes blurred and indistinct. In particular, the experience under the Constitution of 1922 showed that a rigid and exclusive definition of the judicial power would, if anything, make more difficult the functioning of the separation of powers, and would not be consistent with the structure of the society established under that Constitution. This is an area where the wisdom of the observation of Oliver Wendell Holmes that, in a constitution, there must be some play at the joints, has particular value. It was in the context of the analysis of the full and original jurisdiction of the High Court that Henchy J. set out the principle of harmonious interpretation of the Constitution and rejected a rigid and literal interpretation of Article 34 in *Tormey v. Ireland* [1985] I.R. 289. The experience of many judges and writers has shown that it is difficult and often impossible to offer a clear prescriptive definition of the nature of the judicial power or, indeed, the executive or legislative powers. However, that does not mean that it does not have some independent content. I consider that if it was possible to conclude that the procedure to determine an unfair dismissal case under the provisions of the 2015 Act did not constitute an administration of justice for the purposes of the Irish Constitution, solely because of these features of the enforcement process, it would be to almost empty the concept of the administration of justice of any independent meaning, and render it an almost formal and circular concept: the administration of justice which is consigned so solemnly to courts established under the Constitution and to judges appointed under it would be no more than business which from time to time is done in those courts.

107. Again taking a broad perspective, it is apparent that the development in 1977 (building on the example of the Redundancy Payments Act) and establishing a separate code of unfair dismissal, and conferring jurisdiction upon an Employment Appeals Tribunal, was

a decisive shift. In the field of industrial relations, it was a move from the collective claim to an assertion of individual rights, and from resolution of disputes by collective action, arbitration, and conciliation, to a form of State-enforced official judicial determination of individual disputes. The issue to be decided was not a matter of discretion, or what was advisable or desirable in the future for industrial peace or good employer/employee relations: it was, rather, a determination of the legal rights of parties in relation to the past events. The deciding body had power to determine, for the purpose of its decision, the facts which had occurred, and to apply the law to such facts. Indeed, if the tribunal failed to do so correctly, it would be open to correction, not because the decision it had reached was unwise or inadvisable, but simply because it was wrong or impermissible as a matter of law. It had power to exercise jurisdiction against the will of a party and ensure that its orders were enforced by the State. It could compel the attendance of witnesses and the production of documents and failure to comply was an offence. It had power to determine disputes according to law and, in the words of Griffith C.J., quoted by Kennedy C.J. in *Lynham*, to "order right to be done in the matter".

108. The Blueprint to Deliver a World-Class Workplace Relations Service (2012) which preceded the enactment of the 2015 Act, and which was exhibited in the proceedings, states that the decisions of the adjudication officers would include the issues identified as relevant to the claim, an explanation why any such issue was not determined, the findings of fact relevant to the issues, a concise statement of the applicable law, the application of that law to the facts found, and the decision (including any award). This is precisely the task of any court required to resolve a justiciable controversy. The fact that, since 1977, a determination in respect of a claim for unfair dismissal, whether favourable or not, precludes pursuit of a claim for wrongful dismissal (and *vice versa*) is a clear illustration of the fact that the respective processes were understood to occupy the same ground. Furthermore, the fact that the existence of an unfair dismissals jurisdiction is understood

to preclude development of the common law of dismissals demonstrates the function the unfair dismissals regime is understood to perform. Approaching the issue with a degree of caution and flexibility consistent with the case law, it is appropriate to acknowledge that not one of these features, on its own, is determinative and it is possible to have many of these features but yet conclude that the process does not amount to the administration of justice. However, here, it is an unavoidable conclusion, in my view, that what was designed and sought to be implemented was a judicial process which was intended to resolve justiciable controversies according to law.

109. A valuable contemporary book written from the perspective of the Trade Union movement, N. Wayne, *Labour Law in Ireland: A Guide to Workers' Rights* (Dublin: ITGWU/Kincora Press, 1980), makes the point very clearly. At p. 98, it is observed that:-

> "unlike the Labour Court and the Rights Commissioner the [*E.A.T.*] is *exclusively* concerned with issuing legal rulings." (*Emphasis in original.*)

At p. 103, it is said:-

> "[*t*]hough the [*Rights*] Commissioners are required to implement the Unfair Dismissals Act, in practice they have come to be regarded as having a broader function – that of settling disputes… By contrast the [*E.A.T.*] will operate *strictly in accordance with legal principles*." *(Emphasis added.)*

In my view, this is a correct analysis. In terms of the nature of the process, the procedure to be followed, the issue to be determined, and the manner in which it was to be determined, whether viewed from the perspective of abstract legal analysis, or the more pragmatic and functional vantage point of the persons made subject to it, it is plain that the process set out was intended to be a judicial process. The question of the method of enforcement becomes critical therefore. Under the 1977 Act, there was a cumbersome process which allowed not just for a full appeal to the Circuit Court, but, moreover, required such a rehearing even in cases where there had been a refusal to comply with the

determination of the tribunal. Such a procedure cannot be explained as required by considerations of efficiency, and it seems plain, as the commentators observed, that the purpose of the enforcement procedure, initially at the instance of the Minister, was to establish a marked distinction from the administration of justice, and protect against constitutional frailty. Whether or not the extended enforcement procedure under the 1977 Act had the effect that the entire procedure was not the administration of justice (something on which I express no view), I do not think that the almost automatic enforcement procedure under the 2015 Act can have the same effect. Instead of interposing a full hearing by a court with the effect, and reality, that the order enforced is that of the Circuit Court and not that of the tribunal, the court process is commandeered to provide for near-automatic enforcement of the determination of the adjudication officer or Labour Court. In my view, the function of the W.R.C., and the Labour Court on appeal, is the administration of justice. It is not coincidental that the parallel jurisdiction in the U.K. is conferred upon a tribunal understood to be performing a judicial function and part of the judicial system.

D. <u>Limited Functions and Powers</u>

110. The fact that the exercise of the jurisdiction by the W.R.C. constitutes an administration of justice does not, however, mean that it must be performed by a court. Article 37 is framed in negative terms:-

> "nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature."

Although the Article does not define either the area of administration of justice or the subset covered by this saver, it is, in my view, clear that justice may be administered by bodies which are not courts, and by persons other than judges in non-criminal cases. However, such exercise must constitute the exercise of limited functions and powers of a

judicial nature. The only judicial consideration is that contained in the judgment of Kingsmill Moore J. in *Re Solicitors Act 1954* set out at para. 67 above.

111. These observations have not been the subject of much, if any, judicial scrutiny for the subsequent half-century and more, and have had the effect of significantly limiting the scope of Article 37, with the result that much of the case law has been determined by reference to the basic distinction between the administration of justice and administrative functions. It is, perhaps, somewhat surprising that it has been accepted uncritically, given that the decision of the Supreme Court in *Re Solicitors Act 1954* has been treated as increasingly anomalous. However, this narrow conception of the scope of Article 37 was analysed and criticised by Professor James Casey in 'The Judicial Power under Irish Constitutional Law' (1975) I.C.L.Q. 305 as follows:-

> "This exegesis of the word "limited" is one of the crucial aspects of the case, yet no real reasons are offered in support of it. One might think it possible to hold that the context suggests a different meaning, *viz*. "restricted in number or as to subject-matter". This construction would give the Oireachtas wider scope for experiment."

Referring to the reference to Article 34.3.4°, Casey notes, at p. 322:-

> "The precise meaning of "limited" in this context has not yet been settled by judicial decision. Consequently the Supreme Court's assertion that "limited jurisdiction" necessarily means something quite different from "limited functions and powers" is difficult to accept."

112. Taken in isolation, there is no doubt that the interpretation of Article 37 accepted as in *Re Solicitors Act 1954* is a possible interpretation of the text alone. It is, however, also possible to interpret the terms of Article 37 more broadly, as argued for by Professor Casey. There are a number of reasons why, in my view, a broader interpretation should, indeed, be taken. First, the plain function of Article 37 is to provide a saver to permit the

exercise of some functions and powers by persons and bodies who are neither judges nor courts under the Constitution. What is required to be performed in courts by judges is the administration of justice under Article 34. It is, and has always been, accepted that there are administrative functions which can be carried out by non-judicial bodies, albeit that they may be required to act judicially and are bound by the rules of constitutional justice. Article 37 was not required to render such functions and powers constitutional. It follows, necessarily, that what Article 37 validates is something which, in the absence of the Article, would be considered an administration of justice and exclusively consigned to the courts, and not a mere component of the administration of justice such as, for example, the right to hear evidence or require the attendance of witnesses. In broad terms, therefore, what Article 37 permits is a State-mandated decision-making function to be exercised by persons other than judges, which suggests a capacity to determine some disputes, at least, conclusively. Whatever Article 37 permits, it must be capable of being the administration of justice which means, at a minimum, a State-supported decision-making function capable of delivering a binding and enforceable decision.

113. Second, the background to Article 37 points to a broader understanding of the text. If the exercise of the powers of the Land Commission and the Revenue Commissioners, to take two of the extant examples considered in 1937, could nevertheless be considered to be "limited" functions and powers capable of being validated by Article 37, then that suggests a significantly broader scope for the application of the Article, and argues against a narrow reading.

114. Third, the test of far-reaching effect is both relativist and impressionistic. In any event, it can be said that any change in the law is intended to have <u>some</u> effect, and most contested decisions made by any official decision-making body will be keenly felt by the parties to it. It seems likely that Mr. Lynham considered the original decision of the Land Commission, that the valuable lands to which he was about to become entitled were to be

compulsorily transferred to the Reverend Dr. Butler, was a decision having far-reaching effect, and no doubt the Reverend Dr. Butler felt the same when that decision was later reversed. A decision by the Revenue Commissioners in relation to tax may be of enormous, even ruinous, impact on a person or a company. Far-reaching does not, therefore, supply a useful basis for identifying the area covered by Article 37, but it does have the unhelpful effect of suggesting that Article 37 bodies must have a very limited scope, and excludes, or at least inhibits, the possibility of conferring decision-making jurisdiction in important areas on bodies with particular expertise in that limited area.

115. Finally, contrasting Article 37 with Article 34.3.4° and the local and limited jurisdiction of courts, and excluding from limited powers and functions under Article 37 anything which can be said to limit a court's jurisdiction for the purposes of Article 34, is not persuasive. Indeed, a different lesson might be drawn from the text. It seems at least arguable that both Article 37 and Article 34.3.4° are to be contrasted not with each other, but, rather, with Article 34.3.1° and "the full original jurisdiction" of the High Court, and the power to determine all matters and questions, whether of fact or law, civil or criminal. On this approach, the limitations on jurisdictions of local and limited courts under Article 34.3.4° may indeed provide some insight as to the type of limitation contemplated by Article 37. There is, in my view, no necessary reason to conclude that the fact that inferior courts may have limits to their jurisdiction should exclude the possibility of similar limits being taken into account when considering the operation of non-judicial bodies under Article 37.

116. Looked at in this way, there are a number of ways in which the functions and powers of the W.R.C. can be said to be "limited". First, and most obviously, it is limited by subject matter to those areas of employment law specifically identified in the Act. It has no inherent jurisdiction, and no jurisdiction under, or in relation to, common law. Furthermore, it does not have jurisdiction to deal with any other type of dispute. This, in

itself, is, in normal language, a significant limitation and, moreover, something that distinguishes such a body from courts established under the Constitution having general jurisdiction. Second, there is a limitation on awards which can be made by the W.R.C. which, for example, in cases of unfair dismissals, is limited to an award of compensation of 104 weeks' remuneration. In some cases, this can, of course, be a substantial sum, but it may equally in some cases fall short of the loss suffered by the applicant. It is, in any event, a limitation on the powers of the W.R.C. The Circuit Court has, for example, a limitation on equitable jurisdiction by reference to rateable valuation which captures some very valuable property, but that it is still a court of limited jurisdiction when dealing with such matters is undeniable. Third, there is the (much reduced) limitation on enforceability coupled with the limited capacity of the District Court to substitute compensation for redress by way of reinstatement or reengagement. Fourth, the decision of the W.R.C. is subject to appeal. While the question of appeal or confirmation by the court has tended to be approached under the heading of the enforceability of the order made by the deciding body, it is also, and perhaps more, relevant when considering the question of limitation on the powers and functions of a non-judicial body under Article 37. A requirement that a decision be confirmed by a court, or which makes it subject to a full *de novo* appeal in a court, is necessarily a limitation on the powers of the body giving the decision. Here, the decision by an adjudication officer is subject, firstly, to a full appeal on a matter of fact to the Labour Court. That body is, in turn, subject to appeal on a point of law to the High Court. These appeals are available as of right, and do not require permission from either body or the court itself. Thus, the correctness of the conclusion of the W.R.C. on matters of fact or law may be reviewed and, insomuch as a decision made by the Labour Court is a matter of law (as it can involve the application of law to the facts), it is reviewable, in turn, by the High Court.

117. Finally, in this regard, I think it is appropriate to have regard to the limitation imposed by the fact that the W.R.C. is a body subject to judicial review. While this might be said to be common to any body exercising a power or function under public law today, that does not mean that it is not a significant limitation on the exercise of the powers and functions of such a body. It is worth recalling that the extensive exercise of the jurisdiction of the High Court by way of judicial review for jurisdiction, error of law and, to some extent at least, of fact, unreasonableness, proportionality, the taking into account of irrelevant considerations, or failing to consider relevant considerations, compliance with the Constitution and the E.C.H.R., and much more, is largely a feature of the development of the law in the latter part of the 20th century. At the time of the decision in *Re Solicitors Act 1954*, for example, the first edition of De Smith's *Judicial Review of Administrative Action* (London: Stevens & Sons, 1959), and Wade's *Administrative Law* (Oxford: Oxford University Press, 1961), had not been published, and it would be more than a quarter of a century before the first edition of Hogan and Morgan's *Administrative Law in Ireland* (Dublin: Round Hall, 1986) in this jurisdiction. It is useful to consider if, for example, the Solicitors Act of 1954 had provided by statute for the extensive review which is now available under the supervisory jurisdiction of the High Court, how such a review would have been analysed when considering limitations on the powers of the tribunal. A decision of an adjudication officer is limited in subject matter, and may be appealed, both in relation to fact to the Labour Court, and in relation to law through the Labour Court to the High Court, and, in addition, may be reviewed not merely for what it has done but, as this case illustrates, how it has done it. In my view, when these matters are considered cumulatively, I would conclude that the W.R.C. is exercising limited powers and functions of judicial nature, which exercise of power is therefore covered by Article 37 and does not, therefore, offend the Constitution.

118. I appreciate that some of my colleagues take a different view of what is, on any view, a difficult case. Charleton J. would find that the absence of an appeal to the Circuit Court (or, presumably, any court) means that the jurisdiction of the W.R.C. and Labour Court is the administration of justice and is not saved by Article 37. I recognise that the possibility of appeal has been considered important from the time of *Lynham v. Butler (No. 2)*, but I have difficulty in agreeing that an adjudication loses its character as the administration of justice if the selfsame issue may be decided by a court on appeal, which is the administration of justice. The third limb of the *McDonald* test acknowledges that the existence of an appeal does not deprive an adjudication of its character as the administration of justice. The decision of a court is no less the administration of justice because it is subject to appeal and I cannot see, therefore, why a final and binding adjudication by a non-judicial body is not the administration of justice because the issue can be the subject of appeal. Nor, if the availability of an appeal is viewed as a limitation bringing the jurisdiction within Article 37, can I see that there is a fundamental constitutional distinction between an appeal, the form of review provided for under the Residential Tenancies Act 2004, for example, which limited a court to considerations of whether there was a want of procedural fairness or a manifestly erroneous decision, and the type of appeal and review which applies in this case, particularly when the review of what is a limited administration of justice can be expected to be rigorous.

119. I have also had the opportunity of reading the judgment, to be delivered, of MacMenamin J. in its draft form. I recognise the scholarship displayed, and the important and real concerns which lead him to a different conclusion to that which I have come. I hope to set out, relatively briefly, some of the principal reasons why, however, I respectfully disagree.

120. The logic of the analysis advanced by MacMenamin J. is that the exercise of jurisdiction by adjudication officers and the Labour Court under the 1977 Act and related legislation

is the administration of justice reserved to courts and judges under Article 34 and is, accordingly, incompatible with the Constitution; however, that, he considers, could be remedied by the provision of an appeal to a court established under the Constitution. However, the conclusion that the exercise of jurisdiction is the administration of justice leads to the further conclusion that the personal rights of a citizen under Article 40.3 of the Constitution are engaged. On this basis, the procedures provided for under the 2015 Act in relation to hearings in private, the inability to require evidence to be given on oath, the absence of a specific provision provided for cross-examination, and the inability to provide for suitably qualified decision-makers for cases with a significant legal dimension are, also, separate and distinct items of unconstitutionality.

121. It is something of a paradox that what is described as a cautious and narrow approach leads, nevertheless, to a wholesale invalidation of the Act and the procedures adopted under it. MacMenamin J., however, disagrees that the jurisdiction can be covered by Article 37, partly for reasons of history, and more fundamentally because he considers that the combined effect of the W.R.C.'s power to prosecute offences under the Act and the fact that the failure to comply with an enforcement order made by the District Court is an offence under s. 51 of the Act means, in his view, that the jurisdiction is, at least in part, criminal and thus outside the potential scope of Article 37. Alternatively, it is said that the power of the W.R.C. to disapply national law incompatible with E.U. law, which power the Court of Justice of the European Union ("the C.J.E.U.") established, in Case C-378/17 *Minister for Justice and Equality & Anor. v. The Workplace Relations Commission* ECLI:EU:C:2018:979, ("*Minister for Justice v. W.R.C.* (C.J.E.U.)") and *Minister for Justice, Equality and Law Reform v. The Workplace Relations Commission* [2017] IESC 43 (Unreported, Supreme Court, Clarke J. (as he then was), 15th of June, 2017) could not be considered a limited function or power and which accordingly, again,

has the effect of preventing the jurisidiction of the W.R.C. and Labour Court under the 2015 Act from being capable of benefitting from the protection of Article 37.

122. First, if it is correct that the adjudication officer and/or the Labour Court is engaged in the administration of justice when making decisions pursuant to the procedures of the 2015 Act in relation to questions of unfair dismissal and payment of wages (and I agree that it is), then, as already discussed, I doubt that the elaborate machinery of the 2015 Act could be rendered a non-judicial administrative function merely by providing for an appeal to a court. Those cases in which recourse to a court has been found to have the effect of rescuing an adjudicatory function from unconstitutionality involve an application to court for a determination or confirmation of a determination with the full capacity of the court to come to its own conclusion on the merits so that, indeed, the court could be said to be the "effective decision-making tribunal" and making the "vital decisions" in a real sense, as explained by Finlay C.J. in *C.K. v. An Bord Altranais* [1990] 2 I.R. 396, 403. Indeed, the third limb of the *McDonald* test recognises that a decision-making function can be the administration of justice if it comes to final and binding decisions, even if those decisions are subject to appeal.

123. While it is a matter for others to judge in due course, I do not consider or intend that my judgment should involve any radical departure from precedent in the shape of the *McDonald* test. Indeed, since I reach the same conclusion as my colleagues by reference to the test, such differences of approach, if any, might be thought to be minimal rather than radical.

124. In my view, the circumstances here are also entirely distinguishable from the situation identified in *Cowan v. A.G.* There, an electoral court established under the Municipal Elections (Corrupt and Illegal Practices) Act 1884 was to be presided over by a barrister, and had jurisdiction not only to try issues in relation to a disputed election, but also to try a person on a criminal charge of an illegal or corrupt electoral practice, which on

conviction carried a sentence of up to 6 months' imprisonment. By contrast, if, under the 2015 Act, a party fails to comply with an enforcement order made under s. 44 or s. 45, such non-compliance may constitute a criminal offence triable in the District Court. In such circumstances, however, it would be the District Court which was administering justice in a criminal matter. The function of prosecuting the offence, if carried out by the W.R.C., would not thereby mean that the W.R.C. was invested with any jurisdiction to administer justice in criminal matters. Article 37 provides a limited saver in respect of functions which otherwise would have to be carried out by judges under Article 34: the prosecution of criminal offences has never been a judicial function.

125. The decision in *Minister for Justice v. W.R.C.* (C.J.E.U.) is certainly striking, but that case was decided explicitly on the basis that the obligation to disapply national law considered to be inconsistent with E.U. law was an obligation that lay on <u>any</u> body, whether judicial or administrative, which had the obligation to apply or enforce law. Indeed, the case itself was decided on the basis that the W.R.C. was an administrative, and not a judicial, body. The disapplication of national law and the enforcement of law was not treated by the C.J.E.U. as a judicial function, but instead an obligation on any body applying the law. If, indeed, all the bodies subject to that obligation were to become thereby bodies administering justice under Article 34, and not entitled to benefit from the saver in Article 37, then the unconstitutionality would sweep very far indeed. Indeed, the logic of MacMenamin J.'s approach would appear to lead not only to the conclusion that the functions currently performed by the W.R.C. are the administration of justice which can only be carried out by a court, but also to a finding that only the High Court could do so, since he considers the disapplication of national law a judicial function which could not be carried out by a court of local and limited jurisdiction. In fairness, it should be observed that neither this contention, made in reliance on the *Minster for Justice v. W.R.C.*, nor the argument that the W.R.C. and or/the Labour Court are engaged in the

exercise of a criminal jurisdiction (and thus excluded from Article 37) was advanced in argument or even touched on by either of the parties, and are not endorsed by any other member of the Court.

126. I do not agree, with respect, that the historical materials suggest that the drafters of the Constitution took an extremely narrow view of Article 37. The functions of the Land Commission, the Revenue Commissioners, and the Social Welfare Adjudicators are significant and important functions. They are limited functions, but only by subject matter and the possibility of appeal to, and review by, a court. They have far reaching effects on lives. Nor would I, for my part, consider that the judgments of Murnaghan and FitzGibbon JJ. in *The State (Ryan) v. Lennon* [1935] I.R. 170 were in any way akin to the tactic of legality discussed by MacMenamin J. One might, with equal, if not greater, justification question how a democratic society based on the separation of powers might have developed if the dissenting judgment of Kennedy C.J. had prevailed. The 1922 Constitution may, indeed, have had an Achilles heel, but if it did, it is not self-evident that it was part of the courts' function to purport to remedy that or any other perceived defects rather than to identify them. But, these matters are some distance from the issues arising in this case and I doubt that, even if it was appropriate to determine this case by these broad considerations, it would indeed be possible to do with any precision or accuracy. For example, if it is possible to remove an adjudicatory function from the field of the administration of justice by the simple device of allowing for a limited, rare, but expensive appeal to a court, with the consequence, it appears, that the obligation to adopt procedures required by Article 40.3 would also disappear, then it might be thought that the constitutional protection for the field of the administration of justice could be hollowed out. Similarly, while MacMenamin J. considers that the 5th limb of *Mc Donald* means that the principles of Article 34, as interpreted, would not stand in the way of other quasi-judicial bodies operating in new areas which were never the business of the courts,

I do not, with respect, understand how this squares with a conclusion that the W.R.C. in exercising statutorily-created jurisdiction in respect of the Unfair Dismissals Act 1977, the Employment Equality Act 1998, or the Equal Status Act 2000 – to mention only three – all of which would have been regarded as novel, if not indeed heretical, in 1937, is nevertheless administering justice reserved exclusively to courts by Article 34. If, moreover, it is possible to avoid Article 34 (and Article 37) entirely by creating new claims and causes of action, or forms of adjudication which may, however, render redundant common law actions, then it would be possible to circumvent the Constitution much more effectively and comprehensively than by the use of Article 37 that MacMenamin J. fears, since the resultant jurisdiction would be deemed administrative only, and subject to no requirement of limitation and reviewable only on the basis of unspecified fair procedures. This would be particularly troubling, since such new areas of adjudication are, almost by definition, areas considered to be of such relevance to the lives of citizens and their current concerns as to require statutory intervention. In the end, the only sure guide to our decision can be the terms of the Constitution understood in its context, and as interpreted by the courts. Accordingly, while acknowledging the important concerns raised in the judgment of my colleague, I cannot agree that Article 37 should be read so narrowly and restrictively, whether as a matter of interpretation or broader policy.

127. MacMenamin J. also quotes from my judgment in *O'Connell*, in which I acknowledged that there was no single unifying theory for the identification of the administration of justice, the area of the judicial function, or the nature of justiciable controversies. I hope the discussion earlier in this judgment explains why I still consider that it is not possible to identify a single infallible litmus test which will determine the existence of the administration of justice or, indeed, the limits of the area covered by Article 37. However, the Constitution and the case law make it clear that, while closely related, there are critical

distinctions between: (i) administrative adjudication required to be carried out in accordance with fair procedures; (ii) the administration of justice by a judge under Article 34; and (iii) the exercise of limited functions and powers of a judicial nature under Article 37, each of which has different legal consequences. In this case, we are required to locate the jurisdiction exercised by adjudication officers and the Labour Court under the 2015 Act within that classification. We cannot avoid that task.

128. I fully accept that the boundaries between the areas are difficult and contestable. It is also emphatically the function of the court under the Constitution to determine, in any given case, how a particular jurisdiction is to be analysed and categorised. Indeed, it may be for future courts to revisit, revise, and refine the decisions made. It is to be expected that those courts will approach this task cautiously in the light, in particular, of the concerns expressed in this case by my colleagues and will be vigilant to ensure in the future, just as much as in the early part of the 20th century, that there is no whittling away of the function of the administration of justice. That is a foundation, indeed keystone, of the separation of powers and cannot be eroded without undermining the essential constitutional structure of the State.

129. This case is located at a difficult and indistinct frontier. But, decision-making is unavoidable and no course is free from difficulty. If Article 37 is shrunk almost to vanishing point as covering no more than adjectival and somewhat inconsequential functions not previously thought to potentially contravene Article 34, then the law would be faced with a stark binary choice between either the administration of justice required to be carried out by judges appointed under the Constitution or the performance of administrative functions by persons subject to appointment and removal by the executive and required only to comply with unspecified fair procedures. Such a stark divison is not attractive, particularly in an area where history shows that precision is impossible and

some flexibility is required. I do not agree, therefore, that the case law shows a reluctance to invoke Article 37. On the contrary, as observed in this regard at para. 6.4.111 of *Kelly*:-

> "Subsequently, however, there was clear evidence of judicial unhappiness with the logical implications of the *Solicitors Act* case and nearly all the later cases show a tendency either to confine that case to its special facts or to refuse to apply the principle by analogy."

130. Thus, in *Central Dublin Development Association v. The Attorney General* (decided in 1969 but reported in (1975) 109 I.L.T.R. 69), Kenny J. held that the ministerial power exercisable under the Local Government (Planning and Development) Act 1963 to decide if a development was an exempted development was an administration of justice, but covered by Article 37, and the same principle must, it appears, apply to the later exercise of similar powers by An Bord Pleanála. In *Madden v. Ireland* (Unreported, High Court, McMahon J., 22nd of May, 1980), McMahon J. found that the power of the Lay Commissioners and the Appeal Tribunal of the Land Commission to fix the price of lands acquired was "the administration of justice and the exercise of judicial power", but was sanctioned by Article 37. He said, at para. 14:-

> "Experience has shown that modern Government can not be carried on without many regulatory Bodies and those Bodies can not function effectively under a rigid separation of powers. Article 37 had no counterpart in the Constitution of Saorstát Éireann and in my view introduction of it to the Constitution is to be attributed to a realisation of the needs of modern Government. The ascertainment of the market value of a holding of lands by an administrative Body with special experience appears to me to be the kind of judicial power contemplated by Article 37."

131. In *The State (Calcul International Ltd. and Solatrex International Ltd.) v. The Appeal Commissioners & The Revenue Commissioners* (Unreported, High Court, Barron J. 18th

of December, 1986), Barron J. considered that the powers of the Appeal Commissioners in Revenue matters was not the administration of justice but, if it was considered to be such, then it clearly fell within Article 37. Most recently, in a monumental judgment in the High Court on multiple issues arising from the An Blascaod Mór National Historic Park Act 1989 (*An Blascaod Mór Teo. & Ors. v. Commissioners of Public Works & Ors.* [1998] IEHC 38 (Unreported, High Court, Budd J., 27th of February, 1998)), Budd J. found that the power of the property arbitrator to assess compensation under the Acquisition of Land (Assessment of Compensation) Act 1919 was an administration of justice, but permitted under Article 37. These are all substantial functions which cannot be considered incidental or adjectival. If anything can be said to be absent from the case law to date, at least until today, it is a finding that a function conferred by statute is the administration of justice being performed outside courts and not permitted by Article 37, and contrary to Article 34 .

132. I appreciate and accept that there are downstream risks which it is difficult to foresee or remove in advance, and that future courts may have to navigate those waters in the light of the developing case law. However, the paradox remains that if the jurisdiction of the Adjudication Officer and/or the Labour Court is seen as the administration of justice which is both limited, and must comply with the requirements of the administration of justice by an independent tribunal according to law under Aticle 37, that provides a structure for analysis, and greater assurance of fair outcomes. I am reluctant to accept that it should be viewed either as the administration of justice which can only be performed by a court, or the performance of an administrative function by a non-judicial body, in each case dependant only on the presence or absence of the fig leaf of a rarely used and expensive appeal to court, which the evidence in this case showed was little more than a statistical curiosity, and which accordingly provides little by way of guarantee of fairness throughout the process for the parties to employment disputes.

133. I have also had the opportunity to read a draft of the judgment which McKechnie J. delivers today. As I read it, he agrees that the function being performed under the 2015 Act constitutes the administration of justice under Article 34, and to that extent would apply the *McDonald* criteria with a degree of flexibility. However, he does not agree that the function can be considered to be covered by Article 37. This follows from his reading of the case law, rather than from the concerns which lead MacMenamin J. to his conclusions. He agrees with the conclusion I would come to in relation to procedures and the order I propose in that regard, and, unlike MacMenamin J., does not consider that there is any constitutional frailty in the provisions in relation to cross-examination or the absence of a requirement that ajudication officers or members of the Labour Court should possess legal qualifications. I acknowledge and respect the reasons which lead a valued colleague – whose last judgment this is – to his separate conclusions. His judgment does make it very clear that the question of appeal cannot be decisive, and accordingly the conclusion he would reach means, necessarily, that the functions currently being performed by adjudication officers and the Labour Court on appeal under the 2015 Act, and indeed any similar functions created by statute, can only be performed in courts, by judges appointed under the Constitution. The reasons why I differ, with respect, from him in this regard are, I hope, sufficiently apparent from the discussion set out above.

E. <u>Procedures</u>

134. The conclusion that the jurisdiction created by the 2015 Act is not an impermissible administration of justice, but rather falls under Article 37 of the Constitution, does not, however, dispose of this case. The appellant complains of the procedures adopted by the adjudication officer and the W.R.C. and relies, in this regard, on the evidence of both a solicitor, Mr. Ciarán O'Mara, and a barrister, Mr. Tom Mallon B.L., with considerable experience in employment matters acting for both employers and employees. The

appellant also points to the extraordinary facts of this case as being the manifestation of systemic flaws in the organisation and procedures adopted by the W.R.C.

135. Taking this latter point first, the appellant criticises the evidence submitted on behalf of the respondent because no affidavit has been sworn by the individual officer with no explanation given by any witness for how the error in this case occurred. It should be said that, in making this point, the appellant does not seek to embarrass the individual adjudication officer, and agrees that it is not necessary to identify that officer by name in these proceedings. I agree, and would not wish to be unduly influenced by the startling, indeed calamitous, error in this case. The fact is that anyone can make a mistake which, in hindsight, appears both extraordinary and inexplicable. Given that the State is not seeking to defend the decision in any way, I do not consider the absence of an affidavit from the adjudication officer to be significant. What is relevant here, however, is what that error suggests for broader practice. It is not that the procedures under the 2015 Act necessarily lead to an adjudication officer deciding a case without hearing from the parties. It is, however, relevant, I think, that such an error could only occur, or at least could most readily occur, if it was commonplace to decide cases on documents submitted and with very limited or no oral hearings, and if such hearings take place in private.

136. In addition, I do not think that the evidence of the practising lawyers can be discounted as readily as the respondent suggests. It may well be the case that lawyers are only retained in a small minority of cases where the complexity and amounts at issue can justify their engagement and, therefore, the unsatisfactory experience they recount in such cases cannot necessarily be extrapolated to the majority of cases dealt with by the W.R.C. However, that does not address the criticism. As discussed above, the 2015 Act has, in effect, conferred a jurisdiction limited by subject matter upon the W.R.C. That jurisdiction extends, effectively, to all disputes arising in the course of, or in relation to, employment, and renders largely redundant the traditional common law remedies. The

system established must, therefore, be capable of providing a satisfactory resolution for all the cases, whether complex or simple, and whether the awards are small or more substantial. Indeed, the individual employer and employee are entitled to no less than a competent resolution in any and every case. I consider it disturbing, therefore, that experienced practitioners would consider it necessary to express in a measured and responsible way the serious concerns which they have. Furthermore, if the hearings take place in private, then the only way in which evidence can become available as to the practices followed is if practitioners and representatives are prepared to provide evidence.

137. I wish, however, to make it absolutely clear that, in doing so, I do not criticise in any way the policy underlying the 2015 Act of providing a cheap, relatively informal, and efficient decision-making function, staffed by persons with expertise in the areas of employment law and with practical experience in industrial relations. The concept of speedy dispute resolution close to the workplace and in a manner not hidebound by either formality or procedure has much to recommend it, and I would reject unhesitatingly the contention that such a body must be staffed by people with formal legal training and sufficient legal experience to be appointed judges. I should also say that, in my limited experience, I have had the opportunity of considering a number of decisions made by adjudication officers which show a detailed understanding of the relevant law, and a careful and thoughtful assessment of the facts of the case. Courts and lawyers do not have a monopoly on fact-finding, or even the law's application, and cannot claim infallibility in either respect. If it were otherwise, there would be no need for an appellate system. There is no doubt that the range of decisions required to be made by the W.R.C. can involve very complex areas of law both national and European, but there is no justification for insisting that, as a matter of constitutional law, a law degree or experience as a practising lawyer is an essential qualification.

138. The logic of the conclusion that the W.R.C. is exercising functions covered by Article 37 is, however, instructive here. The exercise of jurisdiction captured by Article 37 is the administration of justice. The Article merely permits it to be carried out by a body other than a court and by a person other than a judge in a context that is non-criminal and limited. This has the consequence that, for example, a decision-maker is not required to make a declaration required by Article 34.6 to be appointed by the President, and is not prohibited from holding any other position of emolument. However, the function being performed and the power being exercised must comply with the fundamental components of independence, impartiality, dispassionate application of the law, openness, and, above all, fairness, which are understood to be the essence of the administration of justice. It might be said that this is encompassed in the requirement that any decision-maker act judicially and adhere to the principles of constitutional justice but, in my view, the acknowledgement that what is at issue here is the administration of justice, albeit by a body other than a court and a person other than a judge, provides a useful structure within which to consider the procedures established pursuant to the legislation. The standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34.

139. The 2015 Act represents a number of different policies which are sought to be pursued in the field of labour law more generally. First, there is a comprehensive judicialising of disputes noted by the Franks Report in the United Kingdom which is, perhaps, its own unexpressed compliment to the virtues of the law and legal method resolution as a way of resolving disputes between individuals. Increasingly, in the latter part of the 20th century, citizens were given rights by statute, and the capacity to have those rights enforced as a matter of law. On the other hand, the 2015 Act seeks to pursue the desirable objective of having any disputes resolved as speedily, cheaply, and informally as possible, and without the aspects of court proceedings which might be considered unnecessary and,

in some cases, intimidating and inhibitory. There is no necessary incompatibility between the two policies. However, if the policy of informality and the rejection of expensive and potentially cumbersome legal procedures becomes a rejection of the law and those features of procedure necessary for a fair determination, then there is an unavoidable, and fatal, clash. It might be thought that to be able to dispense with unnecessary and irrelevant procedures, but maintain the fundamental structure sufficient to permit a fair hearing and a proper application of the law, would require a very comprehensive understanding of what matters are central to the fair resolution of disputes and what matters, by contrast, can be safely discarded or modified. It has to be recognised that if it is desired to have legal disputes, sometimes involving complexity of fact and law, resolved satisfactorily outside the court system, it is necessary to respect the essence of the fact-finding processes and capacity for legal analysis that can be found in courtrooms. Wherever they are decided or by whom, it is not possible to have claims fairly determined in accordance with law in the absence of law and fair procedures.

140. The appellant points specifically to three further features of the 2015 Act which, it is contended, are incompatible with the Constitution. First, proceedings before the adjudication officer cannot be heard in public as s. 41(13) provides that "proceedings … before an adjudication officer *shall* be conducted otherwise than in public" (*emphasis added*); second, there is no possibility to take evidence on oath, and, consequently, no penalty for false evidence; and, third, there is no express provision for cross-examination, as s. 41(5) provides merely that the adjudication officer shall give to the parties an opportunity to be heard by the adjudication officer and to present evidence relevant to the complaint or dispute.

141. In response to these points, the respondent offers a number of different arguments. It is argued that the procedures adopted are consistent with the policy of ensuring that proceedings do not become excessively formal or intimidatory. It is pointed out that the

prohibition on public hearings only applies before adjudication officers. Under s. 44(7), proceedings before the Labour Court on appeal shall be heard in public unless otherwise ordered. It is also argued that it is not necessary to have evidence on oath or have some other method of punishment for false evidence, and that it is permissible to pursue a policy of relative informality in proceedings. In relation to cross-examination, a different argument is advanced. It is said that the Act does not preclude cross-examination. The Act must be construed compatibly with the Constitution and, in such cases where constitutional fairness requires that evidence be capable of being directly challenged, then that must be permitted. There is nothing in the procedures set out in the Act which precludes this, and therefore the Act cannot be said to be unconstitutional. If, in any particular case, cross-examination ought to have been provided and was not, then that may be corrected by judicial review.

142. Approached through the lens of Article 37, I cannot accept that there is a justification for a blanket prohibition on hearings in public before the adjudication officer. Article 34.1 makes clear that public hearings are of the essence of the administration of justice. In some cases, this may be practically important because the publicity may bring forward further relevant evidence and witnesses, or because it will allow a party (whether an employee or employer) to achieve public vindication. It may, furthermore, have the general public benefit that it allows the public to see justice administered, which might, for example, make it easier for a judgement to be made on the fairness, competence, and efficiency of the decision-maker. However, the requirement for a public hearing does not require any functional justification: from time immemorial, it has been regarded as fundamental to the administration of justice, and as establishing a principle from which any exception must be justified. Jeremy Bentham said that:-

"[*w*]here there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity."

143. The rule established under the Constitution is not an absolute one, even for court proceedings, and is not expressly required under Article 37 in respect of the adjudicative processes covered by it. There is a justification for calm, quiet, and private resolution of many disputes which may be of particular sensitivity for the participants, and it may even be permissible to have a presumption in favour of private hearings at first instance, but it is not, in my view, possible to justify the absolute ban contained in s. 41(13), particularly when, on appeal, the opposite provision is made.

144. Similar arguments arise in relation to the absence of the possibility of ensuring that evidence is given on oath, and the consequential capacity to punish witnesses for deliberately false evidence. It should be said that the significance of evidence on oath is not because of any importance attached to the procedure itself, but because it triggers the power to punish for false evidence and thus provides an incentive to truthful testimony. Those who designed the system, and who may have some familiarity with the standard type of dispute and how they are best resolved, may have considered that it is preferable not to have the formality of an oath or the capacity to punish for false evidence, although no evidence was presented in this case as to any such conclusion, or any basis for it. It is, moreover, noteworthy that there is a power to administer an oath to witnesses before the Labour Court. See s.21(1)(b) of the 1946 Act as amended by s.74 of the 2015 Act. It is, moreover, difficult to square this approach with the fact that there is a capacity to summon witnesses to give evidence, and produce documents, and that such witnesses are given the same immunities and privileges as witnesses before the High Court, and that failure or refusal to give such evidence is a criminal offence. Though there may be few prosecutions for perjury, there seems little doubt that the structure created by the

requirement to give evidence on oath, and the possibility of prosecution for false evidence, is an important part of ensuring that justice is done in cases where there is serious and direct conflict of evidence. Certainly, we have yet to find a better one. There is nothing in the Act which suggests that such conflicts cannot arise in the context of the jurisdictions exercised by the W.R.C. In such circumstances, I consider that the absence of at least a capacity to allow the adjudication officer to require that certain evidence be given on oath is inconsistent with the Constitution. I appreciate that one possible contention is that a blanket rule is easier to apply since, if the question of evidence on oath becomes a matter for discretion and only applicable in certain cases, it is an issue which may be raised in many cases, and, if an incorrect decision is made, may lead to the overall decision being quashed. This, in turn, might lead to adjudication officers feeling that the safest route is to concede the procedure even when it is not required, and possibly unhelpful, and leading, inevitably therefore, to greater and unnecessary formality in the proceedings. However, this type of problem is inevitable in any form of judicial decision-making and is a reason to have experienced decision-makers. Difficulty of decision-making cannot be designed out of a system intended to decide difficult disputes.

145. Finally, in this regard, it is striking that the Act sets out specific procedures for the adjudication officer (and the Labour Court) to follow. Section 41(5) requires the adjudication officer to permit the parties "to be heard" and "to present evidence". Given this enumeration of procedures, the absence of a reference to cross-examination might appear deliberate and directed towards discouraging cross-examination. The Act contemplates "evidence" being given by "witnesses" having the same privileges and immunities as witnesses in the High Court. As long ago as *Re Haughey*, these features of court proceedings, and, in particular, the ability to cross-examine the opposing party, were regarded as fundamental to fair procedures, and the right of cross-examination

(which was excluded by the procedures adopted by the Committee of Public Accounts) was one of the rights without which no party:-

> "could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of *clocha ceangailte agus madraí scaoilte*. Article 40, s. 3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s. 3, are not political shibboleths but provide a positive protection for the citizen and his good name."

146. The arguments offered in defence of the statute effectively concede that cross-examination may be necessary in at least some of the cases coming before an adjudication officer and, it might be thought, in most, if not all, cases in which a witness attends and gives evidence which is not conceded. It is certainly unsatisfactory, in my view, that there is no express provision for this in the procedures set out in the Act, particularly when the Act is meant to be capable of being operated by persons without any knowledge of the law, and for decisions to be made by persons without any broader legal experience or training, even though they may have very detailed familiarity with the statutory code in the field of employment law. Mr. O'Mara, in his affidavit acknowledged the "tremendous advance" in establishment of a single system for adjudication, but observed that this had come at a cost:-

> "Although never specifically stated, there has been an underlying hostility to the involvement of the legal profession in acting for parties to employment litigation. We can all agree that there should not be a place for unnecessary formalism and lay litigants should not be discouraged. This should not mean that minimum standards of procedures … should not have a place".

The State respondents exhibited a paper prepared by the Registrar of the W.R.C. on "fair procedures in quasi judicial statutory bodies" which addressed, *inter alia*, the question of

cross-examination. Quoting Wigmore's famous description of cross-examination as the greatest legal engine invented for the discovery of truth, the paper continues:-

> "whether courts are really concerned with the discovery of truth is a topic for another day. For the purposes of this presentation, it is worth emphasising that depriving a party to a hearing from their constitutionally entrenched right to confront and cross-examine his or her accusers could be deemed prejudicial, by the courts, in certain circumstances."

This seems to display a narrow and defensive conception of fair procedures. Cross-examination and any other procedure should be allowed because they contribute to a fair hearing, and not merely because refusal may lead to challenge. It is, however, the case that it is to be presumed that an Act will be operated consistently with the Constitution, and any procedures carried out under it will comply with constitutional requirements. I note that the W.R.C. has produced a *Guidance Note for a WRC Adjudication Hearing* which, at para. 6.4, expressly refers to the right to question and cross-examine witnesses. While the guidelines have no statutory force, they are an indication that the W.R.C. does not seek to preclude cross-examination where it is necessary. If cross-examination is wrongly refused, then a remedy is available. I cannot conclude that the absence of an express reference to the availability of cross-examination in this case renders the Act unconstitutional.

147. Finally, the issue of the independence of decision-makers was touched on in argument, although not itself a separate ground of challenge. Independence and impartiality are fundamental components of the capacity to administer justice. Under the Act, an authorised officer is appointed by the Minister, which appointment contemplates revocation of the appointment in accordance with s. 40. Section 40(7) merely provides that the Minister may revoke an appointment under the section, but does not specify the circumstances in which such revocation may, and, as importantly, may not, occur. While

the section contemplates the possibility of appointment for a fixed term, it is not required. Section 40(8) does contain a guarantee that an adjudication officer "shall be independent in the performance of his or her functions". However, the Act does not reconcile this with the power under the preceding subsection which gives to the Minister unqualified power of revocation of appointment. This is troubling, particularly as it is likely that the adjudication officers will be civil servants in the Minister's department with other responsibilities where they will routinely be required to accept direction. It would seem, however, that, if the procedure is treated as an administration of justice permitted by Article 37, the power of revocation could not be exercised in a fashion that interfered with, or detracted from, the independence of the adjudication officer in the exercise of their functions. Membership of the Labour Court is not regulated by the 2015 Act but by the provisions of the Industrial Relations Act 1946, which provides for appointments for a fixed term and removal for stated reasons but does not contain any express statement of the independence of such members. These matters were not the subject of argument in this case but would, at a minimum , require careful scrutiny in the light of the conclusion of this Court that the functions being performed are functions of a judicial nature involving the administration of justice under the Constitution. These considerations are not peculiar to the Irish constitutional order: guaranteed impartiality and independence are also essential requirements for any adjudication within the scope of European law, or in accordance with Article 6 E.C.H.R. and the jurisprudence of the E.Ct.H.R.

III – Remedy

148. The features identified above which are I consider to be repugnant to the Constitution are not inevitable, or even central, to the operation of the 2015 Act. It is necessary to distinguish between the consequences of each finding. The terms of s. 41(13) require that all hearings shall be conducted otherwise than in public. It is appropriate to declare that

provision repugnant to the Constitution. The effect is that the prohibition on public hearings is removed, and proceedings may, but not must, be heard in public. In relation to question of the administration of an oath, the unconstitutionality resides in the absence of something, rather than a positive provision in the statute. It would, in my view, be inappropriate to declare the statute as a whole unconstitutional because it does not make provision for this, particularly because, in many cases, an adjudication officer may properly decide that such a requirement is not necessary. Instead, I think it is appropriate to merely declare that the absence of provision for the administration of an oath, or any possibility of punishment for giving false evidence, is inconsistent with the Constitution.

149. These conclusions do not, moreover, appear to have any consequence for decisions already made in other cases under the 2015 Act, nor do they necessarily preclude current proceedings under the Act, even without amendment of the Act. The effect of this decision is that proceedings may be heard in public, and it would appear that it is only in those cases where an adjudication officer concludes that it is necessary that an oath be administered that the flaw in the Act would preclude proceedings pending any considered amendment of the Act. However, I would hear the parties further on the question of the precise remedy, and the order to be made.

An Chúirt Uachtarach

The Supreme Court

Clarke CJ
O'Donnell J
McKechnie J
MacMenamin J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2020:000066
[2020] IESC 000
High Court record number 2017/146 JR
[2020] IEHC 178

Between

Tomasz Zalewski
Applicant/Appellant

- and -

The Workplace Relations Commission, An Adjudication Officer [Y], Ireland and the Attorney General
Respondents

-and-

Buywise Discount Stores Limited
Notice Party

Judgment of Mr Justice Peter Charleton delivered on Tuesday, April 6th 2021

1. Following the Unfair Dismissals Act 1977, employees have the right not to be sacked, excepting substantial reasons of competence or qualifications. Up to the Workplace Relations Act 2015, unfair dismissals cases were heard by a tribunal with a right to a complete rehearing in the Circuit Court. This judgment concerns the constitutionality of the sections of the 2015 Act which abolished rights of appeal to a court, save for the referral of a point of law. Does the adjudication by a State official of unfair dismissal claims constitute an adjudication which Article 34.1 of the Constitution requires to "be administered in courts by judges appointed" as such, or are such adjudications, instead, "the exercise of limited functions and powers of a judicial nature" which are excepted by Article 37.1? Is, further, the issuing of a District Court order for enforcement as required by the 2015 Act consequent on such an adjudication such as to validate the process within

the administration of justice by courts; or, as the Act demands, is a court order premised on a hearing excluding the employer unconstitutional?

Issue for adjudication

2. Correctly deciding what happened to Mr Zalewski to get him sacked from his job in Buywise Discount Stores in Dublin would tax the abilities of a professional judge. This unfair dismissal case does not involve any fine ruling as to points of precedent, law or statutory interpretation; adjudicating his case does require experience of how people behave, patience in listening to two starkly different sets of factual assertions and a determination to come to fair findings that will reflect as far as is possible the actual facts as drawn from a haze of contradictory assertion. Mr Zalewski had a job, but, as and when he applied to the Workplace Relations Commission for redress for unfair dismissal, he had become unemployed through having been summarily sacked for improper conduct, or so his employer claimed. His contract of employment has been repudiated. First at a brief hearing by his employer concluding he should be told to leave and then through that decision being affirmed by the decision maker's father on an internal workplace appeal. Where does this leave Mr Zalewski? Many decisions on fair procedures centre on the constitutionally protected right to enjoy one's reputation; *In re Haughey* [1971] IR 217, 265. To the ordinary working person, of more importance than reputation is being actually able to earn a living. Work bestows dignity. Work is a necessary part of psychic balance. It is work which puts bread on the table. And when that bread is earned through honest labour, it is properly a source of pride for those who have put effort into their livelihood: *Imíonn an tuirse ach fanann an tairbhe*. Those who work hard, who really try, are an asset to any employment for which they are qualified.

3. Having a contract of employment repudiated through dismissal makes the immediate future of the dismissed worker one of real uncertainty. The right to work is put in jeopardy. A new job has to be found. A new employer has to be convinced that the prospective employee will, firstly, knuckle down to the task with the competence or qualifications he or she possesses, be these experience or a formal diploma or natural physical attributes, and, secondly, enhance the workplace through the content of their character. Just as no one would wish to engage an incompetent or a sluggard, nor would any employer knowingly choose to engage a thief.

4. Yet, the reasons given by Buywise Discount Stores for the repudiation of Mr Zalewski's employment involve all those faults. If true, these are almost insurmountable obstacles to a working person's value in the marketplace. A dismissed worker ordinarily will need a reference. References come in various forms, even if not notifying summary dismissal: that a person has left of their own volition and after proper notice; that an employee was made redundant; that the employment terminated by mutual agreement. Each of these carry resonances beyond the skeletal appearance of language. Furthermore, many contemporary references are not in writing but constitute supplying contact details of former employers to prospective employers. Hence, what may follow is the exchange of open-ended information rather than a formal declaration, itself of limited value. This particular dismissed person is in a very bad situation. What is Mr Zalewski to do? He went to the Workplace Relations Commission seeking justice, that a true and fair adjudication be carried out as to the facts leading to his dismissal and as to who was in the right and who was in the wrong and as to whether emotion and supposition supplanted reasonableness in the mind of his employer Buywise Discount Stores. He was as badly let down by that appeal to justice as was possible. Yet, this was the only system from which he could seek

redress, that mandated by the State since 2015 to deal with unfair dismissals, one with no appeal on the facts to any court. *An luibh ná faightear is í a fhóireann.*

Disputed circumstances

5. These are the basic circumstances. Mr Zalewski worked from March 2012 to April 2016 in a general shop trading under the Costcutter brand owned by Buywise Discount Store. The place was plagued by theft: shoplifting and robbery. He was a security guard initially, but attained the rank of supervisor from December 2014. A year later, he was provisionally promoted to assistant manager, but this did not work out. He was reverted to his former role. During this, he was present for robberies in the store: one using a knife and one using a firearm. Most seriously, in October 2014, both pepper spray and a gun were used in robbing the shop, the firearm being actually discharged. Mr Zalewski initiated a personal injuries action against his employer, presumably a negligence claim of an unsafe system or place of work, seeking damages for having been traumatised by being sprayed with a noxious substance and by a gun being discharged.

6. In April 2016, the manager of the shop became emotionally troubled over the presence in the store of a person he believed to be a repeat shoplifter and, apparently, by the fact that Mr Zalewski had not arrested her. He and another employee were subjected to a dressing down involving, it is claimed, the all-too-common use of expletives. Mr Zalewski got upset, went home and sought medical advice. This was regarded by his employer as gross misconduct. Matters seemed to calm and the manager invited Mr Zalewski in for a chat, apologising for the conduct of the meeting over the suspected shoplifter. But, on returning after a few days sick leave, he was called to another meeting. Apparently, he was told this was a continuation of the earlier one and informed of the employer's view that he was not doing his work, that the shop condition was unacceptable, that he was failing to protect the stock, that he was not preventing shoplifting, that he had organised legal and medical advice for other staff over the violent robbery and that this was insubordinate of the company.

7. A lot of this might be emotionally driven, but it would be the job of anyone assessing the case to decide if any of this had a factual basis. Perhaps some comments might have arisen from frustration over repeated criminal actions, a kind of lashing out in frustration perhaps. He was then formally called to a disciplinary meeting. After that, in a letter dated 26 April 2016, his employer claimed that he had not followed the robbery prevention policy and had undermined other staff who were attempting to follow it, had denigrated the work ethic of the store in the context of robberies and, most damagingly had "associated with and used money that had been removed from our tills". In consequence, the letter stated, Mr Zalewski was summarily dismissed for gross misconduct. He appealed. There followed an appeal hearing internally before the manager's father. During this process, Mr Zalewski was told that there was "absolutely nothing" in the dismissal letter stating that the management had "thought that you were ever robbing" and purporting to stress that this was somehow "an accusation made by another member of staff" but "at no time" did management "ever think or say that you were involved in stealing." The dismissal was affirmed.

The task

8. A professional judge dealing with this case would first of all note that under s 6 of the Unfair Dismissals Acts 1977 to 2015 the burden of proving that a reasonable employer

would have regarded there as having been "substantial grounds for dismissal" rested on the employer Buywise Discount Store; s 6(1). There being no issue but that Mr Zalewski had been employed and then was dismissed, as opposed to being an independent contractor or working on a fixed-term contract which had expired, and that a valid termination of his contract of employment could only take place for reasons related to "the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do". If the dismissal was substantially caused, or in the statutory language "resulted wholly or mainly", by the civil litigation claim arising out of the violent robbery or from Mr Zalewski being a likely witness in another employee's claim, it would be automatically unfair; s 6(2)(c).

9. It would be for the employer to prove substantial grounds for dismissal. Thus, a shop owner's frustration over the actions of criminal third parties is not enough to justify sacking an employee. A case has to be made out showing that the employee was not competent in the assigned duties or not capable of carrying out these duties or was lazy. This is not simple. It is not an easy task to go about sifting through even commonplace facts in search of the truth. Was there any connection with the employee and money stolen from the tills; or is that allegation being withdrawn and if so why was it made? What was the anti-robbery policy of the shop and what instructions or training was given to the employee? Was that policy such as to endanger employees so that it might justifiably not always be followed? Was there a policy on suspected shoplifters; were they to be banned or discouraged from the shop? How were they identified and was a list kept? Since under s 4 of the Criminal Justice Act 1984, a civilian, a non-police officer, may only arrest if, as a matter of hard fact and not of reasonable suspicion, an offence carrying a potential penalty of at least 5 years imprisonment had been committed, and reasonable suspicion attached to the person to be arrested, what was the policy on arresting suspected shoplifters? Was the shop left in disarray and if so when and how badly? Was company policy denigrated and if so how and to whom? What, if any, connection did civil litigation over the violent robbery have to the dismissal? If procedures were agreed which were more than the minimal procedure of putting the dismissal allegation to an employee and hearing a reply before making a decision, what were these procedures and were these followed?

10. The consequences for Mr Zalewski should his integrity not be vindicated would be to diminish his ability to find work. But that is only one side of the case. Dismissal litigation has serious ramifications for an employer as well. Any understanding of business must comprehend that it may be impossible for people to work together where trust in a person's competence has broken down. Where that happens, it is not unusual for a voluntary severance package to be offered, rather than risk litigation. In circumstances, however, of tight margins or of businesses being under strain, perhaps due to economic circumstances or loss through theft as can happen in retail, finding the money may be difficult. At the end of every hearing on unfair dismissal before what was the Employment Appeals Tribunal, which was the predecessor of the Workplace Relations Commission, the panel sitting would ask both sides what their preferred remedy was in the event of a finding for the employee whose employment had been terminated; the remedies being compensation for up to two years of salary, reengagement in the same or a similar post, or reinstatement so that whatever salary and benefits had been lost became immediately payable as if the employee had worked throughout. Thus s 7 of the 1977 Act, as amended, was given life in a procedure akin to that where a separate hearing takes place before a convicted person is sentenced. Both the entitlement to redress and the form thereof were concisely addressed by the employer and the employee. In that context, the provisions of the replacement legislation startle.

The Workplace Relations Commission

11. For 38 years, unfair dismissals claims were dealt with by the Employment Appeals Tribunal. That consisted of a barrister or solicitor as chair of each hearing accompanied by, and with equal decision-making power, a person nominated by employer's bodies and by trade unions. Generally, as in all tribunal hearings, strict rules of evidence were not followed but hearings focused on the essence of what led to the dismissal and written rulings followed. A rehearing was possible by appeal to the Circuit Court, which was a rehearing of all the evidence, and a further, and regrettable because it was unnecessary and expensive, appeal by rehearing to the High Court. If the matter had started, as was possible, before a rights commissioner under the 1977 Act, that in turn could be appealed to the Employment Appeals Tribunal, hence the name of the adjudicative tribunal, but both parties had to agree to the rights commissioner first dealing with the claim, otherwise the first instance hearing was before the Employment Appeals Tribunal. Four potential hearings by way of repeated first-instance examinations of evidence tended to favour appeals by the side with more resources, almost invariably the employer, and this system was judicially criticised; *Panisi v JVC Ireland Ltd* [2011] IEHC 179.

12. The Department of Jobs, Enterprise and Innovation in 2012 produced a report entitled, worryingly, "Legislating for a World-Class Workplace Relations Service: Submission to Oireachtas Committee on Jobs, Enterprise and Innovation". Since Ireland is a first-world country, such hyperbolic titles are unnecessary. But, the result was the Workplace Relations Act 2015. This set up the Workplace Relations Commission. Briefly, an employee can make a complaint to the Commission that the employer has contravened any scheduled provision. This schedule includes minimum notice of termination, conditions of employment, payment of wages, holiday pay, equal treatment and unfair dismissals. An employee or employer can also refer a dispute as to the employee's entitlements under other scheduled provisions. The kinds of application dealt with by the Commission are, statistically: pay issues, 28%; discrimination or inequality issues, 14%; unfair dismissals cases, 14%; working time issues, 13%; industrial relations and trade disputes, 9%; and conditions of employment disputes, 8%. While, on being dismissed, Mr Zalewski put in claims for minimum notice of termination and payment of wages, under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Payment of Wages Act 1991 as amended, the substantive case effectively concerns his dismissal.

13. Under s 47 of the 2015 Act, on receipt of a complaint, or referral of a dispute, the Director General of the Commission may inform the parties that it is intended, if there is no objection, to deal with it by written submissions only. Similarly, if there is no objection, a complaint can be referred for mediation. If successful, the agreed result of mediation becomes a binding contract that, if necessary, is litigated in court in the ordinary way. Most disputes are considered, as in this case, by an adjudication officer. Appointment of adjudication officers is by open State competition. A judge in a court requires a legal qualification as a barrister or solicitor and 10 years of practice before appointment to the District Court or Circuit Court, and 12 years in all other courts. Here, the evidence discloses that the Commission takes people who have experience of either personnel management or industrial relations or employment law. No minimum practice in those areas is specified. The job of such adjudication officer, under s 45, is to inquire into the complaint or dispute. Section 42 enables frivolous or vexatious claims to be dismissed straight away. The legislation specifies that the parties, who may be represented, must be given an opportunity to be heard and to present any evidence relevant to the complaint or

dispute. No evidence is given on oath. Powers of compulsion are granted, breach of which is a summary offence, such as giving notice in writing to any person requiring their attendance at a specified time and place to give evidence or produce documents. A decision must be given in writing but mistakes of an administrative or clerical nature may be corrected by notice to the parties. Hearings are in private but all rulings are published, though anonymised. Regulations governing hearings are possible under s 41(17) as to "the presentation of a complaint, referral of a dispute or conduct of proceedings" but no such provisions have been passed. Hence, there is only informal guidance as to how those who have never run a case might conduct a hearing such as that brought by Mr Zalewski.

14. A ruling by an adjudication officer may be appealed by either side to the Labour Court, which is a tribunal not a court. Section 44 provides that the decision of the adjudication officer can be appealed by either party to the Labour Court within 42 days, but the Labour Court can extend time if satisfied that there are exceptional circumstances. Similarly at first instance, under s 47 the Labour Court may inform the parties that it intends, if there is no objection, to deal with the appeal by written submissions only. On this appeal the parties are statutorily entitled to be heard in the same way as at first instance. Proceedings are to be conducted in public unless the Labour Court decides that there are special circumstances. Decisions are given in writing, as at first instance. No appeal to a court, as envisaged by Articles 34, 35, 36 and 37 of the Constitution, is possible. This is in stark contrast to the 1977 Act; see *Panisi*. A point of law may be referred by the Labour Court to the High Court; meaning upon an appellate adjudication by the Labour Court, either party may appeal on a point of law to the High Court; s 46. This is not, however, in any sense an appeal based on the merits, that is, it is not a re-examination or re-adjudication on the facts.

15. Effectively, the order of the adjudication officer, or that of the Labour Court on appeal, has the same status as a court order. Both employer and employee are bound by law to obey such orders. But, there is possible further intervention, which is for an employee, not an employer, to go to the District Court; s 45. If an employer does not carry out the decision of the Labour Court within 42 days, and has not appealed a point of law to the High Court, or has abandoned the appeal, an application may be made to the District Court by the Commission or the employee, or trade union body acting on behalf of the employee only. The employer is entirely shut out. The employer may not be heard by the District Court other than in respect of the question whether the decision has been carried out, that is, has the employer paid compensation as ordered or re-engaged or re-instated the employee. This is merely a basic and uncontentious question of fact. The legislation provides, in flagrant breach of the constitutional principle that a court should hear from each side, or at least provide that opportunity, that the District Court shall not hear any evidence on any other issue, but shall make an order directing the employer to carry out the decision in accordance with its terms. The District Court may order, under s 43(4), the payment of interest on the delayed implementation of the order if in all the circumstances this is considered appropriate, but without hearing from the employer. Apart from inability to pay, under s 51, it is an offence to fail to comply with a District Court order to pay compensation.

16. Section 43(2) provides that if the adjudication officer's decision had required the employer to re-engage or reinstate the employee, the District Court may instead order the employer to pay compensation "of such amount as is just and equitable having regard to all the circumstances". Even though the employer is entirely shut out from addressing the court, unlike the ordinary course of any court hearing where parties are entitled

constitutionally to address the judge as to remedy, the result of a hearing may be altered in the absence of a party. This is not simply notice, there is a legislative requirement that the employer may not make any submissions, yet the employee can. It could be that 6 months has passed since a sacking and re-engagement is ordered by the Labour Court or adjudication officer, but the District Court faced with non-compliance could decide, in the absence of the employer, that instead two years salary as compensation be paid. Average wages now approach €50,000 per annum. Further, the adjudication of compensation has always depended on any contribution to the dismissal made by the employer. An award of €100,000 may cripple a small or medium sized enterprise. More importantly, it may also be unjust. How is a judge of the District Court to know what is the right order to make or whether, for instance, the dismissed employee has made no effort to mitigate unemployment without information from both sides? Even still, the law as set out in the 2015 Act gives the employer no rights. Well, the Constitution does.

Mr Zalewski's experience

17. Mr Zalewski's treatment by the Workplace Relations Commission was nothing short of dreadful. He engaged a solicitor. Both turned up for a hearing on 26 October 2016. The employer was represented but the person who made the decision to dismiss was not there due to a family event. Notwithstanding that, the employer had the burden of proving substantial reasons of competence or qualification to justify the dismissal, something impossible without the person who made the decision to dismiss; the employer's representative started outlining their case without calling any actual evidence. This was objected to on behalf of Mr Zalewski. The matter was adjourned by the adjudication officer who asked Mr Zalewski's representative to bring along certificates of social welfare payments for the next occasion. The new hearing date was notified by post for 13 December 2016. That day, both parties turned up and were represented, expecting a hearing. Instead, the adjudication officer met them in the corridor. It was announced that the decision in the case had already been made. A few days later that decision was received in the post. It stated that findings had been made on the basis of the "evidence and a written submission". There was no evidence of any kind. An order was made dismissing the case. The decision reads:

> On the basis of the evidence and my findings above I declare the respondent conducted the investigation, disciplinary and appeal hearings in accordance with the disciplinary procedures of the company…
>
> The complainant and his legal representative did not advance any argument or evidence at the hearing as to why they considered the dismissal "to be both procedurally and substantially unfair" as stated in the complaint form.
>
> The Complainant stated at the hearing that he was in receipt of jobseekers benefit from the Department of Social Protection since the date of his dismissal. He was requested to provide evidence of this but did not do so.
>
> In accordance with s. 8(1)(c) of that Act I declare the complaint of unfair dismissal is not well founded.

18. How did this happen? Not a single reference to fact is made in this template ruling. There is no reasoning. The document has every appearance of the unthinking use of a template. The chat in the corridor in purported remembrance of the case and stating that

the parties had been called back by mistake indicates that there must have been some kind of deliberation. The State does not explain this. A suggestion during argument of a possible template confusion might be a possibility. It is not for the courts to speculate but it is, in the ordinary way, the normal thing for the State to explain; the relevant authorities are set out in Murphy & Others – The Role and Responsibility of the State in Litigation [2020] 01 IJSJ. Where did this leave the person who had sought justice? What about the allegation over complicity in theft, not preventing robbery, not following shoplifting policy, being insubordinate, walking off the job? No decision on anything was made: no reasons; no vindication of the case made by anyone; no basis for seeking fresh employment with a clean record; no basis for saying the dismissal was correct for some substantial reason related to competence or qualification.

19. By a decision, on consent, of Meenan J in the High Court, on these judicial review proceedings, on 8 February 2018, the adjudication officer's decision was quashed; [2018] IEHC 59. Meenan J also decided in the light of that decision that Mr Zalewski no longer had standing to bring the constitutional challenge with which this judgment is concerned. That decision was reversed by this Court on 18 March 2019; judgment of Finlay Geoghegan J [2019] IESC 17.

Approach to serious adjudications

20. According to Ciarán O'Meara solicitor and Tom Mallon barrister, both lifetime practitioners in employment law, what has just been described might reasonably, but unfortunately, be expected from the qualifications and experience required of those tasked by the Workplace Relations Commission to make important decisions on people's employment and reputation. Here the decision impacted directly on the future working life and on the reputation of Mr Zalewski. Yet, what has been described happened. The evidence from those practitioners is that some called upon to make such important decisions do not understand the more difficult questions that arise in employment law, including rights derived from European law. There is a hostility to representation by the legal profession, they assert. Those adjudication officers with more ability and experience tend to be assigned more serious cases, according to them, but where does that leave ordinary cases: are these to be assigned some less expert form of assessment? Their evidence is of a marked contrast to the professionalism of court adjudication. Furthermore, since the public is not admitted to view the activities of the Workplace Relations Commission, theirs is the only evidence of a disturbing situation that there is likely to be.

21. This evidence could not have come from any other source since the workings of administrators in deciding unfair dismissals, cases of fundamental moment to the reputation and marketability of working people, are closed to both the media and to the public. Of course, few enough members of the public wander into courts, but they are there when they come as of rights and are welcome. Usually, their place is taken by dedicated newspaper and electronic media reporters who have a crucial constitutional role in seeing that justice is administered soundly. As well as that evidence, an academic article indicating profound levels of dissatisfaction with this system under the 2015 Act is cited on behalf of Mr Zalewski; Barry – Surveying the Scene: How Representatives' Views Informed a New Era in Irish Workplace Dispute Resolution [2018] DULJ 41/4. The abstract reads:

> The Workplace Relations Act 2015 introduced a major overhaul of workplace dispute resolution bodies in Ireland, streamlining a complicated system for

> resolving workplace disputes comprising multiple fora into a two-tier structure. The article describes and analyses the results of two surveys undertaken by the author of the views of employment law and industrial relations practitioners and other representatives in Ireland before the reforms in 2011 and after the reforms in 2016. This article describes the purpose, methodology and considers the results of both surveys. The 2011 survey informed the agenda for reforming the Irish workplace dispute resolution system in 2015. The 2016 survey informed the new workplace dispute resolution bodies where improvements could be made. The impact of these surveys will be considered in the context of recent developments in the operation of the new system.

22. While this relates to research from 2016, levels of dissatisfaction are then at 49%. The State's response is that this is inadmissible in evidence. Just that: dismissal out of hand of any criticism of a system that so markedly and in every fundamental respect failed Mr Zalewski. Of course, there are also affidavits about how much training is received, and how seriously matters are taken. But that does not explain this. The Court of Justice of the European Union would take no such attitude in dismissing an important academic contribution and, furthermore, much of what is concerned in the administration of the task of the Workplace Relations Commission is derived from this State's obligations in European law.

23. Evidence has been presented that the Workplace Relations Commission, in the kind of serious employment disputes that would tend to attract the services of practitioners such as Mr O'Meara and Mr Mallon, has a serious problem. The State response has been to point to the lack of specificity in citation and to emphasise a training regime for staff.

24. Success in any enterprise depends on people working hard. That is what an independent country is all about. Success in the administration of the State depends on every public servant approaching their task as a duty to the nation, regarding work as the means whereby this independent country's very existence is justified by the committed nature of what is done in the name of Ireland. All public servants are members of that team and all are required to give their best. While there is a separation of powers, the task of executive, government and judiciary are devoted to the public good and this cannot be achieved save through dedicated work and the unremitting exercise of good sense. It is not for this Court to reach a conclusion on whether the Workplace Relations Commission is a failure. That is not part of the case. The complaints made by practitioners are essentially in the context of competency and consequent effects on fairness of adjudication, especially where legal procedures worked out through experience have met with less than enthusiasm.

25. What can fairly be recorded beyond the example of this case, without ruling, is that there is much evidence of inadequacy. In the context of industries and forms of administration which have an immediate determination to find out the cause of any failure, and to seriously address why accidents or maladministration has occurred on the basis of objective appraisal, matters work better in the long run. Mistakes are corrected, people are expected to tell the truth as to any errors since the emphasis is not on punishment but the wider good of the organisation and those served by it, structures are changed where found inadequate and, above all, there is no carpet under which to sweep the evidence of malfunction. In contrast, where what is involved is a closed society intent on self-protection, a kind of secular priesthood, ranks will be closed, mistakes will be covered up or denied, the truth will be almost beyond reach and in consequence what is bad will

institutionally become worse. This does not serve the Irish people. Matthew Syed in a book-length study contrasts the perpetuation of mistakes within contexts where this happens, as for instance where hospitals react with hostility to accusations of error, which can happen but does not always happen, and where attitudes may have changed, with the airline industry where travel safety is upheld through the objective recording of fact and later objective analysis of accidents, a determination to find causes and a consequent obligation to change for the better; Syed – *Black Box Thinking: Why Most People Never Learn from Their Mistakes--But Some Do* (London, 2015). It is possible, certainly it is to be hoped, that since the initial judicial review of this astonishing set of events that matters may have improved at the Workplace Relations Commission.

Compulsion absent representation

26. There are many instances in law where a citizen is bound by legal regulation which does not first of all give to him or her any right to speak or make representations to the contrary of what the law requires, this despite criminal sanction for disobedience. A prime instance is road traffic legislation as to who may be licenced to drive, what the speed limit is, obedience to signals, direction of travel and condition of vehicles. There, you simply obey and have no choice because there is nothing to argue or make representations about. Another may be public health legislation for the protection of the common good, which may perhaps override individual rights, but subject to exceptions. Yet another may involve deprivations of liberty because of mental illness, but with periodic reviews by independent experts. Those who are mentally ill may indeed speak before being confined to hospital but their representations may not be entirely grounded in reality. A change in planning law may alter the expectations of many and enhance the prospects of others. Central to a democratic society is participation through the free choice of representatives to speak to and thus have a hand in legislating for the entire community. With planning legislation, democratic consultation is added as a further tier as to zoning decisions, which can change tort liability for nuisance, and rights to notice and objection as to any proposed development.

27. Legislation is a function of representation, consideration of the solution to wide questions of policy and the furtherance of social order mandated by the Preamble to the Constitution. In a way, and the point should not be stretched, through democratic participation citizens join in law making or at the least designate the persons trusted or the policies hoped for. Courts are different. This is the forum where the citizens have reposed trust in those qualified for fair judgment, where the law is entitled to the evidence of all, and where all witnesses are bound through democratic obligation to the truth. Courts do not impose liabilities on those coming before the judicial process without notice. At the very least, in civil cases a statement of the case is proven to be served and left unanswered before liability can be established in the absence of a party and in summary criminal cases proof of service of being summonsed on particular charges to court is required before a court may proceed to possible conviction and the imposition of penalties. The more modern procedure, whether constitutionally mandated or not, is to issue a warrant of arrest before any serious conviction is imposed. When there is a conviction, there is a sentence hearing characterised by brief submissions as to the justice of the appropriate penalties.

28. Contrast such basic principles for the administration of a just system with s 43 of the 2015 Act:

> (1) If an employer in proceedings in relation to a complaint or dispute referred to an adjudication officer under section 41 fails to carry out the decision of the adjudication officer under that section in relation to the complaint or dispute in accordance with its terms before the expiration of 56 days from the date on which the notice in writing of the decision was given to the parties, the District Court shall—
> (a) on application to it in that behalf by the employee concerned or the Commission, or
> (b) on application to it in that behalf, with the consent of the employee, by any trade union or excepted body of which the employee is a member, without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the decision in accordance with its terms.
> (2) Upon the hearing of an application under this section in relation to a decision of an adjudication officer requiring an employer to reinstate or reengage an employee, the District Court may, instead of making an order directing the employer to carry out the decision in accordance with its terms, make an order directing the employer to pay to the employee compensation of such amount as is just and equitable having regard to all the circumstances but not exceeding 104 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Act of 1977.
> (3) The reference in *subsection (1)* to a decision of an adjudication officer is a reference to such a decision in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought, or if such an appeal has been brought it has been abandoned and the references to the date on which notice in writing of the decision was given to the parties shall, in a case where such an appeal is abandoned, be construed as a reference to the date of such abandonment.
> (4) The District Court may, in an order under this section, if in all the circumstances it considers it appropriate to do so, where the order relates to the payment of compensation, direct the employer concerned to pay to the employee concerned interest on the compensation at the rate referred to in section 22 of the Act of 1981, in respect of the whole or any part of the period beginning 42 days after the date on which the decision of the adjudication officer is given to the parties and ending on the date of the order.
> (5) An application under this section to the District Court shall be made to a judge of the District Court assigned to the District Court district in which the employer concerned ordinarily resides or carries on any profession, business or occupation.

29. Hence, interest may be charged upon a statutorily mandated unanswered representations from one side of a legal dispute. Here, however, the issue is limited to the time between the Workplace Relations Commission order and the court hearing. Even still, what if there is culpable delay by or on behalf of the only party entitled to speak to this, the employee or employee representative. Should there not be a chance to at least make that case?

30. More seriously, even, a re-engagement or re-instatement may be altered on hearing only one side to what may be a cripplingly expensive order of compensation for up to 104 weeks of salary. There may only have been absence from work for 25 weeks. There may have been no effort to mitigate the situation. This is hard to credit. The reason both sides are required in a legal dispute is that, as a matter of human nature, some will lie and need to

be corrected by opposing testimony or submissions, but more will take a subjective view of what objective fact may disclose as an exaggeration or a mistake. Some mistakes are culpable, after all, in themselves and all too often mistakes, so called, are made in the direction of those it suits. So, even as a counsel of prudence, efforts should be made to hear both sides of a dispute. Is that not the experience of the human race since the time of the prophet Daniel? Yet here, a statute requires "without hearing the employer or any evidence" that a default of 56 days by the employer, what might merit re-engagement, which does not carry financial loss, may be turned by the District Court on not hearing that employer into damages against a firm or employer amounting to up to two years of salary. That can happen even though that might not be merited. After all, how is the District Court judge to know if limited to hearing only one side of the case? The employee may have immediately moved to a better rewarded engagement or might have just decided to not seek work at all. The 1977 Act makes that relevant: the 2015 Act shuts out the employer from making that case.

31. This is both relevant under the 1977 Act and is relevant too as a matter of ordinary sense. But how does the judge know what to do? The judge is prohibited from hearing evidence from an employer, save as to default in compliance with the order, and is compelled to consider submissions from only one side of the case. Yet, the result may be unjust and may be financially crippling. Furthermore, this approach flies in the face of the principle established by this Court in *The State (Irish Pharmaceutical* Union*) v Employment Appeals Tribunal* [1987] ILRM 36 and see *Galway-Mayo Institute of Technology v Employment Appeals Tribunal* [2007] IEHC 210. Those cases establish a duty on the Employment Appeals Tribunal to ask employers and employees at the end of a hearing into unfair dismissals what remedy they prefer; reengagement, reinstatement or compensation in salary of up to 104 weeks. This is simply normal procedure. If a party chooses a remedy, for instance damages, in an application, a court or tribunal may proceed to award that remedy after finding facts that justify that result. However, if there are variable statutory remedies, the parties must be allowed, even in brief terms, to address why one is to be regarded as appropriate over another. There is also the point from *In Re Haughey*, using the analysis of Ó Dálaigh CJ that "under the Constitution the Courts cannot be used as appendages or auxiliaries to enforce the purported convictions of other tribunals". But the point is even more fundamental: this is a denial of justice.

32. Section 43 offends the Constitution, is incompatible with a fair and impartial hearing and cannot be saved through any construction that does not do violence to the plain words of the legislation. Yet, in the High Court, it was this court's mandate, in reality the use of the courts system as a purported instrument of validation, which was held to save the overall scheme for the administration of unfair dismissal claims from being the administration of justice apart from those appointed as judges within the system of courts set up by the Constitution; Simons J [2020] IEHC 226.

Limitation of judicial powers by appeal

33. The Constitution Committee of 1934 had discussed a draft Article 64 providing that the "judicial power of the" State "shall be exercised and justice administered in the public courts established by the Oireachtas, by judges appointed" as regulated in the text. To that, a recommendation was added:

> We are of opinion that this Article should be regarded as fundamental. We suggest, however, that it should be carefully re-drafted so as to meet the present position

> in which judicial or quasi-judicial functions are necessarily performed by persons who are not judges within the strict terms of the Constitution, e.g. Revenue Commissioners, Land Commissioners, Court Registrars, etc.

34. According to Gerard Hogan, *The Origins of the Irish Constitution*, 1928-1941 (Dublin, Royal Irish Academy, 2017) pages 40-44 and 84, this proviso was to remove doubts as to the powers of such bodies and, in addition to enable the more expeditious and economical administration of justice and transaction of public business, but that criminal trials should be specifically excluded. According to An Taoiseach, addressing Dáil Éireann, on the debates as to the 1937 Constitution, questions had arisen:

> about the Land Commission, as to whether their functions were of a judicial character or not … So as not to get tied in the knot of that judicial powers of functions could only be exercised by the ordinary courts, established here, you have a provision of that type.

35. Consideration as to the efficient dispatch of public business are ever more sharply in focus with the accretion of bodies designated to regulate financial business, to promote equality and to combat such evils as racism and hatred. We remain, nonetheless, with Article 34.1 as it emerged from the analysis as to where judicial power should be distributed in providing simply that: "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution" and generally in public, but that, outside of criminal trial, according to Article 37 this was not to "invalidate the exercise of limited functions and powers of a judicial nature … by any person or body of persons duly authorised by law" to so do "notwithstanding that such person or body of persons" is not a constitutionally appointed judge in a court. The line is a bright one, but difficult at times to draw, the Constitution being both imperative in commanding the separation of justice from administration, stating "Is i gcúirteanna a bhunaitear le dlí agus ag breithiúna … a riarfar ceart", and merely indicative as to what are "feidhmeanna agus cumhachtaí teoranta breithiúnais a oibriú" outside of that territory, which by reason of the second reference becomes less certain. Nor is there anything as to possible interaction as between the two spheres, supposedly administrative or executive but involving judicial-type decisions or orders, and the possible cure of any blurring of the usurpation of judicial power by enabling a corrective appeal to an actual court. What kind of appeal? That would be the question, and how could an appeal validate the trespass on a court function by enabling a court to review that decision as to fact and as to law and to intervene so as to reverse findings of fact or change the form of relief given on hearing both sides: unlike in s 43 of the 2015 Act which has no regard at all to this fundamental.

36. Apparently, the only statutory provision actually declaring that a quasi-judicial function is authorised is s 24 of the Courts and Court Officers Act 1995 in providing for Master of the High Court to be authorised "to exercise limited functions and powers of a judicial nature within the scope of Article 37 of the Constitution." As often declared, the Master has no judicial power; *Permanent TSB v Carr* [2019] IEHC 14. The Master prepares cases for the High Court, depending on the current state of the Rules of the Superior Courts may to make discovery orders, makes some preliminary orders as to trial preparation and can analyse papers and decide that elements of a potential defence are not disclosed whereby judgment may be entered straight away. Everything done in that court, however, is subject to appeal by way of the re-litigation of the order before a judge. In so far, therefore, as some judicial powers are exercised, the boundary there set, the *teorann* set out in Article 37, is that such power is limited because a litigant can immediately have it set to

rights by an unfettered appeal to a judge who will reconsider matters not as an appeal but effectively as if nothing had ever happened; in other words, the decision being considered afresh. Sometimes startling provisions emerge from older statutes whereby it may be inferred that the legislature may have thought that because of the nature of the decision made that some exercise of judicial power may have been involved.

37. There the cure, again, was an unfettered appeal. For example s 33 of the Road Traffic Act 1961 enables learner drivers to be tested for their competence on the Rules of the Road and in practical skills by local authorities. A test may be deferred if the candidate does not show up with the right documentation, a provisional licence, proof of identity and a car properly authorised to be driven in public. But, as regards knowledge of rules and competency at driving, clearly the tester is making an assessment: does this person know what road signs mean, directive or advisory, and can the candidate safely drive a car or motorbike or bus or tractor or lorry? Is that adjudication judicial? Has it anything to do with the administration of justice? Is it such as to require that a court should hear about what happened at a particular junction or the engagement of gears? Apparently, according to s 33(6) which provides that:

> (a) A person aggrieved by a decision under subsection (4) of this section may appeal to a Justice of the District Court having jurisdiction in the place in which such person ordinarily resides, and the Justice may either refuse the appeal or, if satisfied that the test was not properly conducted, direct that the applicant shall be given a further test.
>
> (b) A decision under this subsection of a Justice of the District Court shall be final and not appealable.

38. Ostensibly on the basis of good measure, there can be no other reason, it is also provided that a decision by the examiner as to the propriety of candidate's papers and the authorisation of the vehicle to be on the public road are similarly appealable.

39. What the model does at least posit, if not establish, leaving aside the notion that a driving tester is exercising judicial functions, is that one limitation whereby a power of a judicial nature exercised outside of a court may accord with Article 37 is where, as with the Master, anything done may be rendered as nothing through a judge hearing the same issue again and without regard to any prior decision outside of the court. This is a blind rehearing whereby the judge is obliged to assess the issue with no regard to any prior administrative or quasi-judicial decision through embarking on the cause again and as if no decision, save one enabling the appeal through having been made outside of a court, had happened. But, the question in the first instance must be as to where the definition or adequate description of what is limited may lie. It is there that the boundary is set. The current editors of *Kelly: The Irish Constitution* (5th edition, Dublin, 2018) put the difficulties starkly at 6.4.101 in stating:

> Any statutory power, whether of a judicial or any other nature, is in one sense necessarily 'limited', since it can be exercised only within the four corners of the area, great or small, which the statute marks out and 'delimits'. It is not, however, in this sense that the courts have understood the word in the Article 36 Context, but rather in the senses of 'modest, 'not far reaching', 'confined to special situations'; in other words, in senses which leave much room for subjective judicial appraisal, since there appears to be no objective criterion for any of these notions.

Identifying limited judicial powers and functions

40. The challenge being thus set in *Kelly's Constitutional Law*, the case law enables at least three criteria that put matters into the sphere of what are limited functions and powers of a judicial nature to be identified with some security: technical matters; findings which do not have any result other than the public expression of an opinion with no consequent order; and provisional orders and findings subject to immediate appeal which are so limited until confirmed by a court that are of no lasting effect.

41. Technical matters, firstly. Tax is assessed on the basis of income, expenditure or expenses, allowable expenses or statutory allowances, transactions, profit and loss. In essence, while the taxation code can be complex, requiring huge resources of memory to turn acquaintance into expertise, and difficult concepts such as deliberate avoidance for no business purpose arise from time to time, what is involved is a technical calculation. The decision of liability to tax is the well from which the amount to be taken from the taxpayer is calculated. That calculation may be precisely titrated. The reasoning of Barron J in *The State (Calcul International Ltd and Solatrex International Ltd) v Appeal Commissioners* [1986] 12 JIC 1802, whereby the work of the Appeal Commissioners was described as technical, was criticised as being 'very questionable' by the editors of *Kelly* at 6.4.111-6.4.112. The assigned power was described by the High Court as being limited, even though there was not, nor sensibly could be, any monetary limit, such as that on Circuit Court orders in civil cases, on how much tax the taxpayer could made liable for. As Barron J stated:

> In reality, the decision has no effect on the fortune of the taxpayer, since the Appeal Commissioners do no more than decide the amount for which the taxpayer was always liable. Their decision may well affect the particular taxpayer adversely since he may be found liable to pay a sum for which he believes he was not liable. But this does not have far-reaching effects. The payment of Customs duty or Value-Added Tax is related proportionately to value of the goods concerned, whereas the payment of Income Tax and Corporation Tax is related proportionately to the relevant taxable income. Such payments cannot have far-reaching effects on the fortune of the taxpayer … since in each case the liability is relative, being proportionate either to his income or to his turnover as the case may be.

42. The validity of the reasoning, however, is to be seen in the accuracy of the description of what the essence of taxation is: the Appeal Commissioners cannot go beyond a calculation. What they do is to assess where in the balance liability tips, income or, as in VAT, turnover or in capital gains profit or in gift or inheritance tax degree of relatedness and amount, after taking into account all due allowances and relevant bands. This is not a judicial assessment. There may be an issue as to a fact, but there the burden is on the taxpayer to demonstrate an allowable expenditure or to set out a vouched account of income, since all relevant books must be kept. This is a technical matter. It is not of its essence about the truthfulness of the relating of an event, the assessment of damages so that an amount is arrived at which will compensate for tortious wrongs, or make up for a broken agreement, the motivation for actions or the general standards of conduct applicable within the community. In taxation there is no equity. All liabilities arise from statute and every sum payable is capable of precise calculation from the records that must be maintained. Certainly, as the editors of *Kelly* state, an incorrect calculation can have the

effect of putting a taxpayer's financial stability into crisis, but the fundamental point is that what deviates from accuracy can be demonstrated as such.

43. A more fundamental point arises here. It is the effects of an order combined with the enforceability of what is ordered, its appealability and its susceptibility to remedy, which are part of the tapestry of description enabling a reading of whether what is done in a quasi-judicial way outside court is an unconstitutional usurpation of judicial function. Calculation is limited. Error in calculation, even if it be the case that appeals are confined to law, and in taxation there is an appeal to recheck facts possible to the Circuit Court under s 942 of the Taxes Consolidation Act 1997 as amended, such a mistake is identifiable and susceptible to judicial review since such a miscalculation will fly in the face of calculable reason; *State (Keegan) v Stardust Tribunal* [1986] 1 IR 642, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *Meadows v Minister for Justice* [2010] 2 IR 701 at 173-174 imposing a proportionality dimension to what is rational in the decisions of non-judicial tribunals. What the remedy is and what it consists of is of its nature a limiting function on any tribunal. In the same way, while Mr Zalewski may have made complaints to the Workplace Relations Commission as to entitlement to holiday pay, minimum notice and the non-payment of wages due, these also are matters requiring assessment and calculation and not the exercise of any judicial consideration.

44. Secondly, there are public tribunals and commissions of inquiry, which can be held in public, where at the end of an examination of facts, often with live evidence, a report will be issued for public discussion. This will attach blame to individuals for such diverse matters as the sinking of a ship, portraying an innocent individual as a child abuser, misusing public funds, the abuse of political influence, failing to regulate money lending or any other controversy which the Oireachtas considers justifies the huge expenditure of time and money that such an inquiry entails. Tribunals of inquiry, set up under the Tribunals of Inquiry Acts 1921 to 2004 are public examinations of matter of great moment. Commissions of inquiry under the Commission of Investigations Act 2004, as amended, tend to be set up at a lesser temperature and generally are conducted in private. None of this legislation, whereby facts may be found by what is usually a judicial figure, or group of individuals chaired by a sitting or former judge, most often retired, have any implications beyond that such facts are declared after a trustworthy process by a trustworthy person. No tribunal can make any final order, beyond an order as to costs at the discretion of the chair, and other orders of compulsion as to attendance and the preservation and production of documents. These while mirroring, and in relation to the Tribunals of Inquiry (Evidence) Act 1921 expressly adopting to the tribunal the powers of the High Court as to necessary pre-trial and compulsion in aid of hearing orders, are limited. All that happens in the end is that an opinion is publicly expressed.

45. Of course, in many ways, and especially in the modern era where criminal law intrudes into European-inspired regulations and into areas of life outside those reserved in the past to behaviour against the community demanding penal sanction, what is to be investigated by a tribunal will easily overlap with liability in tort, as where an oil tanker is destroyed by negligence and people are killed, or the commission of crimes, as where the State is defrauded of public funds in dealing with economic subsidies or where life is lost through what may be very serious negligence. That trespass on the function of a court cannot matter because of the absence of consequence. What a tribunal does not do is make an order that any individual represented before it is liable to pay damages or that some person go to jail or be fined; *Goodman International Ltd v Hamilton (No 1)* [1992] 2 IR 542, [1992] ILRM 145. Hence, the limitation is in not going to where a court must go once a court

makes findings of fact. A court makes an order: a tribunal expresses a view. Similarly, in *M v Medical Council* [1984] IR 485, a finding of misconduct as a doctor, or of unfitness to practice, was only regarded as the publication of an opinion since the final power of sanction through removal from the register of medical practitioners was reserved to the High Court. Admonishment, censure or advice were the limited options which the Medical Council could choose from without invoking the power of a court; similarly for nursing professionals see *K v An Bord Altranais* [1990] 2 IR 396 as to a similar scheme. Opposite to the approach of courts in not dealing with hypothetical situations, because judges pursue the finding of facts in order to make a final order, tribunals and commissions of inquiry find facts and make non-binding recommendations arising therefrom. This is nothing more than an opinion. Furthermore, any suggestions as to, for instance, reforming the police or as to pointing out that public servants of some particular kind are not providing value for the wages paid in attending to duties, are entirely capable of being ignored. In the cynical view, not shared here, inquiries push matters away from public attention, but in reality they push matters into public scrutiny provided they act quickly. Such enquiries have to be pushed on ruthlessly or they are a failure. Even still, a report may be shelved. That is not how courts operate with powers of compulsion up to imprisonment for breach of injunctions, damages enforceable by judgment mortgages over property and persons confined to prison for perhaps decades in condign punishment of misdeeds.

46. Thirdly, what is limited is what does not immediately bite: meaning that the tribunal can reach conclusions but these are of no effect until there is an appeal provided for to a court which each party declines and where the court, if an appeal is taken, causes a judge to re-examine the circumstances and reach an independent decision. Court orders have effect immediately. To that there are exceptions, but these are provided for by the Oireachtas as a matter of policy under the relevant Courts Acts. Hence, criminal convictions under appeal by way of complete rehearing from a District Court to a Circuit Court judge entitles an accused to lodge recognisances and achieve bail. Even still, the judge setting the conditions is acting judicially; recognisances may not be refused on a whim or because the evidence was thought to be overwhelming. Similarly, a civil liability finding by the Circuit Court or District Court may be appealed to, respectively, the High Court or the Circuit Court and it is only if on a complete reconsideration the order is affirmed that practical effect is initiated.

47. In the decisions, this identification of what is of no immediate practical effect is not thus well developed, but the concept is a clear influence on what is to be seen as a limitation which puts a quasi-judicial power on the constitutional side away from any unlawful usurpation of the administration of justice. Thus, in *O'Mahony v Melia* [1989] IR 335, at issue were the residual aspects of the powers of Peace Commissioners. While the order in question was only the remand of a suspect overnight in custody and while the judgment of Keane J referenced the prohibition on outsourcing any criminal business from the courts, the case exemplifies an order which had immediate effect in taking a suspect from his usual abode in consequence of a judicial assessment outside of the sphere of judges in courts and orders that a suspect should be locked up. From that there was no immediate relief; the order bit straightaway. What can be legitimate, but strongly dependant on an overall analysis, and on the historical nature of the power being exercised away from courts, is the exercise of powers which lead to an order but which do not prejudice a court hearing by a judge. The result of a tribunal giving an adjudication on a case is that an opinion is expressed which if not appealed within a statutory timeframe can result in the opinion becoming a binding order. But the parties have an absolute entitlement to seek a re-adjudication by a judge in a court. It might be protested that only one court hearing takes

place and that there ought constitutionally be a further appeal. That is not necessary. There has been a hearing, before the tribunal out of court, and a complete rehearing by a judge. Nothing further is required. That is reflected in the existing court structure of hearings and appeals. Such a judge is "independent in the exercise of their judicial functions and subject only to the Constitution and the law" under Article 35.2 and have taken an oath to uphold that Constitution and those laws and to act "without fear or favour, affection or ill-will towards any" person under article 34.5.1°. There are many powers exercised by the High Court, for instance s 5 of the Illegal Immigrants (Trafficking) Act 2000 or s 50 of the Planning and Development Act 2000, which are subject to no appeal. Essentially, this is because the form of analysis undertaken by the High Court is effectively at second-instance, here a scrutiny of decisions as to status or as to suitability for sustainable development. Medical and solicitors' regulation cases illustrate how a tribunal reaching a conclusion but subject to appeal can sufficiently limit the powers and functions of a judicial nature so as to keep the interaction as one which by retaining the function of the courts passes muster. The former Employment Appeals Tribunal under the 1977 Act prior to amendment was another example: a tribunal makes an adjudication which is binding only if no party appeals, and on appeal there is a judicial hearing in a constitutionally mandated court.

48. The leading cases, *Re Solicitors Act 1954* [1960] IR 239 and *McDonald v Bord na gCon (No 2)* [1965] IR 217, concern the delegation of what were regarded, respectively by the Supreme Court and by the High Court, as decisions, delegated to the Solicitors Disciplinary Committee and to the greyhound body, which would end a career. Kingsmill Moore J considered the Solicitors Act as engaging decisions of "far-reaching effect and importance". If the model followed, however, is one of a tribunal reaching a conclusion but, like a tribunal of inquiry, this being no more than an exercise in opinion, that a solicitor should be struck off or that a doctor's misconduct is so worthy of censure that a erasure from the register is appropriate, and where it is clear that where the final power of review vests in a court, that limitation brings the model onto a constitutionally permissible ground. This is also the analysis of MacMenamin J and, clearly, as he also states, that is dependent on the nature of the appeal. But nowhere in any decision where judicial functions are being exercised do any of the decisions cited by the majority allow judicial review to be a sufficient basis of court limitation of what is an administrator exercising judicial power in a fundamental area to the rights of citizens. It is not. It cannot be and in that regard the majority analysis is at odds with both the decisions and with principle.

Meaningful and technical appeal confounded

49. In this respect, the third criterion enabling a limitation on judicial powers and functions, a distinction must be drawn as between an appeal which has the effect of enabling the judicial function under Article 34 and one which disables it through partialness or which uses a court like a rubber stamp. Analysing the *Calcul International* case from this perspective is perhaps not profitable. While Barron J there held the powers of the Revenue Commissioners to be on the correct side of constitutionality because they had no power to make a final order themselves, in reality to draw a distinction as between an order that cannot be appealed as to amount or as to liability to tax but which is enforceable as a contract debt in court and an order which does not need the initiation of a summons in court to enforce it perhaps misses the essence of the distinction. When the Revenue Commissioners decide that a taxpayer is liable to tax and in a particular amount, that is apart from any appeal enabled by statute. What a court does with a Revenue debt is simply assess that it is due. A court is not analysing the validity of a tax return or engaging in any

underlying assessment of taxability. It is the nature of the calculation and susceptibility to judicial review on reasonableness grounds that would provide a remedy.

50. Similarly, in the modern context, the idea may be unattractive that a grant or refusal of planning permission could be argued to be a judicial function, as Kenny J held in *Central Dublin Development Association v AG* (1975) 109 ILTR 69. What matters about that decision is that the High Court held that powers and functions of a judicial nature, because they affect "the fortunes of citizens in a profound way because of the results of the Minister's decision" are limited because that decision is appealable. Hence, Kenny J held for constitutionality because: "The Minister's decision does not decide finally that a particular development cannot be carried out; it decides only that permission is or is not required." It is not to be doubted that in *Deighan v. Hearne* [1986] 1 IR 603 at 615, Murphy J correctly declined to engage in a tax assessment of the plaintiff in favour of the administrative tribunal established in this regard; the jurisdiction of the High Court would only come into play in the most exceptional circumstances because legislation provided a constitutional procedure "competently staffed and efficiently operated to carry out that unpopular but very necessary task".

51. The model formerly adopted under the Unfair Dismissals Act 1977, but doubted as to its constitutionality even in that fully appealable format by the current editors of *Kelly* 6.4.100 citing remarks by McKenzie J in *Government of Canada v Employment Appeals Tribunal* [1992] 2 IR 484, was of vesting powers of a judicial nature in a body consisting of three persons, one legally qualified, with an appeal therefrom to the Circuit Court as an open rehearing unbound by any conclusion of that tribunal. That model is limited in function and is limited in power, and thus in conformity with Article 37, since its decision is of what is, in effect, a statutorily enforced and non-binding arbitration and is one where the judicial function within the court is completely unfettered by any conclusion reached. The model in the Workplace Relations Act 2015 is, on the other hand, to set the Constitution upside down. It is to treat the courts as limited, having only the power to decide such legal issues as may be referred, and as having no function save that which the parties or the Labour Court might choose to ask, with the final decision not in the courts but in the tribunal on receipt of the High Court's ruling as to law. It is to be remembered that the High Court is not entitled in exercising a function of ruling on referred points of law to actually instruct a tribunal as to what decision must be reached. Instead, the High Court decides a point of law and the application of that ruling is for the tribunal; *Barry & Others v Minister for Agriculture & Food* [2015] IESC 63.

52. There are many forms of appeal. This has been the subject of analysis by Clarke J in *FitzGibbon v Law Society* [2014] IESC 48 and it is not necessary to repeat that here. One quite popular one is to subject a tribunal to scrutiny on the basis of the proof by an appellant of a serious error, or a series of factual or legal errors mounting up to a significant error; see *Fitzgibbon* at paragraph 2. Another view is that judicial review is an adequate remedy in itself. That depends. Our form of judicial review is not the same as the kind of reconsideration of administrative decisions such as would be exercised by the Conseil d'État in France. There, a range of decisions from Covid 19 restrictions to austerity financial measures to the practice of euthanising elephants in public zoos are subjected to argument and reanalysis and a fresh decision results which is binding on the authority concerned. Our form of judicial review initiated as to the validity of a record and as to jurisdiction, which came to embrace serious legal errors disabling jurisdiction, developed as to process and through the theory that no administrative or quasi-judicial body has authority to make an unreasonable decision, enabled review of such decisions as flew in

the face of fundamental reason and common sense, and embracing decisions so lacking in proportionality as to meet that criteria. On an order being quashed, the matter is taken up again by the tribunal or lower court or by the administration, applying the correct process to the reconsideration of the decision.

53. A judicial review is a supervisory function under the full and original jurisdiction granted to the High Court under Article 34.3.1° of the Constitution. While the majority judgment characterises current judicial review powers as unrecognisable from those exercised in practice by the High Court in the 1980s, that is not so. There is a continuity and notwithstanding development there continues to be a stark difference. Judicial review could always undermine a decision if it so flagrantly flew in the face of fundamental reason and common sense as to impugn jurisdiction. No tribunal and no body exercising quasi-judicial functions is empowered to come to a bizarre decision or one which turns the facts on its head. That is the continuity. To that is now added a proportionality analysis where appropriate as to what may have been reasonable about the decision. That changes some cases but not cases such as any judicial review of the findings of fact in this case might be. In addition, jurisdiction is now considered in the context of legal error, rather than legal error being considered as being within jurisdiction, it is more likely to demonstrate a trespassing outside the boundaries of jurisdiction. All through, the courts engaged judicial review as to errors of record but these considerations have become less important. What has become more important has been procedure but a truly wrong decision can be reached by excellent procedures. And here is the nub of the problem: the key difference that is absent from the majority judgment. An appeal to a court, such as the Circuit Court under the 1977 Act, will mean a judge will look at the actual evidence again and give a decision. What if, in this case, Mr Zalewski is condemned as a thief? Once there is any evidence to support that, judicial review is out. That could ruin his work prospects. That is not limited, technical or merely adjudicative of statutory rights: it is the very decision that must be made by a judge. That engages the fundamentals of justice and which frightened and apprehensive seekers after justice must surely be entitled to if not at first instance then, as a saver under Article 37.1, through a meaningful factual appeal. What if the employers here were stuck with a lazy person and a thief, surely a decision to that effect also cries out for judicial analysis. In neither case could the technical and procedural manoeuvrings of judicial review, divorced from the fundamentals that a bad decision was made, possibly make up for a factual reappraisal. It is not allowed in judicial review. The majority decision is thus not an enhancement of the fundamental drive of the Constitution. Judicial review cannot be adequate in this context. What is needed is justice. Either a very bad mistake was made by an employer in summarily dismissing Mr Zalewski for dishonesty or that decision was correct. To sort that out needs wisdom and experience applied to fact. This is the administration of justice according to the majority, but also according to the majority, merely looking at whether a decision was utterly unreasonable or weighing the procedure of an administrator in crucial cases of fact suffices to bring adjudication constitutionally outside the ambit of the courts. The only factor which might save such a process is a complete appeal and not the procedural focus of Order 84. Judicial review may be appropriate in some technical types of administrative decisions, such as planning, and the function is also appropriate in such technical analyses in preserving the full and original jurisdiction of the High Court in Article 34.3.1° of the Constitution; *Tormey v. Ireland* [1985] I.R. 289. This function also rightly relieves the courts of the matters touched on in *Deighan v Hearn* and in *Doherty v South Dublin County Council (No. 2)* [2007] 2 IR 696. What judicial review does not do, and cannot ever do, is remove a bad judicial decision and replace it with a fair hearing as to fact leading to a correct factual analysis that vindicates rights and points as to where the truth reposes. That is what Mr Zalewski is entitled to under the

Constitution as is his former employer and that is what neither will get from proposed solution of judicial review. What is needed is at least the prospect of a full rehearing by an actual judge. In the *FitzGibbon* case, Clarke J's concurring judgment treats the forms of appeal which may result from an actual finding by a tribunal as being:

(a) A de novo appeal;
(b) An appeal on the record;
(c) An appeal against error, and
(d) An appeal on a point of law.

54. Each of these forms of appeal are described in the judgment of Clark J and that classification and analysis is here adopted. Assuming without deciding that what is already in the courts cannot be taken away, a working approach to statutory schemes and the constitutionality of the exercise of limited functions and powers of a judicial nature is to consider, firstly, the breadth of the power, secondly, the availability of an appeal to a judge in court, and thirdly, the extent of that appeal. It must depend upon how deeply the function and power tranches on the constitutional requirement in Article 34 as to how extensive an appeal must be. It must depend also upon the Constitution preserving in the courts the powers and functions which historically belong to the courts and not to the executive. In that regard, s 33 of the Road Traffic Act 1961 may be overdone; but that is within the choice of the legislature. That requires consideration of the nature of unfair dismissal since, in accordance with the interpretation of the *Calcul International* case, all that is involved in the technical award of holiday pay, minimum notice and redundancy payments, apart from that substantive issue of whether a dismissal was justified by substantial grounds related to competence or qualification, is a matter of calculation and not of judicial analysis. But, does unfair dismissal need an adjudication by a judge, even if only after a preliminary but non-binding unless appealed ruling by an administrator or tribunal? As a matter of justice and of close connection to contract law, the answer is yes.

Unfair dismissal and courts

55. For Mr Zalewski, and for those in his position, a finding such as that of the Workplace Relations Commission, later quashed by the High Court, is a potential disaster. It is more than disappointing how little serious effort was put into what is clearly the administration of justice by the Workplace Relations Commission. This is not only a personal fault but a profound structures, training and management issue. That want of application is exacerbated by being in private and thus out of the way of public scrutiny and media analysis as to approach. But it is made a denial of justice, of the right to justice, by leaving no avenue open save the sterile desert of procedure. Procedures can be gotten right but procedure alone solves no one's problem of being blocked from seeking justice in a court.

56. The idea that a worker must be protected in employment and not subject to arbitrary dismissal is not novel and in many respects fits within the historical aspect of litigation. Legal obligations to pursue the security of employment against unfairness in ending the employment contract arose from the International Labour Organisation's work on gaining acceptance of that idea on a convention basis. The first instrument specifically dealing with termination of employment was adopted as a recommendation in 1963, but subsequently, the Termination of Employment Convention was after Ireland had already passed the Unfair Dismissals Act in 1977, that is in 1982, entering into force on 24 November 1985 in circumstances where the State had already fulfilled its international obligations. Further work has been done internationally, including as to reasons which automatically render a

termination of employment unfair, such as exercising a right to litigation, making disclosures as to dangerous practices and race relations. This has resulted in Convention No 158, which adopted the Termination of Employment Recommendation, 1982, replacing its predecessor. As of September 2008, there are 34 recommendations.

57. There is a well-developed line of authority that what is in the courts stays in the courts and that if new rights are developed to be decided by a statutory tribunal, it is to those that a rights-seeker must go, with perhaps judicial review being an adequate remedy or whereby a limited right of appeal to courts is enabled by the legislature. An example is equality legislation. This does not trespass on established torts or create a new civil wrong for adjudication in courts but constitutes a new form of entitlement with specifically designed forms of redress; see *Doherty v South Dublin County Council (No 2)*. Nor is this kind of legislation necessarily the provision of safety rights for workers which are enforceable as a species of tort actions under the traditional heading of breach of statutory duty. One goes to a court if injured by a failure to fence a prime mover or to erect compliant scaffolding, to enforce a damages claim based on that tort heading but one goes to a tribunal to obtain redress for novel remedies and statutorily created entitlements. Thus, the case law is far-seeing in embracing the concept of what is within Article 34 as being what, as a matter of history, the courts have dealt with.

58. The test is well traversed in various cases. As *Kelly* notes, it is the application that is difficult; The Irish Constitution 6.1.5-6.1.20. The approach of turning all legal rules into definitions works well with many issues but in others a legal concept may be sufficiently delineated if described but not precisely bordered by precise words. This issue exemplifies that description is possible but, because of the multifaceted nature of decision-making binding citizens becoming increasingly the responsibility of new bodies enforcing new obligations or rights, definition is elusive. The standard five-point test derived from *The State (Shanahan) v Attorney General* [1964] IR 239 and that of Kenny J tentatively approved by this Court in *McDonald v Bord na gCon (No 2)* [1965] IR 217 at 244 succeeds in laying out an approach to predictably differentiate as between what is and what is not the administration of justice. Of the tests, many would be met by statutory tribunals or administrative bodies, most notably the compulsion of witnesses and evidence mentioned in *Shanahan* by Kennedy CJ and, besides, there has to be a practical aspect to this. The courts are not preciously to guard powers of compulsion of evidence simply because as a matter of history, judges exercised such powers almost, but not wholly, exclusively. This was, up to the majority judgment in this case, the test:

1. A dispute or controversy as to the existence of legal rights or a violation of the law;
2. the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
3. the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
4. the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;
5. the making of an order by the court which as a matter of history is an order characteristic of courts in this country.

59. Of the *McDonald* five-part test, unfair dismissal certainly involves a dispute as to the legal right to not loose one's job without substantial reason related to competence or

qualification and this is not a merely technical matter or question of calculation based on statutory entitlements. Yet, that right derives from statute and the legislature fulfilled the classic model of moving outside courts with new rights through setting up a tribunal in 1977, but with a full right to appeal to a court. The second aspect of the test repeats that criterion and requires that a court make a determination. But, again, the right and the remedy are statutory. The third criterion is that the determination be final.

60. As a matter of recent history, for close to forty years, final decisions of the Employment Appeals Tribunal were not final because, as a matter of acceptance or rejection by the parties, either could appeal on a *de novo* hearing basis to the Circuit Court. There, and there alone, the later unnecessary appeal *de novo* to the High Court having been abolished after the *JVC* case, the determination became final and was so because the judicial power had intervened and had considered and given a ruling on the rights and wrongs involved. This scheme in the 2015 Act, in contrast, uses the courts as merely a port for the gaining, by no analysis or discretion, of an order that Simons J in the High Court incorrectly thought saved the scheme. It does not. Because nothing judicial happens in the District Court under the 2015 Act. Furthermore, in making a decision in the absence of one of the parties' rights to make submissions and in altering an order without evidence from an employer, a breach of age-old rights is wrongly endorsed and, even worse, mandated by statute. The fourth criterion as to enforcement through the executive power of the State cannot be said to be judicial unless there is a judicial involvement in so deciding. That takes assessment, evidence in some form, a consideration of the options legally open and a balancing of where best that compulsive power ought to be used as part of the functions of the judicial arm of government. The final criterion as to history protects the courts from being denuded of power by unscrupulous government and upholds the bedrock of citizens rights through the executive being checked in its power. Here, on behalf of the State, the Attorney General argued that forty odd years of doing something one way was not the establishment of exclusive jurisdiction under the 1977 Act for the courts; that what was meant by Kenny J was the historical aspects of the administration of justice. History is not what we were; it is also what we have become and it is what we have regarded over decades as the minimum of respect for the Constitution that is acceptable. That, however, is not all there is to it. A job is a contract. The courts enforce contracts. The 1977 Act added new rights to existing contracts.

61. In analysing where this lies, the peaks of resonance from the spectrum of cases tend to show up the preciousness of the courts being required to guard to themselves under Article 34 life-changing judicial decisions, since these are not of their nature limited. Preserving those areas of law within which as a matter of history the courts have discharged their duties; the maintenance of the sovereign power of the State within a system of separation of powers where the legislative and executive arms of government may not wrestle away from the courts decisions requiring the administration of rights through judicial skills and coercive orders in favour of devolving these onto non judges; and, finally, determining to keep within the courts decisions which require the independence which judges have sworn to uphold and which require the experience and qualifications that enable justice to be done.

62. It is argued by the Attorney General that unfair dismissal is both new and is a limited area of litigation. It might be wondered, however, how new what happened to Mr Zalewski and those in like positions is? Certainly, in the 1977 Act and under the 2015 Act, if an ex-employee opts for a remedy based on a failure to have substantial reasons for dismissal based on competence and qualifications, that is a remedy created by statute, inspired by

the International Labour Organisation. If there is a period of notice appropriate by implication, or expressly set out in the contract of employment, that is justiciable as a matter of contract as wrongful dismissal in a court. Of course, the remedies are different and a choice must be made. But, there is more than an overlap. Mr Zalewski was simply told by his employer to get out, branded it seems as dishonest and given no back pay. That is the repudiation of a contract. It may be correct in terms of contract law or not but it is a matter of law for which injunctive relief is available, which is solely the preserve of the Circuit and High Courts and not of any tribunal. The claim of abuse of contract that he makes is as a matter of history closely tied up to equitable remedies and to the administration of disputes which are historically characteristic of courts. The legislature could have declared, as in consumer cases, an implied term not to be dismissed unfairly or granted injunctive relief as a matter of course in the courts. It is the substance that matters.

63. Dismissal in this manner with no recourse to a final analysis by a court leaves Mr Zalewski bereft of reputation, damaged in the marketplace for work and stripped of the human dignity of labour. This is a judicial controversy.

Under Article 37.1

64. In accordance with the analysis to which that conclusion led, it may be claimed, as counsel for Mr Zalewski sought to argue, and which counsel for the Attorney General persuasively opposed, that it follows that every adjudication official must be a judge. That is not so. Where a *de novo* appeal is possible, it may be argued that the parties have been put to bother for no good reason. That is not so. While failings are highlighted by the evidence, and will no doubt be addressed as real concerns, compulsory arbitration, because with a proper appeal that is what this is, of this kind of dispute is not wrong. Many parties after a first instance decision decide that the decision maker was probably right or that their case was insufficiently strong. For those who do not, however, the judicial power should be available and in unfettered form. That is only possible by a full rehearing appeal. That recourse was sparingly exercised under the 1977 Act and its availability limits, within the meaning of Article 37, the exercise by those other than judges of the powers and functions of a judicial nature which this exercise undoubtedly embraced. This may be considered by some to be akin to the solution in *McNamee v Revenue Commissioners* [2016] IESC 33 whereby an initial hearing of a very informal sort in the first round and with fair procedures in the second review suffices, but it is not. This is about ensuring that any deviation from the exclusive judicial function in Article 34.1 is only that permitted by Article 37.1 and that the function of the courts as an arm of government is protected.

Fair Procedures

65. Sympathy abounds for the proposition that disputes should not be turned into ceremonies akin to a State Trial, that pre-trial procedures should not be used to exhaust patience or finance, that questioning should only be used as an instrument of truth and as a polite exercise rather than as a strategic resort to confusion where a case lacks merit, that unnecessary costs be shunned and that peopling teams with abundant lawyers to do simple cases does not aid the administration of justice. That is what judicial case management, so necessary in larger cases, sets out to counter and counters successfully in jurisdictions which employ that method successfully. Judicial experience in making parties focus on what uncomplex but difficult cases are about is what saves costs; *Talbot v Hermitage Golf Club* [2014] IESC 57.

66. Fair procedures are not the answer to sense where the plain result of a case is that court-like formalities would have changed nothing. As recently as in *Shatter v Guerin* [2019] IESC 9, a consensus was reached that there is a minimum standard, derived from existing judgments of the Court, that examination by a single party with the circulation of a draft conclusion and supporting documentation for comment is possible and that only very rarely are full rights of information, or charge or notice of what is wrong, full relevant papers, representation, rights to cross examine and make submissions necessary. This is not such a case. The fundamental decision is that of Barrington J in *Mooney v An Post* [1998] 4 IR 288 at 298. More recently this was followed by Clarke J in *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233. He there describes a floor of rights where "the minimum" is that a person affected as to their protected rights "is entitled to" some notice of what might be described as "the charge against him" or her. While cross-examination or a public hearing do not come into the question, necessarily, that person must "be given an opportunity to answer it and make submissions." Thus the basic right is fair notice and a chance to comment.

67. Secondly, there is the model where a person is appointed to investigate some issue and goes about by calling in individuals one by one and asking them what they have to offer. These persons, of course, may be ordinary witnesses to some public scandal or to a disaster or they may be those reasonably considered to be responsible. Even still, they are simply asked about their involvement. What then of notice, since cross examination is excluded, and a chance to make submissions? In this, which is the *In re Pergamon Press Ltd* [1971] Ch 388 model, when all evidence has been taken and gathered, such transcripts and documents as cause the enquirer to feel that a particular organisation or individual or people are responsible for something which has gone wrong, these are sent to them with a draft report set of preliminary findings and submissions are invited. On considering those submissions, there is sufficient of audi alteram partem, hearing the party potentially to be blamed, for the report to be finalised and published. This is a valuable model, one which has enabled important enquiries under s 14 of the Companies Act 1990: for instance the report of 30 July 1992 into Chestvale Properties Limited and Hoddle Investments Limited by John Glackin. This is now s 748 of the Companies Act 2014. This is a valuable model, of wide use and should not be unwittingly abolished by this specific analysis.

68. Without this model, those kind of enquiries would become as difficult as those now attending on public tribunals of inquiry. As this second model demonstrates, the kind of elaborate procedures identical to a criminal trial are not necessary to ensure a fair examination of even serious events whereby a public opinion be pronounced and one, at that, which potentially destroys the good name of a citizen.

69. What is emphasised by the will of the legislature in maintaining court appointed inspectors into companies, and by the case law generally upholding the *Pergamum Press* model, and by the establishment in *Atlantean* of sufficiency in notifying and hearing, is that there is no necessity to ensure a fair hearing through cross-examination and the kind of procedures characteristic of a murder trial. Here, the complaint is made that, without trial procedures, the administration of oaths or affirmations to witnesses, and a legally qualified judge, a hearing must be unfair. That is not so. Furthermore, accreting onto models already authorised by law a duty to follow trial procedures would destroy the entire legal basis whereby hearings may be conducted. As to legal qualification, that is desirable for State bodies which are determined to serve the working community by providing a level of expertise which is helpful. In some jurisdictions, notably magistrates in England, judges are chosen for good sense and not for legal qualifications. In others, judges on gaining a

law degree enter a scheme of sitting immediately and without experience as a practitioner. What does perhaps matter is a judicial oath to emphasise and carry with those appointed the seriousness of the role undertaken. But, that again is not a legal requirement. Application to the task in hand and the availability of legal advice suffice. Where there is a conflict, but only in a matter as serious as this, being enabled to ask questions will assist in non-technical matters. The oath or affirmation may aid in the discovery of the truth but may strictly not be necessary.

70. What should not happen is that a clear breach of Article 34.1 not within the exception of Article 37.1 should be made to appear compliant with the Constitution through the accretion of procedures proper to courts. Acting like a court does not make an administrator a court. Good sense should not be overridden by recourse to the fallacy that procedures cure non-application to duty or that the appearance of fairness represents openness of mind and an independent determination to find the truth. Instead of a meaningful appeal, the majority judgment considers that enhanced procedures may cure what is a grim prospect for any litigant, employee or employer, seeking justice within the confines of the meaningful-appeal proof Workplace Relations Commission.

Concise summary

71. Firstly, a claim for unfair dismissal involves the administration of justice: the determination of who is right and who is wrong in a matter closely allied to contract law and involving decisions of fact in aid of uncovering truth. Such a decision carries that degree of moment that it is not within the limited range of decisions that could be regarded as technical or administrative. Any such judgment, that a person was unfairly dismissed, on substantial grounds, for incompetence, dishonesty or lack of qualification, is one where the very nature of a person is called into question and determined in core area of life. Protection of the right to work and of the entitlement of working men and women to their reputation is what should be at the heart of the administration of decisions which may ruin a career or devalue those individuals in the struggle to earn an honest living. Yet, this has been taken away from any recourse to the courts. That is constitutionally wrong. In not allowing any judicial determination even by way of an appeal on an unfair dismissal case, the Workplace Relations Act 2015 completely deprives a justiciable controversy of a judicial determination. In a complex modern environment where rights are often created by statute and administered by specialised bodies, it does not infringe the Constitution for these to be considered by non-judicial figures. Where, however, as is the case with unfair dismissal, those rights transcend what is limited or technical, but go to the very core of what defines a person in their social standing or conduct, there must be a choice to either the employee or the employer to seek justice in a court by way of a final factual appeal that requires a rehearing. Judicial review as a remedy, suitable for planning, tax, licencing, and other technical matters, is not an answer that makes such cases limited since the subject matter of unfair dismissal so embraces the essence of what courts are set up under the Constitution to do: to administer justice, to determine such fundamental rights as the entitlement of a working man or woman to hold their head high and to seek employment having been vindicated in the most core aspects as to honesty and competency by a judge. Under the majority decision, that constitutional entitlement is completely lost. A full appeal to a court from an administrative body has been abolished by the 2015 Act in favour of private hearings by administrators. Justice is about the truth coming out. Judicial review, which the majority consider limits this denial of recourse to a constitutionally established court, is about procedure, jurisdiction and reasonableness. Judicial review does not

substitute a good judicial decision for an unwise or wrong-headed analysis by an administrator.

72. Secondly, the 2015 Act uses the District Court as a discretion-deprived adjunct to administration. In disabling one side of a case, excluding the employer from being heard, whereby the District Court may cause an order for re-engagement or re-instatement to be changed into an order for damages, being salary of up to two years, the Workplace Relations Act 2015 fundamentally violates the Constitution. The notion that courts would decide radically different remedies, which damages by way of salary for up to two years and reengagement and reinstatement into a job are as results to an unfair dismissals case, without hearing from the employer's side involves a statutory model that undermines all the existing principles of fair procedure.

73. Finally, the majority, by requiring a basic level of fairness of procedure, so notably and completely denied by the Workplace Relations Commission to Mr Zalewski, somehow genuinely seek that some improvement may come about in what is a sad reflection on application to duty and a denial of what the Constitution contemplates as the path to justice. Curiously, the one place where all of that fairness of procedure is to be found is in a court. But, that is also the path unconstitutionally blocked by this legislation to those who may have a fundamental need to be vindicated as to their honesty and their competence as working people who have to sell themselves in the cold and unforgiving marketplace.

THE SUPREME COURT

[RECORD NO.: 66/20]

Clarke C.J.
O'Donnell J.
MacMenamin J.
McKechnie J.
Dunne J.
Charleton J.
O'Malley J.

BETWEEN:

TOMASZ ZALEWSKI

APPELLANT

AND

ADJUDICATION OFFICER, THE WORKPLACE RELATIONS COMMISSION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 6th day of April, 2021

Section I

Introduction

1. This appeal arises from a judgment delivered by Simons J. in the High Court, regarding a claim brought by the appellant, Tomasz Zalewski, against the respondents. ([2020] IEHC 178). The issues in this case, at one level, concern an injustice done to Mr. Zalewski when he brought a claim before the Workplace Relations Commission, ("WRC"). At another, and more profound, level the questions raised concern as to the harmonious interpretation of the Constitution. Article 6 of the Constitution provides that all powers of government, legislative, executive and judicial, derive under God, from the People, whose right it is to designate the rulers of the State, and, in final appeal, to decide all questions of national policy, according to the requirements of the common good. The Constitution provides that the powers of government are exercisable only by, or on the authority of, the organs of State, established by this Constitution (Article 6.2). These powers of government are carefully balanced and based on a tripartite allocation of function and responsibility between the legislative, executive and judicial arms of the State. The functions and powers of the third arm, the judiciary, are laid down by Article 34 of the Constitution.

Background

2. The case arises in the following circumstances. At the time of the events, the appellant was a married man with a young child. He previously worked in Buywise/Costcutters Discount Store in the North Strand in Dublin. The shop where he worked was subject to a series of robberies, some of which were violent. He had a series of disagreements with his employers. He was accused of not doing enough to stop the thefts. He was also accused of having removed money from the till of the shop. Mr. Zalewski's case was that he was summarily dismissed from his employment. His view was that he had been unfairly dismissed, and that the procedures leading to his dismissal were a sham.

3. On the advice of his solicitor, Mr. O'Hanrahan, Mr. Zalewski brought a claim to the WRC, claiming unfair dismissal under the Unfair Dismissals Act, 1977 ("UDA 1977"), and Payment of Wages Act, 1991 ("PWA 1991"). These were to be dealt with by an adjudication officer, appointed by the Minister under s.24 of the Workplace Relations Act, 2015 ("WRA 2015"), with the powers set out in s.40 of that Act.

4. In pursuing the claim, Mr. O'Hanrahan put in a written submission to the WRC. Later, in an email, he informed the Adjudication Officer, ("AO"), who had been designated to inquire into the claim, that, because of an anticipated conflict in the evidence, he wished to have an opportunity to cross-examine all witnesses appearing on behalf of Buywise. The solicitor said he would object to any hearing based exclusively on written submissions, although, in some circumstances, the WRA 2015 actually allows for such a procedure (s.47). The employers, too, put in a submission. They contended they had carried out an investigation in line with policies and procedures, and that all the requirements of natural justice had been observed. Mr. Zalewski disagreed. He considered that the original hearing before Mr. Alan Costello, Jnr., and the appeal before Mr. Alan Costello, Snr., the owners of the shop, were, effectively, a sham.

5. On the date assigned, 26th October, 2016, a brief hearing took place. The representative appearing for Buywise asked for an adjournment. Mr. Zalewski and his solicitor did not object. After a brief hearing, in which no evidence was heard, the matter was then set to be dealt with in December, 2016. By letter of the 1st November, 2016, the WRC informed Mr. O'Hanrahan that there was to be a new hearing date of the 13th December, 2016. Mr. O'Hanrahan so informed Mr. Zalewski. On the adjourned date, Mr. Zalewski and Mr. O'Hanrahan arrived for the hearing. They met the employers' representative. They began to talk. They were then briefly joined by the AO, who had been assigned. She had walked into the corridor at that moment.

6. What happened then can only be described as truly bizarre. Mr. O'Hanrahan was informed that a decision had already been made in his client's case. The AO apologised, saying the hearing had been given an adjourned date in error. She had issued her decision in the previous week, and the scheduling office had made an error in arranging a hearing for that morning. This situation became truly *Kafkaesque*, when a number of days later Mr. O'Hanrahan received a copy of what purported to be the AO's decision.

The Adjudication Officer's Decision

7. I deal briefly now with some of the statements contained in that decision. The AO said that, in compliance with the legislation, she had "*inquired into the complaints",* and given "*the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaints."* The decision contained a "*summary of complainant's position*". This, too, gave the appearance that Mr. Zalewski had been given the opportunity to present his complaint, and make relevant

submissions. It stated that Mr. Zalewski had been requested to provide a statement from the Department of Social Protection, and that he had not done so. There were then findings. The decision stated:

> *"The complainant did not contradict the respondent's, (i.e. the employer's), evidence, that the meeting of the 12th April, 2016, was called by the respondent to discuss issues concerning the store, and his role as assistant manager".*

8. Later, the unfair dismissal complaint was summarised in this way:

> *"The complainant and his legal representative did not advance any argument or evidence at the hearing as to why they considered the dismissal to be both "procedurally and substantially unfair" as stated in the complaint form.*
>
> *The Complainant stated at the hearing that he was in receipt of jobseekers benefit from the Department of Social Protection since the date of his dismissal. He was requested to provide evidence of this but did not do so."*

Explanations

9. In these proceedings, two affidavits were filed by the WRC, which sought to explain what had happened. The first of these stated:

> *"The filing of the decision as a "decision to issue", and the issue of the decision in that further hearing was an administration error with their [sic] being no intent to conduct the hearing or issue the decision, other than in accordance with natural and constitutional justice and fair procedures."*

10. Later, there was a second affidavit, sworn by a departmental official. This said:

> *"In error, a decision was prepared in advance of the adjourned hearing proceeding, and it was for that reason that the presentation of evidence and the questioning of witnesses did not occur in this instance".*

Inconsistencies

11. In what follows there is no criticism whatever intended of those who represented the respondents in this appeal. To the contrary, their submissions did justice to the importance of the

case. My criticism, rather, must focus on the WRC itself. In any organisation mistakes will happen. There will be pressure of work, and confusion about cases. But what happened in this case could not simply be explained on the basis of "misfiling". Unfortunately, what is actually found in this "decision", however construed, does not allow for any conclusion other than, on its face, it was a prejudging of a hearing which had not even taken place. It contained a series of inaccuracies. It gave the impression to any reader that a hearing had taken place, where both sides had been given the opportunity of presenting their case. This was simply incorrect. It alleged the appellant had failed to file documentation. This, too, was incorrect. It was not simply that the decision contained errors concerning some aspects of a claim. That can happen. More seriously, it purported to give a full decision based on events and evidence which had simply never taken place at all. The AO who was responsible for this did not swear an affidavit. Instead, others sought to explain what had happened. I hope I will be forgiven for concluding that, when considered, the explanations tendered simply do not hang together.

12. Since that time, the WRC itself has chosen never to explain what happened. What occurred hangs like a pall over the entire case, where the appellant's claim involves allegations of systemic failure. The WRC has not informed anyone about what happened, or why it happened. That is not an acceptable situation. There is no indication of a systems-review in order to find out what happened. The Court is not told what occurred immediately after the AO met the parties on the "adjourned date". Surely then a question might have been prompted in someone's mind on the WRC side, as to whether there had been a mistake. But a filing mistake would not account for what was contained in the decision.

Mr. O'Hanrahan's Evidence concerning other hearings

13. In these proceedings, Mr. O'Hanrahan, Mr. Zalewski's solicitor, deposed that his experience had been that hearings of complaints before the WRC were often heard in a manner where there was no *viva voce* evidence, with no opportunity given to test that evidence by means of cross-examination. He had had previous experience of AOs hearing and deciding cases on the basis of written submissions, and brief and extremely informal hearings, where there had been no formal evidence, or an opportunity to properly test such evidence. He points out that the WRA 2015 does not make a clear provision for cross-examination. Nor does that Act make any provision for the taking of evidence on oath, or the other requirements necessary for ensuring fair procedures

in complex matters, where there is a dispute on evidence. It is ironic that an organisation which was created in order to ensure fair and efficient hearings for parties, including workers who are deprived of rights to employment, should have acted in such a manner in relation to this worker, and then not explain what happened.

14. Mr. Zalewski brought High Court proceedings challenging the procedure, and the decision. Later, on the 4th April, 2017, the Chief State Solicitor wrote to Mr. O'Hanrahan, and gave an account, based on instructions, as to the circumstances which had led to the issuing of the decision. The letter stated the respondents would not stand over the decision of the AO, and that the respondents were willing to agree to the disposal of the proceedings on certain terms, namely, the making of an order of *certiorari* in respect of the decision, and the remittal of the complaint to the WRC, paying Mr. Zalewski's legal costs. Mr. Zalewski refused this offer, unless consent was forthcoming to the grant of all the reliefs which he had sought in the legal proceedings, including claims regarding the compatibility of certain sections of the WRA 2015 with Article 34 of the Constitution.

The Evidence of Experienced Legal Practitioners in Industrial Relations Law

15. In these proceedings, Mr. Tom Mallon, B.L., and Mr. Ciaran O'Mara, Solicitor, both swore supporting affidavits. It is no exaggeration to say both are lawyers pre-eminent in the field of industrial relations law. In his affidavit, sworn in 2019, Mr. Mallon deposed that, since the inception of the WRA 2015, he had been disturbed by a number of hearings which had taken place before AOs. He set out that many AOs, and indeed members of the Labour Court, had appropriate qualification and experience and were properly qualified for determining complaints under the UDA 1977, Employment Equality law, the Protected Disclosures Act, and other legislation. A number of AOs were qualified barristers or solicitors. He acknowledged that there were AOs who did not have legal qualifications, but, by reason of their experience and general knowledge, had great competence to conduct a hearing.

16. However, Mr. Mallon deposed that many AOs lacked competence to adjudicate issues of law which arose which might be complex. In a not insignificant proportion of cases in which he had appeared, AOs lacked sufficient qualifications or experience. In some cases, AOs were, in his view, incapable of exercising the full range of powers under the WRA 2015 and lacked the basic skill and ability to conduct a fair hearing. His concerns about qualifications and experience of AOs

applied equally to some members of the Labour Court. Mr. Mallon deposed that, as time passed after the introduction of the WRA 2015, the facility to permit cross-examinations had become more common, but it was not yet granted in every single case. He believed that, in the early days, there had been a policy to deny cross-examination, and to reduce the time available for cases to a minimum. He maintained, however, that there continued to be serious issues regarding the administration of hearings, the assignment of limited time, and difficulties in obtaining second and subsequent hearing dates.

17. Mr. O'Mara deposed that it was his experience that a number of AOs simply did not understand some of the more difficult issues which arise. Very fairly, he considered it would be inappropriate for him to refer to any specific case. However, he stated that he had appeared before AOs in cases where he firmly believed that the officer quite simply did not have the sufficient understanding to deal with the important matters before them. These are serious allegations, and not to be readily disregarded.

Background to the WRA 2015

18. No issue was raised as to the admissibility of preparatory materials regarding the WRA 2015, (cf. *Crilly v. Farrington* [2001] 3 I.R.; s.5 Interpretation Act, 2005). I treat this material *de bene esse*. The defence in this case referred to the intent behind the WRA 2015. That intent was, in many respects, a laudable one. The aspiration was to create a system whereby disputes of this nature could be informally resolved without recourse to excessive reliance on legal procedures. Anyone can entirely sympathise with that view. The respondents referred to a number of impressive reviews and reports which ultimately provided for the basis of the WRA 2015 procedures, which partly superseded the UDA 1977. One review said there had been difficulties in enforcing awards under the UDA 1977 and its successor Act in 1993. Further, it was desirable that awards should be enforced through only one statutory body. The question of enforcement of awards is an important issue in this case, as will be seen later.

19. The respondents also referred to a document, "Legislating for a World Class Workplace Relations Service". This was a submission to the Oireachtas Committee on Jobs, Enterprise and Innovation in July, 2012. It set out some of the cumbersome aspects of the procedures under the UDA 1977. It stated that the appeals system (which included a potential for appeal to the courts) on the merits, might be exploited by an employer determined to force a complainant in an unfair

dismissals action to endure several *de novo* hearings of his or her complaint. (page 57). The Court has not been informed about any consideration given to the legal or constitutional effect of adopting the procedures in the WRA 2015, which were quite radical. These included that the Labour Court would act as a court of final appeal for final adjudication decisions of the WRC, subject to the right of either party to bring a further appeal from a Labour Court determination to the High Court on a point of law only (page 58).

20. The respondents' case also referred to extensive WRC material, whereby AOs were sought to be trained in relation to fair procedures - and how to conduct hearings. There was a survey where questions were put to AOs as to the number of times they permitted questioning. Reference was made to a "guidance note", reflecting the terms of the WRA 2015: it stated that an AO was to take direct evidence from both parties, and all other relevant witnesses; that the other party, or the representative, would be given the opportunity to question the parties, and other witnesses, regarding the evidence they have given. When all the evidence had been taken, both parties were to be given the opportunity of providing a summing up of the case.

21. Taken together, these documents, whether or not admissible in evidence, provide a good picture of the intentions behind the intended legislation, which took statutory form in 2015. Many of these were good intentions and aspirations, but that alone cannot absolve the WRA 2015 from the same level of constitutional scrutiny as any other legislation. The Constitution applies to all legislation.

The High Court - *Locus Standi*

22. The judicial review proceeding first came before the High Court, where the respondent sought to raise issues as to *locus standi* of the appellant to pursue the constitutional claims. Meenan J. upheld those submissions, but sternly criticised the affidavits sworn by the respondents seeking to explain what had occurred as "lacking credibility". The appellant appealed to this Court, which held that the appellant had *locus standi* to pursue the constitutional claim.

The High Court: Simons J.

23. Ultimately, the matter came before Simons J., who delivered a judgment remarkable in its clarity and rigorous reasoning. As he outlined, the appellant's case involved contentions; (a) whether the proceedings in question involved the administration of justice within the meaning of

Article 34 of the Constitution; (b) that relevant provisions of the WRA 2015 were invalid, having regard to Article 34 of the Constitution in that they conferred decision-making powers on a non-judicial body, namely, AOs appointed by the Minister. The judgment also outlined the two main defences relied on by the State respondents. These were (a) that a decision of an AO lacked the character of a binding determination, and that, if a claimant employee wished to enforce a decision, it was necessary to apply to the District Court in order to do so. This was said to be fatal to the argument that AOs were themselves carrying out the administration of justice; (b) the respondents contended that employment disputes had not traditionally been regarded as the business of the courts, or justiciable. Here, reliance was placed on the important decision of *McDonald v. Bord na gCon* [1965] I.R. 217, ("*McDonald*"). However, because Simons J. concluded that what was in issue was not an administration of justice, he did not consider it was necessary for him to consider an alternative case advanced by the respondents, which was based on Article 34, if necessary combined with Article 37, of the Constitution.

Articles 34 and 37 of the Constitution

24. Article 34.1 of the Constitution provides:

> *"1. Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."*

This speaks to the constitutional purpose of the Article. Article 34.2 defines the courts in which justice should be administered as comprising (i) courts of first instance; (ii) a court of appeal, and (iii) a court of final appeal.

25. Article 34.3 provides that the Courts of First Instance "*shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal*". Article 34.3.4 also provides for Courts of First Instance, including courts of local and limited jurisdiction, with a right of appeal as determined by law.

26. Article 37 can be seen as being in the nature of a saver. It provides:

> *"1. Nothing in this Constitution shall operate to invalidate the exercise of **limited functions and powers of a judicial nature**, in matters other than **criminal matters**, by any*

person or body of persons ***duly authorised by law*** *to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."* (Emphasis added)

I have emphasised a number of terms as they arise later for detailed consideration. In *re The Solicitors Act 1954* [1960] I.R. 239, this Court applied the interpretative principle *expressio unius est exclusio alterius* to these two provisions, holding that the corollary of what was said in Article 34.1 was that justice should not be administered by persons who are not judges appointed in the manner provided by the Constitution, save in those cases specially excluded by other provisions of the Constitution (*Kelly,* at p.263).

Procedure under Part 4 of the WRA 2015

27. Part 4 of the WRA 2015 sets out the mechanisms whereby claims and disputes under various pieces of legislation, including employment legislation, are to be determined. The "first instance" hearing is to be by AOs, with a right of appeal thereafter to the Labour Court. Thus, the provisions of Part 4 might, as Simons J. pointed out, be regarded as setting out the procedure with the substantive rights to be found in other pieces of legislation, here, the Unfair Dismissals Act, 1977, and the Payment of Wages Act, 1991.

28. In the course of the judgment, Simons J. made many important observations, all of which should give cause for pause, and further reflection. Among these, he noted that one point made in the argument by counsel had been that, if legislative change of the type involved here could be done *in one significant area of law*, i.e. employment law, then, in principle, it could be done in relation to other areas of law, such as family law or commercial law. He observed that the sheer breadth of jurisdiction conferred upon AOs and the Labour Court might be relevant to arguments as to whether the exercise of the statutory jurisdiction involved the administration of justice under Article 34 of the Constitution, or the exercise of limited functions and powers of a judicial nature within the meaning of Article 37 of the Constitution. The High Court judge commented that the Payment of Wages Act, 1991, which dealt with payment in lieu of notice, might provide stronger grounds for an argument based in respect of Article 37 of the Constitution. This was because such a claim might be measured in hundreds rather than thousands of Euros. Under the UDA 1977, by contrast, award might include reinstatement – effectively a form of enforcement by way of mandatory injunction- and potential awards of redress up to 2 years loss of salary. The judge was

well aware of the balance, or perhaps tension, between the spirit and letter of Article 34 and Article 37 of the Constitution.

29. Under the redress available under the UDA 1977 (as amended by the WRA 2015), AOs have the power to order (a) re-instatement; (b) re-engagement; (c) payment of compensation in respect of loss, not exceeding 104 weeks' remuneration; (d) compensation, not exceeding 4 weeks' remuneration, as might be just or equitable having regard to all the circumstances.

30. The WRA 2015, therefore, removed a number of provisions which had previously existed under the UDA 1977. The jurisdiction previously exercised by rights commissioners and the Employment Appeals Tribunal, ("EAT"), was transferred to AOs. Importantly, the right of appeal to the Circuit Court was removed, and replaced by a right of appeal from an AO to the Labour Court, and to the High Court, but only on a point of law.

31. The High Court judgment dealt with two main issues. The first of these was whether or not the legislation was compatible with Article 34 of the Constitution. For reasons set out presently, Simons J. ultimately held that it was. The second aspect, dealt with later in this judgment, deals with fair procedures.

Section 41(5) of the WRA 2015 and Article 34 of the Constitution

32. It is necessary to set out the procedure under s.41(5) of the 2015 Act:

> *"(5)(a)An adjudication officer to whom a complaint or dispute is referred under this section shall -*
>
> *(i)* ***inquire*** *into the complaint or dispute,*
>
> *(ii) give the parties to the complaint or dispute an opportunity to—*
>
> *(I)* ***be heard by the adjudication officer****, and*
>
> *(II)* ***present to the adjudication officer any evidence relevant to the complaint or dispute****,*
>
> *(iii) make a decision in relation to the complaint or dispute in accordance with the relevant redress provision, and*

(iv) give the parties to the complaint or dispute a copy of that decision in writing." (Emphasis added)

The words emphasised (above) indicate the number of procedural steps which were not taken by the AO assigned to Mr. Zalewski's case, prior to the issuing of the decision.

33. As can be seen from the text of s.41, an AO to whom a dispute is referred shall give the parties to the complaint or dispute an opportunity to be heard and to present to the AO any evidence relevant to the complaint or dispute, make a decision in relation to the complaint or dispute, in accordance with the relevant redress provision, and give the parties to the complaint or dispute a copy of that decision in writing. (s.41 (5) (a)(i), (ii), (iii), (iv) WRA 2015). While an AO has the power to compel the attendance of witnesses, (failure to attend can be an offence under the Act), he or she has no express power to administer an oath or affirmation. A right of appeal to the Labour Court is provided for in s.44 WRA 2015, as applied to a claim for unfair dismissal by s.8A of the UDA 1977. The Labour Court proceedings are to be conducted in public, unless the Labour Court, upon application of a party, determines that, due to the existence of special circumstances, the proceedings, or part thereof, should be conducted otherwise than in public (s.44(7) WRA 2015). The procedures there allow for a wider range of fair procedure requirements. The Labour Court may, in turn, refer a question of law to the High Court for determination (s.44(6) WRA 2015). Section 41(5) is quoted above. Whether it can be said that the law as it stands provides adequate provision for full independence of decision-makers at first or second level in the WRC must be open to question. The Minister retains considerable powers of appointment, and determination of persons appointed under s.10 Industrial Relations Act, 1946.

Enforcement: Section 43

34. Section 43 of the WRA 2015 is also central to this appeal. It is necessary to quote it in full.

"43(1) If an employer in proceedings in relation to a complaint or dispute referred to an adjudication officer under section 41 ***fails to carry out the decision of the adjudication officer under that section in relation to the complaint or dispute in accordance with its terms before the expiration of 56 days from the date on which the notice in writing of the decision was given to the parties****, the District Court shall -*

(a) on application to it in that behalf by the employee concerned or the Commission, or

(b) on application to it in that behalf, with the consent of the employee, by any trade union or excepted body of which the employee is a member,

without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the decision in accordance with its terms.

(2) Upon the hearing of an application under this section in relation to a decision of an adjudication officer requiring an employer to reinstate or reengage an employee, the District Court may, instead of making an order directing the employer to carry out the decision in accordance with its terms, make an order directing the employer to pay to the employee compensation of such amount as is just and equitable having regard to all the circumstances but not exceeding 104 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Act of 1977.

(3) The reference in subsection (1) to a decision of an adjudication officer is a reference to such a decision in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought, or if such an appeal has been brought it has been abandoned and the references to the date on which notice in writing of the decision was given to the parties shall, in a case where such an appeal is abandoned, be construed as a reference to the date of such abandonment.

(4) The District Court may, in an order under this section, if in all the circumstances it considers it appropriate to do so, where the order relates to the payment of compensation, direct the employer concerned to pay to the employee concerned interest on the compensation at the rate referred to in section 22 of the Act of 1981, in respect of the whole or any part of the period beginning 42 days after the date on which the decision of the adjudication officer is given to the parties and ending on the date of the order.

(5) An application under this section to the District Court shall be made to a judge of the District Court assigned to the District Court district in which the employer concerned

ordinarily resides or carries on any profession, business or occupation." (Emphasis added)

35. Thus, if an employer fails to carry out the decision of an AO in relation to a complaint or dispute, the District Court *shall*, on application to it by an employee or the Commission, or brought with the consent of the employee by any trade union or excepted body, "*without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the decision in accordance with its terms."* The effect of s.43(1)(b) is to substantially and radically restrict the application of fair procedures in the District Court. The District Court is debarred from hearing a respondent employer, or any evidence, save in relation to the matters set out in s.43(1). The effect of sub-section (2) is that, when hearing an application in a case where an AO has required an employer to reinstate or re-engage an employee, the District Court may, instead of making an order directing the employer to carry out the decision, instead make an order directing the employer to pay compensation to the employee, as may be just and equitable having regard to all the circumstances within the statutory limitation provided for under the Act. But the section does not identify any basis upon which a District Court judge might exercise that limited discretion, other than what is set out. Under s.43(4), the District Court may also direct an employer to pay to the employee concerned interest on the compensation "*at the rate referred to in section 22 of the Act of 1981*". The question considered later are whether these provisions can be seen as vesting a court with true curial powers recognised under the Constitution, as protecting fair procedures.

Enforcement: Section 51 of the Act

36. Section 51 of the WRA Act, 2015, provides:

"51(1) It shall be an offence for a person to fail to comply with an order under section 43 or 45 directing an employer to pay compensation to an employee.

(2) It shall be a defence to proceedings for an offence under this section for the defendant to prove on the balance of probabilities that he or she was unable to comply with the order due to his or her financial circumstances.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both."

37. The High Court judgment points out:

> *"Crucially, it is not an offence for an employer to fail to comply with the decision of an adjudication officer or the Labour Court: the offence is the failure to comply with the order of the District Court."*

38. But these are not the only enforcement provisions. As can be seen, under s.51 it is provided that it shall be an offence for a person to fail to comply with an order under s.43 made by an AO, or s.45 made by the Labour Court, directing an employer to pay compensation to an employee. As can be seen Section 51(3) provides:

> *(3) A person guilty of an offence under this section shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both."*

39. The WRA 2015 contains other extensive enforcing powers. In each, the WRC is the prosecuting authority in a criminal prosecution, where courts may impose a fine and imprisonment against an employer who fails to comply with an order made by the District Court. But further prosecutor powers are provided for under s.7 of the Act in relation to other offences which may be committed by an employer. On summary conviction, these can involve a fine, imprisonment for not more than 6 months, or, on conviction on indictment, to a fine not exceeding €50,000, or imprisonment for a term not exceeding 3 years, or both. In each instance, the WRC is the prosecuting authority of these offences, many of which relate to the power of inspectors to carry out inspections on premises in order to ensure compliance with working conditions.

Section 66 of the Act and Hearing Procedures

40. I also mention here s.66 of the WRA 2015, which provides for transfer of functions from the Employment Appeals Tribunal. *Inter alia*, it provides that references in any enactment, *or instrument* in enactment, to the Employment Appeals Tribunal, insofar as they related to a function transferred to the WRC, should be constructed as references to the Commission. In the case of the Redundancy Payments Act, 1967 and later the UDA 1977, S.I. 24/1968 provided that a party to an appeal by the Employment Appeals Tribunal might, (a) make an opening statement, (b) call witnesses, (c) cross-examine any witnesses called by any other party, (d) give evidence on his own behalf, and (e) address the Tribunal at the close of the evidence. The Employment Appeals Tribunal also had the power to administer an oath. (See Regulation 13, S.I. 24/1968; s.19 UDA

1977; Regulation 10, S.I. 286/1977; and *Employment Law*, Regan & Murphy, 2nd Edition, 2018. But see also s.26(2)(d) – (f) Interpretation Act, 2005).

McDonald v. Bord na gCon

41. The first question which Simons J. had to determine was whether or not these extensive powers were compatible with Article 34.1 of the Constitution. He applied the long-established "classic", five-pronged test, identifying whether or not there has been an administration of justice, contrary to Article 34.1, as first set out in *McDonald v. Bord na gCon* [1965] I.R. 217, ("*McDonald*"). These now long-established indicia are:

1. The resolution of dispute or controversy as to the existence of legal rights, or a violation of the law;

2. A process involving a determination or ascertainment of the rights of parties, or the imposition of liabilities, or the infliction of a penalty;

3. A final determination, (subject to appeal), of legal rights or liabilities, or the imposition of penalties;

4. The enforcement of those rights or liabilities, or the imposition of a penalty by the court, or by the executive power of the State, which is called in by the court to enforce its judgment;

5. The making of an order by the court which, as a matter of history, is an order characteristic of courts in this country.

Simons J.'s conclusion that the fourth limb of *McDonald* was not satisfied

42. In the High Court, and in this Court, there is broad agreement that the adjudicative role of the WRC satisfied the first three elements of the *McDonald* test. The brief summary which follows does scant justice to Simons J.'s fully reasoned judgment. In brief, he concluded that the decision-making process under s.43 WRA 2015 lacked one of the essential characteristics arising from the fourth test in *McDonald*, namely, the ability of a decision-maker to enforce its decisions. He held that the necessity of having to make an application to the District Court to enforce a decision of an AO, or the Labour Court, deprived determinations of one of these essential characteristics of the administration of justice. Given that the District Court's discretion to modify the form of redress

represented a significant curtailment of the decision-making powers of AOs, and the Labour Court, the function exercised by the District Court could not be dismissed as a mere "rubber stamping" of the earlier determination. He held that the District Court could, in effect, overrule a decision made by an AO or the Labour Court to direct reinstatement or re-engagement. (para. 218) He concluded that a decision-maker, who was not only reliant on the parties invoking the judicial power to enforce its decision, but whose decisions as to the form of relief were then vulnerable to being overruled as part of that process, could not be said to be carrying out the administration of justice (para. 219).

43. The judgment noted what he called "the anomaly" that, requiring the intervention of the District Court to enforce a determination of the Labour Court was sufficient to deprive it of one of the characteristics of the administration of justice, but the existence of a full right of appeal against an EAT decision to the Circuit Court would not. However, he opined, that it might be that recourse to judicial power was always necessary to obtain an enforcement order, whereas a first instance decision became final and conclusive in the absence of an appeal. With other statutory schemes, the legislation provided an alternative to legal proceedings, but this did not displace a right of action.

Simons J. conclusion that the fifth limb of *McDonald* was satisfied

44. In the High Court, Simons J. held that this fifth criterion only assumed importance in cases where there had been a long-established tradition of a particular type of decision-making, falling either inside or outside the courts' jurisdiction. He correctly cited *In re Solicitors Act, 1954* [1960] I.R. 239, ("*the Solicitors Act"*); *Cowan v. Attorney General* [1961] I.R. 411, ("*Cowan*"); *Keady v. Commissioner of An Garda Siochana* [1992] 2 I.R. 197, ("*Keady*"); and *O'Connell v. The Turf Club* [2017] 2 I.R. 43, ("*O'Connell*"), as instances where the courts had drawn that line. In *The Solicitors Act*, Kingsmill Moore J. held that the scope of a decision which might run afoul of Article 34 was very wide, including decisions of a type that might fundamentally affect persons and their livelihoods. In *Keady*, recognising the important role of administrative bodies in the running of the State, this Court held that Kingsmill Moore J.'s judgment should be confined largely to its own facts, and that it could not be said that the large range of administrative bodies by then in existence were engaged in making orders which, as a matter of history, were characteristic of the courts.

45. On this, Simons J. observed that claims for *wrongful* dismissal had been the business of the courts for decades before the WRA 2015. The law of employment generally concerned adjudications similar to those involved in proceedings for breach of contract. He rejected the respondents' submission that the UDA 1977 had created a new self-contained statutory jurisdiction, which had never been part of the jurisdiction of the High Court. He doubted that legislation by the Oireachtas could put legislation beyond the reach of the courts, without infringing Article 34. He pointed out that the fact that the Circuit Court had previously exercised jurisdiction to hear and determine appeals in claims of unfair dismissal under the UDA 1977 showed that the orders made by the WRC had been orders of a type historically made by the courts. He pointed out that, in *Doherty v. South Dublin Co. Co.* [2007] 2 I.R. 696, the issue had been whether the full and original jurisdiction of the High Court could be relied on when there had been an exclusive jurisdiction conferred on the tribunal under the Act. This did not address the different question of whether an order made by the Equality Tribunal was of a type which as a matter of history had been made by the courts. Thus, the High Court judgment actually concluded that the hearing and determination of a payment of wages claim did fulfil the fifth limb of the test in *McDonald*: that is to say, the making of orders determining claims were characteristic of the business of the courts as carried out under the UDA 1977, and the type of orders made pursuant to the common law jurisdiction for wrongful dismissal.

46. I comment here that the scope of the fifth limb remains significant in this case. As explained earlier in *re Solicitors Act*, Kingsmill Moore J. proposed as one of the tests of judicial function the extent to which the power to exercise a far-reaching power to strike a solicitor off the Rolls could be a non-judicial power. Some subsequent decisions, especially *Keady*, showed a desire to limit that decision to its special facts. (cf. *The State (Calcul International Ltd. & Anor) v. Appeal Commissioners*, 18 December 1986, Barron J., High Court).

The Unfair Dismissals Act, 1977

47. The UDA 1977 did not oust the jurisdiction of the courts. Rather, the statutory right to make a claim for unfair dismissal was parallel to the common law right of action for wrongful dismissal. Simons J. observed, however, that the existence of this parallel jurisdiction under statute was a limitation on the common law. (See *Johnson v. Unisys* [2003] 1 AC 518; *Eastwood v. Magnox Electric plc* [2005] 1 AC 503, as applied in Ireland by Laffoy J. in *Nolan v. Emo Oil*

Services Ltd. [2010] 1 ILRM 228). But the issue of what areas of law are, as matters of history, characteristic of the courts, remains an important consideration, if it comes to a question of whether some areas of law can be placed in the hands of a non-judicial decision-making body.

48. The High Court judge concluded that, even if the preservation of a parallel right of action before the courts might be an answer to an allegation that a statutory decision-maker was carrying out the administration of justice, this could not apply in the context of employment legislation. He was of the view that the failure to satisfy the fourth limb of *McDonald* meant that the decision did not constitute the administration of justice for the purposes of Article 34.

49. Simons J. held that, even if the preservation of a parallel right of action before the courts might be an answer to an allegation that a statutory decision-maker was carrying out the administration of justice, this could not apply in the context of employment legislation, which dealt with an area which he held had been traditionally part of the courts' jurisdiction. However, he concluded that the failure to satisfy the fourth limb of *McDonald* meant that the decision did not constitute the administration of justice for the purposes of Article 34. It is fair to say that the judge's decision on this question was arrived at with, as he said, "some hesitation".

50. As mentioned, the rigour of the analysis, and the scope and depth of the judicial reasoning in the High Court judgment, is such that, in hindsight, it is unfortunate that the trial judge, for perfectly good reasons, did not consider it necessary to consider Article 37 of the Constitution. His assessment and consideration of that question would have been of real benefit to this Court, particularly in light of the observations he had made at the outset of his judgment regarding the extent of the jurisdiction provided for by the WRA 2015, *by contrast with* the *limited* jurisdiction under the Payment of Wages Act. The word "limited" is one of the key elements of Article 37 of the Constitution.

Procedural Requirements

51. Additionally, the High Court judge held that the appellant's claims for entitlement to fair procedures, compliant with Article 40.3 of the Constitution, began by assuming that an AO was equivalent to that of a judge. However, he held that, given that the decision-making power under the WRA 2015 did not involve the administration of justice, this could not be so. He held the evidence based on a 2016 survey which found that 49% of claimants were dissatisfied, or very

dissatisfied with the new system, was not sufficient in itself to lead to a conclusion that there was a systemic problem with the use of AOs to hear claims. He commented that the appellant's evidence was "generalised" and "vague", to the extent that it was not possible to make a determination of systemic failure. I deal with these inferences later in this judgment. Thus, he held that AOs did not require to have legal qualifications; that the provisions did not require an oath or affirmation; that there need be no express provision for cross-examination, or hearings in public. I address these four conclusions at the end of this judgment.

Section II

An Overview of the Issues in this Case

52. The starting points, as in all issues which come to court, must be a set of given facts, and how the law should be applied to those facts. At one level, this case *simply* involves a consideration of the interaction between Articles 34 and 37 of the Constitution. But I believe, that, in fact, the issues go deeper and touch on the very nature of the State itself, as identified in the Constitution adopted by the People in 1937, and amended, where necessary, by a vote of the People in referendums. In enacting the Constitution, the People, who are sovereign, recognised the nature of the State identified in the Constitution as being based on Montesquieu's concept of the tripartite allocation of powers, based on checks, as well as balances. The constitution of the United States was the first which sought to give practical effect to Montesquieu's understanding of the tripartite allocation of powers.

53. Now, the very issue of how that constitution should be interpreted has come to the forefront of political discourse, and itself become a political question. We are fortunate that, in this State, our Constitution is flexible enough to entrust fundamental decisions to the People as the ultimate legislators. But the fact that there has been a tendency in other countries and jurisdictions, to portray courts as the agents of undesired or dangerous change must, on occasion, prompt a degree of caution when engaging in constitutional development. I make these observations not as a judicial conservative, but because I think there are times for caution. To everything there is a season. How a state actually functions is dependent upon the values of those who rule and administer that state. This judgment concerns the interpretation and application of the separation of powers, as identified in the Constitution of 1937. Underlying the previous jurisprudence of the courts on this issue is an accretion of wisdom in the process of interpretation by judges who, since

the time the Constitution was enacted, had, to the forefront of their minds, the preservation and protection of the values expressed in that Constitution – again not for judges but to serve the public, including those who, like Mr. Zalewski, have to go to court to vindicate their rights when these have been denied elsewhere. In this process, judges bring to bear their own life experience, and the experience of other judges. It is hardly necessary to reiterate Oliver Wendell Holmes' oft quoted remark that experience, not logic, is the life-blood of the law. Holmes, having warned that the law cannot be dealt with as if it contains only the axioms and corollaries of a book of mathematics, then added "*In order to know what [the Court] is, we must know what it has been, and what it tends to become."* (The Common Law 1881).

54. I start this consideration also bearing in mind O'Dalaigh C.J.'s caution in *McMahon v. The Attorney General* [1972] I.R. 60, that constitutional rights "*are declared, not alone because of bitter memories of the past, but no less because of improbable, but not to be overlooked, perils of the future".* I acknowledge that the jurisprudence, (especially *McDonald*), in relation to Article 34 has been occasionally criticised as lacking a foundational *prescriptive* basis. But, while the judges in the courts do and must consider legal theory, in *practice* we must be empirical and practical. In any process of interpretation, too, courts must have regard to the *improbable*, but not to be *overlooked*, perils of the future. In judicial reasoning, judges will bring to bear not only their experience in interpreting the Constitution, but some knowledge of history and contemporary events which show the ways in which apparently well-established constitutional values can be placed under threat or undermined. Fortunately, this State is not threatened by such political forces in this way, either at present or in the foreseeable future. I engage in this discussion fully acknowledging that there is always the risk that accusations will be made of unnecessary concern, and of judges protecting their own territory. To that I would respond, the courts do not belong to judges, but to serve the People. Ultimately, under the Constitution, the courts provide the forum to right wrongs, and administer justice. Throughout the process he has been ably represented by his lawyers. The events in this case prompt a question as to how the appellant could have vindicated his rights if he had not been legally represented?

Section III

An Article 37 Resolution of the Case

55. This judgment would hold there is a direct route to resolving this claim, based on Article 34 of the Constitution itself, and the established case law. But, it is proposed, there is another route to resolution by resort to Article 37 of the Constitution, holding that, in fact, the Adjudication Officer and the WRC were, in this case, ones exercising limited powers and functions under Article 37 of the Constitution. This requires close scrutiny, both of the intent and effect of that Article. Like Holmes, we must proceed on the basis of what the law has been, and not only what it tends to become, but what it might possibly become. It is necessary, first to look at what the law "has been" regarding Article 37, back to the intention of the authors of the Constitution.

The Original Intentions of Article 37 – The Protection of *Quasi* Judicial Bodies

56. Discerning the "original intention" of the drafters of a constitution is not always a satisfactory method of interpreting the provisions of a living constitution. However, sometimes, such investigations throw much light on the interpretive process. This is such a case.

57. The original intention behind Article 37 was simple. (See Hogan, *The Origins of the Irish Constitution, 1928 to 1941,* p.580 et seq.). The Article was intended, only, to avoid the difficulties and litigation which had been experienced since independence, when the exercise of powers of a judicial, or *quasi* judicial, nature had been challenged in the courts on the grounds that these were matters reserved to the courts. (Hogan, p.581). These included powers exercised by the Land Commission, Ministers, County Registrars, Referees, and persons holding similar offices. In a revealing observation, Mr. Philip O'Donoghue, an official in the Attorney General's office in 1937, stated that the Article "*merely attempts to establish that rulings of such* ***quasi-judicial bodies*** *shall not be* ***upset on purely technical grounds, namely, that they were not judges****"*. (See p.581 *Origins*) (Emphasis added). This limited intent, therefore, was to avoid chaos in large areas of administration, as would deprive of their functions "the numerous Courts of *Referees, Appeal Committees, and Appeals Tribunals"* operating under Acts such as the *"Old Age Pensions Act, National Health Insurance Acts, and Unemployment Insurance Acts."* These were the *quasi* judicial bodies which described the intention of the authors of the Constitution. The note from Mr. O'Donoghue to the then Attorney General, Patrick Lynch, K.C. was in the context of an

amendment to the Constitution then being considered before the Dáil, the effect of which would have been the entire deletion of Article 37 from the Constitution. Perusal of the Dáil Record of 12th May, 1937 shows, among other things, a concern as to how the Article *might* be deployed, bearing in mind the lack of limitations in the text. Be it said, that concern was not warranted. The authors of the Constitution had no such intention. (See Hogan, op. cit. p.41, 63, 84, 333.n.). The powers were to be exercised within the strict terms of the Constitution. (Hogan, p.84). But those who proposed the amendment had concerns as to the potential scope of the Article, as applied in other, future, circumstances.

58. There can be no doubt that the authors saw Article 37 as a saver, or exception, or exclusion, from the fundamental principle established by Article 34 that justice *shall* be administered in courts established by the Constitution. This value, including the open administration of justice, mentioned in the same Article, were seen as fundamental to the independent, democratic nature of the State, and the principle of separation of powers contained in the Constitution.

59. But not all shared this view. There were concerns raised in the Oireachtas about the potential scope of Article 37, at a time when, elsewhere in Continental Europe, the Weimar Constitution, a "parent" of our own, had been subverted by enemies of the rule of law by the utilisation of what was called the "*tactic of legality*", in which the *law* itself was exploited or interpreted in order to undermine the fundamental objectives of the Constitution. The functions and protections which, under the Weimar Constitution, were intended to be uniquely vested in the courts, were, instead, reposed by law in other "*courts*", by an "enabling" legislation. (See *Judges, Transition, and Human Rights*, Morrison ed.: Quinn, *Dangerous Constitutional Moments,* C.12, p.223 et seq).

The State (Ryan) v. Lennon

60. There was, too, another concern, based on recent national constitutional experience. That concern was to ensure that the spirit and intent of the new Constitution could not be undermined by an interpretation which defeated the aims of the new Constitution.

61. In *The State (Ryan) v. Lennon* [1935] I.R. 170, this Court's predecessor had to consider whether, under the terms of the 1922 Constitution, the Oireachtas had an unlimited power of amendment during a transitory period, provided for under Article 50 of that Constitution, which

provision it was claimed, could itself be amended by the Oireachtas, rather than the People. The majority of the former Supreme Court, (Fitzgibbon and Murnaghan JJ.), considered that the Third Dail Eireann, as a constituent assembly, could have exempted Article 50 from the amending powers conferred upon the Oireachtas, but had not done so. Thus, the courts had no jurisdiction to read either into the Constituent Act, or into Article 50, a proviso excepting it, and it alone, from these powers.

62. Chief Justice Kennedy's dissent is memorable. He held that:

> *"... any amendment of the Constitution, purporting to be made under the power given by the Constituent Assembly, which would be a violation of, or be inconsistent with, any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void."* ([1935] I.R. 209)

63. The judgments of the majority of the former Supreme Court, justifying the power of amendment claimed, were so utterly contrary to the spirit and original intent of the 1922 Constitution as should be a cause for reflection in this case, where, to my mind, what is in question is both the spirit and text of the 1937 Constitution. As I have already commented, Ireland is now fortunate. But it is also sometimes the duty of courts to look to what might now seem improbable, but what might possibly occur in the far future. Reading the judgments cited in this case, it is hard not to admire the role past judges have played in interpreting the Constitution, and shaping and guiding the evolution of the State. Some judges of half a century ago might be surprised as to how the nature of the State has evolved. But one feature of the many judgments is striking: it is a judicial reluctance to address the difficult issues of interpretation of what are *quasi* judicial functions by resort to Article 37, though there are some limited exceptions to this reluctance.

The Achilles Heel of the 1922 Constitution

64. Our Constitution of 1937 was specifically intended to avoid the "Achilles heel" of the 1922 Constitution where its authors had not foreseen the possibility of unlimited amendment by the Oireachtas. The question of limitations is always important in any constitutional discussion. A power or function which is stated in terms in a constitution to be "limited" is not to be interpreted in a way which undermines a more general definition of power or function or deprive that general definition of its true effect in spirit and text.

Section IV

Other Relevant Case Law

In re The Solicitors Act

65. Three judgments setting out settled law, form the essential framework for this judgment. These are *McDonald, re The Solicitors Act*, and *Keady*, referred to below. The judgment of the former Supreme Court in *re The Solicitors Act 1954*, actually predates *McDonald*. But it is essential background. In that case, the court had to consider the power provided by the Solicitors Act, 1954, to strike a solicitor off the Roll of Solicitors. Reversing an order of the High Court, the former Supreme Court held that the power to strike a solicitor off the Roll of Solicitors was, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen was a matter which called for the exercise of the judicial powers of the State, and because to entrust such a power to persons other than judges was to interfere with the necessity of the proper administration of justice. The Court held that the powers and functions conferred by the Solicitors Act, 1954 on the disciplinary committee could not be described as merely limited powers and functions of a judicial nature, within the meaning of Article 37 of the Constitution, and accordingly the exercise of such powers was unconstitutional, and the applicants accordingly were not validly struck off the roll of solicitors.

66. In the course of his judgment, Kingsmill Moore J. observed that the power to strike a solicitor off the roll was disciplinary and punitive in nature, even though what was in question was not a criminal cause or matter. It was, however, a sanction of such severity that its consequences might be much more serious than a term of imprisonment. He observed that admission to the roll of solicitors was only attained after a long apprenticeship and training and the attainment of a high standard of legal knowledge. When a solicitor was struck off the roll, all his training and endeavours would go for nothing and it became a penal offence for him to practice as a solicitor. Historically, the act of striking solicitors off the roll had always been reserved to judges. It was necessary for the proper administration of justice that the courts be served by legal practitioners of high integrity and professional competence. On that basis, this Court's predecessor concluded that the power to strike a solicitor off the roll was, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen was a matter which called for the

exercise of judicial power of the State, and because to entrust such a power to persons other than judges was to interfere with the necessities of the proper administration of justice.

67. As we will see, the over-broad scope of this section of the judgment was later limited by this Court in *Keady.* In recognising the important role of administrative bodies in the running of the State, this Court held that application of that part of Kingsmill Moore J.'s judgment should be confined largely to its own facts, and that it could not be said that the large range of administrative bodies by then in existence were engaged in making orders which, as a matter of history, were characteristic of the courts.

68. But I do not think many of the observations in Kingsmill Moore J.'s judgment can so easily be disregarded. He raised legitimate questions as to the potential interpretation of Article 37. The validity of those questions endures. His conclusion was that, in accordance with Article 34, the fact that justice *was to be administered in courts established by law*, by *judges* appointed *under* the Constitution, necessitated that there could be only one corollary: that justice was *not* to be administered by persons who *were not* judges appointed in the manner provided by the Constitution, save in those instances especially excluded by the Constitution. Critically, he pointed out that justice, and what is "administration of justice" were nowhere defined in the Constitution, save that trial of criminal matters and offences was, undoubtedly, the administration of justice, as was clear from Article 38 of the Constitution.

69. But, regarding the text of Article 37, he rhetorically asked these questions:

> *"What is the meaning to be given to the word "limited"? It is not a question of "limited jurisdiction" whether the limitation be in regard to persons or subject matter.* ***Limited jurisdictions are especially dealt with in Article 34(3),(4).*** *It is the "powers and functions" which must be "limited", not the ambit of their exercise. Nor is the test of limitation to be sought in the number of powers and functions which are exercised. The constitution does not say "powers and functions limited in number. Again it must be emphasised that it is the powers and functions which are in their own nature to be limited. A tribunal, having but a few powers and functions, but those of far-reaching effect and importance, could not properly be regarded as exercising "limited" powers and functions. The judicial power of the State is, by Article 34 of the Constitution,* ***lodged in the courts****, and the provisions of Article 37 do not admit of that* ***power being trenched upon, or of its being withdrawn***

piecemeal from the courts. *The test as to whether a power is or is not "limited", in the opinion of the court, lies in the effect of the assigned power when exercised."* (Emphasis added) I return to each of the underlined passages later.

Those questions, especially ones arising from the emphasised words, have never satisfactorily been answered. It is not a sufficient answer simply to assert a power under an Act is "*limited*". Many, indeed most, statutory powers and functions are "limited". One concern posed in this judgment is, the extent to which powers, perhaps concerning fundamentally important areas of law, might be deemed by statute to be *limited* by a statute, when there might be no way under the Constitution of knowing or discerning which areas of law, whether core areas or not, are actually capable of such "limitation".

70. In the 1960 case, Kingsmill Moore J. added that, if the exercise of the assigned power was calculated ordinarily to effect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised, they cannot properly be described as "limited". It was that final passage which this Court later had to limit in *Keady*. This Court observed it went too far and did not have regard to the way in which administrative bodies formed an essential part of the State.

Keady

71. For present purposes, it is useful next to consider in more detail the last of the triad of cases, that is, the judgment of this Court in *Keady*. In that case, a tribunal of inquiry, composed of members of An Garda Siochana, found the plaintiff guilty of a number of breaches of discipline in relation to the falsification of claims for expenses. The plaintiff sought an order of *certiorari* in respect of the decision, on the grounds that the tribunal had acted *ultra vires* in determining upon criminal matters. He also sought a declaration that the tribunal had acted *ultra vires* in the absence of criminal convictions, and that the effect of the tribunal's decision constituted more than a mere exercise of limited functions and powers of a judicial nature, as permitted by Article 37 of the Constitution.

72. In dismissing the appeal, this Court held that Articles 37 and 38 of the Constitution did not operate to prohibit the making of allegations, which might also found a criminal prosecution before any statutory or other domestic tribunal of inquiry. (*The State (Murray) v McRann* [1979] IR 133,

and *Deaton v. Attorney General* [1963] I.R. 170). This Court held that the tribunal of inquiry had power to determine a breach of discipline in respect of breaches of garda conduct. The Court held, crucially, that, having regard to what is described in the headnote as "long and settled authority", the Garda Tribunal inquiry, although obliged to act judicially, did not exercise a judicial function, in that its determination was not upon a contest between parties before it, but an inquiry only, and, moreover, matters of internal police discipline historically had never been reserved to the jurisdiction of the courts in the administration of justice. In so holding, this Court *applied McDonald* as settled law. The Court went on to hold that, unlike the powers of certain tribunals established to regulate the professions, with the powers of disqualification, or striking from the register, and powers to make further professional practice in the absence of proper certification or registration a criminal offence, a garda was appointed to or dismissed from his office by the Commissioner, in accordance with the regulations. In so holding, this Court distinguished *In Re Solicitors Act 1954, and C.K. v. An Bord Altranais* [1990] 2 I.R. 396. In the course of his judgment, McCarthy J. quoted from the judgment of Kennedy C.J. in *Lynham v Butler (No.2*) [1933] I.R. 74. There, the then Chief Justice, identified that the controversies which fall to courts for determination may be divided into two classes, criminal and civil. Chief Justice Kennedy said:

> *"In relation to the former class of controversy, the Judicial Power is exercised in determining the guilt or innocence of persons charged with offences against the State itself and in determining the punishments to be inflicted upon persons found guilty of offences charged against them, which punishments it then becomes the obligation of* ***the executive department of government to carry into effect.****"* (Emphasis added)

73. The former Chief Justice continued:

> *"In relation to justiciable controversies of the civil class, the judicial power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens and the State, or between any parties whoever they may be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. ... It follows from its nature as I have described it that the exercise of the judicial power, which is coercive and must frequently act against the will of one of the parties to enforce its decision adverse to that party, requires of necessity that the judicial department of government have*

compulsive authority over persons as, for instance, it must have authority to compel appearance of the party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property."

74. Having referred to *The State (Shanahan) v. Attorney General & Ors.* [1964] IR 239, and the five tests in *McDonald*, McCarthy J. pointed out that Walsh J. had accepted the characteristic features of a judicial body set out by Kennedy J. in *McDonald*. McCarthy J. indicated that the *McDonald* tests were cumulative, and each must be satisfied. But then McCarthy J. added:

"It was scarcely intended by Kenny J. or by this Court to exclude from the qualifying criteria such matters as were identified by Kennedy C.J. in Lynham v. Butler (No.2) [1933] I.R. 74 - authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property."

These, I understand, were identified by McCarthy J. as being "qualifying criteria", which, too, would constitute the administration of justice. As will be seen, very many of the powers of the AO and the WRC involve precisely those powers.

75. But, importantly, McCarthy J. went on to point out that, for the purposes of *Keady*, test number 5 was not satisfied, that is, that the courts had no role, as a matter of history, in the supervision and disciplining members of An Garda Sioahana. He observed:

"In the case of an office or other position created by statute and held pursuant to statute, in my view the principles stated in In re Solicitors' Act 1954 [1960] I.R. 239 are not to be extended, if they are to be extended at all, so as to embrace the statutory framework which deals with the creation of and appointment to a particular position or rank and not to the wider factor of being qualified to work for gain in a restricted occupation as well, in appropriate cases, as being qualified to hold a particular position or rank. ..."

76. In his judgment in *Keady*, O'Flaherty J. observed that the line of authority established that there was now in place a "*well charted system of administrative law which requires decision-makers to render justice in the cases brought before them and sets out the procedures that should be followed, which procedures will vary from case to case and from one type of tribunal to another and which, of course, are subject to judicial review."* But, O'Flaherty J. did not consider it necessary, on the facts of the case, to embark on any consideration of the concept of "limited

functions and powers". In my view, the fifth test in *McDonald*, together with the limitations contained in *Keady*, militate against any suggestion that any other past, or future, *quasi* judicial bodies might be deemed to be administrations of justice, as properly understood.

Section V

The Established Status of Article 34 Case Law

77. But, additionally, McCarthy J. enumerated the vast number of decisions of the courts which had expressed what he termed the "constitutional prescript" that justice shall be administered by judges in a manner provided by the Constitution. These included *Lynham v. Butler,* cited earlier*; Halpin v. Attorney General* [1936] I.R. 226; *State (McKay) v. Cork Circuit Judge* [1937] I.R. 650; *Fisher v. Irish Land Commission & The Attorney General* [1948] I.R. 3; *The State* (*Crowley) v. Irish Land Commission* [1951] I.R. 250; *Foley v. Irish Land Commission & The Attorney General* [1952] I.R. 118; *Cowan v. Attorney General* [1961] I.R. 411; *Deaton v. Attorney General* [1963] I.R. 170; *State (Shanahan) v. Attorney General & Ors.* [1964] IR 239; *McDonald v. Bord na gCon (No.2)* [1965] I.R. 217; *Garvey v. Ireland* [1981] I.R. 75. He was seeking to emphasise the accretion of consideration which had been given to the issue. McCarthy J. quoted an observation of Davitt P. in *The State (Shanahan) v. The Attorney General* [1964] I.R. 239, to the effect that he had "*certainly no intention of rushing in where so many eminent jurists*" had feared to tread and offer a definition of judicial power.

78. McCarthy J. stated:

> *"I share the reluctance of Davitt P. … to attempt a definition of judicial power; it is easier,* ***if intellectually less satisfying****, to say in a given instance whether or not the procedure is an exercise of such power, rather than to identify a comprehensive check-list for that purpose. The requirement to act judicially is not a badge of such power."* (page 204) (Emphasis added.)

Observations in *O'Connell v. The Turf Club*

79. Years later, in *O'Connell v. The Turf Club*, this Court stated:

> *"There are very many bodies which adopt court-like procedures and which may make orders and determinations which have severe impact on individuals which can far exceed*

the orders made by courts. Furthermore, it must be recognised that the case law on this area is difficult and some of the decisions are not easily reconciled. The line between bodies required to act judicially or fairly, and those exercising judicial functions, is not one easily drawn in any jurisdiction, but is here more complicated by the existence of Article 37." (para. 54.)

But the judgment went on:

> *"It is now* ***however, much too late to seek any comprehensive theory****, even if such was desirable. Instead the resolution of these cases must be found within the existing case law and the guidance which they offer. As the majority of the Constitutional Review Group noted in this regard in its Report of the Constitutional Review Group 1996, (Stationery Office Dublin 1996, at page 155):*
>
> > *"…there is no completely satisfactory answer to the problem raised and … there are great difficulties in formulating a different set of words which deal adequately with these complex issues".* (Emphasis added.) (para. 54)

I think there was much wisdom in each of these observations. For courts, any search for a theory can *only* begin, and be rooted in, present realities, past experience, and take place within the framework of the Constitution governing the courts, and other organs of government. That present-day reality and experience includes the way in which courts have, sometimes with difficulty, sought to define the "administration of justice". As recently as three months ago, this Court delivered an important judgment as to the rights of persons when a decision is made to consider depriving a person of citizenship and whether this was in the nature of a judicial decision. In *Damache v. Minister for Justice* [2020] IESC 63, this Court's comprehensive judgment relied heavily on *McDonald* in its consideration of whether revocation of citizenship was a judicial procedure. (c.f. paras. 39 – 70 of the judgment). The judgment describes the *McDonald* criteria as the "classic test", (para. 64), whereas, here, the Court considered whether the power came within Article 37 of the Constitution, but concluded the power was an executive function.

80. The three quotations cited above speak powerfully as to the established status of the *McDonald* criteria in a profoundly important area of jurisprudence. The evolution of that jurisprudence is comprehensively dealt with in the judgments delivered by my colleagues. The

historic case law is dense. In order to see the wood from the trees, I think the focus must be on what are the key decisions.

81. To again simplify: the five-pronged test in *McDonald* must now be subject to the limitations imposed on it by this Court in *Keady*. The *McDonald* test may not always be satisfactory in jurisprudential theory. But, I would hold that practice and experience show the criteria should be maintained as a fundamentally important safeguard for the rights of individuals going to court – not judges - even accepting criticisms. The criteria are rooted in experience and history. It has been said, by way of criticism, that the tests, especially presumably the fifth one, based on history, may be "circular", but it begins from what courts actually *do*, an essential starting point in an empirical analysis as to the nature of the checks and balances, which, in truth, has troubled courts in many common law nations.

The Attorney General's Submissions on Article 34 and *McDonald*

82. This case requires to be examined in a balanced way, looking at *all* the possible consequences of a potential invocation of Article 37, from all standpoints. I begin with the Attorney General's important submissions.

83. The Attorney General appeared for all the respondents in this appeal. He deserves thanks for this, and for his reminders to this Court concerning the values protected and served in the *McDonald* decision. In this appeal, he argued that the procedures under s.41(5) of the WRA 2015 did not satisfy either the fourth or fifth tests of *McDonald*, and, therefore, did not constitute the administration of justice. For the reasons now set out in this judgment, I respectfully differ from the conclusions he would seek to draw concerning how the fourth and fifth limbs of *McDonald* should be applied.

84. But those submissions are, nonetheless, of fundamental importance. They transcend the significance of this one case concerning the constitutionality of procedures in one Act of the Oireachtas. Based on his specific experience, and vantage point, the Attorney General submitted that *McDonald*, as now mediated by *Keady*, posed no insurmountable problems for the evolution of the administrative state. It is hard to think of more reliable expert testimony on the concrete reality of the issue. The Attorney General submitted with great force, that the current formulation of *McDonald* should be maintained. I do not think his cautions should be ignored. *Pace* criticisms

occasionally levied against *McDonald*, he submitted that the judgment, as a matter of fact, based on experience, provided a balance between the different relevant considerations that needed to be applied in the application of Article 34 of the Constitution. He pointed out that the test contained the flexibility necessary to allow for the development of the law. In fact, it could, in some senses, be seen as a far-reaching test, or at least one which gave a structure, within which Article 34 could be interpreted, which nonetheless managed to contain a certain flexibility, as it envisaged that, not only would the law develop, but that the spheres of operation and responsibility of other organs of the government could also develop. The Attorney General submitted that the decision in *McDonald*, as now seen through the prism of *Keady*, actually encapsulated a core principle of the Constitution and of government in its broadest sense; that core principle being that the separation of powers should not stand in the way of new institutional approaches to a social, economic or political problems that had been addressed by other organs of government. The regulatory aspect that now pervades so many of the rights and obligations of different sectors of society simply could not be conducted by the standards and efficiencies required consistent with the Constitution itself, if one took a narrow view of what had been intended within the meaning of Article 34. The Attorney General submitted that, rather than ticking any one of the five tests in *McDonald*, they should, rather, be applied cumulatively. I agree with that submission.

85. But what he said in relation to Article 37 is no less relevant. He submitted that a reliance on Article 37 could lead to having to see that Article as "a prism" through which one assessed the accretion of power in the judicial sphere, and then determining the effect on the individual affected. This, he submitted, would create difficulties in legislation, and would be *to introduce an entirely different test from McDonald, whereby the concept of justiciability became the touchstone of whether or not a particular decision-making function came within Article 34 – an idea which had never been suggested previously*. This would overlook both the fourth and fifth criteria in *McDonald* and involve an abandonment of that *established authority*. The importance of these submissions cannot be overstated.

<u>The Respondents' Case on Article 37</u>

86. It must be said that, at minimum, there was something of a tension between the respondents' primary case, supporting Simons J.'s conclusions on the fourth limb, and opposing his conclusions on the fifth limb, and the respondents' alternative, fall-back position involving

reliance on Article 37 as a constitutional justification for the WRC functions. The Attorney General expressed strong reservations on resort to Article 37. But, in fact, the respondents' case relied on both *McDonald, and* Article 37, contending the AO was exercising a limited power or function.

87. In her able argument, Ms. Catherine Donnelly, S.C., who also appeared on behalf of the respondents, outlined circumstances in *which, were it thought appropriate,* the Court might adopt the approach that what is in issue here is the administration of limited judicial powers under Article 37 of the Constitution. She correctly pointed out that, quoting from Johnson J. in *Lynham v Butler (No.2*) [1933] IR 74, that it was illusory to ask the courts to judge at first instance every minor matter of dispute arising out of the greatly extended and articulated administration. Ms. Donnelly S.C. submitted that the Court should look at the scheme of the WRA 2015, and the objectives, including simplification and integration of mechanisms, and the pathways to redress. These included a system that was "non-legalistic" that encouraged compromise and agreement. The aim is to have access to an adjudication body, which was informal, with the appropriate assistance on the presentation of the facts. Thus it was that the legislation included dispute resolution procedures and facilities. The primary objective is to seek resolution of disputes close to the workplace level. This is to be done in a non-legal informal basis, to encourage compromise and agreement. These are, she submitted, legitimate objectives for the legislature to pursue. I entirely accept that, in themselves, these are legitimate policy objectives. But I do not understand why it is said Article 34 of the Constitution stands in the way of such aims and objectives. Article 34 does not stand as an obstacle to pre-trial mediation, or for that matter court procedures aimed at resolving issues without resort to a full hearing.

Observations on Article 37

88. Nor can it be successfully argued that the structures created by the WRA 2015 are necessary for the vindication of entitlements under the Act. This argument confuses means with ends, policy with the words of the statute. The *desire* was to provide a system of resolution of employment disputes which is sufficient, timely, and minimises costs. But there is nothing in the respondents' case to suggest that these same objects could not be achieved in a constitutionally compliant manner. For example, the simple step of adopting procedures which are clear and constitutionally compliant, but which achieve those same ends. (See, for example, the rules governing the Commercial Court). Different procedures would not alter the statutory rights set out

in the Act. The abrogation, or non-observance, of earlier procedures laid down for the Employment Appeals Tribunal, could, in any given case, certainly obstruct the attainment of entitlements for workers, as much as, potentially, for respondents.

89. As to the words of Article 37, she submitted that the limitations in question there were such as might render it appropriate to characterise the power here as being "limited". But, she submitted, one could not simply adopt it. The issue in the *re Solicitors Act* was not only the question of earning one's profession, but the severity of the sanction, containing a disciplinary element, which brought it outside the scope of being the exercise of a limited jurisdiction.

90. These, too, were significant submissions in the context of this case. They again raised the question, what *limitations* can be found in Article 37, or elsewhere in the Constitution? But I think the difficulties in favouring an Article 37 resolution in this case go very far. I turn then to the manner in which this case can be resolved by the application of established case law, rather than by resort to an idea which has "never been suggested previously".

Section VI

Simons J.'s Conclusions on the Fourth *McDonald* Criterion: Enforcement of Rights or Liabilities

91. There is no dispute in relation to the first three *McDonald* criteria. They are satisfied. The question under the fourth heading can be simply put. It is whether the decision of an administrative officer can be enforced by the executive power of the State, which is called on to enforce that judgment? Contrary to the submissions of the respondents, I would answer "yes" to this question. The text of s.43 has been set out earlier. It provides that, if an employer fails to carry out the decision of an AO, then an application can be made by the employee, or trade union, or excepted body to the District Court who, *without hearing the other side, or any evidence,* other than in relation to the making of the decision, can make an order directing the employer to carry out the decision in accordance with its terms. The District Court may, instead of making an order directing the employer to carry out the decision, direct the employer to pay to the employee compensation of such amount as is just and equitable, having regard to all the circumstances, but not exceeding 104 weeks' remuneration. Furthermore, the court may award interest pursuant to the s.22 of the Courts Act, 1981. But then, in the event of further non-compliance, without just excuse, the WRC

itself is empowered to bring a criminal prosecution against a respondent where, on conviction, such respondent may be liable to a fine or imprisonment. It is necessary to look at s.43 in combination with s.51. Does s.43 offend *the Constitution* of 1937, or just one Article of the Constitution?

Section 43 of the WRA 2015

92. Where the State respondents' argument falls down is that the wording of s.43 is not incompatible with the argument made seeking to justify it. The rationale for this section can only be a legislative or drafting concern in relation to the administration of justice, as in *McDonald*. The fourth limb is "*the enforcement of those rights or liabilities, or the imposition of a penalty by the court or by the executive power of the State, which is called in by the court to enforce its judgment*". Simons J. concluded, with hesitation, that the area of discretion permitted by s.43 of the WRA 2015 was sufficient to render that section, and the procedure flows from it, constitutionally firm. I respectfully disagree. In a key finding, Simons J. concluded: "*A decision maker who is not only reliant on the parties invoking the judicial power to enforce its decisions, but whose decisions as to form of relief are then vulnerable to being overruled as part of the process cannot be said to be carrying out the administration of justice.*" I do not agree that what can be invoked here can be characterised as "*the judicial power*", in the sense of a court carrying out its function as a court recognised under the Constitution. Nor do I agree that, within the rigid limitations contained in s.43 of the Act, it can be said that, in considering remedy, the District Court could be said to be carrying out a judicial function, where fair procedures are a fundamental requirement. Very similar procedures were struck down in similar circumstances by this Court. (See, for illustration, *DK v. Crowley* [2002] 2 I.R. 744). The procedure here cannot be justified, either on the basis of fairness, or proportionality.

93. Instead, the District Court, for enforcement, is restricted to the process set out in s.43 of the Act, which simply cannot be seen as being ones where a court carrying out a judicial function. But s.43(1) involves a near-total restriction on the right of fair procedures. I agree with O'Donnell and Charleton JJ. who also hold in their judgments, that its effect is to allow for a mechanism whereby the court is called upon by statute to exercise a power and function which, by any standard, cannot be seen as a court exercising a *judicial* function, having regard to the principle of *audi alteram partem*, fair procedures, or the right to summon witnesses and cross-examine. Thus,

the question is whether this power can be said to be the invocation and exercise of a *judicial* power "making the vital decisions" under the Constitution? If it was, it could be said that an ultimate decision on the merits could be made by a court of law exercising fair procedures. This is not a *judicial* power.

94. The intent behind s.43 was to provide "a protective" constitutional umbrella to the procedures, by providing that ultimately, resort could be had to a court. It fails in that aim, but simply because the District Court is not acting as a court, but, rather, in an administrative capacity. I do not agree either that the fact that the District Court can modify an AO's order on redress, can be seen as a significant judicial curtailment of the statutory power. At best, it is unclear how, and on what basis that power could be *judicially* exercised, having regard to the way in which the power of a District Court is so limited by s.43(1)(a) and (b). So also the exercise of the power under s.43(2) must operate within the constraints set out in s.43(1)(a) and (b).

95. Prior to the WRA 2015, a right to appeal to a court on the merits was, it is clear, assumed to be a potential constitutional protection. It was adopted in the UDA 1977 in order to avoid running afoul of Article 34. The importance of this assumption can be easily shown. In *Keady*, McCarthy J. quoted from, and distinguished, the judgment of this Court in *CK. v An Bord Altranais* [1990] 2 I.R. 396, a case arising under s. 38 of the Nurses Act, 1985, where the Court was considering a procedure contained in that Act for the regulation, registration and disciplining of members of the nursing profession. But, in the course of his judgment, Finlay C.J. observed that:

> *"... it is in **the court**, namely, the High Court, that the decision effective to lead to an erasure or suspension of the operation of registration must be made. The necessity for that procedure to vest that power unequivocally in the court, in my view, arises from the constitutional frailty that would attach to the delegation of any such power to a body which was not a court established under the Constitution, having regard to the decision of the former Supreme Court in In re Solicitors' Act 1954 [1960] IR 239."* (p. 403.) (Emphasis added)

96. Finlay C.J. went on to say:

> *"In order for the court to be **the effective decision-making tribunal leading** to a conclusion that the name of a person should be erased from the register, or the operation*

of registration should be suspended, it is, in my view, ***essential*** *that, having regard to the particular facts and issues arising in any case,* ***it is the court who should make the vital decisions****".* (Emphasis added.)

It was the "*fact*" that a court has made the final decisions that was seen as providing compliance with Article 34.

97. Along with the fair procedures enshrined in Regulation 13 of S.I. 24/1968, the fact of a potential appeal on the merits militated against a constitutional challenge to the UDA 1977 on the basis of non-compliance with Article 34, despite some doubts expressed *obiter*. (see *Canada v. Employment Appeals Tribunal* [1992] 2 I.R. 484). In enacting the WRA 2015, the legislature, and those who were to administer the WRA 2015, departed from those protective measures provided for in the 1977 legislation, and by statutory instrument, not carried forward.

98. Like many of the provisions of the WRA 2015, s.43 espoused the good intention of protecting claimants from ruthless employers. But, to my mind, the section seeks to achieve its intention in a manner which simply could not withstand constitutional scrutiny. The process set out in the section denies the right of *audi alteram partem* to a respondent. It could not be characterised as a court administering justice. The section is, rather, a legislative devise. The process, as laid down in s.43, lacks the fundamental elements of justice and constitutional fairness, which would have to include in such a process the implementation of the constitutional guarantee that both sides can be heard. It is incapable of being understood as having any other purpose. But, not only that, it requires a District Court to carry out an assessment as to whether or not reinstatement should, or should not, be ordered, in circumstances where no right of audience is provided for. It is incapable of being understood as having any other purpose or meaning.

The Fifth Limb: Orders "as a matter of history characteristic of the courts"

99. As to the fifth limb of *McDonald*, I would uphold Simons J.'s conclusion that the fifth limb is satisfied. I accept his analysis. Having considered the issue in great detail, he concluded:

"The hearing and determination of employment disputes, and the making of orders thereon, is something which is characteristic of the business of the courts. This is evident from the fact that for almost forty years prior to the enactment of the WRA 2015, the Circuit Court had heard and determined claims under the UDA 1977, whether by way of a full

appeal or by way of an application to enforce a determination of the Employment Appeals Tribunal." (paras. 101-121 of the High Court judgment).

100. I think his findings that employment law has always been the business of the courts is correct. I do not agree with the respondents' submissions that the WRA 2015 can be seen as a self-contained code, to be seen as segregated, separate and distinct from the general area of employment law. While I agree that the courts will not entertain a claim for unfair dismissal, under the legislation, the line of distinction between unfair dismissal, the business of the WRC, and wrongful dismissal, the business of the courts, is too thin to be meaningful as an escape from the fifth limb. The judgments of my colleagues also set out reasons with which I respectfully agree.

The Five *McDonald* Criteria are satisfied

101. In this case, there are areas of agreement between the judgments. As I understand it, there is consensus that the five tests, as set out in *McDonald*, are satisfied, and consequently the procedures under question here are incompatible with Article 34.1 of the Constitution. The enforcement measure comes as near to automatic as is possible, and does not allow for input by a losing party. The District Court, as O'Donnell J. comments in his erudite judgment, is seen as a vehicle for enforcement, but is not deployed for its capacity to administer justice. Instead, the court process is "conscripted" in aid of the enforcement of the decision of the WRC (para. 95 of his judgment). Thus, the process cannot be an administration of justice, as it does not contain any of the essential ingredients of fair procedures (para. 97). The fifth limb is satisfied. Thus, the judgments are agreed that the functions of the WRC are the administration of justice. Charleton J., in his judgment, agrees with this conclusion. As I point out later, I am not sure how this finding, that the enforcement procedure cannot be an administration of justice, is necessarily compatible with the conclusion that the enforcement procedures constitute a limitation on the power of an adjudication officer, as set out in s.41(5) of the WRA 2015.

102. To my mind, until these important issues can be considered further, and in greater detail, I think the arguments in favour of the maintenance of *McDonald*, as now understood, are overwhelming. Experience shows that the test has withstood the test of time, as the Attorney General submits. Properly understood, the principles identified do not stand in the way of necessary work of *quasi* judicial bodies, which, historically, were never part of the business of the courts, or were to be excluded from the ambit of Article 34. Those same principles, to my mind,

would not stand in the way of other *quasi* judicial bodies operating in new areas which were never the business of the courts. The principles are based on a series of judgments, where the courts have had to consider, an admittedly difficult question of the identification of judicial power in the context of the *administration* of justice, rather than a theoretical consideration of the problem.

Section VII

The Choice and Consequences

103. This is a case where it is essential to maintain a clear focus on the main issues. The Court is faced with a choice. But every choice, including those made in constitutional interpretation, entails a sacrifice. We should not sacrifice the substance or intent of Article 34. If the application of the logic of *McDonald* has the effect of arriving at a conclusion that the WRC is engaged in the administration of justice, I would conclude that its procedures, devoid of any protection as they would be by the flawed s.43 of the Act, are contrary to Article 34.1 of the Constitution.

104. The question then is how the Court should proceed? In the course of his comprehensive and detailed judgment, O'Donnell J. quotes from an extraordinarily interesting and thought-provoking work of legal and political philosophy. The author criticises *McDonald*, as providing only a *descriptive* summary of the everyday workload of the contemporary court, and that it does not offer a suitably *prescriptive* analysis of the core concepts of the judicial function. It is said the logic of the judgment is "hopelessly circular", as it relies on the current nature of the court's activities. A criticism is made that the categorisation of institutional power should be carried out on a case by case basis, despite the fact that this "easier if intellectually less satisfying" approach has been adopted by U.S. and Irish courts in several cases. These important observations must be cause for reflection. But, to be candid, I find the fact that *McDonald* provides a "descriptive" summary to be unsurprising. It is hardly a valid, practical, criticism, as that judgment is *predicated* on an analysis which must, of necessity, start from the reality of court business, which, in turn, reflects the *reality* of the society within which courts must function. Any identification of a process by a court must begin with what *is* the work which the courts actually do. An analysis by a court cannot begin with a clean slate, or a rejection of the accretion of case law, history, and experience. The work of the courts is a reflection of the society in which the courts must operate, framed by the concepts underlying the Constitution from the beginning.

105. Courts are constantly engaged in an empirical day-by-day process of self-definition by the demands placed upon them. In that sense, any approach to a definition of court functions must always be based on practical reality, and historical accretion. Any critique or reasoning must be seen in the light of its ultimate end point or object, which, in this instance, advocates a *new theory* of *separation of powers*. But the *foundational principle* within which the courts *actually* operate is set out in the Constitution itself. This reflects Montesquieu's thinking as realised first in the Federal Constitution. I think that any argument that the tripartite principle now fails to acknowledge a substantial tranche of government activity, including *quasi* judicial decision-making, or other administrative procedures, must, for the purposes of this case, be seen in the light of the Attorney General's submissions that *McDonald*, as explained, should be maintained, and that the judgment, as now understood, poses no real obstacle to the necessary extensions of administrative government. I agree, as the Attorney General submits, that an understanding of Article 34 should not be gleaned from the context of judicial observations regarding the separation of powers made in other jurisdictions, in different eras. The consideration in this judgment is confined to decisions of our own courts, and not only referring to history and experience, but speaking to what are contemporary and, potentially, future issues. Not all references to past experience lead to a restrictive interpretation of a constitution. The concerns in this judgment are contemporary ones, and arise from future possibilities.

Uncertainty

106. One deep concern, arising from proceeding to an Article 37 resolution of this case, is that, as Kingsmill Moore J. pointed out, it gives rise to uncertainty. From the standpoint of the State, I see the force of the Attorney General's submissions. These speak powerfully against the adoption of what he described as what would be an "entirely new test", distinct from *McDonald*. I would say the same, even if what was suggested is a "softening" of *McDonald* in the way suggested in the judgment of the majority. My apprehensions are increased by the fact that, by the same steps of logic, it might be possible, *by statute*, to engage in a process of legislation which, itself, might, potentially, have the effect of "hollowing out" Article 34 of the Constitution. A process which might lead to a near equivalence between the administration of justice, under Article 34 of the Constitution, and judicial powers subject to limitations, under Article 37 of the Constitution, begs the question of where, precisely, would the limitations be drawn? I pose the question, considered

later in more detail, whether, even having regard to the precept that in interpreting a constitution there must be scope for flexibility at the points of intersection, that this could be the correct course of action for this Court to adopt in this case? I pose these concerns, too, in addition to those expressed by the Attorney General, as to the difficulty from the respondents' standpoint in drafting legislation in defining what the limits might be, and where the line between Article 34 and Article 37 should be drawn, and what duties of compliance with fair procedures, or otherwise, might be entailed.

Identifying Core Areas of Law

107. During argument in the appeal, there was some limited discussion as to the consequences of a departure from, or a softening of, *McDonald*. This, in turn, gave rise to a consideration as to whether there were core areas of law which could not be taken away from the courts. It is no criticism of counsel to say this discussion was rather inconclusive and speculative. Examples were given of what might be core areas, such as the whole area of administrative law, or the common law in large part. I am unable to see why these particular areas might be seen as definitively ones which could be described as core areas, and many other areas which would not fit in that description. Perhaps, a distinction might be made on areas governed by statute, and those not so limited. The reason for this difficulty is self-evident. There are *no* objective constitutional criteria for determining what are such core areas. I revert to the rhetorical question posed by Simons J. If legislative change of the type involved in the WRA 2015 could it be done in one significant area of law, then, in principle, it could be done in other areas of law? Simons J. instanced family law or commercial law. There were just examples. Neither Article 34, nor Article 37, contain any constitutional limits. It is true, criminal law is precluded by the terms of Article 37. But, with that one exception, I, too, pose the question, could other important areas of law be legislatively re-classified "by (statute) law", even those involving fundamental rights, with their scope categorised *by legislation* by an Oireachtas as "limited functions"? At some future time could some future Oireachtas define by statute *other* areas of law as "limited" in their area, or exercise, or by the limited extent of the remedy? I do not say this would, or will, ever foreseeably happen. I do not suggest that any foreseeable government would seek to adopt such a course. But I do not see why this Court should adopt a course of action involving a substantial departure from established

precedents in a constitutional area which has the potential to affect both the State and the rights of citizens and individuals who must have recourse to the courts in the protection of their rights?

Absence of Constitutional Limitations

108. This question is not fanciful or speculative. In his comprehensive submissions, the Attorney General addressed the possibilities that there could, in the far future, be some cynical attempt by a legislature to remove core administrative or judicial functions, and to "dress them up" in some way. He submitted such circumstances would require a different approach by this Court, but that this consideration did not arise in an assessment of the jurisdiction of the District Court, as it raises under s.43 of the WRA 2015, in this case. I am not convinced that this concern should be thus confined. I think this issue certainly arises more broadly in the context of an Article 37 resolution of the case.

109. I find it hard to escape a sense that a different approach does indeed involve something "new" in terms of the norms of constitutional interpretation. I would emphasise, it is the *provisions* of *the* WRA 2015 which fall to be examined by reference to the Constitution and long-established principles of law: not a converse approach. I see a theoretical case can be made for reviewing the dividing line between Article 34 and 37 – the concept is theoretically and intellectually attractive - but this cannot be at the expense of depriving Article 34 of its spirit and substance. If there is one thing that is absolutely clear, it is that the authors of the Constitution were of the view that there must be a distinction, even if sometimes a difficult one to draw, between the administration of justice under Article 34, and the exercise of limited judicial powers under Article 37. They were seeking to establish a republic governed by the rule of law, the Constitution of which would be proof against modification or amendment, save by the People.

110. I do not think that it is necessary for the just resolution of Mr. Zalewski's case that the procedures under the WRA 2015 should be "re-categorised" under Article 37 of the Constitution, especially when the extent to which the administration of justice of the WRC can be characterised as "limited" under Article 37 has not been fully explored. Like Kingsmill Moore J., and McCarthy J., I think this raises the spectre of uncertainty.

The Order later proposed in this judgment

111. As will be seen later, I would hold that, for the purpose of doing justice in this case, what was in question was an administration of justice, where the appellant was entitled as of right to the full range of *Re Haughey* principles. I re-emphasise, without going further, that neither s.43 of the WRA 2015, nor any provision of that Act, provide that the decisions in issue in *this* case would be capable of an appeal on the merits by a court of law. The provisions governing appointment and determination of presiding officers are not sufficient to guarantee judicial independence.

An Article 37 Resolution of the Case: The text of Article 37: Limitations

112. I turn to a consideration of the limitations, as they are to be found in Article 37. I now consider the issue from a somewhat different standpoint than that set out in the Attorney General's submissions, to which I will return.

"Other than criminal matters …"

Core Functions

113. As touched on earlier, the concerns I have in relation to the application of Article 37 include, but are not limited to the fact that, in the range of the legal areas – whether they are deemed to be core functions of the courts or not – it might be possible to legislate so as to reclassify that area so that, by reason of legislative limitations "by law", be deemed "*limited functions and powers of a judicial nature …, by any person or body of persons duly authorised* ***by law*** *to exercise such functions and powers notwithstanding that they are not judges …"*. (Emphasis added) With the exception of criminal law, Article 37 itself contains no specific limitations on what areas of law, whether fundamental rights or otherwise, might, potentially, be placed within its scope. This is so despite the "original intent" of Article 37 being very limited. Are there other reasons why the Court should not adopt an Article 37 resolution? I think there are, potentially. I offer a number of instances merely as illustrative of a more general concern.

Cowan v. Attorney General

114. In *Cowan v. The Attorney General* [1961] I.R. 411, (adverted to in the High Court judgment), the plaintiff was elected a member of Dublin City Council. Subsequently, his election was the subject of an election petition on the grounds that he was disqualified by law from seeking

election. A practising barrister was elected on to an election court to try the petition. In an action by the plaintiff seeking, *inter alia*, a declaration that such assignment was unconstitutional, Haugh J. held in the High Court that the purported assignment of the election petition to be tried by the barrister was repugnant to, and *ultra vires*, the Constitution because (i) the election court might make findings which would affect the life, liberties, fortunes or reputations of individuals; and (ii) t*he election Court might exercise its jurisdiction in matters partly criminal*. As a consequence, the High Court held that the impugned sections of the various Acts that permitted a practising barrister be selected as an adjudicator in this case were repugnant to, and *ultra vires*, the Constitution. (*In re Solicitors Act 1954* applied).

115. In the course of its judgment, Haugh J. held:

> *"I am of opinion that the* [election] *court, availing of all the powers and duties conferred upon it in its ordinary day-to-day exercise of its powers and functions, is in fact not exercising the limited functions and powers allowable by Article 37, and is therefore unconstitutional."* (p. 423.)

116. In so finding, the judge was adopting much of the phraseology used by Kingsmill Moore J. in *Re Solicitors Act*. However, more relevantly, Haugh J. then went on to observe:

> *"Assuming for the purpose of my further observations, that the exercise of its powers is of a limited nature in the manner envisaged by Article 37, a further important question arises.* ***Does that court exercise even part of its powers and functions in matters that are criminal****? From the pattern of the Acts as a whole it seems to me that the court's right to assume its criminal jurisdiction, at any time, should circumstances so warrant, is one that cannot be taken away from it without doing something that was contrary to the intention of Parliament. And it is beyond question that the court has power to try persons on matters that are criminal and to fine and imprison a person whom it convicts on a criminal charge. ..."* (Emphasis added, p. 423.)

117. Later, he said that he felt:

> *"... compelled to hold that an election court, even if only exercising limited functions and powers of a judicial nature, must of necessity be ready at all times to exercise its powers in the criminal matters assigned to it - either of its own volition or at the request of the*

Attorney General - a function that is expressly prohibited by Article 37 of the Constitution. For these reasons I must hold that the election court when it sits to hear any matter is unconstitutional. …" (p. 424.)

118. In so finding, Haugh J. was persuaded by the arguments of Mr. T. J. Conolly, S.C., a pre-eminent advocate in the development of Irish constitutional law. The judgment was not appealed, as is pointed out in *Kelly* on the Constitution.

Enforcement

119. Again, for the purposes of this judgment, I go no further than to observe, as was pointed out earlier, that an AO is, under the WRA 2015, an official of the WRC. But it is the WRC which, having engaged in adjudication becomes also the prosecuting authority, for the purposes of a prosecution for the criminal offence of non-compliance with a District Court order. While the WRC may not be the decision-maker in this context, it is certainly granted by statute a deep engagement in a criminal matter. (See the passage from *Lynham v. Butler*, quoted earlier). Section 51, quoted earlier, provides that it shall be an offence for a person to fail to comply with an order under s.43, or s.45, directing an employer to pay compensation to an employee. Section 43 deals with the decision of an AO. Section 45 deals with a decision of the Labour Court.

120. This was not an argument advanced by the appellant, nor could it be, in his case. It is, however, are potential unforeseen potential consequence of categorisation of the functions of the WRC under Article 37. I make no comment on whether this Court would necessarily uphold the *Cowan* decision in its entirety. I confine myself to saying that it speaks to the inadvisability of a re-categorisation of the powers and functions of the WRC under Article 37, without due deliberation. The question, therefore, is twofold. When engaging in enforcement, would the WRC be engaged in "limited" functions? Would these functions be "criminal" matters? (c.f. Article 37).

121. I express this concern with caution. I do not say these considerations are definitive. There are authorities which might appear to be of contrary effect. (*The State (Murray) v McRann* [1979] IR 133; *Gilligan v. Governor of Portlaoise Prison*, 12th April, 2001, High Court, McKechnie J.; *Keady*; *Goodman International v. Hamilton (No. 1)* [1992] 2 I.R. 42). It may be said *Cowan* was distinguished in *Keady*. Similar concerns have arisen elsewhere in the case law, such as in *Melling v. Ó Mathghamhna* [1962] I.R. But I do think these observations show that a reasoning process

based on re-categorisation is, itself, fraught with difficulty, and not consistent either with the spirit of either Article 34 or 37, or, to use the interpretive term *expressio*, the "*expression"* of a firm principle concerning the role of the judiciary contained in Article 34. I accept that other long-established bodies, fundamentally important to the State, have extensive powers involving adjudication and enforcement. In some cases, such enforcement powers have been held by the courts to be non-criminal in nature. (cf. *McLoughlin v. Tuite* [1986] I.R. 235). But, in fact, these would not come within the scope of the fifth limb of *McDonald*. These included those bodies described by the authors of the Constitution for the limited purposes described by those authors. A further illustration assists in the consideration of whether the process can now be seen as "limited".

"Limited Functions and powers …"

Minister for Justice v. WRC

122. The learned editors of Kelly comment that, hitherto the courts have understood the meaning of "limited" as meaning "modest or not far-reaching". But the editors also comment, perceptively, that the words leave much room for subjective interpretation, since there appears to be no objective criterion for any of these notions. (Chapter 6.4.101). Can it be said the powers of an AO are "modest", and not "far-reaching".

123. In the judgment of the CJEU in *The Minister of Justice v. The Workplace Relations* Commission (Case C-378/17), the Court of Justice, tasked with determining the direct effect of E.U. equality law in the context of a reference from the WRC, held that the primacy of E.U. law meant that national courts (within which category it included the WRC) must be under a duty to give full effect to the provisions of E.U. law even when in conflict with national law, and without requesting or awaiting the prior setting aside of that provision of national law by *legislative* or other *constitutional* means. The CJEU went on to say that it had repeatedly held that such a duty to dis-apply national legislation was binding on "all organs of the State, including administrative authorities called upon within the exercise of their respective powers to apply E.U. law" (para. 35 and 38). But the court also held that, insofar as the WRC must be considered as a court or tribunal, within the meaning of Article 267 TFEU, it could refer to the court questions of interpretation, or relevant provisions of E.U. law, be bound by the judgment of the court, and forthwith apply that judgment, dis-applying, if necessary, of its own motion, conflicting provisions of national

legislation (para. 47). The court ruled that rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of E.U. law. Thus, an AO would have the power to disapply national law. I contrast this with Article 34.3.2 of the Constitution, which, in terms, limits the jurisdiction to raise the question of validity of any law under the Constitution to the High Court, the Court of Appeal, or the Supreme Court, and precludes such issues being raised in courts, save those courts. Thus, such questions cannot be raised in courts of local and limited jurisdiction established under Article 34.3.4 of the Constitution. This surely speaks very strongly against any proposition that an AO can be operating "modest", or "limited" powers.

124. I acknowledge that such duties may arise from membership of the European Union, but I find it impossible to conclude that such an extensive power could be reconcilable with the provisions of Article 37 of the Constitution, which have hitherto been understood to be modest, and not far-reaching. I do not think it is a response to say that now other statutory bodies, many of which deal with new areas of law never part of the business of the courts, are under a similar duty. The question is, what do the words of Article 37 mean? The word "limited" must have a concrete application, and from the standpoint of the State and its People, must be capable of clear definition as an aspect of the rule of law which requires certainty.

The Text of Article 37

125. I accept that the WRA 2015 was intended with the intention of protecting rights of vulnerable employees. But that good aim cannot obscure the consequences which flowed from the attempt to achieve that aim. In summary, and at its heart, this case concerns a matter of constitutional interpretation. Article 34 of the Constitution expresses a fundamental principle in the clearest of terms. It is that "*justice **shall** be administered in courts established by law by judges appointed in the manner provided in the Constitution …"*. The mandatory expression of that principle, reflected in the word "*shall*", is clearer still in the Irish version of the Constitution, which provides:

> *"Is i gcúirteanna a bhunaítear le dlí agus ag breithiúna a cheaptar ar an modh atá leagtha amach sa Bhunreacht seo **a riarfar** ceart, …."* (Emphasis added)

Literally translated, this is:

> *"It is* ***in courts established by law and to judges appointed in the manner set out in the Constitution*** *that justice* ***shall*** *be administered ...".* (Emphasis added)

This principle is an expression of a fundamental principle of the Constitution, in turn, referable to Article 6, which identifies the tripartite nature of the arms of government.

126. By contrast, Article 37 is, it is clear, a saver. It provides that:

> *"Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."*

127. The ambit of power and function, contained in Article 34, is not only clear, it is supported by the remainder of that Article, which sets out the structure and the constitutionally based jurisdictional limits of other courts established under the Constitution, and by law. In Kelly, it is suggested that Article 37 may have confused rather than clarified matters. (See The Irish Constitution, 6.4.7). Elsewhere, in Bennion, *Statutory Interpretation*, 4th Edition, it is suggested that saver clauses are an unsatisfactory guide, as they may throw doubt on which matters are intended to be preserved, but which are not mentioned in the saver. This concern is not, I think, confined to statutes.

128. The judgment of the majority (para. 106 et. seq.), concludes that, although Article 37 does not define either the area of administration of justice, or the "subset" covered by this saver, it is nonetheless clear that justice may be administered by bodies which are not courts, and by persons other than judges in non-criminal cases. However, such exercise must constitute the exercise of limited functions and powers of a judicial nature. I do not know how this conclusion can be reconciled with the words and intent of Article 34.

129. Earlier, this judgment quoted the passage from Kingsmill Moore J. in *Re Solicitors Act 1954*. The judge of the former Supreme Court was there engaged in an interpretation of Articles 34 and 37. The judgment identified what was contained in Article 34 as the *expression (expressio)*

of principle, and Article 37 as the saver, or exception. This is not only consistent with the principle of constitutional interpretation, but also with the concept of a harmonious interpretation of the Constitution, whereby an interpretation of one Article should not do violence to an interpretation of another. The Constitution must be seen as a whole. It must look to the fundamental purpose of each provision. The "fundamental purpose" of Article 34, to use Henchy J.'s phrase in *Tormey v. Ireland*, is to give expression to the powers and functions of the third arm of government, that is, judiciary.

130. I believe that the judgments are *ad idem,* that s.43 WRA 2015 is inconsistent with Article 34 of the Constitution, as identified by the "*McDonald/Keady"* criteria. One question which might logically follow is whether it can be said that s.43 is repugnant to the Constitution, or whether, rather, it is saved by Article 37 of the Constitution, and is to be seen, in fact, as one of the limitations on the functions exercised under s.41?

131. I here pose some consequential questions which I find difficult to resolve. The first is whether s.43(1) and (2) are *also* repugnant to Article 37? If they are not, is the consequence that they become surplusage? If these provisions of s.43 are *also* repugnant to Article 37 of the Constitution, by reason of flawed and questionable procedures, what is the consequence to the procedure under s.41(5) or s.43, and s.51, seen together? Can s.43 be seen as a limitation on the powers set out in s.41(5) of the WRA 2015.

Consequences of an Article 37 Resolution of this case

132. I see further difficulty in the steps whereby it is said that the procedure can be located within Article 37. It is suggested that, whatever Article 37 permits, it must be capable of being the administration of justice, which means, at a minimum, a State sponsored decision-making function, capable of delivering a binding and enforceable decision. I am uncertain how that is reconcilable with s.41(5) and the intent behind s.43, given the flaws in the latter. The judgment of the majority holds that the background to Article 37 points to a broader understanding of the text, and that the exercise of the powers of the Land Commission and the Revenue Commissioners could be considered limited, then that suggests a significantly broader scope for the application of the Article. I am not persuaded that this is so. In fact, Article 37 was intended to be a constitutional exclusion clause. Such clauses are generally to be interpreted narrowly. The evidence from the authors of the Constitution shows nothing but the same intention. So, too, does the text in the first

national language. Article 34.3 itself contains, either expressly or by clear implication, a series of limitations, which indicate the intent of the Constitution itself. The reservation of power contained in Article 34.3.2, regarding which courts may consider invalidity of laws, has been referred to. All these point to the conclusion that Article 37 should be given a narrow interpretation. An alternative analysis leads to areas of uncertainty in application, which are not consistent with the spirit of the Constitution, or the fundamental precepts of the rule of law, which include certainty. Whether decision-making bodies extant, or in the future, do, or do not, come within Article 37 will continue to have to be assessed on a case by case basis. The powers, including those implied by the Court of Justice in Case 378/17, and potentially vested in an AO are hard to reconcile with the concept of such persons exercising limited powers or functions. It appears to me that the logic of the reasoning goes too far: it is to disproportionately elevate the administration of justice under Article 37 into a position of near-equivalence to Article 34, which sets out the essence of the principle of where justice is to be administered – that is in courts established by the Constitution. As a matter of interpretation, the "exclusion", or saver, which is Article 37, almost itself becomes an *expression* of constitutional principle. Moreover, arguably, the saver becomes a different form of limitation, that is, on the right of claimants to have access to the administration of justice in the courts.

The Five Limitations Proposed

133. But, even if I am incorrect in my conclusions as to the potential scope of Article 37 of the Constitution, I think that there are other intractable issues based on any process of *application* of the approach adopted. It is said that the functions and powers of the WRC can be said to be limited by (a) subject matter; (b) limitations on awards; (c) enforceability; (d) a right of appeal to the Labour Court; and on point of appeal to the High Court; and (e) the fact that WRC may be subject to judicial review. But, again, I pose a question of interpretation.

134. Could these five limitations also be applied to the Circuit Court when it is carrying out an administration of justice under Article 34 of the Constitution? Where, then, is the distinction? In administering justice under Article 34, under its governing statutes, the Circuit Court is, also, subject to very similar limitations. But it cannot be suggested that, as a consequence, the powers and functions of the Circuit Court – in essence an administration of justice under the Constitution - might, in any given case, fall to be considered under Article 37 of the Constitution, rather than

Article 34. Where then does the dividing line lie? There must be a distinction made between form and substance. The five limitations identified are those of statutory form, rather than derived from the substance of constitutional administration of justice. My concern, therefore, is whether, at some future time, a legislature might assert this power of designation of limitations. Addressing each, I do not believe that "subject matter" can be a true constitutional limitation under Article 37. In any given law-case, a judge will, too, be limited by subject matter. Here, the limitation is that contained in the WRA 2015, as enacted by the Oireachtas. That limitation is one set not by the courts, but by the Oireachtas. The limitation of awards is, too, laid down by statute, where similar considerations arise. I turn then to enforceability. This must be seen in light of the uncertain constitutional status of s.43 of the Act. Yet, it is said that this constitutes a limitation for the purposes of s.41(5). But any objective standard, it cannot be seen as a limitation cognisable by law. Next, there is a "right of appeal to the Labour Court". The difficulty here is that, while there is such an appeal, it is not to a court of law, although a fuller range of fair procedures are provided for in the WRA 2015. But, further, such right of appeal is to a body appointed by the Minister, whose members do not enjoy the degree of independence which is guaranteed to the judiciary under the Constitution. Such absence of guarantees might, in individual cases, lead to a want of appreciation of what is required as true independence in decision-making. I include here the avoidance of actual or objective bias. Finally, there is said to be the existence of "judicial review". The fact that an AO, or the Labour Court, may be susceptible to judicial review is not, to my mind, a meaningful limitation. It also is applicable to any statutory administrative body exercising *quasi* judicial powers.

135. Taken together, I am concerned that the limitations, as described, do not set any objective boundary. Potentially, in some far future less benign scenario than the present, these might actually be utilised as a means of attempting to redefine or transgress the boundary between legislature and judiciary. Perhaps these concerns may be seen as hypothetical. But it is the duty of courts, especially this Court, to guard against a potentially non *bona fide* application of the law, as well as benign application. The obligation of this Court is to ensure that there remain checks, as well as balances. (Federalist Papers No. 78). The questions posed earlier in this judgment remain recurrent themes: by what yardstick or measure can an assessment be made as to whether a given area of law is, or is not, a core function of the courts, and who is to make such an assessment? Must that yardstick, in turn, be measured by reference to the fifth limb of *McDonald*? But then the concept of "core areas" begs a further question: whether, outside those core areas, there is to be "penumbra"

of other non-defined core areas, which may, or may not, fall to be classified in one category or the other.

The Attorney General's Submissions Reconsidered

136. On the other side of the line are the Attorney General's concerns, which are no less important. By what objective criteria will it be possible, in any given future case, for the executive or legislature, acting entirely *bona fide,* to determine whether some future regulatory, or other body, with an adjudicatory function, is a limited administration of justice under Article 37. What rights will flow from such categorisation under that Article? When for some hypothetical statutory body is designated as having a limited judicial function, to what extent will fair procedures be required in any given situation, and if so, which entitlements of fair procedure? From what standpoint, will the question of limitations fall to be considered? As mediated by *Keady*, *McDonald* poses no obstacle to the operation of extant statutory bodies, sometimes with extensive powers and functions, operating in the public interest which were never part of the courts domain. There is much to be said for "leave well enough alone". Properly understood, *McDonald* does not stand in the way of accommodating competition or financial regulation, or the myriad of other important examples cited by the respondents, which are vital parts of the functioning of a modern state. Those statutory bodies deal with functions which were never part of the business of the courts historically. They are excluded from being an administration of justice by the fifth limb of *McDonald*. The limited intent of the authors of the Constitution is clear from the historical material referred to earlier.

137. I express these reservations in what I hope are polite and restrained language. Heightened judicial rhetoric is both unattractive, and counter-productive. But I would not like those constraints to conceal my very deep concern as to the process of classification applied here, from every standpoint. I am unable to see any basis within the Constitution which allows for an objective limitation on such a process of re-categorisation. As O'Dalaigh C.J. observed "*The duty of the courts is not only to look to the present, but also the improbable future"*. On the most fundamental level, I conclude, a broad interpretation of Article 37, in the manner envisaged here, has the potential effect of hollowing out the *essence* or *substance* of Article 34. This cannot reflect a harmonious constitutional interpretation. It affects both the State in its concerns, and the citizens and others, who may have to seek recourse to the courts.

138. Perhaps I may be permitted to make further observations. In *The Minister for Justice v. The Workplace Relations Commission*, the equality case referred to earlier, Advocate General Wahl observed *that in relation to equality legislation, not all disputes in particular those raising important issues of principle with broader legal importance, are best dealt with by such bodies* [as the WRC]. (para. 87). He made this comment among many other valuable and perceptive observations, having pointed out that AOs, such as persons engaged in the process under discussion there, did not necessarily have legal qualification. He commented that bodies, such as the WRC, might be better placed than courts to provide low cost, speedy and effective solutions to conflicts of that nature (paras 87-88). But I think this comment also raises the question as to whether, in industrial relations law, as in equality law, there are areas which would be challenging, be it said, even for legally qualified persons, not to mind those not so qualified.

139. I turn then to a different question. Earlier this judgment noted that the WRC has not adopted any rules of procedure by statutory instrument. This, too, creates undesirable uncertainty, which arose in this case. Where significant issues are at stake, such as employment, parties are entitled to know, in advance, the rules of procedure to be applied prior to embarking on a hearing. This did not occur. This is not to say that the full range of fair procedures would be necessary in every case, but, in this one, they were necessary. In a case where there is a conflict of evidence, a person entrusted with making decisions or determinations which may affect someone's life, must make clear to the parties, from the outset, the scope of procedures which will apply in that given case. Such procedures are necessary for the administration of justice. Here, the full range of *Re Haughey* procedures should have applied.

140. Finally, I add observations as to the appellant's rights, *even* if it were to be held that the issue was not an administration of justice, but, rather, a *quasi* judicial administrative procedure. To my mind, the procedures were of such importance that the full range of *Re Haughey* rights would apply in cases of this type. Mr. Zalewski's personal rights under Article 43, including his right to a good name, are no less important to him, a worker, than to a doctor, or a solicitor. Thus, there should have been rules of procedure. There should have been a power to administer an oath. The importance of the issues required a right to cross-examine. Finally, in my view, he would be entitled to have a hearing in public. (*Re Haughey* [1971] I.R. 218; *Kiely v. Minister for Social Welfare* [1977] I.R.; *Glover v. BLN* [1973] I.R. 388).

Section VIII

Conclusion

143. In view of my conclusion that the procedures, as provided for at present by the WRA 2015, in fact, should be seen as an administration of justice, I would have set aside Simons J.'s findings on the four procedural requirements which he deemed did not arise for resolution. I would hold that each such requirement should have applied, even were the proceedings not an administration of justice, I would hold that the appellant's personal rights required the same entitlements should have been available to him.

144. This is a difficult constitutional issue. But, throughout our constitutional history, the process of judicial reasoning has operated as a form of self-righting mechanism, where the logic or consequence of each decision is later reviewed and scrutinised on the basis of new perceptions, different circumstances, and accretion of experience. Thus, mis-steps are remedied. In this case, the Court is of one mind that the procedure in question did constitute an administration of justice, contrary to Article 34 of the Constitution. That decision is based on the application of settled principles. I would hold that, by that logic, and the application of those long-settled principles, the consequent orders should necessarily be to declare the procedures in question under the WRA 2015, as repugnant to the Constitution of 1937.

THE SUPREME COURT

Record No: S:AP:IE:2020:000066

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

Between

TOMASZ ZALEWSKI

Applicant/Appellant

and

AN ADJUDICATION OFFICER (Y), AND THE WORKPLACE RELATIONS COMMISSION, AND IRELAND AND THE ATTORNEY GENERAL

Respondents

and

BUYWISE DISCOUNT STORES LIMITED

Notice Party

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 6th day of April, 2021

1. There are three issues of law which arise out of the background to these proceedings: firstly, whether the adjudication process provided for in the Workplace Relations Act 2015, insofar as it applies to determine the underlying claim of the appellant, constitutes the 'administration of justice' within the meaning of Article 34 of the Constitution, secondly, if it does, whether such process can successfully seek the protection of Article 37, and in either event was that process, by its actual application to the appellant and his complaint, conducted in violation of Article 40.3.1 and Article 40.3.2 of the Constitution. At a very much secondary level, the European Convention on Human Rights Act 2003, ("the 2003

Act") was also invoked.

2. Mr. Zalewski was employed by the notice party, which operated a convenience store under the franchise "Costcutter" at North Strand, Dublin, between 2012 and 2016. He went from being a security guard, to being a supervisor and later was appointed to the position of assistant manager in the store. Unfortunately, shoplifting was not uncommon, but a more serious incident occurred in October, 2014 when the shop was robbed with a gun being discharged. He commenced personal injury proceedings against his employer arising out of this incident. In April, 2016 he was reprimanded by the manager who alleged that he should have been more involved when on some occasion a known shoplifter was on the premises. A short period of sick leave followed. Subsequently, the owner's son and the manager apologised to him for the latter's conduct at such meeting. Upon returning to work his performance as assistant manager was seriously questioned, both in terms of the security of the shop and also for arranging medical and legal advice for other staff members arising out of this robbery. In addition, he was accused of having used monies from the till, in effect an allegation of dishonesty, all of which were said by the employer to constitute gross misconduct for which he was summarily dismissed. His only right of appeal, which he unsuccessfully utilised, was to the shop owner himself. The only clarification arising from that appeal was that no accusation of theft was being made against him. Otherwise, the dismissal and its summary nature was to stand.

3. The appellant then instituted a claim for unfair dismissal under the Unfair Dismissals Act 1977 (as amended), and the Payment of Wages Act 1991 (as amended). The application made, pursuant to the Workplace Relations Act 2015, was assigned by the Director General of the Workplace Relations Commission ("the WRC"), established under the Act, to an Adjudication Officer, the first named respondent, who on 26th October, 2016, held a very brief meeting at which the parties were present and/or represented. This lasted for no more than a few minutes, ten at most, at which point both parties believed that the matter had been adjourned: whilst there is some difference of understanding as to the reasons why this occurred, nothing turns on this. The real point is that neither party ever understood that the case had been in any way concluded at that stage: in fact, the contrary was their specific impression. What then followed was seriously problematic.

4. By letter dated 1st November, Mr. Zalewski was notified that the further hearing date would be the 13th December. However, on attending, with his solicitor, at the designated place and time, they were informed by the employer's representative and immediately thereafter by the adjudication officer in person that she *had already* reached a decision on the dispute and that the letter had issued in error. In a document dated and published some three days later, a four-page written decision issued which on its face contained findings purportedly based on evidence and submissions: in fact it read as if a full hearing had taken place. Evidently, given the brevity and cursory nature of the only meeting previously held, this description was seriously mystifying. At the most basic level, such

matters demonstrated several major deficits in the process adopted and at a general level are said by the appellant to reflect a structural and systemic failure in the operations of the adjudication process. These events, and this point in particular, will be further explored in that part of the judgment dealing with the fair procedures argument.

5. The within judicial review proceedings then followed in which an order of *certiorari* was sought in respect of the adjudication officer's decision and also in which a challenge was made on both constitutional and convention grounds. The former claim was advanced on two bases, firstly, that the powers conferred by various provisions of the 2015 Act as well as s. 8 of the Unfair Dismissals Act 1977 (as amended), constituted the administration of justice within the meaning of Article 34 of the Constitution, and were not saved by the provisions of Article 37, and secondly, and in any event, that the actual procedures adopted by the adjudication officer violated certain specified rights of the appellant under Article 40.3.1 and 40.3.2 of the Constitution. The Convention claim sought a declaration pursuant to s. 5 of the 2003 Act, that the same statutory provisions were incompatible with Articles 6 and/or 13 of the European Convention on Human Rights.

6. The quashing of the decision was not and could not, have been contested, but the constitutional argument was vigorously resisted at all levels. One such involved the State issuing a motion seeking to have that claim dismissed on the basis that since the adjudication was quashed, all other matters were moot or were otherwise of such a nature that should not be entertained by the court. In effect, this was treated by Meenan J. as a *locus standi* objection, with the learned judge holding that it could not be assumed that any rehearing of the complaints would suffer from the same constitutional infirmities as the original hearing had: on that basis, Mr. Zalewski was not "in real or imminent danger of being adversely affected, by the operation of the statute" ([2018] IEHC 59). On appeal this Court, when reversing that decision, identified the key constitutional issue as being a challenge to the statutory scheme as such and not as to what an adjudication officer might or might not do in any individual case under that scheme. In effect, the appellant's submission was that he should not be forced to have his claim determined by a regime which he argued violated Articles 34 and 37 of the Constitution. Accordingly, all issues came on for hearing and were determined in a judgment delivered by Simons J. on the 21st day of April, 2020 [2020] IEHC 178.

7. Given the concession made which necessarily and obviously had to be done, Meenan J. described the explanation offered by the adjudication officer/WRC for what had occurred, an administrative error, as being "unacceptable" and "lacking credibility": the trial judge himself described it as "bizarre". Both would have been entirely justified in expressing in much stronger terms his rejection of that explanation which was unbefitting from any decision making board. Unfortunately, even if it were possible to do so, the explanation offered was not improved upon in the appeal before us, but rather was simply reiterated.

I entirely concur.

8. After considering, *inter alia*, the constitutional challenge, which by court direction was confined, in argument, to the 1977 and 1991 Acts (*locus standi*, para. 97 *infra*) and having reviewed the authorities, Simons J. dismissed all complaints as made. On the Article 34 issue, he was satisfied to apply *McDonald v. Bord Na gCon* [1965] I.R. 217 "*McDonald".* Of the five features outlined by Kenny J., and said to constitute the administration of justice, both parties agreed that numbers (i) to (iii) were satisfied with some dispute on points (iv) and (v). The learned judge rejected the State's submission that requirement No. (v) had not been satisfied, and also rejected the appellant's claim that requirement no. (iv) had been satisfied.

9. On the former, he held that employment disputes have traditionally been regarded as justiciable, and were characteristic of the type of orders made by courts, for decades if not centuries, under their common law jurisdiction: comparing unfair dismissal with wrongful dismissal and a claim for payment in lieu of notice with a breach of contract claim. On the latter however, given the fact that the enforcement of any order made by an adjudication officer or the Labour Court on appeal, would have to involve the District Court, and that on the hearing thereof such court could modify the ultimate form of redress, the trial judge felt that such were "irreconcilable with a finding that the two statutory bodies are carrying out the administration of justice". (para. 82). Although reaching that conclusion with "some hesitation", (para. 77) nonetheless the result was that the claim was dismissed. Having so concluded, he found it unnecessary to consider the arguments made in relation to Article 37 of the Constitution.

10. The learned judge then considered each limb of the argument advanced in support of the submission that the procedures of the 2015 Act are entirely insufficient to meet the requirements of, and therefore are inconsistent with, Article 40.3 of the Constitution. These related to the fact (i) that an adjudication officer did not have to have a legal qualification, (ii) that there was no provision enabling such officer to administer the oath or affirmation, (iii) that likewise there was no express provision for the cross examination of witnesses and finally, (iv) that all hearings before such an officer are held otherwise than in public. For the reasons outlined in his judgment, he rejected each aspect of this submission.

11. On an application for leave, the Supreme Court permitted a direct appeal on all of the grounds advanced by the appellant, and also permitted the State's cross appeal with regard to the judge's finding on requirement No. (v) of the *McDonald* test. ([2020] IESCDET 93**)**. It is those issues which I now turn to.

Constitutional Provisions (1937):

12. The following Articles of the Constitution insofar as relevant read as follows:-

(i) *Article 6*:

"6.1 All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to requirements of the common good.

6.2 These powers of government are exercisable only by or on the authority of the Organs of State established by the Constitution."

(ii) *Article 34* :-

"1. Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

2. The court shall comprise:

(i) Courts of First Instance;
(ii) A Court of Appeal; and
(iii) A Court of Final Appeal

3.1° The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.

2° …

3° …

4° The Courts of First Instance shall also include courts of local and limited jurisdiction with a right of appeal as determined by law."

(iii) *Article 37*:

"37.1 Nothing in this constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.

37.2 …"

Constitutional Provisions (1922):

13. The provisions of the 1922 Constitution corresponding to those above quoted, are as follows:

(i) *Article 2*:

"2. All powers of government and all authority, legislative, executive and judicial, in Ireland are derived from the people of Ireland, and the same shall be exercised in

the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution".

(ii) *Article 64:*

"64. The judicial power of the Irish Free State (Saorstát Eireann) shall be exercised and justice administered in the public courts established by the Oireachtas by judges appointed in manner hereinafter provided. These courts shall comprise Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also courts of local and limited jurisdiction, with a right of appeal as determined by law."

There is no provision akin to that of Article 37.

Separation of Powers – Brief History

14. The concept and notion of a constitutional tripartite separation of powers is to be found in the inspiring and enlightening writings of Blackstone, where such a proposition was enunciated with both clarity and foresight more than 250 years ago (*Commentaries on the Law of England*: Vol. 1, p. 267: 1769: Dublin Ed.). Whether it was he or others (*Montesquieu: Esprit des Lois* (1748)), who were the original thought inspiring individuals behind this framework, matters now of historical importance only: whoever, it has found widespread acclaim and approbation ever since, as evidenced by its adoption in multiple constitutional systems.

15. Under our constitutional system, that structure was given effect to by creating the legislative, the executive and the judicial. Post 1922 and after some transitional and temporary measures, the legislative power of the Irish Free State was established, *inter alia*, by the Electoral Act 1923, the executive power by the Ministers and Secretaries Act 1924, and the judicial system and courts administration by the Courts of Justice Act 1924, and the Court Officers Act 1926, respectively, all as amended, with the judicial power operating under the overall guidance of Article 64. That Article, which was not dissimilar to the third Article of the US Constitution, together with Article 2, were designed to ensure that each organ of government did not impermissibly encroach on the other, with the ultimate authority to determine any asserted trespass resting on the judiciary.

16. Under both Article 2 of the 1922 Constitution and Article 6(1) and (2) of the 1937 Constitution, provision was made for the judicial power of government to be exercised only by the organ of the State designated in the Constitution for that purpose, namely the Courts as staffed by judges duly appointed in accordance with law. This is a fundamental attribute of the sovereignty of the State and the constitutional formation adopted by its people. Therefore, justice, its administration and its administration by such judges, is a

red line constitutional imperative. Any relaxation of this intrinsic principle, which must be found within the Constitution itself, is by way of a derogation from this norm. One such is that as provided for in Article 37, which as stated, had no equivalent in the State's first Constitution.

17. That Article by its terms permits non-judicial bodies in matters other than criminal, to exercise limited functions and powers of a judicial nature. There is therefore an inextricable link and relationship between both Article 34 and Article 37. The appropriate delineation between one from the other may well involve a consideration of both. At least this will be so, in some circumstances: in others not necessarily the case, as for example where in the first instance the activities under scrutiny are found not to constitute the administration of justice. Where however uncertainty might exist, an examination of the parameters of each may be required. When so doing, I am not at all certain that it is either possible or desirable that factors, which may be considered more appropriate to one provision, should be excluded from the assessment of the other, *i.e.* the *dicta* of Kingsmill Moore J. on Article 37 (para. 34 *infra*). In any event, when the landscape is looked at, questions arise as to what is the correct meaning of 'justice' in Article 34, which sometimes is referred to as the 'administration of justice', or the 'judicial function' or the 'judicial power', with the corresponding questions under Article 37 being what is understood by the words "functions and powers", and particularly what meaning is to be ascribed to the word "limited", which qualifies, in a qualitative sense, that phrase. Where statutory provisions are correctly classified as "limited", their exercise, even by non-judicial persons, will attract the cover of that constitutional provision.

18. The mere recitation of the relevant provisions of these Articles will not to any appreciable extent enlighten this exercise of differentiation, nor will such a similar undertaking relative to other Constitutions necessarily help in this regard, (*e.g.* the third Article of the US Federal Constitution and s. 71 of the Commonwealth of Australia Constitution Act 1990). One must therefore look at the relevant authorities, which discussed these issues particularly where their resolution was necessary in any given situation. In mentioning case law, I am not of course ignoring the academic literature, but surprisingly enough whilst a good deal has been written about the individual components of Article 34, little enough has appeared with regard to Article 37.

Pre-1937*:*

19. The foremost authority in this area under the 1922 Constitution is undoubtedly *Lynham v. Butler (No.2)* [1933] I.R. 74 ("*Lynham v. Butler (No.2)*"), which shows a fascinating history of why litigation should be avoided if at all possible: on several occasions such was beyond the grasp of both Francis Lynham and the Reverend Dr. Butler. That history however, falls just short of the inventiveness with which the government dealt with Mr. Lynham's appeal to the Privy Council in 1925 against the Supreme Court's dismissal of his appeal in what are known as the "Ejectment Proceedings" case ([1925] 2 I.R. 82 (H.C.):

[1925] 2 I.R. 231 (S.C.)): such occurring at a crucial time in the State's ongoing separation from the United Kingdom (Dáil Debates, 3rd February: Seanad Debates, 24th February and House of Lords Debates 3rd March, 1926). Moreover, the acceptance of the appeal by the Judicial Committee, which had earlier rejected each of the three applications previously made, was all the more surprising in view of the well declared Irish insistence on how restrictive that possibility should be: in fact, Article 66 has been described by some, as being for the government, the "most obnoxious feature of the [1922] Constitution" (Kohn – *the Constitution of the Irish Free State* p. 335/356).

20. After what can only be described as a markedly hostile engagement between the parties, ferocious and relentless at times, over the ownership of the subject lands, Mr. Lynham sought the sum of £1,635, either as *mesne* profits or damages for the defendant's unlawful occupation of the lands from August, 1924 to April, 1928. The claim was resisted on multiple grounds, the only one of interest to us was whether the Lay Commissioners in arriving at a particular decision were engaged in the exercise of judicial power under Article 64 of the Constitution: if so, for a variety of reasons the claim could not succeed with follow on consequences for the ownership of the lands. This very brief description of the background does not do justice to the intricacies of the encounter: for those interested, such details are fully set out in the judgment delivered by Kennedy C.J. In any event, the net point of interest was whether or not Article 64 was violated.

21. What can be seen from his judgment, is that the Chief Justice identified the following features as being inherent in the administration of justice.

- The existence on the civil side of a recognised legal dispute between parties, involving rights or liabilities and on the criminal side the issue of guilt or innocence and where appropriate, the imposition of penalty: it involved further, on the civil side,
- The making of a decision on such disputes,
- The determination in final manner of those disputes, and
- The enforcement of the resulting court order backed where necessary by executive support.

The oft quoted passage upon which this summary is based, appears at pp. 99/100 of the report.

22. In applying the principles outlined to the situation at hand, the conclusion reached was as follows:-

> "In my opinion, the Land Commissioners are; like the Estates Commissioners, primarily an administrative body with a great variety of ministerial duties to perform. Their duties are too numerous and too diverse to permit of an exhaustive examination

> on a single occasion so as to put one in a position to affirm that the statutes have not purported to impose on them any duty of other than ministerial character. The nature of some of their ministerial duties requires that they be performed judicially, in the sense that they must be performed with fairness and impartiality in such a way as not to offend against the cannons of natural justice, which requirement however will not convert a ministerial act into a judicial act in the sense of an act which must be performed by a judge in a court of justice." (104/105 of the report)

Concurring judgments were delivered by both Fitzgibbon J. and Johnston J., to which further reference will be made at a point where I will endeavour to explain the *rationale* behind the court's general approach to, and assessment of, the powers so exercisable by the Land Commission.

23. Leaving aside the *inter partes* dispute for a moment, what is immediately apparent is that, *Lynham v. Butler (No.2)* in particular, but also some other cases have contributed significantly to the discussion on the administration of justice and provided a distinguished transitional platform for the subsequent decisions in both *Re Solicitors Act, 1954* [1960] I.R. 239 and in *McDonald*. That single judgment of the Chief Justice contributed no less than four of the five characteristics, each of which is immediately recognisable, in *McDonald v. An Bord na gCon* [1965] I.R. 217 *("McDonald")*. Although not mentioned by the Chief Justice, Palles C.B. in an earlier case had also highlighted as an aspect of the judicial power, the making of a final determination affecting rights or liabilities: the full quotation and the context in which the point is made can be found in the report: (*R (Wexford County Council) v. Local Government Board* [1902] 2 I.R. 349 at 373/374).

Post-1937:

24. As stated earlier in this judgment, the substance of Article 37 had no comparable expression in our constitutional model before then, and so little insight as to its meaning can be deduced from the case law during the earlier period. However, as there is an obvious association between that provision and Article 34 and as both feature in most of the decisions which are about to be discussed, it would be appropriate at this juncture to briefly consider the history of the provision, and against that background consider thereafter the relevant authorities.

Article 37 - General History

25. Although it is entirely unsurprising that a new provision, like Article 37.1, reflecting the ongoing birth and growth of this nation, even if still in its infancy, was included in the Constitution, it is perhaps notable that in the core and central areas of justice, judicial power and the administration of both, this measure by its plain wording makes permissible the exercise, by non-judges, of limited judicial functions and powers (excepting criminal matters), something not contemplated or envisaged by the laws of the Irish Free State. This, in contrast with Article 34 which had a very strong forbearer in Article 64 of the 1922

Constitution. Therefore, Article 37.1 has a different antiquity to its more core sister provision and accordingly, falls to be considered as such. Without in any way attempting to ascertain the definitive intentions or motives of those involved, there are some nuggets in the public domain which can be gleaned about the history and purpose behind that provision.

26. Documentation from the first two meetings of the Constitutional Review Committee (1934) shows that it seriously considered the drafting of an entirely new Constitution, rather than simply confining its remit to an examination of the existing text. Soon however, this was seen as too mammoth a task, and although that ambition was curtailed, nonetheless its recommendations were to become highly influential in the drafting of the 1937 Constitution. This is evident by the fact that many of its innovatory features, including Article 37, can be traced back to it. Its final report was given to Mr. de Valera, then Taoiseach, on the 3rd July, 1934. Of the four Committee members; Stephen Roche, a secretary in the Department of Justice; Michael McDunphy, assistant secretary in the Department of the President of the Executive Council; John Hearne, legal adviser in the Department of External Affairs and Philip O'Donoghue, assistant to the Attorney General; the three last mentioned all went on to play a significant role in the preparation of the 1937 Constitution, which was a clear indicator of the significance of their work.

27. Article 64 was, unsurprisingly, identified by the Committee, as one of the Constitution's fundamental provisions. This was subject, however, to a textual amendment being made which would reflect, according to the Committee "the present position in which judicial or quasi-judicial functions are necessarily performed by persons who are not judges within the strict terms of the Constitution, e.g. Revenue Commissioners, Land Commissioners, Court Registrars etc.". Stephen Roche drew up what the amendment might look like: it began as follows:-

> "Provided for the removal of doubts and for the more expeditious and economical administration of justice and transaction of business, that nothing in this Article shall be deemed to render invalid any enactment, or any role, order or arrangement made under the authority of any enactment…" (G. Hogan, '*The Constitution Review* Committee of 1934', Ireland in the Coming Times: essays to celebrate T.K. Whitaker's 80 years, p. 354 - 355)

As Hogan observes, this draft was clearly anticipatory of what became Article 37.1.

28. Later, as work on this continued, two members of the House (Mr. John A. Costello and Mr. Patrick McGilligan), suggested that in its entirety this proposal should be abandoned. This prompted Mr. O'Donoghue to write to the Office of the Attorney General (Patrick Lynch K.C.) expressing, his deep concern at this turn of events, his defence of the proposal and, most interestingly, articulating the reasons he believed it should remain. In a memorandum written on the 26th May, 1937, he explained that

the provision was "designed to avoid the difficulties and litigation which were experienced in the past when the exercise of powers of a judicial or quasi-judicial nature was challenged in the Courts on the grounds that these were matters reserved for the Courts" (G. Hogan, 'The Origins of the Irish Constitution 1928-1941' p. 580). Only with the benefit of hindsight can we now observe that whatever other effects the provision may have had, litigation of the nature described, was perhaps not avoided to the extent that Mr. O'Donoghue may have been hoping for. In a further memo, two days later, he stated that the suggested deletion would deprive certain bodies of their functions and would be extremely dangerous: he mentioned a cohort of such bodies, including County Registrars and the numerous Court of Referees, Appeal Committees and Appeal Tribunals operating under legislation such as the Unemployment Insurance Acts, National Health Insurance Acts, Old Age Pension Acts. Practical matters regarding the everyday running of the State appear to have been at the forefront of his concern.

29. Thus, to some extent, it seems that the intention behind Article 37.1 was relatively straightforward and borne out of pragmatism. Both before and after 1922, many bodies existed, authorised by statute, to make decisions on facts and after argument was had, which could affect the rights and liabilities of people: not altogether different in one respect from court intervention. Although the practice met some resistance, the same largely went unchallenged until the 1930 proceedings, which resulted in *Lynham v Butler (No 2)* [1933] I.R. 74. As indicated elsewhere, it was of particular significance that the subject matter of the case was the Land Commission. Indeed, when addressing the Dáil on the 2nd June, 1937 (Dáil Debates), Mr. de Valera is quoted as saying:-

> "There were questions about the Land Commission, as to whether their functions were of a judicial character or not ... So as not to get tied in the knot that judicial powers or functions could only be exercised by the ordinary courts established here, you have to have a provision of this type."

It is against this backdrop that the insertion of Art. 37.1 should be viewed.

30. However interesting this brief look at history is, it cannot determine the meaning of the provision in a constitutional sense. As J. P. Casey cautioned, to know the broad purpose of the Article "does not carry one very far". (Casey, 'The Judicial Power under Irish Constitutional Law' ILCQ (1975) 24(2) p. 304, 308). This has to be a matter for the judicial arm of government.

Case Law:

31. The leading authority on the non-Land Commission side which firstly considered in depth the provisions of both Article 34 and 37 of the Constitution was the case of *In the Matter of Solicitors Act 1954: O'Farrell & Gorman* [1960] I.R. 239 *("O'Farrell & Gorman")*. In that

case the Disciplinary Committee of the Incorporated Law Society of Ireland, set up by s. 13 of the Solicitors Act 1954 ("the 1954 Act"), had the powers, after inquiry and having found established misconduct, to suspend a solicitor from practice, to order that his name be removed from the Roll, to compel the making of restitution or satisfaction to any aggrieved party, to make an order for costs against him (all within s. 18), and to order that the findings be published in Iris Oifigiúil, three daily newspapers and, as is their right, in the Society's Gazette (s. 21(2) of the 1954 Act). In respect of both Mr. O'Farrell and Mr. Gorman, the Committee duly exercised these powers save that relating to restitution and satisfaction: such giving rise to the constitutional challenge which was asserted on their behalf. The issue was whether or not the conferring and the use of those powers constituted an exercise of judicial power and if so, whether such could avail of the provisions of Article 37. The single judgment of the Supreme Court was that of Kingsmill Moore J.

32. The learned judge made it clear that a tribunal or body which operates by contractual consensus were not those under discussion: their powers are not statutorily based or derived, and existed solely in respect of those who have agreed to be bound by whatever rules and regulations govern the particular organisation which they have joined. Clubs, Trade Unions and some professional bodies are examples. Rather, it was those Associations which rely upon the state or the legislature for their efficacy which were in issue. (p. 264)

33. Having quoted extensively and with obvious approval from *Lynham v. Butler (No.2)*, *Fisher v. Irish Land Commission* [1948] I.R. 3*, the State (Crowley) v. Irish Land Commission* [1951] 1 I.R. 250*,* and *Foley v. Irish Land Commission* [1952] I.R. 118, the learned judge then conducted a survey of some Australian cases: in particular, *Huddart, Parker & Company v. Moorehead*, [1909] 8 CLR 330, the *Waterside Workers* case [1918] 25 C.L.R. 434, and *Shell Company of Australia v. Federal Commissioners of Taxation* [1931] A.C. 276, observing in the process that in reality such cases were more helpful in identifying what was not the administration of justice, rather than what was. In any event, from the resulting exercise, one can discern some aspects, but not all, of what is now regarded, or at least up to the present case has been regarded, as the administration of justice.

34. The conclusion reached from this survey was that a precise and exhaustive definition of the concepts involved were extremely difficult if not impossible to achieve. This because of the variety of powers and functions, either singularly or collectively, which a legislature can entrust to various bodies which are not courts in a constitutional sense, with such powers and functions to be exercised by persons who are not judges, also in that sense (271). Therefore, one must look at each entity and the particular powers under scrutiny, so that a decision can be made, having regard to the observations outlined in the case law. Such led to the following statement:-

> "Eventually the question whether any particular tribunal is unconstitutional must depend on whether the congeries of the powers and functions conferred on the tribunal or any particular power or function is such as to involve the pronouncement of decisions, the making of orders, and the doing of acts, which on the true intendment of the Constitution are reserved to judges as being properly regarded as part of the administration of justice and not of the limited character validated by Article 37" (p. 264).

35. The learned judge endeavoured to put some descriptive terms on Article 37. Having rhetorically asked what was the meaning of the word "limited", he immediately discounted any association with the jurisdiction of the courts, as in his view the concept of "limited jurisdiction" was covered by Article 34.3.4 of the Constitution. Secondly, it was the "powers and functions" which must be limited and not either the scope of their exercise, or the number of such powers statutorily conferred. If any of those were intended to govern the phrases, the Constitution would have said so.

36. He then continued:

> "A tribunal having but a few powers and functions but those of far reaching effect and importance could not properly be regarded as exercising "limited" powers and functions. The judicial power of the state is by Article 34 of the Constitution lodged in the courts, and the provisions of Article 37 do not admit of that power being trenched upon, or of its being withdrawn piecemeal from the courts. The test as to whether a power is or is not "limited" in the opinion of the court, lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated ordinarily to effect in the most profound and far reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as "limited"." (263 – 264)

37. Turning to the provisions of the 1954 Act, the learned judge also noted the existence of the procedural powers vested in the Committee which in respect of the following, were the same as if it was the High Court or a judge thereof: namely, the attendance of witnesses, the giving and testing of evidence on oath, the production of documents and the taking of evidence on commission. Further, whatever might constitute a court contempt could equally constitute a Committee contempt, which if so found could be certified to the High Court for further inquiry. (s. 19 of the 1954 Act).

38. In addition to his general views on both Article 34 and 37, it is necessary to also bear in mind three further observations which he made by reference to the powers which the Disciplinary Committee had. Firstly, he was satisfied that the power to strike off was "disciplinary" and "punitive" in nature and that a sanction of such severity may have more consequences for an individual than a term of imprisonment. It mattered not in his view

that the conduct alleged was not strictly that of a 'criminal matter', because in light of the repercussions which arose, the adjudication on such conduct demanded qualities of impartiality, independence and expertise which are required of the holder of a judicial office. Secondly, whilst noting that the power to make a restitution or satisfaction order would only arise if misconduct had been established, nonetheless, such misconduct could include fraud or negligence which, may well involve contentious and difficult questions, and which if before a court of law, damages by way of *restitutio in integrum* could easily follow. In that respect, the power of the Committee would be no different from the court. And thirdly, he placed considerable reliance on the role which historically the court played in striking the name of a solicitor off the Roll: such stemmed from its ultimate superintendence over and its overarching authority to ensure a practitioner's utmost propriety.

39. Given therefore the object of the powers, the functions vested in the Committee, the nature and extent of the inquiry involved, and the adjudicative role demanded, as well as the punitive, restitution and historical aspects last mentioned, it was the court's opinion that such were unconstitutional "…both because the infliction of such a severe penalty on a citizen is a matter which calls for the exercise of the judicial power of the state and because to entrust such a power to persons other than judges is to interfere with the necessities of the proper administration of judges". (275). Neither this reasoning or the underlying issues involved, were seriously addressed in the further solicitor's case decided a few months later. (*In the Matter of the Solicitors Act 1954: D.A. Solicitor*: [1961] 95 ILTR 60).

40. The importance of this judgment does not simply rest on the court's confirmation that the features identified in *Lynham v. Butler (No.2)* (para. 21 above) are appropriate to the administration of justice, but also in its assessment of Article 37 (para. 125 of this judgment). In the period since its delivery, much discussion has taken place regarding certain aspects of it. However, surely what was said about criminal matters as such cannot be faulted: perhaps the creation of an offshoot by treating the Committee's power as quasi-criminal (para. 38 above), could be up for discussion, whilst undoubtedly the court's treatment of how the functions and powers are "limited" as well as the far reaching effect test have been the subject of much attention.

The Follow-on Regime:

41. The Oireachtas moved swiftly to deal with the infirmity identified in *O'Farrell and Gorman*. Section 5 of the Solicitors (Amendment) Act 1960, repealed ss. 13, 14(1) and (2) and 15-23 inclusive (thus repealing the impugned sections, see para. 31 above) and by virtue of s. 7(3)(a) and (b) of the 1960 Act put a new procedure in place whereby the Disciplinary Committee had to embody its findings and the recommendation as to sanction, in a report and based thereon make an application to the High Court, which had the power to make a variety of orders, including one striking the solicitor's name off the Roll (s. 8(1)(a)(i) of the

1960 Act). Ultimately, that statutory mechanism was held to satisfy the fault line identified by Kingsmill Moore J., but not without some initial challenge, arising mostly within the professions.

42. In a doctor's case arising under the Medical Practitioners Act 1978, Finlay P., as then, had no difficulty in distinguishing the regime in existence under the 1954 Act with that provided for in ss. 45 – 48 of the 1978 Act, under which the Medical Council had to seek High Court approval to suspend a doctor, remove his name from the register or attach conditions to his practising certificate. As such, the Council's role could not be said to constitute the administration of justice. In respect of its powers to advise, admonish or censure, or to publish a finding of misconduct or unfitness: if it could be said that these were final in any respect, then such were, in the court's view, clearly limited in their effect and consequence, and accordingly were covered by Article 37. From the reference last made, it is apparent that *O'Farrell & Gorman* was both applied and approved (*M. v The Medical Council* [1984] I.R. 485**)**.

43. Several subsequent pieces of legislation such as the Dentists Act 1985 and the Veterinary Surgeons Act 1960, both as amended, implemented that procedure which prevented the underlying process from any constitutional frailty which might otherwise have resulted from *O'Farrell & Gorman*. In respect of provisions, identical to those relating to dentists, the Supreme Court in *C.K. v. Bord Altranais* [1990] 2 I.R. 396, when dealing with the Nurses Act 1985, and having affirmed the correctness of *M. v. The Medical Council* and the related decision of *In Re M. (a Doctor)* [1984] I.R. 479, confirmed the validity of this approach and pointed out that "the necessity for that procedure to vest that power unequivocally in the court, in my view, arises from the constitutional frailty which would attach to the delegation of any such power to a body which was not a court established under the Constitution, having regard to the decision of the former Supreme Court in *Re the Solicitors Act* [1960] I.R. 239". Such a legislative step was therefore entirely justified with Finlay C.J. expressing the view that "…it is the court who should make the vital decisions" (403).

McDonald v. Bord na gCon* [1965] I.R. 217 *("McDonald"):

44. *McDonald* was the first real case in which a definitive overall description of the 'administration of justice' was outlined. As is apparent however, it was not of course the first case to discuss the subject: many previously had joined the debate, an example of which is the judgment of Davitt P. (*the State (Shanahan) v. the Attorney General* [1964] I.R. 239 ("*Shanahan*"). The fact that the learned President included in the four points mentioned by him the right to compel the attendance of witnesses or parties, (not referenced in *McDonald)*, but did not mention the historical aspect of the judgment of Kenny J., does not render both decisions inconsistent: rather, as with many other judgments, the observations made were intended as a further contribution. It seems to me that the observations of the President in *Shanahan* were intended as an addition in this

area and not as some sort of rigid or strict definition of the administration of justice.

45. In any event, the facts in *McDonald*, whilst important of course to the decision in both courts, are not altogether crucial to the point of principle as in the days before *Cahill v. Sutton* [1980] I.R. 269 ("*Cahill*"), very few standing restrictions applied to a legislative constitutional challenge: it was therefore the scope of the overall statutory provisions which was under review. In any event, the case involved the making of an exclusion order by Bord na gCon ("the Board"), pursuant to the exercise of its statutory powers, with the consent of the Irish Coursing Club ("the Club"), both of which were established by the Greyhound Industry Act 1958 ("the 1958 Act"), whose fundamental object was to develop, improve and regulate that industry in all of its major facets. The Board was given power to make regulations, which it did, regarding matters such as the establishment, use, supervision and control of racetracks, the conduct of race meetings, the control of greyhound training for reward, as well as the holding and conduct of public sales of greyhounds. The effect of such regulations was that no such activity could be engaged in without a license being granted by the Board or in the case of an on course bookmaker, without a permit being obtained. In addition, the Board and its authorised officers were given investigative powers: as a result such officers could investigate any occurrence observed by him or brought to his notice, relating to any race or the performance of any greyhound at a race meeting, or when in attendance at a public sale. Further, pursuant to s. 45 of the Act, a disqualification order could be made in relation to specified greyhounds which were kept, owned, trained or managed by a named person, which had the effect, of preventing their registration in the Irish Greyhound Stud Book, of being entered in any authorised greyhound race or coursing meeting or of being offered for sale at a public sale of greyhounds. It was however the powers given under s. 47 which were impugned on constitutional grounds.

46. The Board with the consent of the Club or the Club with the consent of the Board (depending on which body was purporting to exercise a given power), was authorised to make an "exclusion order" under s. 47 prohibiting a person from being at any greyhound racetrack, any authorised coursing meeting or any public sale of greyhounds. Provisions were made for notifying the person concerned of any proposed order and affording him an opportunity of making representations which would be considered. If the order was made, its enforcement was provided for by subs (7), (8) and (9) of the Act: the subsections are in identical form, save that they relate to greyhound racetracks, coursing meetings and the public sale of greyhounds respectively: accordingly, a reference to subs (7) would be sufficient: -

> "7. Where a person to whom an exclusion order applies is found on any greyhound racetrack, any person acting under the direction of the licensee under the Greyhound Racetrack License relating to the track may remove such first mentioned

person therefrom and for this purpose may use such force as may be reasonably necessary."

Such an order was made in respect of the plaintiff/respondent, who mounted, *inter alia*, a constitutional challenge to the provisions in question: such was determined as a preliminary issue on the application of the Attorney General. Kenny J., then of the High Court, determined the matter in his favour, but even though the legal principles outlined by him were endorsed by the Supreme Court, his decision was overturned on the merits. Centrally it is the High Court judge's treatment of what constitutes the administration of justice and in the process the judge's reference to Article 37 of the Constitution, which are directly in focus in this case.

47. The following five features are identified as being characteristic of what is and what constitutes the administration of justice:-

"(1) A dispute or controversy as to the existence of legal rights or a violation of the law: [subject matter]
(2) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty: [decision]
(3) The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties: [finality]
(4) The enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgments: [enforcement]
(5) The making of an order by the court which as a matter of history is an order characteristic of courts in this country. [characteristic of courts]" (pp. 230 – 231)

All of these matters were complementary to each other, and pertained to establishing by decisive decision, legal rights and their enforcement by resulting order on the civil side, and the infliction of sanctions or penalties on the criminal side. Self-evidently the learned judge was fully alive to the existence of many other incidences of justice (para. 78 below) but clearly felt that such were so obvious and well-known: their specific citation was not required.

48. Holding that the overall effect of an exclusion order was the creation of a legal prohibition against the subject person being at any greyhound racing track, at any authorised coursing meeting or from attending any public sales of greyhounds, Kenny J. went on to find that the process involved, the powers conferred, and the impact of their exercise possessed all of the above characteristics. In short, these involved (i) a dispute, that is whether or not the person acted in violation of the regulations/code of conduct, and (ii) a determination that such person had been guilty of the allegation(s) made against him, with the resulting imposition of a liability, namely the making of an exclusion order: further, (iii)

a determination which was final in that there was no appeal on the merits against it, (iv) the power to have an exclusion order enforced if necessary by physical force, as well as the powers of the Control Committee established by the Regulations, to impose unlimited fines, and finally (v) the order was similar in both form and effect to an injunction against trespass which is characteristic of orders which the court traditionally makes in this jurisdiction. Accordingly, the plaintiff had established that the power so conferred constituted an exercise in judicial power.

49. When referring to Article 37, Kenny J. firstly dealt with a submission that the proceedings before the Board were criminal in nature and therefore fell foul of Article 37 *in limine*. That submission was rejected. He then went on to acknowledge that the Board was limited in certain respects in that it had no power to summon witnesses, or to administer the oath and evidently, was confined in its operation to the remit outlined in the Act. But in his view, these considerations were irrelevant in light of a passage from *O'Farrell & Gorman*, (264), which specified that the real test was 'to look at the effects or consequences' of the assigned power when exercised. Through that prism, Kenny J. had no doubt but that Article 37 could not be invoked. From the resulting decision the respondent Board appealed to the Supreme Court.

50. This Court *via* the judgment of Walsh J., whilst accepting the five point test as outlined by the learned trial judge (p. 244), nonetheless held, on the application of those principles to the statutory provisions in issue, that when the Board/Club were utilising s. 47, only one of the five requirements could be satisfied. With great respect, it is not easy to understand this conclusion, particularly in view of the reasons offered for it by the court. Given the acceptance of the test and the uncontroverted circumstances, it is difficult to see how there could have been such a divergence between the courts. A dispute undoubtedly existed which involved the making of a decision without an appeal on the merits: a very strong argument can be made in support of the trial judge's view as to the effect of an exclusion order; the actual and rather plain wording of s. 47(1) so confirms – it "prohibits a person from all of the following", being on a greyhound racetrack, at a coursing meeting or at a public sale of greyhounds. In addition, on many occasions the court's intervention for a second or subsequent time will be required in the case of a variety of civil proceedings. Further, the court's discussion on Article 34 was extremely limited and extended only to generalised conclusions that its provisions were not operative in the context of the case. There was no discussion on the provisions of Article 37. Overall, given the striking difference in outcome, it is a matter of serious regret that this Court did not engage more fully with the agreed principles and agreed facts, relative to various provisions of the Act, in particular section 47. Be that as it may, what emerges from *McDonald* in the context of this case are the five features identified by Kenny J.

51. It is interesting to note that this was not the first occasion on which the learned judge considered what elements might constitute the administration of justice. The forerunner

was *Deaton v. The Attorney General & Anor* [1963] I.R. 170 ("*Deaton*"), where the issue was whether the powers of the then Customs Commissioners under s. 186 of the Customs Consolidation Act 1876, "to select" the punishment for an accused person, if convicted of an offence under the Act, was an exercise of judicial power. Neither the facts or the outcome are material to us, save to note that one such option had to be adjusted in light of this Court's decision in *Melling v. O'Mathghamhna v. the Attorney General* [1962] I.R. 1. In his judgment, Kenny J. discussed what became features Nos (i), (iii), (iv) and (v) in *McDonald,* although in light of the approach adopted, he felt it unnecessary to decisively pronounce on any of these matters. Article 37 did not arise in that case as the type of revenue proceedings involved were, by the date of the hearing, undoubtedly criminal in nature (*Melling*). However, the debate engaged in is interesting in the context of whether or not all five requirements must exist so as to constitute the administration of justice, particularly when the learned trial judge himself felt that the absence of a justiciable controversy or of a final determination may not be decisive or conclusive as to whether the act is or is not an exercise of the judicial power (175).

52. Notwithstanding these remarks, McCarthy J., in *Keady*, interpreted a passage from the judgment of Walsh J. in *McDonald* (244), as requiring all five: *Purcell v. Central Bank of Ireland* [2016] IEHC 514 relied on *Keady* and said the same (p. 53), with O'Flaherty J. in *Plunkett*, stating "it seems clear that any activity to qualify as being an administration of justice, each of the five *McDonald* test would be satisfied (*the State (Plunkett) v. Registrar of Friendly Societies (No.1)* [1998] 4 I.R. 1 at 5. The deduction made by McCarthy J. is, may I respectfully suggest a possible overreading of the passage relied upon as I do not believe it was so intended: rather, I feel that Walsh J. was only dealing with the circumstances of the case before him. In any event, no further debate took place in any of these cases or elsewhere on this rather important question and, in light of my conclusion on the Article 34 issue, I do not find it necessary to further explore this issue, but would simply comment that the matter is not foreclosed, certainly not on the basis identified by McCarthy J..

53. One further case decided in 1961 can usefully be alluded to at this point. By virtue of the Municipal Corporations Act 1882, and the Municipal Elections (Corrupt and Illegal Practices) Act 1884, as adapted in this country, the powers formerly exercised by the High Court relating to petitions arising out of municipal elections became vested in election courts, to be presided over by a senior barrister appointed in the manner provided for by that legislation. Issues arising out of parliamentary elections however remained with the High Court. In response to a petition questioning the legality of his appointment to Dublin City Council, Mr. Cowan sought a declaration that the intended hearing before the election court (Mr. Richard N. Cooke S.C.) violated Article 34 of the Constitution. The High Court so agreed.

54. Having outlined the relevant provisions of both Acts, the 1882 and 1884 Acts, Haugh J. quoted with obvious approval from *Lynham v. Butler (No.2)* and from *O'Farrell & Gorman*, including the passage from the judgment of Kingsmill Moore J. regarding Article 37 of the Constitution (p. 420-422). Being satisfied that an election court when hearing such petition was engaging in precisely the same class of work as the High Court did pre-1882, and still does when hearing a parliamentary election petition, it followed in his view that such constituted the administration of justice. In addition, as the court could make findings which would affect in a most profound and far reaching way the lives, liberty, fortune and reputation of those affected, such powers could not avail of the protection of Article 37 of the Constitution. In essence, this was a direct application of the Supreme Court decisions in the cases mentioned, in particular *O'Farrell & Gorman*. This in my view was a stand-alone part of his decision and the importance of such conclusion on this point is not undermined by the additional finding that since an election court might engage, within jurisdiction, in matters partly criminal, that aspect of its powers also violated Article 37 of the Constitution (*Cowan v. Attorney General* [1961] I.R. 411).

The Subsequent Cases:

55. The five-characteristic formulation from *McDonald* and the reasoning of Kingsmill Moore J. from *O'Farrell & Gorman* have, generally, enjoyed widespread judicial support with nothing in the judgment of O'Flaherty J. in *Keady* to credibly challenge *O'Farrell & Gorman*. In *Central Dublin Development Association v. AG* [1975] 109 I.L.T.R. 69, the same judge, Kenny J., applied *McDonald* in holding that some provisions of the Local Government (Development and Planning) Act 1963, constituted the administration of justice, but went on to conclude that in accordance with the judgment of Kingsmill Moore J, the same were entitled to the protection of Article 37.

56. *McDonald* was applied by this Court in *Goodman International v. Hamilton (No.1)* [1992] 2 I.R. 542, on a straightforward basis (589/590: S.C.: 556: H.C.) as it was by the High Court in *Wheeler v. Culligan* [1989] I.R. 347 (Costello J.), and likewise In The Application of *Neilan v. DPP* [1990] 2 I.R. 267 (Keane J.): see also *Brady v. Haughton and Others* [2005] IESC 54, [2006] 1 I.R. 1, *Cassidy v Commissioner of an Garda Síochána and Others* [2014] IEHC 386 (Barr J.), The two most recent cases are those of *O'Connell v. The Turf Club & Ors* [2017] 2 I.R. 43 ("*O'Connell*"), and *Damache v. Minister for Justice & Ors* [2020] IESC 63 ("*Damache*"). In the former, *O'Farrell & Gorman* and *McDonald* were applied in both the judgments of Hardiman J., who expressed no reservations whatsoever about either decision (p. 64-67) and by O'Donnell J., with whom the other members of the court agreed, (p. 98-100). On the facts, Hardiman J. was satisfied that "certain [but not all] of the criteria" set out in *McDonald* were satisfied, at least to the extent that the exercise of the power "may arguably constitute an administration of justice" (p. 66). On the other hand, O'Donnell J. could not see any compliance with requirements (iv) and (v) of *McDonald*.

57. Although explaining what is undoubtedly true, namely that the boundary line between judicial power and administrative power is not easy to determine, nonetheless, O'Donnell J. continued "it is now…much too late to seek any comprehensive theory, even if such was desirable. Instead the resolution of these cases must be found within the existing case law and the guidance which they offer", citing in support the report of the Constitutional Review Group 1966, at p. 55. (para. 93). See also *Damache* where in the context of a purported revocation of a certificate of naturalisation , this Court unanimously held that such a revocation, if made could not be enforced in its own right or converted into a judgment (*O'Connell* 94) so as to achieve the deportation of the applicant: for that purpose an entirely different procedure would be necessary. Accordingly, in applying the *McDonald* criteria, point No. (iv) and for other reasons point No. (v) were not satisfied with the result that Article 34 was not infringed. (para. 67-71)

Suggested Pull-Back:

58. Despite the longstanding support underpinning the above approach to both Article 34 and Article 37, some of my colleagues have expressed the view that the principles involved, never somehow gained the traction which might have been anticipated after those cases were decided. In other words, there was an expectation that such might have led to the constitutional compatibility of many statutory bodies being intensely scrutinised with a partiality toward their demise. The fact that this did not occur is relied upon to recant from the widespread approval which both authorities have since enjoyed. Others have tended to confine this line of argument to the test of Kingsmill Moore J. on the Article 37 provision. In either situation, *Keady* is primarily cited in this regard: in fact, very few if any other cases are aligned with that decision for this purpose. It is said that *Keady* (i) represents a significant pull back from the taxing demands of both *O'Farrell & Gorman* and *McDonald*, (ii) that it regarded the five-point test of Kenny J. as a guide only to the definition of judicial power and, (iii) that it also decided that *O'Farrell & Gorman* should be confined to its own facts and not otherwise have general application: all pointing to a more relaxed judicial approach to both Articles 34 and 37 of the Constitution. With the utmost respect, even if some such generous standard should be appropriate to either one or both of these constitutional provisions, I have great difficulty in reading *Keady* as a justification for this conclusion. I doubt very strongly that the case is an authority for what is being suggested. My reasons are as follows.

***Keady v. the Commissioner of An Garda Síochána* [1992] 2 I.R. 197**:

59. In issue in *Keady* was whether or not the powers of the Commissioner of An Garda Síochána, to dismiss a member from the force, following a breach of discipline finding by a Tribunal of Inquiry, all under An Garda Síochána (Disciplinary) Regulations 1971, were such as to breach the provisions of Article 34 of the Constitution and if so, could Article 37 be invoked to save them. Two judgments were delivered, McCarthy J. and O'Flaherty J., both of which were agreed by the other members of the Court.

60. McCarthy J. referred, with approval, *inter alia*, to *Lynham v. Butler (No.2)* (202), *Cowan*, *Shanahan, McDonald* and *O'Farrell & Gorman* (203), when discussing the essential features of the administration of justice, and in the process cited large passages from the judgments of Kennedy C.J., Kingsmill Moore J., and Kenny J. The learned judge went on to apply *McDonald* and concluded that the challenge failed requirement No. (i) in that there was no dispute or controversy of a kind envisaged by that characteristic of the test. On the broader front he rejected a submission that the legislative regime dealing with certain professions (para. 41 above), should by analogy be applied to the powers in question, so that only the court would have the ultimate dismissal authority in that regard (*C.K. v. An Bord Altranais* [1990] 2 I.R. 396: Finlay C.J. at 403, with whom McCarthy J. agreed, was cited in support). In his view, members of An Garda Síochána were entirely different from professional people who required a certain qualification and an ongoing standing to practice: whereas apart from the higher management being nominated by the government, all members of the force were appointed by the Commissioner. He then went on to say "In the case of an office or other position created by statute and held pursuant to statute, in my view the principles stated in *In Re The Solicitors Act 1954*, [1960] I.R. 239, are not to be extended, <u>if they are to be extended at all</u>, so as to embrace the statutory framework which deals with the creation of and an appointment to a particular position or rank and not to the wider fact of being qualified to work for gain in a restricted occupation as well in appropriate cases as being qualified to hold a particular position or rank" (emphasis added) (206/207). These features he said, distinguished the regulations and members of the force from the professions mentioned and their governing legislation. It seems to me however that having endorsed the line of authority as mentioned, I cannot accept that by simply distinguishing the members of the force from other professional people or by the throwaway comment which is emphasised, he intended to suggest that such case law had outlived its usefulness and that it was no longer of general application. If he did, I like several other judges would strongly disagree with such proposition.

61. O'Flaherty J., delivered a second judgment: when referring to *O'Farrell & Gorman* he felt "central" to that decision was the historical role which the court played in maintaining a profession of recognised integrity and one with the highest level of competence: *C.K.* was differentiated on the basis that a dismissal of such a person resulted in a loss of his professional qualification whereas a member may have lost his employment, but not any qualification. Further, having cited the five point test from *McDonald*, he isolated "two essential ingredients" from the five, namely the existence of a contest between parties and the infliction of "some" form of penalty or liability. In Mr. Keady's case there was no such dispute or controversy and accordingly, Article 34 was not engaged: it was not therefore necessary to consider Article 37.

62. It is however that part of his judgment, which comments on the decision of Kingsmill Moore J., which is more relevant to the instant discussion. Having referred to that passage which identified the severity of the imposed sanction as a key factor, the learned judge

continued "Earlier in the court's judgment it made clear that it was not dealing with a domestic tribunal with a jurisdiction based solely on contract (at p. 264). It seems clear, therefore, that the case of solicitors must be regarded as exceptional and, perhaps, anomalous and owes a great deal to the historical fact that judges always were responsible for the decision to strike solicitors off the Roll". This has been relied upon for suggesting that *Keady* hoisted a red flag against the further general application of *O'Farrell & Gorman,* if indeed, it did not signal its virtual demise or something close or akin to it. I respectfully disagree, as the passage quoted does not in any way support the conclusion reached (para. 126 *infra*).

The Land Commissioners and the Revenue Commissioners

63. A line of argument running through this case is a suggestion by the respondents that since the powers exercised by both the Land Commission (or "L.C.") and the Revenue Commissioners (or "R.C.") have on several occasions resisted various challenges under Article 34 of the Constitution, then the powers of the WRC by analogy should likewise be so declared. This in my view involves an inherent misunderstanding as to the reasons why historically both of those bodies were found to be external to the constitutional provision as mentioned. My reasons are as follows.

Land Commission:

64. Notwithstanding the respect which ever since has rightfully been paid to the judgment of Kennedy C.J. in *Lynham v. Butler (No.2)*, it is I think more revealing to consider that of his colleague in understanding the true *rationale* which underpins L.C. cases in a constitutional setting. The decision of Johnston J. is most insightful in this regard. At both the outset of his judgment and again towards its conclusion, great emphasis was placed on the exercise of carrying out the land purchase code, described as a "great social work of the highest importance" (115), and as "an administrative task of national importance and of colossal magnitude" (p. 123). This work involved *inter alia* the abolition of the dual ownership of land by acquiring whole estates for relocation purposes and by advancing monies to certain tenants to enable them to acquire their holdings. Such an undertaking was vested in the L.C. being the land administrator for the entire state and as a body "…equipped with the most complete knowledge of the agrarian and social conditions of this country and actuated by an absolute determination that every citizen and every class of citizen should get fair play and honest treatment". Therefore, the identification of such lands in that case was not in any sense an exercise of power under Article 64. In his view "any other result would have a most paralysing effect upon the whole work of the Land Commission", and would convert that provision of the Constitution into "a guarantee of anarchy and not of order" (123/124). See also to the same effect *In Re Maxwell's Estate* ([1891] 28 LR IR. 356 and *In Re Lawrence Estate* [1896] 2 I.R. 347).

65. *Fisher v. Irish Land Commission* [1948] I.R. 3, was I think one of the first cases of note to call for resolution after the 1937 Constitution. This was a "resumption" case under s. 39 of

the Land Act 1939, in respect of which the Lay Commissioners had the power to decide all issues arising, including the question of title to the subject lands: its decision was final subject only to an appeal on a point of law. In dismissing an Article 34 challenge, Gavan Duffy J., as then, when once more referring to the policy of the code, alluded to the grave economic problems of the time and the dreadful plight of small farmers who were forced to survive on totally uneconomic holdings. This could be addressed, at least in part by the equitable distribution of certain estates, following the partial or total expropriation of some proprietors. As the ordinary courts were in his view ill fitted for that task, the Oireachtas turned to the Land Commission as a tried and efficient public trustee and as an expert body enjoying great public confidence. As such, it "…must now enjoy a very wide and virtually uncontrollable discretion in the practical administration of the policy committed to its charge" (p. 11). It was clear to the learned judge that by committing those issues to "one of the most extensive agencies of administrative government in the State", the legislature clearly felt that the measures in question were "extra judicial in their general scope" (10). On the constitutional question, whilst confessing that he himself would "classify the power given…as fundamentally legislative, though one might call it administrative in everyday speech" (p. 12), nonetheless, he very much doubted whether any of those powers could be said to partake of the administration of justice. As such, recourse to Article 37 was not required to validate the powers of the Commission under s. 39 of the Act: however, if it was, those powers were clearly of a limited nature under that provision. The Supreme Court so agreed with these views and this conclusion.

66. It is interesting to note that the same judge, who as counsel for Mr. Butler (*Butler v. Lynham (No.2)*), had boldly and vigorously asserted "in his devastating argument" that the Land Commission was "an unconstitutional court", "a judicial enormity" and thus, unconstitutional (Fitzgibbon J. 109), had in an earlier judgment commented on Article 37 as follows:-

> "The Oireachtas has continued the policy of committing the highly technical and intricate administration of land purchase under a wide and comprehensive code to a responsible body of specialists, with an extraordinary and unique jurisdiction: and this anomaly is carefully protected by Article 37 of the Constitution." (*In Re Loftus Bryans Estates* [1942] I.R. 185 at 198) (emphasis added)

67. There are two further cases which might be mentioned: *The State (Crowley) v. Irish Land Commission* [1951] I.R. 250 and *Foley v. Irish Land Commission* [1950] 2 I.R. 118. In the first, again a "resumption" case but under a different subsection of s. 39 of the Land Act 1939 from *Fisher*, the court was satisfied that whilst the Commission's function was *quasi*-judicial it was captured by Article 37, whereas in the second, which involved the exercise of powers under s. 2(b) of the Land Act 1946, the court dealt with the constitutional argument by reference to both Article 34 and Article 37 holding that whichever applied, the impugned powers were not susceptible to constitutional challenge. (See the High Court

judgment in Foley where Dixon J. agreed completely with the views espoused in *Fisher* as to the social importance of the L.C. and the functions its performed).

The Revenue Commissioners:

68. In the past number of years, diverse challenges in a variety of ways have been asserted against certain powers of the Revenue Commissioners, in which decisions of the Appeals Commissioners, Tax Inspectors and the Collector General, have all been questioned. The first of those which I wish to mention is *the State (Calcul International Limited & Ors) v. Appeal Commissioners & Anor* (Unreported, High Court, 18th December, 1986) ("*Calcul*"). Barron J., rejected the submission that by finally determining an appeal, moved by the taxpayers against assessments raised by tax inspectors, the Appeal Commissioners were exercising judicial power. In doing so, he endorsed both *McDonald* and *O'Farrell & Gorman*, citing certain sections from the latter which included the passage: that if the impugned powers affect in "the most profound and far reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised, they cannot properly be described as "limited"". (para. 56).

69. When addressing their functions he held that, whilst questions of fact and law may be involved and that the process is adversarial in nature, nonetheless the Commissioners "do not deprive [the tax payer] of anything nor impose penalties, nor limit his freedom of action" (para. 60), with their essential function being to adjust, if at all, the quantum of any assessment. Further, although acknowledging that the required exercise, involved determining the amount of tax to be paid and as a result "obviously imposes liability upon the tax payers concerned" (para. 60), nonetheless, in accordance with the cited case law, such powers did not amount to the administration of justice. In addition, firstly, although recognising the seriousness of being branded a tax defaulter, such was but an inference from the decision and not part thereof. Secondly, although their decision may well impact financially on a taxpayer, the same should not do so in any profound way as any liability is proportionate to the value of goods or to one's taxable income: it is thus relative in that way with the actual amount involved, however large, not being important. Therefore, on the Article 37 issue the powers in question cannot be said to have the kind of far reaching effects as contemplated by the authorities. The conclusion can be contrasted with *Hunt*, where this Court (Keane C.J.) held that the powers of the Appeal Commissioners in issue in that case were properly characterised as limited functions and powers of a judicial nature within the meaning of Article 37.1. (*Criminal Asset Bureau v. Hunt* [2003] 2 I.R. 168).

70. Where in a situation of default, occurring within s. 7 of the Finance Act 1968, the Revenue Commissioners, following demand as in this case based on an assessment, had the power to activate recovery steps: either by distraint or court proceedings. (s. 485 of the Income Tax Act 1967). ("the 1967 Act"). In his challenge, Mr. Kennedy alleged that s. 7 was repugnant to Article 34 of the Constitution. Finlay C.J., in giving the court's judgment

rejected that argument. Although not referring to either *O'Farrell & Gorman* or *McDonald* by name, it is clear that both decisions were being endorsed and applied, subject perhaps to a revised wording on point (v) of *McDonald* (paras. 82 & 83 below). In his view, there was no "contest" or "issue" of fact or law arising on the 25th July, 1984, when the Collector General generated the enforcement steps, even if he did so in the mistaken belief that the tax remained unpaid: accordingly, there was no judicial determination involved in that decision. Secondly, what created/imposed the liability or affected the appellant's rights was not the decision of the Collector General, but rather was his own default in complying with his statutory obligations. Finally, the powers contained in s. 485 of the 1967 Act, did not oust any of the functions vested in judges under Article 34. Accordingly, that aspect of the claim was rejected. (*Kennedy v. Hearne* [1988] I.R. 481).

71. In the third case, where returns are not made for schedule D purposes, assessments may be raised under s. 184 of the 1967 Act, which in the absence of appeal become final and conclusive. Enforcement steps may then be taken requiring the County Sheriff to execute for the amount specified (s. 485 of the 1967 Act: see the preceding paragraph). Having found himself in these circumstances, Mr. Deighan at that point of the process challenged both the power to raise the assessments and that of the County Sheriff to levy execution thereon.

72. Murphy J., in the High Court, was entirely satisfied that the raising of an assessment was purely an administrative task: it involved neither a dispute or controversy and in the 'ordinary' way, resulted from the application of the relevant statutory provisions to the information which the tax payer was obliged to submit. Whilst of necessity the situation is more difficult where default has occurred, nonetheless the legal effect of each procedure is the same. The "finality" aspect of an assessment results, not from any determination by the Inspector as such, but rather by the tax payer's failure to challenge, on appeal that assessment. In the view of the learned trial judge, Article 34 was not engaged. That decision was affirmed on appeal, with this Court applying the principles which it had in the then recent past set out in *Kennedy v. Hearne* [1988] I.R. 481. Accordingly, the constitutional challenge to both the raising of the assessment and the execution steps was rejected. (*Deighan v. Hearne* [1990] 1 I.R. 499).

The Underlying Rationale for such Bodies:

73. The land question seen in a national and historical context, and the State's policy response – to alleviate the untoward affliction and ghastly suffering of its people – *via, inter alia,* the Land Acts/Land Purchase Acts including the establishment of its implementing agency, were in my view key appreciating factors in the judicial approach to the constitutional challenges previously mentioned. In so saying, I am not suggesting that legal learning of the most scholarly type was not applied by those imminent judges involved in such decisions: however, in light of some of the individual conclusions reached and the reasoning behind them, some further explanation should be added. Indeed, this type of influence can be seen in some cases quite explicitly and even if less so in others, is still

present. A brief recap on the judgment of Johnston J. in *Lynham v. Butler (No.2)* will illustrate this point. The learned judge was unquestionably satisfied that the Commission's work was correctly described as administrative, and not judicial. Even if some or many of its activities had the appearance of the latter, such were in his view *quasi*-judicial in character, and were purely incidental and ancillary to its principal functions as above described. With that pragmatic reasoning, it was possible to preserve the distinction between the administration of justice and the several administrative tasks which the executive sought to have carried out by non-judicial bodies: if such had to be otherwise classified, the same would seriously undermine that branch of government. The tripartite division established under Article 6 of the 1922 Constitution was not devised in that way and had within it a breadth of flexibility and elasticity which allowed for the carrying out of such functions: this in his view was a sound basis for the distinction so made. Accordingly, the judicial conclusion in that and other cases, was that the Land Commission in all of its attributes and in performing all of its functions was administrative in nature, with its national standing being pre-eminent in this regard (Kelly, 6.1.11).

74. On the Revenue front, the overall impression given in each of the three judgments just discussed (*Calcul, Kennedy and Deighan*), is that the functions performed by the Appeal Commissioners, Inspector of Taxes and the Collector General are not part of the administration of justice because the actual liability of the taxpayer is already existing and has been or is capable of being determined, by reference to the relevant provisions of the tax code; their function was to do no more than estimate, calculate and declare this liability. None of the decisions saw any of these powers, all exercised without court intervention, as involving a justiciable controversy of fact or law, or as being causally responsible for the imposition of a liability on the tax payer. Given the serious consequences which the resulting debt may have on the person and his asset position, it is perhaps surprising how, on the application of the principles outlined in *O'Farrell & Gorman*, Barron J. saw nothing profound or far reaching in their effect (*Calcul*) or why, some more critical analysis has not taken place on the constitutional compliance of such powers.

75. The Chief Justice in *Deighan v. Hearne*, had perhaps other reasons in mind to explain such cases when he said "this court in *McLoughlin v. Tuite* [1989] I.R. 82, has already indicated the importance within the constitutional framework of the revenues of the State and that has bearing upon the powers properly and necessarily vested in the Inspector of Taxes in this context" (504). The passage in *McLoughlin* was a reference to the fact that the tax code in general and the income tax sector in particular contained a series of statutory provisions so as to ensure that each tax payer should pay his due taxes and should do so "with a promptitude which will permit the central fund to be so established at any time so as avoid unnecessary short term borrowing" (88): Murphy J. in the High Court said something along the same lines. It therefore seems to me that the tenor of such comments alludes perhaps to a view of the work of the Revenue Commissioners which is not too far removed from the view of what the Land Commission did under the land

purchase code. In any event, I am quite satisfied that both bodies must be considered as being in a special area of consideration for both Article 34 and 37 purposes.

Observations on Article 34:

76. Although in *McDonald* Kenny J. felt it unnecessary to refer to more than three cases on the Article 34 and 37 aspects of his judgment (*Farrell and O'Gorman: Cowan*, and *The Queen v. Davidson* [1954] 90 C.L.R. 353), there was an abundance of other case law, in addition to *Lynham v. Butler (No.2),* which would have justified the formation which he outlined. Some of the authorities in question, much earlier in time, identified the following constituent elements of the test:-

(i) All controversies of a justiciable nature (*Kansas v. Colorado* (206 U.S. 46)

(ii) Deciding such controversies "between its subjects, or between itself and the subjects, whether the rights relate to life, liberty or property": followed by "…a binding and authoritative decision…" – *Huddart, Parker & Co. v. Moorehead*, 8 C.L.R. 330 at 357:

(iii) Adjudicating "…as to legal claims, rights and obligations whatever their origin, and to order right be done in the matter…" (*The Waterside Workers Case* [1918] 25 C.LR. 434,);

(iv) Having the power to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision ('Lectures on Constitutional Law' (1891) at 314: Miller J.: U.S. Supreme Court)

77. A few comments on the above: the extract at (ii), from Griffin C.J. in *Huddart Parker & Company*, was later acclaimed as being "a classic and widely accepted definition" (*Attorney-General for Australia v. The Queen* at p. 621). Secondly, the reference to "controversies" obviously means justiciable controversies and that relating to 'life, liberty or property', as illustrative only of the many other aspects of one's being and one's existence, which can be impacted, and thirdly, the mention of the "binding" nature of the decision is also noteworthy.

78. In addition to the impressive and diverse range of authorities on this issue, it appears to me at a glance, and certainly at a general level, that the identifiable elements from *McDonald* are for the most part self-evident. The first is the "subject matter" of a suit, a "justiciable issue", a "dispute or controversy" involving citizens, the State or other legal personalities. Of course not every dispute is amenable to judicial determination, and not every judge when sitting as a "court" is always exercising judicial power. Examples of both might be:

- The engagement of Article 15(10) - aspects of -, (12) and (13) of the Constitution: or an Article 26 reference,

- The raising of an estimate by the Revenue Commissioners in respect of monies due in a particular context, such as that presenting, (*Kennedy v. Hearne* [1988] I.R. 481)
- The performance by the A.G. of a function under s. 2 of the Extradition (Amendment) Act 1987, repealed since 2003 (*Wheeler v. Culligan* [1989] I.R. 344),
- The giving of directions under s. 7(4) of the Companies Act 1990 (*In Re Countryglen Plc* [1995] 1 I.R. 220),
- The administration of assets or trusts or when enforcing a family arrangement by consent (*Deaton* – 174/175), and
- The making of orders in wardship cases, in lunacy proceedings, and in certain matters regarding the winding up of companies (*In Re R. Ltd* [1989] I.R. 126 at 135 and *Deaton* – 174/175)

79. However, it should be noted that not all orders so made, particularly in the latter examples given, can be accurately described as non-justiciable: such will depend on the nature of the application itself, the relief being sought, the orders made and also perhaps the stance of the relevant parties. (*Eastern Health Board v. M.K and M.K. v. K.* [1999] 2 I.R. 99, Barrington J. at 116: *In Re Greendale Developments Limited (in liquidation) (No.1)* [1997] 3 I.R. 540 at 547 and *In the matter of JJ* [2021] IESC 1, McKechnie J.). Aside from this *caveat* however*,* such limitations are self-created and self-imposed so that the court's jurisdiction is properly and correctly exercised.

80. In relation to the second requirement, society could not in any compatible or self-restraining way exist unless disputes which inevitably arise could be determined by an independent and impartial body, with expertise and knowledge and one commanding widespread public respect: otherwise resort would be had to the most unsavoury means of resolution: hence the decision making aspect of justice. Thirdly, such decision, or determination, must have the inbuilt capacity to be an end in itself, meaning that subject to other avenues within the judicial process, such as reviews or appeals, there should be no necessity to engage with external bodies to bring finality to the matter referred. Fourthly, it is the constitutional norm that where enforcement of court orders becomes necessary, the same can and indeed must be executed by the executive branch whose constitutional powers and duties, include this obligation. The court self-evidently in no civilised jurisdiction can directly enforce its own orders. So much so for points (i) – (iv): the fifth feature however, requires some further comment.

81. As noted by Kenny J. in *Deaton,* this aspect of the "test" derived from a suggestion in *The Queen v. Davidson* [1954] 90 CLR 353, to the effect that if as a matter of historical fact the order or event under scrutiny, was typical of what the courts traditionally engage in, then the doing of such act would be characteristic of the judicial function. Whilst undoubtedly, it is true that Dixon C.J. in his judgment said something along those lines,

nevertheless the source of this observation should be noted as well as what the author actually stated, which was that "in doubtful cases" [we] ask whether the subject power was exercised by the Crown, parliament or by judges "at the time our constitutions were adopted" (The Rule Making Power, 12th A.B.A. 599: Dean Pound). With great respect, whatever limited validity this proposition may have in a certain context, it is very difficult to see how the extrapolation made by the learned judge could be justified on such basis.

82. Leaving that aside however, and despite what Kenny J. said, I do not believe that support for the same point can also arise from the reference in *O'Farrell & Gorman* to the historical role of the court regarding solicitors: that in my view was particular to context, and was neither absolute in intention or unconditional in effect. Moreover, a moments reflection will illustrate that if taken literally, such aspect of the test could render immune from an Article 34 challenge, the exercise of powers conceived in and serving modern society, but which are foreign looking to the historical landscape. Such would have quite disturbing implications for the separation of powers and within that for the constitutional role of the court under that provision. I therefore would alter the fifth requirement by removing its confinement to the "historical" nature of such orders, and instead would adopt the refinement suggested by Finlay C.J., where such is included but not decisively so worded: the Chief Justice said "a further test which can be applied to the question whether this section allows the exercise of a judicial function is whether it has the effect of invading or ousting any of the functions vested in the judges by Article 34 of the Constitution" (*Kennedy v. Hearne* [1988] I.R. 481 at 489). This has the obvious benefit of being able to assess the requirement in a contemporary setting.

83. There is another justification for this view. I have always believed that the Constitution should be viewed as an instrumental medium to serve the people who in return would serve the Constitution. As prevailing values, norms and standards will inevitably change over time, it is important that the highest level of the societal legal order should be capable of adjustment, by interpretation, so as to reflect those needs and requirements. Thus, it has often been said that the Constitution is flexible and is amenable to change, with no one interpretation being definitive for all time. However, to say that the Constitution is a living document is a treacherous generality, being as deceptive as it is accurate. Certainly in some areas it has been adapted to reflect society but in many others, particularly in the most sensitive and personal areas, such as families, marriage, status, relationships and the like, it appears quite incapable of movement, in fact it seems to be frozen in its historical origin. It is to be regretted that a more bold, innovative and imaginative approach has not been adopted by the judiciary at large. In any event, I cannot imagine that Kenny J. intended to exclude from the purview of Article 34 all orders other than those which traditionally the courts were likely to make. If however I am wrong in that regard, I would also on this basis, include as part of point No. (v), orders which are typical or normal of the judicial system at any given time.

84. All of the above discussion is helpful in offering an understanding of what the essential elements of both Article 34 and 37 are, and where these interrelate with each other in the constitutional frame. This exercise is however complicated by the fact that bodies, in number several; in title, structure and composition vast; and in reach and scope enormous, have nonetheless consistently been held to be ministerial or administrative, but not judicial. These exist in multiple sectors of society and in many instances have a variety of powers and responsibilities for making decisions which affect the person, good name and property rights of citizens, sometimes in a most profound way. From this category can be excluded those which simply conduct exercises such as the taking of accounts and enquiries, the making of calculations, the ascertainment of facts, or those who engage in matters which are purely ancillary to and subordinate of the judicial system, *e.g.* registrars, examiners and the Master. With regard to the former agencies, many may exhibit, to use a hollow phrase "the trappings of a court" (*Shell* case, Lord Sankey at p. 296), such as having the power:

- To entertain contested disputes s
- To compel the attendance of witnesses and sometimes parties
- To direct the production of documents
- To take evidence on oath and to preside over cross examination
- To resolve factual disputes and decide controversial points of law, and
- To make a determination on such disputes, to finality.

These features are but illustrative: some will have more or less powers and others different powers. It is difficult to be more precise than this, as all will depend on the make-up of their individual formation.

85. Whilst the decisions of such organisations may be subject to review or appeal, howsoever described, and whilst the supervisory nature of the court's jurisdiction cannot be excluded, nonetheless the breadth of their established remit, can be considerable. To an onlooker, even a lawyer, their features may appear to closely resemble, if not indeed be indistinguishable from, the court process. As a justification, many would argue that given the complexity of modern day society, it would not be possible for the executive branch to govern in an effective and efficient way without utilising such entities. That indeed may be the case, but almost inevitably some such body with such powers, either by their creation or functioning, will inescapably encroach into justice and then may or may not have the protection of Article 37. This therefore begs the question: how can separation be decided upon?

86. In considering this matter, it is obvious that the existence of the factors above mentioned, cannot be decisive in badging an entity as a court or in determining the Article 37 issue (*O'Farrell & Gorman* at 273), even if undoubtedly such are also clearly incidents of the judicial power. A good deal of this convergence can be explained by the absolute

obligation on those bodies to act judicially at all times, that is to comply and ensure compliance with, not only natural justice, but also with the broader requirements inherent in the current understanding of constitutional justice: in short, they must act fairly and impartially and in a proportionate way to the circumstances presenting: (Kingsmill Moore J., 265/266): or as put "are subject to the trammels of a quasi-judicial body" (*Crowley* at 267). To satisfy this duty which exists regardless of the Article 34/37 debate, many of the requirements above identified would have to be complied with. But, as sometimes stated, "due process is not necessarily judicial process" (*Reetz v. Michigan* 188 U.S. 505). Accordingly, not a great deal of differentiation can be deduced from the existence of these features, whether implicit or explicit in the exercise of the subject power. So the basic problem remains for the court, as the only organ of government who can so decide, by what test can it be determined which bodies/powers merit constitutional condemnation, and which do not?

87. As is evident from reviewing the case law, whilst many judges have described the ingredients of what constitutes the administration of justice few have ventured to define it in such a way that the resulting test could be applied at a general level to the varying circumstances which may present. Whilst some phraseology, different from that used in *Lynham v. Butler (No.2)* and *McDonald*, appears from time to time, the same is more by way of explanation than analysis. It is therefore probable that it is not possible with any precision to delineate the boundary in an all-inclusive or exclusive way. Whilst it would be much more acceptable if that exercise could be achieved, such may not be realistic given the myriad of bodies established *inter alia* by statute with such diverse subject matters, powers, functions and responsibilities.

88. Even Kingsmill Moore J. concluded, from a survey of the representative cases outlined in his judgment, that "from none of the pronouncements as to the nature of judicial power which have been quoted a definition at once exhaustive and precise be extracted, and probably no such definition can be framed". Very much the same was echoed by Davitt P., in *Shanahan*, where he was content to identify a number of features, subsequently evident in *McDonald*, which if existing were to his mind an exercise in judicial power. McCarthy J. in *Keady* added a further voice in this regard "I share the reluctance of Davitt P…to attempt a definition of judicial power: it is easier, if intellectually less satisfying, to say in a given incidence whether or not the procedure is an exercise of such power, rather than to identify a comprehensive check list for that purpose" (204). Further, having said that any such definition is complicated by the existence of Article 37, O'Donnell J., in this precise context said "It is now however, much too late to seek any comprehensive theory, even if such was desirable. Instead the resolution of these cases must be found within the existing case law and the guidance which they offer" (*O'Connell v. the Turf Club* [2017] 2 I.R. 43 at 98).

89. Finally, as the majority of the Constitution Review Group noted in this regard in its report (1996) "…there is no completely satisfactory answer to the problem raised and…there are great difficulties in formulating a different set of words which deal adequately with these complex issues". (para. 34). It is difficult, from an examination of the case law, to otherwise than agree with these and the above observations, with the result that if a generalised approach by way of a comprehensive description cannot be satisfactorily found, then in my view one can only proceed on a case by case basis and apply the well-established principles to the powers under scrutiny in any given case. In consequence, I am satisfied to adopt and apply, subject to the *caveat* above mentioned (paras. 82 and 83), the criteria set out by Kenny J. in *McDonald,* as further explained, both before and after that decision, in a number of the cases previously considered in this judgment.

90. To understand the conclusion reached in this case on the Article 34 issue, it is necessary firstly to refer to the procedures of the 2015 Act under challenge and secondly, to address briefly the restriction which the learned trial judge placed on what arguments could be advanced by the appellant on the constitutional issues, in effect, the standing point.

The Procedures under the 2015 Act: an Administration of Justice:

91. Prior to the 2015 Act, there were several different bodies which played a role in the investigation, adjudication and resolution of industrial relations disputes and employment issues, loosely so called. With the intention of streamlining the procedural mechanism utilised by such bodies, the 2015 Act created a unifying process through which all such disputes would be processed and determined. This new procedure included claims under the 1977 Act and the 1991 Act.

92. At the outset, it should be noted that the EAT was abolished by this Act (s. 65), and that its functions relating to, *inter alia*, claims under the 1977 and 1991 Acts were transferred to the Workplace Relations Commissions (WRC) (s. 66). From our point of view however, the most relevant sections are those contained in Part 4 of the Act (ss. 38 – 53 inclusive), which cover the initiation, investigation and adjudication of disputes arising out of employment in the workplace generally, including the enforcement of any orders so made.

93. An employee who wishes to make a complaint, must do so directly to the Director General of the WRC who on receipt thereof, refers it to an "adjudication officer" ("AO"). The resolution process by way of mediation did not feature in this case (s. 39). That official has duties, obligations and powers under s. 41 of the Act. Included are the following:- to afford the parties an opportunity to be heard and to present their evidence and to make a decision on the complaint in accordance with the relevant redress provision (subs (5)(a)). The AO has the power by way of written notification to compel the attendance of witnesses, to give evidence and to provide documents, with such persons being entitled to the same immunities and privileges as a witness before the High Court (subs (10) and (11)): the failure or refusal to give evidence or produce documents in accordance with the

notice is a criminal offence which on summary conviction is subject to a class E fine (subs (12). In addition, proceedings before an adjudication officer "shall be conducted otherwise than in public" (subs (13), and all such decisions are published. However, of note and indeed of some surprise, is the fact that there is no provision for the administration of an oath, or for the cross examination of witnesses.

94. The enforcement of a decision made by an adjudication officer is by way of an application to the District Court, which becomes necessary only if and where an employer defaults in compliance within 56 days of the decision being notified to him: obviously such a step is not required where the order has been satisfied. This provision, along with s. 43(1) and (2) plays a central role in Mr. Zalewski's appeal against the finding of the learned trial judge that requirement (iv) of the *McDonald* test has not been met. On such an application, which can be moved by the employee or with his consent by a trade union or excepted body of which he is a member, or indeed by the WRC itself, "…the District Court shall without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the decision in accordance with its terms." (emphasis added) (subs (1)). Ss. (2) also bears quoting "Upon the hearing of an application under this section in relation to a decision of an adjudication officer requiring an employer to reinstate or reengage an employee, the District Court may, instead of making an order directing the employee to carry out the decision in accordance with its terms, made an order directing the employer to pay to the employee compensation of such amount as is just and equitable having regard to all of the circumstances but not exceeding 104 weeks remuneration in respect of the employees employment…" (emphasis added). There are comparable provisions for the enforcement of a decision of the Labour Court, although in that situation the District Court has no power to interfere with any redress aspect of the order made (s. 45). In addition, the Court has a discretionary power to award interest under s. 22 of the Courts Act 1981, as amended. This is not material. Finally, a failure to comply with the court's order made under s. 43 (AO) or s. 45 (LC) is a criminal offence punishable on summary conviction, with a class A fine or imprisonment for a term not exceeding 6 months, or both (s. 51).

95. In terms of the appeal structure, such is contained in s. 44. There is a right of appeal to the Labour Court by way of a full re-hearing on facts and law (s. 44(1)), which body can refer any legal question to the High Court (s.44(6)). Following its decision, the parties may also appeal to that Court, but only on a point of law (s.46). Various time limits for these steps are set out in the sections mentioned. This system can be contrasted with the previous regime under the 1977 Act, which provided for a full re-hearing before a court, namely the Circuit Court.

96. As is evident, the features of the 2015 Act just identified have the practical effect of creating a procedure for dispute resolution which is in fact entirely akin to that of legal proceedings. Though the setting and framework of an inquiry under s. 41 may well be

more informal and swifter than a court action, these considerations are irrelevant to the question, which now must be considered, of whether the process is or is not an administration of justice. Before doing so however, a brief word about a standing issue.

***Locus Standi* Point:**

97. As mentioned, but only scarcely so, (para. 8) the applicant on the constitutional issue was not permitted by the learned trial judge to rely on the powers of the WRC under any enactment, save that of the 1977 and 1991 Acts: in particular, he wished to highlight that under s. 12(3)(c) of the Protected Disclosures Act 2014, an employee who had been "unfairly dismissed" on the basis that he/she made a protected disclosure, may be entitled to five years remuneration. That, according to Mr. Zalewski illustrated the vast nature and scope of the powers which an adjudication officer and the Labour Court alike possess.

98. Prior to *Cahill v. Sutton* [1980] I.R. 269 the range of arguments available on a constitutional challenge to a piece of legislation was extensive but not unlimited: it certainly was not confined to the individual circumstances of any given plaintiff: an example of which is *McDonald* itself, where the full range of the Board's powers were considered. In fact, the law books are littered with submissions that ranged far and wide in that respect but which are not purely theoretical or wholly unrealistic. All of that changed with this Court's decision in *Cahill,* which resulted in a significant modification to that practice as then applying in this jurisdiction. The resulting consequences were that any person seeking to mount such a challenge, was confined to how he was or would be impacted by such provision(s): no wider claim would be entertained. (p. 284 of *Cahill*).

99. Although with some flexibility from time to time, *Cahill* has been consistently applied ever since. However, it has attracted some criticism, including that from McCarthy J., who as lead counsel for Mrs. Sutton was baffled by the decision and who subsequently as a judge expressed hesitancy, indeed, even a flat-out refusal to accept what he described as the "busybody" basis for the decision *(Norris v. v Attorney General* [1984] I.R. 36 at p. 91). He doubted in the 43 years before *Cahill*, that there had been many instances, if any at all, of "officious interference" where a plaintiff instituted a case of this type without a personal reason or justification to so do: "reluctantly" however, at the end of the day he considered himself bound by it (p. 91).

100. Four years later, the learned judge dissented, yet again, from the rest of this Court, who had applied *Cahill* to reverse the decision of Costello J., who held that the applicant had standing to bring *mandamus* proceedings seeking to compel the government to commence, by an S.I., s. 60(1) of the Civil Liability Act 1961, which abolished the rule against non-feasance (*State (Sheehan) v. The Government of Ireland* [1987] I.R. 550). It is difficult to disagree with his comment that "If the prosecutor [who had tripped on a pavement and had been injured], or another in like position, does not have *locus standi*, then who has?" (p. 562). Whilst other voices have been raised from time to time, the

decision of Henchy J. is still very much alive.

101. This particular case, in quite a specific way, illustrates very well the concerns which McCarthy J. had in mind. There is no doubt but that the range of compensation which an adjudication officer could award would be, and in fact was, an important aspect of the court's consideration in this appeal, especially in relation to Article 37, with there being a significant difference between 260 weeks (five years' worth) of salary under the 2014 Act, as distinct from 104 weeks (two years' worth) of salary under the 1977 Act. Simons J. in fact made a very similar point regarding the other end of the scale where under the 1991 Act, the maximum amount is 2 weeks' remuneration, albeit he did so to make a different point. Nonetheless, this very example highlights the artificiality of a situation which can result from an over restrictive approach to standing.

102. In addition, the Oireachtas, which must now examine quite carefully certain provisions of the 2015 Act, in particular those referable to both an adjudication officer and the Labour Court, are left with what is in essence an incomplete assessment by this Court of the full powers which such bodies possess under the legislation. In many situations that would not give rise to a difficulty and in fact would accord with a sensible application of *Cahill*: but in this case, given the integrated nature of these powers, it may well do so. It certainly has resulted, at the very least, in the creation of a doubt as to what the overall outcome of the case would be, on the Article 37 provision, if this argument had been considered: obviously this will inevitably create uncertainty for the legislature as they assess the future pathway of the WRC.

103. In light of both of those points, the question remains whether this was a productive or an ineffective application of the doctrine of *locus standi*? Given that one of the main objectives of the rule, is to protect the administration of justice and also to ensure that any such challenge retains "the force and urgency of reality", I do not accept that allowing Mr. Zalewski to rely upon the argument mentioned would have undermined this *rationale*, particularly since he was permitted, to "make the general point that the adjudication officers and the Labour Court exercise jurisdiction under a great number of pieces of legislation" (para. 31 of the High Court judgment). Quite the reverse may I suggest: and may I further add that had the rejected argument been allowed, the case would have been conducted in a more realistic, informative and worthwhile manner.

The *McDonald* Test:

Requirement No (iv)

104. The learned trial judge dismissed the Article 34 claim on the basis that in his view point (iv) of the *McDonald* test could not be satisfied (para. 47 above). The two essential reasons for this conclusion were firstly, that the bodies in question were dependent on the parties to activate the follow on enforcement procedure and secondly, the District Court's power to modify the redress ordered, if such was to include either re-instatement or re-

engagement ("re-employment", for short). The inclusion of the Labour Court in this latter reference by the judge was not intended and can be disregarded. As a result, therefore, in his opinion, neither body could be said to be involved in the administration of justice (para. 77 of the judgment). I respectfully disagree with this view.

105. In the first instance it is important to note the concession made by the respondents, to the effect that points No's (i) to (iii) of *McDonald* are in place. These factors must therefore create an extremely influential platform from which the other requirements should be considered, as it necessarily follows that the subject powers/processes have, at that point, permeated acutely into the judicial domain. This is a significant journey step into the zonal sphere of justice. In consequence, the further analysis required must be consciously impacted by that position.

106. In looking at this matter, it is important to differentiate between the position of an adjudication officer, and the role of the District Court: in this regard, one must start by again considering the process conducted by the AO (para. 93), from complaint to decision, and the legal position of the parties when that process has concluded. As previously noted, to fulfil the functions demanded by statute, the AO, having received a complaint, must consider all relevant evidence which either party offers and must afford to each of them an opportunity to be heard: for such purposes, he or she has the power to order the attendance of witnesses and the production of documents, both under pain of criminal sanction. The officer must adjudicate on the resulting evidence, both oral and documentary, and must do so by way of a decision which is then published. Certainly at first glance, such features sit side by side with those which are inherent in the court process. So where is the complaint at that point and what is the position of the parties?

107. Leaving aside the possibility of an appeal or the exercise of the court's supervisory jurisdiction, the unfair dismissal complaint at that point has been dealt with: it has concluded: it is over: the matter has ended. The facts, relevant to all aspects of the dispute, whether conflicting or otherwise, have been aired, the legal principles have been canvassed, the parties have had their say on both and a decision on the merits and law has been given. The AO is the only entity which touches the facts and applies the law to those as found. For all intents and purposes once over, the position of the parties has been established. There will be a winner and a loser or something close to either. The issue determined will never be revisited in the District Court. The matters dealt with have been ring-fenced and assigned to that process. Whilst the shortcomings of this system and the limitations inherent in it, cannot be ignored, and rightly are regarded as significant (paras 137 – 142 *infra*), nonetheless for all intents and purposes the parties will have engaged in a process which will have resulted in the final determination of the controversy between them: akin to essential aspects of legal proceedings. That the parties will have so considered, is clearly demonstrated by the fact that over 90% of decisions by adjudications officers are not appealed and so presumably have conclusively terminated the dispute

between those involved. It is only where default is made by the employer in complying with such decision, that the District Court becomes engaged.

108. It is obvious that a decision of the adjudication officer is not, of itself, directly enforceable as a judgment of a court is: hence the involvement of the District Court for that purpose. It is however important to carefully analyse the basic provisions which govern such application, as applying to an adjudication officer (s. 43(1) and (2) of the 2015 Act): the position of the Labour Court is that as set out above (para. 94). These provisions however, whilst curious to a point, are neither novel or original as can be seen by their inclusion in the amendment to the 1977 Act. Under s. 10(1) and (2) of the original Act, the relevant Minister could apply to the Circuit Court to enforce an order of the EAT; such however involved an entire rehearing by that court of the substantive case previously determined by the tribunal. Much if not exactly the same as if the employer had appealed under s. 10(4). That position was however altered by s. 11 of the 1993 Act, which, by virtue of subs (3) set out a process virtually identical to that contained in s. 43(1) of the 2015 Act. Apart from also permitting an employee to move such an application, the same was made *ex parte*, and required evidence only of the earlier decision and non-compliance following notification: based thereon, the Circuit Court was obliged to make an order enforcing the decision of the EAT, with a similar power in respect of any re-engagement or re-instatement, if suggested by the tribunal (para. 94 above). As can be seen, what resulted from the amendment was pretty much identical to what is now contained in the 2015 Act.

109. An application to the District Court can only be made by two persons, namely the employee or the Commission: I discount a trade union or an excepted body as independent from the employee, as neither can operate without his consent (s. 43(1)). If the trial judge is correct, as I think he is, in saying that one of the reasons for the Supreme Court's decision in *McDonald* was the fact that neither the coursing club or the racing club themselves could seek an injunction to enforce the exclusion order, that is not a factor in this case given the power of the Commission to also make such an application. That aside, there are several distinctive features of the process which must be noted: the employer has no right to be present or heard, the only evidence which is required of the employee or which can be demanded by the court is the existence of a decision and default having been made following notification thereof. With that evidence only, the District Court is mandatorily obliged to make an order directing due compliance with the decision of the AO in accordance with its terms. Save for the peculiarity of one aspect of the redress system, it has no other function: it cannot review the case even if it disagrees with the conclusion reached. The evidence involved could not be more perfunctory: it could hardly be said to involve anything more than the most cursory engagement, in that, on the production of such evidence its role is preordained by statute: the result is inescapable and must be as indicated. If the legislation therefore had so rested, the decision of the learned trial judge on this point may well have been different. However, it

was the modification powers of the court which were ultimately the most significant factor in his final decision.

110. These provisions are understandable as to intent and purpose but not readily recognisable as achieving that objective. I agree with MacMenamin J. that the principal intention behind these provisions was to offer a form of protective shield, so that this regime would be rendered less vulnerable to constitutional challenge. Whilst some doubts were occasionally expressed about the constitutionality of the EAT, (*Canada v. Employment Appeals Tribunal*: and some academic commentators: such as '*Kelly: The Irish Constitution*' at 6.4.111), it must be said that for the duration of its existence, those doubts were never seriously pursued. In any event, it is now of course the situation under the 2015 Act which is in issue.

111. At first I felt that I had a certain insight into the *rationale* behind subs (2) of s. 43 (para. 94 above), but in hindsight, I am far from sure of that understanding. In the notice of application one assumes that the employee will set out what form of redress he is seeking: if that is compensation, then subject to what follows, it is very difficult to see how the AO could order, in its place, re-employment without that having been sought by the employee. Whilst a possibility, it certainly seems a strange one. The most likely sequence therefore is that in the first instance such is sought and granted by the AO, but by the time of the District Court hearing, the employee has had a change of mind and then seeks to substitute an order for compensation for what was originally sought. How this could be considered by the District Court, given its remit, is far from easy to understand.

112. The other possible reason for this provision might be employer related in that it is, I suppose, not impossible to think of such a person, even one who is denying the unfairness alleged and certainly one who is defending the unfair dismissal claim, making such a suggestion before the AO. That situation might conceivably arise if there is any significant delay between the dismissal and the adjudication, and might be further influenced by intervening events occurring during that period. For example, it is not fanciful to suggest that an award of two years' compensation might render a business non-viable, and thus no matter how unappealing, re-employment might then be the most attractive outcome for the employer. But as the defaulting party, it is difficult to see how such a submission could prevail over the wishes of the employee. It any event, he certainly could not make that argument before the District Court as he will not be present, or represented or have any opportunity to adduce evidence or make submissions, or otherwise participate in any way in such proceedings.

113. A further difficulty of a much more general nature also arises with that possible scenario. Under the statutory provisions, the proofs required of an employee (or the WRC if the moving party) are extremely limited with the only evidence needed being that to support the very specific requirements above mentioned (paras. 109). The question then is this:

on what evidential basis could the District Court possibly discharge the compensation award and substitute in its place re-engagement or re-instatement? At the most instinctive level, some evidence would be required relating to the "unfairness" of the dismissal itself and the reason why compensation, rather than the alternative was sought: and, likewise as it would be to assess the appropriateness of the employee returning to the workplace, what position might be offered and of course why compensation was not or could not have been discharged. How, such evidence could possibly be entertained in light of the statutory focus on the restricted nature of the court's role and in the absence of the employer, is something I seriously struggle with. Furthermore, it must be recalled that all courts including of course the District Court is constitutionally bound to exercise fair procedures and to comply with natural and constitutional justice, right throughout their remit. How the operation of these provisions could be rendered compatible with this norm, is almost impossible for me to understand. As a result, it seems to me that save in the rarest of circumstances, which presently I cannot imagine, this provision (s. 43(2) of the 2015 Act) is both legally and constitutionally inoperable.

114. I very much doubt if any of these difficulties can be resolved or explained by the suggestion of some of my colleagues that in its role, the District Court is not involved in the administration of justice and that the judges, when so acting, are neither exercising judicial power or engaging in the judicial act: the logical corollary of that position is to say, as indeed it has been, that the court is somehow acting as a purely administrative chamber. I can find no authority for this proposition or for the analysis giving rise to it.

115. The fact that the District Court has such a limited role in supporting the enforcement of the antecedent decision, is no reason in itself to justify such a view. Several examples exist where on very limited evidence a court is obliged to make a particular order and may even do so on an *ex parte* basis. Some of these cases have been referred to in the other judgments delivered. *Dublin Corporation v. Hamilton* [1999] 2 I.R. 486, was one such case where it was held that the District Court could make an order under s. 62 of the Housing Act 1966, on the very specific and limited proofs set out in that section: a section not condemned by this Court in *Gallagher,* but compromised in *Donegan* ([2012] IESC 18, [2012] 2 I.L.R.M. 233) on the basis that in the absence of some method to determine a genuine dispute on the underlying facts, the Article 8 rights of the tenant were infringed. The problem in *DK v. Crowley* [2002] 2 I.R. 744, did not stem from the District Court's power to grant, *ex parte,* an interim barring order, but rather from the failure of both the legislation and the rules of that court (unlike the Circuit Court) to afford the respondent an early opportunity of contesting the order: there was no requirement for a return date or that a motion should issue. I therefore cannot see in any of these cases any support for the suggestion that the court when involved under s. 43 of the 2015 Act is but purely an administrative agency.

116. The fact that the District Court, when called upon, provides a supporting element to the enforcement of the A.O.'s decision, does not change the constitutional categorisation of what the adjudicative process is. If that in itself was the only reason to re-classify what otherwise would be an exercise of judicial power, then the same would have to follow regarding multiple other situations where similar support is frequently called upon. Whilst appreciating that there is a difference, these are not quite the same: attachment and committal, orders for possession, orders of *fieri facis* and sequestration, to name but some, come to mind. In addition, whatever the historical view might have been, it is no longer correct to say that court intervention in areas such as wardship, company law matters, the administration of estates *etc* (para. 78 above) is not an exercise of judicial power. Many of these can be highly contentious. To whom should a grant of administration be given? Should a person be admitted to wardship, noting the judgment of this Court given earlier this year in *J.J.* ([2021] IESC 1)? Consequently, it is only in very limited and very rare circumstances that orders typically made by a court are to be considered as not involving the administration of justice.

117. There is one further reason why in my view requirement No (iv) of *McDonald* is satisfied. In *O'Connell*, where in the context of the powers of the Turf Club, O'Donnell J. suggested as an alternative to direct enforcement that where a process for converting a prior decision into a judgment existed, then the same would satisfy this particular requirement: *Rogers v. Moore & Ors* [1931] I.R. 24 is cited in this regard. *Rogers*, is I think a case different to the point being made, in that the attempted set off, by the Turf Club, of a fine unauthorised by the relevant rules from monies held by it on Mr. Roger's behalf, was declared *ultra vires*. That aside, it seems to me that apart from the modification point, the District Court's involvement under the 2015 Act can be seen as a "process for converting" the previous decision of the adjudication officer into a judgment. As a result, on this ground also, I would set aside the decision of the learned trial judge on this issue. Accordingly, for the above reasons, I am entirely satisfied that requirement No. (iv) in *McDonald* has been met.

Requirement No (v):

118. On this point, I am satisfied to rest my conclusion in the same way and for the same reasons as set out by the learned trial judge at paras. 101 and 102 of his judgment. In particular, I fully agree that the determination of employment disputes across a diverse range of circumstances has been recognised as the business of the courts for several decades. Indeed, much longer. Putting the matter in reverse, would any practitioner specialising in this area or indeed, any judge dealing with such matters, consider that the same was foreign to court intervention or to his judicial role. I doubt very much so. Accordingly, it is unnecessary to add further on this matter.

Resulting in:

119. Consequently, as all five aspects of the McDonald test are satisfied in this case the only remaining issue on the administration of justice side, although of the highest significance, is to consider whether the adjudicative process of the 2015 Act, being that relevant to this case, can be said to be an exercise of functions and powers of a limited nature as ordained by the provisions of Article 37 of the Constitution (para. 12 above).

Article 37: Limited Functions and Powers:

120. In an earlier part of this judgment I outlined some of the discussion which the 1934 Constitutional Review Group had, and some of the debate which followed, on what eventually became Article 37: from a political perspective those who favoured its inclusion expressed concern about the potential vulnerability of bodies such as the Land Commission, the Revenue Commissioners, County Registrars, the Master *etc*. In effect bodies, which undoubtedly were not courts under the Courts of Justice Act 1924, but which were performing certain notable functions, considered necessary to give expression to executive policy in a variety of social, economic, cultural, political and legal spheres: these bodies were variously described as either administrative/ministerial in nature or as exercising quasi-judicial functions or sometimes both (paras. 25 - 30 above: History of Article 37).

121. In the period which followed 1922, there were a few intermittent cases where Article 64 was mentioned but not discussed in any significant way until *Lynham v. Butler (No.2)*. One of the earlier decisions, *Roe v. McMullan* [1929] I.R. 9, is of doubtful value as the only comment of note, that of Sullivan P., arose out of a particular submission of counsel which was in fact rejected: in any event, the observation made was quite ambiguous as to meaning (p. 15). Immediately prior to the delivery of that judgment, the Supreme Court of the Irish Free State, when dealing with the powers of the Master, on a referral by the court, to "assess" damages for an established breach of contract, held that it had not been shown at the particular point where the proceedings were, that the intended "calculation" was an exercise in judicial power. (*Matheson & Ors v. Wilson* [1929] I.R. 134). Another instance is where the court found that the execution of distress warrants by county registrars did not violate Article 64 (*Halpin v. Attorney General* [1936] I.R. 226), and finally, where it was held that an adjudication in bankruptcy by a county registrar was also constitutionally compliant (*the State (McKay) v. Cork Circuit Judge* [1937] I.R. 650). However, apart from those, there were very few other judicial murmurings, of note, which might have caused political unease.

122. Accordingly, whilst other bodies were undoubtedly mentioned in the debates and even in the case law, I remain entirely of the view that by far the greatest concern to the executive related to the Land Commission and the Revenue Commissioners. These were the focus of the concern: both from a political perspective (paras. 25-30 above) and a judicial perspective, the latter, as can be seen from the manner in which the courts, both pre and post 1937 have consistently ring-fenced such bodies from constitutional frailties.

(paras. 73-75 above). In this regard, may I highlight the views of no less a figure than Gavan Duffy J. who acknowledged on two occasions that position, firstly, in *Re Loftus Byrans Estate* [1942] I.R. 185 at 198 – saying that the Land Commission had "an extraordinary and unique jurisdiction: and this anomaly is carefully protected by Article 37 of the Constitution" (198) - and secondly, in *Fisher v. Irish Land Commission* [1948] I.R. 3, where he commented that Article 37 was 'probably' inserted to avoid the possible difficulties which were discussed in *Lynham v. Butler (No.2)* (see paras 73 – 77 above). Finally, may I say that the functioning of these bodies does not offer any general assistance to the interpretation of the constitutional provisions in issue.

123. As stated earlier in this judgment, an understanding of Article 37 cannot really be fully developed without involving a discussion on Article 34, which has been had elsewhere, but a brief recap is required. That provision is a cornerstone of our constitutional structure and is the lead provision on the judicial side of government. It therefore must have a headline meaning in the sense that there must be an area of administration, a core or principle area, that no other entity or body save for judges, may adjudicate upon. That area is separate to, and protected from encroachment by, all other arms of government: that is what the Constitution decrees. What *McDonald* tried to do was to put some practical meaning on this and to offer a criteria by which contested issues might be resolved. Save for the historical aspect of the five-point test, what was articulated by Kenny J. has been consistently applied since then. I readily acknowledge that it is not fully prescriptive in the sense of setting out a criteria, all embracing and immune from ambiguity, which by simple application could resolve all such disputed matters: whilst it is always more satisfying if the analysis gives rise to an authoritative definition of, as in this case, judicial power, nonetheless where, despite sharp attention by many insightful minds over several years, that has been found obstinate in reach and obscure in search, I am not afraid to rest on what is found practicable for a functioning judicial system. To those who voice opposition could I respectfully add that the strength of their disapproval would be more impressive if an alternative formula was offered to address the concerns raised: none such has been made and I have yet to see a more compelling approach to Article 34. I therefore reject the criticism made of this decision and likewise reject the subordination of the judge's reasoning as being circular in nature. Whilst I acknowledge the enormous benefit of academic discussion, abstract theory whilst formidable and highly welcome in its way, must at times yield to the judicial imperative of adjudicating upon cases in a constitutionally compliant manner.

124. What I think cannot but be acknowledged, even if I am wrong in suggesting that the Land Commission and the Revenue Commissioners were the key incentives behind Article 37, is that such provision was never intended to sit side by side with Article 34, and that both would have comparable status. Article 37 was grafted as an exception or derogation from a core principle upon which the vast majority of constitutional regimes, throughout the world, function, namely that justice is administered by judges duly appointed as such.

Such provision is subservient to Article 34 and must yield to its hierarchical superior of general application. It therefore follows that no matter what interpretive tools are used, such a provision must be narrowly construed and only in that way given effect to: any other application is a hostage to trust and offensive to the equilibrium created by the Constitution: such would severely undermine and damage the judicial institution, even if that is already considered, by some, as the weakest limb of government.

125. To this day the most informative case on Article 37 remains *O'Farrell & Gorman* in respect of which, despite some suggestions to the contrary, there has been a remarkable lack of criticism in the sixty years or more since Kingsmill Moore J. delivered the court's judgment in that case. One such however is that offered by Professor Casey, whose views can be distilled into the following: firstly, that no "real reasons" were given for the courts definition/description of "limited" and that "it was possible" a different meaning could prevail, namely being "restricted in number or subject matter", secondly, since the courts have not definitively decided on what the word "limited" means in Article 34.3.4 of the Constitution "it is difficult to accept" that in differentiating between that provision and Article 37, the court was correct. The main justification for these criticisms, if such can be so described, is that a more expansive approach "would give the Oireachtas wider scope for experiment" (321): so that for example the legislature could hive off "certain specified jurisdictions *e.g.* negligent actions" to a tribunal (*Constitution Law in Ireland* (3rd Ed.): (*The Judicial Power under Irish Constitutional Law*: I.C.L.Q., Vol. 24, No. 2, p. 305/324: C.U.P. 1975).

126. It has been further said that the decision has been marginalised and is seen as being increasingly anomalous: apart from *Casey* and *Keady,* I see no widespread support for such views but the generalised criticism of that case and *McDonald* offered by Professor Gwynn-Morgan should be noted. *Keady* in my view has been elevated into a position it simply does not merit: McCarthy J. referenced *O'Farrell & Gorman* as being one of a number of cases which he endorsed as having examined the meaning and breadth of the "constitutional prescript" of the administration of justice (202): and he then cited a particular passage from the court's judgment (204). Having stated that the decision should not be extended to the code in question he added the innocuous comment "if it is to be extended at all", which in my view has since been over-emphasised, wrongly applied and indeed probably misconstrued. The reservation expressed by O'Flaherty J. arose from his understanding that the historical relationship of the court with the solicitor's profession was virtually the entire basis for the decision (para 62 *supra*): a view which I respectfully disagree with: there were many more reasons which underpinned that decision (paras. 38 and 39 *supra*). It would I think have been more convincing if the learned judge had solely relied on An Garda Síochána being a disciplined force which required internal control, for not extending *O'Farrell v. Gorman* to that particular code.

127. In any event, what cannot be ignored or downplayed are the numerous judicial statements which subsequently have endorsed Kingsmill Moore J.: likewise, what cannot be disregarded is the fact that no one, including those which might have ventured disapproval, have set out an alternative version which would better orientate Articles 34 and 37. It is I think extremely difficult to disagree that what must be "limited" are the "functions and powers" in issue: if that is so, to suggest that such can be done by 'numerical restriction or isolated subject matter', is very much open to question and highly debateable. Further, such a meaning would interface with Article 34.3.4 in a manner which invades, and even perhaps questions its independent value. Such provision is the foundational principle for the type of restriction suggested (para. 125): however it clearly applies only to the jurisdiction of certain courts, and not as suggested on the Article 37 side: if it was the latter, one would have to wonder why there would be two provisions giving rise to the same result. In addition, in circumscription either by number or subject matter, it would be possible to exclude from Article 34 entire areas of justiciable issues such as commercial law, family law, or indeed apart from crime, any other sector of the legal order: just the fear expressed by MacMenamin J. in his judgment. Indeed, if permissible, one could readily see a statutory provision deeming or declaring such a move as being "limited" in nature. Furthermore, such a step would erode or certainly lessen public confidence in the carefully structured balance, even if imprecise, envisaged by the Constitution.

128. In every sense if an activity is limited (as it is in Article 37), it must have some parameters beyond which it ceases to be limited. On the dictionary side, there are several meanings to that word, but none of these can be really influential and certainly not decisive for our purposes: these might suggest, 'modest', 'not far reaching' or 'confined to special situations' (*Kelly* 6.4.10). That being so, it seems to me that the most appropriate yardstick is to judge this derogation from the red line constitutional norm that justice is administered by judges in established courts.

129. Kingsmill Moore J. suggested that where the powers conferred, looked at collectively, are such as to involve decisions, orders, or the doing of acts which the Constitution reserves to duly appointed judges, such therefore cannot be validated by Article 37. That of course must be correct, but begs the question: its purpose therefore was to give an indicative flavour of what he meant to convey, rather than being an end to itself. Having discounted the type of limitation endorsed by *Casey* (para. 125), the judge went on to describe the test previously outlined, which it will be recalled, is as follows: "The test should be as to whether a power is or is not "limited" in the opinion of the court, lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated ordinarily to effect in the most profound and far reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as "limited"." Whilst I acknowledge its subjective element, it is not unexplained as to meaning or effect: in my view, to this day his analysis of Article 37 has

not been bettered.

130. Those who have argued for an expansive understanding of this term, including *Casey*, are for the most part motivated by a concern that unless so provided, the exercise by the executive branch of its functions will be curtailed and restricted and thereby will have the potential of rendering government action less effective than what otherwise it might be. Whilst fully understanding that viewpoint, it provides a very doubtful legal or constitutional justification for such an approach. Firstly, it belittles the carefully constructed separation between the judiciary and all other agencies which exist to implement the executive function. This role of the former is, as stated, a core norm, it cannot be neutralised for the sake of government efficiency and effectiveness. In essence, what is being suggested is that the Constitution should somehow be subservient to the government and not that the government, like every other organ of state, every person, citizen, entity and body, should be constitutionally bound. The preservation of Article 34 in its rightful positioning is not for the accretion of power for the judiciary or to enhance the status of judges themselves: rather, it is to serve the people, to protect frights and to uphold the rule of law.

131. Secondly, if the government felt unduly restricted in the exercise of its functions or that its ability to govern was overly curtailed, it could have taken a number of opportunities to move an effective amendment to Article 37 in that regard. Some might say that this would be a last resort, but that very provision in its original form was added to by the 6th Amendment in 1979 dealing with adoption. Thirdly, and being ever so mindful of the absolute necessity that the executive must function through a multiple of agencies, I can see no serious evidence that the decided caselaw has caused the government undue concern in conducting the functions which it wishes to undertake and in the manner of doing so. Several bodies, other than the Land Commission, such as the Censorship of Publications Board, the Social Welfare system, various tribunals *etc*, have all survived constitutional challenge from time to time. Finally, in this context, it is significant to note that it has not been suggested by the constitutional law officer of the state, who appeared on behalf of all respondents, that the efficacy of government or its policy was or is being compromised by the principles which currently govern Article 37: although in fact he was seriously concerned that this case should not be resolved by reference to that provision, which if viewed through a particular lens, could create an entirely different test from *McDonald*, thus potentially causing great uncertainty for the legislature. Therefore, these arguments in my view, even if they were such as should be considered, cannot have any real influence on the outcome of the point under discussion.

Functions of the AO/LC:

132. In considering possible protection under Article 37, it is not of insignificant value to note that the start point is that the adjudicative process of the WRC under the 1977 and 1991 Acts, constitute the administration of justice under Article 34 of the Constitution: all members of the Court so agree. This in itself is of some note. The powers given by the

Act to facilitate this process have been set out earlier in this judgment and do not require repetition here. However in short, could I highlight the following: firstly, that almost fifty pieces of legislation are now subject to that process, secondly, virtually an entire area of law, namely all employment disputes are governed by it and whilst its provisions do not preclude an action at law, nevertheless the evidence is dramatic in showing what a vast number of complaints have been adjudicated upon by the WRC in the period between October, 2015 to May, 2019. Therefore, it must be seen as the mainstream vehicle within which such disputes are resolved. Thirdly, as the facts of this case strikingly demonstrate, dismissal issues can have major consequence for reputation, good name and for the right to earn a livelihood. Fourthly, the jurisdiction in monetary terms is limited only by double what a person's salary is. Given that the average industrial wage is approximately €40,000, it can therefore extend from €80,000 at that average level up to multiples of that figure in the case of high earners. Without any imagination whatsoever an award could be significantly greater than the jurisdiction of the Circuit Court in personal injury matters, in contract and in other tort actions. Furthermore, both the AO and the Labour Court have the power to order the re-engagement or re-instatement of an employee which is at least akin to the court making a mandatory order, in effect compelling even a recalcitrant employer to resume a working relationship with an unwelcome employee. Accordingly, given those widespread powers of the WRC, and noting the size of the national workforce which in this jurisdiction is upward of 2.32 million, I take the view that the same are constitutionally flawed and must remain so unless whatever limitations can be found in respect of such powers are sufficient for Article 37 purposes.

Suggested Limitations:

133. One of the most striking and worrying aspects of what is suggested as constituting the necessary limitations is the commonality of the features proposed. Firstly, the absence of inherent jurisdiction: to my knowledge there is no entity, other than the High Court and this Court (now also the Court of Appeal) which can be said to have a power, authority or a jurisdiction which is correctly described as "inherent". Secondly, apart from the High Court and the existing appellate structure, every creature of statute is bound by the parameters of its legislative remit: the extent of it is a matter of construction and not relevant here. What matters is that all such bodies must remain within the four corners of the powers deposited with them. Thirdly, it must logically follow that there will be a point beyond which such bodies cannot go: for at that stage they would have exceeded their jurisdiction. Take the Circuit Court as an obvious example but there are many others also: on the civil side the most common actions might be in contract and tort, the upper limit of which is €60,000 for personal injuries and otherwise €75,000. Fourthly, all inferior courts and bodies are subject to the supervisory jurisdiction of the High Court, whether by way of *certiorari, mandamus*, injunction or other remedy, now for the greater part all moved by way of judicial review: this is a constitutional imperative as is evident from Article 34.3.1. Fifthly, with the vast majority of decisions, adjudications, and determinations by whatever name, there is some right of review, re-assessment or of appeal, whatever that might be

called and finally, the reliance on the activities of the WRC being confined to resolving disputes under a limited number of Acts is entirely unpersuasive: in fact in light of the numerous enactments involved, the force of the point is to the contrary. As applying to the 2015 Act, I cannot see in any of these matters how either singularly or collectively they could constitute the type of "limitation" envisaged by Article 37 of the Constitution. Furthermore, the role of the District Court in the enforcement process, is for the reasons above outlined, so denuded of substance that it could not in my view be regarded as adding value to the respondents' alternative claim as seeking safety in that provision.

134. In looking at such "limitations" said to exist in relation to the WRC and said to maintain the survival of the process under Article 37, I confess, with the greatest respect that if such are intended to create some sort of template by which future Article 34/37 issues are to be determined, I fear that the yardstick of judgment by such routine matters could gravely undermine our present understanding of that provision and Article 34 and could potentially lead the legislature to contemplate precisely what Professor Casey had in mind which if occurred, would seriously damage the judicial role. The concerns of MacMenamin J. are not at all far-fetched in this regard. That of course would be a bad day for our constitutional stability.

135. Two further points if I might, even if the first is slightly out of sequence. In my view, it is only where a court has a decisive influence on the substantive outcome that its involvement could possibly save the powers of an administrative body which otherwise violated Article 34. In saying this, I am speaking of the courts' intervention at first instance level and not at any later stage. Secondly, I have never taken the view that a right of appeal could render constitutional the exercise of judicial power by a non-judicial body. I cannot see any logic or justification for such view. In any event in this case, the appeal is to the Labour Court which is not a court and its independence in a constitutional sense is questionable.

Conclusion on Article 37:

136. None of the above suggested reasons are such as to constitute a "limitation" as properly understood, of the adjudicative functions and powers of the WRC under the 2015 Act. I therefore would hold that such provisions are inconsistent with Article 34 and cannot attract the protection of Article 37 of the Constitution.

Constitutional Justice/Fair Procedures:

137. Under this heading of argument, the appellant suggests that his rights under Article 40.3.1 and 2 of the Constitution have been violated. Four specific complaints were made in this regard.

Legal Qualification:

i) The Act contains no requirement for adjudication officers or members of the Labour Court to have any legal qualifications, training or experience: This was rejected by Simons J., who found that a decision-maker with relevant experience would be able to make necessary determinations of fact and, in respect of any difficult legal questions, that there was adequate recourse to the Labour Court but in particular also to the High Court.

The Oath

ii) There is no provision for an adjudication officer to administer an oath or affirmation: this was also rejected by the trial judge, who held that there was no constitutional requirement to have an unfair dismissals claim conducted on the basis of sworn evidence. The procedures provided for were obviously less stringent than those in criminal proceedings but also had attendant benefits such as informality and expedition. Having the evidence sworn before the Labour Court on appeal, was sufficient to put the mind of the learned judge at ease.

Cross Examination:

iii) There is no express provision made for the cross-examination of witnesses: this argument failed to have regard to the principles enumerated in that case, namely that administrative proceedings had to be conducted in accordance with the laws of natural of justice; at a practical level this translated into an assumption that if cross-examination was required, the adjudication officer would permit it. Therefore, the 2015 Act is not necessarily defective in this regard.

Otherwise than in Public:

iv) The proceedings before an adjudication officer are held otherwise than in public: The final argument made was rejected by Simons J. on the basis that a public hearing in an appellate court could remedy the hearing at first instance being conducted in private.

138. At the level of principle I reject the suggestion, so frequently found in the case law of many courts, including this Court, that a review, by appeal, case stated, judicial review or otherwise, can somehow be a substitute for an unacceptable system operating at the front line: save in very limited circumstances, a two or multi-step measure, unless made absolutely clear that such is truly a composite event or a single process, demands at each level, the application of such constitutional justice as may be appropriate. As experience has shown, employment disputes can often involve difficult questions of law as well as having to discern fact from non-fact, accuracy from inaccuracy and truth from un-truth. Those who regularly practice their profession or carry out their responsibilities involving such issues, are well qualified to that end, whereas persons even if otherwise suitable, may fall short of having the requisite skill, knowledge or experience in this regard. The availability of an appeal to the Labour Court or to the High Court on a point of law is no

substitute for these attributes.

139. In relation to the WRC, I fully appreciate why it may not be necessary on all occasions to have qualified lawyers determining such issues. However, the availability of a panel of such persons would in my view be central to the legitimacy of the process, as would be the discerning appointment of suitable individuals in any given case who would, having regard to the issues, be in a position to properly reflect the requirements of constitutional justice. If a lawyer is reasonably required, a lawyer should be appointed. In fact, any doubt or uncertainty in this regard should be dealt with by the exercise of a generous perspective rather than by the adoption of a minimalist approach. In the belief that the process will heretofore be conducted on that basis, I would not regard the absence of legal qualifications, *per se*, as being unconstitutional in respect of the appointment of, or the exercise of his or her function by an adjudication officer.

140. With respect, it seems extraordinary to me that no provision has been made for the administration of the oath in respect of a body, such as that under discussion, given the range of its powers and functions vested in it. Where, as I suspect, the vast majority of cases that go to a hearing are contentious, certainly as to fact and maybe as to law, the absence of an express power in this regard is utterly lacking in constitutional compliance. In that regard, I agree entirely with the order proposed by O'Donnell J.

141. Given the presumption of constitutionality and the absolute obligation on every "adjudicating" body to act judicially and comply with natural and constitutional justice, the failure to expressly make provision for cross examination, even if extremely difficult to understand, is however not fatal. Again, where there is any conflict of fact, the adjudicator, to render compliance with his or her duty, must readily accede to any *bona fide* request made by either party to cross examine a witness on their evidence. This is one of the most basic instinctive requirements of justice. A denial, even where peripheral, should only be made, by conscious decision and then on sustainable grounds which are duly explained, as otherwise such could potentially render the process unlawful.

142. With regard to the proceedings being held otherwise than in public, I agree with O'Donnell J. and MacMenamin J. that the blanket ban on hearing any of the referred cases in public is unconstitutional. I can well accept that a statutory provision which for just cause allows such a course to be adopted could and most probably would be constitutionally valid, but without vesting any discretionary power on the adjudicator to make that decision, the underlying statutory direction cannot stand.

The Systemic Point:

143. A further argument made under Article 40.3 of the Constitution was that the system of adjudication by adjudicating officers suffered from systemic deficiencies which travelled far beyond this particular case. The essential evidence in this respect was given by both Mr.

Tom Mallen B.L., and Mr. Kieran O'Meara, Solicitor. Whilst the appellant's own solicitor, who himself is an experienced practitioner in this area, supported what was averred to, it is perhaps more satisfactory to stand that aside given his retainer by Mr. Zalewski. In any event, both Mr. Mallen and Mr. O'Meara, each of whom are pre-eminent in the field of industrial relations law, stated in their evidence that since its creation in 2015, they have knowledge of several hearings, conducted by A.O.s without appropriate qualification or experience and who in their view lacked the competence to decide issues significant to a just resolution of the complaint. It is difficult to fault either for not identifying a particular adjudication officer or for not giving the title of individual cases. Neither Mr. Mallen nor Mr. O'Meara were cross examined on their affidavits and given the breadth of their experience in this area and the cogency of their evidence, the disclosures made are troublesome indeed. For me, a call on this issue is much closer than it was for the learned trial judge. However, if one steps back a little from that detail and considers the overall flavour of the evidence given, it would not for me take a great deal more to render this a very serious issue indeed. However, in view of the other conclusions, I do not find it necessary to go further other than to again highlight the importance of addressing these concerns in an acceptable way.

Conclusion

144. In conclusion, I hold that the procedures adopted by the WRC violate Article 34 of the Constitution and are not saved by Article 37. Secondly, even if I did not reach this conclusion, I would also hold that the appellant's rights under Article 40.3.1 and 2 have been breached in the manner indicated. I would hear the parties as to the precise orders which should follow. In the above circumstances and given the conclusions reached, it is unnecessary to consider the Convention claim.

[2009] IESC 10 Judgment delivered by Finnegan J. [rem diss.]

THE SUPREME COURT

APPEAL NO. 464/2006

Denham J.
Hardiman J.
Finnegan J.

BETWEEN

ADAM BERBER

PLAINTIFF/RESPONDENT

and

DUNNES STORES LIMITED

DEFENDANT/APPELLANT

Judgment of Mr Justice Finnegan delivered on the 12th day of February 2009

The respondent was an employee of the appellant. The respondent in his pleadings advances a number of causes of action. For the purposes of this appeal the issues which arise are as follows:-

1. Was the respondent wrongfully dismissed by reason of a breach by the appellant of the implied term of the contract of employment that it would not conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, such breach amounting to repudiation of the contract of employment which the respondent was entitled to accept.

2. Was the respondent in breach of the contract of employment and/or negligent and in breach of duty as a result of which the

respondent sustained personal injury and special damage being five months loss of earnings referable to a period over and above the three month notice period during which the respondent was unemployed in consequence of personal injury.

The factual background

The respondent commenced employment with the appellant as a trainee manger in April 1980 at the age of nineteen. On completion of his training he was employed as a store manager at various locations until 1988. From 1988 until November 2000 he transferred from store management to the position of buyer being successively group footwear merchandiser, men's footwear buyer and men's readymade buyer. On his last management performance review in February 2000 his performance was generally rated at the level of "effective contribution". The assessment provided for four performance standards in descending order – excellent, highly effective, effective contribution and below standard. The review contained a comment "colour issue". Some years prior to that review the appellant had a colour blindness test carried out on all buyers and the respondent was reported as colour blind. Notwithstanding this he had been moved to a position as men's readymade buyer. From February 2000 onwards the plaintiff's evidence was that there was a change of attitude towards him evidenced by the following:-

(a) Unlike previous years as a buyer when he spent as many as fifty days abroad during 2000 he was sent abroad only once.

(b) There was an increased interest in the state of his health notwithstanding an excellent work attendance record. He had been diagnosed with Crohn's disease in 1978. He had a recurrence of his

disease in 1995 and again in spring 2000. In the years 1995, 1996 and 1999 he missed one day through illness. He had no absences in 1998. He was absent for five days in 1997 and seven days in 2000 up to 23rd November 2000 (the relevance of which date will appear hereafter).

In July 2000 he was told that he was not being sent on a trip to the Far East because Mrs Heffernan was concerned that he might get ill on account of his Crohn's disease and he considered this "bizarre". In October 2000 the respondent was informed that he was to be transferred from buying back to store management and his colour blindness was adverted to at this time. He was informed on the 22nd November 2000 that he was to be moved to the appellant's store in the ILAC Centre Dublin as either department manager of menswear or ladieswear. The respondent considered this demotion and sought a meeting with Mrs Heffernan and a meeting took place on the 23rd November 2000. At the meeting it was agreed that the respondent would return to store management initially at the appellant's store in Blanchardstown Shopping Centre, which was regarded as it's flagship store, where he would undergo training with a view to being fast-tracked for appointment as store manager or regional manager within six to twelve months. The respondent's understanding was that he would commence work in the ladieswear department in Blanchardstown on the 4th December 2000. On the 27th November 2000 the respondent was directed to report for duty that day to Blanchardstown and to take up a position in the homewares department. He considered this a variation of his agreement with Mrs Heffernan and he tried to contact her without success as she was abroad. He did not go to Blanchardstown on the 27th November 2000 but was contacted the next day by the director of store operations Mr McNiffe. On the 28th and 29th November the

respondent had three meetings with Mr McNiffe. At the meeting on the 28th November 2000 the respondent refused to go to Blancharsdstown until such time as he had spoken with Mrs Heffernan. There were two meetings on the 29th November 2000. At the first meeting the respondent read out a statement which he had prepared but refused to furnish a copy of the same to Mr McNiffe and maintained his refusal to go to Blanchardstown. At the second meeting the respondent maintained this position and Mr McNiffe suspended him from work with pay. Thereafter the respondent's communications to the appellant were largely through his solicitors. The first solicitors' letter dated 7th December 2000 made it clear that the respondent would go to Blanchardstown on the terms which he had agreed with Mrs Heffernan. The matters raised on his behalf were that the transfer was taking place seven days earlier than agreed, a plan to fast track him was not yet prepared and that the position was in homewares. In the letter the respondent's solicitors said in relation to the respondent's suspension:-

> *"The effect of this quite extraordinary conduct on the part of the company towards our client and the stress generated by it, has resulted in our client becoming ill and he attended his doctor on 1 December and again today, 7 December, who has ordered him to rest and certificates to this effect have been delivered to the company."*

The letter threatened proceedings if the suspension was not lifted. In a short report of 31st January 2001 the respondent's treating surgeon had this to say:-

> *"Over the last while he has had an exacerbation of symptoms (of Crohn's disease) and I have no doubt the recent wrangle has exacerbated his symptoms and has resulted in him having to increase his medication."*

In a reply of 12th December 2000 the appellant's solicitors gave as the reason for the respondent's suspension his attitude at the meetings with Mr McNiffe, his persistence in seeking to speak to Mrs Heffernan and his refusal to explain his issues to Mr McNiffe which they categorised as unreasonable. The letter indicated that the appellant was prepared to overlook the incident provided that the respondent reported to work in Blancharstown as soon as certified fit to do so by his doctor.

Having considered this evidence the learned trial judge categorised the attitude of each of the parties. The respondent considered that Mrs Heffernan was intent on ousting him from his employment. He attributed this to jealousy of the respondent's brother who had achieved remarkable commercial success. Mrs Heffernan had alluded to this at the meeting on the 23rd November 2000. The learned trial judge found that the appellant was motivated by sound management considerations in deciding to transfer the respondent from buying to store management. However the respondent's solicitors letter of the 7th December 2000 should have sounded alarm bells with the respondent's senior management as to the respondent's state of health. On the other hand the appellant inferred from the respondent's conduct that he had an ulterior motive in that he was attempting to orchestrate a situation in which he could get a severance payment or compensation: the learned trial judge held that this was an incorrect inference. She concluded that while some of the respondent's behaviour might be characterised as unreasonable, it was attributable to his trust in the appellant's senior management executives having been shattered. The learned trial judge noted that responses from Mr McNiffe to the respondent's solicitors letters were sent directly to the respondent at his home address sometimes by courier and sometimes on Saturday, and, while the appellant was entitled to communicate directly

with the respondent this course heightened the respondent's distrust of the appellant and increased the stress he was under.

The respondent reported for work in Blanchardstown on 28th December 2000 having been cleared to do so by his doctor. There was an incident that day. He was dressed casually in the manner in which he dressed while working as a buyer in Head Office. He was informed by Mr Sills, the store manager, that the dress code for managers was a conservative coloured suit and formal footwear. The respondent asked Mr Sills to put that in writing and Mr Sills did so on the 29th December 2000. The respondent explained that he was on the defensive at this time because of the cumulative effect of the problems which he was having. He ceased work again four days later on account of ill health. He contended that his treatment at Blanchardstown in this period exacerbated his ill health. He particularised two matters:-

(a) A document entitled "Drapery Management Analysis" widely circulated included his name under the heading of "new trainees" which he considered humiliating, defamatory and vindictive. The document is in fact no more than a manuscript duty roster for the particular store for a particular week.

(b) A personalised twelve week homewares training plan which was furnished to him on his arrival was appropriate to a newly joined trainee and failed to take account of his twenty one years experience.

These complaints were contained in a letter of 11th January 2000 from the respondent's solicitors in which it was alleged that these matters were a continuation of a course of treatment which began the preceding February designed to sideline him out of management and out of his employment. The letter demanded the withdrawal

of the Drapery Management Analysis and the preparation of an appropriately devised training plan. There was a measured and conciliatory response from Mr McNiffe by reply dated 12th January 2000. Mr McNiffe explained the mis-description in the roster as an oversight and sought flexibility on the respondent's part in giving the training programme a chance to work. He explained that in the twelve years since the respondent had been in store management much had changed and that it was important that the respondent re-learn the business from the ground up. The respondent was requested to return to work the following Monday. By letter dated 21st February 2001 the respondent's solicitors advised the appellant that the respondent's treating surgeon had indicated that the respondent might return to work but that before doing so the respondent required confirmation in relation to the training programme and his future career path and that a communication be circulated to all management and staff within head office and all stores to correct the mis-description in the Drapery Management Analysis. There was further correspondence but ultimately a meeting was arranged for the 7th March 2001 between the respondent and his solicitor and Mr McNiffe and the appellant's solicitor and at which a stenographer retained by the respondent attended. Following the meeting Mr McNiffe wrote to the respondent setting out the matters which had been, he considered, agreed and this gave rise to further disagreement and further correspondence. The first matter in issue was the length of time before the respondent would proceed to a position as store manager or regional manager: Mr McNiffe suggested that this could take eighteen months with an initial position as No. 2 before progressing to a position of No. 1. in store management. The respondent was insisting on a time scale of three to six months rather than the six to twelve months mentioned by Mrs Heffernan at the meeting of 23rd November 2000 notwithstanding that he had only attended for work in

Blanchardstown for four days since that meeting. The second related to the training programme and the extent to which the respondent should be involved in its preparation. The first matter was not resolved prior to the respondent leaving his employment. On the second matter while a training programme was produced on the 8th March 2001 the respondent's solicitors raised in correspondence a number of points in relation to the same with which Mr McNiffe was not prepared to agree. A third matter was in relation to the Drapery Management Analysis and concerned the text of an announcement made. The announcement as circulated was not in the terms agreed. The learned trial judge held that the substance of the announcement was as agreed and she did not consider the variations to be of significance. The circulation was narrower, the learned trial judge held, than the respondent was entitled to expect.

There were further live issues at this time. One related to a Christmas bonus of €1,500 which the respondent claimed to be entitled to in respect of Christmas 2000. Another related to a schedule of monthly meetings which it was agreed on the 7th March 2001 should take place between the respondent and senior management. A meeting scheduled for the 8th May 2001 had not taken place and by letter dated 9th May 2001 the respondent's solicitors complained of this. The learned trial judge held that in view of the respondent's absence through illness the appellant was justified in considering the complaint unreasonable.

The respondent returned to work towards the end of April 2001. His solicitors continued to raise issues on his behalf in correspondence. He continued to work until the 15th May 2001. On the 15th May 2001 the respondent was rostered for duty from 10 a.m. to 8.30 p.m. but incorrectly believed that he had been rostered for duty from 8.30 a.m. to 6 p.m. He attended at 8.30 a.m. During the morning Mr Sills the store manager made it clear to the respondent that he was required to attend until 8.30 p.m.

There were heated exchanges. Mr Sills made it clear that he was the respondent's superior and the respondent's reply was that Mr Sills could deal with his solicitor. He did not work until 8.30 p.m. The learned trial judge found that in relation to this incident the respondent was in the wrong and that Mr Sills conduct was understandable.

By letter dated the 30th May 2001 the respondent's solicitors wrote to the appellant's solicitors as follows:-

> *"We refer to our letters of 1 May and 9 May, neither of which have received a response. Our client has kept us closely advised of the developments at his place of employment which have had a severely adverse effect on his health. We have advised our client that the company has repudiated its obligations towards him as an employee. Our client has written the enclosed letter to Mrs Margaret Heffernan.*
>
> *We have been instructed to seek damages against the company in relation to the company's repudiation of the contract of employment and to the reckless imposition by the company of physical and emotional suffering on our client including an abusive verbal attack on our client by a senior manager in the presence of other members of management and staff. Unless we receive from the company within seven days of the date of this letter, adequate proposals to compensate our client, proceedings will issue without any further notice. In that event we shall be obliged for your confirmation that you have authority to accept service of such proceedings on behalf of your client."*

The letter from the respondent enclosed therewith complained that the appellant had failed to honour his understanding of the meeting of 7th March 2001. He complained of the altercation with Mr Sills on the 15th May 2001. Finally he complained that his working environment was hostile to his health and in consequence he had been advised by his consultant Professor Ó Morain to cease working in that environment.

Thereafter the respondent was out of work for a period of approximately eight months. At the end of January 2002 he obtained a position as a buyer with another retail group on terms no less favourable than those which he had enjoyed with the appellant.

High Court findings on the evidence

On the evidence the learned High Court judge made the following findings:-

(a) There was little disagreement between the parties as to the terms of the contract of employment. In dispute, however, was the respondent's entitlement to a Christmas bonus of €1,500 and an annual bonus of €5,000. The learned High Court judge found that the respondent had earned each of these bonuses and awarded the respondent the same in respect of the period 31st May 2001 to the 19th January 2002 in the amount of €9,079.00.

(b) It was a term of the respondent's contract of employment that the appellant acting reasonably could assign him from one work location to another and from one management function to another appropriate management function. Change of work location was not an issue for the respondent. The appellant was entitled to transfer the respondent

from buying to a suitable position in store management commensurate with his experience.

(c) It was an implied term of the respondent's contract that both the employer and the employee would maintain mutual trust and confidence.

(d) The respondent sought to set up what happened between him and Mrs Hefferman on the 23rd November 2000 as a free standing agreement. The appellant categorised the meeting as a consultation process. The learned trial judge held that neither view was correct but that what transpired at the meeting on the 23rd November 2000 must be interpreted in the context of the implied term that both the employer and the employee would maintain mutual trust and confidence.

(e) The appellant acted *bona fide* in deciding to move the respondent from buying to store management.

(f) The respondent through Mrs Heffernan had a *bona fide* concern about the respondent's health. The respondent worked in the same building as Mrs Heffernan and their paths crossed occasionally. The respondent was unwell from March 2000 onwards and this must have been obvious to anyone who would meet him. He had an uncharacteristic number of absences because of illness during 2000.

(g) The appellant's treatment of the respondent up to and including 23rd November 2000 viewed objectively was such that appropriate steps were taken by the appellant to allay the respondent's concerns in relation to the proposed move and to protect the employer and employee relationship.

(h) Mr McDermott (the respondent's departmental head) or Mrs Heffernan or both "were subconsciously, if not consciously, aware of the respondent's vulnerability at the time of the meeting of 23rd November 2000."

(i) After the 23rd November 2000 Mr McNiffe failed to have proper regard to the respondent's medical condition. This is particularly so after the appellant was informed by the respondent's solicitor by letter of 7th December 2000 of the effects of the stress generated by his suspension on the respondent.

(j) In the absence of knowledge of the respondent's physical and mental condition an objective assessment of the respondent's conduct after 23rd November 2000 justifies the conclusion that the respondent was being unreasonable. Samples of such conduct are the respondent's refusal to share with Mr McNiffe the issues which were troubling him and his insistence on speaking to Mrs Heffernan at the meetings on the 28th and 29th November 2000, his reaction to Mr Sill's instruction in relation to dress code on 28th December 2000, and some of his requirements in relation to the training programme produced on 14th March 2001.

(k) Mr McNiffe adopted an uncompromising stance with the respondent from the outset in requiring the respondent to attend for work in Blanchardstown or else he would be suspended. After the suspension was lifted Mr McNiffe would not deal with the respondent until he returned to work in Blanchardstown notwithstanding that the respondent was on sick leave and the appellant had been warned of the

effect which his work situation was having on the respondent and of the respondent's perception of the appellant's motivation. The appellant maintained this stance for three months. The stance was informed by the appellant's perception that the respondent never had any intention of allowing the move to Blanchardstown to work which view was erroneous.

(l) The respondent's perception of the appellant's motivation was reinforced by the error of including his name under the heading "new trainee" on the roster in January 2001 and the failure to supply him with a suitable training programme.

(m) The appellant ought to have been aware that the extension of the time frame for achieving a position as store manager or regional manager from twelve months to eighteen months would reinforce the respondent's distrust.

(n) The delay of one week in producing a training programme would be inconsequential in the normal course of events. In the present case, however, it would be of significance to the respondent because it was envisaged that he would have it before he returned to work. The insistence that the respondent return to work before the programme was available was unnecessarily peremptory.

(o) The respondent's submission that there was a series of breaches of the contract of employment by the appellant, the accumulation of which resulted in a repudiation of the contract, is not correct.

(p) The manner in which the appellant dealt with the respondent in the knowledge of the precarious nature of his physical and psychological

health viewed objectively amounted to oppressive conduct likely to seriously damage the employer/employee relationship and it did so. Accordingly the appellant breached its obligation to maintain trust and confidence. Breach of that obligation goes to the root of the contract of employment.

(q) The respondent's work situation prolonged the respondent's ill health and caused his failure to respond to treatment.

(r) The respondent was justified in leaving his employment on receiving his treating surgeon's advice.

(s) The respondent is entitled to an award of damages for wrongful dismissal in the amount which he would have earned had he continued for a period commensurate with the notice to which he was entitled: three months notice is reasonable notice.

The Law – Breach of Contract

There is implied in a contract of employment a mutual obligation that the employer and the employee will not without reasonable and proper cause conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them. The term is implied by law and is incident to all contracts of employment unless expressly excluded. The term imposes reciprocal duties on the employer and the employee. In assessing whether there has been a breach by the employer what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. Having regard to the mutuality of the obligation the impact of an employee's behaviour is also relevant. The test is an objective one: if conduct objectively considered is likely to cause

serious damage to the relationship between employer and employee a breach of the implied obligation may arise. ***Malik v Bank of Credit and Commerce International S.A.*** [1996] I.C.R. 406.

In ***Lewis v Motorworld Garages Limited*** [1986] I.C.R. 157 Browne-Wilkinson J. summarised the law as follows:-

1. *In order to prove that he has suffered constructive dismissal an employee who leaves his employment must prove that he did so as a result of a breach of contract by his employer, which shows that the employer no longer intends to be bound by an essential term of the contract: see* ***Western Excavating (E.C.C.) Limited v Sharp*** *[1978] I.C.R. 221.*

2. *However, there are normally implied in a contract of employment mutual rights and obligations of trust and confidence. A breach of this implied term may justify the employee in leaving and claiming that he has been constructively dismissed: see* ***Post Office v Roberts*** *[1980] I.R.L.R. 347 and* ***Woods v W.M. Car Services (Peterborough) Limited*** *[1981] I.C.R. 666, 670 per Browne-Wilkinson J.*

3. *The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term. See* ***Woods v***

W.M. Car Services (Peterborough) Limited *[1981] I C.R. 666. This is the 'last straw' situation."*

As to the "last straw" it was held in ***Omilaju v Waltham Forest London Borough Council*** [2005] 1 All. E.R. 75 that the quality that a "last straw" had to possess was that it was an act in a series whose cumulative effect amounted to a breach of the implied term. The essential quality of that act was that, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a breach of the implied term of trust and confidence.

As to whether conduct amounts to a repudiation of the contract the ordinary law of contract applies: the cumulative effect of the acts complained of must be such as to indicate that a party, in this case the employer, had repudiated its contract. ***Brown v Merchant Ferries Limited*** [1998] I.R.L.R. 682. It had earlier been held in ***Woods v W.M. Car Services (Peterborough) Limited*** [1981] I.R.L.R. 347 by Browne-Wilkinson J. following ***Courtaulds Northern Textiles Limited v Andrew*** [1979] I.R.L.R. 84 that any breach of the implied term that the employers will not, without reasonable and proper cause, conduct themselves in the manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee was a fundamental breach amounting to a repudiation since it necessarily went to the root of the contract. This broad statement was not accepted by the Court of Appeal in ***Bliss v South East Thames Regional Health Authority*** [1985] I.R.L.R. 308. Nor was it accepted by Douglas Brodie in an article in the Industrial Law Journal, Volume 25, No. 2 at p.121 which article was referred to with approval in both ***Malik v Bank of Credit and Commerce International*** and in ***Browne v Merchant Ferries Limited.***

It must not be forgotten, however, that the implied term applies to both the employer and the employee. Thus in ***Woods v W.M. Car Services (Peterborough) Limited*** [1981] I.C.R. 666 Browne-Wilkinson J. said:-

> *"In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee:* ***Courtaulds Northern Textiles Limited v Andrew*** *[1979] I.R.L.R. 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see* ***British Aircraft Corporation Limited v Austin*** *[1978] I.R.L.R. 332 and* ***Post Office v Roberts*** *[1980] I.R.L.R. 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed;* ***Post Office v Roberts.*** *"*

The learned trial judge's finding in the present case on this aspect was as follows:-

> *"In my view the (respondent's) submission that there was a series of breaches of contract on the part of the (appellant) and that the accumulation of those breaches resulted in a repudiation by the (appellant) of the (respondent's) contract is not correct. The correct interpretation of what happened is that the manner in which the (appellant) dealt with the (respondent) in the*

knowledge of the precarious nature of his physical and psychological health viewed objectively amounted to oppressive conduct. It was likely to seriously damage their employer/employee relationship and it did so. Accordingly, the (appellant) breached its obligation to maintain the (respondent's) trust and confidence."

The learned trial judge found that up to and including the 23rd November 2000 objectively the appellant took appropriate steps to protect the employer and employee relationship. Having regard to the learned trial judge's findings it is necessary to look at the conduct of each of the parties after the 23rd November 2000. The appropriate test must be applied to that conduct. In relation to the test the following matters are to be noted:-

1. The test is objective.
2. The test requires that the conduct of both employer and employee be considered.
3. The conduct of the parties as a whole and the accumulative effect must be looked at.
4. The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it.

Conclusion on the breach of contract claim

The test must be applied to the events which occurred after the 23rd November 2000.

On the 27th November 2000 the respondent was instructed to report to Blanchardstown. He did not do so. The appellant made contact with him and discussions took place over the 28th and 29th November 2000. The learned trial judge found that at that date the appellant was "subconsciously" aware of the respondent's vulnerability. The appellant was indeed aware that the respondent suffered from Crohn's disease. However the appellant was first notified that stress was exacerbating his Crohn's disease on receipt of the solicitor's letter of the 7th December 2000. There was no evidence to justify a conclusion that at the date of these events the appellant's were aware of the respondent's mental condition or if it's effect on his Chron's disease. Applying an objective test to the suspension of the respondent with pay it cannot be said, in my view, that the same was unreasonable. The appellant acted *bona fide* and within its rights in deciding to move the respondent from buying to store management and to the location at Blanchardstown. The respondent's refusal to co-operate until such time as he should speak to Mrs Heffernan was in my view unreasonable. In ***Harrington v Irish Life and Permanent Plc,*** the High Court, unreported 18th June 2003 Smyth J. stated the law as follows:-

> *"(a) The following basic principles are applicable:-*
>
> *1. the employer impliedly contracts to obey the lawful and reasonable orders of his employer (or his employer's delegate) within the scope of the employment he contracted to undertake. Chitty on Contracts (24th ed. Vol. 2 para. 37-050); and*
>
> *2. it has long been part of our law that a person expudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his Master. Such a refusal fully justifies an employer in dismissing him summarily.*

(Per Karminski L.J. in ***Pepper v Webb*** *[1969] 2 All E.R. 216 at 218, cited with approval and adopted by Hamilton J. as he then was in* ***Brewster v Burke & Anor*** *[1985] 4 J.I.S.L.L. 98 at p.100)."*

Notwithstanding the seriousness of the respondent's refusal to comply with the direction given to him the appellant did not seek to dismiss the respondent but rather adopted the significantly less draconian measure of suspending him with pay. This course was adopted only after three meetings over two days at which the respondent was asked to re-consider his stance. Objectively the respondent's conduct was unreasonable. On hearing from the respondent's solicitor by letter dated 7th December 2000 the appellant gave an unequivocal assurance of willingness to overlook the incidents provided the respondent returned to work as soon as his doctor should certify him as fit to do so.

When certified fit to return to work the respondent did return on the 28th December 2000. By this date the appellant was on notice of the state of the respondent's health having received his solicitors' letter of 7th December 2000. However the respondent had been certified as fit to return to work by his medical adviser and the appellant was entitled to rely on this. Immediately the incident relating to the dress code for managers occurred. The respondent required that Mr Sills instruct him in writing as to the dress code. The exchange, according to the respondent, was not an unpleasant one but the request to put the dress code in writing would justify concerns in the appellant as to the course of future interaction with the respondent. The occurrence, however, is neutral for present purposes neither party having acted unreasonably.

The next incident which occurred was the error in the Drapery Management Analysis or roster which described the respondent as a new trainee. It was a mistake and was promptly acknowledged by the appellant as such. It offended the respondent. However mistakes occur and there is no reason to consider what occurred other than as a mistake. The appellant did not act unreasonably and judged objectively the effect upon the respondent could not reasonably have been anticipated.

The respondent objected to the personalised training plan as being appropriate to a newly joined trainee and as ignoring his twenty one years experience. However he was new to homewares. As pointed out by the appellant much had changed in the period during which the respondent was absent from store management and operating as a buyer. Nonetheless reasonable attempts were made to accommodate the respondent's concerns and a new plan was provided albeit seven days too late. I would not categorise the appellant's conduct in relation to the plan viewed objectively as unreasonable. There was a willingness to accommodate some, if not all, of the respondent's concerns. The learned trial judge found that the appellant was aware of the respondent's vulnerability at the date of preparation of the original training plan: I understand this to mean the normal anxiety and concern which any employee might feel on a significant change in his employment taking place. I do not consider the appellant's course of conduct in relation to the training plan as unreasonable or oppressive.

The correction to the Drapery Management Analysis was not in the form agreed but was in substance to like effect. Its circulation was narrower than required. The Analysis was a document internal to Blanchardstown being the store's duty roster for a particular week. It consisted of a printed document with a number of columns each headed with a brief description of an employee category or function: one such

heading was "new trainee" and while not appropriate to the respondent this was the heading best reflecting the respondent's situation. The form was completed in manuscript listing the names of employees under each category. The respondent required the correction to be circulated by e-mail and internal post to all stores in Ireland, the U.K. and Spain and the respondent through Mr McNiffe accepted that there would be circulation by e-mail to all stores. The correction was circulated to department heads, store managers and regional managers in Ireland. I am of the view that the original limited circulation would not justify the very wide circulation required by the respondent. However his requirement was acceded to by the appellant but not complied with. I am, however, satisfied that the default by the appellant could not amount in isolation to a breach of the implied term in his contract of employment.

Meetings were agreed to take place on a monthly basis and no meeting took place on the 8th May 2001. However as the learned trial judge held this was entirely reasonable as the respondent had attended for work on only four days in December 2000 and did not attend thereafter until late April 2001.

The final matter to which it is appropriate to refer is what occurred when the respondent returned to work at the end of April 2001. On the 15th May 2001 he was rostered for duty from 10 a.m. to 8.30 p.m. but he incorrectly believed that he had been rostered for duty from 8.30 a.m. to 6.00 p.m. When he was required by Mr Sills to remain on duty until 8.30 p.m. there were heated exchanges with Mr Sills insisting that he work until 8.30 p.m. and the respondent refusing to do so. The respondent did not work beyond 6 p.m. and his final salvo was that Mr Sills could deal with his solicitor. This was part of a consistent pattern of conduct and not an isolated incident: the respondent objected to written communications to him being sent to him directly and required that all such communications should be sent to his solicitor. I consider

the respondent's stance in this regard as damaging to the relationship and unreasonable.

That being the history of interaction between the appellant and the respondent and looking at each event individually and at the events cumulatively, I am satisfied that the conduct of the appellant judged objectively was not such as to amount to a repudiation of the contract of employment. The conduct judged objectively did not evince an intention not to be bound by the contract of employment. On the other hand the conduct of the respondent was in the instances mentioned above unreasonable or in error and the employer's conduct must be considered in the light of the same. In these circumstances the purported acceptance of repudiation of the contract of employment by the respondent was neither justified nor effective. The respondent must fail on his claim under this heading.

The law - personal injuries claim

As the learned trial judge found, this claim can be based in contract or in tort and it is not necessary to distinguish between the two causes of action. The respondent claims that as a result of the appellant's breach of contract or breach of duty to him he incurred a recognised psychiatric illness and not mere hurt, upset and injury to his feelings and in addition physical injury being the exacerbation of his Crohn's disease.

In ***Maher v Jabil Global Services Limited*** [2005] 16 E.L.R. 233 the plaintiff claimed that as a result of his treatment by his employer, the defendant, he suffered significant psychological harm. The plaintiff claimed that the amount of work which he was required to perform and the pressure under which he was placed by management to achieve targets which he claimed to be unrealistic gave rise to stress

and that his employers knew or ought to have known that stress was a likely consequence of their conduct. As authority for the proposition that an employer may be liable for stress engendered injury to health of an employee as opposed to ordinary occupational stress the learned trial judge referred to ***McGrath v Trintech Technologies Limited*** [2005] E.L.R. 49, ***Quigley v Complex Tooling and Moulding,*** unreported, High Court, Lavan J. 9th March 2005 and ***Hatton v Sunderland*** [2002] 2 All E.R. 1.

The Court of Appeal in ***Hatton*** considered four cases in each of which as a result of stress the plaintiff suffered psychiatric illness. In examining the law the court went back to first principles – liability in negligence depends upon three inter-related requirements:

1. The existence of a duty to take care.
2. A failure to take the care which can reasonably be expected in the circumstances and
3. Damage suffered as a result of that failure.

The court held that special problems attend claims for psychiatric injury and that they require care in determination because they give rise to difficult issues of foreseeability and causation and in identifying a relevant breach of duty. As to foreseeability, the issue in most cases will be whether the employer should have taken positive steps to safeguard the employee from harm and the threshold to question is whether the kind of harm sustained to the particular employee was reasonably foreseeable. The test is not concerned with the person of ordinary fortitude. The answer may be found in asking the question whether the employer knew or ought to have known of a particular vulnerability. Stress is merely a mechanism whereby harm may be caused

and it is necessary to distinguish between signs of stress and signs of impending harm to health. Frequent or prolonged absences from work which are uncharacteristic for the person concerned may make harm to health foreseeable: there must be good reason to think that the underlying cause is stress generated by the work situation rather than other factors. Where an employee is certified as fit for work by his medical adviser the employer will usually be entitled to take that at face value unless there is a good reason for him to think to the contrary. As to the duty of care the employer's duty is to take reasonable care and if the risk of harm to health is foreseeable the employer must act reasonably. It is necessary in each case to consider what the employer could and should have done. Finally if a breach of duty is found it is still necessary to show that that particular breach of duty caused the harm complained of: where there are several factors contributing to stress related illness if the employer made a material contribution he will be liable for the whole subject to any rights he may have to seek contribution from others who have contributed to the injury.

Hale L.J. set out a number of propositions which she derived from the case law the following being relevant to this case:-

1. The ordinary principles of employer's liability apply.
2. The threshold question is whether the kind of harm to the particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).
3. Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder it is harder to foresee than physical injury,

but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.

4. The employer is generally entitled to take what he is told by his employee (including what he is told by the employee's medical adviser) at face value unless there is good reason to think to the contrary.

5. The indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.

6. The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the cost and practicability of preventing it, and the justifications for running the risk.

7. An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.

8. If the only reasonable and effective steps would have been to dismiss or demote the employee the employer will not be in breach of duty in allowing a willing employee to continue in the job.

9. In all cases it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.

10. The claimant must show that the breach of duty caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.

The medical evidence in this case is as follows. On the 31st January 2001 Professor Colm Ó Moráin, Consultant Gastroenterologist, wrote to the respondent's solicitor a short report as follows:

> *"This is to confirm that Adam is a patient of mine. He has Crohn's disease for which he has had a previous resection done in the eighties but since then he has had recurrence. Over the last while he has had an exacerbation of symptoms and I have no doubt the recent wrangle has exacerbated his symptoms and has resulted in him having to increase his medication."*

In a further short report dated 25th April 2001 Professor Ó Moráin reported as follows:-

> *"Adam is having ongoing problems with his Crohn's disease. He had a recent exacerbation and as a result of this he has a probable mass on the right side of his bowel which represents an inflamed portion of his bowl. I feel this is pressing on his bladder and as a result is causing recurrent urinary tract infections. He does need ongoing treatment and unfortunately the continuous stress at work is not helping his symptoms. We are closely monitoring his progress at the moment and he does require strict medical supervision at the moment but I am concerned that the level of stress at work may well be exacerbating his symptoms.*

In a report of 31st May 2001 Professor Ó Moráin reported as follows:-

> *"In the last year, however, Adam has been having a flare-up of his Crohn's disease and I do feel that the psychological stress he is undergoing has a major role to play in this exacerbation. The flare-up has been characterised by more frequent visits to me and increasing his doses of medication, more marked since February 2000. With his present exacerbation he will be closely monitored at weekly intervals for the next few weeks.*
>
> *I am concerned about Adam's deterioration of health and after a long discussion with him I do think that his work situation is certainly not helping health wise and I feel the best approach would be for him to get out of this environment. I feel this would be a positive contribution to his health."*

As to the respondent's psychological condition there was a report from Dr. Paula McCoy, Consultant Psychiatrist. The following paragraphs of the report set out her opinion:-

> *"29. The background here appears to be that of a normal individual, with a stable, social and personal family background; and a record of high achievement at the work place, notwithstanding the fact that Mr Berber has suffered from a chronic inflammatory bowel disease since his teens with arduous treatment required at times.*
>
> *30. The history and clinical findings as I have elicited them would accord with the development of a psychological adjustment disorder, with features of anxiety and possible features of depression, in Mr Berber*

occurring on a background of work place stress over many months, following the occurrence of the events under consideration. This disorder is likely to have been of moderate severity.

31. *It is recognised that the occurrence of ongoing stress disorders may be associated with less favourable clinical outcomes in some chronic medical conditions, including Crohn's disease and hypertension. In my view the occurrence of the psychological disorder noted at 31 above is likely to have contributed to symptom severity and possibly, to symptom duration in Mr Berber's Crohn's disease.*

32. *The psychological disorder noted at 31 above appears in Mr Berber's case to have resolved over the months following resolution of the situational stresses with which it was associated (work place difficulties and ensuing period of unemployment). I expect that Mr Berber's close family support, and his previously stable personality with the passage of time have been favourable factors in his recovery from this disorder."*

The Civil Liability Act 1961 in section 2 defines personal injury as including any disease and any impairment of a person's physical or mental condition. The learned trial judge accepted Dr. McKay's evidence and found, as she was entitled to do on the evidence, that the adjustment disorder from which the respondent suffered constituted an illness or injury and that it exacerbated the respondent's Crohn's disease and hampered treatment of that disease. She found that the adjustment disorder and the consequential impact was attributable to the manner in which the appellant dealt with the respondent after 23rd November 2000. She found that the injuries suffered by the respondent were reasonably foreseeable and that for the like

reasons for which the appellant had been found in breach of contract it was in breach of duty. As I have found that the appellant was not in breach of contract it is necessary to look at those circumstances again and apply to them the appropriate test.

Causation is not an issue in that the personal injury arose out of the circumstances existing in the work place. The learned trial judge found that at the relevant times the appellant was subconsciously aware of the respondent's vulnerability. This being so I am satisfied that a reasonable employer applying its mind to the situation would in fact be aware of that vulnerability. However that is not a vulnerability to mental injury but rather that the respondent felt vulnerable by reason of the changes in his occupation from buyer to a position in training for store management. If the respondent had applied its mind to the situation I am satisfied that it was also foreseeable having regard to his vulnerability that if it should fail to take reasonable care it would result in stress. From receipt of the respondent's solicitor's letter of the 7th December 2000 the appellant was actually aware that the respondent was suffering from stress and that the stress was affecting the respondent's Crohn's disease. Accordingly, at least from receipt of the letter of 7th December 2000 the respondent had a duty to take reasonable care not to cause harm.

The question for determination then is whether the appellant took reasonable care. What is reasonable depends upon the foreseeability of harm, the magnitude of the risk of that harm occurring, the gravity of the harm which may take place, the cost and practicality of preventing it, and the justifications for running the risk: ***Stokes v Guest Keen and Nettlefold (Bolts and Nuts) Limited*** [1968] 1 W.L.R. 1776. In ***Hatton v Suderland,*** Hale L.J. said:-

"It is essential therefore, once the risk of harm to health from stress in the work place is foreseeable, to consider whether and in what respect the employer has broken that duty. There may be a temptation, having concluded that some harm was foreseeable and that harm of that kind has taken place, to go on to conclude that the employer was in breach of his duty of care in failing to prevent that harm (and that the breach of duty caused the harm). But in every case it is necessary to consider what the employer not only could but should have done."

I have already held had that the employer's reaction to the events of the 27th, 28th and 29th March 2001 was reasonable. In the incident relating to the dress code there were exchanges but they were not heated and I am not satisfied that the appellant acted other than reasonably. The mis-description in the roster was a mistake and any harm resulting from the same in my view was unforeseeable. The error in relation to the hours upon which the respondent was rostered for duty was the respondent's mistake. The wording of the circular correcting the error in substance was as agreed. Its circulation was less than that agreed but, insofar as that fell short of the circulation agreed, the shortfall looked at in terms of the circulation of the error was not such as to make injury foreseeable. The training programme as originally drafted the discussions concerning its contents and the seven days delay in producing the revised training plan taken together are not circumstances which make mental injury foreseeable. Insofar as the appellant was unwilling to discuss the contents of the plan while the respondent was absent from work due to stress and its effect on his Crohn's disease it was perhaps more beneficial to the respondent that matters causing him stress should not be discussed until he was certified fit to return to work by his

medical adviser. Had the appellant insisted on discussing the training plan at a time when the respondent was certified as unfit for work such conduct might well be regarded as oppressive conduct. Each of the incidents raised in the course of the hearing and which occurred after the 23rd November taken individually fails on the test of foreseeability. I am satisfied that cumulatively they also fail. The appellant responded reasonably to each incident as it arose and the alternative available to the appellant was to abdicate from all control of the manner in which the respondent would carry out the duties of his employment.

The injury sustained by the respondent being unforeseeable the respondent's claim based on breach of duty must fail.

Conclusion

For the reasons hereinbefore set out I will allow the appeal and set aside the judgment of the High Court save and except in so far as the sum of €9,079.00 was awarded to the respondent in respect of Christmas and annual bonus which sum should carry interest at Courts Act rate from the 1st June 2001.

12. 2. 2009.

Henry Denny & Sons (Ireland) Limited, trading as **Kerry Foods,** Appellant, v. **The Minister for Social Welfare,** Respondent [S.C. No. 378 of 1995]

Supreme Court 1st December, 1997

Contract - Employment - Whether contract for services or contract of service - Shop demonstrators - Whether "servant" or "independent contractor" - Whether "insurable persons" - Social Welfare (Consolidation) Act, 1981 (No. 1), ss. 5(1)(a), 111(1) and 298-300.

High Court - Jurisdiction - Appeal from expert tribunal - Whether jurisdiction limited to questions of law - Whether mistake of law in decision of appeals officer - Whether findings reached on evidence and within jurisdiction - Test to be applied in determining whether findings correct - Whether conclusions of appeals officer were those which reasonable person could draw - Social Welfare (Consolidation) Act, 1981 (No. 1), s. 300(4).

Words and phrases - "Servant" - "Independent contractor" - "Insurable person" - Social Welfare (Consolidation) Act, 1981 (No. 1), s. 111.

Section 5(1)(a) of the Social Welfare (Consolidation) Act, 1981, provides as follows:-

> "every person who, being over the age of 16 years and under pensionable age, is employed in any of the employments specified in *Part I* of the *First Schedule*, not being an employment specified in *Part II* of that *Schedule*, shall, subject to *section 65(1)*, be an employed contributor for the purposes of this Act..."

Employment is defined under Part I of the First Schedule of the Act of 1981 as employment under a contract of service or apprenticeship. Section 111(1) of the Act of 1981 provides, *inter alia,* that every question arising in relation to a claim for benefit under the Act and as to whether a person is an "insurable person" shall be decided by a deciding officer.

Section 300(4) of the Social Welfare (Consolidation) Act, 1981 provided [now contained in the Social Welfare (Consolidation) Act, 1993] as follows:-

> "The Chief Appeals Officer may, at any time and from time to time, revise any decision of an appeals officer, if it appears to him that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts, and, save where the question is a question to which *section 298(6)* applies, any person who is dissatisfied with the revised decision may appeal therefrom to the High Court on any question of law."

The appellant was contacted in 1988 by S.M. ("the demonstrator") who offered to work for the company as a shop demonstrator. The demonstrator was interviewed, placed on a panel and signed a written twelve month contract of employment. The manner in which a demonstrator was employed was that when a store requested a demonstration for a product a demonstrator on the panel was contacted, sent to the store and carried out the demonstration. The demonstrator then submitted an invoice to the appellant which was signed by the store manager. The demonstrator was paid at a

daily rate and was given a mileage allowance. As a shop demonstrator under her contract of employment the demonstrator was not eligible to become a member of the appellant's pension scheme or a trade union.

The demonstrator was employed by the appellant under yearly renewable contracts from 1991 to 1993. Her written contract of employment for 1993, described her as an independent contractor and purported to make her responsible for her own tax affairs. The demonstrator worked an average of twenty eight hours a week for forty eight to fifty weeks a year and carried out approximately fifty demonstrations a year. The demonstrations were not carried out under the supervision of the appellant, however, she was required to comply with any reasonable directions given by the owner of the store and she had been provided with written instructions as to how she was to carry out her work. She was supplied by the appellant with the materials for performing the demonstration and required the consent of the appellant prior to subcontracting any of the demonstrations assigned to her.

A question arose as to whether the demonstrator was employed under a contract of service or a contract for services and was to be considered an "insurable person" under the Social Welfare Acts. The question was referred to a deciding officer, pursuant to s. 111(1) of the Social Welfare (Consolidation) Act, 1981, who decided that the demonstrator was employed under a contract of service. The appellant appealed the decision to an appeals officer pursuant to s. 298(1) of the Act of 1981, who affirmed the decision. The appellant then applied to the Chief Appeals Officer pursuant to s. 300(4) of the Act of 1981 for a review of the decision of the appeals officer. The review was refused by the Chief Appeals Officer. The appellant then appealed the decision of the Chief Appeals Officer to the High Court by way of special summons pursuant to s. 299 and s. 300(4) of the Social Welfare (Consolidation) Act, 1981. The High Court refused to set aside the decision of the appeals officer and held that the appeal was on a question of law only and in such an appeal the court does not go into the merits of the decision but is confined to considering if the conclusions and inferences of the appeals officer are those which no reasonable person could draw or whether they are based on an erroneous view of the law. In so deciding, the court was required to consider whether there was evidence to support the findings of fact that the demonstrator was employed under a contract of service and whether the appeals officer applied the law correctly.

At the hearing, the appellant submitted that the trial judge erred in law in the approach which she adopted to the appeal as she had failed to distinguish between the power of the High Court to set aside inferences of fact where those inferences are based on documents and its powers in regard to other inferences of fact. It was also contended that the trial judge had applied the wrong test in holding that she should only interfere with the findings of fact of the appeals officer if they were such that no reasonable person could have reached them on the evidence. It was submitted on behalf of the appellant that where the question to be determined by the appeals officer was a mixed question of law and fact a different approach should have been taken and that even if the trial judge had correctly exercised the jurisdiction of the High Court in the appeal the decision of the appeals officer should nonetheless be set aside as being incorrect in point of law as he had failed to have proper regard to the written contract of employment.

Held by the Supreme Court (Hamilton C.J., Keane and Murphy JJ.), in dismissing the appeal, 1, that the High Court should not interfere with the findings of the appeals officer unless his findings were incapable of being supported by the facts or were based on an erroneous view of the law.

2. That the only matters to be determined by the High Court were whether there was evidence to support the finding of fact by the appeals officer that the demonstrator was employed under a contract of service and whether the appeals officer had applied the correct legal principles.

Mara (Inspector of Taxes) v. Hummingbird Ltd. [1982] 2 I.L.R.M. 421 followed.

3. That it had not been shown that the appeals officer in any way misconstrued the written contract and was entirely correct in holding that he should not confine his consideration to what was contained in the written contract of employment but should have regard to all of the circumstances surrounding the demonstrator's employment.

4. That, if the appeals officer had erred in law in his construction of the written contract, his decision would be liable to be set aside by the High Court.

Dicta of Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Ltd.* [1982] 2 I.L.R.M. 421 approved.

5. That in deciding whether a person was employed under a contract of service or under a contract for services each case must be considered in light of its particular facts and of the general principles which the courts have developed. In general, a person will be regarded as being employed under a contract of service and not as an independent contractor where he or she is performing services for another person and not for himself or herself.

Graham v. Minister for Industry and Commerce [1933] I.R. 156, *Queensland Stations Property Ltd. v. Federal Commissioner of Taxation* [1945] 70 C.L.R. 539 and *Cassidy v. Ministry of Health* [1951] 2 K.B. 343 considered. *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173 and *McAuliffe v. Minister for Social Welfare* [1995] 2 I.R. 238 approved.

6. That the degree of control exercised over how the work was to be performed, although a factor to be taken into account, was not decisive. The inference that the person was engaged in business on his or her own account can be more readily drawn from where he or she provided the necessary premises or equipment or some other form of investment, where he or she employed others to assist in the business and where the profit which he or she derived from the business was dependent on the efficiency with which it is conducted by him or her.

7. That the appeals officer was entitled to arrive at the conclusions which he did on the facts and having taken into account all of the circumstances of the demonstrator's employment.

8. That the appeals officer was correct in applying the legal principles laid down in decisions of the High and the Supreme Court to the facts as found by him and he was not bound by an unwritten judgment of the Circuit Court which was a decision on different facts in another statutory context.

(*Per* Hamilton C.J.): That the courts should be slow to interfere with the decisions of expert administrative tribunals.

(*Per* Murphy J.): That the decision as to whether the demonstrator was retained under a contract of service depended on the totality of the contractual relationship

express or implied between the parties and not solely upon any statement as to the consequences of the bargain.

Cases mentioned in this report:-

Cassidy v. Ministry of Health [1951] 2 K.B. 343; [1951] 1 All E.R. 574.

Graham v. Minister for Industry & Commerce [1933] I.R. 156.

Queensland Stations Property Ltd. v. Federal Commissioner of Taxation [1945] 70 C.L.R. 539.

Mara (Inspector of Taxes) v. Hummingbird Ltd. [1982] 2 I.L.R.M. 421.

Market Investigations Ltd. v. Min. of Soc. Security [1969] 2 Q.B. 173; [1969] 2 W.L.R. 1; [1968] 3 All E.R. 732.

McAuliffe v. Minister for Social Welfare [1995] 2 I.R. 238; [1995] 1 I.L.R.M. 189.

Ó Coindealbháin (Insp. of Taxes) v. Mooney [1990] 1 I.R. 422.

In re Sunday Tribune Ltd. [1984] I.R. 505.

Appeal from the High Court.

The facts have been summarised in the headnote and are fully set out in the judgment of Keane J., *infra*.

The High Court (Carroll J.) heard and dismissed the appeal by order dated the 19th October, 1995. By notice of appeal dated the 17th November, 1995, the appellant appealed to the Supreme Court.

The appeal was heard by the Supreme Court (Hamilton C.J., Keane and Murphy JJ.) on the 23rd and 24th July, 1997.

Paul Gallagher S.C. (with him *Herbert Giblin*) for the appellant.

Aindrias Ó Caoimh S.C. (with him *Nuala Butler*) for the respondent.

Cur. adv. vult.

Hamilton C.J. 1st December, 1997

I agree with the judgments about to be delivered but I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be

corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review.

Keane J.

Demonstrators who offer passing shoppers free samples of wine, cigarettes, sausages or whatever are a familiar feature of supermarkets today. The net issue in this case is as to whether they are properly regarded in law as engaged in their tasks under a "contract of service" or a "contract for services".

The significance of the distinction is that if such a demonstrator is regarded as being employed under a contract of service, then he or she is an insurable person for the purposes of the Social Welfare Acts, 1993 to 1997. In the case of Ms. Sandra Mahon who performed such services for the appellant, a deciding officer, an appeals officer and the chief appeals officer in the department of the respondent were of the opinion that she was employed under a contract of service and hence was an insurable person. That conclusion was upheld on appeal to the High Court by Carroll J. in a judgment delivered on the 18th October, 1995. From that decision, the appellant has appealed to this Court.

The relevant legislation can be shortly summarised. Under s. 5(1)(a) of the Social Welfare (Consolidation) Act, 1981, (the Act in force at the time that the question arose in relation to Ms. Mahon), every person over the age of 16 years and under pensionable age is "an insured person" for the purposes of the legislation if he or she is employed in any of the employments specified in Part I of the First Schedule. Paragraph 1 of Part I, refers to:-

> "Employment in the State under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise, or without any money payment."

Under s. 111(1), every question arising *inter alia* as to whether the employment is or was insurable employment is to be decided by a deciding officer of the respondent. Section 298(1) provides that, if any

person is dissatisfied with that decision, the question is to be referred to an appeals officer. Section 300(4) provides that:-

> "The Chief Appeals Officer may, at any time and from time to time, revise any decision of an appeals officer, if it appears to him that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts, and, . . . any person who is dissatisfied with the revised decision may appeal therefrom to the High Court on any question of law."

The facts - which were not at any stage materially in dispute - should now be set out.

Ms. Mahon contacted the appellant by telephone in or about 1988, with a view to providing her services as a demonstrator and, having been interviewed, was placed on the panel from whom demonstrators are selected by the appellant. She was engaged on the terms of a written contract. The contract expired at the end of each year and a fresh contract was then entered into annually between her and the appellant. The appellant has approximately 70 demonstrators on its panel.

The manner in which Ms. Mahon's services were availed of by the appellant was as follows. The particular retail store which required one of the appellant's food products to be demonstrated got in touch with the local customer service manager of the appellant and asked for such a demonstration specifying the day or days upon which it was required. Three or four days before the date of the proposed demonstration, the manager would telephone a demonstrator on the panel to inquire whether or not the demonstrator was available to provide her services on the particular days at the specified shop. Generally speaking, neither the demonstrator nor the appellant knew prior to this time whether or not a demonstration was to be given at any particular shop or store during the immediately following weekend. If the demonstrator was available, it was agreed that the service should be provided. The demonstration was carried out without any supervision by the appellant.

Ms. Mahon submitted an invoice in respect of the services provided after each demonstration to the appellant. The invoices were not treated as valid unless they were signed by the manager of the particular store in which the demonstration was carried out. Her fees were discharged on a fortnightly basis on production of the completed invoices. She was paid approximately £28.32 *per* day for her services and was also paid travelling expenses at the rate of 27p *per* mile. She was not a member of any pension scheme of the appellant nor was she a member of a trade union.

New contracts were entered into by the appellant with Ms. Mahon in respect of each of the years ending the 31st December, 1991, the 31st December, 1992, and the 31st December, 1993. While there were some differences, the contracts for each of the years in question were in broadly the same terms. That in force for the year ending the 31st December, 1993, contained a number of important provisions which must be set out in full.

The letter from Ms. Bernie Campbell, the customer services manager, confirming the retention of Ms. Mahon and enclosing the terms and conditions of her employment, began as follows:-

> "This is to confirm that [the appellant] is willing to retain your services as a demonstrator/merchandiser commencing on the 1st January, 1993 and ending on the 31st December, 1993.
>
> For the avoidance of all doubt, I am obliged to point out to you that you will not be an employee of [the appellant], you will be providing it with your services as an independent contractor as and when they are required during the term of the contract.
>
> The contract shall be subject to the standard terms and conditions, a copy of which is attached thereto . . ."

Attached to this letter were what were described as "NOTES" which stated as follows:-

"(1) You will be responsible for your own tax affairs. [The appellant] will be making returns to the revenue of all payments made to you. These payments will be made gross.

(2) You will not be an employee of [the appellant], you will be an independent contractor. This has implications in the area of employment legislation and from the point of view of injury or health and damages sustained or caused while you are providing services under the general terms and conditions to [the appellant]."

Clauses 2 to 9 inclusive were as follows:-

"(2) *Retention of services*

[The appellant] may, at its absolute and sole discretion and on such occasions as it thinks fit, retain the services of the demonstrator for the purposes of demonstrating and/or promoting and/or merchandising the product at such venues within the area as [the appellant] may from time to time require. [The appellant] shall give the demonstrator not less than 24 hours notice of the retention of his/her services hereunder. In the event of the demonstrator being unable for any reason to provide a service hereunder

when requested so to do, the demonstrator shall at the earliest opportunity so inform [the appellant]. The demonstrator shall in such an event arrange for the service to be provided by a third party or by a servant or agent of the demonstrator PROVIDED ALWAYS that any such third party, servant or agent shall first have been approved by [the appellant] and shall agree to perform the service on terms and conditions which are these terms and conditions.

(3) *The performance of functions*
The demonstrator shall use his/her best endeavours to promote and/or demonstrate and/or merchandise the product to the best advantage of [the appellant] and shall at all times, while performing his/her functions hereunder, act in the best interest of [the appellant]. The demonstrator shall at all times be courteous towards customers or potential customers of [the appellant].

(4) *Proper dress*
The demonstrator shall present himself/herself in a neat, clean and tidy manner, properly attired and shall wear such uniform, jackets, coats and/or head-dress as [the appellant] may from time to time require and shall at all times present himself/herself in a manner that befits a demonstrator/merchandiser/promoter of food products.

(5) *Punctuality*
The demonstrator shall punctually attend at the time(s) stipulated by [the appellant] at the location where the demonstration, promotion or merchandising of the product is to take place.

(6) *Abide by regulations*
The demonstrator shall abide by such directions and regulations as may be in force at the place where the demonstration / promotion / merchandising is to take place. In the event of the demonstrator considering that any such directions or regulations are so restrictive that they effectively prevent or severely inhibit the performance of the demonstrator's functions hereunder, the demonstrator shall at the earliest opportunity inform the sales manager for the time being of [the appellant]whose decision on the matter shall be final and binding.

(7) *Misconduct*
Without prejudice to the terms of clause 16 hereof, if the demonstrator shall be guilty of any serious misconduct or neglect of his/her obligations under these terms and conditions [the appel-

lant] may forthwith terminate the particular contract under which the services of the demonstrator are retained without prejudice to any other remedy which [the appellant] may have in such an event against the demonstrator.

(8) *Independent contractor*
The demonstrator is and shall be deemed to be an independent contractor and nothing in this agreement shall be construed as creating the relationship of master and servant or principal and agent. It is further agreed that the provisions the of the Unfair Dismissals Act, 1977, shall not apply to the contractual relationship that exists between [the appellant] and the demonstrator.

(9) *Property of [the appellant]*
All uniforms, coats, overalls, head-wear and utensils given to the demonstrator by [the appellant] shall at all times remain the sole property of [the appellant] and the demonstrators shall take all reasonable care of and shall not assign or part with the possession of any such uniforms, coats, overalls, head-wear and utensils."

Clause 11, which provided for the payment of the fees in the manner already described, also made it clear that it was the duty of the demonstrator to pay and discharge such taxes and charges as might be payable out of such fees.

Clause 12, under the heading "*Indemnity*", provided that the demonstrator was to exercise due skill and care and was to indemnify the appellant against claims for loss and damage sustained as a result of any act or omission of the demonstrator. It also made clear that the lifting and moving of goods, *etc.*, in connection with the performance of the contract were to be done at the demonstrator's sole risk, but that nothing in the contract was to be construed as obliging the demonstrator to perform a task which was dangerous or to do anything in an unsafe manner.

Clause 13, under the heading *"Not to work for Competitors"*, provided that:-

"The demonstrator shall not, for so long as he/she is making his/her services available to [the appellant] as a demonstrator and/or merchandiser and/or promoter, act as demonstrator, merchandiser or promoter in the area of any product which would be in competition with the product of [the appellant]."

Clause 16, under the heading *"Separate Contract,"* provided that:-

"Each separate retention of the demonstrator's services by [the appellant] shall, unless otherwise agreed between [the appellant] and

the demonstrator, be a separate and distinct contract to which each of these terms and conditions shall apply."

Ms. Mahon carried out approximately 50 demonstrations in the course of a year. She was not supervised in any way by the appellant in carrying out the demonstrations, although she was expected, as clause 7 made clear, to comply with any reasonable directions given by the owner of the shop or store in which she was carrying out the demonstration. Moreover, while there was no continuous and direct supervision, a circular letter from Ms. Campbell dated the 17th February, 1993, to all the demonstrators gave detailed instructions to them as to how they should do their job. This letter also made it clear that, in the event of a demonstrator finding on arrival at a store that the particular demonstration had been cancelled, he or she was entitled to ask if they could demonstrate another product. If there was no work available for them, the appellant paid no more than the mileage rate.

On the 11th May, 1992, the deciding officer decided that Ms. Mahon was an insurable person. An appeal having been lodged, an oral hearing took place before the appeals officer at which evidence was given by Ms. Mahon and Mr. Liam Kerins, an accountant employed by the appellant. The appeals officer made his findings in the form of a written report dated the 30th April, 1993.

During the course of the hearing, the appellant had indicated that it was relying in part on a decision of the Circuit Court on an appeal from a determination by the Employment Appeals Tribunal in the case of a Mr. Robert Cronin that his status was that of an independent contractor and not of an employee. The appeals officer indicated that he did not consider himself bound by this decision, although he did refer to other decisions of the High Court and of this Court and also to certain English authorities.

He was also referred to a decision by a local Inspector of Taxes that demonstrators such as Ms. Wilson were self-employed persons and not within the scope of the P.A.Y.E. system. However, he said that he was aware that the Revenue had generally deemed employments of this nature to be under a contract of service and subject to P.A.Y.E. and was of the view that the stance adopted by the Inspector was "merely a holding arrangement".

The appeals officer also referred to a questionnaire from the department which had been completed by the appellant and in which it was apparently accepted by the appellant that it had the right to direct and control the demonstrator as to how, when and where he/she did the work.

As to the written contract, the appeals officer said:-

"Considerable reliance has been placed on the actual contract of employment, which is signed by Ms. Mahon annually. However, as Ms. Mahon mentioned at the hearing, she wants the work and thus has very little real option but to sign same."

Having referred to some of the authorities, he added:-

"Thus in the present case, I am required to consider the facts and the realities of the situation on the ground irrespective of what the actual contract states or specifies."

He then expressed his conclusion as follows:

"The facts are that Ms. Mahon was recruited by the appellant. Has worked for the company for a number of years. Works 27/28 hours *per* week for 48 to 50 weeks of the year. Is paid a basic rate of £85 together with travelling expenses. Must do the work herself and supplies labour only. Cannot engage other people to stand in for her except in exceptional circumstances and then only with the approval of the company. She is supplied with materials to carry out her work. It appears to me that she cannot but be regarded as being subject to control and direction of the company.

All these factors when considering the above-mentioned test indicate that the only reasonable conclusion that I can come to is that the ingredients for a contract of service exist in this case and I so decide."

On the 22nd September, 1993, an application was made on behalf of the appellant to the Chief Appeals Officer to revise this decision. On the 11th October, 1993, the appellant was informed that the Chief Appeals Officer was of the view that the appeals officer had properly addressed himself to the issues arising from the deciding officer's decision and that the appeal decision was not erroneous by reason of some mistake having been made in relation to the law or the facts.

These proceedings were then instituted by way of an appeal pursuant to s. 300(4) of the Act of 1981 from the decision of the Chief Appeals Officer. (In the special summons, the appeal was also stated to be brought pursuant to s. 299, but it was accepted at the hearing that the appropriate form of appeal was under section 300(4).)

In her judgment, the learned High Court Judge (Unreported, High Court, Carroll J., 18th October, 1995), having pointed out that the appeal was on a question of law only, observed:-

"In an appeal on a question of law the court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law) the court should confine itself to

considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law.

In this case that means that the court must consider (1) whether there was evidence to support the finding of fact that Sandra Mahon was employed on a contract of service and (2) did the appeals officer apply the law correctly. It is not for the court to start weighing the various factors."

Having also said that the fact that the contract was stated to be a contract for services was not a decisive factor and that "the entire contract" had to be considered in order to decide whether it was indeed a contract for services, the learned High Court Judge said that she was satisfied that the approach of the appeals officer was correct in law. She was also satisfied that he was correct as a matter of law in holding that he was not bound by the decision of the Circuit Court in the case of *Cronin*. Having said that the appellant had pointed to facts which supported the view that the contract was a contract for services and that the respondent had relied on facts which pointed to a contrary conclusion, she expressed her own conclusion as follows:-

"The decision reached depends on the importance which the appeals officer attached to some facts. This was a balancing operation which is essentially a matter of degree and his conclusions should not be disturbed unless they are such that no reasonable person could draw them.

In my opinion the appellant has not shown that the conclusions drawn by the appeals officer are ones which no reasonable person could draw and neither have they shown that they were based on a mistaken view of the law.

In those circumstances, the appeal should be dismissed."

On behalf of the appellant, counsel submitted first that the learned High Court Judge was wrong in point of law in the approach she had adopted to the appeal. He said that, in particular, she had failed to distinguish between the power of the High Court to set aside inferences of facts where those inferences are based on documents, such as the written contract in the present case, and its powers in regard to other inferences of fact. He further submitted that, in general, she had applied the wrong test in holding that she should only interfere with the findings of the appeals officer if they were findings of fact which no reasonable person could have reached on the evidence. He said that where, as here, the question before the appeal's officer was not one of fact, but a mixed question of

fact and law, the learned High Court Judge should not have adopted so circumscribed an approach. He cited in support the decision of this Court in *Mara (Inspector of Taxes) v. Hummingbird Ltd.* [1982] 2 I.L.R.M. 421 and the High Court decisions in *Ó Coindealbháin (Insp. of Taxes) v. Mooney* [1990] 1 I.R. 422 and *McAulliffe v. Minister for Social Welfare* [1995] 2 I.R. 238.

Counsel secondly submitted that, even if the jurisdiction of the High Court was as stated by the learned High Court Judge, the decision of the appeals officer should nonetheless have been set aside as being incorrect in point of law. He said that it was clear from his report that the appeals officer had wholly failed to have regard to the terms of the written contract between Ms. Mahon and the appellant, contrary to the principles of law enunciated in the authorities. He said that the appeals officer had effectively ignored the contract on the ground that if Ms. Mahon wanted the work she had to agree to that contract. Counsel said that, while it was accepted that clause 8 of the contract, providing that the demonstrator was to be deemed to be an independent contractor, was not determinative of the issue, it was of importance when viewed in the context of other terms of the contract. He relied particularly on those clauses of the contract which made it clear that the appellant was not obliged to retain the demonstrator's services and that the demonstrator was not obliged in turn to provide the services when requested, which imposed on the demonstrator the duty to discharge any taxes and which required the demonstrator to indemnify the appellant against any claims against it. He submitted that these clauses were not usually found in a contract of employment.

Counsel also relied on the fact that there was no supervision of the demonstrator's work and that, on the contrary, she had to comply with the directions and regulations of the particular store or shop which had requested the demonstration, which would obviously vary from one company to another.

Counsel submitted that, in addition, the appeals officer was wrong in law in wholly disregarding the decision of the Circuit Court, even though he was not bound by it. He had also placed too much reliance on the Form IWSI signed by the appellant, the form of which, requiring as it did "YES" or "NO" answers, made it difficult for the appellant accurately to describe the nature of Ms. Mahon's employment.

On behalf of the respondent, counsel submitted that the jurisdiction of the High Court was limited under s. 300(4) of the Act 1981 to questions of law. Accordingly, unless the appeals officer had made a mistake of law or reached a conclusion which was not open to him on the evidence, his

decision could not be set aside by the High Court. Counsel urged that it was clear from the appeals officer's report that he was aware of, and had applied, the relevant principles of law. Since his conclusions were reasonable, capable of being supported by the evidence and reached in accordance with the relevant legal principles, there was no ground on which they could be interfered with by the High Court.

Counsel for the respondent submitted that the legal principles applicable in determining whether a particular contract was one "of service" or "for services" had been identified in a number of Irish decisions such as *Ó Coindealbháin (Insp. of Taxes) v. Mooney* [1990] 1 I.R. 422 which made it clear that the critical question was whether the person concerned was performing the relevant services as a person in business on his or her own account: if he or she was not, then the contract was clearly one of service. He submitted that the facts in the present case were closely analogous to those in the English decision of *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173, where it had been held that a person employed by a company engaged in market research as an interviewer was employed under a contract of service within the meaning of the corresponding English legislation. He submitted that the appeals officer in the present case was correct in law in adopting a similar approach to the employment of Ms. Mahon.

Counsel further submitted that the appeals officer was correct in point of law in declining to follow the unreported decision of the Circuit Court in *Cronin* which had been reached on the basis of different facts and under different statutory provisions. The appeals officer was also correct in taking the view, that, while he should have regard to the decision in question, he was not bound to follow it and should take as the relevant binding precedents decisions of the High Court and the Supreme Court.

The first question that arises for consideration on this appeal is as to whether the High Court Judge was correct in holding that the only matters to be determined by her were whether there was evidence to support the finding of fact by the appeals officer that Ms. Mahon was employed under a contract of service and whether the appeals officer had applied the correct legal principles.

In *Mara (Inspector of Taxes) v. Hummingbird Ltd.* [1982] 2 I.L.R.M. 421, Kenny J., speaking for this Court, said at p. 426 in reference to findings of fact in a case stated by an appeals commissioner under the Income Tax Act, 1967:-

> "A case stated consists in part of findings on questions of primary fact . . . These findings on primary facts should not be set aside by the

courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw."

In the present case, both the appeals officer and the learned High Court Judge were of the view that the fact that Ms. Mahon was described in the written agreement as being employed as an "independent contractor" was not conclusive. It is accepted that they were correct in so holding. It is correct to say that the appeals officer appears to have taken the view that the importance of the terms of the written contract was somewhat diminished by the fact that Ms. Mahon wanted the job and accordingly had no option but to sign the contract. However, it is also clear from his report that he considered in some detail the actual terms of the written contract and also had regard to the manner in which the work was done by Ms. Mahon.

If the appeals officer had erred in law in his construction of the written contract, then, in accordance with the principles explained by Kenny J., his decision would be liable to be set aside by the High Court. In the present case, however, it has not been shown that the appeals officer in any way misconstrued the written contract: he was, on the contrary, entirely correct in holding that he should not confine his consideration to what was contained in the written contract, but should have regard to all the circumstances of Ms. Mahon's employment. Equally, the High Court Judge was correct in the view she took that she should not interfere with his findings in this regard unless they were incapable of being supported by the facts or were based on an erroneous view of the law.

The second question that arises on this appeal is as to whether the conclusions reached by the appeals officer in his report were in fact based

on an erroneous view of the law. The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as the Act of 1981, is to be regarded as a contract "for service" or a contract "of services" have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a "servant" and "independent contractor". However, there is a consensus to be found in the authorities that each case must be considered in the light of its particular facts and of the general principles which the courts have developed: see the observations of Barr J., in *McAuliffe v. Minister for Social Welfare* [1995] 2 I.R. 238.

At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that test does not always provide satisfactory guidance. In *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, it was pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see *Queensland Stations Property Ltd. v. Federal Commissioner of Taxation* [1945] 70 C.L.R. 539.

In the English decision of *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173, Cooke J., at p. 184 having referred to these authorities said:-

> "The observations of Lord Wright, of Denning L. J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what

degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

It should also be noted that the Supreme Court of the Irish Free State in *Graham v. Minister for Industry and Commerce* [1933] I.R. 156, had also made it clear that the essential test was whether the person alleged to be a "servant" was in fact working for himself or for another person.

It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.

The question remains as to whether the appeals officer, in the light of the legal principles to which I have referred, was entitled to arrive at the conclusion he did on the facts as found by him. I have no doubt that he was. Obviously, having regard to the nature of the work for which she was employed, there was no continuous supervision of Ms. Mahon by the appellant. That cannot be regarded as a decisive factor, any more than it was in the case of the market researcher, the nature of whose employment was in issue in the case decided by Cooke J. On the other side of the equation are the facts that Ms. Mahon was provided by the appellant with the clothing and equipment necessary for the demonstration and made no contribution, financial or otherwise, of her own and that the remuneration she earned was solely dependent on her providing the demonstrations at the times and in the places nominated by the appellant. The amount of money she earned was determined exclusively by the extent to which her services were availed of by the appellant: she was not in a position by better management and employment of resources to ensure for herself a higher profit from her activities. She did not as a matter of routine engage other people to assist her in the work: where she was unable to do the work herself, she had to arrange for it to be done by someone else, but the person in question had to be approved by the appellant.

The written agreement was undoubtedly drafted with understandable care with a view to ensuring, so far as possible, that Ms. Mahon was regarded in law as an independent contractor. However, as I have already pointed out, although this was a factor to which the appeals officer was bound to have regard, it was by no means decisive of the issue. When he took into account all the circumstances of her employment, he was perfectly entitled to arrive at the conclusion, as he did, that she was employed under a contract of service.

As to the submission that the appeals officer should have treated himself as bound by the unreported decision of the Circuit Court in *Cronin*, it is sufficient to say that, since it was a decision on different facts in another statutory context and no written judgment appears to have been available, the appeals officer was entitled to adopt the approach he did, *i.e.* of applying to the facts as found by him the legal principles laid down in decisions of the High Court and this Court. This he clearly did and, for the reasons I have already given, I am satisfied that the High Court Judge was entirely correct in holding that his conclusions could not be disturbed.

I would dismiss the appeal.

Murphy J.

I am in complete agreement with the judgment delivered by Keane J. but I would like to add certain observations of my own partly in deference to the very able argument presented by counsel on behalf of the appellant and more particularly to provide such assistance as I can for the administrative tribunals charged with the duty of implementing the provisions of the Social Welfare Acts, 1993 to 1997.

The argument on which the appellant most confidently relied was that the appeals officer had erred in law in failing to have sufficient regard to the terms of the written contract between Ms. Mahon and the appellant and that the learned judge of the High Court failed to correct that error. The appellant cited the principle accepted by Blayney J. in *Ó Coindealbháin (Insp. of Taxes) v. Mooney* [1990] 1 I.R. 422 at p. 424 in the following terms:-

> "Where the agreement creating the relationship between the parties is expressed in writing, . . . the entire agreement between the parties is to be found in the writing, so it is the unique source of their relationship; it follows that it is from its terms alone that the nature of the relationship can be determined."

It is then said that this principle was ignored or misapplied by the appeals officer who in his written report dated the 30th April, 1993, stated as follows:-

> "Considerable reliance has been placed on the actual contract of employment, which is signed by Ms. Mahon annually. However, as Ms. Mahon mentioned at the hearing, she wants the work and thus has very little option but to sign same."

The officer went on to say, as Keane J. has already noted:-

> "Thus in the present case, I am required to consider the facts and the realities of the situation on the ground irrespective of what the actual contract states or specifies."

The document known as the "Demonstrators' General Terms and Conditions", which was applicable to Ms. Mahon and all other demonstrators whose names were from time to time included on the panel maintained by the appellant as persons available to provide the services of a demonstrator, is reasonably lengthy but not very informative. It is clear that the panellists might have been called upon "to demonstrate, promote, market and sell" the appellant's products at different locations but little guidance is forthcoming as to the manner in which those operations would be carried out or the skills which the panellists might possess or would be required to exercise in carrying out their functions. The document is silent as to who decides the precise form of any particular commercial activity involved. Has the demonstrator any role in deciding what form a demonstration should take? Presumably important commercial issues could arise as to the amount of individual samples to be provided or the form or scope of any particular display. The general terms and conditions cast no light on these matters. The document, for the greater part, regulates matters of conduct which might be of equal application to an employee or to an independent contractor.

The terms and conditions expressly provide that the demonstrator is:-

> "deemed to be an independent contractor and nothing in this agreement should be construed as creating the relationship of master and servant or principal and agents."

The same clause goes on expressly to provide that:-

> "It is further agreed that the provisions of the Unfair Dismissals Act, 1977, shall not apply to the contractual relationship between [the appellant] and the demonstrator."

Again the express provisions included a term that:-

"It shall be the duty of the demonstrator to pay and discharge such taxes and charges as may be payable out of such fees to the revenue commissioners or otherwise."

On behalf of the appellant it was conceded that these provisions were not of decisive importance. In my view their value, if any, is marginal. These terms are included in the contract but they are not contractual terms in the sense of imposing obligations on one party in favour of the other. They purport to express a conclusion of law as to the consequences of the contract between the parties. Whether Ms. Mahon was retained under a contract of service depends essentially on the totality of the contractual relationship express or implied between her and the appellant and not upon any statement as to the consequence of the bargain. Certainly the imposition of income tax and the manner of its collection falls to be determined in accordance with the appropriate legislation and the regulations made thereunder as they impinge upon the actual relationship between parties and not their statement as to how liability should arise or be discharged.

The terms and conditions governing the engagement of Ms. Mahon were not "the unique source" of the relationship between her and the appellant. I am satisfied that the appeals officer was correct in his conclusion that he was required to consider "the facts or realities of the situation on the ground" to enable him to reach a decision on the vexed question whether the respondent was an employee or an independent contractor. In seeking to ascertain the true bargain between the parties rather than rely on the labels ascribed by them to their relationship the appeals officer was expressly and correctly following the judgment of Carroll J. In *In re Sunday Tribune Ltd.* [1984] I.R. 505. Of course the appeals officer was not entitled to ignore the terms and conditions under which the demonstrator was engaged nor did he do so. His report analyses fully and fairly the relevant written conditions in the context of the oral evidence heard by and the arguments addressed to him. I have no doubt that the officer was entitled to reach the conclusion that he did and that the learned trial judge was correct in upholding that decision.

I would dismiss the appeal herein.

Solicitor for the appellant: *Martin O'Donoghue.*

Solicitor for the respondent: *The Chief State Solicitor.*

Sarah Berkeley, Barrister

THE SUPREME COURT

[2015] IESC 63

[Appeal No. 86/2011]

MacMenamin J.
Laffoy J.
Charleton J.

BETWEEN:

JOHN BARRY, CONOR O'BRIEN, MARY O'CONNOR, MICHAEL SPRAT AND CIARAN DOLAN

APPELLANTS

AND

THE MINISTER FOR AGRICULTURE & FOOD

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 16th day of July, 2015

1. I too would reverse the High Court judgment and order. I adopt the narrative of events set out in Charleton J.'s judgment. I agree with the order which both he and Laffoy J. propose.

2. The Employment Appeals Tribunal erred in concluding that an earlier judgment, delivered in this case by Edwards J. in the High Court, directed the Tribunal to find, as a matter of fact and law, that the appellants were self-employed, and had never been employed by the Minister.

3. In proceeding on this misconception, the Tribunal acted outside the scope of its statutory power as outlined in Charleton J.'s judgment.

4. It was for the Employment Appeals Tribunal itself to determine, on the facts, whether or not an employment relationship existed between the parties. It follows, therefore, that the Tribunal erred in concluding that Edward J's High Court ruling *required* it to make a finding in a particular way. In so concluding, it fell into error. It also follows that Hedigan J. erred and his judgment should be set aside. Thus, the matter should be remitted to the Employment Appeals Tribunal to be determined in accordance with its jurisdiction. That this course is necessary is profoundly unfortunate. This case has had a very long duration. It is to be hoped that, ultimately, the matter can achieve finality on remittal.

Management of the Matter As Remitted

5. I would suggest the following course of action might be adopted before the reconstituted Tribunal:

(a) That the parties prepare an issue paper identifying the questions now to be determined by the Tribunal. This issue paper should be no more than two A4 pages. It shall be submitted to the Tribunal:

(b) That the parties prepare written submissions of no more than fifteen A4 pages. These should address, in sequence, the agreed issues as identified in the issue paper. The sequencing and timing of these submissions are a matter for the Tribunal.

(c) The Tribunal may, thereafter, apportion such time, as may appear to it appropriate, for oral submissions. I note the parties accept that the evidence which has already been heard, may now be accepted by the Tribunal on foot of the transcript. It will be necessary to refer to those transcripts to assist the Tribunal panel now charged with finally concluding the matter.

(d) In the event that the parties disagree in relation to the issues, I would suggest that the Tribunal itself should receive a proposed issue paper from both sides, and should thereafter prepare its own issue paper, identifying the issues which, in turn, should be the subject of written submissions in the sequence therein set out.

John Mortimer
16/7/2015

signed

THE SUPREME COURT

[2015] IESC 63

[Appeal No. 86/2011]

MacMenamin J.
Laffoy J.
Charleton J.

IN THE MATTER OF THE REDUNDANCY PAYMENTS ACT 1967 – 2003

AND

IN THE MATTER OF THE MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS 1973 – 2001

BETWEEN

JOHN BARRY, CONOR O'BRIEN, MARY O'CONNOR, MICHAEL SPRATT AND CIARAN DOLAN

APPELLANTS

AND

THE MINISTER FOR AGRICULTURE AND FOOD

RESPONDENT

Judgment of Ms. Justice Laffoy delivered the 16th day of July, 2015

Introduction

1. The background and the long drawn-out history of the endeavours of the appellants (the Applicants) to establish entitlement to payments under the Redundancy Payments Acts 1967 – 2003 (the Redundancy Payments Acts) and the Minimum Notice and Terms of Employment Acts 1973 – 2001 (the Minimum Notice Acts) following the termination of their retainer, to use a neutral word, as temporary veterinary inspectors at the Galtee Meats plant in Mitchelstown, County Cork on the closure of that plant in October 2004 is set out

in the judgment to be delivered by Charleton J. I agree with the finding of Charleton J. that the decision of the High Court which is the subject of this appeal on a question of law, the judgment and order of the High Court (Hedigan J.) made on 9th February, 2011 (the second High Court order), must be set aside. I understood counsel on both sides to be *ad idem* that the consequence of such a finding would be that the matter would have to be remitted to the Employment Appeals Tribunal (the Tribunal). I am satisfied that that is what must happen. The purpose of this judgment is not to re-traverse ground which is addressed in the judgment of Charleton J. Rather it is to highlight certain matters which may assist the Tribunal in understanding why its substantial efforts to date have not brought the matter to a conclusion and what its duty is going forward.

First determination of the Tribunal

2. The issue between the Applicants and the respondent (the Minister), who had retained the Applicants as temporary veterinary inspectors, from the outset has been whether the Applicants were employees of the Minister under a contract of service, so as to entitle them to the statutory payments they have claimed. When the matter was first before the Tribunal in 2006 it was decided that the Tribunal would determine, as a preliminary point, whether the Applicants "were employed under a contract of service or a contract for service" by the Minister. Having heard the matter over four days in June and October 2006, the Tribunal gave its determination on 12th March, 2007 (the first determination). In the first determination, the Tribunal comprehensively outlined the Applicants' case and the Minister's case and the legal submissions made by counsel for both parties. It then gave a reasoned determination which extended over five pages. The outcome was that the Tribunal determined by a majority, one member of the three member Tribunal dissenting, that "the five [Applicants] were employed by the [Minister], under a contract of service, and therefore they were employees".

First order of the High Court

3. The Minister appealed against the first determination on a question of law to the High Court pursuant to the Redundancy Payments Acts and the Minimum Terms Acts. The appeal, in which the Applicants were respondents, was heard in the High Court by Edwards J., who gave judgment on 7th July, 2008. The judgment is reported as Minister for Agriculture v. Barry [2009] 1 I.R. 215. The conclusion of the High Court Judge is quoted in the judgment of Charleton J.

4. The order of the High Court was made on 22nd July, 2008 (the first High Court order). Its curial part contained eight declarations in the following terms:

"The Court doth declare that

(i) there was insufficient evidence before the [Tribunal] on which the Tribunal could properly find that the [Applicants] were employed by the [Minister] under a contract of service

(ii) the [Tribunal] erred in law in finding that mutuality of obligation was present in an implied contract between the [Minister] and the [Applicants]

(iii) the [Tribunal] erred in law in finding that there was mutuality of obligation based on an obligation on the part of the [Applicants] alone with no obligation on the part of the [Minister]

(iv) the [Tribunal] erred in law in failing to consider evidence that the [Minister] was not obliged to provide work to the [Applicants] and that the [Applicants] did not have an expectation of a particular level of work

(v) the [Tribunal] erred in law in attaching no weight to the evidence that the [Applicants] were entitled to refuse up to 16% of shifts before action would be taken by the [Minister]

(vi) the [Tribunal] incorrectly distinguished relevant and binding authorities from the facts in the case before it and failed to have regard to same

(vii) the [Tribunal] erred in law in determining that the [Applicants] were employed under a contract of service with the [Minister]

(viii) the claim of the [Applicants] pursuant to [the Redundancy Payments Acts] and [the Minimum Notice Acts] be returned to the [Tribunal]"

5. There was no appeal to this Court against the first High Court order.

Second determination of the Tribunal

6. After the matter was remitted to it by the first High Court order, the Tribunal conducted a further hearing on 8th January, 2009 and heard evidence from the witnesses referred to in the judgment of Charleton J.. It subsequently gave its determination on 31st July, 2009 (the second determination). In the second determination it was recorded that "there was no final objection that further evidence be heard" at the hearing on 8th January, 2009. The Tribunal then recorded the additional evidence which was adduced on behalf of the Applicants and on behalf of the Minister. The decision of the Tribunal in the second determination is quoted in part in the judgment of Charleton J.

7. When one analyses the decision in the second determination, the following features emerge:

(a) The Tribunal identified the question on the preliminary issue as concerning "the status and working relationship between the [Applicants] and the [Minister]", expressing it also in terms as –

(i) whether the Applicants were "engaged under a contract of or a contract for services", and

(ii) whether the Applicants were "employees or contractors of the [Minister]".

The answer to that fundamental question would determine whether the Tribunal had jurisdiction to hear the substantive matter, it stated.

(b) Its findings as to "mutuality of obligation" in the first determination having been declared to be erroneous in the first High Court order, as recorded at para. 4 above, the Tribunal noted that the Redundancy Payments Acts and the Minimum Notice Acts make no reference to "the disputed imported [phrase] of mutuality of obligation", but stated that it was mindful that it must deal with that issue. It set out to define mutuality of obligation, stating that it can be defined as that the work provider is obliged to provide employment and there is a corresponding obligation on the worker to accept and carry out the work provided. Setting out its decision, following reference to the renewed hearing at which the additional evidence was adduced in January 2009 and its consideration of the written submissions it had obtained from the parties, the Tribunal stated that it still maintained –

> ". . . on the balance of probability, by a majority decision that the [Applicants] and the [Minister] were engaged in a working relationship that carried sufficient mutuality of obligation to allow them to be classified as possible employees".

(c) Having made that finding, the Tribunal stated that the finding allowed it to "consider the various other tests associated with determining whether they were employed under a contract of or for services". It must be assumed that that conclusion was derived from the characterisation of Edwards J. in his judgment (at para. 47) of the "mutuality of obligation test" as "an important filter". In any event, the Tribunal then stated:

> "In that consideration their determination from March 2007 applies".

(d) However, the Tribunal went on to reverse its determination of 12th March, 2007, that is to say, its first determination, on the basis of its interpretation

of the judgment of Edwards J. and the first High Court order, outlining its understanding in the following passage:

> "The judge on that case issued eight declarations concluding that the case be returned to the Tribunal. Two contrasting interpretations emerged from the totality of those declarations. One was that the judge was in effect instructing the Tribunal to change its original determination due to its many errors in law in reaching that determination. Another interpretation was that this ruling was silent on the Tribunal's original determination but critical of its reasoning and flawed approach in law as to how it reached that decision".

It was then stated that, notwithstanding the majority view expressed earlier, which I understand to be a reference to the decision that the "determination from March 2007 applies", it was stated that the Tribunal felt bound to accept the former interpretation, that is to say, that it was instructed to change its original determination.

(e) On that basis, the Tribunal reversed its first determination of 12th March, 2007 and found that the Applicants were engaged under a contract for services with the Minister and that it had no jurisdiction to proceed with the hearing of the substantive issues under the Redundancy Payments Acts and the Minimum Notice Acts.

8. It is absolutely clear from the foregoing outline that the Tribunal misunderstood the effect of the declarations embodied in the first High Court order. Although very specific, in my view, those declarations did not amount to a direction by the High Court to the Tribunal as to the decision it should make when the matter was remitted to it. I agree with the view expressed by Charleton J. that it would not have been open to the High Court on

the first appeal to give such a direction. Indeed, on this appeal, there was consensus between counsel on both sides on that point.

The second order of the High Court

9. That leads to the second appeal on a question of law from the Tribunal to the High Court, in which the Applicants were appellants and the Minister was respondent. It is quite clear from the summary of the reliefs sought by the Applicants on that appeal against the second determination of the Tribunal, as set out in paragraph 3 of the judgment of Hedigan J. delivered on 9th February, 2011, that at the core of the appeal was the Applicants' contention that the Tribunal erred in law in acting on its misunderstanding of the first High Court order in –

(a) believing that it had been directed by the High Court to change its original determination due to its many errors in law in reaching that original determination, and

(b) failing to consider that, having heard additional evidence, it was entitled to apply the legal principles enunciated by the High Court in the first judgment and to make its own determination having regard to the totality of the evidence.

Unfortunately, on the second appeal, Hedigan J. did not identify or address that as the core issue, but rather entered on an assessment of the additional evidence, against the background of the declarations in the first High Court order, in particular, that at the first hearing before the Tribunal there was insufficient evidence on the basis of which a finding could be properly made that the Applicants were employed by the Minister under a contract of service. On the basis of his assessment of the evidence, Hedigan J. concluded (at para. 7.7) that no reasonable Tribunal would be entitled to conclude that the Applicants were employed other than under a contract for service. On that basis, he disallowed the

appeal without addressing the real complaint of the Applicants, stating that it was not necessary for him "to consider the issue of express directions to the Tribunal as to the correct application of the law to the facts of this case".

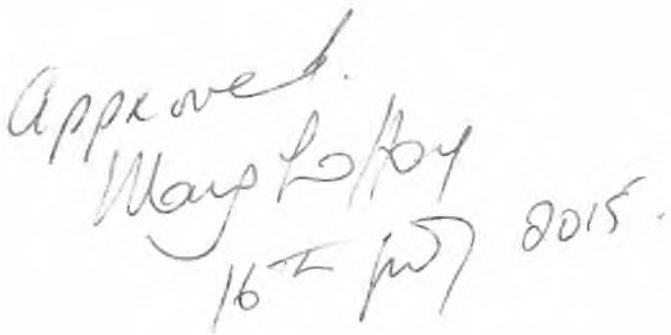
10. Having regard to the foregoing, the Applicants have unquestionably established that the second High Court order should be set aside on the grounds that it was based on an erroneous failure by Hedigan J. to address the core issue on the appeal, namely, that the Tribunal, in making the second determination had not performed its statutory duty, in that it had wrongly acted on a misinterpretation of the first High Court order in concluding that it had been instructed to reverse its first determination, when it should have made a determination on the basis of the evidence then before it and the proper application of the relevant legal principles.

Remittal to the Tribunal

11. On the remittal from this Court to it, the function of the Tribunal will be to determine whether the Applicants' claim to be entitled to payments under the Redundancy Payments Acts and the Minimum Notice Acts have been established in accordance with the applicable statutory criteria. That will involve, *inter alia*, determining whether each of the Applicants was an employee of the Minister in accordance with the application of the relevant legal principles to the evidence before it.

12. I fully agree with the view expressed by Edwards J. in his judgment (at para. 42) that the work relationship between each of the Applicants and the Minister "was a very unusual one, and one which it is not easy to classify". Notwithstanding that, in making the determination which it will be under a duty to make, the Tribunal will have to assess the evidence as to the work relationship of the Applicants with the Minister adduced by the parties before it by reference to the legal principles which have been established by the courts over the years in order to make a finding as to whether or not each of the Applicants

was an employee of the Minister. No doubt the Tribunal will be assisted in that task by the guidance given in the judgment of Edwards J. However, it is for the Tribunal to determine on the basis of the evidence before it as to whether, in accordance with the established principles, each of the Applicants was or was not an employee of the Minister prior to October 2004.



Judgment delivered by MacMenamin, J. , Laffoy, J. & Charleton, J.

Vets v Min Ag May 17 2015

An Chúirt Uachtarach
The Supreme Court

[2015] IESC 63

Record Number: 2009/1132SP

Appeal Number: 86/2011

MacMenamin J
Laffoy J
Charleton J

Between

John Barry, Conor O'Brien, Mary O'Connor, Michael Spratt and Ciarán Dolan

Applicants/Appellants

And

The Minister for Agriculture and Food

Respondent

Judgment of Mr Justice Charleton delivered on Thursday the 16th day of July 2015

1. The applicants/appellants are all veterinary surgeons. Each worked over several years in the Galtee Meats Plant in Mitchelstown in County Cork as temporary veterinary inspectors for the respondent Minister. This work involves inspecting animals, in this case it was apparently always pigs, prior to slaughter, to ensure that they are disease free and, upon slaughter, to examine the carcass, with particular attention to the internal organs, for lesions or other signs of illness. This work is standardised throughout the European Union pursuant to legislation, the purpose of which is human health. The plant shut down in October 2004. The vets were informed by the Minister that no more work was available to them. Of the 5 vets, one had worked almost fulltime in the plant, doing the ordinary maximum 4 hour shift on any working days, while the other vets also had a private practice outside those hours. They all claim to have been employees of the Minister. That is the core assertion in their case. It is denied: the Minister argues that, on the arrangements between the Minister and the vets, the vets are self-employed: this despite their shift not being subject to a VAT charge by the vets and despite the Minister apparently deducting the pay related social insurance and pay as you earn income tax, and

accounting for same. On their services being no longer called on, the vets claimed statutory entitlements in respect of employees, effectively claiming that they were made redundant. That issue of statutory rights to employment benefits is one within the jurisdiction of the Employment Appeals Tribunal. Pursuant to the statutory appeal mechanism whereby this matter came before the High Court, neither that court nor this Court on appeal is entitled to decide that issue. That point is crucial to this appeal.

Background

2. It is regrettable to record that this is the eleventh year of this legal dispute. Thus far, there have been two determinations of the Employment Appeals Tribunal and two judgments of the High Court. This appeal, from the second of those judgments, has not focused on the tests for determining the circumstances where a person engaged in work is self-employed or, in the alternative, is an employee of another. Since that matter was not argued, it is unfortunately not possible to give any guidance on the matter. Instead, the appeal focused solely on the particular history that has led here.

3. Entitlements were claimed by the vets under the Redundancy Payments Acts 1967-2003 and the Minimum Notice and Terms of Employment Acts 1973-2001. On the Employment Appeals Tribunal hearing this matter first, over four days in June and October, 2006, a preliminary question was self-set for determination: "Whether the temporary veterinary inspectors were employed under a contract of service or a contract for service by the Department of Agriculture and Food." That led to a detailed analysis of the precise circumstances whereby the vets were first engaged in the meat plant in Mitchelstown and the individual work history of each vet. In its ruling of 12th of March, 2007, the Employment Appeals Tribunal considered that a proper legal analysis required a judicial tribunal to look "at the contract as a whole" and to ask "is the person in business on his or her own account?" The Employment Appeals Tribunal in its first assessment decided thus:

> The majority having regard to all the factors in this case herein found that there is little to support the proposition that the five [vets] were engaged in business on their own account. Rather, the preponderance of evidence suggests that they undertook a continuing arrangement to provide their own skill and labour in the service of the Department of Agriculture and Food on a mutually convenient basis as to how and when they would work and that they did so for remuneration. They were not in a position to be enterprising in relation to their [temporary veterinary inspectors'] employment. They were paid a salary. This salary was paid by the... Department... in Cavan. The [temporary veterinary inspectors were not in a position to do their own shifts faster or in a shorter period of time like TB testers were. [They] simply came in and did their own work, finished their shift and went back to their own business. The fact that four of the five [vets] had their own business does not preclude them in law from being employees of the Department of Agriculture and Food. The Tribunal determines by majority decision ... that the five [vets] were employed by the [Department] under a contract of service and therefore they were employees.

4. Pursuant to ss.39 (14) and 40 of the Redundancy Payments Acts and s.11 (2) of the Minimum Notice and Terms of Employment Acts, an appeal on a question of law may be brought against a decision of the Employment Appeals Tribunal. The Respondent Minister brought such an appeal to the High Court, Edwards J, claiming a misdirection

as to the applicable law or, alternatively, that the law had been incorrectly applied to the facts. Edwards J overturned the ruling of the Employment Appeals Tribunal on 7th July, 2008; *Barry & Others v. Minister for Agriculture and Food* [2009] 1 IR 215 at paragraph 73 and see [2008] IEHC 216. Edwards J was critical of the decision of the Employment Appeals Tribunal to limit the issue before it to a binary question, recognising that a self-employed relationship could turn over time into an employment relationship depending on the circumstances. He held that there was no "single composite test" for determining whether an employment relationship existed; that the "enterprise test" was not necessarily determinative of the issue; and that "questions of control and integration" were not merely to be regarded as elements to be taken into account in applying the enterprise test but were, rather, tools whereby appropriate inferences might be drawn. Edwards J at para.20 of that first judgment in the High Court concluded:

> In my view the [Employment Appeals Tribunal]'s fell into error from the very outset in formulating the preliminary question in the way that it did, and in failing to have regard to all possibilities in determining the nature of the work relationship between the parties. That initial error was compounded by a finding of mutuality of obligation on a flawed and untenable basis. Further, the [Employment Appeals Tribunal] misdirected itself in law ... based upon a misinterpretation of Keane J's judgement in *Henry Denney & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34. In all the circumstances I must allow the appeals... I will hear submissions as to what orders may be appropriate in the circumstances.

5. On the matter returning to the Employment Appeals Tribunal for a second appraisal, further evidence was heard on the 8th January, 2009. That evidence consisted of testimony from one of the vets, from an official in Veterinary Ireland and from an official of the Respondent Minister, Michael Mackessy. Written submissions were then made by the parties in preference to oral submissions. A spoken submission with a chance for the Employment Appeals Tribunal members to ask questions, might well have been more helpful in the complex circumstances of the wealth of individual tests that might be applied to the circumstances. The Employment Appeals Tribunal in a final ruling on the matter of 31st July 2009, the second ruling, did not feel itself to be free to make a decision. Instead, it regarded the judgment of Edwards J as directing it to find as a matter of fact and as a matter of law that the vets in the Michelstown meat plant were self-employed and had never been in the employment of the respondent Minister. Accordingly, the first determination of 12th March 2007 was reversed in favour of finding that all of the vets "were engaged in a contract for services with the respondent" and that it had "no jurisdiction to proceed with substantive hearings on these cases" under the legislation. The operative part of that second ruling follows:

> The question in this preliminary issue concerns the status and working relationship between the [temporary veterinary inspectors] and the [respondent Minister]. [In other words] were the [vets] engaged under a contract of or a contract for services?... [The legislation states] that an employee is a person who has entered into or works under a contract of employment, whether that contract is for manual labour, clerical work or otherwise, is expressed or implied, oral or in writing, and whether it is a contract of service or apprenticeship or otherwise.... Lack of mutuality of obligation means not only must the provider not be under any obligation to provide employment, the worker must not be under any obligation to accept any work that is offered.... [The] tribunal still

> maintains on the balance of probability, by a majority decision, that the [vets] and the respondent [Minister] were engaged in a working relationship that carried sufficient mutuality of obligation to allow them to be classified as possible employees. This allowed the Tribunal to consider the various other tests associated with determining whether they were employed under a contract of or for services. In that consideration their determination from March, 2007 applies. However, a ruling from the High Court in this case... issued eight declarations concluding that the case be returned to the Tribunal. Two contrasting interpretations emerged from the totality of those declarations. One was that the judge was in effect instructing the Tribunal to change its original determination due to its many errors in law in reaching that determination. Another interpretation was that this ruling was silent on the Tribunal's original determination but critical of its reasoning and flawed approach in law as to how it reached that decision. Following further consultations of this division of the Tribunal and notwithstanding the majority view expressed above and the relevant legislation, the Tribunal feels bound to accept the former interpretation.

6. That ruling was again appealed to the High Court, Hedigan J, this time by the vets. Hedigan J in the second High Court appeal refused to overturn the ruling, holding that as a matter of law the Tribunal had been correct; *Barry & Others v. Minister for Agriculture and Food* [2011] IEHC 43. Hedigan J held that the question of mutuality of obligation is central to the issue that the Tribunal had decided and that there was "nothing in the additional evidence... which was of such crucial importance that having heard it no reasonable Tribunal would be entitled to conclude that the [vets] were employed other than under a contract for service." Hedigan J on the express issue that has been argued on this appeal, that of the entitlement or non-entitlement of the High Court to direct the Employment Appeals Tribunal as to their findings, held at para.7.7:

> I am obliged therefore to refuse the relief sought by the appellants to have their claim returned to the Employment Appeals Tribunal. It is therefore not necessary for me to consider the issue of express directions [by Edwards J in the High Court] to the Tribunal as to the correct application of the law to the facts in this case.

7. That issue as to whether there had been an express direction by Edwards J and if there had been what was to be done about it was, however, central to the question as to whether the Employment Appeals Tribunal had properly exercised jurisdiction in relation to this matter.

Contract

8. One of the problems faced by the Employment Appeals Tribunal, and by Edwards J on the first appeal to the High Court, was that there was little in the way of a written contract that could have assisted in determining whether: the vets in working at the Middleton meat plant were self-employed contractors; or whether, from the outset, they were employees of the respondent Minister; or whether, over a period of time, the conditions of engagement changed at a particular point from one to the other. Some details are available. A notice from the Department of Agriculture and Food dated 28th of August, 1995, specifies that applicants for the work will be given training and that an inspector in charge at each meat plant "will call upon the services of the panellists at the plant as and when required on the basis of seniority, availability and suitability, assessed

on work performance." This, presumably, is the "major agreement" referenced by the Employment Appeals Tribunal, first decision, as "concerning rules of engagement for [temporary veterinary inspectors]". Another notice which is stated to be effective as of "1st January, 1999" specifically requires this training but establishes that there may be "disciplinary action", where there is inability to attend for a particular shift in the plant. In itself, this is a peculiar term to apply to a self-employed person, though it is not necessarily determinative of the nature of an employment relationship in itself. This memorandum provides indications in relation to annual leave, inability to attend for practice reasons, sick leave, and maternity leave. An update was provided in November, 1999. Then, there is an agreement of the 2nd September, 2003, as to budget allocations and a new hourly rate of pay was set at €58.35 but subject to adjustments under further national wage agreements. As of January, 2004, detailed conditions of engagement were set out by the Department in a lengthy document which provided for remuneration and attendance, absence of payment for lunch breaks, electronic recording of the hours worked, detailed provisions as to the operation of the panels and as to how shifts were to be changed. Finally, a memorandum from the Department on 16th June 2004 refers to applicants being notified "by Personnel Division as soon as they have been approved for engagement."

9. It is not before this Court on this appeal and, further, it was not a matter whereby the High Court could have made a decision for itself as to whether these memoranda coupled with the manner of the operation of the working conditions constituted employment of the vets, as opposed to the engagement of self-employed contractors. It is correct to note, however, as was noted by Edwards J, that there is no universal test whereby it may be said that if a particular indication is met or not met that a person is employed or not. Furthermore, it may need to be factored into any such analysis that it can be that a course of dealings over years may turn from what was initially the engagement of self-employed contractor to do work on a particular basis into an employment relationship. No direction or suggestion is hereby given. As follows from the analysis set forth below, it is for the Employment Appeals Tribunal to make that decision on analysis of the facts individual to each case, and in terms of any entitlement that may result for redundancy payments or minimum notice of the termination of employment to find a point in time, if such exists, whereby a self-employed status turned into an employment relationship, should there be facts whereby that decision might be made.

Jurisdiction

10. The Employment Appeals Tribunal was originally established in 1967 as the Redundancy Appeals Tribunal under s.39 of the Redundancy Payments Act 1967. With the introduction of statutory rights to redundancy on the failure of a business or on surplus employees being let go, an entitlement was also established with a view to determining rights by ex-employees to redundancy payments to seek a ruling from a rights commissioner, whose ruling in turn could be appealed to a more formal quasi-judicial tribunal. Both the rights and the manner of enforcing the rights were new to the legal system and were justiciable not in the courts established under Article 34 of the Constitution, but through a mechanism of resolution established separately. Procedural rules are contained in the Redundancy (Redundancy Appeals Tribunal) Regulations 1968, which have been since much amended; SI No.24 of 1968. Hearings are conducted by a panel of three, with a legally qualified chairperson and hearings are open to the public, save by request. Complaints of not being given the statutory minimum notice of

dismissal may be referred to the Employment Appeals Tribunal under the Minimum Notice and Terms of the Employment Act 1973 section 4. Upon such a claim succeeding, an award may be made in compensation for any loss and this is recoverable as a simple contract debt against the employer; section 12 (2). A right of appeal is provided, as noted above, and this may also be exercised by the relevant Minister; section 12 (3). The extensive jurisdiction of the Employment Appeals Tribunal includes such legislation as the Maternity Protection Acts 1994-2004 and the Transfer of Undertaking Regulations 2003; see generally Forde and Byrne, *Employment Law* 3rd Ed., (Dublin, 2009). The appellate jurisdiction is specifically defined in s.39 of the Redundancy Payments Act 1967 in providing:

> The decision of the Tribunal on any question referred to it under this section shall be final and conclusive, save that any person dissatisfied with the decision may appeal therefrom to the High Court on a question of law.

11. The Employment Appeals Tribunal is a creature of legislation exercising jurisdiction in the enforcement of modern employment rights which did not exist at common law and which were created specifically by statute, often pursuant to international convention obligations, and with precise remedies under legislation, the analysis of which are within the exclusive competence of that statutory body. The High Court is not mandated to exercise that jurisdiction. Appeals are not by rehearing, with the High Court applying its own view, but are on the basis of whether there has been an error of law in the reasoning or, alternatively, such a fundamental error of fact such that an error of law may be inferred. Clarke J in *Fitzgibbon v. Law Society of Ireland* [2014] IESC 48 (Unreported, Supreme Court, 29th July, 2014) at para 1.2 commented on the wide range of statutory wordings which can cause confusion;

> [The] problem stems from the use of terminology in the context of appeals which can be open to legitimate debate as to its proper meaning and which can, therefore, lead to significant uncertainty as to the precise form of appeal permitted. The background to that difficulty is that the term "appeal" covers a wide range of possible forms of process. These comments are offered in the hope that they may be taken on board by those who are charged, whether in the public or private spheres, with drafting rules or legislation (whether primary or secondary) which provide for the possibility of an appeal.

The only body with jurisdiction in respect of redundancy payments and minimum notice payments on the termination of employment is the Employment Appeals Tribunal. That jurisdiction exists by virtue of statute and its exclusive nature determines that no other body can make decisions that are mandated solely to the Employment Appeals Tribunal. In reaching the decision which he did, it is clear that Edwards J was not giving any direction to the Employment Appeals Tribunal as to the decision which it should make; and nor could he. The appellate jurisdiction exercised in this statutory context by the High Court is one in relation to law only. The statutory entitlement to appeal is limited and, specifically, this form of appeal is not a rehearing. The High Court cannot substitute its own view for that of the Tribunal. Indeed, in his decision Hedigan J recognised this in quoting from the decision of Donaldson MR in *O'Kelly & Others v. Trusthouse Forte plc* [1983] ICR 723 where it was stated that an appellate court "must loyally accept the conclusions of fact with which it is presented" on such an appeal despite that exercise being "unpalatable … on occasion." The trial judge accepted that unless there has been an express direction of law, deriving an incorrect principle of law from factual analysis by

the Tribunal was a heavy burden. This emphasises the express nature of the jurisdiction of statutory tribunals and the role which they have in fact finding. This form of statutory appeal, not by way of rehearing, is an exercise in respect for the tribunal tasked with finding facts. Donaldson MR. held that such tribunals were at large unless "no reasonable tribunal, properly directing itself on the relevant questions of law could have reached the conclusion under appeal."

12. It may be possible to set up tribunals in relation to employment or immigration or any other specialist sphere which are fully judicial in nature. It is also, perhaps, possible to have appeals from quasi-judicial bodies determined by a court rehearing under statute. The determination of such tribunals or courts exercising that kind of appeal might, under such legislation, be such that a re-analysis of the relevant factors afresh or a rehearing of the evidence or a reconsideration of the materials entitles the tribunal to give a fresh appraisal of the facts which is final and determinative. That model has been adopted in the neighbouring kingdom in respect, for instance, of immigration disputes. No comment is made as to whether that model is consistent with constitutional principles in this jurisdiction. It is not, for good or bad, the model that is adopted under this legislation. It is not the jurisdiction which has been given to the High Court in exercising an appeal on a point of law from the Employment Appeals Tribunal.

13. The limited nature of the jurisdiction exercised by the High Court in such circumstances is perhaps more obvious by analogy with judicial review under Order 84 of the Rules of the Superior Courts. There, the entitlement of the High Court in exercising its jurisdiction over lower courts and over tribunals and administrative officials is to rule as to whether the procedure was correct and consistent with the relevant elements of fairness, operated within jurisdiction, in terms of fact did not fly in the face of fundamental reason and common sense and, in terms of the record, was correct. The High Court on judicial review has no entitlement to substitute its own view in terms of fact for that of any statutory body or lower court which is under review despite making a finding that, for instance, an error of law was so important as to amount to an excess of jurisdiction. More fundamentally, it is not the function of the High Court on judicial review to exercise any statutory jurisdiction which by statute is exclusively given to a tribunal. Thus, it is not possible for the High Court to grant planning permission, nor is it possible for the High Court to grant a mining licence or a foreshore licence or an exploration licence upon finding on judicial review that any particular administrative or quasi-judicial decision in relation to such matters cannot stand. Thus, for instance, while it may be within the competence of the High Court to grant a declaration as a matter of law whether a resident of Ireland is liable to pay income tax, it is not for the High Court to exercise in place of the Revenue Commissioners the machinery whereby a taxpayer is assessed to a particular amount of tax for a particular year; see *Deighan v Hearne* [1986] IR 367.

14. Similarly, when an appeal is taken pursuant to statute which allows resort to a court simply on a point of law, the High Court is entitled and obliged to state what point or principle of law was in error where a statement of law has been made by a lower court or by a quasi-judicial tribunal. There may be some circumstances where the statement of law effectively determines the point under appeal: but even in such a rare case it is a matter for the parties to return to the tribunal with the ruling of the High Court and it is for that tribunal to apply the ruling of law to the facts as found exclusively within the tribunal's jurisdiction in order to reach a determination. There are no circumstances under which the tribunal may declare that its jurisdiction is spent since, as a creature of statute, the

sole and exclusive entitlement to exercise that jurisdiction, which was expressly created for it alone, rests with the tribunal.

Result

15. In thus deciding that the High Court, Edwards J, had made a ruling requiring the tribunal to find in favour of the respondent Minister, the Employment Appeals Tribunal was in error in the second determination. The trial judge in the judicial review of this second decision, Hedigan J, was unfortunately drawn into an analysis of employment law related to the factual circumstances and the point which was so clearly identified on this appeal as to jurisdiction was regrettably subsumed in a plethora of legal argument in the High Court.

16. It is also reasonable to comment in this context that it is far too common for complex issues of law to overwhelm or occlude the clear questions that are necessary to be stated for the decision of any tribunal, or the decision of any court, as to what result should be arrived at. In the rehearing of this matter by the Employment Appeals Tribunal, the courtesy extended to courts whereby it is indicated as to what issues, cast as simple and ordinary questions, need to be decided for the result to go one way or the other should be adopted. This used to be the function of pleadings but this purpose of clarification through pleading has now largely been lost. As a matter of practice, it is for the advocate pursuing a case to put before a tribunal or court such straightforward questions for its determination as will enable a decision to be made.

17. In the result, the ruling Hedigan J in the High Court must be overturned. The case of whether the vets were employed by the respondent Minister or were, instead, self-employed persons doing shifts at the Mitchelstown meat plant is a matter of fact for the Employment Appeals Tribunal on a rehearing of the matter. This judgment also concurs with the separate judgment of Laffoy J.

Approved 16 July 2015
Peter Charleton.

In the Matter of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, and in the Matter of the Courts (Supplemental Provisions) Act, 1961, and in the Matter of Pádraic (otherwise Páraic) Haughey.

High Court 1971

March 10–12 31

Supreme Court

May 11–14 17, 19 20 June 24

[1971. No. 58 SS.]

Constitution of Ireland—Statute—Validity—Inquiry by committee of Dáil Éireann—Refusal by witness to answer questions—Statute authorising the committee to "certify the offence" and empowering the High Court after inquiry to punish the offender as if he had committed contempt of the High Court—Whether a minor offence—Right to trial by jury—High Court—Jurisdiction—Whether a court of summary jurisdiction—Standing ord rs of Dáil Éireann—Criminal offence—Particulars—Oireachtas Witnesses Oaths Act, 1924 (*No.* 53), *s.* 1—*Constitution (Consequential Provisions) Act*, 1937 (*No.* 40), *s.* 4, *sub-s.* 1—*Committee of Public Accounts (Privilege and Procedure) Act*, 1970 (*No.* 22), *s.* 3, *sub-s.* 4—*Constitution of Ireland*, 1937, *Articles* 37, 38, 40.

On the 1st December, 1970, the Committee of Public Accounts was ordered by Dáil Éireann to examine specially the expenditure of a certain grant-in-aid for Northern Ireland relief and any moneys transferred by the Irish Red Cross Society to a bank account into which moneys from the grant-in-aid were or might have been lodged, and to furnish a separate report upon the expenditure. On the 23rd December the Oireachtas passed the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, which provided by sub-s. 4 of s. 3 that, if any person being a witness before the Committee should refuse to answer any question to which the Committee might legally require an answer, the Committee might "certify the offence of that person under the hand of the chairman of the committee to the High Court" and that the High Court might "after such inquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court."

Hearsay evidence, containing serious accusations against *H.*, was received by the Committee and *H.* then attended before it as a witness but, having made a statement, he refused to answer any questions of the Committee. The Committee then certified to the High Court that "an offence under the said Act has been committed by the said *H.*" by reason of his refusal to answer questions. The High Court ordered *H.* to show cause why he should not be punished in accordance with the terms of the Act of 1970 and at the hearing of the motion before three judges of the High Court the evidence was furnished on affidavit. *H.* did not ask for a trial by jury. In sentencing *H.* to six months imprisonment it was

Held by the High Court (O'Keeffe P., Murnaghan and Henchy JJ.), 1, that the sub-section did not empower the Committee to conduct a criminal trial in violation of Article 38 of the Constitution but merely authorised the Committee to complete a step preliminary to a criminal trial in the High Court, and that a conviction did not take place until the High Court had recorded a conviction after the completion of a proper inquiry.

2. If the functions and powers of the Committee were of a judicial nature, they were limited functions and powers which were authorised by Article 37 of the Constitution.

3. The sub-section did not infringe the provisions of Article 38, s. 5, of the Constitution relating to a right to trial by jury since, if a right to trial by jury existed because the offence created by the sub-section was not a minor offence, the terms of the sub-section did not preclude a trial in that form.

High Court
1971

In re
HAUGHEY

Attorney General v. *O'Kelly* [1928] I.R. 308 and *Attorney General* v. *Connolly* [1947] I.R. 213 considered.

4. Standing Order 127 of Dáil Éireann had been duly made in accordance with the provisions of Article 15, s. 10, of the Constitution.

5. That the certificate of the Committee contained a sufficient statement of the offence with which *H.* had been charged, although the statement did not specify the questions which he had refused to answer; and that a majority decision by the Committee to certify the offence was sufficient.

On appeal by *H.* it was

Held by the Supreme Court, in allowing the appeal, 1, that the offence created by the sub-section was not the offence of contempt of court but was an ordinary criminal offence which, by reason of the unlimited nature of the penalty authorised upon conviction, was not a minor offence within the meaning of s. 2 of Article 38 of the Constitution.

Conroy v. *Attorney General* [1965] I.R. 411 and *The State* (*Sheerin*) v. *Kennedy* [1966] I.R. 379 applied.

2. That, accordingly, a person charged with that offence was entitled to a trial by jury under the provisions of s. 5 of Article 38 of the Constitution.

3. That the presumption in favour of the validity of an Act of the Oireachtas, having regard to the provisions of the Constitution, was sufficient to support a construction of the sub-section which required the trial of the person accused of the offence to be held in the High Court, but the presumption was not sufficient to support a construction which would authorise a trial by jury.

McDonald v. *Bord na gCon* [1965] I.R. 217 and *East Donegal Co-Operative* v. *Attorney General* [1970] I.R. 317 applied.

4. That, as the sub-section purported to authorise a summary trial in the High Court in relation to an offence which was not a minor offence, the sub-section infringed the provisions of Article 38, s. 5, of the Constitution and was invalid.

5. That, if the offence created by the sub-section had been a minor offence and therefore triable in a summary manner by a court of summary jurisdiction pursuant to s. 2 of Article 38, then (*a*) the High Court would not have jurisdiction to try the person accused of the offence as that court was not a court of summary jurisdiction and (*b*) the sub-section would violate the provisions of Article 38 by allowing a penalty appropriate to a non-minor offence to be imposed upon conviction for a minor offence.

Held further by the Supreme Court (Ó Dálaigh C.J., Walsh, Budd, FitzGerald and McLoughlin JJ.) as follows:—

6. (*Per* Ó Dálaigh C.J., Walsh, Budd and FitzGerald JJ.). The facts that the evidence against *H.* in the High Court had been given on affidavit instead of orally as required in a criminal trial and that *H.* had been denied an opportunity to cross-examine the witnesses who gave evidence against him furnished an additional ground for setting aside his conviction and sentence.

7. (*Per* Ó Dálaigh C.J., Walsh and Budd JJ.). As the certificate of the Committee was the only document which described the charge made against *H.*, it should have contained particulars of the relevant questions and an assertion by the Committee that they could require answers to those questions.

8. (*Per eosdem*) The role of *H.* before the Committee was not that of a witness but was that of a party accused of serious offences, whose conduct had become the subject matter of the Committee's inquiry and, accordingly, in those circumstances the enforcement of any rule of procedure which would deprive *H.* of his right to cross-examine, by counsel, his accusers and to address, by counsel, the Committee in his defence would violate the rights guaranteed by Article 40, s. 3, of the Constitution.

9. (*Per* Ó Dálaigh C.J., Walsh, Budd and McLoughlin JJ.) Any examination by the Committee of the expenditure of moneys of the Irish Red Cross Society lodged in the same bank account as moneys from the grant-in-aid would be

outside the functions of the Committee, except for the purpose of segregating the two funds.

9. (*Per* Ó Dálaigh C.J., Walsh, Budd, FitzGerald and McLoughlin JJ.) That the standing orders of Dáil Éireann had been duly made pursuant to Article 15, s. 10, of the Constitution; and that the Committee had power to administer oaths.

10. (*Per* Ó Dálaigh C.J., Walsh, Budd, and FitzGerald JJ.) That a majority decision of the Committee to certify an offence under the sub-section was sufficient.

MOTION ON NOTICE.

On the 19th February, 1971, the High Court (O'Keeffe P.) on the application ex parte of the Attorney General made an order giving him liberty to serve on Mr. Pádraic Haughey a notice requiring him to attend before the High Court on the 24th February, 1971, to show cause why he should not be punished in like manner as if he had been guilty of contempt of the High Court; the order also directed that a copy of the order and a copy of a certificate dated the 18th February, 1971, of the Committee of Public Accounts of Dáil Éireann should be served with the said notice.

On the 22nd February Mr. Pádraic Haughey issued a plenary summons (1971. No. 701 P.) in the High Court naming the Attorney General as defendant and seeking a declaration that the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, was repugnant to the Constitution.

When Mr. Pádraic Haughey attended, as respondent, before the President of the High Court on the 24th February he undertook to file in the Central Office on or before the 8th March a statement of the grounds upon which he relied in claiming that the Act of 1970 was repugnant to the Constitution and invalid; and on the 24th February the President ordered the applicant to file in the Central Office on or before the 1st March an affidavit stating the facts which were alleged to constitute an offence under the Act of 1970; and the President further ordered the respondent to file in the Central Office on or before the 8th March a notice or affidavit showing cause (other than the alleged grounds for the invalidity of the Act of 1970 under the Constitution) why he should not be punished in like manner as if he had been guilty of contempt of court; and the 10th March was fixed as the date for the hearing of the questions arising on the documents to be filed. The respondent did not ask for a trial by jury. An affidavit of Patrick Hogan was filed on behalf of the applicant on the 26th February and two notices were filed on behalf of the respondent on the 8th March.

The applicant's motion was heard in the High Court (O'Keeffe P., Murnaghan and Henchy JJ.) on the 10th, 11th and 12th March

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and on the last day the High Court made an order in the following terms:—". . . And the Court having on the 10th day of March 1971 refused an application on the part of counsel for the said Pádraic Haughey for leave to cross-examine Patrick Hogan on his affidavit filed herein on the 26th day of February 1971 and the Court being satisfied that the said Pádraic Haughey has been guilty of the offence certified by the Committee of Public Accounts of Dáil Éireann under the hand of its Chairman in writing dated 18th February 1971 namely that the said Pádraic Haughey on the 17th day of February 1971 being in attendance as a witness before the said Committee engaged in the performance of the functions assigned to it by order of Dáil Éireann made on the 1st day of December 1970 did contrary to the provisions of Section 3 (4) (*b*) of the above mentioned Act refuse to answer questions to which the said Committee might legally require answers DOTH ORDER AND ADJUDGE that the said Pádraic Haughey do undergo a term of six calendar months imprisonment dating from this 12th day of March 1971 in the custody of the Governor of Mountjoy Prison in punishment of the said offence and IT IS ORDERED that the Attorney General be at liberty to issue an Order of Committal accordingly[1] and the Court doth refuse an application on the part of counsel for the said Pádraic Haughey for bail or a stay pending an appeal to the Supreme Court."

S. F. Egan S.C., *D. P. Sheridan S.C.* and *K. J. Haugh* for the applicant.

T. J. Conolly S.C., *A. J. Hederman S.C.* and *P. J. Connolly* for the respondent.

No judgment containing the reasons for the decision of the High Court was delivered on the date of its order of the 12th March, but such reasons were stated on the 31st March, 1971, as follows:—

March 31

O'KEEFFE P.:—

I have had an opportunity of reading the judgment which Mr. Justice Henchy is about to deliver and I agree with it for the reasons stated therein.

[1]See p. 237, *post.*

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MURNAGHAN J.:—

I accept that there are cogent reasons why the members of the Court should give at the earliest convenient time their reasons for the decision which the Court made on the 12th March, 1971. As I have been on Circuit, I have not had the necessary opportunity of formulating my reasons in writing. However, I have been fortunate in having been afforded the opportunity of reading a copy of the opinion about to be delivered by Mr. Justice Henchy. In the circumstances, and in the interest of expedition, I content myself with saying that I agree generally with the reasons therein contained as the basis of the decision which this Court has already announced.

HENCHY J.:—

It was resolved by Dáil Éireann on the 1st December, 1970, that a committee of the House, the Committee of Public Accounts, should make a special examination of the expenditure of certain moneys. The precise wording of this resolution, as passed in its amended form, was as follows:—"That the Committee of Public Accounts shall examine specially the expenditure of the Grant-in-Aid for Northern Ireland Relief issued from Subhead J., Vote 16 (Miscellaneous Expenses) for 1969/70 and any moneys transferred by the Irish Red Cross Society to a bank account into which moneys from this Vote were or may have been lodged and shall furnish a separate report on this expenditure as soon as possible." To make provision for privilege, immunity and procedure in the performance by the Committee of Public Accounts (hereinafter called "the Committee") of its functions under that resolution, a special Act entitled the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, was passed. Sub-section 4 of s. 3 of this Act[2] provides that, if a person who appears before the Committee as a witness refuses to answer any question to which the Committee may legally require an answer, "the committee may certify the offence of that person under the hand of the chairman of the committee to the High Court and the High Court may, after such inquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court."

Amongst those summoned to appear before the Committee was Mr. Páraic Haughey. When he appeared before the Committee on the 17th February, 1971, and was sworn as a witness, he was told by the chairman of the Committee that it was proposed to ask him

[2]See p. 240, *post.*

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certain questions. Thereupon, asserting that he was entitled as of right to make a sworn statement, he read out a written statement[3] in which, having deposed to certain matters of fact, he stated that he was not prepared to be examined by the Committee. After an interval, during which the Committee sat in private, the Committee reassembled in public and the chairman put a series of questions to Mr. Haughey. It was clear from the replies he gave to these questions that he was not prepared to give any information to the Committee other than what was in his written statement. When asked if he claimed the right to refuse to answer any question whatsoever that the Committee might put to him, Mr. Haughey replied:—"I am further advised—I will read the last sentence [*of the written statement*]—not to answer any questions, for the reasons already given." Faced with that impasse, the chairman ceased to examine Mr. Haughey further.

In exercise of the powers vested in them by s. 3, sub-s. 4, of the Act, the Committee then certified to the High Court on the 18th February, 1971, under the hand of the chairman that, by reason of his refusal to answer questions to which the Committee legally required answers, Mr. Haughey had committed an offence under the Act. Thereupon the High Court, on motion of the Attorney General, gave liberty to the Attorney General to serve a notice on Mr. Haughey calling on him to attend before the High Court on the 24th February, 1971, to show cause why he should not be punished in like manner as if he had been guilty of contempt of the High Court. When the matter came before the High Court on that date, it transpired that Mr. Haughey had issued a plenary summons against the Attorney General seeking to have the Act declared invalid as being repugnant to the Constitution. On Mr. Haughey by his counsel undertaking to file in the High Court and to serve on the Chief State Solicitor a statement of the grounds on which he claimed the Act to be repugnant to the Constitution and invalid, he was ordered to file in the High Court a notice or affidavit showing cause (other than the grounds for challenging the constitutional validity of the Act) why he should not be punished in like manner as if he had been guilty of contempt of the High Court. The matter then came before this Court to determine if he should be so punished under the Act and, if so, whether the Act should be held invalid as being repugnant to the Constitution. At the conclusion of the hearing the Court ruled against Mr. Haughey on both of these issues but postponed giving its reasons for so deciding. To-day the Court sits to give its reasons.

[3]See pp. 255-6, *post*.

I propose to deal first with the grounds (other than those challenging the constitutional validity of the Act) relied on as showing cause why Mr. Haughey should not be punished as if he had been guilty of contempt of the High Court.

It is submitted that the powers and functions conferred on the Committee by the resolution of Dáil Éireann entrusting this inquiry to the Committee are ultra vires Standing Order 127 of the standing orders of Dáil Éireann. Standing Order 127 says that the function of the Committee is "to examine and report to the Dáil upon the accounts showing the appropriation of the sums granted by the Dáil to meet the public expenditure, and to suggest alterations and improvements in the form of the Estimates submitted to the Dáil." It is the contention of counsel for Mr. Haughey that, when Dáil Éireann by its resolution of the 1st December, 1970, entrusted to the Committee an examination of any moneys transferred by the Irish Red Cross Society to a bank account into which moneys voted by Dáil Éireann were or may have been lodged, Dáil Éireann was seeking to endow the Committee with functions beyond the ambit of those vested in it by Standing Order 127. The moneys of the Irish Red Cross Society, it is said, derive from sources such as public subscriptions and Standing Order 127 gives no power to the Committee to examine the expenditure of such moneys. Even if this argument is correct, and I refrain from so holding, it would avail Mr. Haughey only to the extent of making the resolution of the Dáil invalid in so far as it purported to delegate to the Committee an examination of the expenditure of moneys paid into a bank account by the Irish Red Cross Society; it would not call into question the delegation to the Committee of an examination of the expenditure of the Grant-in-Aid for Northern Ireland. Consequently this argument, even if well founded, would help Mr. Haughey only if his refusal had been limited to questions dealing with the Red Cross moneys. It was not so limited. For example, he specifically refused to answer either affirmatively or negatively when he was asked if he claimed a right to refuse to answer any question whatsoever that the Committee might put to him. I hold that this argument is irrelevant to the circumstances of this case.

It was next contended by counsel for Mr. Haughey that Standing Order 127 (incorporating by internal reference Standing Orders 67 and 70) has not been made by the Dáil as required by Article 15, s. 10, of the Constitution of Ireland. The latter section states that each House of the Oireachtas "shall make its own rules and standing orders." While standing orders of Dáil Éireann, including one

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corresponding to that now numbered 127, existed at the date of the coming into operation of the Constitution on the 29th December, 1937, the complaint is that before any standing order could have validity after that date it should have been made by the Dáil on or after that date. It appears, however, that on the 12th January, 1938, the Dáil made a series of amendments in the standing orders as they existed on the 29th December, 1937. Further amendments were made on other dates and, in particular, the standing order which is now numbered 127 was amended by the Dáil on the 29th October, 1963. The Constitution lays down no procedure for the making of standing orders by the Dáil. I am satisfied that when the Dáil formally amended an existing standing order (or what was considered to be an existing standing order) it may be said to have thereby made such amended version a standing order for the purposes of Article 15, s. 10, of the Constitution. Since the Dáil did so in regard to Standing Order 127, I consider that this challenge to the validity of Standing Order 127 fails.

It is contended that, if these arguments against the jurisdiction of the Committee in this case fail, Mr. Haughey is not in default of s. 3, sub-s. 4, of the Act of 1970 in that the questions he refused to answer were not questions to which the Committee could have legally required him to answer under oath. The basis of this submission is, first, that the Committee had no power to administer an oath to him because the Oireachtas Witnesses Oaths Act, 1924, did not apply; and, secondly, that even if it did there was no compliance with s. 3 of that Act. That this submission is unmeritorious is shown by the fact that Mr. Haughey appeared before the Committee armed with a written statement which he read out under oath and in which he claimed to be entitled as of right to make the statement under oath. As a matter of law this submission has no greater validity. The contention that the Act of 1924 does not apply rests on the argument that it has application only to the Houses of the Oireachtas of Saorstát Éireann; but the Constitution (Consequential Provisions) Act, 1937, adapts its application to the present Houses of the Oireachtas and any committee of either of these Houses. Section 3 of the Act of 1924 provides that any oath under that Act may be administered by a person appointed for that purpose by the Ceann Comhairle. It has been proved in this Court that John R. Tobin, clerk to the Committee, was duly authorised by the Ceann Comhairle on the 23rd December, 1970, to administer oaths for the purposes of s. 3 of the Act of 1924 and that it was he who administered the oath to Mr. Haughey. So this ground fails.

The point is taken, quite rightly, that sub-s. 4 of s. 3 of the Act of 1970, being a penal provision, should be construed strictly. For

that reason it is said that the certificate of the offence, given under the hand of the chairman of the Committee, is insufficient in that it does not specify what were the questions which Mr. Haughey was legally required to answer and which he refused to answer. It is argued that the charge against Mr. Haughey should be given in the certificate with the particularity of an indictment. If that be so, I would be prepared to hold that the certificate complied with that requirement. Section 4, sub-s. 1, of the Criminal Justice (Administration) Act, 1924, provides that:—"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge." In the present case the certificate[4] could have left Mr. Haughey in no doubt as to what offence he was being charged with and, considering that he had failed to yield the information sought by every question that was put to him, he cannot be heard to say that the certificate withheld from him reasonable information as to the nature of the charge. His counsel has not, and could not, suggest that Mr. Haughey is prejudiced in the present proceedings in any way by any want of particularity in the certificate. The point is taken as a purely technical one. In my view it is unsustainable.

The further point has been taken by counsel for Mr. Haughey that the certificate does not show and it has not been otherwise proved that the Committee decided unanimously to give this certificate. Without citing any authority, counsel submits that the Committee, being an unincorporated body, could reach its decisions only by an unanimous vote. However, I consider it to be well-settled law that a parliamentary committee of this kind, charged as it is with carrying out a duty of a public nature, is entitled to act by majority decision: see the authorities cited by Professor Hand in his article[5] entitled "The Development of the Common Law Principle of Majority Rule in the Arbitration of Matters of Public Concern." Neither in his written notice showing cause nor through his counsel in this Court has Mr. Haughey questioned the making by the Committee of the certificate filed in this Court. I have already rejected the objection taken as to its lack of particularity. To that I add a rejection of the submission that it should have been shown that it was made by the unanimous decision of the Committee.

When this matter was before the President of the High Court on the 24th February, 1971, he gave liberty to Mr. Haughey to show

[4]See pp. 244-5, *post*.

[5]4 Irish Jurist N.S. (1969) at p. 74.

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cause by filing either an affidavit or a notice showing cause. Mr. Haughey chose to file a statement of cause. He has led no evidence at this hearing in support of the cause shown, but he has applied for liberty to cross-examine the chairman of the Committee. The reason given to the Court for that application was that it was intended by such cross-examination to establish (*a*) the conduct of the Committee at previous hearings, (*b*) that one or two other witnesses had been allowed to give evidence before the Committee which was based on hearsay and which was incriminatory of Mr. Haughey, (*c*) that the Committee had gone outside the scope of the Dáil resolution committing this special examination to the Committee, and (*d*) that the Committee had so interpreted that resolution as to investigate the commission of crimes by persons including Mr. Haughey. The application for liberty to cross-examine has been refused on the ground that none of the matters sought to be established by cross-examination could be said to be relevant to the issue as to whether Mr. Haughey refused to answer questions to which the Committee might legally require answers; and that was the only issue on which it was sought to adduce this evidence. Even if Mr. Haughey were justifiably aggrieved by the conduct of the Committee in regard to other witnesses, that could not justify him in refusing to submit to any examination whatsoever by the Committee. The conduct of the Committee in regard to other witnesses and the extent to which they were keeping within their terms of reference could conceivably be factors to be reckoned in deciding whether they could legally require particular questions to be answered but, since Mr. Haughey's attitude was one of total refusal to divulge any information in response to any question the Committee might put to him, the stage had not been reached when such factors could be taken into account. It follows that the matters sought to be brought out in cross-examination in this Court were inadmissible on the issue of Mr. Haughey's guilt. In my view Mr. Haughey fails in all the grounds relied on by his counsel as showing cause.

There remains the claim that the Act of 1970 is invalid as being repugnant to the Constitution. The first and principal ground in support of this claim is that the mode of trial and punishment laid down by s. 3, sub-s. 4, of the Act of 1970 for the criminal offence created by that sub-section is such that, if his offence be other than a minor one, Mr. Haughey is denied his constitutional right to a trial with a jury. For my part, I am prepared to hold that the offence created by s. 3, sub-s. 4, is a criminal offence and that a conviction for it does not take place until the Committee, under

the hand of the chairman, have certified the offence and the High Court has recorded a conviction "after such inquiry as it thinks proper to make." Therefore, applying the tests laid down by the Supreme Court in *Conroy* v. *Attorney General*,[6] if it turns out that the offence is not a minor one for the purposes of the provisions[7] of Article 38, s. 2, of the Constitution, the person certified by the Committee is prima facie entitled to trial by jury under s. 5 of that Article. But in *Attorney General* v. *O'Kelly*[8] Sullivan P. (with Meredith and Hanna JJ. concurring) held that the then High Court had jurisdiction to try summarily a charge of contempt of court notwithstanding Article 72 of the Constitution of 1922 which stated that:—"No person shall be tried on any criminal charge without a jury save in the case of minor offences triable by law before a Court of summary jurisdiction and in the case of charges for offences against military law triable by Court Martial or other Military Tribunal." In *Attorney General* v. *Connolly*[9] Gavan Duffy P. (with whom Maguire and Davitt JJ. concurred) followed the judgment of Sullivan P. in *Attorney General* v. *O'Kelly*[8] and held that the High Court continued to have jurisdiction to try summarily a charge of contempt of court notwithstanding the provisions of Article 38 of the present Constitution. If the law laid down in these cases is applicable to the present case, it disposes of the argument that s. 3, sub-s. 4, of the Act of 1970 dispenses unconstitutionally with trial by jury.

If the law laid down in these cases were to be held not to govern the present case, I would hold that a person appearing before the High Court after the Committee has certified his offence under s. 3, sub-s. 4, is not debarred from trial by jury if the offence is not a minor one. The sub-section makes clear that there shall be no punishment and, therefore, no conviction in the High Court until "after such inquiry as it thinks proper to make." If trial by jury is a constitutional right in cases under the sub-section which are too serious to be classified as minor, the problem is whether such mode of trial is comprehended by the words "after such inquiry as it thinks proper to make." It is a well-established rule of interpretation that statutes which have been enacted after the coming into operation of the Constitution enjoy a presumption of constitutionality, and "one practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed

[6][1965] I.R. 411.
[7]See p. 246, *post.*
[8][1928] I.R. 308.
[9][1947] I.R. 213.

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that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant": see *McDonald* v. *Bord na gCon.*[10] Furthermore, "an Act of the Oireachtas, or any provision thereof, will not be declared invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of the Act should be given in cases of doubt": see *East Donegal Co-Operative* v. *Attorney General.*[11]

The provision in s. 3, sub-s. 4, of the Act of 1970 that the High Court shall not punish or take steps for the punishment of a person certified until "after such inquiry as it thinks proper to make" involves no repugnancy to the Constitution under this ground of complaint unless it can be shown that the Oireachtas clearly intended the sub-section to empower the High Court to convict and punish summarily in violation of a constitutional right to trial by jury. Far from showing such an intention, the sub-section in my view clearly permits trial by jury if the judge or judges of the High Court consider that mode of trial to be the proper form of inquiry, or part of the proper form of inquiry, to be made before punishment is inflicted. Trial by jury of a criminal offence is a form of inquiry for, in effect, it involves a question being put to the jury by the judge asking if they are unanimously satisfied beyond reasonable doubt that the offence charged has been committed by the accused. If trial by jury is a constitutional necessity for the trial of certain types of offence under the sub-section—and I stress that I am not so deciding—I see nothing in the sub-section to prevent that mode of trial. On the contrary, in stipulating that punishment is not to be inflicted in the High Court until "after such inquiry as it thinks proper to make," the sub-section should be read as making trial by jury mandatory if the person certified by the Committee is entitled under the Constitution to trial by jury. Counsel for Mr. Haughey has argued that a contrary conclusion is indicated if one looks at s. 17 of the Criminal Procedure Act, 1967, which deals with the restriction of publication of information as to the preliminary investigation of indictable offences, because such restriction is incompatible with the procedure involved under the Act

[10][1965] I.R. 217, 239.

[11][1970] I.R. 317, 341.

in question here. There might be force in that argument if s. 17 of the Act of 1967 were applicable to the present case, but Part II of the Act of 1967 (comprising ss. 5–20) is headed "Preliminary Examination of Indictable Offences in the District Court" and has reference only to cases of indictable offences originating in a preliminary examination in the District Court. Since that is not the case here, it follows that s. 17 of the Act of 1967 does not apply.

I would reject this challenge to the constitutional validity of the Act of 1970 because a person charged under the sub-section is either not entitled under the Constitution to trial by jury or, if he is so entitled, the sub-section does not deprive him of that right.

Counsel for Mr. Haughey proceeded to impugn the constitutionality of the Act of 1970 by alleging that the powers conferred on the Committee by the Act of 1970 and by the Dáil resolution of the 1st December, 1970 (and the manner of the exercise of these powers) are contrary to Article 34 of the Constitution in that they amount to an administration of justice and an exercise of the judicial power reserved by Article 34 for the Courts established under that Article. Since the Dáil resolution of the 1st December, 1970, merely resolved that the Committee should make a special examination of the expenditure of certain moneys and report as soon as possible on that expenditure, and since it is silent as to how that examination is to be carried out, I fail to see how the provisions of the Constitution which are relied on can be invoked against that resolution. Such examination is not in any sense an exercise of judicial powers, since the examination and the report following on it do not affect rights or impose liabilities. As to the Act itself, even if there be validity in the submission that the Act of 1970 empowers the Committee to exercise functions and powers of a judicial nature, since such functions and powers are limited and are not exercisable in a criminal matter they are validated by Article 37 of the Constitution. The power to certify an offence, given to the Committee by s. 3, sub-s. 4, of the Act of 1970, is not a power exercisable in a criminal matter; it is merely a power exercisable for the purpose of bringing into existence a criminal matter. If judicial powers are given to the Committee by the Act, I would be prepared to hold that these powers are properly exercisable under Article 37 of the Constitution; since Article 37 provides that nothing in the Constitution shall operate to invalidate the exercise of the functions and powers permitted by that Article, Mr. Haughey is thereby precluded from invoking against the Act, as he seeks to do, Articles 6, 15, 28 and 34 of the Constitution.

The next point taken against the constitutional validity of the Act of 1970 is that it confers on the Committee, contrary to Article

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38 of the Constitution, the power to try persons for criminal offences. The only provision in the Act that has reference to a criminal offence is s. 3, sub-s. 4, which empowers[12] the Committee to certify an offence but, as I have already pointed out, that is not the trial of a criminal offence; it is merely a step preliminary to the commencement of the trial of a criminal offence in the High Court. I would hold that nothing in the Act of 1970 is repugnant to Article 38 of the Constitution.

As to the further complaint that the Committee have interpreted the powers conferred on them by the Act in such a manner that they have sought to try people for criminal offences and otherwise have adopted procedures that violate (or threaten to violate) the constitutionally guaranteed rights of Mr. Haughey and others, there is no evidence before this Court that the Committee have done so and an application to receive such evidence was refused on the ground that it would be irrelevant to the issue of guilt in this case. However, even if such evidence were before the Court, I would point out that the mere fact that an Act has been operated in violation of constitutionally guaranteed rights is not in itself sufficient to make the Act unconstitutional; the provisions of the Act must have clearly stamped on them the intention of the legislature that the Act may be operated unconstitutionally. As was stated by the Supreme Court in *East Donegal Co-Operative* v. *Attorney General*,[13] "the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts." If he considers that any constitutionally guaranteed right of his has been violated or is threatened with violation by the Committee, Mr. Haughey is entitled to institute the appropriate proceedings in the Courts but he is not entitled to seek to redress any grievance he may have by adopting a course of conduct which is forbidden by the Act and which is calculated to frustrate the constitutional operation of the Act.

It was also submitted that the Act of 1970 violates Article 40, s. 3, of the Constitution[14] in that the Committee is given power to summon and examine witnesses in public without such witnesses

[12]See p. 240, *post*.

[13][1970] I.R. 317, 341.

[14]See p. 261, *post*.

being accorded any of the rights or protections accorded to the ordinary citizen in the Courts established under the Constitution. In particular it is complained that the ruling of the Committee that witnesses will be allowed legal representation only for the purpose of consultation amounts to a denial of constitutional justice. As I have already pointed out, even if that were the effect of the Committee's ruling it would not render the Act of 1970 unconstitutional; but I find nothing in the Act, or in the procedures laid down by the Committee in its interim report, that could be said to be a deprivation or diminution of the constitutional or legal rights that a witness would be entitled to in a court established under the Constitution.

Finally, it is argued that s. 3, sub-s. 4, of the Act of 1970 is repugnant to the Constitution (in particular Article 38) in failing to provide a punishment for the offence created by the sub-section. Since the offence created is a constructive contempt of the High Court and there is attached to it the punishment which it would attract if it were a contempt of the High Court, I cannot find any validity in this argument, as the punishment is clearly defined by reference. In this, as in other respects, there is nothing novel or unique about the section; it merely reproduces provisions that are to be found in a wide range of statutory provisions such as s. 1 of the Tribunals of Inquiry (Evidence) Act, 1921, and the First Schedule (para. 6) of the Restrictive Trade Practices Act, 1953, and s. 15 of the Solicitors (Amendment) Act, 1960, and s. 60 of the Trade Marks Act, 1963.

For the aforesaid reasons I would disallow the cause shown. Mr. Haughey has not asked for trial by jury and this Court, having considered the law and the facts, does not consider a trial by jury to be called for. Having regard to all the circumstances, the sentence of six calendar months imprisonment seems to me to be appropriate.

The respondent, Mr. Pádraic Haughey, appealed to the Supreme Court from the order and judgment of the High Court.

T. J. Conolly S.C. and *A. J. Hederman S.C.* (with them *P. J. Connolly*) for the respondent:—

Section 3, sub-s. 4, of the Act of 1970 does not merely create an offence of constructive contempt of court; it creates a new substantive criminal offence which is punishable in like manner as if the offender had been guilty of contempt of the High Court. It is

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punishable only after the taking of an essential step of a judicial nature which is not authorised by the Constitution, namely, the certifying to the High Court of the offence by the Committee. The High Court is not given jurisdiction to try an issue as to whether an offence has been committed; its function is merely to determine the punishment of a person who has been found by the Committee to be an offender.

Even on the assumption that the Committee's certificate is a mere administrative step—analogous to an indictment—which is preliminary to a judicial inquiry by the High Court, the sub-section is still unconstitutional as no express provision is made for trial by jury, although the offence created is not a minor one.

There are two alternative methods by which an administrative tribunal can properly call the Courts in aid to punish a default in appearing, or in giving evidence, before it. First, the statute which sets up the tribunal may provide that such default shall be a minor offence, punishable summarily, as in s. 86 of the Local Government Act, 1941, and in ss. 82 and 83 of the Local Government (Planning and Development) Act, 1963; see also s. 76 of the Housing Act, 1966, and s. 75 of the Health Act, 1970. Secondly, the tribunal may be empowered to certify to the High Court that, in its view, a person has made such default, but the statute reserves to the High Court the power to inquire fully into such alleged default and to hear the defence of the person charged and any evidence offered on his behalf and then, having held such inquiry, the Court is empowered to punish or take steps for the punishment of the person charged "in like manner as if he had been guilty of contempt of the court" as in the Special Commission Act, 1888, and s. 1, sub-s. 2, of the Tribunals of Inquiry (Evidence) Act, 1921, and s. 19, sub-s. 2, of the Solicitors Act, 1954, and s. 15, sub-s. 2, of the Solicitors (Amendment) Act, 1960.

Section 3, sub-s. 4, of the Act of 1970 empowers the High Court to determine merely the *quantum* of the penalty which it shall impose on a person who has already been found by another tribunal to be in default, and the form of that enactment is similar to s. 17, sub-s. 2, of the Control of Prices Act, 1937, and s. 35, sub-s. 2, of the Minerals Development Act, 1940, and para. 6 (4) of the First Schedule to the Restrictive Trade Practices Act, 1953, and para. 12 (4) of the Second Schedule to the Prices Act, 1958, and s. 8, sub-s. 4, of the Land Act, 1965. It is possible that those statutory provisions, unlike the enactment which is in issue in this case, are justified on the basis that the tribunals created by the relevant statutes are exercising "limited functions and powers of a judicial nature, in matters

other than criminal matters" as authorised by Article 37 of the Constitution. The matters into which the Committee of Public Accounts has been inquiring have included criminal matters, and this has brought the Committee into conflict with Articles 34 and 38 of the Constitution.

A witness before a tribunal can be in contempt only if the tribunal is acting within jurisdiction. In this case the Committee had no jurisdiction to proceed with the inquiry and the respondent was not a compellable witness before it; the Committee had no jurisdiction either to compel Chief Superintendent Fleming to give evidence before it, or to give him privilege in respect of the evidence which he might elect to give.

The Act of 1970 contravenes Article 40, s. 1, of the Constitution in as much as witnesses who give evidence before the Committee are deprived of the rights and protections that are accorded to ordinary citizens in the Courts established under the Constitution. The Act also contravenes s. 3, sub-s. 2, of Article 40 in as much as a citizen, whose good name has been attacked by evidence which would not have been admitted in a court established under the Constitution, is deprived of an opportunity to test by cross-examination the allegations contained in such evidence.

The effect of the evidence of Chief Superintendent Fleming is to make the respondent a person who has been accused of committing an offence and, therefore, his position resembles that of a defendant who is being prosecuted rather than that of a mere witness in an action.

It does not appear from the certificate of the Committee whether its decision was made unanimously or by a majority. If the Committee's decision was a majority one, it was made *ultra vires* in the absence of a specific provision in the Act that the Committee might certify the commission of an offence on a majority verdict: *Brain* v. *Minister of Pensions*[15]; *Minister of Pensions* v. *Horsey.*[16] [They also referred to *Grindley* v. *Barker*[17] and to *Picea Holdings Ltd.* v. *London Rent Assessment Panel.*[18]]

The resolution by which the Committee was authorised to embark on these enquiries was *intra vires* Dáil Éireann to the extent only that it authorised the ascertainment of the initial destination of the public funds which are the subject matter of the inquiry. Thereafter, any transfers of the moneys are private financial transactions into which the legislature can have no jurisdiction to inquire. The Courts are empowered to interfere to restrain the

[15][1947] K.B. 625.
[16][1949] 1 K.B. 526.
[17](1798) 1 Bos. & P. 229.
[18][1971] 2 Q.B. 216.

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legislature from such an undue exercise of power: *Stockdale* v. *Hansard.*[19] Money paid to the Irish Red Cross Society, though paid to a body set up pursuant to an Act of the Oireachtas, is money paid into a private account. Paragraph 14 of the Irish Red Cross Order, 1939, which establishes the Irish Red Cross Society in accordance with the Red Cross Act, 1938, provides that the accounts of the Society "shall be audited by a duly qualified auditor appointed by the Central Council" of the Society; but neither in the Red Cross Act, 1938, nor in the amending Acts of 1944 and 1954 is there any provision empowering the investigation of the Society's accounts by the Auditor and Comptroller General.

[They also referred to *Attorney General* v. *O'Kelly*[20]; *The State* (*Browne*) v. *Feran*[21]; *Ex parte Grossman*[22]; *The State* (*Gettins*) v. *Fawsitt*[23]; *Attorney General* v. *Casey*[24]; *Attorney General* v. *Connolly*[25]; *Attorney General* v. *O'Ryan and Boyd*[26]; *John* v. *Rees*[27]; *Kilbourn* v. *Thompson*[28] and *Watkins* v. *U.S.*[29]]

S. F. Egan S.C. and *D. P. Sheridan S.C.* (with them *K. J. Haugh*) for the Attorney General:—

The previous admission by the Committee of hearsay evidence is irrelevant to a consideration of the consequences of the respondent's admitted refusal to answer questions put to him by the Committee. A witness in the High Court who refused to answer questions would not cease to be in contempt, merely because hearsay evidence had been admitted previously. Similarly, a witness in the High Court does not enjoy any protection from allegations made against him by another witness in the case.

An Act of the Oireachtas which has been passed since the coming into force of the Constitution of Ireland, 1937, ought not to be declared to be invalid where it is possible to construe its provisions so that they accord with the Constitution: *East Donegal Co-Operative* v. *Attorney General*[30]; *McDonald* v. *Bord na gCon.*[31] Section 3, sub-s. 4, of the Act of 1970 is open to the construction that the Committee's function is merely to refer a complaint to the High Court for inquiry.

This inquiry may be a summary one if the High Court decides that the offence that it is investigating is a minor one—otherwise

[19](1839) 9 Ad. & E. 1.
[20][1928] I.R. 308.
[21][1967] I.R. 147.
[22](1925) 267 U.S. 87.
[23][1945] I.R. 183.
[24][1930] I.R. 163.
[25][1947] I.R. 213.
[26][1946] I.R. 70.
[27][1970] Ch. 345.
[28](1881) 103 U.S. 168.
[29](1957) 354 U.S. 178.
[30][1970] I.R. 317.
[31][1965] I.R. 217.

it must be by jury: *Conroy* v. *Attorney General.*[32] The test of whether an offence is a minor one is the penalty which is actually imposed rather than that which the Court could have imposed: *Frank* v. *U.S.*[33] By that test, the High Court clearly found the respondent's offence to be a minor one which was analogous to contempt of court, and one with which (as with contempt of court) a superior court is constitutionally empowered to deal without a jury: *Attorney General* v. *Connolly*[34]; *Attorney General* v. *O'Kelly*[35]; *In re Earle*[36]; and *The State* (*Quinn*) v. *Ryan.*[37] To that limited extent, the High Court can properly be regarded as a court of summary jurisdiction with the meaning of Article 38, s. 5, of the Constitution.

The Committee of Public Accounts, which is created by Standing Order 127 of the standing orders of Dáil Éireann, is empowered by Standing Order 72 to arrive at a decision by a simple majority. It is not a court; it is merely a fact-finding tribunal and, as such, it may use hearsay evidence. The witnesses' rights are protected adequately by s. 3, sub-s. 2, of the Act of 1970.

The Act of 1970 was passed in reliance on the Constitution of 1937; it is more attenuated than the Tribunals of Inquiry (Evidence) Act, 1921, because the protections of that Act are embedded in the Constitution.

[They also referred to O'Connor's Justice of the Peace, Vol. I, p. 130; and *The State* (*Sheerin*) v. *Kennedy.*[38]]

T. J. Conolly S.C. in reply:—

The departure in the Act of 1970 from the formula prescribed in the Tribunals of Inquiry (Evidence) Act, 1921, cannot be explained by an assumed reliance on the Constitution of Ireland, 1937, since that Constitution was in force when the Solicitors Acts, 1954 and 1960, were passed and the formula of the Act of 1921 was employed in those Acts.

In *Attorney General* v. *Connolly*[34] and in *Attorney General* v. *O'Kelly*[35] the Court held that a superior court of record had an inherent power to commit for contempt of court and did not consider the effect of the Constitution. [He also referred to *Attorney General* v. *Kissane.*[39]]

If the Act of 1970 is to be held to confer an analogous power to commit for contempt of the tribunal, such contempt, being in the nature of a criminal contempt, should be punishable by a fixed

[32][1965] I.R. 411.
[33](1969) 395 U.S. 147.
[34][1947] I.R. 213.
[35][1928] I.R. 308.
[36][1938] I.R. 485.
[37][1965] I.R. 70.
[38][1966] I.R. 379.
[39](1893) 32 L.R. Ir. 220.

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term of imprisonment and not by a term which depends on the exercise of a discretion of the tribunal or the High Court: *Attorney General* v. *James.*[40] [He also referred to *Gompers* v. *Bucks Stove & Range Co.*[41]]

The effect of Article 72 of the Constitution of 1922—and in this respect the position has not been altered by the Constitution of 1937—is to preclude the High Court from acting to any extent as a court of summary jurisdiction. Where the subject of the inquiry is in essence a criminal charge as in this case, there is no answer to the respondent's claim of a right to be represented, and to cross-examine witnesses, at the hearing of the charge. The clear words, or necessary implication, which would be required to exclude the principles of natural justice are not present in the Act of 1970. [He referred to *McDonald* v. *Bord na gCon.*[42]]

Cur. adv. vult.

The judgment delivered by Ó Dálaigh C.J. was divided into two parts. The first part was the judgment of the Supreme Court on the issue of the constitutionality of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970. On this issue only one judgment was pronounced as Article 34, s. 4, sub-s. 5, of the Constitution of Ireland, 1937, provides that the decision of the Supreme Court on the validity of a law having regard to the provisions of the Constitution shall be pronounced by such one of the judges of the Court as the Court shall direct, and that no other opinion on such question, whether assenting or dissenting, shall be pronounced. The second part, and the judgments of the other judges of the Supreme Court, dealt with the several other grounds of appeal.

June 24

Ó DÁLAIGH C.J., delivering the judgment of the Court:—
This appeal is taken by Mr. Pádraic Haughey against an order of a divisional court of the High Court which is dated the 12th March, 1971. The High Court, by its order, having recited that "the Court being satisfied that the said Pádraic Haughey has been guilty of the offence certified by the Committee of Public Accounts of Dáil Éireann under the hand of its Chairman in writing dated

[40][1962] 2 Q.B. 637. [41](1911) 221 U.S. 418.
[42][1965] I.R. 217, 243.

18th February 1971 namely that the said Pádraic Haughey on the 17th day of February 1971 being in attendance as a witness before the said Committee engaged in the performance of the functions assigned to it by order of Dáil Éireann made on the 1st day of December 1970 did contrary to the provisions[43] of Section 3(4) (b) of the above-mentioned Act refuse to answer questions to which the said Committee might legally require answers" ordered and adjudged as follows:—"that the said Pádraic Haughey do undergo a term of six calendar months imprisonment dating from this 12th day of March 1971 in the custody of the Governor of Mountjoy Prison in punishment of the said offence." The order added that "the Attorney General be at liberty to issue an Order of Committal accordingly." Counsel for both parties have stated that this addendum formed no part of the Court's spoken order and that they accept no responsibility for it. By notice of appeal, also dated the 12th March, Mr. Haughey appealed to this Court against the order of the High Court; and on that day, on the application of Mr. Haughey, this Court granted him an interim stay of execution, and on the 16th March, 1971, the Court granted a further stay of execution until the disposal of this appeal.

On the 1st December, 1970, it was ordered by Dáil Éireann as follows:—"That the Committee of Public Accounts shall examine specially the expenditure of the Grant-in-Aid for Northern Ireland Relief issued from Subhead J, Vote 16 (Miscellaneous Expenses) for 1969/70 and any moneys transferred by the Irish Red Cross Society to a bank account into which moneys from this Vote were or may have been lodged and shall furnish a separate report on this expenditure as soon as possible." The Court was informed that Vote 16 was voted on the 18th March, 1970.

The Committee of Public Accounts is a select committee of Dáil Éireann which, pursuant to Standing Order 127 of the standing orders of Dáil Éireann relative to public business, is appointed as soon as may be after the beginning of the financial year "to examine and report to the Dáil upon the accounts showing the appropriation of the sums granted by the Dáil to meet public expenditure and to suggest alterations and improvements in the forms of the estimates submitted to the Dáil." On the 17th November, 1970, it was ordered by Dáil Éireann in pursuance of Standing Order 127 that the Committee of Public Accounts be appointed. On the 3rd December, 1970, the Committee of Selection reported that it had nominated twelve named members of Dáil Éireann to serve on the Committee of Public Accounts on the appropriation accounts for

[43]See p. 240, *post*.

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the year ended 31st March, 1970, and the Dáil thereupon ordered that the report be laid before the Dáil. The Committee of Selection is authorised by Standing Order 73 to nominate the members to serve on select and special committees. On the 10th December, 1970, the Committee of Public Accounts met and Deputy Hogan was elected chairman.

On the 15th December, 1970, the Committee presented an interim report to the House in which it reported that in considering the adoption of procedures to govern its proceedings it had encountered a difficulty of a fundamental nature, *viz.*, the extent of the application of the provisions of ss. 12 and 13 of Article 15 of the Constitution. Section 12 confers privilege on all official reports and publications of the Oircachtas, or of either House thereof, and utterances made in either House wherever published; and s. 13 provides, *inter alia*, that the members of each House of the Oireachtas shall not be amenable to any court, or any authority other than the House itself, in respect of any utterance in either House. The report stated that the difficulty for the Committee was whether these sections, which it regarded as essential to the effective discharge by members of the Houses of their duties, were applicable to (a) the utterances in the Committee of the members, advisers, officials and agents of the Committee; (b) the utterances in the Committee of any persons sent for by the Committee to give evidence; (c) the documents of the Committee and of its members prior to an order of the Dáil that they be laid before it; and (d) any papers or records sent to the Committee at its request or of his own volition by any person prior to an order of the Dáil that such papers or records be laid before it. The report then stated that it seemed to the Committee that, if the sections of the Article did not apply, the effective conduct of the business referred to it by the Dáil might prove to be impossible, having regard to the nature of the examination which it must conduct.

Having exhibited an extract from the report of the Attorney General's committee on legal points referred to the Attorney General by the all-party Committee on the Constitution and also the opinion of counsel whom the Committee consulted, the Committee observed in its report that it would be seen from these documents that, although the Committee had been advised that it enjoyed absolute privilege, the constitutional provisions might bear differing interpretations as to whether privilege attaches to the documents of the Committee before presentation to the House and to any papers or records sent to the Committee by any person at its request or of his own volition prior to an order of the Dáil

for presentation and to utterances made in the Committee. The Committee further observed that in the circumstances, and since it could not adjudicate authoritatively on the issues, it had come to the conclusion that it would not be proper for it to proceed with the examination of the matter referred to it pending a resolution of the difficulty. The report then added that "consideration of the legal opinions suggests that the matter can be resolved by legislation" and the Committee recommended the earliest adoption of this course for the favourable consideration of the Dáil. The report also pointed out that the question as to whether the Committee had power to compel the attendance of witnesses was adverted to during the Dáil debate on the motion referring the examination of the expenditure of the Grant-in-Aid to the Committee, and the Committee suggested that the opportunity should be taken to resolve this last matter also if the House should decide to take legislative action, as suggested by the Committee.

Finally, the Committee reported that, in order to be in a position to proceed as soon as possible when the difficulties brought to its attention had been resolved, the Committee had adopted a number of procedures to govern its examination and these it sets forth in an appendix. It will suffice, for present purposes, to refer to clauses (i), (iii) and (viii) of the procedures. By clause (i) the Committee will sit in public during the taking of evidence by it, but the chairman is empowered to exclude persons at his discretion during the taking of certain evidence. By clause (iii) the Committee will allow witnesses to be accompanied, solely for the purpose of consultation, by counsel, solicitors or advisers as may be determined by the Committee in each relevant case. However, such counsel, solicitors or advisers will not be permitted to examine any witness nor to address the Committee. By clause (viii) witnesses will be invited to furnish preliminary statements.

On the 23rd December, 1970, the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, was passed by the Oireachtas. The term "committee" is defined by s. 1 of the Act of 1970 as meaning the Committee of Public Accounts of Dáil Éireann while engaged in the performance of the functions assigned to it by the order[44] of Dáil Éireann made on the 1st December, 1970. By s. 2, sub-s. 1, of the Act, the members of the Committee shall not be amenable to any court, or any authority other than Dáil Éireann, in respect of any utterance in the Committee. By s. 2, sub-s. 2, of the Act (*a*) the documents of the Committee and documents of its members connected with its

[44]See p. 221, *ante*.

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functions, (*b*) all official reports and publications of the Committee and (*c*) the utterances in the Committee of the members, advisers, officials and agents of the Committee, wherever published, shall be privileged. By s. 3, sub-s. 1, of the Act, the Committee may for the purposes of its functions do all or any of the following things—(*a*) summon witnesses, by letters delivered to them personally or by registered post, to attend before it; (*b*) examine the witnesses attending before it; and (*c*) require any such witness to produce to the Committee (or require any person, by letter delivered to him personally or by registered post, to send to the Committee) any document in his power or control. By s. 3, sub-s. 2, of the Act a witness before the Committee, and a person sending a document to the Committee, shall be entitled to the same immunities and privileges as if he were a witness before the High Court. By s. 3, sub-s. 3, of the Act a witness summons shall be signed by at least one member of the Committee.

Section 3, sub-s. 4, of the Act of 1970 (under which Mr. Haughey was dealt with) is in the following terms:—

> "(4) If any person—
>
> (*a*) on being duly summoned as a witness before the committee makes default in attending, or
>
> (*b*) being in attendance as a witness before the committee refuses to take an oath or to make an affirmation when legally required by the committee to do so, or to produce any document in his power or control legally required by the committee to be produced by him or to answer any question to which the committee may legally require an answer, or
>
> (*c*) fails or refuses to send to the committee any document in his power or control legally required by the committee to be sent to it by the person, or
>
> (*d*) does anything which would, if the committee were a court of justice having power to commit for contempt of court, be contempt of such court,
>
> the committee may certify the offence of that person under the hand of the chairman of the committee to the High Court and the High Court may, after such inquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court."

On the 17th February, 1971, when the Committee was purportedly engaged in the performance of the functions assigned to it by the order of Dáil Éireann made on the 1st December, 1970, Mr. Pádraic Haughey appeared before the Committee as a witness, having been duly summoned to appear. After Mr. Haughey had

been sworn, the chairman of the Committee, addressing Mr. Haughey, said:—"Mr. Haughey, as you know, we are investigating the question of the expenditure of a Grant-in-Aid of £100,000, and, owing to statements that have been made about the alleged importation of arms, I want to ask you a few questions in general in which you may be able to help us?"

In reply, Mr. Haughey read out a written statement which he handed later to the chairman. Mr. Haughey's statement, the full text of which is annexed[45] to this judgment, may be summarised as follows. He said that he wished to make a statement on oath. On the 29th January, 1971, he had received a registered letter which was a notice to produce to the Committee all documents in his possession touching on the matters which the Committee was inquiring into. On the 6th February, 1971, he received by registered post a witness summons signed by a member of the Committee. He was there in answer to that summons. He had not then, nor had he ever, any documents or copy documents which would or could in any way relate to the matters being investigated by the Committee. He never, directly or indirectly, got in touch or sought to get in touch with Mr. C. J. Haughey in order that he would authorise customs clearance of any guns, ammunition or materials of any nature or description, nor did he (Mr. C. J. Haughey) ever indicate to him what his attitude would be if such requests were made to him, as the matter never arose between them. Referring to reports which he had read of "alleged evidence" given before the Committee, he definitely never received or gave money, or received or gave any cheque or any valuable security in the name of George Dixon; nor did he ever use the name George Dixon in any connection with any financial or banking dealings. No moneys from the Grant-in-Aid for Northern Ireland Relief were ever paid to him, nor did he ever have any control over any of these moneys, nor had he ever any say in the disbursement of this money. His brother, Charles Haughey, never discussed with him the moneys voted for Northern Ireland relief—until after he had received a subpoena to appear before the Committee.

Mr. Pádraic Haughey then said he wished to state the reasons why he was not prepared to be examined by the Committee. He was advised by his lawyers that the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, did not give any privilege or immunity to any newspaper, periodical, radio, or television which published any evidence allegedly given before the Committee. His legal advisers were then considering his position in civil law, as a result of reports of alleged evidence already given

[45] See pp. 255-6, *post*.

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by witnesses before the Committee, in so far as that alleged evidence referred to him personally and he was advised that, by giving evidence before the Committee, he might be liable in civil law and under the laws of the land for any answer he might make. While he appreciated that the laws of evidence might well be stretched by a non-legal body, such as the Committee, nevertheless he was not prepared to submit to examination arising out of so-called principles of justice. He was advised that because of the publicity already given to allegations not based on best evidence or admissions made against him he was entitled as of right to make a sworn statement, and he was further advised not to answer any questions for the reason already given. Mr. Haughey then handed in copies of his statement, and the chairman, having ascertained from Mr. Haughey that he was following the advice he had been given, announced that the Committee would go into private session.

After an interval of three-quarters of an hour, the Committee resumed public session and the chairman then asked Mr. Haughey a number of questions. The chairman's first questions were an inquiry as to whether Mr. Haughey accepted the authority of the Committee (i) to conduct the investigation, (ii) to summon witnesses, and (iii) to examine witnesses appearing before it. Mr. Haughey's answer in relation to item (ii) was that he was subpoenaed to come there; as to the other matters, his answer was to refer to his sworn statement. The chairman then asked:—"Do you then claim the right to refuse to answer any question whatsoever that this Committee of Dáil Éireann may put to you?" Mr. Haughey replied:—"I am further advised—I will read the last sentence—not to answer any questions, for the reasons already given." The chairman then read s. 3, sub-s. 2, of the Act of 1970 to Mr. Haughey. Mr. Haughey repeated that he was advised not to answer any question for the reasons already given. Then the chairman said:—"I just want to ask you one other question: did you travel by plane to England with Mr. —— [*name given*] and others?" Mr. Haughey replied as before. The chairman next read to Mr. Haughey the terms[46] of s. 3, sub-s. 4, of the Act of 1970. He added:—"I think it is only fair to warn you that the Committee may be obliged to act on that if you continue to refuse to answer questions or give evidence." Continuing, the chairman referred to a Government decision at a meeting on the 16th August, 1969, that a sum of money—the amount and the channel of disbursement of which would be determined by the Minister for Finance—would be made available from the Exchequer to provide aid for victims

[46]See p. 240, *ante*.

of the current unrest in the Six Counties, and he asked Mr. Haughey if he was aware that the Government had so decided. Mr. Haughey replied:—"I have made a sworn statement, Mr. Chairman, and everything in it is relevant to your inquiry, as far as in relation to me personally." The chairman then referred to an announcement made by the Government Information Bureau on the same date stating that the Minister for Finance would make funds available for the relief of victims of the disturbances in the Six Counties and that he would have early consultation with the chairman of the Irish Red Cross, and he asked Mr. Haughey if he was aware that the Government Information Bureau had so announced. Mr. Haughey repeated that he was advised not to answer any questions. The chairman then said:—"You are refusing to answer that question—would you say 'yes' or 'no'?" Mr. Haughey replied:—"I am further advised not to answer any questions." The chairman concluded by saying:—"We will take that as a 'no'. Thank you very much." Mr. Haughey then thanked the chairman and Committee and, having first inquired if he was free to go, he withdrew.

On the application of counsel for Mr. Haughey, this Court admitted the printed transcript of the minutes of the evidence given before the Committee by Chief Superintendent John P. Fleming on Tuesday, the 9th February, 1971, which was a week before Mr. Haughey appeared before the Committee. The chairman began the session by saying to the Chief Superintendent:—"You know, of course, that we are investigating this question of the expenditure of public money." He then asked:—"Have you any information in respect of the passage of money to any persons or organisations which might be of help to us?" The Chief Superintendent replied "Yes, I have" and he then asked for, and received, permission to refer to a note for dates and amounts. He then added that, at the outset, he wished to point out that all his information had come from confidential sources and that he was not at liberty to reveal the sources.

In the course of his evidence Chief Superintendent Fleming then made several references to Mr. Pádraic Haughey, as follows:—

(i) In or about the third week of August, 1969, Mr. Haughey paid over £1,500 in London to Cathal Goulding, Chief of Staff of the I.R.A.

(ii) In August or September Mr —— [*name given*] had a meeting with a certain leading I.R.A. leader in Dublin and promised him about £50,000 for funds for the I.R.A., for the North; he was not sure about future meetings but he knew Mr. Haughey was deeply involved.

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(iii) One consignment of arms at least came in through Dublin Airport some time early in October—there could have been a second or third—and Mr. Haughey made all arrangements at the airport to take in this consignment. He handed them over at the airport to two leading I.R.A. men. As far as he was aware the arms were taken away in a truck. When asked by the chairman "Have you any knowledge of the source of the moneys which paid for the arms?," the the Chief Superintendent replied:—"I imagine it came from the grant-in-aid fund."

(iv) Mr. Haughey went to London on the 16-17th November, 1969, and from confidential information the witness knew that he went for the purpose of purchasing arms, and that he travelled with a person referred to as "J" on the Committee's code list.

(v) There could well have been other arms shipments in which Mr. Haughey or Captain —— [*name given*] may have been involved, but the witness had no evidence, no direct evidence: it was speculation or rumour.

(vi) Deputy Keating referred to a copy letter of the 17th November, 1969, addressed to the Manager of the National Provincial Bank Ltd., Piccadilly, London, confirming the contents of a telephone conversation to the effect that a Mr. George Dixon would call to cash cheques to a total of £11,450 on the 18th November, giving the number of the cheque book, and requesting that he be assisted. The Chief Superintendent said he believed that Mr. George Dixon was Mr. Haughey, and he said the £11,450 was to be used for the purchase of arms in England. He had no information of an importation of arms which would correspond to this. (Deputy Keating added that they knew the facility was not used.)

On the 18th February, 1971 (which was the day following the sitting of the Committee at which Mr. Haughey appeared) a certificate pursuant to s. 3, sub-s. 4, of the Act of 1970 was forwarded by the secretary of the Committee to "The Registrar, High Court . . . for the consideration of the High Court." The certificate was in the following form.

"In the matter of:—*Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act*, 1970.

I, Patrick Hogan of John Street, Cashel, County Tipperary, Surgeon and Dáil Deputy, hereby certify as follows:—

1. I am and was at all material times Chairman of the Committee of Public Accounts of Dáil Éireann.

2. The said Committee was on the 17th day of February 1971 engaged in the performance of the functions assigned to it by Order of Dáil Éireann made on the 1st day of December, 1970.
3. One Pádraig Haughey of 25 Foxfield Avenue, Raheny, Dublin 3, having been summoned to attend before the said Committee duly attended as a witness before the said Committee on the 17th day of February 1971 when the said Committee was lawfully engaged in the performance of its said assigned functions.
4. The said Pádraig Haughey on the said occasion, contrary to the provisions of Section 3 (4) (*b*) of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, refused to answer questions to which the said Committee legally required answers.
5. The said Committee, therefore, in accordance with the provisions of Section 3 (4) of the said Act, hereby certifies to the High Court that an offence under the said Act has been committed by the said Pádraig Haughey by reason of his refusal to answer the said questions.

Given under my hand as Chairman of the said Committee.

P. Hogan
Chairman of the Committee of
Public Accounts of Dáil Éireann.
18th February, 1971."

On the 19th February, 1971, the President of the High Court, on motion of counsel for the Attorney General, made an order which, having recited the reading of the certificate, ordered "that the Attorney General be at liberty to serve on the said Pádraic Haughey a notice requiring him to attend before the High Court in the President's Court at 11 a.m. on Wednesday the 24th February 1971 to show cause why he should not be punished in like manner as if he had been guilty of contempt of the High Court . . ." On the 22nd February, 1971, Mr. Haughey issued a plenary summons in the High Court against the Attorney General claiming a declaration that the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, was repugnant to the Constitution. When Mr. Haughey attended before the President on the 24th February, it was ordered that the Attorney General should file before the 1st March an affidavit stating the facts upon which it was alleged Mr. Haughey had committed an offence under the Act of 1970 and that Mr. Haughey should, on or before the 8th March, file a motion or an affidavit showing cause, and that the hearing should be fixed for the 10th March, 1971. The matter came on for hearing on that date before a divisional court consisting

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of the President, and Mr. Justice Murnaghan and Mr. Justice Henchy. It was agreed that Mr. Haughey, in addition to the grounds relied upon to show cause, should be free to rely on the grounds upon which, in the action he had brought, he sought a declaration that the Act was unconstitutional. The order of the divisional court was made on the 12th March and the reasons of the members of that court were stated on the 31st March, 1971. The President agreed with the reasons stated in the judgment of Mr. Justice Henchy. Mr. Justice Murnaghan, who in the interval had been on circuit and had not the necessary opportunity of formulating his reasons in writing, stated that in the interest of expedition he would content himself by saying he agreed generally with the reasons stated in Mr. Justice Henchy's judgment as the basis of the decision which the High Court had announced on the 12th March, 1971.

The major question raised by this appeal is the validity of s. 3, sub-s. 4, of the Act of 1970, having regard to the provisions of Article 38 of the Constitution. The terms[47] of the impugned sub-section have already been set out and need not be re-stated.

Article 38 of the Constitution is entitled "trial of offences" and is as follows:—

> "1. No person shall be tried on any criminal charge save in due course of law.
>
> 2. Minor offences may be tried by courts of summary jurisdiction.
>
> 3. 1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.
>
> 2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.
>
> 4. 1° Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.
>
> 2° A member of the Defence Forces not on active service shall not be tried by any courtmartial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any courtmartial or other military tribunal under any law for the enforcement of military discipline.

[47] See p. 240, *ante*.

5. Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.

6. The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article."

In the circumstances of this case, the trial of offences by special courts (section 3) or by military courts (section 4) may be ignored; what remains of relevance in Article 38 are ss. 2 and 5 which, read together, provide that no person shall be tried on any criminal charge without a jury, save for minor offences tried by courts of summary jurisdiction.

Article 38 recognises two categories of offence, namely, minor offences and offences which are not minor offences and which, for brevity, may be called non-minor offences. How is it to be determined into which category an offence falls? Of the relevant criteria, the most important is the severity of the penalty which is authorised to be imposed for commission of the offence. This test was laid down by this Court in *Conroy* v. *Attorney General*,[48] which has been followed in *The State (Sheerin)* v. *Kennedy*.[49] The decision in *Conroy's Case*[48] followed the judgment of the former Supreme Court in *Melling* v. *O Mathghamhna*.[50] Turning back to s. 3, sub-s. 4, of the Act of 1970, the penalty authorised for the offence which is in question in this case is such penalty as can be imposed for contempt of the High Court. Contempt of court is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, *i.e.*, without statutory limit. Some English authorities suggest that limits are nevertheless to be imposed—that imprisonment must not be inordinately heavy and the fine not excessive or unreasonable—but the position remains that a common-law misdemeanour can be punished by a penalty entirely outside the range of penalty permissible for a minor offence: see Archbold's Practice in Criminal Cases, 36th ed., paras. 659 and 662. On the authority of the decisions of this Court, referred to above, the offence in question here is not a minor offence. Counsel for the Attorney General submitted that the Court should follow the decision of the United States Supreme Court in *Frank* v. *United States*[51] and apply as a test, not the severity of the penalty *authorised*, but of the penalty *actually imposed*. Here the sentence imposed by the High Court was six months imprisonment, and

[48][1965] I.R. 411.
[49][1966] I.R. 379.
[50][1962] I.R. 1.
[51](1969) 395 U.S. 147.

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this would be within the range of penalty appropriate in the case of a minor offence. This Court sees no reason for departing from the test it laid down in *Conroy's Case.*[52] *Frank's Case*[53] was a case of contempt of court; the present case is not a case of contempt of court but an ordinary criminal prosecution. Moreover, it should be noted that Marshall J., who delivered the opinion of the majority of the court in *Frank's Case,*[53] expressly excluded the test of the penalty *actually imposed* in ordinary criminal prosecutions. At p. 149 of the report his words are:—"In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion." To apply the test of the penalty actually imposed would, in effect, be to deny to an accused the substance of the right to trial by jury guaranteed by Article 38, s. 5, of the Constitution. Therefore, the offence which s. 3. sub-s. 4, of the Act of 1970 has created is a non-minor offence.

Three possible constructions of the impugned sub-section have been put forward during the course of the argument:—

(i) that the sub-section purports to authorise the Committee to try and convict, and thereupon to send the offender forward to the High Court for punishment;

(ii) in the alternative, that the sub-section merely authorises the Committee to complain to the High Court and, thereupon, that it is for that court to try summarily and, if it should convict, to punish the offender;

(iii) in the further alternative, that the sub-section—as in (ii)—merely authorises the Committee to complain to the High Court and, thereupon, that it is for the court either summarily, or upon indictment (*i.e.*, by jury), to try and, if it should convict, to punish the offender.

It has been strongly urged on behalf of Mr. Haughey that the first construction is the correct construction. That argument has been based upon contrasting the formula to be found in the impugned sub-section with the formula of sub-s. 2 of s. 1 of the Tribunals of Inquiry (Evidence) Act, 1921.[54] The latter sub-section is in these terms:—

"(2) If any person—

(a) on being duly summoned as a witness before a tribunal makes default in attending; or

(b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by

[52][1965] I.R. 411.

[53](1969) 395 U.S. 147.

[54]11 Geo. 5, c. 7.

him, or to answer any question to which the tribunal may legally require an answer; or

(c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;

the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the *alleged offence* and after hearing any witnesses who may be produced against or on behalf of *the person charged with the offence*, and after hearing *any statement that may be offered in defence*, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court."

If one compares the formula of the Act of 1970 with that of the Act of 1921, the provenance of the former Act is apparent. But there are significant differences. It will be noted that the Act of 1921 refers to an inquiry into "the alleged offence" and speaks of hearing any witness produced against or on behalf of "the person charged with the offence," and there are further references to the rights of the defendant which are spelt out with care. Mr. Haughey's counsel has called attention to the absence of these very features from the Act of 1970. That Act states baldly that "the committee may certify the offence of that person . . . to the High Court and the High Court may, after such inquiry . . . punish . . ." It has been urged on behalf of Mr. Haughey that the Act of 1970 intended to authorise the Committee to try and to convict and, thereupon, to send the offender forward to the High Court for punishment. It may be noted that the Committee itself appears to have thought that this was the correct construction. The curial clause of the Committee's certificate[55] reads:—"The said Committee, therefore, in accordance with the provisions of Section 3(4) of the said Act, hereby certifies to the High Court that an offence under the said Act *has been committed* by the said Pádraig Haughey by reason of his refusal to answer the said questions." The Committee departed from the strict wording of the section, which states that it may "certify the offence," and certified that an offence had been *committed* by the witness.

If one examines the impugned sub-section in the light of the ordinary canons of construction, the Committee's view—which is also the view contended for on behalf of Mr. Haughey—has much to support it. The sub-section seems to say precisely what the Committee interpreted it as saying. If that view is the correct view, then the sub-section has authorised the Committee to try and to

[55]See pp. 244-5, *ante*.

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convict a witness of a criminal offence. But the trial of a criminal offence is an exercise of judicial power and is a function of the Courts, not of a committee of the Legislature. Article 34 of the Constitution provides that justice shall be administered in courts established by law by judges appointed in the manner prescribed by the Constitution. The Committee of Public Accounts is not a court and its members are not judges. The Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government—legislative, executive and judicial—as appears from an examination of Articles 6, 15, 28 and 34; and a statute that conferred on a committee of the Legislature a power to try a criminal offence would be repugnant to the Constitution and invalid, and a conviction by such committee, and any sentence pursuant thereto, could not stand. Moreover, under the Constitution the Courts cannot be used as appendages or auxiliaries to enforce the purported convictions of other tribunals. The Constitution vests the judicial power of government solely in the Courts and reserves exclusively to the Courts the power to try persons on criminal charges. Trial, conviction and sentence are indivisible parts of the exercise of this power: see *Deaton* v. *Attorney General*.[56]

The formula of the Act of 1921 has been copied *verbatim* in at least a couple of instances in our legislation and significantly, perhaps, in s. 19, sub-s. 2, of the Solicitors Act, 1954, and in s. 15, sub-s. 2, of the Solicitors (Amendment) Act, 1960. The truncated version which is found in the Act of 1970 first appeared, so far as counsel's researches have gone, in s. 17, sub-s. 2, of the Control of Prices Act, 1937, and was repeated in s. 35 of the Mineral Development Act, 1940, and para. 6(4) of the First Schedule to the Restrictive Trade Practices Act, 1953. Mr. Haughey's counsel has called attention, by way of contrast, to the wholly unobjectionable formula employed in s. 86 of the Local Government Act, 1941, and in s. 82, sub-s. 7 (*b*) (iv) of the Local Government (Planning and Development) Act, 1963. The formula in the latter Act reads as follows:—

> "every person to whom a notice has been given who refuses or wilfully neglects to attend in accordance with the notice or who wilfully alters, suppresses, conceals or destroys any document to which the notice relates or who, having so attended, refuses to give evidence or refuses or wilfully fails to produce any document to which the notice relates shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding twenty pounds."

[56] [1963] I.R. 170.

When one compares the formula of the Act of 1921 with its truncated successor, it will be noted that the Act of 1921 put it beyond question that the tribunal was not being vested with a power of trial; although a provision to such effect under the British Constitution (the cardinal principle of which is the supremacy of parliament) would be wholly unexceptionable, however unusual.

If the Court is to apply the ordinary canons of construction of statute law, the Court would affirm the construction of the sub-section first contended for on behalf of Mr. Haughey and in such case, as has already been stated, the sub-section thus construed would offend against the Constitution and the order of the High Court would be set aside in consequence. But, in this instance, the ordinary canons of construction are not applicable. Here the constitutionality of an Act of the Oireachtas established by the Constitution is questioned; in such case the Court must apply different canons of construction.

The Courts, in construing a statute of the Oireachtas, act on the presumption of constitutionality. This presumption was enunciated in *National Union of Railwaymen* v. *Sullivan*[57] and it has been elaborated in two recent decisions of this Court: *McDonald* v. *Bord na gCon*[58] and *East Donegal Co-Operative* v. *Attorney General.*[59] In delivering the judgment of the Court in *McDonald's Case*,[58] Walsh J. said at p. 239 of the report:—". . . an Act of the Oireachtas, is presumed to be constitutional until the contrary is clearly established. One practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, . . . it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant." In delivering the judgment of the Court in *East Donegal Co-Operative* v. *Attorney General*,[59] Walsh J. said at p. 341 of the report:—"It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In

[57][1947] I.R. 77, 100. [58][1965] I.R. 217.

[59][1970] I.R. 317.

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seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts." Applying this doctrine in the present case, the Court is of opinion that it is its duty to reject the construction which the ordinary canons of construction recommend and to treat the Committee's certificate, not as a certificate of conviction, but as "merely a step preliminary to the commencement of the trial of a criminal offence in the High Court" as Mr. Justice Henchy expressed it in his judgment in the High Court. This construction saves the sub-section from the constitutional infirmity from which, in the first instance, Mr. Haughey's counsel has urged the sub-section suffers.

The second of the three possible constructions[60] is that the sub-section authorises the High Court to try and to convict and punish, and to do so by way of summary trial. This in fact is what the High Court did. Mr. Haughey's argument, on the basis of this second construction, has been briefly and simply this. The offence in question here is not a minor offence and all non-minor offences must be tried with a jury; but Mr. Haughey's trial in the High Court was a summary trial, without a jury, and therefore it was in violation of Article 38 of the Constitution[61] and his conviction must, in consequence, be set aside. The wording of Article 38, be it noted, is "no person shall be tried on any [*for brevity I insert* non-minor] criminal charge without a jury," or in the Irish text "ní cead duine do thriail [*i gcúis neamh-mhionchionta*] ach i láthair choiste thiomanta." Trial by jury of non-minor offences is mandatory, it is not simply a right to be adopted or waived at the option of the accused. It follows that the sub-section, on the basis of the second construction which would authorise summary trial in the High Court, would offend against the Constitution no less than it does on the basis of the first construction: the first construction infringes Article 34 and the second infringes Article 38.

Counsel for the Attorney General has argued against this conclusion by submitting that the sub-section can, constitutionally,

[60]See p. 248, *ante*.

[61]See p. 246, *ante*.

allow of summary trial of the charge in question here as a case of contempt of court. Under the Constitution of the Irish Free State in *Attorney General* v. *O'Kelly*[62] and under the Constitution of Ireland in *Attorney General* v. *Connolly*,[63] the High Court tried charges of contempt of court without a jury, *i.e.*, summarily. Neither case was a case of *ex facie* contempt, or so close thereto as to amount to an interference with a pending or current trial. This Court is not now called upon to consider whether *O'Kelly's Case*[62] and *Connolly's Case*[63] were correctly decided; for the purpose of the Attorney General's submission the Court accepts that they were. It is enough for this Court now to say that these two cases cannot assist the Attorney General's submission. The High Court in the present case was not dealing with a charge of contempt of court. The impugned sub-section does not purport to make the offence here in question "contempt of court"; it does no more than direct that the offence, which is an ordinary criminal offence, shall be punished in like manner as if the offender had been guilty of contempt of court, that is to say, it defines the punishment for the offence by reference to the punishment for contempt of the High Court. Moreover, it would not be competent for the Oireachtas to declare contempt of a committee of the Oireachtas to be contempt of the High Court. This is an equation that could not be made under the doctrine of the tripartite separation of the powers of government. The reasoning in *O'Kelly's Case*[62] and in *Connolly's Case*[63] does not support the Attorney General's submission but, on the contrary, it is inimical to it. The exception which the High Court (under Article 72 of the Constitution of the Irish Free State) in *O'Kelly's Case*[62] and (under Article 38 of the Constitution of Ireland) in *Connolly's Case*[63] engrafted on the injunction for trial by jury is based upon the inherent jurisdiction of the High Court to ensure the administration of justice without obstruction. That is to say, the exception finds its source and justification in another article of the Constitution: Article 64 in the Constitution of the Irish Free State and Article 34 in the Constitution of Ireland. Neither *O'Kelly's Case*[62] nor *Connolly's Case*[63] makes any exception in respect of the trial of ordinary criminal offences which are not minor offences.

There is, moreover, yet another barrier to the trial in the High Court without a jury of the offence alleged to have been committed in this case. By the provisions of Article 38, s. 2, of the Constitution the trial of minor offences without a jury is restricted to courts of summary jurisdiction. It is true that the High Court possesses a

[62][1928] I.R. 308. [63][1947] I.R. 213.

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universal jurisdiction in matters, civil and criminal, but that does not make it a court of summary jurisdiction within the provisions of s. 2 of Article 38. A court of summary jurisdiction within the meaning of that section is one whose criminal jurisdiction to try and to convict is restricted to the trial of minor offences. The term "court of summary jurisdiction" was well known prior to the enactment of the Constitution; the expression appeared in almost identical words in the Constitution of Saorstát Éireann and, prior to that, in s. 13 of the Interpretation Act, 1889. Under our law that jurisdiction is exercised only by the District Court. In accordance with the provisions of s. 5 of Article 38, the jurisdiction of the High Court to try criminal offences is a jurisdiction to try them only with a jury.

This does not conclude the matter. The High Court took the view that the formula to be found in the impugned sub-section—"after such inquiry as it [*the High Court*] thinks proper to make"—was wide enough to contemplate trial by jury as well as summary disposal: that is to say, that the sub-section has provided that the alleged offender may be tried either summarily or upon indictment (*i.e.*, by jury) and that, upon conviction, he may be sentenced in like manner as if he had been guilty of contempt of the High Court. This is the third of the three possible constructions[64] of the impugned sub-section. For the Attorney General it was urged that the principle of presumption of constitutionality warranted such a construction. In the opinion of this Court the formula "after such inquiry as it [*the High Court*] thinks proper to make" can be stretched, by presumption of constitutionality, to contemplate a trial in the High Court by a High Court judge or judges but, as has been pointed out, the presumption of constitutionality is not to be applied where it would do violence to the plain meaning of the words. It is, in the opinion of this Court, beyond the reach of the presumption of constitutionality to read into the simple inquiry formula of the sub-section an intention to authorise trial by jury. The statute in this case created an offence which was not prohibited by the common law. It indicated a particular manner of proceeding against the alleged offender by express reference to contempt of court in terms which clearly indicated a summary manner of disposal of the trial and of the offender, if convicted; and the procedure thus indicated clearly excludes that of indictment. This interpretation is reinforced by the express provision that the charge is laid by the certificate of the chairman of the Committee.

If, however, the sub-section were to be construed as contended for by the Attorney General, in the opinion of the Court the sub-

[64] See p. 248, *ante*.

section would not thereby shed its constitutional infirmity. The sub-section, in the supposed meaning, would then authorise trial either summarily or on indictment. But for the sub-section to authorise summary trial (*i.e.*, a mode of trial suitable for a minor offence) and upon conviction to authorise punishment by a penalty only appropriate to a non-minor offence would offend grossly against the substance of the guarantee contained in Article 38. So much then of the sub-section as authorised summary trial would be struck down, and authority to try by jury is all of the sub-section that would remain in force. But Mr. Haughey was tried summarily.

None of the three possible constructions of the impugned sub-section is free from constitutional infirmity and, however one views the sub-section, Mr. Haughey's conviction cannot stand. In the opinion of the Court sub-s. 4 of s. 3 of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, violates Article 38 of the Constitution and, therefore, is invalid and of no effect. The order of the Court will so declare; and, in consequence, this appeal will be allowed, the conviction and sentence of the High Court will be set aside and Mr. Haughey will be discharged. This concludes the judgment of the Court.

APPENDIX

Statement of Pádraig Haughey

"With respect, Mr. Chairman, my name is Pádraig Haughey. I reside at 25 Foxfield Avenue, Raheny, Dublin 3. I am aged 38, married—with one child. I wish to make a statement on oath. On the 29th January, 1971, I received a letter, a registered letter, which was notice to produce to the Committee of Public Accounts all documents in my possession touching on the matters into which the Committee was inquiring. These alleged documents were to be produced before the 22nd January, 1971, and, on the following Monday, I received a letter from the Clerk of the Committee extending the time to produce these alleged documents to the 8th February, 1971, and apologising for the mistake to the date for final production of documents in the original letter. On the 6th February, 1971, I received, by registered post, a witness summons signed by Garret FitzGerald, member of the Committee. I am here in answer to this summons. I have not now, nor had I ever, any documents or copy documents which would or could in any way relate to the matters presently being investigated by this Committee. I wish to state that I never, directly or indirectly, got in touch or sought to get in touch with Mr. C. J. Haughey in order that he would authorise customs clearance of any guns, ammunition or materials of any nature or description, nor did he ever indicate

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to me what his attitude would be if such requests were made to him as the matter never arose between us. Again, referring to reports, which I have read, of alleged evidence given before this Committee, I definitely state I never received or gave money, or received or gave any cheque, or any valuable security in the name of George Dixon; nor did I ever use the name of George Dixon in any connexion with any financial or banking dealings.

I also wish to state that no moneys from the Grant-in-Aid for Northern Ireland Relief issued from subhead J, Vote 16, Miscellaneous Expenses for 1969/70, were ever paid to me, nor did I ever have any control over any of these moneys; nor had I ever any say in the disbursement of this money. Further, I wish to state positively that my brother, Charles Haughey, never discussed the moneys voted for Northern Ireland relief with me until I—until after I had received the *subpoena* to attend before this Committee. I now wish to state that the reasons why I am not prepared to be examined by the Committee are as follows: I am advised by my lawyers that Statute No. 22 of 1970, The Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act, 1970, does not give any privilege or immunity to any newspaper, periodical, radio or television which publishes any evidence allegedly given by a witness before this Committee. At present my legal advisers are considering my position in civil law as a result of the reports of alleged evidence already given by witnesses here in so far as that alleged evidence relates to me personally. I am advised that by giving evidence before this Committee I might be liable in civil law and under the laws of the land for any answer I might make. I wish to state that, while I appreciate that the laws of evidence may well be stretched by a non-legal body, such as this, nevertheless I am not prepared to submit to examination arising out of so-called principles of justice. I am advised that, because of the publicity already given to allegations not based on best evidence or admissions made against me, I am entitled as of right to make this sworn statement and I am further advised not to answer any questions for the reasons already given. I have copies now which I will hand out to you all."

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Ó DÁLAIGH C.J.:—

I turn now to a consideration of the several grounds of appeal which raise questions which are independent of the constitutionality of the Act of 1970, and I follow the order in which these grounds have been dealt with in the judgment of Mr. Justice Henchy.

First, Mr. Haughey objected to such part of the Committee's terms of reference as refers to an examination of expenditure of moneys of the Irish Red Cross Society. The terms[65] of the order of Dáil Éireann of the 1st December, 1970, contemplate an examination not only into the expenditure of the grant-in-aid for

[65]See p. 237, *ante*.

Northern Ireland issued from Subhead J of Vote 16, Miscellaneous Expenses for 1969/70, but also an examination into the expenditure of the Irish Red Cross Society's moneys transferred by the Irish Red Cross Society to a bank account into which moneys from the Vote were, or may have been, lodged. The examination in question here is not being conducted by a select committee established under Standing Order 67, but by the Committee of Public Accounts whose powers are defined in Standing Order 127. Those powers are "to examine and report to the Dáil upon the accounts showing the appropriation of the sums granted by the Dáil to meet the *public expenditure* and to suggest alterations and improvements in the form of the estimate submitted to the Dáil." The examination of the expenditure of moneys belonging to the Irish Red Cross Society, not being moneys granted by the Dáil to meet the public expenditure, is not a matter which, as such, falls within the jurisdiction of the Committee of Public Accounts. If, however, moneys issued from Subhead J of Vote 16 were lodged in a bank account and Irish Red Cross Society moneys were transferred to that account, forming a mixed fund, then for the purpose of segregating the funds the expenditure of the moneys of the Irish Red Cross Society might incidentally be disclosed but, upon the moneys being duly segregated, any further examination into the expenditure of the Irish Red Cross Society moneys would be outside the functions of the Committee of Public Accounts as defined in Standing Order 127.

Secondly, Mr. Haughey has also objected to any examination whatsoever into the expenditure of the grant-in-aid even though conducted within the terms of Standing Order 127. The ground of his objection is that the standing orders relative to public business (of which Standing Order 127 forms part) have not been adopted as the standing orders of the House of Representatives, called Dáil Éireann, established under the Constitution of Ireland, but are the standing orders of the former Dáil Éireann, *i.e.*, the chamber of deputies, called Dáil Éireann, established under the Constitution of Saorstát Éireann. It is surprising that the new Dáil Éireann did not formally adopt a new body of standing orders when the Constitution came into force on the 29th December, 1937, and has not done so since. Article 15, s. 10, of the Constitution contemplated that the new Dáil should make its own rules and standing orders. The section reads:—"Each House shall make its own rules and standing orders . . ." or "Déanfaidh gach Tigh ar leith a rialacha agus a bhuan-orduithe féin . . ." Instead, it appears that the new House has continued to operate under the standing orders of the

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old Dáil Éireann, subject to amendment. On the eve of the coming into force of the Constitution, the Committee of Procedure and Privileges met under the chairmanship of the Ceann Comhairle to consider the "amendment of Standing Orders relative to Public Business consequent on the coming into operation of the Constitution." The Committee's report, printed on the 17th December, 1937, recommended certain amendments which were set out in a schedule to the report. The report said that further amendments would be required after the assembly of Seanad Éireann, and it added that the committee considered that a reprint of the standing orders might await these further revisions. The Oireachtas, it may be noted, was then a uni-cameral House. The suggested amendments were adopted by the new Dáil on the 12th January, 1938. This, in my opinion, was a tacit adoption by the new Dáil Éireann of the standing orders of the former House, as amended, as the standing orders of the new House. It may indeed be that taciturnity is uncharacteristic of parliaments, but it seems to me that the action of Dáil Éireann on the 12th January, 1938, is susceptible of no other construction than that the new House was "making" its Standing Orders within the meaning and intention of Article 15.

Thirdly, Mr. Haughey has objected that the Committee had no power to administer an oath. Mr. Justice Henchy, in the High Court, referred to this objection as unmeritorious as shown by the fact that Mr. Haughey initiated his appearance before the Committee by stating that he wished to make a statement on oath, and then in fact did so. The ground of Mr. Haughey's objection is that the Oireachtas Witness Oaths Act, 1924, which applied to the House of the former Oireachtas and any committee or joint-committee thereof, has not been "carried over." The sustainability of this objection turns on the meaning of the words "governmental authority" in s. 4, sub-s. 1, of the Constitution (Consequential Provisions) Act, 1937, which was enacted in preparation for the coming into operation of the Constitution of Ireland. The relevant portion of s. 4, sub-s. 1, of the Act of 1937 says that every mention or reference in a statute in force before the coming into force of the Constitution of, or to, any governmental authority, whether legislative, judicial, or executive, established by virtue of the Constitution of Saorstát Éireann shall, in relation to anything to be done after the coming into operation of the Constitution, be construed and have effect as a mention of the governmental authority established by the Constitution of Ireland which corresponds to, or has like functions as, such governmental authority established by the Constitution of Saorstát Éireann. The term

"governmental authority" by itself might not be clear, but the sub-section refers to a legislative governmental authority and this, it seems to me, points to the former Oireachtas and its committees. The corresponding legislative governmental authority under the new Constitution, in my opinion, can be none other than the new Oireachtas and its committees. It may be added that the Act of 1937, although passed before the coming into operation of the Constitution of Ireland, was expressed at s. 1 to come into operation immediately after the coming into operation of the Constitution; and Article 50, s. 2, of the Constitution provides that laws enacted before, but expressed to come into force after, the coming into operation of the Constitution should come into force in accordance with the terms thereof, unless otherwise enacted by the Oireachtas. In my opinion the Committee had, and has, authority to administer an oath.

Fourthly, Mr. Haughey objected that the certificate under the hand of the chairman of the Committee was not made with sufficient particularity. The certificate baldly stated an offence in the terms of the sub-section and gave no particulars of the questions, being questions to which the Committee could legally require answers, which it was alleged Mr. Haughey had refused to answer. The validity of this objection depends on the purpose which, in the intention of the Act of 1970, the certificate is to serve. The judgment of the Court has accepted[66] that the Committee's certificate is a step preliminary to the commencement of the trial of a criminal offence. In all criminal proceedings, whether tried summarily in the District Court or on indictment in the Circuit Court or Central Criminal Court, it is required that "particulars of the offence" be furnished: see Rule 44 of the District Court Rules, 1948, and r. 4, sub-r. 4, of the First Schedule to the Criminal Justice (Administration) Act, 1924. The certificate is the only document in which will be found the complaint that the witness has to answer. It should, therefore, furnish all necessary particulars. In this instance these should include the question or questions which it is alleged the witness refused to answer and, coupled with this, an assertion that the Committee could legally require an answer to such question or questions. The transcript of the proceedings discloses that when Mr. Haughey had made his preliminary statement and had dialogue with the chairman of the Committee, the Committee retired and, after an interval of about three-quarters of an hour, it resumed its public sitting and thereupon the chairman put certain questions to Mr. Haughey with the object of reminding him

[66] See p. 252, *ante*.

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of the possible consequence of his refusal to answer them, and then the chairman asked him two specific questions to which the chairman failed to elicit answers. The chairman, it would appear, thought it necessary—and correctly so—to have on record the specific questions which were put, together with the refusals to answer them, for the purpose of certifying an offence under sub-s. 4 (*b*) of s. 3 of the Act of 1970. This point does not appear to have been pursued in any great detail in the High Court where the view was erroneously taken that Mr. Haughey's initial statement, in which he indicated that he would not answer questions for the reasons which he gave, constituted an offence under sub-s. 4 (*b*). If this conduct constituted an offence, it fell to be dealt with under sub-s. 4 (*d*) which makes it an offence to do anything which would be contempt of court if the Committee were a court of justice having power to commit for contempt. The offence created by sub-s. 4 (*b*) is the offence of refusing to answer questions to which the Committee may legally require an answer. Quite clearly the Committee is not legally entitled to an answer to any question which is not relevant to the proceedings and which is not within its terms of reference; before anyone can be convicted of a refusal to answer a question, contrary to sub-s. 4 (*b*), the court would have had to be satisfied that the question put was relevant and within the terms of the inquiry. The court could not so satisfy itself unless a specific question, or questions, has or have first been put.

Fifthly, Mr. Haughey also objected to the validity of the Committee's certificate on the ground that it should have been made by the unanimous decision of all the members of the Committee. The High Court, in the judgment of Mr. Justice Henchy, held that a majority decision sufficed at common law. The High Court was not referred to Standing Order 72 which, by clear inference, says that a select committee may make its decisions by a majority. The words of the standing order are:—"in the event of there being an equality of votes the question shall be decided in the negative." This, in effect, says that for a positive decision a simple majority suffices. The Committee of Public Accounts is itself a select committee by the terms of Standing Order 127. Therefore, the position is that Standing Order 72 furnishes an adverse answer to Mr. Haughey's contention, without need to resort to the common law.

The sixth and last of Mr. Haughey's complaints was that his rights under s. 3 of Article 40 of the Constitution were, and would be, disregarded. Article 40, s. 3, provides as follows:—

"1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

Mr. Haughey's counsel formulated this complaint under two heads—(*a*) with regard to the conduct of the trial in the High Court and (*b*) with regard to the procedures of the Committee.

In the High Court, the court heard no oral evidence, with the exception of the evidence of the clerk of the Committee who was called to prove his authority to administer oaths. The substantive evidence in support of the Committee's complaint was put forward by affidavit—that of the chairman of the Committee—and leave to cross-examine the chairman was refused by the court on the ground that the indicated purpose of the cross-examination was irrelevant to the issue before the court. Mr. Haughey complains of the admission of evidence otherwise than *viva voce* and, further, that he was denied the right to cross-examine.

In a criminal trial, evidence must be given orally; a statute may authorise otherwise but the Act of 1970 in this instance has made no exceptions. The High Court, therefore, should not have allowed the affidavit evidence of the chairman of the Committee.

As to the disallowance of cross-examination, an accused person has a right to cross-examine every witness for the prosecution, subject, in respect of any question asked, to the court's power of disallowance on the ground of irrelevancy. An accused, in advance of cross-examination, cannot be required to state what his purpose in cross-examining is. Moreover, the right to cross-examine "to credit" narrows considerably the scope of the irrelevancy rule. Mr. Haughey, in my opinion, was wrongly denied the right to cross-examine.

As to the procedures of the Committee, Mr. Haughey's complaint is that in the special circumstances in which he found himself a witness, the procedures of the Committee failed to protect his rights under Article 40 of the Constitution. The procedures determined upon by the Committee in its interim report of the 1st December, 1970, by clause (iii) provide, *inter alia*, that:—"the Committee will allow witnesses to be accompanied solely for the purpose of consultation by counsel, solicitor or advisers, as may be determined by the Committee in each relevant case. Such counsel, solicitor or advisers will not, however, be permitted to examine any witness nor to address the Committee."

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The special circumstances in which Mr. Haughey appeared before the Committee were these. A week earlier, at the public sitting of the Committee on the 9th February, 1971, evidence was given by Chief Superintendent John P. Fleming. The Chief Superintendent at the outset explained the nature of the evidence which he proposed to give: all his information was, he said, from confidential sources which he was not at liberty to reveal. In terms of the law of evidence the entire of the evidence which he was about to offer was hearsay evidence.

The evidence in question purported to indicate (i) that Mr. Haughey had paid over money to the Chief of Staff of the I.R.A. in London; (ii) that Mr. Haughey was deeply involved in meetings with a certain I.R.A. leader after August or September and in promising funds for the I.R.A. in the North; (iii) that Mr. Haughey made all the arrangements at Dublin Airport some time early in October to take in a consignment of arms and handed same over to two leading I.R.A. men; (iv) that Mr. Haughey went to London on the 16-17 November, 1969, for the purpose of purchasing arms; (v) that Mr. Haughey or Captain—— [*name given*] could well have been involved in other arms shipments.

As to item (iii), when asked if he had any *knowledge* of the source of the moneys which paid for the arms, the Chief Superintendent said:—"I *imagine* it came from the grant-in-aid fund." As to item (v), relating to the other arms shipments in which Mr. Haughey may have been involved, the witness said that he had no direct evidence and that "it was *speculation or rumour*." The italics are mine.

Therefore, the position of Mr. Haughey was that at a public session of the Committee held on the 9th February, 1971, he had been accused of conduct which reflected on his character and good name and that the accusations made against him were made upon the hearsay evidence of a witness who asserted that he was not at liberty, and therefore was not prepared, to furnish the Committee with the names of Mr. Haughey's real accusers. The question which arises in these circumstances is what rights, if any, is Mr. Haughey entitled to assert in defence of his character and good name? It should be noted that, in the statement which he read to the Committee on the 17th February, 1971, he denied on oath that he had been connected, in any way, with the expenditure of moneys issued out of Subhead J of Vote 16.

Mr. Haughey's counsel offered no criticism of the immunity which the Act of 1970 gives to witnesses; he acknowledged that it would be unrealistic to expect witnesses to come forward without such

immunity. Having thus apparently accepted the necessity for such immunity, counsel's submission was that, in all the circumstances, the minimum protection which the State should afford his client was (*a*) that he should be furnished with a copy of the evidence which reflected on his good name; (*b*) that he should be allowed to cross-examine, by counsel, his accuser or accusers; (*c*) that he should be allowed to give rebutting evidence; and (*d*) that he should be permitted to address, again by counsel, the Committee in his own defence. Protection (*c*) was allowed by the Committee and no real difficulty arose with regard to (*a*), so far as I can see; therefore (*b*) and (*d*) are the crux. The Committee's procedures ruled out the two latter protections.

For the Attorney General it was urged that a witness in the High Court is not allowed the protections mentioned at (*b*) and (*d*) *supra*—this is undoubtedly so—and it was submitted that Mr. Haughey therefore could not be in any better position. The answer made by counsel for Mr. Haughey was that his client is not just a witness but that he has, in effect, become a party because his conduct has become the subject matter of the Committee's inquiry or examination by reason of the charges which have been levelled against him. Counsel points out that Mr. Haughey cannot, in defence of his good name, make his accusers answerable in the civil courts as they are protected by the immunity granted by the statute; and counsel then urges that unless he is allowed on his client's behalf to challenge and test the accusations by cross-examination and, further, to address the Committee, his client's good name is left unprotected. Counsel supported his submission by reference to the well-established procedure, adopted by the several tribunals of inquiry set up by Dáil Éireann to inquire into matters of urgent public importance. In all these instances persons accused in connection with the subject matter of the inquiry were granted the rights of parties and were allowed to appear by counsel, to cross-examine and to address the tribunal.

In my opinion counsel is right in his submission that Mr. Haughey is more than a mere witness. The true analogy, in terms of High Court procedure, is not that of a witness but of a party. Mr. Haughey's conduct is the very subject matter of the Committee's examination and is to be the subject matter of the Committee's report.

No court is unaware that the right of an accused person to defend himself adds to the length of the proceedings. But the Constitution guarantees that the State "so far as practicable" (sa mhéid gur féidir é) will by its laws safeguard and vindicate the citizen's good

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name. Where, as here, it is considered necessary to grant immunity to witnesses appearing before a tribunal, then a person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself. What are these means? They have been already enumerated at (*a*) to (*d*) above. Without the two rights which the Committee's procedures have purported to exclude, no accused—I speak within the context of the terms of the inquiry—could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of *clocha ceangailte agus madraí scaoilte*.[67] Article 40, s. 3, of the Constitution[68] is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s. 3, are not political shibboleths but provide a positive protection for the citizen and his good name. Clause (iii) of the Committee's procedures,[68] while valid in respect of witnesses in general, in this instance would, if applied in the circumstances of this case, violate the rights guaranteed to Mr. Haughey by the provisions of Article 40, s. 3, of the Constitution. This position, however, has not yet in fact arisen in this case because of Mr. Haughey's non-participation in the proceedings of the Committee.

The provisions[69] of Article 38, s. 1, of the Constitution apply only to trials of criminal charges in accordance with Article 38; but in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.

The immunity of witnesses in the High Court does not exist for the benefit of witnesses, but for that of the public and the advancement of the administration of justice and to prevent witnesses from being deterred, by the fear of having actions brought against them, from coming forward and testifying to the truth. The interest of the individual is subordinated by the law to the higher interest, *viz.*, that of public justice, for the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences. It is salutary to bear in mind that even in the High Court, if a witness were to take

[67] *Binding stones and unleashing dogs.*

[68] See p. 261, *ante*.

[69] See p. 246, *ante*.

advantage of his position to utter something defamatory having no reference to the cause or matter of inquiry but introduced maliciously for his own purpose, no privilege or immunity would attach and he might find himself sued in an action for defamation. The witnesses before the present Committee are in no better position. The fact that a witness may have been permitted or even encouraged to venture into the area will afford him no defence in such an action. Furthermore, in the High Court it is the duty of the judge to warn a witness that he is privileged to refuse to answer any question if the answer would tend to incriminate him. That privilege is also enjoyed by witnesses before the Committee, but it does not appear from the documents before us that Mr. Haughey in this case was so warned.

In my opinion this appeal should be allowed and the conviction and sentence of the High Court set aside for the reasons I have stated under head (*a*) of Mr. Haughey's sixth and last complaint, in addition to the reasons given in the judgment of the Court.

WALSH J.:—
I agree.

BUDD J.:—
I agree.

FITZGERALD J.:—
On the secondary issues raised on behalf of Mr. Haughey, which are independent of the constitutionality of the Act, I wish to refer to the various points raised on his behalf in the same order as they are dealt with in the opinion of the Chief Justice.

First, in relation to Mr. Haughey's objection to the inclusion in the terms of reference of power to examine the account of the Irish Red Cross Society, I am of the opinion that the objection is not well founded. It appears to me that the order of Dáil Éireann of the 1st December, 1970, was competent to authorise the Committee to examine any bank accounts which appear to have been credited with any moneys which were shown to have come from the grant-in-aid. The fact that the Irish Red Cross Society's account was named in the order appears consequently to be irrelevant and this specific reference to the Red Cross Society's account was superfluous.

Secondly, I agree with the judgment of the Chief Justice, for the reasons stated by him, that Standing Order 127 must be deemed to have been adopted under the Constitution of 1937 by the

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adoption on the 12th January, 1938, of the amendments to the existing Standing Order 127.

Thirdly, I also agree with the Chief Justice that Mr. Haughey's objection that the Committee had no power to administer oaths is not well founded.

Fourthly, in my opinion Mr. Haughey's declaration that he would not answer any question disposed of any necessity for the Committee to put specific questions to him. His conduct would have justified the chairman in certifying that he had offended against both paragraphs (*b*) and (*d*) of sub-s. 4 of s. 3 of the Act of 1970. In my opinion, the certificate amounts to no more than a statement of facts. It is neither a conviction, as the Committee seem to have thought, nor an indictment and, in my opinion, it should not be analysed as if it were. Mr. Haughey required no information as to his own actions or behaviour in relation to the Committee's inquiry; he was quite familiar with all the relevant facts.

Fifthly, I agree with the opinion of the Chief Justice, for the reasons stated by him, that the Committee's decision did not necessitate unanimity and that a majority decision was sufficient.

Sixthly, in my opinion the procedure adopted by the Committee was ill-advised. They failed to have regard to the fact that Mr. Haughey had the character of an accused person, rather than that of a mere witness as to fact. I do not consider that any constitutional right was thereby infringed but I do consider that the limitations imposed upon him as to the conduct of his case, as a person in effect accused, were contrary to natural justice. On his appearance in the High Court he was deprived of the opportunity of cross-examining the deponent whose certificate purported to establish facts which brought him before the court. There can be no doubt that in the High Court Mr. Haughey had the status of an accused person and was denied the opportunity of presenting his defence in the normal accepted way. I regard his trial before the High Court, if such it can be described, as unsatisfactory; and so the judgment of that court should consequently be set aside.

McLOUGHLIN J.:—

In this judgment I wish to deal shortly with the submissions made on behalf of Mr. Haughey on matters independent of the constitutionality of the Act and will set them out in numbered paragraphs.

1. As to the terms of reference in regard to expenditure of moneys of the Irish Red Cross Society in a bank account into which moneys voted by the Dáil were or may have been lodged.

2. Objection as to the validity of Standing Orders of Dáil Éireann.

3. Submissions that the Committee has no power to administer an oath.

On these matters I agree with what has been said by the Chief Justice in his judgment.

4. Submissions that the certificate of the Committee to the High Court did not set out the offence with sufficient particularity and should have been made by the unanimous decision of the members of the Committee and not the chairman alone.

5. Submissions as to alleged irregularities of the proceedings in the High Court.

Having regard to the decision of the Court that sub-s. 4 of s. 3 of the Act of 1970 is unconstitutional, the objections as to the form of the certificate to the High Court and the alleged irregularities of its proceedings do not, in my opinion, require to be decided.

6. The complaint by Mr. Haughey that the Committee failed to protect his rights under Article 40 of the Constitution in as much as it adopted a procedure denying to a witness the right to have legal advisers to examine witnesses and to address the Committee. This contention, in my view, is based on a misconception as to the nature of the proceedings of the Committee. The direction of the Dáil to the Committee was in these terms:—"That the Committee of Public Accounts shall examine specially the expenditure of the Grant-in-Aid for Northern Ireland Relief issued from Subhead J, Vote 16 (Miscellaneous Expenses) for 1969-70 and any moneys transferred by the Irish Red Cross Society to a bank account into which moneys from this Vote were or may have been lodged . . ." In making this examination the Committee might obtain information which might indicate that moneys from the Vote had come into the hands of persons who had expended them otherwise than for the proper purpose or had illegally misappropriated such moneys. If information of this kind were obtained by the Committee, it was its function to report such information to the Dáil; it was not its function to indict or charge any such person, much less to try and convict.

I do not need to set out in full the special circumstances under which Mr. Haughey appeared before the Committee. They have been fully set out in the judgment of the Chief Justice; in short they were that, one week before his appearance, a witness, Chief Superintendent Fleming, had given evidence implicating Mr. Haughey with the purchase of arms with moneys from the Vote. It is clear that this "evidence" was not first-hand evidence but

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hearsay, or even hearsay upon hearsay, or as the witness said as to part of it "speculation or rumour." In my opinion the Committee was entitled to receive information in this way, not by way of proof, but as a line of inquiry to be investigated, although I think it should have been obtained in private or by way of preliminary statement and not at a public sitting; I also think that the witness was bound to divulge the sources of his information unless he could claim and legally sustain a claim of State privilege.

It is the fact that the Committee adopted rules of procedure which provided (*inter alia*) that:—"The Committee will allow witnesses to be accompanied solely for the purpose of consultation by counsel, solicitor or advisers, as may be determined by the Committee in each relevant case. Such counsel, solicitor or advisers will not, however, be permitted to examine any witness nor to address the Committee."

It is objected that this procedure disregards the constitutional right of Mr. Haughey to have his good name vindicated. If one witness before the Committee maligns another, the latter's good name is not protected if this procedure is resolutely maintained but the Committee, having adopted the procedure, is quite entitled to relax the rule and I am not prepared to assume that the Committee would not have done so in this case if a reasoned application had been made to it so to do. No such application was made; it could still be made and, were it so made, should, in my opinion, be granted. Therefore, I do not sustain this ground of objection.

Solicitor for the applicant: *The Chief State Solicitor.*

Solicitors for the respondent: *Kennedy & McGonagle.*

E. P. de B.

Kenny J.
1968

April 24-26
30
May
July 31

Supreme Court
1972

May 1-5
Dec. 18

DOUGLAS WILLIAM VICTOR GLOVER, PLAINTIFF, *v.* B.L.N. LIMITED, LINCOLN AND NOLAN LIMITED, LINCOLN AND NOLAN (SALES) LIMITED AND LINCOLN AND NOLAN (PARTS) LIMITED, DEFENDANTS.

[1966. No. 1844 P.]

Master and servant—Misconduct—Company—Post of technical director held upon terms of contract—Appointment terminable by company in event of misconduct being established in opinion of board of directors—Misconduct established—Summary dismissal—No notice given of charges of misconduct—Natural justice—Breach of implied term—Damages for wrongful dismissal.

By an agreement dated the 10th January, 1964, a holding company and its three subsidiaries appointed the plaintiff to be technical director of the four companies for a period of five years at an agreed salary, subject to termination in accordance with clause 12 (c) thereof. That clause provided that the plaintiff's appointment might be terminated, without giving rise to compensation, if he should be guilty of any serious misconduct or serious neglect in the performance of his duties which, in the unanimous opinion of the board of directors of the holding company, affected injuriously the business or property of the holding company or of any of the subsidiaries. On the 5th July, 1966, having considered several serious complaints made against the plaintiff, the board of the holding company found unanimously that the plaintiff had been guilty of serious misconduct and neglect affecting the business of one of the subsidiaries, and terminated the plaintiff's appointment as technical director. On the 13th July, 1966, each of the subsidiaries terminated the said appointment. The plaintiff was not given any prior notice of the complaints made against him. In an action brought by the plaintiff in the High Court in which he claimed damages from the four companies for wrongful dismissal and breach of contract, it was

Held by Kenny J., in deciding the issue of liability for damages, 1, that the decision of the board of the holding company was amenable to review by the court.

Diggle v. *Ogston Motor Co.* (1915) 84 L.J.K.B. 2165 not approved.

2. That, in making their decision, the board of the holding company could only take into account the matters known on the 5th July, 1966.

Carvill v. *Irish Industrial Bank Ltd.* [1968] I.R. 325 applied.

3. That the evidence of the matters known to the board of the holding company on that date established that the plaintiff had been guilty of serious misconduct and neglect affecting injuriously the business of one of the subsidiaries.

4. That the plaintiff's position as the holder of an office, as distinct from being only an employee, required the application of the rules of natural justice to the termination of his appointment as technical director.

Ridge v. *Baldwin* [1964] A.C. 40 considered.

5. That since, in breach of such rules, the plaintiff had not been

given prior notice of the charges made against him, his dismissal was invalid and he was entitled to damages.

Byrne v. *Kinematograph Renters Society* [1958] 1 W.L.R. 762 considered.

On appeal by the defendants it was

Held by the Supreme Court (Ó Dálaigh C.J. and Walsh J., FitzGerald J. dissenting), in disallowing the appeal, 1, that the issue of liability depended upon the terms of the contract between the parties, whether the plaintiff was the holder of an office or an employee.

2. That the express provisions of clause 12 (c) specifying the procedure for summary dismissal for misconduct prevented a term being implied so as to exclude such procedure.

3. That, as the provisions of clause 12 (c) involved the holding of an inquiry to ascertain the relevant facts, it was an implied term of the agreement that such inquiry should be conducted fairly.

4. That the inquiry held by the board of the holding company had not been conducted fairly as the plaintiff had not been given prior notice of the charges made against him or an opportunity to refute those charges.

WITNESS ACTION.

By an agreement dated the 10th January, 1964, and made between a holding company and three subsidiaries and the plaintiff, the plaintiff was appointed to be technical director of the holding company and of the three subsidiaries, which were referred to as the operating company, the sales company and the factors company. The appointments were for a period of five years from the 1st April, 1963, until the 31st March, 1968, and thereafter from year to year unless terminated by the holding company or by the plaintiff by six months notice to expire on the 31st March, 1968, or on any day thereafter.

Clause 12 of the agreement provided :—"12. Mr. Glover's appointment as technical adviser of all the companies may be terminated without giving rise to any claim for compensation or damages upon the happening of any events following, namely . . . (c) if Mr. Glover shall be guilty of any serious misconduct or serious neglect in the performance of his duties or wilfully disobeys the reasonable orders directions or restrictions or regulations of the board of directors of any of the said companies which in the unanimous opinion of the board of directors for the time being of the holding company present and voting at the meeting injuriously affect the reputation business or property or management of either the holding company or the operating company or the sales company or the factors

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company . . ." At the trial and at the hearing of the appeal, the reference to "technical adviser" at the start of clause 12 was treated as being a reference to "technical director."

A meeting of the board of directors of the holding company was held on the 5th July, 1966, and the following persons were present at the meeting:—Mr. J. W. Freeman (Chairman); Mr. G. C. V. Brittain (Vice-Chairman); Mr. T. P. Hogan; Mr. P. A. Duggan and Mr. G. A. Brittain (Directors); and Mr. W. Meates (Secretary). The minutes of the meeting, having recited the attendances, continued:—"The minutes of the previous meeting were not produced. The Board having received from Mr. G. C. V. Brittain, Executive Vice-Chairman, a detailed report into the workings of the assembly plant of Lincoln and Nolan Limited it was unanimously resolved that Mr. Douglas William Victor Glover has been guilty of serious misconduct and serious neglect in the performance of his duties which in the unanimous opinion of the Board injuriously affect the business property and management of Lincoln and Nolan Limited. It was further resolved that Mr. Glover's service agreement dated 10th January 1964 with this company be terminated forthwith pursuant to clause 12 thereof. There being no further business the meeting concluded."

By letter dated the 8th July, 1966, the holding company wrote to the plaintiff as follows:—"At its meeting on 5th July 1966 the board of directors of B.L.N. Limited unanimously passed the following resolution:—'It was unanimously resolved that Mr. Douglas William Victor Glover has been guilty of serious misconduct and serious neglect in the performance of his duties which in the unanimous opinion of the board injuriously affect the business property and management of Lincoln and Nolan Limited.' On the instructions of the board of B.L.N. Limited I hereby formally give you notice terminating your service agreement dated 10th January 1964 pursuant to clause 12 thereof. Termination is to be effective forthwith, but as you are at present on holidays with pay your salary will be paid up to and including the 31st instant."

On the 13th July, 1966, at a board meeting of the operating company attended by Mr. J. W. Freeman, Mr.

G. C. V. Brittain, Mr. H. M. Brierley and Mr. P. A. Duggan, a resolution was passed stating that, in view of the resolution passed by the board of the holding company on the 5th July, 1966, in respect of the plaintiff, the board of the operating company "hereby terminates his service agreement dated 10th January, 1964, forthwith pursuant to clause 12 thereof," and the secretary of the operating company was directed to convey that decision by letter to the plaintiff. Identical resolutions were passed at board meetings of the sales company and of the factors company held on the same day and attended by the same individuals. By letters dated the 13th July, 1966, from the operating company, the sales company and the factors company the plaintiff was informed of the decisions of those companies.

The plaintiff did not receive any prior notice of the charges of serious misconduct and of serious neglect.

The plaintiff's action for damages for wrongful dismissal and breach of contract was commenced by plenary summons on the 27th July, 1966, and his statement of claim was delivered on the 15th December. A joint defence was delivered by the four defendant companies on the 9th March, 1967, in which they alleged that the plaintiff had been lawfully dismissed from his employment, as having been guilty of serious misconduct and serious neglect in the performance of his duties which, in the unanimous opinion of the board of directors of the first defendant present and voting at the meeting, had injuriously affected the business, property and management of the second defendant. The misconduct and neglect alleged was not specified by the defendants in their defence, and particulars of such misconduct and neglect were first given in a letter written by the defendants' solicitors a month after the defence had been delivered. Further allegations of misconduct and neglect were made by the defendants' solicitors in further letters written on dates from ten to thirteen months after the delivery of the defence.

C. B. McKenna S.C., G. J. W. Lardner S.C. and *J. Grattan Esmonde,* for the plaintiff.

E. M. Wood S.C., D. D. Costello S.C. and *K. O'Shaughnessy,* for the defendants.

Cur. adv. vult.

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KENNY J.:—

Lincoln and Nolan Ltd. ("the operating company") was incorporated as a private company in Ireland in 1923. Since 1933 its principal business has been the assembly of Austin motor cars, though for some time it also assembled Rovers and Heinkels: it imported the parts from the British Motor Corporation in a completely knocked-down condition and assembled them at a number of factories in Dublin. The parts for all the cars (except Minis) were sent from England in containers which were shipped through Rosslare and were brought to Dublin where they were unpacked: the parts for Minis were imported through the port of Dublin in cases and cartons.

Lincoln and Nolan (Holdings) Ltd. ("the holding company") was incorporated as a public company in 1950 to acquire the shares in the operating company. Its original capital was £300,000 divided into 100,000 preference shares of £1 and 800,000 ordinary shares of 5s. and it obtained a quotation for these on the Dublin Stock Exchange. It never assembled motor cars and it received from the operating company and from its other subsidiaries the sums which its directors considered prudent to distribute as dividends to the share holders. In May, 1966, its name was changed to B.L.N. Limited.

Lincoln and Nolan (Sales) Ltd. ("the sales company") was incorporated as a private company in 1950 and was a wholly-owned subsidiary of the holding company. International Sales Ltd. ("the factor company") was incorporated as a private company in 1958: its name was subsequently changed to Irish Motor Factors Ltd. and later to Lincoln and Nolan (Parts) Ltd. It was also a wholly-owned subsidiary of the holding company. Until April, 1966, the holding company and the other companies had the same persons as directors.

Mr. John W. Freeman, a well-known Dublin stockbroker and a director of many public companies, was the chairman of the holding company and its subsidiaries: he was never a whole-time or, as it is now called, an executive director of any of the companies and he did not claim that he had any technical knowledge about the assembly or sale of motor cars. Mr. H. Martin Brierley was the managing director of the holding company and of its subsidiaries and

held these positions until he resigned in December, 1966. Mr. Brierley had no technical training in the assembly of motor cars; he concentrated on increasing the sales of Austin cars and lorries in Ireland. He believed that the best way to sell them was to build up goodwill and a favourable public image with the dealers who sell Austin cars. He succeeded in increasing the sales of cars assembled by the operating company from 2,400 in the financial year which ended in March, 1958, to about 10,000 in the financial year which ended in March, 1965: during this period the number of those employed by all the companies increased from about 300 to about 600.

This policy, which produced large increases in sales and excellent profits, imposed a very heavy strain on those who had to do the assembly work as the factories were scattered and the work could not be concentrated in one area. This became a particularly difficult problem when a strong demand for Mini cars developed in 1963: the directors of the operating company realised what a large market there was for these cars and it was not easy to produce about 10,000 cars in old buildings which had been acquired when a production of 2,500 was the aim.

The policy of building up goodwill included the carrying out by the operating company of alterations and repairs without charge to cars which had developed defects after the period mentioned in the warranty given by Austins had expired. This seems to me to have been a prudent approach for there is nothing more irritating to a motorist or to a dealer than to be asked to pay for making good some defect which has developed in a new car shortly after the warranty period has expired.

The other directors of the holding company and its subsidiaries were Mr. Patrick Duggan, Mr. Thomas P. Hogan and Mr. Arthur Phillips. Mr. Duggan is a chartered accountant and is a director of many insurance and investment companies. He has not any technical knowledge of motor assembly and was not at any time an executive director. He examined the weekly production charts carefully and commented on any fall in the productivity ratio. Mr. Hogan is an engineer who now specialises in management and is a director of a number of public companies: he did not make any claim to expert knowledge of motor

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assembly. Mr. Phillips had been a director when the plaintiff, Mr. Glover (whom I intend to call "Mr. Glover" to distinguish him from his son, Mr. David Glover), was appointed as technical manager, but died before 1966.

Mr. Glover, who was born on the 11th January, 1914, has many qualifications and a wide experience in mechanical engineering and in the assembly of motor cars. He had worked in the Nuffield organisation and with the British Motor Corporation. In 1957 the directors of the operating company were looking for a technical manager and asked the British Motor Corporation to recommend someone for this position. Mr. Glover was advised to write to Mr. Brierley and a meeting between them was arranged. On the 30th September, 1957, Mr. Brierley wrote to Mr. Glover offering him an immediate appointment as technical manager at a commencing salary of £2,500, with the right to become a member of a non-contributory pension scheme (established by the operating company) after a qualifying period of three years. Mr. Brierley stated that the capital sum assured under this scheme would be £14,878 which would be payable on death; that a pension of £1,334 for each year would be paid at the age of 65; and that, at the discretion of the board, a capital sum could be taken in place of it. In later letters Mr. Brierley stated that some form of production bonus would be given at a later date. Mr. Glover accepted the offer and took up his duties on the 1st November, 1957. In 1959, Mr. Glover was appointed a director of the holding company and of its subsidiaries and technical and production manager of the Lincoln and Nolan Group and was given a commission on the profits of the companies similar to that which he later got under the written contract made in 1964.

On the 1st April, 1959, Mr. Glover joined a retirement benefit scheme set up and managed by Irish Pensions Trust Ltd. for the operating company who paid all the contributions. The basis of this scheme was that the Pension Trust company were to take out policies of assurance as trustees on the lives of those employed by the operating company and were to hold these policies and their proceeds on the trusts stated in a declaration of trust made on the 20th July, 1950. These were that the Pension Trust company was to hold the policy and its proceeds for the employee

if he retired at the age of 65 or if he did so with the consent of the operating company when he was between 55 and 65 years old; if he died while he was employed, the policy was to be held for his personal representative. If the employment was terminated before the employee reached 65 for any reason except fraud or misconduct, the policy was to be held for the employee; while if the employee was discharged before he reached 65 for fraud or misconduct (in relation to which a certificate by the operating company was to be conclusive), or if he voluntarily left the employment of the operating company before he was 65, the policy was to be held as the operating company should decide. Mr. Glover was 52 when he was dismissed. The result of this scheme was that, if he remained in the employment of the operating company until he was 65, Mr. Glover would have got a pension of two-thirds of his salary (the salary scale not to exceed £2,000) for the rest of his life with the right to take this in a lump sum which Mr. Early, an official of the Pension Trust company, valued at £14,192. However, if Mr. Glover left the employment of the operating company on the 31st March, 1968, when his contract on which this action is based would have expired, he would have been entitled to get a fully paid policy for £6,910 payable at 65 or earlier death, or to have received the sum of £4,701 14s. 0d. as the surrender value of the policy, or to have continued it until April, 1977, by paying an annual premium of £659. Thus, under the scheme, Mr. Glover had rights to large sums unless he was discharged for fraud or misconduct or unless he left the employment of the operating company voluntarily; these rights did not depend on the discretion or decision of anyone and they could have been enforced in a court of law.

As the profit history of the group of companies has been relied on by Mr. Glover, I propose to summarise it. When Mr. Freeman was speaking at the annual general meeting held in July, 1957, he stated that the average annual production of cars (which at that time included Rovers) from the time the holding company was formed was about 3,000. Substantial import levies were imposed on parts for assembly in March and July, 1956, and for the year which ended on the 31st March, 1957, the loss of all the subsidiary companies was £38,417 while the loss after allowing for

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tax which could be recovered and depreciation was £29,749. There was a substantial increase in sales in the year which ended on the 31st March, 1958, and there was a profit of £74,862 before payment of tax. For the year which ended on the 31st March, 1959, there was a profit of £78,733 before tax and a dividend of 15% was paid on the ordinary shares. In the year which ended on the 31st March, 1960, the profit was £108,400 and 3,819 motor cars and 525 commercial vehicles were sold. For the year which ended on the 31st March, 1961, the profit before tax was £104,158 and the sales of all vehicles were 4,892. For the year which ended on the 31st March, 1962, the profit was £159,379 and a dividend of 30% was paid on the ordinary shares. In the year which ended on the 31st March, 1963, the companies seem to have supplied the greater part of the market in Ireland for Minis and had a profit of £213,735. In January, 1964, retained profits amounting to £100,000 were capitalised and 400,000 fully-paid ordinary shares of 5/- were issued to the shareholders so that the ordinary share capital was 1,200,000 shares of 5/- each. In the year which ended on the 31st March, 1964, the profit before tax was £217,108 and the company sold 7,924 vehicles. In the year which ended on the 31st March, 1965, the profit before tax was £326,395 and the company sold 10,039 vehicles. From the 1st April, 1965, to the 26th March, 1966, when the amalgamation with Brittains (Dublin) Ltd. became effective, the profit before tax was £233,582 and sales of all vehicles fell to about 8,200.

Brittains (Dublin) Ltd. (which I shall call "Brittains") was a long-established private company which had been assembling Morris motor cars and commercial vehicles from 1933. The parts for these cars were manufactured by the British Motor Corporation and were exported by them to Ireland. The establishment of the European Economic Community, and the movement towards reductions in tariffs on imports into Ireland and England, made the future of the car assembly industry in Ireland uncertain: if it was to survive, it could do so only if its prices became competitive with imported cars and it seemed absurd that two companies should be assembling the products of one English company in different premises and with different staffs. Mr. George Vincent Brittain ("Mr. Brittain") realised that

Brittains and the operating company would have to merge or amalgamate and so Brittains began in January, 1960, to buy the ordinary shares of the holding company on the Dublin stock exchange as a first step towards an eventual amalgamation. These purchases were not made in the name of Brittains but in the name of a nominee company and the identity of the purchaser was a well-kept secret. The directors of the holding company knew that someone was buying large numbers of the shares of their company but were not able to find out who it was until some time in 1963. These purchases continued until October, 1963, when Brittains had acquired about 25% of the ordinary shares of the holding company. Shortly before this date the directors of the holding company discovered the identity of the purchaser when a transfer to the nominee company, with the name of Brittains written on it in pencil, came before them for registration. The purchases of these shares were not made by Mr. Freeman or by his firm (Goodbody & Webb) and, though he was a friend of Mr. Brittain, he did not know who the buyer was. At the end of 1963 Mr. Brittain went to see Mr. Freeman and told him that he had purchased about 25% of the ordinary shares of the holding company with the aim of an amalgamation between the two companies. Before the directors of the holding company knew who the purchaser was, they had agreed to give service agreements for five years to Mr. Brierley and to Mr. Glover to protect their positions as whole-time executive directors if the holding company were taken over. Although the directors had agreed to give these contracts before October, 1963, Mr. Glover's agreement was not signed until the 10th January, 1964, though the five-year period ran from the 1st April, 1963. This, I think, is the explanation of Mr. Freeman's evidence that the contracts to Mr. Glover and Mr. Brierley were given before it was known who the purchaser was.

The agreement of the 10th January, 1964, was made between the holding company, the operating company, the sales company, the factors company and Mr. Glover. Each of the four companies thereby appointed Mr. Glover as technical director of each of them for a minimum period of five years from the 1st April, 1963, and thereafter from year to year unless the agreement was terminated by six

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months notice (given by the holding company or by Mr. Glover) expiring on the 31st March, 1968, or any day thereafter. It provided that during the currency of the agreement Mr. Glover was to devote his whole time and attention to the business and affairs of the four companies and that he was not, without the consent of the board of the holding company, to be interested directly or indirectly in any motor business which was or might or could be in competition with the businesses of the four companies or any of them. Clause 4 provided that he was to be paid by the holding company "as remuneration for his services hereunder to it and to the operating company, to the sales company and to the factors company" a fixed salary of £2,250 p.a. together with £250 expenses. Under clause 5 he was to receive as additional remuneration a commission of 1¼% on the excess over £30,000 up to £70,000 and a commission of 2½% on any excess over £70,000 for each financial year on the aggregate of the net profits or losses of the sales company and of the factors company: the amounts of these profits or losses were to be certified by the auditors of the operating company.

Clause 12 of the agreement (so far as it is relevant) provided:—"12. Mr. Glover's appointment as technical adviser of all the companies may be terminated without giving rise to any claim for compensation or damages upon the happening of any events following, namely:— . . . (c) if Mr. Glover shall be guilty of any serious misconduct or serious neglect in the performance of his duties or wilfully disobeys the reasonable orders directions or restrictions or regulations of the board of directors of any of the said companies which in the unanimous opinion of the board of directors for the time being of the holding company present and voting at the meeting injuriously affect the reputation business or property or management of either the holding company or the operating company or the sales company or the factors company." It has been wisely conceded by counsel that the words "as technical adviser" at the beginning of clause 12 are to be read as if they were "as technical director."

Mr. Brittain was co-opted as a director of the holding company on the 21st January, 1964, and of the operating company on the 16th of June of that year. He attended a

meeting of the board of the operating company on the 28th July at which there was an embarrassing discussion between Mr. Glover and him about Mr. Glover's interest in a company called Motors and Machines Limited. Article 39 of the articles of association of the operating company provided:—"A director may hold any office of profit under the company (other than that of auditor), and may enter into contracts or arrangements or have dealings with the company, and shall not be disqualified from office thereby, nor shall he be liable to account to the company for any profit arising out of any such contract, arrangement, or dealing to which he is a party or in which he is interested by reason of his being, at the same time, a director of a company, provided that such director discloses to the board at or before the time when such contract, arrangement, or dealing is determined upon his interest therein, or, if such interest is subsequently acquired, provided that he, on the first occasion possible, discloses to the board the fact that he has acquired such interest. But no director shall vote as a director in regard to any contract, arrangement, or dealing in which he is interested or upon any matter arising thereout, and if he shall so vote, his vote shall not be counted. But he may be reckoned in estimating a quorum where any such contract, arrangement, or dealing is under consideration."

In September, 1961, Mr. Glover instructed Messrs. Gore & Grimes, who acted in a number of transactions for the holding company, to incorporate a private company called Motors and Machines Limited ("Motors and Machines"). On the 23rd September, 1961, 100 shares in this company were allotted. An allotment of 35 shares was made to Mr. David Glover, 10 to Mr. Glover, 10 to Mr. Glover's wife, 35 to Mr. John Bassett and 10 to Colonel John Bassett; and they became the first directors of the company of which Mr. Glover was chairman. In 1961 Motors and Machines succeeded in getting the sole agency in Ireland for a company called Electro Mechan Heat Ltd., the products of which company were recommended by the British Motor Corporation for use in the assembly of Austins. As the operating company required a large amount of new capital equipment for the assembly of Minis and other cars, it began to purchase it from Motors and Machines. The

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circumstances in which Mr. David Glover acquired this valuable agency show that Motors and Machines were formed by Mr. Glover and his son so that this capital equipment could be sold by it to the operating company. In the period from the 9th October, 1961, to the 31st March, 1963, Motors and Machines sold equipment and goods priced at £3,837 to the operating company; and in the year to the 31st March, 1964, the sales were priced at £12,444 out of total sales of £42,905. In many cases the goods consigned from England to Motors and Machines were collected at the docks by employees of the operating company and brought direct to their factories. Although Mr. Glover was the chairman, a director and a shareholder in Motors and Machines, he did not disclose to the directors of the operating company his interest in the contracts between that company and Motors and Machines. Before he had incorporated Motors and Machines, he had asked Mr. Patrick Duggan to act as that company's auditor and had told him that it would do agency work: he also said that he hoped to do business with the operating company. Mr. Duggan told him that this was undesirable (as it undoubtedly was) and Mr. Glover said that he only wanted to help his son. Mr. Duggan then gave Mr. Glover the good advice that the position would be regular if he confined himself to advising his son. I accept all Mr. Duggan's evidence about this conversation and I reject that of Mr. Glover.

Mr. Brierley and Mr. Hogan knew, from the end of 1961, that Mr. David Glover was managing Motors and Machines and that it was selling equipment to the operating company, and they probably knew that Mr. Glover had some interest in it but neither of them realised the size of the business with the operating company. Mr. Glover resigned his directorship of Motors and Machines on the 29th June, 1964, after Mr. Brittain had become a director of the operating company but before he had attended any of its meetings. Mr. Brittain, having heard about Mr. Glover's connexion with Motors and Machines, was determined to make Mr. Glover reveal his interest in contracts between Motors and Machines and the operating company. Mr. Glover did this most reluctantly and the other directors were embarrassed by the discussion. Mr. Brittain's motive in forcing the

disclosure was not any concern with the niceties of company law but a conviction that a director of a company should reveal his interest in contracts between that company and another of which he was a director. Mr. Brittain regarded the transaction with Motors and Machines as dishonest. On the same day the board of the operating company recorded its view that expenditure of a capital or revenue nature should, in all cases, be supported by alternative quotations and that these should be made available at future board meetings and that, where a director was interested, the interest should be made known directly to the board. The result of this incident was that Mr. Glover and Mr. Brittain had a strong dislike of each other and it is an important part of the background to the stormy events of June and July, 1966.

Mr. Freeman, Mr. Brittain, Mr. Duggan and Mr. Hogan favoured an amalgamation of the operating company and Brittains; while Mr. Brierley and Mr. Glover were strongly opposed to it. The grounds for Mr. Glover's dislike of it were that he had hoped to become managing director of the holding company and of the operating company when Mr. Brierley retired, and he knew that he would never get this office if the amalgamation went through; Mr. Glover also knew that Mr. Brittain had strong and definite views about how a motor-assembly industry should be run and was going to see that these were applied. To these grounds must be added Mr. Glover's feeling that he was in charge of the assembly of Austin motor cars but that it was unlikely that he would continue to be the final authority if the amalgamation went through. The negotiations for amalgamation must have been long and tedious and I am sure that they involved many discussions with members of the legal professions. Compliance with what company law requires on a transaction such as this often irritates business men; there was the additional element that Mr. Freeman (like Dean Swift) has an intense dislike for lawyers and so his violent reaction to a solicitor's letter on the 21st June can be understood. The ultimate basis of the amalgamation was that as the issued ordinary share capital of the holding company was 1,200,000 ordinary shares of 5/- each, the shareholders in Brittains were entitled to an allotment of 850,000 fully-paid ordinary

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shares in the holding company for the transfer of their shares. However, they did not wish to take all the purchase price in shares and so they were allotted 500,000 ordinary shares in the holding company and were paid £350,000. It is an indication of the financial strength of the holding company that this was paid out of its resources. The 500,000 ordinary shares were issued at a price of £1 for each 5/- share because this was their value at that time. There were other assets in Brittains which it was decided should not be transferred and these, amounting to £452,245, were converted into cash which was paid to the shareholders. Another term of the amalgamation was that Mr. Brierley and Mr. Glover were to retire from the board of the holding company. It was suggested during this case that Mr. Glover's resignation from that board was sought so that he could subsequently be removed from his position as technical director: it will be recalled that he could be removed only by an unanimous resolution of the directors of the holding company. I am convinced that this suggestion is incorrect. Mr. Freeman and Mr. Brittain wanted Mr. Glover and Mr. Brierley to resign from the board of the holding company because, if they remained, it would have been necessary to make two other executive directors of Brittains members of the board, and this would have made it too large to be efficient. At a meeting of the board of the holding company on 19th April, 1966, Mr. Glover was told that he was expected to resign from his position as a director of it: he was most reluctant to do this and took legal advice about his position but resigned on the 29th April. The terms of the amalgamation were announced on the 2nd May; it was to be effective from the 26th March and it was completed on the 26th May, 1966, when Mr. Brittain was made executive vice-chairman of the holding company and Mr. George Brittain was made a director of it.

The amalgamation of two large companies always creates many problems: rivalries have to be forgotten, hopes of promotion may have to be abandoned and fears of redundancies and dismissals arise. All of us support change and rationalization in the professions and businesses which other people carry on: we are not enthusiastic about them in our own. Mr. Brittain wanted the amalgamation to be

successful because he thought that it would benefit the shareholders of the holding company and because, having made the decision, he was determined to see it carried out.

[*The judge reviewed further portions of the evidence, including the fact that at a board meeting of the holding company held on the 5th July*, 1966, *Mr. Brittain had read a lengthy report upon the condition and the maintenance of the defendants factories, and that the report concluded by stating that the plaintiff had been guilty of gross dereliction of duty. The judge referred to the resolution*[1] *passed at that board meeting terminating the plaintiff's service agreement, and to the letter of the 8th July giving the plaintiff notice of such termination, and to the fact that the plaintiff had not been given prior notice of any of the complaints made against him in the report and at the said board meeting. The judge continued . . .*]

The defendants submitted that the decision of the board that Mr. Glover had been guilty of serious misconduct and of serious neglect, and that these had injuriously affected the business and property of the defendants, could not be challenged in any court and was conclusive unless the plaintiff established that the decision was dishonest; they cited the judgments in *Diggle* v. *Ogston Motor Co.*[2] as authority for this. The wording of clause 12(c) refutes this contention because it requires that Mr. Glover should be guilty of serious misconduct or serious neglect ascertained objectively before he could be dismissed: it does not make the opinion of the directors conclusive on this matter. Also I think that that decision was plainly wrong and should not now be followed. In it, the defendants employed the plaintiff as a shop superintendent for one year subject to his carrying out his duties "to the satisfaction of the directors." Before the year had ended the plaintiff was dismissed because he had not carried out his duties to the satisfaction of the directors. The jury found that the directors of the defendants were genuinely dissatisfied with the way in which the plaintiff did his duties but that they had no good grounds for this and on these findings the County Court judge entered judgment for the defendants. The plaintiff appealed to a Divisional Court (Ridley and Lawrence JJ.) of the High Court, and

[1]See p. 390, *ante*.

[2](1915) 84 L.J.K.B. 2165.

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the judges did not find it necessary to reserve judgment. They held that a *bona fide* dissatisfaction by the directors was sufficient to entitle them to terminate the agreement which should not be read as requiring reasonable satisfaction. However, it has been held in many cases that when work is to be done to the satisfaction of the owner of property, the Court will imply that this means reasonable satisfaction: the cases on this matter are conveniently summarised on p. 248 of Hudson on Building Contracts (7th ed.). I do not see why contracts of employment should be in a different category. The reasons given for the decision are also completely inconsistent with what Lord Radcliffe said in *Nakkuda Ali* v. *Jayaratne*.[3] I, therefore, reject the defendants' first submission.

I come now to consider whether Mr. Glover was guilty of serious neglect in the performance of his duties. If the directors dismissed him for this, they can rely only on the acts and omissions which they knew of on the 5th July, 1966, and so they are confined to the serious neglect mentioned in the report of the 4th July, 1966. In *Carvill* v. *Irish Industrial Bank Ltd.*[4] it was held that the only grounds which could be relied on to justify the immediate dismissal for misconduct of an employee who was employed on a yearly basis, and whose contract did not contain provisions for summary dismissal, were those known to the board which dismissed him when they did so; and it was held that the views expressed in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*[5], that an immediate dismissal for misconduct may be justified on grounds discovered subsequently, were wrong. The same principle must, I think, apply when the contract provides for summary dismissal for serious neglect of duty or for serious misconduct.

[*The judge examined the evidence relating to* 18 *allegations that the plaintiff had been negligent in the performance of his duties. The judge found that all except one of the allegations had not be established. The judge continued* . . .] In my opinion, all the charges of serious neglect of duty, except those connected with the condition of the fuse board in the East Wall factory, fail.

I come now to consider the charges of serious misconduct.

[3][1951] A.C. 66, 76, 77.

[4][1968] I.R. 325.

[5](1888) 39 Ch. D. 339.

It is impossible to define the misconduct which justifies immediate dismissal. In giving the advice of the Privy Council in *Clouston & Co. Ltd.* v. *Corry*[6] Lord James of Hereford said:—"There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other." What is or is not misconduct must be decided in each case without the assistance of a definition or a general rule. Similarly, all one can say about serious misconduct is that it is misconduct which the court regards as being grave and deliberate. And the standards to be applied in deciding the matter are those of men and not of angels: see *Jupiter General Insurance Co.* v. *Shroff*[7] and the decision of Mr. Justice Budd in *Flynn* v. *Great Northern Railway Co.* (*Ir.*) *Ltd.*[8] The burden of establishing serious misconduct rests on the defendants: I do not accept Mr. Costello's argument that the defendants discharge this if they establish a *prima facie* case of serious misconduct. The case on which he relied, *Federal Supply and Cold Storage Company of South Africa* v. *Angehrn*[9], is not an authority for this. It establishes that when the defence to a charge of misconduct is that it was done for the benefit of the master the burden of establishing this rests on the employee; but this presupposes that the employer has proved misconduct.

The main charge of serious misconduct related to the sale of capital equipment and goods to the operating company by Motors and Machines[10] when Mr. Glover was a shareholder in this company which was managed by his son. I have no doubt that until 1964 these transactions were serious misconduct because Mr. Glover had not disclosed his interest in the company to his co-directors. From 1964, however, all the directors of the operating company knew that Mr. Glover had this interest and they could have checked on the dealings between the two companies. Some of the purchase authorisations were not countersigned by Mr. Brierley as they should have been and the agencies were obtained in a remarkable way. But

[6][1966] A.C. 122, 129.
[7][1937] 3 All E.R. 67.
[8](1953) 89 I.L.T.R. 46.
[9](1910) 80 L.J.P.C. 1.
[10]See pp. 399, 400.

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all these considerations are outweighed by the absence of any evidence establishing that the operating company suffered any loss from these transactions. Mr. Brittain admitted that he could not establish this and a comparison of prices charged by Motors and Machines and by other companies shows that some of the contracts were favourable to the operating company: the directors of the holding company could not reasonably conclude that the dealings with Motors and Machines injuriously affected the property or business of the operating company. Mr. Costello urged that it was serious misconduct for Mr. Glover to put himself in a position where his duty to the operating company clashed with his interest in promoting the sales of Motors and Machines, and said that it was irrelevant that the operating company had not suffered any loss in these contracts. In support of this he cited a passage from the judgment of Cotton L.J. in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*[11] at p. 357 of the report:—"If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to shew that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer. He has a temptation, especially where he is getting a percentage on expenditure, not to cut down the expenditure, but to let it be increased, so that his percentage may be larger." I do not accept this as a correct statement of the law.

It is not misconduct to put oneself in a position where duty and interest clash: it is a counsel of prudence not to do so but the misconduct is in failing to reveal the position to those likely to be affected by it, so that they cannot decide whether the performance of the duty will be influenced by the competing interest. The modern view of the position of directors of companies (who often have this problem) is shown in s. 194 of the Companies Act, 1963, and in

[11] (1888) 39 Ch. D. 339.

Article 84 of the model articles for public companies and in Article 7 of those for private companies in Table A to that Act. These show that when a conflict between duty and interest arises, a director is bound to disclose the nature of his interest to his co-directors and, in my opinion, the same rule applies to those employed for it would be ridiculous that there should be one principle of conduct for directors and another for employees.

The Supreme Court has decided in *Carvill* v. *Irish Industrial Bank Ltd.*[12] that one ground of the decision in the *Boston Case*[13] was incorrect: I am not prepared to accept any part of it. The members of the Court of Appeal did not reserve judgment and some of the statements of the reasons are astonishing. One of the arguments in the case was that the act relied on was an isolated act and so could not be misconduct. Lord Justice Cotton dealt with this contention at p. 358 of the report in these words:—"As far as we know it may have been an isolated transaction, but if we find at the very beginning of the employment that this agent, whose duty it was not to receive anything from the persons with whom he was dealing, did in fact do so, and in fact kept the receipt secret for months after the money was received, I am not satisfied that he did not do other things equally inconsistent with his duty to his principals . . ." At p. 370 of the report Fry L.J. dealt with this argument by stating:—"We have no other ground upon which we can conclude this to be an isolated case except the absence of success on the part of the plaintiffs in proving any other case except that to which I shall shortly refer, and the oath of Mr. Ansell that it is such. I do not feel judicially satisfied that it is an isolated case." These two passages mean that, if an employer establishes that an employee has committed one act of misconduct, the court may infer that he has committed many others although there is no proof that he did. I reject this view. The argument based on the Motors and Machines transactions fails because the directors could not reasonably conclude that the contracts injuriously affected the business, property or management of any of the companies; and so the directors could not terminate Mr. Glover's agreement under clause 12(c) on this ground.

[12] [1968] I.R. 325.

[13] (1889) 39 Ch. D. 339.

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A further charge of misconduct is that Mr. Glover authorised or allowed Motors and Machines to recondition petrol pumps for cars for £1 17s. 6d. when this work could have been done by the operating company. Mr. Golding, an employee of the operating company, arranged that Mr. Douglas Glover would purchase the necessary parts from the operating company for £1 10s. 0d., that he would then do the work and would be paid £1 17s. 6d.; 496 pumps were reconditioned. There has been no evidence that the operating company could have done the work at the same or a lower price or that Mr. Glover knew that the work had been given to Motors and Machines. This is the type of small job that most owners of large factories are reluctant to undertake and I am not prepared to hold that what was done was misconduct.

The next charge relates to the work done on four motor cars. The facts about the first two of these were known to Mr. Brittain when he made his report and are mentioned in it: the facts about the third and fourth cars were discovered afterwards. The work on the first two cars was done in the rectification department in Upper Mayor Street which was established to deal with defects found in cars after the warranty period had expired, and to do repairs to cars owned by the company. No charge was made for any work done in this department unless Mr. Glover directed the foreman to do so. Mr. Brierley and Mr. Glover believed that the operating company could get useful publicity by entering teams for motor rallies: in some of these the drivers of the Austin team drove their own cars and in others they drove company cars. Many of the Austin cars which were driven in rallies were tuned in the rectification department and those which were damaged were repaired there without charge. The rallies were a reasonable form of advertisement and the decision to do the tuning and repair work on the cars entered for them without charge was not misconduct. The first car was submerged in a flood in Dublin in June, 1963. The owner had it comprehensively insured and it was brought for repair to the operating company and examined. The owner did not wish to keep it as it had been flooded (a view reasonably held by all motor car owners) and wanted the insurance company to treat it as a total loss. The

operating company then made an estimate of the 20th June for £200-250 in which the work necessary to restore the car was described in detail. I am prepared to assume in Mr. Glover's favour that this was drawn on a generous scale and that some of the work described was not subsequently carried out in the rectification department. The insurance company were not, however, prepared to treat the car as a total loss: they paid £4 10s. 0d. to the operating company for bringing the car from Stillorgan Road and they paid the owner an amount, which was not proved, for the damage. Mr. Glover then bought the unrepaired car from the owner for £170 and the registration book was sent to him on the 26th June. Mr. Glover had the car brought to the rectification department where it was repaired; the damage to the upholstery and to the electrical parts was made good. Some of the parts for this work were obtained on Mr. Glover's instructions from the East Wall Road factory and were subsequently replaced. No time sheets were kept in the rectification department so that the cost of the work is unknown: I estimate that the labour and material cost of the work without any addition for profit or overhead expenses was £125. No charge was ever made for any of the work and Mr. Glover paid nothing for it. Mr. Wood suggested to Mr. Glover that the transaction was bare-faced robbery and got the remarkable answer that it was not theft but that Mr. Glover was not making any excuse for it. I accept the evidence of Mr. O'Grady about the work done on this car and I reject that of Mr. Glover in so far as it conflicts with it. Mr. Glover could not have thought that he was entitled to have this work done without charge because it was a perquisite of his office. Although the amount involved was the comparatively small sum of £125, I have no doubt that what Mr. Glover did and his failure to pay the cost price of the work was serious misconduct. I am sure that many of the staff knew of this transaction and it set an utterly deplorable example to all of them. Those in the high office of director cannot expect the employees of their company to act honestly if they do not set a high standard.

An attempt to excuse what Mr. Glover did in relation to cars, and the work done in his own home, was made on the ground that the other directors were taking benefits

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from the company and were having their cars tuned and repaired without charge. The only allegation against Mr. Freeman was that a client of his (Mr. Hutchinson), whose wife was an invalid, wanted his car altered so that she could get into it easily. Mr. Freeman asked Mr. Glover to have this done and no charge was made for it. Mr. Freeman never suggested to Mr. Glover that the work should be done without charge and did nothing to induce this belief: the omission to charge resulted from Mr. Glover's view that Mr. Hutchinson should have the work done for nothing because he was a friend of Mr. Freeman. It was suggested by Mr. Glover that Mr. Hogan had had work done without charge though this charge was withdrawn by Mr. Lardner. Mr. Hogan had purchased an unusual car from the company and it did not run well. He had got assurances about work which would be done and he brought the car back to have it made right. Mr. Duggan paid for all the work which was done on cars owned by his wife or by him and I accept his evidence that, when a private company with which he was associated was buying a new Princess car, he bought it through a dealer instead of buying it at cost price plus 10%, which were the terms on which directors could buy from the operating company. The standard to be applied in judging whether something is misconduct is an objective one, and Mr. Glover's belief (if he had it) that he was entitled to have work done without charge does not excuse him.

The second car, which was owned by the operating company, was badly damaged in an accident in April, 1964. The operating company estimated that the cost of repairs would be £326 and the insurance company decided to pay them £340 which was the pre-accident value of the car. The agreed salvage value was £80 and the insurance company paid £260 to the operating company from whom Mr. Glover bought it for £80. Repair work was done on it by his son but he could not jig it and it was brought to the Merchant's Road factory where repairs to the body were carried out for which Mr. Glover paid £14 10s. 0d. It was then brought by Mr. Glover to the rectification department where he instructed Mr. O'Grady to take the engine out of the sub-frame, to fit a new sub-frame and to put the engine back into it. The cost of the materials used was

£15 19s. 0d. and the cost of labour was £1 and no payment for this was ever made by anyone. Mr. O'Grady did not charge for this because bills were sent for work in the rectification department only when he was instructed to do so. My view is that what Mr. Glover did was misconduct but the small amount involved prevents it from being serious misconduct.

Mr. Glover's dealings with the third and fourth cars were not known when he was dismissed and they cannot, in my view, give any ground for the termination of his contract. However, it has been argued by the defendants that they are entitled to rely on them because a general charge of corruption is made in the report. This seems to me to be incorrect because clause 12(c) required that there should be serious misconduct which, in the opinion of the directors, injuriously affected the company's property or business and I cannot understand how they could form any view on this until they knew the details of each transaction. As my view on this may be incorrect, I think I should deal with each of the transactions. The third car was owned by Mr. Glover; it was involved in a crash when he was driving it to a rally in which he was taking part. He had the car repaired in the rectification department: the cost was £154 11s. 9d. which he did not pay. As a decision had been made to take part in rallies, I think that he may have believed that he was entitled to have the car repaired at the company's expense. The defendants have not proved that he acted dishonestly and, in my view, what was done was not serious misconduct. Mr. Glover's conduct in relation to the fourth car was serious misconduct because it was grossly dishonest. The car, which was owned by Mr. Glover, had an insurance excess of £75. It was involved in an accident and an estimate of £282 16s. 0d. for the cost of the repairs was prepared by the operating company. The insurance company subsequently paid £206 15s. 5d. (their estimate of the cost of repairs less the £75 excess) to the operating company. The repairs on a labour and material basis (excluding profit) cost £113 4s. 0d. and Mr. Glover was given credit in his personal account with the operating company for £92 18s. 4d. He never paid the £75 and he said that he did not notice that he had got credit for the £92 18s. 4d. I do not believe this evidence. The

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£92 18s. 4d. belonged either to the insurance company or to the operating company: Mr. Glover could not have believed that he had any claim to it.

The next series of complaints related to work done by employees of the operating company for Mr. Glover during the hours when they were employed by it and for which no charge was ever made. I accept the evidence of Mr. Stephen Grant on this. It establishes that Mr. Grant and Mr. Kenny worked for two or three weeks in Mr. Glover's house at Sandycove, for four weeks in his house at Step-a-Side and for about four weeks in a flat occupied by Mr. Douglas Glover. When these employees worked outside their usual hours they were paid by Mr. Glover. The materials used in the work of building wardrobes, preparing floors and constructing a small bar came from the operating company. The work was done when there was no work for carpenters in Mayor Street. Mr. Glover estimated that the total length of time for which the men worked in his houses was about 20 days. Mr. Grant had done work for Mr. Brierley in his house and Mr. Brierley said that he regarded this as being a legitimate perquisite of his office. I do not think it was and I have no doubt that what was done was misconduct by Mr. Glover. But was it serious misconduct? If the operating company had been a small private company in which nearly all the shares were owned by one person, I would not have regarded what happened as being serious misconduct because the difference between a small private company and a privately-owned business is one which is understood by few. But the operating company was wholly owned by a public company whose shares were quoted on the stock exchange and which employed about 600 people. After much consideration I have come to the conclusion that it was serious misconduct.

Other acts of misconduct were relied on. Work was done on a boat owned by Mr. Glover and no charge was made for this. Mr. Costello candidly admitted that this was not serious misconduct and I agree with his view. Some small items of furniture were made for Mr. Glover but this was not serious misconduct. He was paid sums ranging from £86 to £96 as Christmas boxes for five years, but he did not seek these and they were got for him by Mr. Brierley. It was also said that he had obtained

payment of his commission when he knew that this was calculated on a wrong basis. He did not do the calculations and certificates for the amount of the commission were not obtained from the accountants. In my view, none of these matters was misconduct.

My view then is that Mr. Glover was guilty of serious neglect of duty and of serious misconduct which the directors could reasonably have considered as injuriously affecting the business, property and management of the operating company. However, it has been argued by counsel for Mr. Glover that, if this was the position, the termination of the contract before it expired was invalid because the rules of natural or constitutional justice were not observed: see the judgment of Mr. Justice Walsh in *McDonald* v. *Bord na gCon*.[14] In this connexion they relied on the speech of Lord Reid at p. 63 of the report of *Ridge* v. *Baldwin*.[15] The principle of natural justice invoked is that when a charge is made against someone and when a person or body of persons has to decide whether it is well founded or not, the person against whom it is made should have notice of the matters alleged against him and be given a fair opportunity of making his case to the person or body which has to decide it. I do not propose to review the many cases on this matter because Lord Reid has done this in *Ridge* v. *Baldwin*.[15] His survey shows that the courts have never stated a general rule which makes it possible to say when the principle applies: they have, as always, decided each case by holding that, in some circumstances the principle applies and that in others it does not. Some rules in this connexion are, however, well established. The first is that the principle is not limited in its application to judicial or semi-judicial tribunals but extends to an administrative body which is not administering justice: see the decision of the Supreme Court in *Foley* v. *Irish Land Commission*[16] and the speech of Lord Hodson in *Ridge* v. *Baldwin*.[15] The second rule is that it does not apply to the removal of the holder of an office which is held at the will or pleasure of another. The third rule is that it applies to the removal of a person who holds an office for a term of years when he is discharged before the term

[14][1965] I.R. 217, 242.
[15][1964] A.C. 40.
[16][1952] I.R. 118, 157.

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has expired. The fourth is that it does not apply to the dismissal of a person who is employed under a contract of service when it is terminated under a clause in it which authorises dismissal for misconduct or when the employee is discharged under the term implied in most contracts of employment that he may be summarily dismissed for misconduct; in this case there is no such implied term because it is excluded by clause 12. The fifth is that when someone is deprived of property rights by a decision of any tribunal or body of persons, the Courts, in the absence of a statutory provision excluding the necessity for giving him notice of the charges and an opportunity of making his case, hold that justice requires that he should be given a hearing before a decision is made: see Lord Reid's speech in *Ridge* v. *Baldwin*.[17]

But does the principle apply when a person holds the office of director and has a contract under which he is entitled to retain it for a fixed period? The defendants say that Mr. Glover was an employee of the companies and nothing more, and that he cannot rely on the principle. The characteristic features of an office are that it is created by Act of the National Parliament, charter, statutory regulation, articles of association of a company or of a body corporate formed under the authority of a statute, deed of trust, grant or by prescription; and that the holder of it may be removed if the instrument creating the office authorises this. However, the person who holds it may have a contract under which he may be entitled to retain it for a fixed period: see the decision of the Supreme Court in *O'Brien* v. *Tipperary Board of Health*[18] and in *Carvill* v. *Irish Industrial Bank Ltd.*[19] This is Mr. Glover's position because he held the office of director of three of the companies at the date of his dismissal and had a contract under which he could retain them for five years. But the holder of an office does not hold it under a contract: he holds it under the terms of the instrument which created it and so, if he has not a contract, he cannot recover damages if he is removed. So justice requires that he should not be removed until the body with power to do this knows his answer to the case against him so that it can reach a correct

[17][1964] A.C. 40.

[18][1938] I.R. 761.

[19][1968] I.R. 325.

decision. But as the holder of an office may have a contract, the presence or absence of it cannot be the feature which distinguishes an office from employment so far as the principle of natural justice is concerned. It follows, I think, that someone who has a contract of service may successfully invoke the principle of natural justice if his position under the contract resembles that of the holder of an office and the question in every case of this type is :— "Should the person who has been dismissed be put into the category of the holder of an office or should he be regarded as an employee only?" These were the considerations which Lord Reid had in mind in *Ridge* v. *Baldwin*[20] when he said at p. 65 of the report :—"The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence : it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them." It was not argued that Mr. Glover could be removed from his office only under the articles of association of the companies of which he was a director. It was assumed that the termination of the contract under clause 12 had the effect of removing him from these offices and I have not considered the issue whether his removal from the office of director was valid under the articles or the application to this clause of the decision in *Southern Foundries* (1926) *Ltd.* v. *Shirlaw*.[21]

Clause 12(c) of the contract imposes restrictions on the companies as to the grounds upon which the holding company might terminate it. Mr. Glover could not be validly dismissed for serious neglect of duty or for serious misconduct : the directors had to be unanimous that the neglect or misconduct injuriously affected the reputation, business,

[20] [1964] A.C. 40.

[21] [1940] A.C. 701.

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property or management of any of the companies. Therefore, the directors of one company had to decide whether the misconduct or neglect affected the reputation, business or property of another company which did not have the same persons as its board of directors and which was obliged to give effect to the resolution of the board of the holding company. Mr. Glover's position as a director and an employee of the operating company, of the sales company and of the factors company, seems to me to have resembled that of the holder of an office because his directorship of and his contract with these three companies could be terminated by the directors of another company. Then there is the feature that Mr. Glover's pension rights, which included an accrued right to a fully paid-up policy, were enforceable against the operating company and not against the holding company. These were created before the contract was signed and were not affected by it. Clause 12(c) therefore gave the directors of the holding company the power to deprive Mr. Glover of his rights against another company. Lastly, Mr. Glover had the safeguard that the decision of the board was to be unanimous.

All these considerations lead me to the conclusion that Mr. Glover's position should be regarded as that of the holder of an office and not that of an employee only, and that the principle of natural justice applies to a termination under clause 12(c).

But should I, having listened to speeches and evidence for 22 days and having heard Mr. Glover's answer to the charges, substitute my conclusions for those which the directors might have reached if they had given him an opportunity to make his case ? In *Byrne* v. *Kinematograph Renters Society*[22] one of the plaintiff's complaints was that the rules of natural justice had not been observed because the tribunal refused to hear a witness whom he wished to call. Mr. Justice Harman (as he then was) said that he had heard the evidence and that it would not have affected the decision of the tribunal if it had been heard, and he refused to set the verdict aside. I have no doubt that Mr. Glover was guilty of serious neglect of duty and of serious misconduct and that these injuriously affected the

[22] [1958] 1 W.L.R. 762.

business, property and management of the operating company, but I do not know what conclusions the directors would have reached if they had heard him and whether their decision would have been unanimous. They might have allowed him to retain his pension rights if he had offered to resign immediately. I cannot say that the resolution[23] of the 5th July, 1966, would have been passed if they had heard him.

As Mr. Glover did not get notice of the charges against him and as the directors of the holding company did not give him an opportunity to make his defence, the termination of his contract by the resolution of the 5th July and the letter of the 8th July was invalid and he is entitled to damages against the defendants.

It was argued by Mr. Lardner that the termination was invalid because the charges were not stated in sufficient detail in the report[24] to make it possible for the directors to conclude that serious misconduct or serious neglect had been established. In my opinion, so far as serious neglect was involved, the photographs of the fuse boards were sufficient to enable the directors to decide this matter. The report does not state the amount of the losses which Mr. Glover's serious misconduct had caused to the operating company but the details given were sufficient to enable the directors to decide that it injuriously affected the property and management of the operating company.

Counsel have agreed that the assessment of damages would be dealt with after I had decided whether the defendants were liable to Mr. Glover.

On the 25th November, 1968, damages were assessed[25] at £9,694. This sum, as to £4,701 thereof, represented the surrender value of a policy of assurance issued for the plaintiff under the second defendants' retirement benefit scheme, for which the plaintiff had had to make no payment. The remaining £4,993 was in respect of the plaintiff's loss of salary, director's fees and commission, and of his

[23]See p. 390, *ante.*

[24]See p. 403, *ante.*

[25]See p. 432, *post.*

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loss of use of the car which had been made available to him under his contract of employment.

The defendants appealed to the Supreme Court against the judgment of Mr. Justice Kenny, while the plaintiff cross-appealed against so much of that judgment as found that the plaintiff had been guilty of serious neglect of duty or of serious misconduct and that such neglect of duty and misconduct were of a nature which the directors of the first defendants could reasonably have considered to have injuriously affected the business, property or management of the second defendants.

The first paragraph in the grounds of appeal stated in the defendants' notice of appeal was in the following terms:—

"1. The learned trial judge misdirected himself in law and on the facts (a) in holding that someone who has a contract of service may successfully invoke the principle of natural justice if his position under the contract resembles that of the holder of an office; (b) in holding that the plaintiff's position should be regarded as that of the holder of an office (or as resembling that of the holder of an office) and not that of an employee only; (c) in holding that the principle of natural justice applied to the termination of the plaintiff's employment under clause 12(c) of his contract of employment; (d) in holding that as the plaintiff did not get notice of the charges against him and as he was not given an opportunity to make his defence the termination of the plaintiff's contract was invalid; (e) in holding that he had no jurisdiction to substitute a conclusion which he might have arrived at for that which the directors might have reached if they had given the plaintiff an opportunity to make his case; (f) in holding that the plaintiff was entitled to damages by reason of the failure of the defendants to give the plaintiff notice of the charges against him and the failure of the directors of the holding company to give him an opportunity to make his defence; (g) having decided that the plaintiff was guilty of serious misconduct and serious neglect of duty and that these injuriously affected the business, property and management of the operating company in holding that the plaintiff was entitled to damages; (h) in holding that the plaintiff was entitled to damages in the absence of any or

any sufficient proof that the directors of the holding company would or would probably have dealt with the plaintiff otherwise than as they did in the event of its directors having given the plaintiff an opportunity to be heard."

By an order dated the 13th March, 1970, the Supreme Court (Ó Dálaigh C.J., Budd and FitzGerald JJ.) directed with the consent of the parties that the hearing of the appeal be confined in the first instance to the issues raised by para. 1 of the defendants' grounds of appeal (*supra*).

At the hearing of the defendants' appeal to the Supreme Court, the title of the action was altered by the substitution of Brittain Smith & Co. Ltd., Smith Manufacturing Ltd., Lincoln and Nolan Ltd. and Brittain Smith (Service) Ltd. as defendants in place of B.L.N. Ltd., Lincoln and Nolan Ltd., Lincoln and Nolan (Sales) Ltd. and Lincoln and Nolan (Parts) Ltd. respectively.

E. M. Wood S.C. and *D. D. Costello S.C.* (with them *K. O'Shaughnessy*), for the defendants:—

Assuming the correctness of the finding of the trial judge that the plaintiff's position *vis-à-vis* the defendents was analogous to that of the holder of an office, the proper relief to have given him in this case was a declaratory order, with an inquiry as to damages; in view of the serious misconduct and neglect found against the plaintiff, that inquiry should have resulted in a finding that no damages were due.

The trial judge has misapplied the decision of the House of Lords in *Ridge* v. *Baldwin*[26] which does not decide that a servant is entitled to damages for breach of contract where he has been dismissed for good cause, but without having been given an opportunity at the time of his dismissal to defend himself against the charges made against him. *Vine* v. *National Dock Labour Board*[27] is distinguishable from the present case since in that case the terms of the plaintiff's employment were governed by a statutory scheme of employment.

An employer, in dismissing an employee, is not exercising a quasi-judicial function. If he were, the employee would be, as it is agreed that he is not, entitled to an order of certiorari against the employer: *Vidyodaya University*

[26][1964] A.C. 40.

[27][1957] A.C. 488.

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Council v. *Silva*.[28] [They also referred to *Nakkuda Ali* v. *Jayaratne*[29]]

If the plaintiff's contract of employment had provided that he should be heard before being dismissed, he could have enforced that term of the contract, but that was not the case here. The plaintiff appears to have been regarded by the trial judge as seeking both a declaration that his dismissal from his employment was a nullity and damages for wrongful dismissal. The two remedies are normally alternative, not co-extensive: *Barber* v. *Manchester Regional Hospital Board*.[30] [They also referred to *Palmer* v. *Inverness Hospitals Board*[31]; *Malloch* v. *Aberdeen Corporation*[32]; *Glynn* v. *Keele University*.[33]]

The courts' power to interfere with the dismissal of an employee is conditional on such dismissal either being made on frivolous or futile grounds, or having been carried out in such a way as to lead to a "real substantial miscarriage of justice" (*per* Lord Evershed in *Ridge* v. *Baldwin*[34]). None of these pre-conditions exist here, where we have the anomalous position that the trial judge has held that the defendants, having made a full inquiry, were fully justified in dismissing the plaintiff but that nonetheless the plaintiff is entitled to damages for wrongful dismissal.

G. J. W. Lardner S.C. (with him *C. B. McKenna S.C.* and *J. Grattan Esmonde*), for the plaintiff:—

The plaintiff was already a director of all four defendant companies when he was employed as technical director under the service agreement which was terminated. As such, he was an office-holder of the four companies, and not a mere servant of the companies.

The power to remove him from his office of director under clause 12(c) involved the fair investigation of any charges of misconduct or neglect made against him. This, in turn, involved acquainting the plaintiff with such charges and giving him an opportunity of meeting them. The power of removal could be exercised only after an objective investigation of the charges for the purpose of

[28] [1965] 1 W.L.R. 77.
[29] [1951] A.C. 66.
[30] [1958] 1 W.L.R. 181.
[31] 1963 S.C. 311.
[32] [1971] 1 W.L.R. 1578.
[33] [1971] 1 W.L.R. 487.
[34] [1964] A.C. 40, 93.

deciding (a) whether serious misconduct or neglect of duty by the plaintiff was established and (b) if so, whether such misconduct or neglect had injuriously affected any one of the four companies. Even after a full investigation, the members of the board could only dismiss the plaintiff if they were unanimous on both these points.

A director of a company is not to be regarded as being on the same footing as a servant of the company: *In re Newspaper Proprietary Syndicate Ltd.*: *Hopkinson* v. *Newspaper Proprietary Syndicate Ltd.*[35] and see Bowen L.J. in *Hutton* v. *West Cork Railway Co.*[36] His position is that of an office holder: *McMillan* v. *Guest.*[37] [He also referred to s. 2 of the Companies Act, 1963] Where a person is removed from an office, or from a position analogous to an office, his employer is required to act judicially: *Ridge* v. *Baldwin*[38]; *McClelland* v. *Northern Ireland General Health Services Board*[39]; *The State* (*Curtin*) v. *Minister for Health.*[40] [He also referred to *Cox* v. *Electricity Supply Board.*[41]]

Quite apart from the plaintiff's contractual position, the defendants, in exercising their powers of dismissal, must act by reference to constitutional principles of natural justice and may not deprive the plaintiff of a property right without notice to him, or giving him an opportunity to be heard: *Ridge* v. *Baldwin*[38]; *Fisher* v. *Jackson*[42]; *Cooper* v. *Wandsworth Board of Works*[43]; *Maunsell* v. *Minister for Education and Breen*[44]; *Wood* v. *Woad.*[45] [He also referred to the Constitution of Ireland, 1937, Article 40, s. 3, sub-ss. 1 and 2; *McDonald* v. *Bord na gCon*[46]; *East Donegal Co-operative* v. *The Attorney General*[47]; *The Queen* v. *Smith*[48]; *Foley* v. *Irish Land Commissioner*[49]; and *The State* (*O'Sullivan*) v. *Buckley.*[50]]

The right of the courts to inquire whether natural justice has been observed in an employer's dealings with an employee cannot be ousted even by the express terms of the

[35] [1900] 2 Ch. 349.
[36] (1883) 23 Ch. D. 654, 672.
[37] [1942] A.C. 561.
[38] [1964] A.C. 40.
[39] [1957] N.I. 100.
[40] [1953] I.R. 93.
[41] [1943] I.R. 94.
[42] [1891] 2 Ch. 84.
[43] (1863) 14 C.B. N.S. 180.
[44] [1940] I.R. 213.
[45] (1874) L.R. 9 Exch. 190.
[46] [1965] I.R. 217.
[47] [1970] I.R. 317.
[48] (1844) 5 Q.B. 614.
[49] [1952] I.R. 118.
[50] (1964) 101 I.L.T.R. 152.

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contract of employment: *Lawlor* v. *Union of Post Office Workers*[51]; *Barnes* v. *Youngs*.[52] [He also referred to *Lee* v. *Showmen's Guild of Great Britain*[53]; *The State (Curtin)* v. *Minister for Health*[54]; *Flynn* v. *Great Northern Railway Co. (Ir.) Ltd.*[55]] No intention to contract out of the constitutional right to a fair hearing can, in any case, be spelt out of the plaintiff's contract.

The board of the first defendants was under a constitutional obligation not to deprive the plaintiff of his position, and his pension rights, without giving him due notice of the charges made against him and an opportunity of being heard. A dismissal after such notice might well have been valid; a dismissal without such notice was a breach of contract for which the plaintiff was properly held entitled to recover damages. [He referred to *General Billposting Co. Ltd.* v. *Atkinson*.[56]]

Normally, where there has been a purported termination of a contract of service, the contract will not be treated as subsisting, but it may be so treated in a case where damages will not provide an adequate remedy: *Hill* v. *C. A. Parsons Ltd.*[57]

Cur. adv. vult.

Dec. 18

Ó DALAIGH C.J.:—

I have read the judgment which Mr. Justice Walsh is about to deliver. I agree with it and have nothing to add.

WALSH J.:—

The history of the formation and incorporation of the defendant companies is so fully set out in the judgment of Mr. Justice Kenny that it is unnecessary for me to repeat it. For the same reason it is unnecessary to set out any detailed history of the earlier associations of the plaintiff with the defendant companies.

[*The judge referred to the service agreement and, in particular, to clause* 12(*c*) *thereof; to the pension scheme; to the report submitted to, and the resolution passed at, the*

[51] [1965] Ch. 712.
[52] [1898] 1 Ch. 414.
[53] [1952] 2 Q.B. 329.
[54] [1953] I.R. 93.
[55] (1953) 89 I.L.T.R. 46.
[56] [1909] A.C. 118.
[57] [1972] Ch. 305.

meeting of the board of directors of the holding company held on the 5th July, 1966; *to the letter dated the 8th July,* 1966, *from the holding company to the plaintiff; and to the resolutions passed by the boards of the operating company, the sales company and the factors company on the 13th July,* 1966. *The judge then continued . . .*]

For the purpose of this limited[58] appeal only, it is unnecessary to go into details of the particular complaints. I proceed on the assumption that the learned trial judge's assessment of the facts and his conclusion that the plaintiff was guilty of serious neglect of duty and of serious misconduct were correct, and that the nature of the neglect and misconduct was such that the directors could reasonably have considered them to have injuriously affected the business, property and management of the operating company.

At the time the plaintiff was given his notice of dismissal he knew nothing of these charges because he was not given notice of them nor was he given any opportunity to answer them. In fact, he did not find out what the charges were until April, 1967. On the 27th July, 1966, the plaintiff issued proceedings for damages for wrongful dismissal. His statement of claim was delivered on the 15th December, 1966. The defendants delivered their defence on the 9th March, 1967, and alleged that the plaintiff was guilty of misconduct and neglect and that the defendants acted in lawful exercise of their rights under the agreement. On the 13th March the plaintiff's solicitor asked for particulars of the alleged misconduct and neglect and, in a long and detailed reply of the 12th April from the defendants' solicitors, the plaintiff learned for the first time the charges upon which the defendants sought to justify his dismissal. The plaintiff in his reply, which was delivered on the 24th May, denied that he was guilty of the alleged or any misconduct or neglect and claimed that the boards were acting in excess of the authority vested in them under the service agreement to dismiss the plaintiff. The reply also claimed that the opinion formed by the board was not a *bona fide* one based upon any fair or proper inquiry or investigation into the circumstances of the case or upon any reasonable or justifiable grounds, and that it was formed without

[58] See p. 419, *ante*.

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reasonable or probable cause. It also claimed that the several boards of directors, in passing the resolutions, acted contrary to the principles of natural justice.

Mr. Justice Kenny held that, as the plaintiff did not get notice of the charges against him and as the directors of the holding company did not give him an opportunity to make his defence, the termination of the plaintiff's contract by the resolution[59] of the 5th July and the letter of the 8th July, 1966, was invalid; the judge held that the plaintiff was entitled to damages against the defendants. Mr. Justice Kenny reviewed the various cases he mentioned in his judgment, in particular the decision of the House of Lords in *Ridge* v. *Baldwin*[60]; the speech of Lord Reid in that decision led him to the conclusion that the plaintiff's position should be equated to that of the holder of an office, and not that of an employee only, and that the principles of natural justice applied to a termination under clause 12(c) of the plaintiff's agreement.

In my opinion, this case hinges entirely upon clause 12(c) of the service agreement. The defendants have relied upon this particular clause to justify their summary dismissal of the plaintiff. I agree with Mr. Justice Kenny when he states that, because of the express provisions of this clause, no implied term is to be read into the contract that the plaintiff might be summarily dismissed for misconduct. On the contrary, the clause expressly provides that the plaintiff could not be validly dismissed for misconduct unless it was serious misconduct and was of a kind which, in the unanimous opinion of the board of directors of the holding company present and voting at the meeting, injuriously affected the reputation, business or property of either that company or of the subsidiary companies. The question of whether or not such a contract could be terminated summarily for breach of fundamental condition on the part of the plaintiff was not raised in this case and was not relied upon by the defendants so I do not feel any need to offer any view upon that point. It appears to me quite clear that the operation of clause 12(c) would necessarily involve (a) the ascertainment of the facts alleged to constitute serious misconduct, (b) the determina-

[59]See p. 390, *ante*.

[60][1964] A.C. 40.

tion that they did in fact constitute serious misconduct, and (c) that the members of the board present and voting should be unanimously of opinion that the serious misconduct injuriously affected the reputation, business or property of the holding company or of the subsidiary companies. The parties by their conduct explicitly set up the machinery for dismissal specified in clause 12(c); that machinery designated the board of directors as the tribunal, and required unanimity of opinion upon the effect of such serious misconduct if it should be proved.

In my view, it was necessarily an implied term of the contract that this inquiry and determination should be fairly conducted. The arguments and submissions in this Court ranged over a very wide field particularly in the field of constitutional justice: see the judgments of this Court in *McDonald* v. *Bord na gCon*[61] and *East Donegal Co-operative* v. *The Attorney General.*[62] The Constitution was relied upon; in particular Article 40, s. 3, of the Constitution. This Court in *In re Haughey*[63] held that that provision of the Constitution was a guarantee of fair procedures. It is not, in my opinion, necessary to discuss the full effect of this Article in the realm of private law or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures. It is unnecessary to decide to what extent the contrary can be provided for by agreement between the parties. In the present case the provisions of clause 12(c) do not seek expressly or by implication to exclude the right of any of the parties to a fair procedure.

The plaintiff was neither told of the charges against him nor was he given any opportunity of dealing with them before the board of directors arrived at its decision to dismiss him. In my view this procedure was a breach of the implied term of the contract that the procedure should be fair, as it cannot be disputed, in the light of so much authority on the point, that failure to allow a person to meet the charges against him and to afford him an adequate

[61] [1965] I.R. 265.

[62] [1970] I.R. 317.

[63] [1971] I.R. 217.

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opportunity of answering them is a violation of an obligation to proceed fairly.

Having regard to the evidence which was given at the trial, one could not say with any degree of certainty that the members of the board of directors would have come to the same conclusion on the facts as Mr. Justice Kenny did, or that they would have arrived at a unanimity of opinion on the effects of such misconduct as they might have found proved, particularly when one has regard to the close personal relationships which existed between some members of the board and the plaintiff and their knowledge of his activities in the firm since he joined it. But even if one could say with certainty that, if he had been given a fair hearing, the result would still have been the same, in my view that does not offer any ground for validating retroactively a procedure which was clearly invalid. It is to be noted that the board acted with great haste in dismissing the plaintiff, and on a report which did not contain complaints or allegations of misconduct set out with the particularity with which they were set out subsequently in the reply to the plaintiff's notice for particulars. Furthermore, as was settled by this Court in *Carvill* v. *Irish Industrial Bank Ltd.*[64], an employer, in defending an action by an employee for wrongful summary dismissal, cannot rely upon misconduct which was not known by the employer at the time of the dismissal. I would add that the misconduct, if known but not in fact used as a ground for dismissal at the time, cannot be relied upon afterwards in an effort to justify the dismissal.

For the reasons I have already stated, I am of opinion that the plaintiff was wrongfully dismissed in that the dismissal was a violation of the provisions of clause 12(c) of the service agreement because of the failure to inform him of the charges against him and the failure to give him an adequate opportunity of answering them.

I am conscious of the fact that Mr. Justice Kenny's conclusion that the defendants had acted in breach of the contract is based on somewhat different grounds and, therefore, I should deal with Mr. Justice Kenny's reasons. He placed great reliance upon the speech of Lord Reid in *Ridge* v. *Baldwin*[65] and quoted with apparent approval the

[64][1968] I.R. 325.

[65][1964] A.C. 40.

passage at p. 65 of the report in which Lord Reid said:— "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract." This particular point does not arise for decision in this case but I wish to expressly reserve my opinion on the correctness of this statement if it is intended to convey that a court cannot make a declaration which would have the effect of reinstating a person wrongfully dismissed. I do not think that the decision in *Ridge* v. *Baldwin*[66] is directly applicable to the present case. In that case the appellant was a Chief Constable and by a statutory provision the watch committee had power to suspend or dismiss him when they thought him negligent in the discharge of his duty or otherwise unfit for the same. The Chief Constable was not the servant of the watch committee, or of any one else, and he was the holder of an office from which he could be only dismissed in accordance with statutory provisions. It was held that the power of dismissal of this officer, contained in the Municipal Corporations Act, 1882, could not have been exercised until the watch committee had informed the officer of the grounds on which they proposed to proceed and had given him a proper opportunity to present his case in defence. It was a prerequisite that the question of neglect of duty should be considered in a judicial spirit and that could not be done without giving the officer in question the opportunity to defend himself against such a charge, and he would therefore have to be told what was the alleged neglect of duty. As that had not been done the decision was a nullity.

Unlike the present case, *Ridge* v. *Baldwin*[66] was not governed by the terms of a contract. In my view, once the matter is governed by the terms of a contract between the parties, it is immaterial whether the employee concerned is deemed to be a servant or an officer in so far as the distinction may be of relevance depending on whether the contract is a contract for services or a contract of service. In the present case it is immaterial whether the

[66] [1964] A.C. 40.

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plaintiff is an officer or a servant of his employers and, in my view, the case does not fall to be decided upon that distinction but rather upon the actual terms of the contract for the reasons I have already given.

Mr. Justice Kenny attached importance to the fact that the plaintiff's position with any of the four companies involved could be terminated by the directors of one of them (namely, the holding company) and that this was a characteristic which equated his position to that of an officer. This particular position was the result of a contract between the parties, including the plaintiff, and clause 12(c) of the service agreement gave the directors of the holding company the final decision in whether or not he should be dismissed. I agree with Mr. Justice Kenny in so far as he says that this situation strengthened the plaintiff's position in his claim to have a fair hearing, but it leads me to the conclusion that this right was an implied term of the contract by reason of the particular machinery set up by clause 12(c) and, therefore, it is not necessary to examine what might have been the plaintiff's position if such a machinery had not been provided. The relationship between the plaintiff and the defendants was a contractual one in so far as this particular matter is concerned.

Even if there had not been a pre-existing contractual relationship and the plaintiff had been invited to attend such an inquiry, it is probably correct to say, as Harman J. held in *Byrne* v. *Kinematograph Renters Society*[67], that a contract between the plaintiff and the defendants that the inquiry would be fairly conducted could be implied. It never appears to have been doubted in cases decided in England that, if the basis of the jurisdiction to conduct such an inquiry was based on statute or on the agreement of the parties, public policy prevents the exclusion of the rules of what in England is called natural justice where they ought to be observed. It is unnecessary in this case to enter into an examination of the other aspects of this problem which have engaged English courts, namely, whether the obligation to observe the rules of natural justice can be relied upon in a case where the relationship

[67] [1958] 1 W.L.R. 762.

between the parties is not founded either on statute or on contract.

Lastly, I come to deal with the defendants' contention that, if a hearing had been given to the plaintiff, there was nothing he could usefully have said and the result would have been the same. I think this proposition only has to be stated to be rejected. The obligation to give a fair hearing to the guilty is just as great as the obligation to give a fair hearing to the innocent. Furthermore, in this case, by reason of the provisions of clause 12(c), it would not be simply a case of establishing guilt or innocence, because the most important and effective power of the board of the holding company was one which was mainly a discretionary power, namely, to form the opinion or not that the plaintiff's misconduct injured any of the four companies.

For the reasons I have already given, I am of opinion that the defendants' appeal on all the matters set out in para. (1) of the said notice of appeal[68] should be dismissed. This appeal, which took the form of an appeal confined in the first instance to the issues set out in the said paragraph of the notice of appeal, was heard pursuant to the order of this Court of the 13th March, 1970, which gave liberty to the parties to have the appeal on these issues heard in the first instance. Summarised briefly, the issues set out in para. (1) of the notice of appeal were whether the plaintiff was entitled to receive notice of the charges against him and to be given an opportunity to reply to the same, by virtue of clause 12(c) of the service agreement, before he could be dismissed; and whether he was entitled to damages for wrongful dismissal when he did not receive such notice before his dismissal. I am expressing no view on what damages the plaintiff should receive, or on what basis they should be calculated, as that aspect of the appeal has not yet been heard.

FITZGERALD J.:—

In my opinion the defendants' appeal in this case should be allowed. It appears to me that by the agreement of the 10th January, 1964, between the four companies and the plaintiff, the relationship of master and servant was

[68] See p. 418, *ante*.

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created and the plaintiff thereby became the technical director of all four companies. His duties were set out in the agreement as including an obligation to obey, conform, and comply with the orders of the directors of the respective boards. He was obliged to devote his whole time to the business of the companies and was precluded from having an interest in any competitive concern. His basic salary for his services to the four companies was fixed at £2,250 p.a. plus £250 expenses. In addition provision was made for commission to be paid to him by the holding company dependent on the net profits, if any, of the operating company. The employment was for five years with provision for its extension. I take the view that the plaintiff was a servant of the four companies and not an "officer" or "official", as was submitted on his behalf.

Clause 12 provides for the termination of his employment by the four companies. The material clause for consideration is clause 12(c) which is as follows:—

"12. Mr. Glover's appointment as technical adviser[69] of all the companies may be terminated without giving rise to any claim for compensation or damages upon the happening of any events following, namely . . . (c) if Mr. Glover shall be guilty of any serious misconduct or serious neglect in the performance of his duties or wilfully disobeys the reasonable orders directions or restrictions or regulations of the board of directors of any of the said companies which in the unanimous opinion of the board of directors for the time being of the holding company present and voting at the meeting injuriously affect the reputation business or property or management of either the holding company or the operating company or the sales company or the factors company."

Other than the necessity for the decision of the directors of the holding company being unanimous, no procedure for the holding of the directors meeting is stipulated. The directors of the holding company met on the 5th July, 1966, and unanimously decided[69] on his dismissal. The directors' decision falls within the provisions of clause 12(c) of the contract.

Lord Reid in *Ridge* v. *Baldwin*[70] states at p. 65 of the

[69] See p. 390, *ante*.

[70] [1964] A.C. 40.

report:— "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract." I accept that as being a correct statement of the law. The many cases quoted in support of the plaintiff establish that a person holding an office created by statute or statutory regulation, or subject to prescribed procedure imposed by statute, statutory regulation or the contract of employment itself, is entitled to insist upon the prescribed procedure being followed and upon being given full opportunity of meeting any charges or complaints against him. In my opinion, the plaintiff in the present case is not entitled to such safeguards. His rights are to be found solely within the contract of his employment as the servant of the four companies.

The decision of Mr. Justice Kenny, following a full hearing of the facts, was that the plaintiff's conduct would have justified dismissal and yet he was awarded over £9,000 damages for wrongful dismissal; this appears to me to be inconsistent in itself and it fortifies my view that the plaintiff should have been non-suited and that this appeal should be allowed.

There has been a judicial determination by Mr. Justice Kenny that the plaintiff's conduct amounted to a breach by him of his contract which his employers were entitled to treat, and have treated, as a breach of his contract; and I fail to see how he can be awarded damages against them in this action.

Solicitors for the plaintiff: *W. & E. Bradshaw.*

Solicitors for the defendants: *A. & L. Goodbody.*

E.P.de B.

In the matter of an appeal pursuant to **s. 90(1)** of the **Employment Equality Acts 1998 to 2011**. **Nano Nagle School**, Appellant v. **Marie Daly**, Respondent and **The Irish Human Rights and Equality Commission**, *Amicus Curiae* [2019] IESC 63, [S.C. No. 37 of 2018]

Supreme Court 31 July 2019

Equality – Employment – Discrimination – Disability – Competency – Capability – Reasonable accommodation – Statutory interpretation – Duties – Proportionality – Fair procedures – Whether competency and capability to be assessed after reasonable accommodation made – Employment Equality Act 1998 (No. 21), ss. 16 and 82 – Directive 2000/78/EC, recitals 17, 20 and 21, article 5 – United Nations Convention on the Rights of Persons with Disabilities, articles 1, 2 and 5.

Practice and procedure – Statutory appeal – Appeal from expert tribunal – Appeal on point of law – Ultra vires determination – Whether failure in statutory duty of expert tribunal amounting to issue of law requiring intervention of court.

Words and phrases – "Duties" – "Tasks" – Employment Equality Act 1998 (No. 21).

The Employment Equality Act 1998, as amended, provides, *inter alia*, as follows:-

"16.–(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—

(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or

(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.

…

(3)(a) For the purposes of this Act, a person who has a disability is fully competent to undertake, and fully capable of undertaking, any duties if the person would be so fully competent and capable of reasonable accommodation (in this subsection referred to as 'appropriate measures') being provided by the person's employer.

(b) The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability—

(i) to have access to employment,

(ii) to participate and advance in employment or

(iii) to undergo training,

unless the measures would impose a disproportionate burden on the employer.

(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of—

(i) the financial and other costs entailed,

(ii) the scale and financial resources of the employer's business, and

(iii) the possibility of obtaining public funding or other assistance."

The respondent was employed as a special needs assistant by the appellant school, which catered for children with various disabilities and needs. The respondent became paralysed from the waist down and was required to use a wheelchair. Following a course of rehabilitation, the respondent sought to resume her employment. The appellant conducted an assessment process, which identified a number of tasks that the respondent could no longer undertake in light of her disability. The redistribution of some of the tasks identified in the assessment process was not considered by the appellant. A report completed by an occupational therapist for the appellant suggested that the respondent might be suitable for the role of a floating special needs assistant, although no such role existed within the school. An informal inquiry was made about the feasibility of funding for the role of a floating special needs assistant but was not followed up. Ultimately, the appellant decided that the respondent was not in a position to return to her work as a special needs assistant.

The respondent brought an application to the Equality Tribunal claiming that the appellant's actions were discriminatory and that the appellant had failed to provide her with reasonable accommodation or appropriate measures to enable her to return to work. The Equality Tribunal found that the respondent was no longer fully competent to undertake, or fully capable of undertaking, the duties attached to the role of special needs assistant.

The Labour Court reversed the decision on the basis, *inter alia*, that the appellant had failed to comply with s. 16(3) of the 1998 Act. The Labour Court found that the appellant had failed in its duty to fully consider the viability of a reorganisation of work and a redistribution of tasks among all of the school's special needs assistants so as to relieve the respondent of those duties that she was unable to perform.

The appellant appealed to the High Court on points of law. The appellant submitted, *inter alia*, that the Labour Court ignored significant evidence to the effect that, even with the most extensive measures, the respondent was not fit for the role of special needs assistant in the school. The appellant further submitted that the Labour Court in effect concluded that s. 16 of the 1998 Act could be construed so as to require the employer to reorganise and restructure the job so that the employee would only be required to carry out the essential duties of the job so restructured rather than the original job itself. The High Court (Noonan J.) upheld the decision of the Labour Court (see [2015] IEHC 785).

The appellant appealed to the Court of Appeal (Ryan P., Finlay Geoghegan and Birmingham JJ.), which allowed the appeal and reversed the decision of the High Court (see [2018] IECA 11). The Court of Appeal held, *inter alia*, that s. 16 of the 1998 Act required full competence as to tasks that were the essence of the position and that the respondent was unable to perform the essential tasks of a special needs assistant in the particular school.

The respondent sought leave to appeal to the Supreme Court, *inter alia*, on the grounds that the decision of the Court of Appeal introduced significant qualifications to the obligations on employers to consider the redistribution of tasks to facilitate persons with disabilities in the workplace. The respondent was granted leave to appeal by the Supreme Court (see [2018] IESCDET 103).

Held by the Supreme Court (O'Donnell, MacMenamin, Dunne and O'Malley JJ.; Charleton J. dissenting in part), in allowing the appeal and remitting the case to the Labour Court, 1, that, read together, s. 16(1) and s. 16(3) of the 1998 Act provided that while an employer was not required to retain an individual in a position if that person was no longer fully competent and available to undertake the duties attached to that position, a person with a disability who could be reasonably accommodated was deemed to be capable of performing the job as if they had no disability. This was subject to the condition that reasonable accommodation should not impose a disproportionate burden on the employer.

2. That the requirement to take appropriate measures to enable a person with a disability to have access to employment, to participate and advance in employment or to undergo training was a mandatory primary duty on the part of an employer.

3. That an employer was required to give the question of redistribution of duties full consideration and, in considering the question of removing or redistributing duties as a means of reasonable accommodation, there was no distinction to be made between the words "duties" and "tasks" contained in s. 16 of the 1998 Act. The test was whether, with reasonable accommodation, the employee was fully capable of undertaking the duties attached to the position and it was a test of fact, to be determined in accordance with the employment context.

Per Charleton J. (concurring): Occluding the legislation with a legal mist of fine distinctions as between various terms for work or tasks and asking such questions as to core competencies and attempting a perfect definition of any particular form of employment in distinction from the commonsense and honest appraisal that the legislation clearly required was to do a disservice to the human rights of disabled individuals. It was always a question of what could be done and whether it would really help the person who had a disability to do their job. If the ability to be "fully competent", with "reasonable accommodation", was not there, then there was no discrimination according to the legal definition if the person could not do the work.

4. That the test to determine whether what was required to allow a person employment was reasonable accommodation was one of reasonableness and proportionality. An employer was not under a duty to re-designate entirely or create a different job to facilitate an employee.

5. That, in considering the provision of reasonable accommodation, an employer had a mandatory duty to examine the possibility of obtaining public funding or other assistance.

6. That while an employer did not have a mandatory duty to consult with an employee at every stage when assessing the provision of reasonable accommodation, a prudent employer would provide an employee with meaningful participation. However, the absence of consultation could not, in itself, constitute discrimination under s. 8 of the 1998 Act.

Bolger v. Showerings (Ireland) Ltd. [1990] E.L.R. 184, *Humphries v. Westwood Fitness Club* [2004] E.L.R. 296 and *Dublin Bus v. McKevitt* [2018] IEHC 78, [2018] E.L.R. 193 considered.

7. That, as a matter of fair procedures, parties were entitled to be provided with an appropriate level of reasoning and definitions for the level of compensation awarded.

8. That in failing to address relevant evidence that had the potential to be determinative of an issue, if not the claim, before it, the Labour Court did not fulfil its statutory duty. While the court would be slow to interfere with a decision of an expert administrative tribunal, it had to intervene where there was a substantial failure of compliance with statutory duty such that the relevant determination was *ultra vires*.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34 and *Attorney General v. Davis* [2018] IESC 27, [2018] 2 I.R. 357 considered.

9. That the court could not act as a surrogate Labour Court, which was charged with a statutory function, and thus the only appropriate order was to remit the matter to the Labour Court for further consideration in accordance with the totality of the evidence adduced, together with such further limited evidence as might be necessary, and the law as explained by the court.

Per Charleton J. (dissenting): What was done, in giving the respondent an opportunity to consult with a doctor and to engage with every aspect of the case as to the effect which her disability had on the highly responsible and demanding work of a special needs assistant, sufficed as a procedure. It was for an employer to be open to the prospects for engagement and to consider what could in good faith be done and there was nothing in the papers before the court whereby the genuineness of either side could be doubted.

Cases mentioned in this report:-

Adidas-Salomon AG v. Fitnessworld Trading Ltd. (Case C-408/01) [2003] ECR I-12537; [2004] 1 C.M.L.R. 14; [2004] Ch. 120; [2004] 2 W.L.R. 1095.

Air Transport Association of America v. Secretary of State for Energy and Climate Change (Case C-366/10) [2011] E.C.R. I-13755; [2012] 2 C.M.L.R. 4; [2012] All E.R. (EC) 1133.

Archibald v. Fife Council [2004] UKHL 32, [2004] I.C.R. 954; [2004] 4 All E.R. 303; [2004] I.R.L.R. 651; (2004) 82 B.M.L.R. 185.

Attorney General v. Davis [2018] IESC 27, [2018] 2 I.R. 357; [2018] 2 I.L.R.M. 486.

BMW v. Deenik (Case C-63/97) [1999] E.C.R. I-905; [1999] 1 C.M.L.R. 1099; [1999] All E.R. (EC) 235; [1999] E.T.M.R. 339.

Bolger v. Showerings (Ireland) Ltd. [1990] E.L.R. 184.

British Gas Services Ltd. v. McCaull [2001] I.R.L.R. 60.

Burnip v. Birmingham City Council [2012] EWCA Civ 629, [2012] L.G.R. 954.

Chief Constable of South Yorkshire Police v. Jelic [2010] I.R.L.R. 744.

Dublin Bus v. McKevitt [2018] IEHC 78, [2018] E.L.R. 193.
Faccini Dori v. Recreb Srl (Case C-91/92) [1994] E.C.R. 1-3325; [1995] 1 C.M.L.R. 665; [1995] All E.R. (EC) 1.
A.H. v. West London Mental Health Trust and Secretary of State for Justice [2011] UKUT 74, (Unreported, United Kingdom Upper Tribunal (Administrative Appeals Chamber), 17 February 2011).
Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34; [1998] E.L.R. 36.
Humphries v. Westwood Fitness Club [2004] E.L.R. 296.
HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11) [2013] I.C.R. 851; [2013] 3 C.M.L.R. 21; [2014] All E.R. (EC) 1161; [2013] I.R.L.R. 571; (2013) 132 B.M.L.R. 58.
International Fishing Vessels Ltd v. Minister for Marine [1989] I.R. 149.
Mallak v. Minister for Justice [2012] IESC 59, [2012] 3 I.R. 297; [2013] 1 I.L.R.M. 73.
Marleasing SA v. La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] E.C.R. I-4135; [1992] 1 C.M.L.R. 305; [1993] B.C.C. 421.
Mid Straffordshire General Hospitals NHS Trust v. Cambridge [2003] I.R.L.R. 566.
Muzi-Mabaso v. Commissioners for Her Majesty's Revenue and Customs [2016] EWCA Civ 1369, (Unreported, Court of Appeal of England and Wales, 27 October 2016).
Nano Nagle School v. Daly [2015] IEHC 785, (Unreported, High Court, Noonan J., 11 December 2015).
Nano Nagle School v. Daly [2018] IECA 11, [2018] E.L.R. 249.
Océano Grupo Editorial S.A. v. Murciano Quintero (Joined Cases C-240/98 to C-244/98) [2000] E.C.R. I-4941; [2002] 1 C.M.L.R. 43.
Pfeiffer v. Deutches Rote Kreuz (Case C-397/01) [2004] E.C.R. I-8835; [2005] 1 C.M.L.R. 44.
R. (Davey) v. Oxfordshire County Council [2017] EWCA Civ. 1308, (Unreported, English Court of Appeal, 1 September 2017).
Royal Bank of Scotland v. Ashton [2011] I.C.R. 632.
The State (Daly) v. Minister for Agriculture [1987] I.R. 165; [1988] I.L.R.M. 173.
Pok Sun Shum v. Ireland [1986] I.L.R.M. 593.
Tarbuck v. Sainsbury's Supermarkets Ltd. [2006] I.R.L.R. 664.
Von Colson v. Land Nordrhein-Westfalen (Case C-14/83) [1984] E.C.R. 1891; [1986] 2 C.M.L.R. 430.

Wagner Miret v. Fondo de Grantía Salarial (Case C-334/92) [1993] E.C.R. I-6911; [1995] 2 C.M.L.R. 49.
Z. v. A. (Case C-363/12) [2014] 3 C.M.L.R. 20; [2014] I.R.L.R. 563.

Determinations of the Supreme Court mentioned in this report:-
Nano Nagle School v. Daly [2018] IESCDET 103, (Unreported, Supreme Court, 6 July 2018).

Appeal from the Court of Appeal

The facts have been summarised in the headnote and are more fully set out in the judgments of MacMenamin and Charleton JJ., *infra*.

By judgment delivered on 11 December 2015 and order made on 13 January 2016, the High Court (Noonan J.) dismissed the appellant school's appeal from the Labour Court determination overturning the decision of the Equality Tribunal ([2015] IEHC 785). The appellant appealed to the Court of Appeal (Ryan P., Finlay Geoghegan and Birmingham JJ.) which, by judgment dated 31 January 2018 and order dated 21 February 2018, allowed its appeal ([2018] IECA 11).

By way of application for leave and notice of appeal dated 20 March 2018, the respondent sought leave pursuant to Article 34.5.3° of the Constitution to appeal to the Supreme Court. On 6 July 2018, the Supreme Court (O'Donnell, Dunne and O'Malley JJ.) granted leave to the respondent to appeal the decision of the Court of Appeal (see [2018] IESCDET 103).

By order made on 9 October 2018, the Irish Human Rights and Equality Commission was granted liberty to appear before the Supreme Court as *amicus curiae* in the proceedings.

The appeal was heard by the Supreme Court (O'Donnell, MacMenamin, Dunne, Charleton and O'Malley JJ.) on 14 March 2019.

Oisín Quinn S.C. (with him *Matthew Jolley* and *Katherine McVeigh*) for the respondent.

Marguerite Bolger S.C. (within her *Heather Nicholas*) for the appellant.

Clíona Kimber S.C. (with her *Cathy Smith*) for the *amicus curiae*.

Cur. adv. vult.

O'Donnell J. 31 July 2019

[1] I have read the judgment about to be delivered by MacMenamin J. and I agree with it.

MacMenamin J.

[2] The respondent, Marie Daly, began work as a special needs assistant ("SNA") in the appellant school in the year 1998. She is also a qualified nurse. The Nano Nagle School in Killarney ("the school") caters for children on the autistic spectrum, and those with mild to profound disabilities. In July 2010, the respondent sustained very serious injuries in an accident whilst on holiday. As a result, she was paralysed from the waist down. Since then she has had to use a wheelchair. She undertook an extensive course of rehabilitation. By the beginning of 2011, she was anxious to resume her employment. The school, as her employer, initiated an assessment process for this purpose. The job of an SNA is a challenging one, and has a significant physical aspect. Ultimately, following a process described in this judgment, the school board refused the respondent permission to return to work.

The equality officer

[3] Advised and assisted by her trade union, the respondent brought an application under s. 83 of the Employment Equality Acts 1998 to 2011 ("the Act") to the Equality Tribunal, now merged into the Workplace Relations Commission (see the Workplace Relations Act 2015). She claimed that the school's decision constituted unlawful discrimination under ss. 6, 8, and 16 of the Act, and that the employer had failed to comply with its statutory duty under s. 16(3) and (4) of the Act to provide "reasonable accommodation" or "appropriate measures" to accommodate her disability, which would have allowed her to return to work. The claim was first heard by an equality officer appointed under the Act. His decision dated 3 December 2013 (see DEC-E2013-168) determined the respondent was no longer fully competent and available to undertake, and no longer fully capable of undertaking, the duties attached to the position. He concluded the school had given consideration to the provision of what are called under s. 16 of the Act "appropriate measures" to enable the respondent to return to work, but that these measures gave rise to "a cost other than a nominal cost", and the school was entitled to rely on s. 16(3) of the Act as a defence. It appears that, referring to *nominal*

cost, the officer was under a misapprehension as to the applicable law; the *nominal cost* test had been removed by s. 9 of the Equality Act 2004; and replaced by the amendment outlined later. This was not the sole basis of his decision, however, as he held the school had a good defence on the basis of incapacity, that there was no discrimination, and the respondent was not entitled to any remedy under the Act.

The Labour Court

[4] The respondent appealed to the Labour Court, which reversed the decision (see EDA 1430, 12 August 2014). It held there had been a failure to comply with s. 16(3) of the Act, and held that, in making its decision on the question of reasonable accommodation, the school had failed to consult with the respondent, who was awarded €40,000 in compensation.

The High Court [2015] IEHC 785 and Court of Appeal [2018] IECA 11

[5] The school appealed to the High Court on points of law. There, Noonan J. upheld the decision of the Labour Court (see [2015] IEHC 785). The school then appealed to the Court of Appeal (Ryan P., Finlay Geoghegan J.; Birmingham J. concurring in both judgments), which upheld the school's appeal, and reversed the decision of the High Court in two judgments, delivered by Ryan P. and by Finlay Geoghegan J. on 31 January 2018 (see [2018] IECA 11). The respondent then applied for leave to appeal to this court, which application was granted in a determination dated 6 July 2018 (see [2018] IESCDET 103).

The leave determination [2018] IESCDET 103

[6] In the leave application, the respondent submitted that the decision of the Court of Appeal introduced significant qualifications to the obligations on employers to consider the redistribution of tasks to facilitate persons with disabilities in the workplace. The panel of this court pointed out that the application appeared to raise the issue of a tension between the *duties* involved in a particular post, and the *tasks* which may be distributed or redistributed by way of reasonable accommodation.

[7] The issues which arise are, undoubtedly, of significant importance, not only to the respondent, but in the broader field of disability law. The

appeal has been elaborately argued on agreed facts, and counsel have helpfully provided extensive and welcome academic commentary, as well as the normal material required for compliance with the practice directions of this court. Counsel for the Irish Human Rights and Equality Commission, as *amicus curiae*, also made helpful written and oral submissions. While the issues turn largely on the interpretation and application of s. 16 of the Employment Equality Act 1998 (as amended), other ancillary questions also arise from the Labour Court's determination.

This appeal

The Act – general background

[8] A general overview of the legislation may be helpful as a starting point. The purpose of the Employment Equality Act 1998 ("the 1998 Act") is, *inter alia*, to promote equality between employed persons, and make further provision with respect to discrimination in, and connection with, employment. The 1998 Act outlaws discrimination in connection with work-related activities on nine distinct grounds, including disability. Whether the respondent, an employee with a disability can be reasonably accommodated with what are called "appropriate measures" is a core issue arising from s. 16 of the 1998 Act. The difficulty arises with the identification of what the *duties* of a position are. The section undoubtedly requires that tribunals, and courts, should decide what those duties are. But, even before the 1998 Act was enacted, scholars expressed concern that the then-proposed legislation was insufficiently specific, as it lacked a clear definition of what the "essential" and "non-essential" duties of a work-position were. It was suggested this lack of clarity raised the possibility that the provisions of the 1998 Act might be interpreted "narrowly", so that it would be necessary for an employee with a disability to demonstrate that they could undertake *all* the duties of the position, whether with or without reasonable accommodation. (*cf.* Quinn and Quinlivan, "Disability Discrimination: the need to amend the Employment Equality Act 1998 in light of the EU Framework Directive on Employment", ch. 9 in Costello and Barry (eds.), *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law, 2003) at pp. 24 and 25). The respondent submits that the Court of Appeal so interpreted s. 16, as it now provides, so as to render it necessary for a disabled person, on reasonable accommodation, to be able to perform *all* of what were seen as the core duties of a position of employment. The respondent and the *amicus curiae* submit that such an interpretation is unwarranted by the words of the section

and would defeat the Act's purpose. Counsel for the school stands over the Court of Appeal judgments, submitting that, when properly interpreted, they express the true meaning and effect of s. 16 of the Act.

[9] The 1998 Act, later amended by the Equality Act 2004, repealed the Anti-Discrimination (Pay) Act 1974, and the Employment Equality Act 1977, although re-enacting parts of that legislation with amendments. Insofar as relevant, the purpose of the amendments provided by the Equality Act 2004 was to give effect to those provisions of Council Directives 2000/43/EC, 2000/78/EC and 2002/73/EC, which still required to be implemented in the State. At the time of the amending enactment in 2004, there was some renewed concern that the new provisions of the Equality Act 2004 did not go far enough in transposing the three Directives.

The 1998 Act, as now amended

[10] Section 2(a) of the 1998 Act defines "disability". The definition includes a *partial absence of a person's bodily function.* There is no doubt the respondent comes within this category. Section 6 defines "discrimination". It provides that, for the purposes of the Act, discrimination shall be taken to occur where, on any of the grounds defined in s. 6(2), a disabled person is treated less favourably than another person would be treated. This is referred to as the "disability ground". Section 8 deals with discrimination by employers. It provides, in relevant part, that an employer shall not discriminate against an employee in relation to access to employment, conditions of employment, access to employment, or classification of posts (see s. 8(1)(a), (b) and (e)). Under s. 8(4)(b), an employer is prohibited from having rules or instructions which would result in discrimination against an employee, or class of employees, including in relation to access to, or conditions of, employment, or in the classification of posts. The prohibition therein contained also relates to a "practice" which results, or would be likely to result, in such discrimination. Section 8(6) provides that, without prejudice to the generality of s. 8(1), an employer shall be taken to discriminate against an employee in relation to conditions of employment if, on any of the "discriminatory grounds", the employer does not afford to that employee (a) the same terms of employment (other than remuneration and pension rights), (b) the same working conditions, and (c) the same treatment in relation to overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures, as the employer offers or affords to another person or class of persons.

[11] Section 8(7) provides that, without prejudice to the generality of s. 8(1), an employer shall be taken to discriminate against an employee in relation to training or experience for, or in relation to, employment if, on any of the "discriminatory grounds", that employer refuses to offer or afford to that employee the same opportunities or facilities for employment counselling, training, and work experience as the employer offers or affords to other employees, where the circumstances in which that employee and those other employees are employed are not materially different. It is unnecessary for a claimant to prove there was an intention to discriminate.

Section 16 of the 1998 Act

[12] Section 16 of the 1998 Act, as amended by s. 9 of the Equality Act 2004, deals directly with disabilities in the context of work. Section 16(1) provides that nothing in the 1998 Act is to be:-

> " … construed as requiring any person to recruit or promote an individual to a position, *to retain an individual in a position*, or to provide training or experience to an individual in relation to a position, if the individual—
>
> (a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or
>
> (b) is not (or, *as the case may be, is no longer*) *fully competent and available to undertake, and fully capable of undertaking, the duties* attached to that position, having regard to the conditions under which those *duties* are, or may be required to be, performed" (emphasis added).

Seen in isolation, these emphasised words might convey that an employer does not have to retain an individual who is no longer capable of performing the duties in that position. But the section must be read in its entirety. An important issue arises from the word "duty" or "duties". The same word is not used throughout s. 16. Later, the drafter used the word "tasks" (see s. 16(4)(b)). Do the words "duties" and "tasks" have the same meaning, or not? The Court of Appeal held that the law permitted, and required, the distribution of "tasks", but that there was no obligation to remove from a disabled employee, or distribute to other employees, what were referred to as the "main duties", or "essential functions" of a position. The respondent submits that the section does not contain any words such as "core duties", or "essential functions". Counsel for the school argues the words

"tasks" and "duties" have different meanings, the first connoting peripheral features of a job; the second the central or core elements.

[13] Section 16(2) is not material. But s. 16(3) then provides:-

> "(a) For the purposes of this Act a person who has a disability is *fully competent to undertake, and fully capable of undertaking, any duties* if the person would be so fully competent and capable on *reasonable accommodation (in this subsection referred to as 'appropriate measures'*) being provided by the person's employer.
>
> (b) The employer shall take *appropriate measures*, where needed in a particular case, to enable a person who has a disability–
>
> (i) to have access to employment,
>
> (ii) to participate and advance in employment, or
>
> (iii) to undergo training,
>
> unless the measures would impose a *disproportionate burden* on the employer" (emphasis added).

The words emphasised above are also keys to understanding the section. The section then identifies criteria for identifying what is a "disproportionate burden". Section 16(3)(c) therefore provides:-

> "In determining whether the measures would impose such a burden account shall be taken, in particular, of–
>
> (i) the financial and other costs entailed,
>
> (ii) the scale and financial resources of the employer's business, and
>
> (iii) the possibility of obtaining *public funding or other assistance*" (emphasis added).

The issue of "public funding or other assistance" is considered later.

The main issue

[14] In a sense, the fundamental issue arises because of the way in which s. 16(1) and s. 16(3) are sequenced. The Court of Appeal held that s. 16(3) of the 1998 Act must be seen as being subject to what is contained in s. 16(1). In standing over that decision, counsel for the school submits this must mean that a court or tribunal should look first to s. 16(1), in order to assess the main duties of a position, and thereafter determine whether, on reasonable accommodation under s. 16(3), an employee was fully competent or capable of undertaking these main duties. On this reading, main duties form the starting point for consideration. As reflected in the decision of the Court of Appeal, the school's case is that, if it is shown that an employer has formed

a *bona fide* belief that an employee with disabilities was not fully capable of performing the *duties* for which he or she was employed, there is a complete defence to a claim of discrimination. Thus, it is argued, the first stage of any analysis requires identification of the duties required for any job based on an assessment of the structure and needs of the particular organisation, and the role required to be performed. Once these main duties of a role are identified, a disabled person should be assessed in accordance with those duties in order to determine their capacity to perform the job. If they cannot perform these duties, then the next question is whether an employer can undertake any reasonable accommodation to render the employee capable of performing those duties. But, if the disabled employee remains unable to perform these main duties after reasonable accommodation, then there is a full defence. The school submits that it arranged to have the duties associated with an SNA assessed by an expert, Ms. Ina McGrath, who identified sixteen duties attached to the position. The respondent could wholly or partly perform nine duties, but was unable to perform seven. Counsel for the school submits that the Court of Appeal correctly held that no adaptation or accommodation could make the respondent able to carry out the job. She submits that there is no requirement to "strip away" some duties associated with a particular job, as this is not required by the section. Counsel submits this would be to create an entirely new position, which is not mandated at either national or European level. But counsel acknowledges that a distribution of "tasks" is acceptable. But these "tasks" are to be seen as those peripheral to the main duties; that is, that they would be secondary or marginal in nature.

[15] Rather confusingly, s. 16(4) contains two sets of subparagraphs, both identified as "(a)", "(b)" and "(c)". The first set relates to the identification of an "employer" and is immaterial. But s. 16(4) then provides that the words "appropriate measures", to be found in s. 16(3)(a) and (b) "in relation to a person with a disability", are to be interpreted as meaning:-

> "(a) … effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned."

Then the subsection first mentions the word "*tasks*" in these terms:-

> "(b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, *distribution of tasks* or the provision of training or integration resources, but
>
> (c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself" (emphasis added).

The Court of Appeal felt that the word "tasks" had a different connotation to "duties", and that an employer's obligation was to consider only the distribution of tasks, but not core duties, which were essential to the job.

[16] It is necessary then to touch on the provisions for redress. Section 75 of the Act provided that investigations by an equality officer were to take place under the aegis of the Director of Equality Investigations. The Act sets out the forum for seeking redress, the appeals procedure to the Labour Court, and further appeal, on a point of law, to the High Court. Section 82 of the 1998 Act sets out the forms of redress that can be awarded. These include an order for compensation in the form of arrears of remuneration for a limited period; and that a successful claimant may receive an order for compensation for the effects of acts of discrimination or victimisation that occurred not earlier than six years before the date of the referral of the case under s. 77. The 1998 Act also allows for an order that an employer be directed to take a particular course of action, or an order for re-instatement or re-engagement, without or without an order for compensation. The level of compensation is subject to a maximum of 104 weeks' pay or €40,000 (see s. 82(4)(a) of the 1998 Act). The practice of the tribunal in determining the level of compensation is to place the complainant in the position he or she would have been in had the discriminatory treatment not taken place (see *A v. Public Sector Organisation* (DEC-E-2006-056, Equality Tribunal, 16 November 2006).

The EU background

[17] Counsel for the respondent, and counsel for the *amicus curiae*, submit that, by interpreting s. 16(3) as being subject to s.16(1), the Court of Appeal erred. The primary argument is based on the wording of s. 16. They also place reliance on EU legal instruments and case law. The EU law is undoubtedly a useful point of reference. But whether it is even necessary to resort to EU law is a point to be determined. It is true that the amending Equality Act 2004 put in legislative form, and reflected, the provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, referred to as the "Framework Directive". It is also true that the recitals of the Framework Directive identify measures intended to play an important role in combating discrimination on grounds of disability. But counsel for the school argues that the mere fact that the Oireachtas used some of the terms employed in the recitals does not, itself, elevate those words to anything beyond guidance for the Framework Directive itself.

The Framework Directive

[18] Recital 17 of the Framework Directive sets out:-

> "This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available *to perform the essential functions of the post concerned* or to undergo the relevant training, *without prejudice* to the obligation to provide reasonable accommodation for people with disabilities" (emphasis added).

[19] Recital 20 provides:-

> "Appropriate measures should be provided, *i.e*. effective and practical measures to *adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources*" (emphasis added).

It will be seen, therefore, that the recital expresses the precept that an individual's workplace must be adapted to the disability and not *vice versa*.

[20] Recital 21 reflects some of the wording of s.16(3)(c) of the Act. It provides:-

> "To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance."

[21] Article 5 mandates that there must be provision to facilitate persons with disabilities to obtain, and to participate as fully as possible in employment:-

> "*Article 5*
>
> *Reasonable accommodation for disabled persons*
>
> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take *appropriate measures*, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a *disproportionate burden* on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned" (emphasis added).

Article 5 undoubtedly contains terminology similar, if not identical to, what is to be found in s. 16.

Section 16: a summary

[22] To summarise, looking to s. 16 itself, the term "reasonable accommodation" was defined by statute as including "appropriate measures" (see s. 16(3)(a) and (b)). The question of "disproportionate burden" under s. 16(3)(b) is to be evaluated by taking into account *financial and other costs, the scale and financial resources of a business, and the possibility of obtaining public funding or other assistance* (see s. 16(3)(c)). Section 16(4)(a) defines "appropriate measures" as meaning effective and practical measures "where needed" in a particular case to adapt the *employer's place of business* on the basis of the disability concerned. Section 16(4)(b) provides that, "without prejudice" to the generality of para. (a), this duty would also include the *adaptation of premises and equipment, patterns of working time, distribution of tasks*, or the provision of training or integration resources.

The Framework Directive: a summary

[23] Turning then to the Framework Directive, recital 17 states that the directive does not require the "maintenance in employment" of an individual to perform the essential functions of the post concerned, but "without prejudice" to article 5 of the Framework Directive, which provides that employers shall take appropriate measures where needed in a particular case to enable a person with a disability to have access to, or participate in, employment, unless such measures would place a disproportionate burden on the employer. Such measures shall not be deemed "disproportionate" when sufficiently remedied by measures existing within the framework of the disability policy of the member state concerned.

The United Nations Convention on the Rights of Persons with Disabilities

[24] At this point it is necessary only to advert to one other feature of the legislative background. The United Nations Convention on the Rights of Persons with Disabilities ("the CRPD") was approved by the European Community by Council Decision 2010/48/EC of 26 November 2009. The

CRPD was ratified by Ireland on 20 March 2018, two months after the Court of Appeal judgment.

[25] Article 1 of the CRPD recites that the purpose of the Convention was to:-

> "… promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity…"

[26] Article 2 provides that discrimination on the basis of disability means *any* distinction, exclusion, or restriction on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field. This includes all forms of discrimination, including denial of reasonable accommodation. It defines reasonable accommodation as being necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

[27] Article 5 deals with equality and non-discrimination. Article 5(2) provides, insofar as material:-

> "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities *equal and effective legal protection against discrimination on all grounds*" (emphasis added).

[28] Article 5(3) provides that:-

> "In order to promote equality and eliminate discrimination, States Parties shall take *all appropriate steps to ensure that reasonable accommodation is provided*" (emphasis added).

ECJ case law: HK Danmark (Joined Cases C-335/11 and C-337/11)

[29] In *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)* [2013] I.C.R. 851 the European Court of Justice ("ECJ") considered the meaning to be ascribed to the term "disability" for the purposes of the Framework Directive. The issue which arose in that case was the distinction between "disability" and "illness". But the ECJ also made significant observations on whether the obligation under the Framework Directive to provide a disabled worker with reasonable accommodation included an obligation to reduce her working hours, in circumstances where

she was unable to work full-time due to her disability. The court considered the extent of the duty imposed on employers to provide a disabled worker with reasonable accommodation. It addressed whether that duty included an obligation to offer a disabled worker a facility to work part-time. But the ECJ pointed out that the EU had ratified the CRPD in 2010, and observed that, in accordance with Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), the European Union had pronounced that international agreements were binding on its institutions, and therefore prevailed over acts of the European Union (see *Air Transport Association of America v. Secretary of State for Energy and Climate Change (Case C-366/10)* [2011] E.C.R. I-13755). As a consequence, the ECJ held that the primacy of international agreements concluded by the European Union meant that instruments of secondary legislation of the European Union were to be interpreted, insofar as possible, in a manner consistent with those agreements. Thus, it followed that the Framework Directive, insofar as it related to disability, was thereafter to be interpreted in harmony with the CRPD.

[30] Referring to article 5 of the CRPD, the court held an employer was required to take appropriate measures in particular to enable a person with a disability to have access to, participate in or advance in employment. It referred, at para. 49, p. 876, to recital 20 in the preamble to the Framework Directive which gave a non-exhaustive list of such measures, which may be "physical, organisational and/or educational." It concluded that, in accordance with the second paragraph of article 2 of the CRPD, reasonable accommodation was to be understood as being necessary and appropriate modification and adjustments, not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Thus, it held:-

> "53. *It follows that that provision prescribes a broad definition of the concept of 'reasonable accommodation'*" (emphasis added).

[31] The court continued:-

> "54. Thus, with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers …"

At paras. 55 and 56, it went on to hold that recital 20 in the preamble to the Framework Directive and the second paragraph of article 2 of the 2009 Convention envisaged not only material but also organisational measures. It noted the term "pattern" of working time must be understood as the rhythm

or speed at which the work is done. The court concluded, at para. 55, p. 877, therefore, that a reduction in working hours may constitute one of the "accommodation measures referred to in article 5 of that Directive" . It pointed out, at para. 56, p. 877, that the list of appropriate measures to adapt the workplace to the disability in recital 20 in the preamble to the Framework Directive was not exhaustive. Consequently, even if it were not covered by the concept of 'pattern of working time', a reduction in working hours could be regarded as an accommodation measure referred to in article 5 of the Framework Directive, in a case in which reduced working hours "make it possible for the worker to continue employment, in accordance with the objective of that article".

[32] While the court referred to recital 17 of the Framework Directive as not requiring the recruitment, promotion or maintenance in employment of a person who was not competent, capable and available to perform the essential functions of the post concerned, it held, at para. 57, p. 877, that this was "*without prejudice to the obligation to provide reasonable accommodation for people with disabilities, which includes a possible reduction in their hours of work*" (emphasis added). What is in question, therefore, is a balancing process identifying what is reasonable and proportionate.

[33] Having pointed out that, in accordance with article 5 of the Framework Directive, the accommodation that persons with disabilities are entitled to must be reasonable, but it must not constitute a disproportionate burden on the employer, the court went on to hold that it was for a national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employers.

[34] The passage must be read as a whole. Seen in this way, it conveys that the principle, laid down in para. 57, p. 877, of *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)* [2013] I.C.R. 851, must be seen as being without prejudice to the obligation on employers to provide reasonable accommodation for people with disabilities.

[35] At para. AG88, p. 430, in his opinion in *Z. v. A. (Case C-363/12)* [2014] 3 C.M.L.R. 20, Advocate General Wahl described the judgment in *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)* [2013] I.C.R. 851 as marking a "paradigm shift" in ECJ case law, whereby, departing from a narrower definition, the EU concept of disability was explicitly aligned with the CRPD, noting that the court's definition of disability only covered professional life, as opposed to society at large. While not referred to in *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)*, article 27(1) of the CRPD provides, *inter alia*, that:-

"States Parties shall safeguard and promote the realization of the right to work, including *for those who acquire a disability during the course of employment*, by taking appropriate steps, including through legislation, to, inter alia: …

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value …" (emphasis added) (*cf.* opinion of Advocate General Wahl in *Z. v. A. (Case C-363/12)* [2014] 3 C.M.L.R. 20 at para. AG117, p. 434).

The facts

[36] The factual description which now follows is taken from the agreed facts, but must also refer to the Labour Court determination. But counsel for the respondent criticises the fact that the Labour Court failed to resolve an important evidential issue. This concerned contacts between the school principal and the National Council for Special Education ("NCSE") about appointing the respondent as a "floating SNA". Counsel for the respondent submits this was an important point, and could have been easily resolved. But counsel for the school submits that, while recording much of the testimony, the Labour Court omitted any reference to what is said to be highly important evidence which could have had a direct bearing on the outcome of the claim. She submits that this evidence raised serious question marks as to whether, even with the most extensive appropriate measures, the respondent could perform the duties of an SNA. These questions can only be answered by consideration of the evidence before the Labour Court.

[37] One can only be conscious of the fact that the following description of the evidence is lengthy, but one can only understand the objections to the determination, and the judgments of the Court of Appeal and the High Court, when set in their full factual context.

The school

[38] The school is situated near Killarney in County Kerry. It operates under the aegis of the NCSE, a State agency which is the funding authority. At the relevant time, there were 73 children attending the school. These were divided into 10 classes. Each class contained between 6 and 8 pupils. The school employed 12 teachers and 27 SNAs. It also employed ancillary

therapy workers, bus staff, a caretaker, a secretary, as well as receiving volunteer help. Two of the classes in the school were designated for pupils with severe or profound difficulties. The pupils in the other classes were classified as having more moderate disability, though the school principal testified that the challenges facing staff members were nonetheless significant, even with those pupils.

The work

[39] Each SNA worked in tandem with a teacher. In general, two SNAs, plus one teacher, were assigned to each classroom. But in three classrooms, graded on the basis of pupils' disabilities, the teacher was accompanied by three SNAs. Prior to her accident, the respondent worked in one of these classes. The role of an SNA was described in a Departmental Circular (SP.ED 07/02). Those duties were of a non-teaching nature. They included preparation and tidying up of classrooms; escorting pupils in alighting and using school buses; providing them with special assistance; helping physically disabled pupils engaging in typing or writing; helping with clothing, feeding, toileting, and general hygiene; assisting in out-of-school visits, walks, and similar activities; supplementing teachers in the supervision of pupils with special needs during assembly, recreational, and dispersal periods; accompanying individuals or small groups who might have to be withdrawn temporarily from the classroom; providing general back-up to the class-teachers; and, where necessary, assisting in catering for the needs of a specific pupil. As the respondent was a qualified medical nurse, she fulfilled a number of roles in the school, and also undertook some secretarial duties from time to time.

Consideration of return to work

[40] By late 2010, the respondent had completed her five-month period of rehabilitation in the National Rehabilitation Centre ("NRC"). She was assessed there by a senior occupational therapist, who formed the view that she could return to work as an SNA on a phased basis. The respondent was discharged from the NRC on 19 December 2010.

[41] The respondent contacted the school in January 2011 to discuss resuming work. She met the school's occupational physician, Dr. David Madden of Medmark, which is a medical consultancy. Dr. Madden himself is a general practitioner and a consultant in occupational health. He informed the school principal that the respondent had agreed to a possible return to

work on 8 March 2011. During the month of February 2011, the school asked the respondent to assist on a number of days in carrying out secretarial and administrative duties. Dr. Madden furnished a report to the school board on 1 March 2011. He confirmed the respondent had completed a satisfactory recovery, and that, despite her ongoing injury, she was fit to return to many of the duties of an SNA. But he expressed the reservation that the school should commission an assessment to ensure that the respondent could carry out the work safely, and to identify potential work activities which might prove challenging to her. In March 2011, the school arranged for an excursion for some of the children to Florida. The respondent was asked to go on this trip in order to assist the teachers and other staff. However, she declined this request due to having been away from her own children for a considerable period during her stay in the NRC.

The Southern Safety risk assessors' report

[42] The school organised a risk-assessment later in the month of March. This was performed by Southern Safety Risk Assessors on 14 and 15 March 2011. The report recommended that, in order to accommodate a return, the respondent's work practices should be rearranged so that her role would be less challenging; that she should rotate from room to room so as to assist in generally less intensive tasks; and that a system be implemented so that she was not alone with children and, where, when necessary, she could call for assistance. It recommended the respondent should not have to carry out challenging or lifting activities. It proposed an occupational therapist be engaged in order to assess the tasks that the respondent could perform, and to assist in setting up a suitable system of work. The report recommended that the occupational therapist should carry out fortnightly, and then monthly, assessments. The report concluded that the principal, deputy principal, and staff members would all have to work together in order to accommodate the respondent, in a process which would require the full commitment of all school staff. It recommended that the school management, as well as the Department of Education, should facilitate the principal and her staff in the process of reintroduction.

[43] In the light of later evidence on this issue, it is worth noting that this report proposed that, if recommended, extra resources be obtained from the Department of Education to maintain the level of care for the children whilst accommodating the respondent's reintegration, that the respondent should be consulted in all of these matters and fully included in the process.

These recommendations acquire a greater significance when the whole picture is considered later.

[44] The consultants proposed all this should be carried out on a trial basis, and then reviewed. The school board considered this report, and thereafter reverted to Dr. Madden, who recommended a further report. The respondent, too, requested a different risk assessment be carried out.

Ms. Ina McGrath's report

[45] Subsequently, Ms. Ina McGrath, who was qualified as an occupational therapist and in ergonomics, was asked to carry out a second assessment following on that conducted by Southern Safety. Her report, based on assessments on 2 September 2011 and 9 September 2011, was sent to the school on 29 September 2011. The respondent was present on the second day, but not the first. The report contained a description of the broad range of activities which staff members undertook, and the way in which the students progressed through the school. Ms. McGrath's report, which assessed the respondent in the school environment, is one of the evidential keystones of the case. Some of what follows is set out in paras. 38 to 48, pp. 264 to 267, of Ryan P.'s judgment in the Court of Appeal. But what is contained in the report must be set out here in a little more detail. Ms. McGrath noted that the respondent had already passed her driving test as a wheelchair user. She had good extremity range of motion and strength. She was able to pick up items from the floor. She could lean to one side but not forward, as there was a risk of unbalancing. She was independent with her own care needs. She needed assistance with getting items from higher shelves which were outside of her reach, and in using sinks which were all at standing height.

[46] The report compels admiration for the valuable work carried out in the school, both by staff and students. But it also showed the extent to which the job of an SNA had a significant physical aspect to it. The report must be considered in detail. Without that detail, there is a risk that the determination and judgments of this and other courts will be misunderstood. Ms. McGrath assessed the position in relation to the suitability of each of the classes. The "reception class", which catered for new pupils needing considerable physical assistance, was ruled out. Classes where the students had autism were also ruled out as unsafe, as there was the potential for students who would regularly need to leave the classroom, or might "act out", possibly needing physical hands-on care in the event of what were called "outbursts". A senior

special class was also seen as off-limits, as it was a step-up from the junior special class, where again the children would require a high level of physical assistance.

[47] Two senior classes were ruled out completely as the children were by then older and were being taught skills to help them become independent in the community. The students in those senior classes went into Killarney to use facilities to go shopping and to participate in work-experience activities in the community. But Ms. McGrath considered the respondent would not have the ability to self-propel her chair for such long distances. Additionally, there were "very strong" young adult males in those classes, which might not be a safe environment for the respondent.

[48] Ms. McGrath identified the junior and middle two classes as those with the greatest classroom and bathroom accessibility, and the least amount of safety risk for the respondent and students. The respondent was asked to come in and spend half a day in each of those classes. She had not assisted in any of those classes previously.

The junior class

[49] The average age of the students in the junior class chosen was nine years. Three of the students had been diagnosed with autistic spectrum disorder ("ASD"). Many of the students had been in the class for three years. They could walk independently, although two of them required supervision. One child required assistance with toileting. Another child needed close supervision secondary to "acting out". One child had dyspraxia, resulting in the risk of accidents and falls. Ms. McGrath described that a new child who had joined the class engaged in serious "acting out" behaviour, and tried to make physical contact with another child. In order to stop this conduct, the SNA permanently working in that class had to remove the newly arrived student to the sensory integration room. There was a further such incident later in the morning. The teacher and the other SNA had to intervene to prevent injury to staff and to other students. Two SNAs had to remove the student from the classroom. Some of the staff members involved reported that, on the previous week, they themselves had had to move out of the way when a shelf was pushed over.

[50] Ms. McGrath found that accessibility did not pose an insurmountable problem. The respondent was able to engage in adequate supervision of four of the children. However, she would not have been able to assist with the child who required assistance in toilet hygiene, or with the child with

ASD, as the conduct of that child was said to be "inconsistent" and "physical".

[51] Ms. McGrath had earlier described the student who had created a problem in junior class being brought to a sensory integration room. The respondent brought one of the other students with dyspraxia into the same room to work on therapy exercises. The other SNA worked with the student with ASD at all stages, while the respondent focused on the child with dyspraxia. The respondent was able to give directions to the child she was assisting on using some specific toys, but was limited to minimal physical assistance. Whilst she was able to verbally prompt the child to use other facilities, she was unable to herself demonstrate correct use of these pieces of equipment. She was able to provide verbal prompts. Ms. McGrath pointed out that, on occasions, with some children, an SNA might, occasionally, have to lie or kneel on a mat to complete a therapy activity. She also pointed out that the respondent could not turn her wheelchair quickly if a child ran behind her or towards the door. Children removed their shoes in the room, and there was a risk of the wheels of the wheelchair going over a child's foot. When returning to the classroom, Ms. McGrath asked an SNA who had worked with the child with ASD if she had felt safe at the time going to, from, and during, her time in the sensory integration room. The SNA "honestly" felt that the child she was supervising needed two physically able SNAs as there was a potential the child might act out physically.

The middle class

[52] In the middle class there were eight children, one teacher and "2.5 SNAs". The "0.5", or "half-SNA", was a person shared with the reception class. Three of these children required assistance with mobility. One had epilepsy and needed physical assistance when walking. Two SNAs escorted this child to the bus. One child with ASD needed to be escorted to a quiet room. Another child with gait difficulties needed physical assistance. The other five children were independently mobile. The respondent was able to assist another SNA with two children who needed assistance with toileting. She provided "good assistance" with one child who was able to assist her in divesting clothing in the course of toileting, but had difficulties with another child who, for physical disability reasons, could not provide the same assistance. Some of the children needed hygiene supervision. The respondent could provide the verbal cues and physical prompts to complete these tasks. The respondent was able to carry out many, but not all, of the functions in

that classroom. Suitable adaptation would have required the sinks to be lowered, but this, in turn, would have created difficulties for a person standing normally. The respondent was able to assist children with taking out books and working on a one-to-one activity; however, was unfamiliar with the children and their programmes of care, which made it difficult for her to get involved. Of the three children in the middle class who needed physical assistance, one was having difficulties, and walking about in a disruptive manner, although not aggressively. The teacher asked the SNAs to take her to a quiet area as the other children were being disruptive. Ms. McGrath stated that the respondent could not assist with escorting this child.

The jobs demand analysis

[53] Ms. McGrath also carried out an assessment in tabular form in a jobs demand analysis. The first column of the table, set out below, lists the duties an SNA performed in the school. Again, in hindsight, it is significant the second column broke down the "duties" into "tasks". The third column identified "tasks" which Ms. McGrath saw as a "best fit" for the respondent. The last column described any environmental or equipment-changes that could facilitate the in her role. A classification process, and an interpretation, of s. 16, in the light of "core duties", on the one hand, and "tasks", on the other, formed an important part of the Court of Appeal's approach. Whether such categorisation was either required or permitted by s. 16, or any other provision of the Act, is considered later. The table must also be considered in light of Ryan P.'s conclusion at para. 64, p. 272, in the Court of Appeal that, in fact, the respondent was regrettably unable to carry out many of the core elements attached to the position of an SNA. The respondent is, of course, referred to in the table as "Ms. Daly".

SNA duties	**Task demands**	**Fit with Ms. Daly**	**Adaptations/ equipment required**
Assist on/off bus	Physically get on bus and assist child with mobility limitations off the bus Walk with child from bus to assembly providing physical assistance	Not a suitable duty for Ms. Daly	

SNA duties	**Task demands**	**Fit with Ms. Daly**	**Adaptations/ equipment required**
	Carry bag while physically supporting student		
Supervision in assembly	Walk with students to assembly	Provide verbal direction or physical prompt in direction of assembly with children who are not independently mobile and who are not at risk risk for absconding	
	Sit with student group in assembly	Ms. Daly can sit with and encourage input from children	
	Say prayers with group and sing with group	She can lead independently mobile children to top of assembly to say prayers celebrate birthdays, *etc.*	
	Physically assist with dancing	Ms. Daly would be limited in self-propelling as many children throw off their shoes	
	Prevent hitting out and acting out behaviour	She could not assist and would be advised to move back if any acting out behaviour occurred	
Prepare and tidy classroom	Bending, reaching, laying out equipment on desks	Ms. Daly could complete these tasks with minor changes to where and how equipment is laid out	Minor modifications to where frequently used items are stored
Moving tables and chairs	Lifting, pushing and pulling	Not suitable duty for Ms. Daly	
Assist with on/off clothing	Assist with taking off outer garments and putting on outer garments	Can assist the more physically able child and child who has less behavioural issues	Provision of step more frefrequently used nappies or extra

SNA duties	**Task demands**	**Fit with Ms. Daly**	**Adaptations/ equipment required**
	Take off trousers underclothes and nappies/pads Put on new pad, underclothes and nappies/pads	Can assist children that require verbal or physical prompt by herself and with another SNA for children who require physical assistance	clothes to wheelchair accessible shelf
Change nappies/menstruation pads		Can assist independently if bathroom permits access for higher functioning kids, *i.e.* those that do not require physical assistance	Move menstruation pads and nappies to accessible shelves
Toilet hygiene	Clean soiled child Remind child to wipe self	Can help wipe child if can access toilet from the side in her chair	Remove panes from toilet cubicle on right in Junior
	Assist with washing hands Remind child to wash hands	Can provide supervision, and verbal cues	Remove bath in Middle 2
Use of school equipment, school chairs, hoists, changing tables, baths	Requires pushing, pulling, use of hi-lo function, use of brakes	Not suitable for use by Ms. Daly	
Mobilise with children in school	Walk with children from assembly to class or room to room on site	Only with independently mobile children who will not run off and who can follow instructions	
	Stairs: work with children on use of stairs as part of therapy activity	Stairs are not accessible for Ms. Daly	
	Escort children on lift	Children are not encouraged to use lift unless they are in a wheelchair	

SNA duties	**Task demands**	**Fit with Ms. Daly**	**Adaptations/ equipment required**
		and only one wheelchair will fit in the lift	
Escort to other school/college in town/shops/coffee shops, *etc.*	Requires ability for close supervision, assisting children with community skills, long distance mobility	Ms. Daly reports she has difficulty with thermo-regulation and cannot self-propel for long distances. Therefore, not suitable duty for Ms. Daly	Powered mobility was offered as option to increase mobility in community but Ms. Daly declined at this time
Safety with kids who hit out, run off, become aggressive	Hands on intervention to prevent a child from hitting other children/staff	Not suitable	
	Escort child who is acting out to sensor integration room or quiet room	Not suitable	
	Calming exercises requires sitting on mat, brushing child or rolling children in weighted blankets, vestibular roll, *etc.*	Not suitable	
PE/Therapy activity	Escort to sensory integration room	Ms. Daly cannot access some parts of room because of floor mats, bean bags, therapy equipment, body rollers, and sensory balls	
	Sit on mat and facilitate brushing,	Unable to demonstrate equipment or transfer	

SNA duties	**Task demands**	**Fit with Ms. Daly**	**Adaptations/ equipment required**
	rolling in balls on sensory balls, body rollers *etc.*	on/off mats. Cannot turn fast in wheelchair and needs large turning area. Not suitable at this time	
	Escort to OT*, SLT+, Physiotherapy	Ms. Daly could escort children who walk independently and are not a flight risk. However, staff report that the children who attend therapies do not fit in this category	
Set up and assist with feeding	Hand out lunches, cut up and prepare lunches and drinks Clean up	Ms. Daly with some minor changes can set up and assist with feeding. She cannot access sinks for wash up and cleaning of utensils	Minor change to classrooms layout and where food/ utensils *etc.* are stored
Yard duty	Supervise and work with kids when in playground or gardening outside Assist on/off swings. *etc.* Push on swing	Not good fit, as Ms. Daly cannot regulate changes in temperature well	
Attend on trips and tours	Assist with children on buses when on day trips or tours	Ms. Daly reports she will not travel on a bus as she gets travel sickness on buses – not suitable activity	
Set up classroom activity – books, pencils, DVDs, paper tasks, homework, *etc.*	Empty items from school bags, pack bags with children	Suitable duty for Ms. Daly	Minor changes to where items are stored and layout of tables

* Occupational therapy
+ Speech language therapy

SNA duties	Task demands	Fit with Ms. Daly	Adaptations/ equipment required
	Reach shelves, cupboard, *etc.*		
Desk top activity	Encourage children and assist with turn pages or homework, *etc.*	Suitable duty for Ms. Daly	May need some room change to allow Ms. Daly access to desk top

[54] The 16 "duties" in the jobs demand analysis were broken into a number of "task demands". It concluded that the respondent could do all, or part of, 9 out of the 16 duties identified, but could not perform 7 of them.

[55] Ms. McGrath commented that because the respondent was in a wheelchair, she was in a more vulnerable position than other staff members, perhaps in instances where a child was "acting out" by throwing items. She could not move as quickly to get herself out of the way if required, or to intervene to protect a child or a staff member. Students who acted out or who required physical assistance needed two physically able SNAs. Ms. McGrath expressed concern that the respondent would not be able to support the other SNA in the instance of a physical outburst that puts that SNA at risk. There might also be a concern regarding division of labour.

[56] The report concluded that it was clear the role of the respondent was limited in assisting with children with physical care needs; and that safety was a main concern for the respondent, staff, and students. Both of the classes assessed had students who could act out and needed hands-on intervention and escorting. This suggested that these classes would need two physically able SNAs to assist with these children. Accessibility was not a limitation, although some adjustments might be required to toilet facilities. Ms. McGrath recommended, therefore, that the respondent could act as a "floating" SNA. She would be able to work with children in certain categories, and could perform SNA duties with children who needed verbal or physical prompts. The report recommended against the respondent working with children who could act out physically. Ms. McGrath expressed a hope that the school would have resources to support the respondent, as it was evident that she was very motivated to return to work.

[57] Ms. McGrath's report went to Dr. Madden. The respondent was not given sight of the report. Following further conversations with the school

principal, Dr. Madden then took the view that, whilst the respondent might be fit for some categories of work, such as a floating SNA, no such position existed in the school. He stated that the assessment confirmed that the respondent had difficulty in completing many of the more challenging aspects of her role as a SNA. He stated that it confirmed that she was not suitable to complete a series of routine work tasks safely. He, too, observed that she was not suitable to work with children who might act out physically, or with physically able children that might run off. Typically, two physically able SNAs were deemed suitable to meet the demands of such roles. The respondent would not be suitable to carry out such routine work tasks, with one other able-bodied SNA.

[58] Referring to the report and conversation with the principal, Dr. Madden pointed out that, while the report suggested that the respondent might be suitable for the position of a floating SNA, no such position existed. He had reviewed the risk assessment and shared the view that the respondent could not participate in many tasks. He understood from discussions that it was not possible to meet the level of accommodation required in order to ensure the safety of all those involved. He acknowledged that the number of roles where the respondent would need accommodation was significant. He concluded that the respondent was not medically fit for the position of SNA.

Consultation

[59] At the Labour Court hearing, the principal of the school testified that she did not consider allocating the respondent's duties among other SNAs. In her view, it would be difficult to relieve the respondent from some of her duties, and the respondent could return to work only if she was able to perform all the duties of an SNA, with assistance or otherwise. She expressed this view to Dr. Madden.

The areas of concern

[60] At this point, it is convenient to re-address the two areas in the determination where the parties express concern with the Labour Court's general approach. The respondent's concern is shorter and may be addressed first.

(a) Contact with the NCSE

[61] The minutes of the school board of management of 15 December 2011 indicated that, as part of the process, the school principal telephoned the Department of Education, and then the NCSE as funding authority, to inquire about "the feasibility of funding for a floating SNA". The minutes stated that, in this phone call, Marie Clifford, the NCSE official, stated the authority would not approve funding for an SNA, because "the NCSE appoints staff for pupils with disabilities, and not for adults". Thereafter, the board sent a letter to the respondent dated 27 December 2011, informing the respondent that she was medically unfit for the position of special needs assistant, and declining her request to return to work.

[62] The school principal accepted that the decision was made without any consultation or input from the respondent. In turn, the respondent accepted that her disability would prevent her from undertaking every one of the tasks normally associated with an SNA. After the school's decision was made known, and after she brought a claim to the Equality Tribunal, the school agreed to provide her with inspection facilities for an expert, but no such inspection took place.

An unresolved issue?

[63] In its determination, the Labour Court recorded that it had difficulty in discerning the meaning of the evidence concerning the NCSE. Counsel for the school makes the case that Ms. Clifford must have understood and appreciated the questions she was being asked. The respondent submits otherwise. But the Labour Court that heard the evidence noted that the official, Ms. Clifford, had not been called to give evidence, and considered the minuted record of the board meeting as "somewhat puzzling", and that there was never any suggestion that the respondent should work with adults (see p. 32 of the determination). The Labour Court went on to hold that, in fact, it was for the board of management to make its own assessment of the reasonableness and proportionality of the form of accommodation that was needed. It concluded that apart from seeking an opinion of the NCSE, there was no evidence that the board had ever independently considered that question. The determination found that the board was influenced in its decision by Dr. Madden's conclusion that the respondent was medically unfit to return to work on the understanding that the school would not, or could not, make the

necessary adjustments in work organisation to accommodate the respondent, and to allow her to return to work part-time in a part-time secretarial role.

[64] In the Court of Appeal, Ryan P. commented, at para. 32, p. 269, that the Labour Court and High Court appeared to have some difficulty in "deciphering" the "shorthand message" conveyed by the official, whom the judgment erroneously identified as a male. The meaning of this minute was obviously a significant issue. But its true significance could have been explained if Ms. Clifford had been available to explain what her response meant. There might have been some significance in that the phone call did not appear to have been preceded by, or followed up with, any letter making a formal case to retain the respondent as a floating SNA, or in one or other of the capacities she had previously fulfilled. Seen in isolation, this might have possibly raised a question as to whether, under s. 16(3)(c) of the Act, the school had, in fact, taken real steps to identify "the financial and other costs" entailed by taking the "measure" of employing the respondent as a floating SNA, or "the possibility of obtaining public funding or other assistance" for such a proposal (*cf*. s.16(3)(c)(i) and (ii) of the 1998 Act).

[65] In my opinion, this was potentially an issue of some importance, and, ideally, should not have been left without clarification. There was no evidence that Ms. Clifford was unavailable, or that documents from the NCSE were unobtainable. The issue went to the question as to whether the school had, in fact, explored the possibility of obtaining public funding, or other assistance (*cf*. s.16(3)(c)(iii)). But, ultimately, this view must be seen in light of the observations later in this judgment as to legal duties on employers under the section, and also in the light of the questions a *bona fide* employer should explore and resolve prior to making a decision.

(b) Omitted parts of Ms. McGrath's evidence

[66] But counsel for the school submitted that the Labour Court had failed to outline, or address, important evidence from Ms. McGrath. It is correct to say she had conducted the more comprehensive of the only two risk assessments which dealt with reasonable accommodation. Prior to the appeal to the High Court on a point of law, the school applied for discovery of documentation relating to the record of evidence given during the course of the Labour Court hearing. It did not accept that the determination accurately reflected Ms. McGrath's oral evidence. The Labour Court voluntarily provided notes taken by the registrar's secretary.

[67] The Labour Court determination recorded Ms. McGrath as testifying, first, that she never considered furnishing the respondent with a draft report for comment before it was presented to the school; second, that the school should consider reallocating or reorganising tasks among SNAs so as to relieve the respondent from the requirement of the tasks she could not perform; and, third, that the respondent could "work with moderately disabled children".

[68] But the school's case is that this was a selective recounting of the evidence which, taken out of its context, suggested that the position was capable of being reorganised, and that the respondent would have been capable of working in the school in such a reorganised position. Counsel submits that by recording only part of Ms. McGrath's evidence, to the effect that the respondent *could* work with more moderately disabled children, the determination conveyed the erroneous impression that this was all Ms. McGrath had to say in relation to the respondent's ability and capacity to work as an SNA in the school. What follows is not disputed by the respondent

[69] Counsel for the school submits the Labour Court determination did not record the fact that Ms. McGrath already knew the respondent, and was familiar with the situation prior to being engaged with the school, despite the fact that this had been outlined at the outset of her evidence. It is said that, when Ms. McGrath indicated she had not appreciated prior to the assessment how demanding the role of an SNA was, she had also said that to perform the tasks associated with the role, a person needed to be able bodied. Counsel points out that, after she observed the respondent in the sensory integration room, Ms. McGrath approached the other SNA who expressed concerns to her that the respondent would not be able properly to assist the other SNA whilst in the room. Counsel submits that, in considering whether or not the respondent was suitable to perform the role of an SNA, Ms. McGrath had concluded that a person performing that role needed to be physically able, and that, having considered everything, she did not believe that the environment in the school was safe for the respondent, and that it was not possible to allow her to perform the role of SNA. It appears that, in response to the Chairman's question, Ms. McGrath had, in fact, testified that it was not possible to accommodate the respondent within the school, and had said that the level of dependency of the children in the school was too high, so that the respondent would be unable to manage. Furthermore, it is said the Labour Court did not accurately reflect Ms. McGrath's views in relation to the issue of a "floating SNA", a position which she acknowledged did not exist. Counsel submits that, in fact, Ms. McGrath certified that, having considered the

matter, the respondent was not suitable for this type of role within the school either.

[70] Counsel submits that no account had been taken of the evidence that Ms. McGrath gave that the respondent was no longer capable of taking on the role of an SNA, and that the role of an SNA in the school was a most physically demanding role. Finally, it is said that, again in response to questioning, Ms. McGrath had testified that the respondent could not work as an SNA in an reorganised environment with the school, and that the role could not, in fact, be reorganised to accommodate the respondent.

[71] Counsel for the school points out that the respondent did not adduce any contradictory expert evidence. She submits that the determination did not record that Ms. McGrath had listed a series of "core functions" which the respondent was not capable of performing, irrespective of adaptations or specialist equipment being provided by the school. It is said this, too, was at odds with the account of Ms. McGrath's evidence set out in the Labour Court's determination.

[72] The school's objection in principle, therefore, was that highly relevant uncontradicted expert testimony was omitted, and had not been reflected in the Labour Court findings of fact. Counsel submitted this error was so egregious that no reasonable administrative tribunal could ever have come to the same conclusion when faced with the same testimony.

[73] Counsel for the school refers to the fact that, on the appeal, the High Court tended to be dismissive of the documentation which was provided in order to demonstrate the discrepancies in the Labour Court determination, and of the notes of the omitted evidence.

(c) The effect of the omitted evidence

[74] The Labour Court and its members perform a service of huge public value. The determination in this case is, in many respects, extremely thorough and meticulous. It contains an impressive outline of the developing case law, by highly experienced panel members, who drew the attention of the parties to the ECJ judgment in *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)* [2013] I.C.R. 851. But there is no doubt significant and relevant evidential material was not recorded or evaluated.

[75] A tribunal, or other decision-maker which is under a duty to give reasons for its decision, should, as part of this process, give some outline of the relevant facts and evidence upon which the reasoning is based. This does

not in any sense, mean that a determination must set out *all* of the evidence; but it should set out such evidential material which is fundamentally relevant to its decision or determination; still more if such relevant evidence is not disputed. Obviously, the test as to the issue of materiality must be fact-specific, and dependent on the circumstances.

[76] There is already a rich and evolved jurisprudence on the duty of deciding bodies to give reasons, developed from the early days of *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 to *The State (Daly) v. Minister for Agriculture* [1987] I.R. 165; *International Fishing Vessels Ltd. v. Minister for Marine* [1989] I.R. 149; and *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297. It is also necessary to consider the statutory provision in question, and the general context. The statutory duty under which the Labour Court operated provides that, on request, it should set out a statement of "why" it reached its determination (*cf.* s. 88(1) of the 1998 Act). The omission to set out the omitted details of Ms. McGrath's evidence has added significance, not least because of the otherwise comprehensive nature of the Labour Court determination. Parties to a decision are entitled to know why they have won or lost, as a matter of fair procedure, and in order to decide whether to appeal. But parties are also entitled to be assured that, in making a decision, an administrative or curial tribunal has had regard to very relevant evidence which arguably had the potential to be potentially determinative of an issue, if not the claim, before it.

[77] It is abundantly clear that not part, but all, of Ms. McGrath's evidence played a significant role in the Court of Appeal decision. What was omitted was relevant. Evidence to the effect that the respondent was unable to perform any of the core functions of the job, that she could not work as an SNA in a reorganised environment, and that the role could not be rearranged to accommodate the respondent, should have been recorded and addressed. I do not say this would have determined the outcome. But alone, or taken in conjunction with the unresolved NCSE issue, this unfortunate omission can only lead to the conclusion that the determination did not fulfil its primary statutory role, and did not determine the complaint in accordance with relevant evidence. Put simply, by not addressing this relevant evidence, the Labour Court did not fulfil its statutory duty. How, in my view, this should be remedied is discussed later.

(d) The determination of the Labour Court: further observations

[78] The determination included an outline of evidence from the respondent, her husband, the school principal, and deputy principal, and the

principal of another special school, as well as Dr. David Madden, as well as what was included in the account of Ms. McGrath's evidence. The determination considered legal analysis, based on Irish, English and EU judgments, including *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)* [2013] I.C.R. 851, which was considered in order to resolve any ambiguity in s. 16 of the 1998 Act, by reference to the Directive. There is reference, too, to the well-known decision of *Marleasing SA v. La Comercial Internacional de Alimentación SA (Case C-106/89)* [1990] E.C.R. I-4135. The Labour Court considered the recitals in the Framework Directive had been taken into account by the drafters of the statute, and, therefore, assisted in the process of interpretation. There was considerable focus on decided case law, perhaps in preference to a more straightforward and precise process of applying the words of s. 16 of the 1998 Act. As the judgment seeks to explain, the meaning of s. 16 can be seen within its own terms, and simply by legislative intention, rather than by having to resort to a more sophisticated approach.

(e) A freestanding obligation?

[79] The Labour Court ultimately concluded that the respondent was entitled to succeed on the basis that the board of management had failed to discharge a statutory duty under s. 16 to take adequate measures to provide the respondent with reasonable accommodation so as to allow her to continue in employment. The determination did not find that the respondent was competent to carry out the duties of a SNA. It concluded, rather, that the school had a duty fully to consider the viability of a reorganisation of work and a redistribution of tasks among all SNAs, so as to relieve the respondent of those duties which she was unable to carry out. It observed that it might have transpired that it was not possible to make the necessary adaptations.

[80] However, it concluded that, in circumstances where the school had failed to carry out such exploration, this, in itself, constituted a failure in its statutory duty. The determination observed that the school's response to the position was based on the belief that its duty was confined to providing the respondent with such accommodation as might enable her to undertake the full range of tasks expected from an SNA. But it observed that, regrettably, no amount of accommodation could produce that result. The determination concluded that the school had construed its duty too narrowly and had taken a mistaken view of what the law required in the prevailing circumstances, including the viability of a reorganisation of work, and distribution of tasks.

[81] Referring to *Humphries v. Westwood Fitness Club* [2004] E.L.R. 296, the Labour Court also observed that the school might reasonably have sought input from the respondent herself and her trade union before making its decision. Consideration might have been given to returning the respondent with modified duties for a trial basis. The determination held that the school had not given any real consideration to those possibilities, and that it was impossible to speculate as to what the outcome might have been if the school's board of management had given proper and adequate consideration to these or any other options that the respondent might have advanced if given the opportunity to make submissions in defence of her position. The school might have concluded that these were or were not viable or reasonable and proportionate in the circumstances prevailing. The determination also observed that it was significant that the school had not considered offering the respondent a renewal of her secretarial role.

[82] In the Court of Appeal, at para. 62, p. 271, Ryan P. strongly criticised the Labour Court's conclusion that there could be a "freestanding" obligation on an employer to carry out an evaluation of all the available options, irrespective of the fundamental question of whether the employee is actually capable of doing the job. He held there was a duty on the Labour Court to answer this fundamental question in the context of the facts of the case as adduced in evidence, not as an abstract proposition. As this judgment seeks to explain later, put in this way, the criticism has some force. This is a case brought under s. 16 of the 1998 Act. The purpose of the 1998 Act is to promote equality between employed persons, and to remove discrimination connected with employment. An obligation is not freestanding, and failure of compliance will not, in itself, give rise to a right to compensation. The effect of a "failure in that obligation" must be considered within the framework of s. 16 of the 1998 Act seen as a whole. Insofar as the respondent's case might suggest there is a freestanding obligation in this situation, I must reject that proposition as a matter of law. I expand on my reasons later.

(f) The basis for the compensation award

[83] There is a further issue: the appropriate form of redress was compensation in the maximum sum of €40,000. But how or why this particular sum was arrived at is unclear. The determination does not specify under which sub-heading of s. 82(4) it comes. The reasoning in the determination moves from a heading "Outcome" to that of "Redress", five lines later, without any explanation as to how this particular compensation sum was arrived

at. In my view, as a matter of fair procedures, parties are entitled to be provided with an appropriate level of reasoning and definitions for the level of compensation. This is a protection against any accusation of an arbitrary or capricious decision-making. I do not say that the decision here comes within that category, but there should be some established, rational, connection between the level of compensation awarded, and the circumstances of the case, including the outcome. This is, *a fortiori*, true in the highly unusual circumstance here where, apparently, as the Labour Court determination recited, at p. 6, the respondent had never actually received a P45 from the school, and that she had been informed that the Department of Education still regarded her as being employed. This incongruity, and its possible consequences for the claim, were not explored.

Conclusions on the determination

[84] For all these reasons, I am unable to conclude that the determination by the Labour Court, as it stands, complies with s. 88(1) of the 1998 Act. Justice must be seen to be done. Part of that process must be that a deciding tribunal is seen to engage with the relevant evidence, and, in its decision, address it one way or another within the prism of the applicable law. When an award is made, there should be some explanation of the basis for the award, as compared to any other sum.

Interpretation and application to this case

[85] Reduced to its essentials, the interpretation issue as applied here could, at one level, be characterised as to whether s. 16(1) is to be seen as subject to s. 16(3), or *vice versa*. The terms of the section have been set out earlier. Section 16(1) sets out a premise. This is that an employer is not required to retain an individual in a position, if that person is no longer fully competent, and available to undertake the duties attached to that position, having regards to the conditions under which the duties are to be performed. But the effect of the terminology of s. 16(3) is unavoidable. It carves out an exception. It provides that, for the purposes of the 1998 Act, which includes the *entirety* of s. 16, a person with a disability is to be seen as fully competent to undertake *any duties*, if they would be so competent on reasonable accommodation. Thus, if a person with a disability can be reasonably accommodated, they are to be deemed as capable of performing the job as if they had no disability; subject to the condition that reasonable accommodation should not impose a disproportionate burden on the employer; including

an assessment of the financial and other costs involved, the scale and financial resources of the employer, and the possibility of obtaining public funding or other assistance. But s. 16(3)(b) explicitly identifies the mandatory primary duty of an employer. He or she *shall take appropriate measures* where needed in a particular case to enable a disabled person to have access to employment, to participate and advance in employment, and to undergo training, unless these measures would impose a disproportionate burden. Section 16(4) then goes on to identify what appropriate measures should be taken. Although the definition is somewhat repetitive and circular, what is identified are effective and practical *measures*, where needed in a particular place, to adapt the employer's place of business, including the premises, equipment, patterns of working time, and *distribution of tasks*, or the provision of training or integration resources, but does not include any treatment facility or thing that the person might ordinarily or reasonably provide for himself or herself.

[86] In my view, the term "distribution of tasks" must be read in a manner which is consistent with the entirety of s. 16, and the purpose of the Act. If it is arguably ambiguous, it should be given an interpretation that reflects the plain intention of the Oireachtas, which can be determined from the Act as a whole (see s. 5 of the Interpretation Act 2005). Seen from the perspective of legislation, it could not have been the intention of the legislature to create a situation where, by deploying the term "tasks" to divide up the term "duties", an employer could effectively render an employee's duty incapable of performance. That would defeat the purpose of the 1998 Act, which is to achieve equality. It is arguable also that this would allow an employer to unlawfully "classify" a post in a discriminatory way (see s. 8(1)(e)).

[87] The Court of Appeal reversed the High Court judgment, and set aside the Labour Court determination, thereby allowing the decision of the Equality Officer to stand. The court did not consider it necessary to remit the case to the Labour Court, which is the forum charged with evaluating evidence. Both judgments of the Court of Appeal make references to the term "core duties", but no such distinction is to be found in the 1998 Act. One would have thought that if it was the intention of the legislature to identify the words "core duties" as creating some form of separate category, it would have been simple to do so. Similarly, the term "essential functions" does not occur in the section.

[88] Moreover, the distribution of some of the respondent's duties, in order to require her to do more of that which she could do, would not necessarily mean that she was not performing the duties of an SNA. The term "where needed" in a particular case, to adapt the employer's place of

business to the disability (see s.16(4)(a)) must be read in the context of s. 16(4)(b), which provides that, *without prejudice* to the "generality" (that is, to adapt the place of business where needed), there are also specific duties which include adapting premises, equipment, working patterns, or *task distribution*. The limitation contained in these sections is only that of disproportionally.

[89] But to imbue the word "tasks" with an artificial value, or as some form of interpretative "trump card", defeats the purpose of the section and the 1998 Act. At any level, to seek to distinguish between tasks and duties would pose real problems, as to how the distinction is to be made, and who should make it. In the case of the respondent, how many of the "task demands" set out in the table can be seen as entirely divorced from duties? In my opinion, very few, if any, of them.

Limitation

[90] This does not, of course, mean that the duty of accommodation is infinite, or at large. It cannot result in removing all the duties which a disabled person is unable to perform. Then, almost inevitably, it would become a "disproportionate burden". If no real distinction can be made between tasks and duties, there is no reason, in principle, why certain work duties cannot be removed or "stripped out". But this is subject to the condition it does not place a disproportionate burden on the employer. But to create a new job will almost inevitably raise the question as to whether what is in contemplation is a disproportionate burden. It is necessary to ensure that, even with reasonable accommodation, proper value is imported to the words of s. 16(1), to ascertain whether an employee is, or is not, "fully capable of undertaking … the duties" attached to the position. But it is hard to see there would be any policy or common good reason why simply the distribution of tasks, or their removal, should be confined only to those which are non-essential. The test must be one of fact, to be determined in accordance with the employment context, instances of which are as illustrated in s. 16(3). The test is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee. It is, therefore, the duty of the deciding tribunal to decide, in any given case, whether what is required to allow a person employment is reasonable accommodation *in the job*, or whether, in reality, what is sought is an entirely different job. Section 16(1) of the 1998 Act refers specifically to the "position", not to an alternative and quite different position.

[91] But I am forced to agree with counsel for the respondent: he is correct in saying the Court of Appeal "read in" words and intent to s. 16, which are simply not to be found there. Thus, when, at para. 54, p. 269, Ryan P. observed that the fundamental proviso in s. 16(1) "must be respected", this was, to my mind, to misunderstand the section. Neither the 1998 Act, nor the Framework Directive (were it necessary to refer to it), requires full competence, seen in isolation. Ryan P. was of the view that s. 16 required that there be full competence as to the tasks that are the essence of the position, otherwise s. 16(1), is rendered ineffective. I differ from this view: to the contrary, full competence is, rather, to be assessed as contingent upon there having been reasonable accommodation and appropriate measures.

[92] It is unnecessary to resort to the judgment of the CJEU in *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)* [2013] I.C.R. 851, or the Framework Directive, though all of these support the interpretation. But the analysis can be confined to the words of the section. The words of s. 16(3) provide that a person will be seen as fully competent *if* they *would* be fully competent on reasonable accommodation. Those terms, too, have meaning. They must be seen as being included in the legislative intention that what is contained in s. 16(1) can only be seen or understood in the context of what is provided for in s. 16(3) of the 1998 Act. Section 16(3) is not peripheral – it is fundamental to understanding the section. This conclusion, based on the words of the section alone, as it happens, accords with any interpretation of the section by reference to the reasoning of the ECJ in *HK Danmark v. Dansk almennyttigt Boligselskab (Joined Cases C-335/11 and C-337/11)*. But this does not mean that s. 16(1) of the 1998 Act is irrelevant.

[93] It follows, therefore, that I am constrained to express respectful disagreement with the judgments of the Court of Appeal. The judgment of Ryan P., which forms part of the *ratio*, laid much emphasis on the evidence in the case, and carried out a careful consideration of Ms. McGrath's report. That evidence in its entirety cannot be ignored.

Issues addressed in the Court of Appeal [2018] IECA 11, [2018] E.L.R. 249

(a) Contact with the NCSE

[94] But the judgment also referred to the telephone contacts made with the NCSE. Ryan P. set out the school principal had followed up the floating SNA idea by contacting that body, but the proposal had not been approved.

Ryan P. observed that the official who had dealt with the request was named in the Labour Court, so that the school was specific as to the refusal of funding. Perhaps so, but this was unclear, and was not solely a matter for the school.

[95] The duty laid down under s. 16(3)(c)(iii) is mandatory. An employer is to explore "the possibility of obtaining public funding or other assistance". To my mind, the making of a phone call, where there was a potential for there having been a misunderstanding, required more. I do not think it could be held to be satisfied simply by making a phone call, where arguably there was misunderstanding (see para. 17.105, p. 287, in Purdy, *Equality Law in the Workplace* (Bloomsbury Professional, 2015), which refers to the existence of the government employment retention grant scheme for employers). This court has not been given any reason why such issues could not have been clarified further in the Labour Court.

(b) Consultation with co-employees

[96] Ryan P. also observed the principal should not be criticised for not approaching the other SNAs to take on physical aspects of the job. He held that the school had a decision to make about the respondent's capacity to work as an SNA. In his view, the principal was not required to canvass the other SNAs whether they would be willing to take on the work that the respondent could not do; even if they were willing, the principal and the board would still have had a decision to make. It would not have been sufficient to have a majority vote of the SNAs.

[97] Again, I think this conclusion did not have sufficient regard to the fact that the terms of the section are mandatory. They place a duty on the employer to show that if they have not carried out such a process, then it is only because the reorganisation necessary would be disproportionate or unduly burdensome. What is essential is that it be shown, objectively, that the employer has, in fact, given the question of redistribution full consideration.

[98] Ryan P. went on to observe that even if there could have been redistribution of some non-essential tasks, this was based on a mistaken premise, flowing from s. 16(1), as to the need for full capability. It is clear the reasoning in the judgments proceeds upon the basis that consideration of redistribution should only be of non-essential tasks. For the reasons outlined earlier, that is to introduce a new test, and new words, into the Act.

(c) Evaluation

[99] Addressing a "duty to consult", Ryan P. rejected, at para. 62, p. 271, in very firm terms, the proposition that there was a "freestanding obligation on an employer to carry out an evaluation, irrespective of the other circumstances of the case and without regard to the fundamental question as to whether the employee is actually capable of doing the job". He concluded, at para. 63, p. 271, that as practical adjustments cannot be made as objectively evaluated, the fact that the process of decision is flawed does not avail the employee. He rejected the proposition that the section, in terms, made the process of inquiry a ground of default, or that a failure to consult constituted a breach of the duty imposed. He commented at para. 62, p. 271, that this was "starkly stated" by the Labour Court, as a matter of law. This alleged failure was ultimately the basis for its conclusion that the respondent was entitled to compensation, on the basis that the employer had failed in its duty under the Act to make reasonable accommodation. Ryan P. concluded at para. 63, p. 271, there was nothing in s. 16 to justify a rule that there should be adequate consideration, absent which, an employer could not form a *bona fide* belief that measures to be taken were impossible, unreasonable, or disproportionate. He considered the proposal to create a floating SNA position was to create an entirely new position. Ryan P. went on to conclude, at para. 64, p. 272, that the central reality of the case was that the respondent was "unable to perform the essential tasks of a special needs assistant in this particular school". In his view, no accommodations could change that, unfortunately. In his view, the Labour Court had wrongly concluded that the obligation of the employer was to strip away things the respondent could not do, and then to ask whether she was able to perform the essential tasks that remained. He concluded, at para. 64, p. 272, that this discounted the consideration which the school gave to the new position arising from Ms. McGrath's report, and was erroneous.

[100] Finlay Geoghegan J. expressed similar views, in particular emphasising the distinction she perceived between the terms "tasks" and "duties". She considered at para. 30, p. 279, that the duty of the employer was only to consider a distribution of certain *tasks*. That duty would depend on the facts, and, in particular, whether the tasks in question were, or were not, all the tasks demanded of a particular duty attached to the position in question.

[101] Here I must respectfully differ. The duty to reasonably accommodate, or to take appropriate measures, where needed, is laid down in s. 16(3), in order for a person with a disability to have "access to employment", unless

the measure would impose a disproportionate burden on the employer. The matters to which a decider should have regard in this connection include those outlined in s. 16(3)(c), including financial and other costs, *etc*. Finlay Geoghegan J. considered that the duty of an employer did not extend to considering the removal from a position or job of a duty, or duties, which might properly be considered a main duty, or an essential function of the position concerned, by the redistribution of *all tasks* demanded by that duty. But there is no such distinction in the section.

[102] As explained earlier, the term "distribution of tasks" to be found in s. 16(4)(b) is illustrative in nature. It must give way to the words in the main part of the section. The word "duty" or "duties" occurs five times in the section; "tasks" just once. An illustration cannot control the language of the section, although at times it may be a guide. It should not curtail or expand the meaning of the section. It does not derogate, or subtract, from the more general duty to be found in s. 16(4)(a) to provide "effective and practical measures", where needed in a particular case, to adapt the place of business to the disability concerned. The subsection is not to be interpreted as undermining or eroding the main purpose set out in s. 16(3)(a) which is to hold that a person with a disability is fully competent to undertake any duties, if they would be so competent and capable on reasonable accommodation being provided by the employer, provided that it is not disproportionate. The term "essential functions" is not to be found in the 1998 Act. What is required by s. 16, read in its entirety, is that consideration be given to distribution of essential duties, as part of a reasonable accommodation.

[103] Again, standing back from the facts of this case, a want of clarity, or vagueness, or imprecision, on this duty might permit employers to themselves categorise elements of a job as being "duties", rather than "tasks", thereby limiting the obligation to consider reorganisation of the way in which the work was done. I am unable, therefore, to agree with Finlay Geoghegan J.'s observations at para. 20, p. 270, that s. 16(1) contained a limitation, to the effect that nothing in the 1998 Act should be construed as requiring any person to retain an individual, if that individual is no longer competent or available to undertake the duties attached to the position. Section 16(1) is not freestanding, it is subject to s. 16(3).

[104] Finally, it should be noted that the Court of Appeal found, at para. 63, p. 271, that there was no justification for the rule outlined in the Circuit Court decision of *Humphries v. Westwood Fitness Club* [2004] 15 E.L.R. 296. In *Humphries v. Westwood Fitness Club*, Dunne J., then a judge of the Circuit Court, held that, in order to form a *bona fide* belief that a claimant

was not fully capable of performing the duties for which she was employed, a respondent employer would normally be required to make adequate inquiries to establish fully the factual position in relation to the claimant's capacity. The nature of the inquiries would depend on the circumstances, but would, at minimum, involve looking at medical evidence to determine the level of impairment arising from the disability, and its duration. If it was apparent that the employee was not fully capable, the school was required, under s. 16(3), to consider what, if any, special treatment or facilities might be available, by which the employee could become fully capable, and account was to be taken of the cost of such facilities or treatment. But Dunne J. went on to hold that such an inquiry could only be regarded as adequate if the employee concerned was allowed a full opportunity to participate at each level, and, on the facts of that case, to present relevant medical evidence, and submissions.

[105] Ryan P. considered *Humphries v. Westwood Fitness Club* [2004] E.L.R. 296 at para. 63, p. 271, in the light of subsequent English case law (see *Mid Staffordshire General Hospitals NHS Trust v. Cambridge* [2003] I.R.L.R. 566; *R. (Davey) v. Oxfordshire County Council* [2017] EWCA Civ 1308, [2018] P.T.S.R. 281; *Muzi-Mabaso v. Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 1369, (Unreported, Court of Appeal of England and Wales, 27 October 2016); *Burnip v. Birmingham City Council* [2012] EWCA Civ 629, [2012] L.G.R. 954; *A.H. v. West London Mental Health Trust and Secretary of State for Justice* [2011] UKUT 74, (Unreported, United Kingdom Upper Tribunal (Administrative Appeals Chamber), 17 February 2011); *Tarbuck v. Sainsbury's Supermarkets Ltd.* [2006] I.R.L.R. 664, to which might be added *Chief Constable of South Yorkshire Police v. Jelic* [2010] I.R.L.R. 744, and *Royal Bank of Scotland v. Ashton* [2011] I.C.R. 632. In his view, a statutory duty was "objectively" concerned with whether the employer complied with an obligation to make reasonable accommodation. In this State, however, our courts have always attached importance to fair procedures where employment is at stake (see *Bolger v. Showerings (Ireland) Ltd.* [1990] E.L.R. 184, and the recent judgment of Ní Raifeartaigh J. in *Dublin Bus v. McKevitt* [2018] IEHC 78, [2018] E.L.R. 193).

[106] I respectfully disagree with the Court of Appeal's conclusion on this issue, but I do not go so far as to say there is a mandatory duty of consultation with an employee in each and every case; the section does not provide for this, still less does it provide for compensation simply for the absence of consultation in an employment situation. But, even as a counsel of prudence, a wise employer will provide meaningful participation in

vindication of his or her duty under the 1998 Act. But absence of consultation cannot, in itself, constitute discrimination under s. 8 of the 1998 Act.

[107] But I would again wish to emphasise these conclusions are not to be understood as requiring a situation where the duty of an employer is understood as having to provide an entirely different job. The duty of accommodation is not an open-ended one. There is no obligation to redefine the employment of an airline pilot as an airline steward, or *vice versa*. The question is, rather, to consider whether the degree of redistribution, or "accommodation", is such as to effectively create a different job entirely, which would almost inevitably impose a disproportionate burden on an employer. Even within the scope of compliance, a situation may be reached where the degree of rearrangements necessary, whether by allocation of tasks, or otherwise, might be such as to be disproportionate. It is a matter of degree, capable of being determined objectively.

A final issue: s. 16(1)

[108] Once consultation, or other necessary steps for compliance, have been taken, an employing entity may have to ask itself the ultimate question whether, having explored the modes of accommodation, and if, prudently having consulted with an employee, the *position*, as defined in s. 16(1) is, *in fact*, capable of *adaptation* so as to accommodate that claimant, and whether the claimant would be capable of performing that function thus adapted. But it is *that "position"* or *job*, not another one. If there is a challenge to this decision, this must be assessed objectively by the tribunal vested with the statutory duty of carrying out such an inquiry, and also vested with the expertise to carry out such assessment. If, on reasonable accommodation, a claimant is unable to fully undertake the duties attached to the position, then the 1998 Act provides there can be no finding of discrimination.

The High Court judgment [2015] IEHC 785

[109] In other circumstances, it might be that the decision of the High Court could then stand in place of that of the Court of Appeal. Regrettably, I cannot reach such a desirable conclusion, which would at least bring an end to this litigation. While there are significant areas of the legal reasoning where I find myself in respectful agreement with Noonan J., one cannot ignore the factual *lacuna* which arose in this case. In the High Court, Noonan

J. referred to the decision of this court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34, where Hamilton C.J. observed that courts should be slow to interfere with decisions of expert administrative tribunals, save where the conclusions were based on an identifiable error of law, or unsustainable finding of fact. Noonan J. concluded he should be slow to interfere with the determination on that reasoning. I do not think *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* is the last word on this issue.

[110] But in the *Attorney General v. Davis* [2018] IESC 27, [2018] 2 I.R. 357, there is to be found a convenient summary of the present law, which is somewhat more nuanced than the judgment in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. In a detailed judgment, McKechnie J., speaking for the court, at para. 55, p. 386, identified what may be regarded as issues of law which may be considered on a case stated. These included (i) findings of primary fact where there is no evidence to support them; (ii) findings of primary fact which no reasonable decision-making body could make; (iii) inferences or conclusions which are unsustainable by reason of any one or more of the matters listed above; or which could not follow or be deducible from the primary findings as made; or which were based on an incorrect interpretation of documents. If not included in that category, I would add a determination which is *ultra vires*, where there is a failure of statutory duty. Undoubtedly, deference is due to an administrative tribunal acting within the scope of its duty. But, when there is a substantial failure of compliance with that statutory duty, a court must intervene. The determination did not comply with the statutory duty laid down in the Act.

[111] It is a most unfortunate fact that this case has now been considered and analysed in some detail by five different tribunals, but there is now only one course available in my view.

Remedy

[112] The question of remedy is constrained by the fact that the approach adopted in each earlier legal forum was erroneous. The court is faced with a series of invidious choices. But this does not mean that the situation is entirely beyond remedy. While the Labour Court determination did not comply with the statute, what occurred can, in fact, and in law, be addressed. But, to my mind, it can *only* be remedied by remitting the appeal to the legal

forum charged under the statute with evaluating the evidence in accordance with law – and applying the law to the facts. There are some issues yet be determined; which, in my opinion, can only be determined by the Labour Court itself. In this way, statutory compliance can be achieved. This court should not act as a surrogate Labour Court, which is charged with carrying out a statutory function. Regrettably, therefore, it seems that the only appropriate order is to remit the matter to the Labour Court for further consideration in accordance with the totality of the evidence adduced, together with such further limited evidence as may be necessary, and the law, as explained in this judgment. This court should not, in my view, seek to pre-empt, or short-circuit, that process. But the decision of the Labour Court must address the legal principles applicable in light of the full evidence. The Labour Court is under a statutory duty to carry out its function in accordance with the law enacted by the Oireachtas. This duty can result in having to make difficult decisions, as well as easy ones. It is to be hoped, however, that whatever ultimate conclusion is arrived at, based on an appreciation of the full factual background, and on a correct interpretation of the law, will bring an end to this overlong litigation.

What the Labour Court must address

[113] The issues which the Labour Court must address are:-

(a) the process of consultation with the NCSE; and

(b) the entirety of Ms. McGrath's evidence, and its legal consequences.

An ultimate legal question, however, is the extent to which it can be said that, even with reasonable accommodation, the respondent can return to the position of an SNA. That is what s. 16(1) provides for in this type of case. If it arises, the court will have to provide a reasoned basis for any award of compensation, having regard to the principles of rationality and proportionality, and the respondent's employment status. The scope of the inquiry is limited to whether the respondent was, in fact, the subject of unlawful discrimination, and, if so, what was the precise nature of that discrimination.

[114] The respondent obviously carried out her work to everyone's satisfaction prior to her accident. Her situation will inevitably attract much sympathy. The issues are important for employees who are disabled, but also for employers, who must know their duties. The fact that this case has not been otherwise resolved to date reflects the fact that the legal issues are not easy ones. The order proposed does not imply that there must be any predetermined outcome in the Labour Court's reconsideration. Ultimately, the

duty of the Labour Court is to make a determination on the entire facts, by applying the law as enacted. The scope of the renewed hearing will inevitably be narrow. Other than these limited areas identified, no new issues can be introduced by either side. That would be to create an injustice. I would, therefore, propose that the appeal against the Court of Appeal order be allowed, and that the specific matters arising be remitted to the Labour Court for further consideration.

Dunne J.

[115] I agree with MacMenamin J.

Charleton J.

[116] The purpose of this judgment is to indicate the reasons for partly assenting in the analysis of MacMenamin J. but to also dissent as to the result proposed.

[117] Having suffered a dreadful accident in July 2010, the respondent's job in Nano Nagle School in Tralee, County Kerry, was held open for her. She is a qualified nurse and had worked there as a highly valued special needs assistant in a school which educates children with mild, moderate and severe disabilities. These include many children who have physical handicaps. After a long period of treatment and rehabilitation for a severed spine, and now using a wheelchair, the respondent sought to return to work. There was a serious engagement by the school in that process. To the regret of everyone, the decision was made that the nature of the work could not suit the respondent.

The legislation

[118] The 1998 Act has been much amended; including by the Equal Status Acts 2000 to 2004, the Equality Act 2004, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, the Civil Law (Miscellaneous Provisions) Act 2011, the Education and Training Boards Act 2013, the Equality (Miscellaneous Provisions) Act 2015 and the Workplace Relations Act 2015. Central to the changes in the legislation is the drive by society to ensure that persons of varying ethnicity, language, religion, and orientation do not suffer from exclusion but are treated, as much as any majority, as valued members of the workforce and of society. This is part of an international and European drive to declare the value which is inherent in

the dignity of all people and to combat discriminatory conduct. In this regard, the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"), ratified by both the State and the European Union, is part of the necessary backdrop to this appeal. Article 27 of the Convention outlines the rights of persons with disabilities at work, which encompasses "the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities". State parties to the Convention have an obligation under this article to "safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment" through measures such as reasonable accommodation and prohibition of discrimination. Directly relevant are Ireland's obligations under European law as expressed in EU Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, the Framework Directive. The Framework Directive prohibits employment discrimination on the grounds of religion or belief, disability, age or sexual orientation. It states in recital 16 that the provision of measures accommodating "the needs of disabled people at the workplace plays an important role in combating" such discrimination. The 1998 Act must be interpreted in the light of the Framework Directive. In turn, the Framework Directive requires to be seen in the light of the international obligations entered into by the European Union on ratifying the CRPD. Matters of interpretation cannot, however, change the clear wording of a statutory obligation. This is a line which the European Court of Justice declared cannot be crossed. In the joined cases of *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV. (Joined Cases C-397/01 to C-403/01)* [2004] E.C.R. I-8835, the following observations were made by the court at pp. 8917 and 8918:-

> "111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.
>
> 112. That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see [*Wagner Miret v. Fondo de Grantía Salarial (Case C-334/92)* [1993] E.C.R. I-6911], paragraph 20).

113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in [*Von Colson v. Land Nordrhein-Westfalen (Case C-14/83)* [1984] E.C.R. 1891], paragraph 26; [*Marleasing SA v. La Comercial Internacional de Alimentación SA (Case C-106/89)* [1990] E.C.R. I-4135], paragraph 8, and [*Faccini Dori v. Recreb Srl (Case C-91/92)* [1994] E.C.R. 1-3325], paragraph 26; see also [*BMW v. Deenik (Case C-63/97)* [1999] E.C.R. I-905], paragraph 22; [*Océano Grupo Editorial S.A. v. Murciano Quintero (Joined Cases C-240/98 to C-244/98)* [2000] E.C.R. I-4941], paragraph 30; and [*Adidas-Salomon AG v. Fitnessworld Trading Ltd. (Case C-408/01)* [2003] E.C.R. I-2537], paragraph 21)."

[119] Section 2 of the 1998 Act defines disability as meaning:-

"(a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
(c) the malfunction, malformation or disfigurement of a part of a person's body,
(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
(e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,

and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person."

[120] Discrimination should not occur. That happens when persons with disabilities are excluded from work of which they are capable. Section 35 of the 1998 Act goes so far as to enable a person who cannot do a full shift of work, or a full week, to be engaged to do less than a person without a disability and for remuneration to be adjusted. Under s. 8 of the 1998 Act, discrimination is prohibited as regards "access to employment", "conditions of employment", "training or experience for or in relation to employment", "promotion or re-grading", or "classification of" employment posts. Section 6 of the 1998 Act provides that where "a person is treated less favourably

than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2)", discrimination occurs. Declared as unacceptable to society are gender discrimination, civil status discrimination, family status discrimination, sexual orientation discrimination, religious discrimination, age discrimination for those over 18, disability discrimination, race discrimination, Irish Traveller Community discrimination, and discrimination because of pregnancy. Work of equal value must, under s. 7, be generally remunerated in an equal way. Advertisements containing discriminatory provisions are prohibited by s. 10 of the 1998 Act. Where contracts, and here the provision particularly concerns contracts related to employment, contain discriminatory terms, these are "null and void" under s. 9 of the 1998 Act. The provisions are equally applicable to men and women under s. 18 and both are entitled to equal remuneration under ss. 19 and 29.

[121] The legislation also provides at s. 16 that the imperative of the legislation is not to require "any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position" where that individual cannot do the work, is not competent or qualified for the work, or will not do the work. That is specifically put in this way in s. 16(1) so that no employer, or prospective employer, or employment agency, is required to offer employment to, or continue in employment, or to search for employment for any individual who:-

> "(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or
>
> (b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed."

[122] This is not different to recital 17 of the Framework Directive which provides:-

> "This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities."

[123] Both in the High Court and in the Court of Appeal in this case, and on this appeal, there was considerable discussion as to whether the anti-discrimination provisions in relation to disability in s. 16 of the 1998 Act ought to be construed on the basis that s. 16(1) is somehow dominant over the provision requiring reasonable accommodation for persons with disabilities in s. 16(3). All legislation is to be construed in accordance with an appropriate regard to other relevant provisions which provide the context for a proper interpretation. Sections 6 and 16 fit together to provide that while it is prohibited that "a person is treated less favourably than another person is, has been or would be treated in a comparable situation" because of grounds ranging from disability to race, that does not mean that an employer is required to engage those who are not willing to do the work or are not "fully capable" of performing the work. Both are sides of the same coin. They go together. What is thus, for example, specifically provided for is that those seeking a person to play as principal flute in a symphony orchestra do not have to engage someone who plays only the piano but expresses a willingness to start learning the other instrument. Thus, whether the person is 40 years old or 80 years old, gay or straight, an Irish-speaking individual descended from Brian Boru or a recently arrived Russian, a Christian or a Jewish applicant, any can and should be chosen once selection for employment is on the basis of competence and willingness. The general and imperative provisions of the legislation are, however, so wide that in s. 16(5) the legislature has felt it necessary to declare that nothing in the Act is to be taken as "requiring an employer to recruit, retain in employment or promote an individual" where that "employer is aware, on the basis of a criminal conviction of the individual or other reliable information, that the individual engages, or has a propensity to engage, in any form of sexual behaviour which is unlawful". To bring home that qualification, s. 16(6) provides that this saver is particularly applicable "where the employment concerned involves access to minors or to other persons who are vulnerable". Thus, while an employer cannot discriminate, an employer is entitled and expected to choose people to fill posts on the basis of ability. A person can be able but have criminal propensities which may, and should on any commonsense basis, disqualify him or her.

[124] The thrust of the legislation is thus to outlaw in the workplace only the kind of discrimination based on bigotry, prejudice or racism. To discern that a particular individual is not committed to the work, or that that person lacks the competence for the work or the capability to tackle the work, is not to deny someone employment through unlawful discrimination. That is not to deny the legislation its nuances; but merely to attempt a

summary. This legislation, after all, is directed to employers and to employment agencies. It is not directed to accountants or tax specialists or lawyers. Occluding the legislation with a legal mist of fine distinctions as between various terms for work or tasks and asking such questions as to core competencies and attempting a perfect definition of any particular form of employment in distinction from the commonsense and honest appraisal that the legislation clearly requires is to do a disservice to the human rights of disabled individuals and the thrust of the CRPD and of the Framework Directive. Hence, it is difficult to see distinctions in relation to any discernible differences between duties, functions and tasks, or core duties and responsibilities as helpful. Nor is it particularly useful to see disability as medical in nature. A person with a disability remains a person, an individual with human dignity who is required to be treated as such. Then the issue is as to how the workplace treats that person. The ideals in the CRPD are translated into practical measures through the Framework Directive and through the 1998 Act.

[125] In reality, every job is different. A person who has pursued a vocation in police work could usefully serve in a vast range of functions in such a huge and multi-faceted sphere of employment. Hence, whether on the beat, or acting as a crime analyst or detective or in administration, a police officer is part of a vast organisation where the specific skills of police work may be more or less needed and where people may be redeployed to tasks which require discretion to be exercised but which back up those at the front line. In some cases, an employer may be able to redeploy people from a very physical task to an area in administration. Thus, in *Chief Constable of South Yorkshire Police v. Jelic* [2010] I.R.L.R. 744, a police officer was diagnosed with chronic anxiety syndrome. The English Employment Appeals Tribunal found that it would have been a reasonable adjustment to swap the jobs being undertaken by the claimant and another policeman, or to offer him re-employment in a civilian job within the police force which was being advertised at the relevant time. A person who lays bricks is different, because qualities such as a keen eye and physical strength backed by experience are there demanded. If someone is employed to build, losing those attributes through an accident means the loss of the trade. United Kingdom authorities including *Archibald v. Fife Council* [2004] UKHL 32, [2004] I.C.R. 954 and *Chief Constable of South Yorkshire Police v. Jelic* suggest that redeployment is part of the duties of an employer in the United Kingdom under the relevant legislation in force at the time they were handed down: s. 6 of the Disability Discrimination Act 1995 referred to the employer's duty to make adjustments including "transferring [a person] to fill an existing vacancy". This

legislation has since been replaced by the UK Equality Act 2010. Sections 20, 21 and 22 of the 2010 Act impose a duty to make reasonable adjustments for disabled persons, but do not reference redeployment. The requirement to redeploy does not arise under the 1998 Act in this jurisdiction. Thus, such cases as cited above from the UK jurisdiction, would not carry the same imperative here. But even under that legislative model, not wishing to work directly with prisoners, as in *Irish Prison Service v. A prison officer* (EDA1837, Labour Court, 17 July 2018), or as in *British Gas Services Ltd. v. McCaull* [2001] I.R.L.R. 60, the necessity to have more than one operative, suggests a common sense interpretation of the legislation, and not one suffused with legal nuance.

[126] Hence, properly the focus is on the work. Again, this is not to be reduced to legal disputations. A job can best be seen by looking at what is involved on the ground. Seeing that job carried out through observation, or experience of that employment, can define the nature of a post much better than any contract of employment or any paper exercise. That was the approach in this case and that approach is right. This is a practical exercise.

[127] Leeway to a reasonable degree is to be afforded to disabled persons in order to enable them to do a job. As mandated by s. 16(3) of the 1998 Act, those with a disability are "fully competent to undertake, and fully capable of undertaking" a job on "reasonable accommodation … being provided by the person's employer". Examples may assist. A person putting together exhaust manifests in a car factory requires to be both highly mobile and very strong, since the items are both heavy and cumbersome, as well as skilful in welding. A physical incapacity coming about while holidaying during employment may mean inability to do the job. On the other hand, a person sitting at a work bench and assembling ignition systems for a car may just as easily do that job from a wheelchair. That person's place of work or access to a workbench may need sensible adjustment. All these assessments are fact-based and legal analysis is not the object of the legislation, the Framework Directive or the Convention. Returning to an earlier example: the principal flute in the symphony orchestra becomes disabled through an accident and is in a wheelchair. She is still a brilliant flautist with a golden tone but, to get on stage, she needs a ramp. To go on tour, a hoist or other measures are needed to get her on the bus. To be fully comfortable, a disabled toilet needs to have easy access to the ladies' dressing room in the rehearsal venue or concert hall. These are what the legislation refers to as appropriate measures. And the 1998 Act requires that every "employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability" to get to their place of work, to "to participate

or advance in employment" or to obtain "training". Those steps must be taken "unless the measures would impose a disproportionate burden on the employer". What is proportionate or disproportionate descends into cost analysis based on "the financial and other costs entailed", the scale of the employer, the state of the employer's financial health and "the possibility of obtaining public funding or other assistance". Section 16(4) amounts to a reiteration in stating that what needs to be done, if it can reasonably be done, is to take "effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned". That can include "the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources". Recital 20 of the Framework Directive is not contradictory of this analysis:-

> "Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources."

[128] But, it is always a question of what can be done and whether it will really help that person who has a disability, or who has developed a disability while in the course of employment, to do their job. To go back to the example of the orchestral musician, if the disability is such as to destroy memory or concentration or ability to play at the top level, then as a matter of humanity, the employer may consider if it is possible to reassign. That is not a legal obligation. If the ability to be, as the 1998 Act says, "fully competent", with "reasonable accommodation" is not there, then there is no discrimination according to the legal definition if the person cannot do the work.

[129] Any analysis should focus on what happens on the ground. It is not appropriate for anybody charged with deciding employment matters to leave out large sections of a narrative given in good faith by an occupational therapist or doctor in order that a particular result may seem attractive. In that regard, the concerns expressed by MacMenamin J. are worrying. The test in the legislation is of full competence when reasonable accommodation is made. That test requires a plain analysis of the facts.

Remedy

[130] The appeal in this case was from the Director General of the Workplace Relations Commission to the Labour Court. This reversed the

finding of the former. That happened in circumstances of concern. The remedies available under s. 83 of the 1998 Act, following a hearing, are in practical terms those available already at first instance under s. 82. Hence, s. 82(1) provides:-

> "Subject to this section, the types of redress for which a decision of the Director General of the Workplace Relations Commission under section 79 may provide are such one or more of the following as may be appropriate in the circumstances of the particular case:
>
> (a) an order for compensation in the form of arrears of remuneration (attributable to a failure to provide equal remuneration) in respect of so much of the period of employment as begins not more than 3 years before the date of the referral under section 77(1) which led to the decision;
>
> (b) an order for equal remuneration from the date referred to in paragraph (a);
>
> (c) an order for compensation for the effects of acts of discrimination or victimisation which occurred not earlier than 6 years before the date of the referral of the case under section 77;
>
> (d) an order for equal treatment in whatever respect is relevant to the case;
>
> (e) an order that a person or persons specified in the order take a course of action which is so specified;
>
> (f) an order for re-instatement or re-engagement, with or without an order for compensation."

[131] In turn, there are limitations as to monetary amounts. Thus, under s. 82(4):-

> "The maximum amount which may be ordered by the Director General of the Workplace Relations Commission by way of compensation under subsection (1)(c) or (1)(f) shall be—
>
> (a) in any case where the complainant was in receipt of remuneration at the date of the reference of the case, or if it was earlier, the date of dismissal, an amount equal to the greatest of —
>
> (i) 104 times the amount of that remuneration, determined on a weekly basis,
>
> (ii) 104 times the amount, determined on a weekly basis, which the complainant would have received at that date but for the act of discrimination or victimisation concerned, or
>
> (iii) €40,000, or
>
> (b) in any other case, €13,000."

[132] Here, the award of the Labour Court was for €40,000. It was not that something specific be done or that the employment held open for the respondent in anticipation of a hoped-for recovery.

[133] Under s. 90 of the 1998 Act, upon a determination being made, either the Labour Court, or the parties, may "appeal to the High Court on a point of law" and the Labour Court may "if it thinks it appropriate, adjourn the appeal pending the outcome of the reference." Here, the errors of fact made in effectively rewriting the occupational therapy report amount to an error of law.

[134] On dismissal from employment for misconduct, a minimum form of fair procedures is required. Some contracts of employment may require more. Where ill-health is in issue then the principles laid out in *Humphries v. Westwood Fitness Club* [2004] E.L.R. 296 and *Dublin Bus v. McKevitt* [2018] IEHC 78, [2018] E.L.R. 193 apply. In *Humphries v. Westwood Fitness Club*, Dunne J. noted at pp. 300 and 301 the following in her analysis of s. 16 of the 1998 Act:-

> "This section, on which the respondent relies, can provide a complete defence to a claim of discrimination on the disability ground if it can be shown that the employer formed the bona fide belief that the claimant is not fully capable, within the meaning of the section, of performing the duties for which they are employed. However, before coming to that view the employer would normally be required to make adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.
>
> The nature and extent of the enquiries which an employer should make will depend on the circumstances of each case. At a minimum, however, an employer, should ensure that he or she is in full possession of all the material facts concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision."

[135] In *Dublin Bus v. McKevitt* [2018] IEHC 78, [2018] E.L.R. 193, Ní Raifeartaigh J. endorsed at para. 53, p. 206, the decision of Lardner J. in *Bolger v. Showerings (Ireland) Ltd.* [1990] E.L.R. 184, which held at p. 186 that where an employer wishes to dismiss an employee with poor health on grounds of incapacity, the onus is on them to show:-

(i) that it was the incapacity that was the reason for the dismissal;
(ii) the reason was substantial;
(iii) the employee received fair notice that the question of his dismissal for incapacity was being considered; and

(iv) the employee was afforded an opportunity of being heard.

[136] The decision not to start the respondent in employment was not due to any misconduct on her part. Procedural rights are thus not engaged in the sense of enabling the right to answer a charge of discreditable conduct. Instead, it was due to the unfortunate occurrence of the disability which the school realised could not enable it to employ the respondent as a special needs assistant. Certainly, had the board of the school sat down with the respondent and discussed the reports in this case, it may be that no case would ever have been taken. But, what was done, in giving the respondent an opportunity to consult with a doctor and to engage with every aspect of the case on the ground as to the effect which her disability had on the highly responsible and physically demanding work of a special needs assistant sufficed as a procedure. The legislation does not demand, and nor should this court impose, any further requirement such as one which demands some kind of procedure related to any scheme of accommodation that might be reached. It is for an employer to be open to the prospects for engagement and to consider what can in good faith be done.

Result

[137] On the papers before the court, there is nothing whereby the genuineness of either side could be doubted.

[138] The order of the Court of Appeal, perfected on 21 February 2018, was to "set aside the said determination of the Labour Court" and that the "award of compensation be vacated". That order should be upheld but on the narrow grounds herein explained.

O'Malley J.

[139] I agree with MacMenamin J.

[*Reporter's note*: The decisions in *A. v. A Public Sector Organisation* (DEC-E2006-056, Equality Tribunal, 16 November 2006), *Daly v. Nano Nagle School* (DEC-E2013-168, Equality Tribunal, 3 December 2013), *A School v. A Worker* (EDA 1430, Labour Court, 12 August 2014) and *Irish Prison Service v. A Prison Officer* (EDA1837, Labour Court, 17 July 2018), referred to in the judgment of MacMenamin J., are available on workplacerelations.ie and labourcourt.ie.]

Solicitors for the respondent: *Bowler Geraghty & Co. Solicitors*.

Solicitors for the appellant: *Thomas J. O'Halloran Solicitors.*

Solicitor for the *amicus curiae*: *Maria Mullan*.

Líosa Beechinor, Barrister

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THE SUPREME COURT

[2016] IESC 40

[Record No. 336/2009]

McKechnie J.
MacMenamin J.
O'Malley J.

BETWEEN:

LOUTH/MEATH EDUCATION AND TRAINING BOARD

APPLICANT/APPELLANT

AND

THE EQUALITY TRIBUNAL

RESPONDENT

AND

PEARSE BRANNIGAN

NOTICE PARTY

Judgment of Mr. Justice John MacMenamin dated the 13th day of July, 2016

1. The appellant now named in the title herein is the successor-in-title to the County of Louth Vocational Education Committee, the applicant, originally named in the proceedings. On occasion, therefore, this judgment contains references to the appellant as "the V.E.C.", where context or understanding so requires.

2. On the 24th July, 2009 the High Court, (McGovern J.), delivered judgment, dismissing the appellant's application for judicial review against the respondent ("the Tribunal"). The appellant appealed that judgment to this Court. It seeks to challenge what it claims was an unlawful decision on jurisdiction in an investigation conducted by Valerie Murtagh, an Equality Officer delegated by the Director of the Tribunal, under the Employment Acts, 1998 to 2004 ("the Acts").

3. The origins of the application lie in complaints to the respondent by the notice party, Pearse Brannigan (Mr. Brannigan). Mr. Brannigan was formerly employed as a teacher by the appellant. He complained of discrimination based on his sexual orientation. Ms. Murtagh, ("the Officer") was delegated to carry out an investigation concerning the complaints. She embarked on an investigation into issues raised by Mr. Brannigan concerning his former employment. Mr. Brannigan set out these complaints, first, in an initial 'EE1' form submitted to the Tribunal, and, later, in correspondence to that statutory body. The issue before the Court is as to parameters of that inquiry.

4. In the judicial review application, the appellant, among other claims, sought declarations to the effect that the Officer be limited to investigating complaints of discrimination made by Mr. Brannigan which had been lawfully referred to it, that is, matters said to have occurred within a period of 6 months, prior to 4th August, 2006, the date the Officer received Mr. Brannigan's first complaint. The appellant claimed it had not been accorded fair procedures in the process of the investigation into the complaints. In dismissing the application, McGovern J. held that the Officer had not made a final determination on the issue of the temporal limit of the complaint; and that the procedures which she had adopted were not unfair, or contrary to natural or constitutional justice.

5. The appeal before this Court is confined to the first, temporal limit, or "*jurisdictional*" issue. No point is now raised on the fair procedures question. The appellant seeks, rather, declarations, either to the effect that the Officer acted *ultra vires*, in purporting to conduct an investigation falling outside the lawful terms of the original complaint made by Mr. Brannigan, or, alternatively, an order requiring the Officer to confine her investigation to the issues set out in Mr. Brannigan's original complaint of the 4th August, 2006. The case is made that the time limits set out in the Acts debar her from investigating any other matters said to have occurred much earlier, and which were not described in the EE1 form. The appellant also seeks an injunction by way of judicial review, staying

the investigation being conducted into the alleged discriminatory acts, save insofar as the investigation is confined to the two allegations contained in the complaint which Mr. Brannigan made to the Tribunal on the 4th August, 2006.

6. It is a matter of concern and regret that the matters raised in this appeal took place some considerable time ago. Nonetheless, the fact remains that there is still an investigation in being, and the progress of that investigation has remained in suspense pending the outcome of these proceedings. It is necessary now to look at the legal background to this application.

7. This judgment, insofar as it addresses matters before the Officer, addresses matters which are not in controversy. For reasons explained in more detail later, the judgment is not to be interpreted as expressing any view on the factual material to be considered in the investigation, or on the legal issues in controversy.

8. It will also be noted that, now, the Workplace Relations Commission has, among other functions, now superseded the Equality Tribunal (See Workplace Relations Act, 2015, s.83(1)(c)). But, the Acts of 1998 – 2004, relevant to this appeal, must still be seen in their broader purpose and context. The issue of equality in employment has been the subject matter of a number of Directives, *inter alia*, Council Directive 2000/78/EC of 27th November, 2000, which established a general

framework for equal treatment in employment and occupations. Article 9 of that Directive provides as follows:

> *"Defence of rights*
>
> *1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."*

9. By its long title, the 1998 Act sought to promote equality between employed persons, and to make provision with respect to discrimination in, and in connection with, employment, vocational training, and membership of certain bodies. The legislation was also intended to make provision in respect of harassment in employment and in the workplace.

10. The 1998 Act pre-dated the E.U. Directive. Nevertheless, the Act, and amendments subsequent to the year 2000, sought to implement these same principles, and are part of a standalone code.

11. Section 79(1) of the 1998 Act, as amended, created a duty on the Director to investigate the case, and, where mediation failed, went on to provide that the Director should "*investigate the case and hear all persons appearing ... to be interested and desiring to be heard.*" Section 79(1) was subsequently substituted by the Civil Law (Miscellaneous

Provisions) Act, 2011, s.24; the substituted provision does not now contain the words "*and desiring to be heard*".

12. Section 77 of the Act of 1998, as substituted by s.46 of the Act of 2004, and the Schedule thereto, provided:

> *"(1) A person who claims -*
>
> *(a) to have been discriminated against or subject to victimisation,*
>
> *(b) to have been dismissed in circumstances amounting to discrimination, or victimisation,*
>
> *(c) not to be receiving a remuneration in accordance with an equal remuneration term*
>
> *(d) not to be receiving a benefit under an equality clause,*
>
> *may, subject to subsections (3) to (9), seek redress by referring the case to the Director."*

13. A complaint, referred under this section, was to be delegated by the Director of the Tribunal ("the Director") to an Equality Officer. Such complaint might, thereafter, become either the subject of mediation, investigation, or, ultimately, after investigation, a decision by such officer.

14. It is clear that the process was intended to provide for a single, expeditious, hearing process, into all relevant matters, conducted without undue formality. Section 79(1A) of the 1998 Act, as amended, provided that a complaint of discrimination, made on more than one ground,

should be investigated as a single case, and that discrimination claims, amounting to victimisation, might also be investigated in one case. Section 79(2) of the Act provided that such an investigation was to be held in private.

15. Pursuant to s.79(3A), the Acts then provided the Director, or an Equality Officer assigned to the case, might hold a preliminary hearing into specified matters, including:

> *"(a) whether the complaint has complied with the statutory requirements relating to such referrals, ... or*
>
> *(d) any other related question of law or fact".*

16. At the time relevant to this judgment, an appeal on a point of law to the High Court from a determination of the Tribunal on preliminary points, including those identified above (see s.79(7) of the Act of 1998, as inserted by s.35(d) of the Equality Act, 2004). Section 79(7) has now been deleted by s.83(1)(f) of the Workplace Relations Act, 2015.

17. The potential effect and impact of the range of orders made by an Equality Officer, under s.82 of the Act of 1998, was by no means insignificant. Consequently, the requirement for effectiveness and informality must be balanced with the principle that any investigations be carried out in a fair manner. Informality and constitutional fairness are not mutually exclusive requirements.

18. The statutory provisions as to time limits applicable to claim lie at the heart of this appeal. These were set out in s.77 of the 1998 Act, as amended by s.32 of the 2004 Act.

19. The relevant provisions were as follows:

> *"(5)(a) Subject to paragraph (b), a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the* ***period of 6 months from the date of occurrence of the discrimination*** *or victimisation to which the case relates or, as the case may be,* ***the date of its most recent occurrence.*** (emphasis added)
>
> *(b) On application by a complainant the Director or Circuit Court, as the case may be, may, for reasonable cause, direct that in relation to the complainant paragraph (a) shall have effect as if for the reference to a period of 6 months there were substituted a reference to such period not exceeding 12 months as is specified in the direction; and, where such a direction is given, this Part shall have effect accordingly."*

It is beyond controversy, therefore, that these provisions had the intent that, in general, a complaint was to be made within a time limited, at least by reference, to the most recent occurrence in question.

20. Section 77(6) of the 1998 Act, as amended by s.32 of the Equality Act, 2004, provided for a situation where the time may be extended where there has been a misrepresentation by a respondent. On the facts

now presented, that situation does not arise here. However, s.77(6A) is of particular relevance. It provided as follows:

> *"(6A) For the purposes of this section -*
>
> *(a) discrimination or victimisation occurs -*
>
> *(i)* ***if the act constituting it extends over a period, at the end of the period,***
>
> *(ii) if it arises by virtue of a term in a contract, throughout the duration of the contract, and*
>
> *(iii) if it arises by virtue of a provision which operates over a period, throughout the period,*
>
> ..." (emphasis added)

21. The interpretation of these provisions, taken together, is, undoubtedly, an issue in the investigation. But, the role of the Superior Courts in considering fact and law issues emerging from a tribunal, such as the respondent, has recently been considered by this Court (see *Barry v. The Minister for Agriculture* [2015] IESC 63). That role is significantly circumscribed. At this stage it is sufficient to emphasise that it is not, generally, the function of the courts to substitute their own views for those of an Equality Officer on questions of fact. Nor should a court, in a judicial review, or an appeal therefrom, seek pre-emptively to exercise a statutory jurisdiction on legal issues which is vested, in the first instance, in an Equality Officer.

22. In the pending investigation, the substantial issues of fact, and law, are yet to be determined. In fact, the true question which arises in this appeal is whether the appellant, in seeking the jurisdictional declarations identified earlier, has established a basis in law for a court to grant such relief. A court does not grant "*advisory*" opinions, or declarations on a hypothesis. Nor will a court grant a declaration where there is insufficient evidence that a wrong has occurred, or might occur. Simple inference by one party of a potential apprehended denial of rights will seldom be sufficient to ground a declaration, unless it is supported by real evidence upon which a court might safely act.

Chronology

23. In order to make his original complaint, Mr. Brannigan used the "EE1 Form". Unlike the T10 application form, until recently used in claims to the Employment Appeals Tribunal prior to its dissolution in 2015, the EE1 form, as used in this complaint, was not mandatory. The content or status of the form was not laid down by statute (see by way of distinction the consideration of the Employment Appeals Tribunal T10 form in *Bank of Scotland (Ireland Ltd.) v. EAT and Grady* [2002] IEHC 119; and *IBM v. Feeney* [1983] ILRM 50). Judging from its layout, the EE1 form, applicable here, appears to have been intended by the Tribunal, to allow a claimant to give a general account of the basic details of the complaint. But, even its very format did not allow for a full description of a complaint; rather, it simply allowed a claimant to present

the claim, often in "*box*" form, in some instances even carried out by a simple "*box ticking*" exercise. In the present case, it is said Mr. Brannigan completed the form by himself, and did not then have legal advice or assistance, although it appears that at the time he did have a solicitor acting for him in his dispute with his former employer. His solicitor is, in fact, named in the EE1 form.

Background

24. The following matters appear not to be in dispute. It is accepted the notice party was employed by the appellant. He brought a complaint to the Tribunal on the 4th August, 2006. He claimed that the appellant had engaged in discrimination, harassment and victimisation against him, contrary to s.77 of the 1998 Act, as amended. He contended that this alleged unlawful conduct derived from the fact of his sexual orientation as a gay man.

25. Under the heading "*Grounds on which discrimination is claimed*", in the EE1 Form, Mr. Brannigan ticked a box headed "*gender*", underlining the word "*male*" beside that box. He did not tick the box for "*marital status*". He underlined the word "*single*" beside the box, and ticked a box for "*sexual orientation*", underlining the word "*homosexual*" beside it. Under the heading "*Description of claim*", Mr. Brannigan ticked the boxes for "*promotion/regrading*", "*conditions of employment*", "*harassment*", and "*victimisation*". Under the heading "*Details of complaint*", he set out a "*date of the first occurrence*" of the

discriminatory act as being the 16th December, 2005. He set out the "*date of the most recent occurrence*" of discrimination as being the 10th March, 2006 (see s.77(5)(a) of the 1998 Act, as amended by s.32 of the Equality Act, 2004, quoted earlier). Mr. Brannigan gave a brief account of two events which occurred when he had been employed as a teacher, in a school run by the appellant. It will be noted that a period of 6 months from the latter of the two events, 10th March, 2006, expired on the 10th September, 2006. Thus, this 6 month period elapsed a little more than one month after Mr. Brannigan submitted the EE1 form, on the 4th August, 2006.

26. More than one year elapsed before the next significant event. On the 17th September, 2007, Mr. Brannigan made another submission at the Officer's request. This also set out allegations of harassment and discrimination. On this occasion, however, rather than simply dealing with the two occurrences referred to earlier, Mr. Brannigan also described further events said to have occurred dating from 1997 up to the date of the end of his working with the V.E.C., apparently, at the end of August, 2006. He complained of alleged mistreatment and discrimination, by more senior teachers, and by other colleagues at the same level of seniority as himself. The complaints related to interactions between various staff members, some said to have been insulting, others more serious, as well as concerns as to how complaints regarding teaching

quality, teaching assignments and supervisory duties were dealt with by more senior teachers.

27. The Officer requested the appellant to provide a response to these submissions by the 31st January, 2008. That deadline passed. No response was received. Ms. Murtagh, of her own accord, granted the appellant an extension of time until the 7th November, 2008. In fact, the appellant did not put in its written submissions until the 21st January, 2009. That timing was significant. The submission came in on the day prior to the first scheduled oral hearing of the investigation. This was to commence on the 22nd January, 2009. The appellant's written responses, which were detailed, addressed all Mr. Brannigan's submissions. However, it can be safely said that those responses dealt in greater detail with the more recent complaints. For the first time, these responses raised an issue in relation to what might be characterised as the *"time issue"*.

28. I should mention now that Mr. Brannigan also sought other forms of legal redress concerning his employment. He instituted High Court personal injury proceedings against the appellant. These were dated 4th July, 2007. Those proceedings were brought after his first submission on the 4th August, 2006, but before his second letter to the Tribunal dated 12th September, 2207. The High Court proceedings contained allegations of bullying and harassment causing personal injury, which were said to have undermined Mr. Brannigan's role as a teacher. The pleadings also described matters allegedly going back to the year 1997. Mr. Brannigan

claimed that the effect of this conduct was that he reached a point where he was constrained to cease work at the end of August, 2006.

29. In this judicial review, Mr. Brannigan deposes in his grounding affidavit that his solicitors informed the appellant of his intention to apply for early retirement on grounds of ill-health on the 11th September, 2007. This was confirmed by a formal letter on the following day. A letter from the appellant dated the 11th January, 2008, indicated this application had been granted. Mr. Brannigan deposed that, from the 6th November, 2006, to the 18th February, 2006, he was without any means of income.

30. While counsel for Mr. Brannigan accepted in argument before this Court that there might be some degree of overlap between the two claims, he contended that the High Court case was in the nature of a personal injuries matter, whereas the complaint arising before the Tribunal related to victimisation and discrimination, based on sexual orientation. This is not a matter which requires determination here. The issue of the settlement sum of the High Court proceedings does not arise in this judgment either.

The Investigation Hearing

31. On the initial day of the investigation hearing, 22nd January, 2009, all parties were in attendance before the Equality Officer. Arising from concerns relating to the pending High Court action, the investigation was adjourned, apparently, by consent.

32. Subsequently, on the 9th February, 2009, Mr. Brannigan submitted a further written rejoinder to the V.E.C.'s responses. A resumed hearing of the investigation took place on the 12th February, 2009.

33. At that resumption, junior counsel for the appellant then raised two preliminary concerns. First, she again sought a stay on the investigation pending the outcome of the pending High Court action. The Officer rejected the application on that ground, holding that she was under a statutory duty to carry out the investigation. No challenge has been brought to that decision.

34. The second issue concerned the temporal scope of the issues. Counsel for the V.E.C. submitted to the Officer that Mr. Brannigan was not entitled to give evidence concerning the "*historic issues*", (going back to 1997), as set out in his second set of submissions of the 17th September, 2007. She submitted that the Officer had no jurisdiction to deal with any matters prior to the 16th December, 2005, which was the date identified in the EE1 Form as being the first occurrence of the discrimination. She referred to the provisions of the Acts, outlined above, laying emphasis on the alleged date of the "*most recent occurrence*" of discrimination.

35. As mentioned earlier, s.79(3A) of the 1998 Act, as amended, provided that a party may apply to an Equality Officer to determine certain matters (including time limitations), as preliminary issues. While one might infer that implied subtext to the appellant's case is the

suggestion that the Officer might have directed a preliminary hearing, no such complaint was made in the judicial review proceedings. On the basis of the authority of *Aer Lingus Teo v. The Labour Court* [1990] ILRM 485, considered later, such an application would have been very unlikely to succeed. The principle is that the Officer should conduct the investigation without interruption. Also, prior to the hearing, the Officer directed that a number of the V.E.C.'s witnesses who were in attendance at the hearing should wait outside. Those witnesses were other teachers, said to have witnessed, or been involved in, the various alleged events over the years. This was within the officer's powers. The hearing proceeded and Mr. Brannigan set out his case.

36. It must be taken as a given that the investigation can be conducted informally and flexibly. That said, what actually occurred is not entirely easy to follow. By the end of the first hearing-day, Mr. Brannigan had apparently given evidence, and been questioned by the officer, but had not been fully cross-examined. This Court was informed the appellant had, in fact, called one witness, Mr. Ger Rooney, a teacher. Why Mr. Brannigan's cross-examination had not been completed is unclear. The procedure is, frankly, puzzling.

37. At the end, the Equality Officer endeavoured to identify further potential dates, but then difficulties arose. No resumed hearing ever took place. These judicial review proceedings were brought to the High Court within two weeks after the second hearing day, on the 27th February,

2009. O'Neill J., in the High Court, granted leave to the appellant to seek judicial review. The appellant originally sought a broader range of judicial review remedies, including *certiorari*.

38. Prior to a consideration of the High Court judgment now under appeal, it is helpful to touch on some of the key matters contained in the affidavits sworn herein. Put at its simplest, the appellant's case is that the Officer exceeded her jurisdiction by considering Mr. Brannigan's evidence on the "*historical incidents*".

39. Mr. Winters, the appellant's Acting Chief Executive Officer, set out his concerns in this way:

> *"23. ... the respondent (referring to Ms. Murtagh) indicated that she had heard the submissions made by this applicant (i.e. the County Louth VEC) in respect of the historic nature of many of the complaints, but wanted to get on with hearing the evidence from Mr. B. It* ***became clear*** *that the respondent's officer was not hearing the evidence for the purpose of considering the issue of whether the Notice Party's earlier complaints were "statute barred", rather, she heard evidence from the Notice Party in respect of matters dating as far back as 1997, and then proceeded to ask questions/conduct her investigation into those matters.*
>
> *24. I say and believe that* ***it is now clear to me****, and I believe the Notice Party and his advisors, that the Officer conducting the investigation is of the view that she has jurisdiction to entertain all*

aspects of the allegations made by the [Notice Party]. She had, in effect, rejected the submissions advanced on behalf of the applicant as to the proper scope of her investigation. She is now conducting a far reaching inquiry into the past twelve years or more, during which the Notice Party was employed by the applicant. Apart from issues of fairness referred to below, ***I am advised she has no jurisdiction to do so ...***" (interpolation identify the parties, and emphasis added by myself)

40. It is noteworthy that Mr. Brannigan, as notice party, says squarely in his replying affidavit that there is nothing in the applicable Employment Equality legislation which would preclude the Tribunal from investigating alleged discrimination which occurred more than 6 months prior to the referral of a claim either, for example, as an instance of continuing discrimination, or as contextual evidence relevant to a complaint. Mr. Brannigan deposed that his complaint, in fact, related to what he characterised as continuing discrimination over a long period, culminating in the two identified incidents, said to have occurred in December, 2005, and March, 2006.

41. What is said in the Officer's affidavit is, however, critical. Ms. Murtagh absolutely refuted Mr. Winters' inference that the reason she had permitted the historic evidence to be given was that she had already made a decision on the contested issue of her jurisdiction to hear, consider, and determine on these matters. She also refuted any suggestion

that she had rejected the V.E.C.'s submissions as to the proper scope of the investigation. She deposed "*I say that I have not made any such decision*". She continued:

> "*14. I did consider that for the sake of expediency that it was best to hear* ***all the evidence together*** *and then make all relevant decisions on facts and law, pursuant to my investigation.* ***This will include a decision on the contested issue raised*** *before me by the Applicant as to the lawful ambit of the investigation ...* ". (emphasis added)

42. Ms. Murtagh was not cross-examined in the judicial review proceedings before the High Court. This Court is, therefore, faced with a situation where there is a clear denial that *any* decision on the jurisdictional issue has been made. Instead, the appellant's concerns are based on inference, or apprehended potential detriment.

The High Court Judgment

43. In the High Court, McGovern J. appears to have held that the EE1 Form was intended only to set out the nature of the complaint in broad outline, and that it was possible to amend a claim, so long as the general nature of the complaint remained the same. The judge considered that Mr. Brannigan, in his second submission, had simply submitted further and better particulars of his claim, albeit in the context of an expanded period of time. He concluded that, under the legislation, complaints made within an expanded period were not time barred, but that any respondent to a

claim must be given a reasonable opportunity to deal with the complaints, and observed the procedures adopted in that regard must be fair and reasonable.

44. Applying the principles outlined in the case law cited earlier, insofar as any findings as to time issues, and the effect of the EE1 form, are part of the High Court judgment, I would set aside these parts of the judgment. They are pre-emptive. As yet, questions of fact or law fall to be determined first by the Officer. The relevant facts of the investigation simply have not been elicited or determined. The Equality Officer has not made any legal ruling on the time issue. Without these, it would be inappropriate, and premature, to express views on legal issues which hinge on evidence as yet not ascertained.

The Appellant's Case

45. In this appeal, in essence, senior counsel for the appellant, Mr. Feichín McDonagh, S.C., submits that, even at this stage, a court should declare it is simply not open to the Equality Officer to investigate, or deal with, any material which is not dealt with in the EE1 Form. Counsel submitted that the officer has *no* jurisdiction to explore the "*historic matters*" at all. However, counsel did accept in argument that it might be open to an Officer to allow evidence of matters which occurred outside the statutory time limitation period, as context, but only insofar as those matters might (or might not) be relevant to the specific issues which are complained of in the EE1 Form.

46. Counsel relies on the provisions of s.77(6)(a) of the 1998 Act, as amended. He contends that the Officer may investigate matters which allegedly occurred more than 6 months prior to the date upon which a particular claim was submitted to the Tribunal, but only as background in relation to a complaint lawfully made in respect of those matters. Counsel submits that there may be no investigation of complaints that are not made in accordance with the time-limit provisions of the Act. As a separate point, counsel submits also that the Tribunal cannot, by a process of fact finding, confer upon itself a jurisdiction which it would not otherwise enjoy under its governing statutes. He contends that, following the lodgement of the EE1 claim with the Tribunal, Mr. Brannigan was invited to provide a further written submission to the Tribunal, which he did on the 17th September, 2007. Counsel says this further document was submitted more than 12 months after Mr. Brannigan had ceased to be employed by the appellant, and more than 12 months after the notice party had made his original claim. More fundamentally, senior counsel submits that the additional materials strayed far outside the terms of the complaint being investigated, and are, effectively, time barred, pursuant to s.77 of the 1998 Act, as amended by s.32 of the Equality Act, 2004. In making these submissions, Mr. McDonagh, S.C. refers to the fact that the later submission concerned different allegations of alleged discriminatory acts on the part of the appellant's employees and staff.

Consideration

47. It is well established that the purpose of a deciding body or tribunal, such as the respondent Tribunal, is to provide speedy and effective redress in cases of alleged discrimination. It is not in dispute the procedures employed may be both informal and flexible. It is true, as Mr. Gerard Durcan, S.C., counsel for the Tribunal, submits, that the range of claimants before such a Tribunal do not fit into any one category. They may or may not be legally represented and, therefore, flexibility is both warranted and necessary.

48. The question is, are there grounds for any declaration? It has been observed, more than once, and not only in this jurisdiction, that it is not in the public interest, nor the intent of the legislation, that investigations, or inquiries, of this nature should be intermittent, or be interspersed with unnecessary representations or counter-representations, or by premature applications made to the courts (see, by way of illustration, the remarks in *Pearlberg v. Varty* [1972] 2 All.ER, cited in the High Court judgment delivered by Carroll J. in *Aer Lingus Teoranta v. The Labour Court* [1990] ILRM 485). However, this precept does not mean that a court might not, ultimately, grant relief were it shown that a deciding officer had, in fact, exceeded jurisdiction.

The Form of Relief Claimed

49. As part of the consideration of this appeal, it is necessary to point to the rules-rubric under which this application was initiated. Essentially,

what is sought now is a simple declaration, although an injunction is part of the claim. There is a subtle, but important, distinction between the various forms of relief which may be claimed in judicial review. Order 84, Rule 18(1) provides:

> *"(1) An application for an order of certiorari, mandamus, prohibition or quo warranto shall be made by way of an application for judicial review in accordance with the provisions of this Order.*
>
> *(2) An* ***application for a declaration or an injunction*** *may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to -*
>
> *(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto,*
>
> *(b) the nature of the persons and bodies against whom relief may be granted by way of such order, and*
>
> *(c) all the circumstances of the case,*
>
> *it would be just and convenient for the declaration or injunction to be granted on an application for judicial review."* (emphasis added)

50. Elsewhere, Order 19, Rule 29, provides that no action or pleading is to be open to objection on the ground that a merely declaratory

judgement or order is sought thereby. A court may, if it thinks fit, make binding declarations of right whether any consequential relief is or could be claimed or not.

51. While, historically, remedies such as declarations or injunctions were merely ancillary to the public law remedies just identified, this is no longer the case. The existence of declaratory proceedings provides a useful remedy in a wide range of circumstances, where, perhaps, the traditional judicial review remedies may not be appropriate. But, the question which arises, on the facts of this case, is whether a declaration should be granted? It is said the Officer has already strayed beyond her remit in allowing historical evidence at all.

52. There are a number of factors which militate against granting a declaration. First, the question arises in circumstances where it is very doubtful whether, in principle, the remedy of *certiorari* would be available at this stage. The officer has denied she has made any decision or order which might be impugned by judicial review. This has not been disproved to the requisite level of probability. On the face of things, she is acting within jurisdiction, or rather it has not been shown that she has exceeded her jurisdiction.

53. Second, it is necessary to, again, point out that this is an inquiry which is still in the course of hearing. It has commenced. Much is still to be adduced. Should a court, even by declaratory order, seek to direct the manner in which the Equality Officer should carry out her task, not only

in circumstances where she has sworn that she has not reached *any* conclusion in relation to jurisdiction, but where the hearing is still in being? I think not. A declaration is not to be seen either as a surrogate for *certiorari* or for an injunction. I would hold that neither *certiorari*, nor an injunction, could be granted restraining the hearing at this stage. Such an application would be premature.

54. Further, in order to obtain relief, even by way of declaration, it would be necessary for the appellant to demonstrate that it is in *imminent* danger of suffering a diminution of rights, or a detriment. But, as yet, there has been no determination of rights or interests.

55. This is a situation where, by analogy, similar principles apply as arose in *Blanchfield v. Harnett (3)* [2002] 3 I.R. 207, *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, and the recent decision of this Court in *Stirling v. Collins* [2014] JIC 2603. In each of these authorities, the courts have emphasised that judicial review was an available remedy which might, in principle, permit challenges to *decisions*, made in the course of a trial, but *only in truly exceptional circumstances*. The courts have consistently held that, although decisions of a court of trial might, ultimately, be subject to *certiorari,* such relief was scarcely ever granted during the course of a trial. The fundamental principle, more recently reiterated in *Stirling*, is that, save only in the most exceptional circumstances, a trial should have "*the unity and continuity of a play*" (see O'Dalaigh C.J.'s remarks in the *People*

(Attorney General) v. McGlynn [1967] I.R. 232). The circumstances in which *certiorari* was granted in *Stirling* were truly exceptional, and clearly went to jurisdiction. It would be an incongruity were this Court now to rule on a jurisdictional issue, in an investigation of this type, where the Equality Officer has not herself delivered a decision on that question.

56. The position here has some resonances too in the decisions of the High Court, and this Court on appeal, in *Aer Lingus Teoranta v. The Labour Court* [1990] ILRM 485. As Carroll J. pointed out in the High Court judgment in *Aer Lingus*, it is not obligatory for an Equality Officer to rule on a time issue "*any more than a court is obliged to hear a preliminary issue on whether a claim is statute barred or not*". That judge laid emphasis on the fact that tribunals, engaging in this important form of work, must be allowed a discretion in the running of their affairs, as to whether to have a preliminary hearing, or whether to deal with all questions, including that of receivability, at one hearing. Subject to comments in the conclusion section of this judgment, I agree with this observation.

57. On appeal in this Court, in *Aer Lingus*, Walsh J. approved this observation, expressing the view that it would be "*far preferable*" that matters should not be brought to the High Court on a point of law, until after the determination of the Labour Court, as to any matter of law arising, had been made. Walsh J. laid emphasis on the fact that Carroll J.

had "*correctly*" mentioned the fact that the Labour Court had not made any findings on the merits of the case, and that, if that had been the position, he would have been content to let the matter go back to the Labour Court.

58. I mention here, however, that in *Aer Lingus*, this Court did find it necessary to make adjudications in relation to the jurisdiction of the Labour Court, and reversed the High Court judgment in that regard. This was because the High Court judge had, in Walsh J.'s words, "*elected*" to go into questions of whether the acts complained of were capable of constituting unlawful discrimination, and expressed views on whether the relevant legislation had retrospective effect. This was in circumstances where the respondent had not fully concluded its deliberations in these issues. The situation which arose in *Aer Lingus* reinforces the inference that a court should guard against premature expressions of views on facts or law, and for that reason, I would set aside any part of McGovern J.'s judgment which might be interpreted as having expressed such views.

59. The position here is not analogous, either, to that which pertained in *Cox v. Ireland* [1992] 2 I.R. 503, where the plaintiff challenged a "*decision*" of civil servants to apply the provisions of s.34 of the Offences Against the State Act, 1939 to his circumstances, while *also* challenging the validity of the section. In *Cox*, this Court ruled that the civil servants in question had not made a "*decision*", in that, the two defendants named had no alternative but to apply the provisions of s.34

OASA, 1939, to the case of the plaintiff, until the provisions in question were declared unconstitutional. But, this Court, nonetheless, granted a declaration by way of judicial review, that the section in question was unconstitutional. No such claim is brought here.

60. As Order 84, Rule 18(1) makes clear, the issue in this appeal concerns the question of whether or not it is "*just and convenient*" to grant a declaration. I do not consider that it would be either "*just*" or "*convenient*". The hearing is still proceeding. It is to be presumed it will be fair. It is to be presumed that the Equality Officer will act within jurisdiction. The policy of this Act, and the courts generally, lean against interference in a pending hearing, save in the most exceptional circumstances. There has been no detriment, or denial of rights or interests, nor has it been sufficiently shown that there is an imminent danger of the appellant suffering such detriment.

Conclusion

61. I would, however, venture some further observations. It goes without saying, first, that the duty of the Equality Officer is both statutory, and, ultimately, delimited by constitutional considerations. As part of fair procedures, it is necessary that all parties be aware, in a timely way, of the case which they must meet. Consequently, it would be wrong, were a situation to evolve in this investigation, where one or other of the parties was under a misapprehension of precisely the range of legitimate inquiry. Second, it is hardly necessary to reiterate that it is not possible

for any tribunal, upon which a particular jurisdiction has been conferred by statute, to extend or confine the boundaries of that jurisdiction by an erroneous determination of fact (see *State (Attorney General) v. Durkan* [1964] I.R. 279, approved in *Killeen v. DPP* [1998] ILRM 1). There may also be circumstances in which a tribunal, although holding jurisdiction to enter upon an investigation or inquiry, may render its decision a nullity by, for example, a denial of fair procedures. It is no part of the case made that in conducting the hearing, as she has, the Officer is pursuing some fixed policy.

62. To my mind, it would not be appropriate to grant a declaration. Subject to my findings on the observations made by the High Court judge on facts and law, I would, therefore, dismiss this appeal. I would remit the matter to the Equality Officer for further investigation and final determination, in accordance with law. I would uphold the High Court judgment and order, to the extent that it held that the application is premature.

13/7/2016

THE SUPREME COURT

JUDICIAL REVIEW

[Appeal No. 336/2009]

McKechnie J.

MacMenamin J.

O'Malley J.

BETWEEN

COUNTY LOUTH VOCATIONAL EDUCATION COMMITTEE:
(NOW KNOWN AS LOUTH AND MEATH EDUCATION AND TRAINING BOARD)

APPLICANT/APPELLANT

AND

THE EQUALITY TRIBUNAL

RESPONDENT

AND

PEARSE BRANNIGAN

NOTICE PARTY

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 13th day of July, 2016

Introduction:

1. This case arises out of proceedings before the Equality Tribunal concerning an allegation of discrimination on grounds of gender and sexual orientation made by the notice party against his former employer, the appellant. The original claim, which it is accepted was validly made, identified two specific incidents only. Although still somewhat difficult to decipher, the substantive point at issue is whether the equality officer is confined, in her inquiry, to those particular incidents, or whether for redress purposes she may also investigate other alleged incidents, stretching back over a decade, which were first notified after the statutory time period for the making of a complaint had passed.

2. This Court is not called upon to directly assess that question in these proceedings as in the first instance this is a matter for the Tribunal, which has not as yet made a ruling on it. To succeed, however, on what is in issue on this appeal, the appellant would have to show that the equality officer assigned to the case can only decide the contested issue at the point when it was raised by the Committee and that any other decision would be demonstrably wrong in law. That, in my view, is a step too far and a barrier too high for the VEC to overcome. Moreover, even if it could do so, the appeal would still have to be dismissed in circumstances where the undisputed facts are that the officer in question has yet to make any decision on the point and where it cannot be shown that she lacks jurisdiction to do so. The reasons for this conclusion follow.

Background:

3. Between 1981 and 2007, Mr. Brannigan (also referred to as "the complainant" or "the notice party") was employed as a teacher in a number of institutions under the control of the County Louth Vocational Education Committee, now known as the "Louth and Meath Education and Training Board", and in this judgment also referred to as "the appellant", "the applicant" or "the VEC". Apparently, for many years the relationship between the parties was at least strained, if not difficult, and perhaps even downright fractious on occasions. In March, 2006, Mr. Brannigan was certified absent from work on grounds of ill health. He returned to work for three days in August of that year, but left, not to return, after this period. As and from September, 2007, he ceased employment entirely, having been approved for early retirement on grounds of ill health.

4. Arising out of this relationship, howsoever one might describe it, the notice party instituted two sets of proceedings against the VEC, the first of which was a claim under the Employment Equality Acts 1998-2004 ("the 1998 Act"), and the second of which, commenced by a Personal Injury Summons, made allegations of bullying and harassment; fortunately, this matter has been compromised by way of an out of court settlement. This second action, therefore, although not entirely irrelevant, plays but an incidental role in the instant case.

5. On the 4th August, 2006, Mr. Brannigan made a complaint, addressed to the Equality Tribunal, alleging discrimination during the course of his employment, for which he claimed the VEC was responsible. The basis of such complaint was that as a known homosexual, he had been discriminated against on the grounds of his sexual orientation. In August, 2008, Ms. Valerie Murtagh, an equality officer, was assigned

to the case. Prior to that the notice party had also furnished a "Submission" to the Tribunal on the 19th September, 2007, which the VEC responded to on the 21st January, 2009, the day immediately prior to the commencement of the hearing. As it happened, the investigation was deferred, at the request of both parties, until the 12th February, 2009, by which date a short replying submission had also been served on behalf of Mr. Brannigan.

6. At the outset of the hearing, the appellant made the following three submissions to Ms. Murtagh:-

(i) That the hearing should be adjourned until the plenary proceedings had been finalised as there was a considerable overlap between both. The officer refused to so do and no issue arises out of that decision.

(ii) That the manner in which the officer proposed to conduct the inquiry, in particular by her refusal to allow a number of VEC witnesses, being fellow teachers and former colleagues of the complainant, to be present when the complainant's evidence was being given, was unlawful. In short, this was a fair procedures point. Whilst this objection formed part of the instant proceedings and was therefore dealt with in the High Court judgment, it has not been pursued as an appellate point to this Court. It thus has no continuing relevance.

(iii) It is solely the third issue which agitates this appeal. That issue is the subject matter of this judgment.

7. In the filed document of complaint known as the EE1 Form, Mr. Brannigan referred to two instances of discrimination only, both specific as to date: the first was

alleged to have occurred on the 16th December, 2005, and the second on the 10th March, 2006. In the Part 8 of the form, where he was asked to give the "date of the first occurrence of the discriminatory act", he specified "Dec 16 2005" as being that date.

8. Based on this information the VEC submitted to the equality officer that she had jurisdiction to investigate these nominated incidents only, and that she could not consider the additional matters upon which the complainant also intended to rely (the "historical evidence"); such matters being those as outlined for the first time in his submission of September, 2007, and again addressed in his replying submission of February, 2009 (para. 33 *infra*). The appellant therefore wanted a ruling on this issue when the submission to that effect was made. Ms. Murtagh declined to do so; rather, her decision essentially was that she would firstly hear the entirety of the evidence, and would then rule on the jurisdictional objection as made. Her decision to adopt that approach led directly to the institution of this judicial review, which in turn has resulted in the hearing before her being adjourned midstream the evidence, and thereafter indefinitely stayed pending the final outcome of these proceedings. That situation, whether inevitable or not, is most regrettable.

High Court Judgment:

9. Having obtained leave to challenge 'the situation as it then stood', and following a fairly far reaching debate in the High Court, McGovern J. delivered his judgment on the 24th July, 2009. He held, *inter alia*:-

(i) That the case of *Bank of Scotland (Ireland) v. Employment Appeals Tribunal & O'Grady*, (Unreported, High Court, Ó Caoimh J., 15th July

2002), did not assist the VEC "as it is clear, on the facts, that the claim by the notice party was made within time and in that way it differs from this case";

(ii) That *Aer Lingus Teoranta v. Labour Court* (Unreported, Supreme Court, 20th March 1990) was in favour of the respondent in that both the High Court and the Supreme Court held that there was no obligation on the Tribunal in question, being the Labour Court in that case, to conduct a preliminary hearing so as to "deem the claim admissible": rather, this and any related point could properly be dealt with as part of the substantive hearing;

(iii) That the EE1 Form, which had no statutory footing and which was merely an administrative document, had as its purpose the setting out, in brief outline, of the nature of the complaint; as such, a complainant was not limited to its contents.

(iv) That as a result, by analogy with court proceedings, there was no reason why the claim as formulated could not be amended so long as the general nature of the complaint remained the same;

(v) That the submissions of the notice party delivered post the 4th August, 2006, should be regarded, in effect, as the furnishing of further and better particulars of the claim, albeit in an expanded period of time: such complaints so made, even within this period, were not time barred under the legislation; and, finally,

(vi) That fairness would, of course, have to ensure that the VEC had an opportunity of properly dealing with all such matters.

Accordingly, the application for relief was dismissed, with the appellant moving to this Court only on the single issue above stated.

10. With regards to the *Bank of Scotland (Ireland)* case, and the point mentioned at the first indent above, I assume that what the trial judge meant was that Ms. Grady, the notice party in that case, was out of time in submitting her claim for unfair dismissal; clearly he could not have been suggesting that Mr. Brannigan was out of time in the instant case. To the extent that this was what the learned trial judge intended, I would agree that the *Bank of Scotland (Ireland)* case does not assist the applicant.

11. However, it is perhaps worth noting another aspect of that case, namely that a claim for redress under the Unfair Dismissals Act 1977 "shall be initiated by giving a notice … to the Tribunal … within the period of 6 months beginning on the date of the relevant dismissal" (s. 8(2)(a) of the Act). O'Caoimh J., the trial judge, following the decision of the High Court in *The State (IBM Ireland Ltd) v. The Employment Appeals Tribunal* [1984] I.L.R.M. 31, held that compliance with such provision was mandatory if the Tribunal was to have jurisdiction to embark upon and determine the submitted claim. Whilst the issue turned on whether "any" claim had been made within the time period, unlike the instant case, nonetheless the language used in the section is not altogether that dissimilar from the relevant provisions of the 1998 Act.

The Relief Prayed For/Grounds Asserted:

12. Although, as is altogether too common, leave was granted to seek multiple declarations, in essence those set out in the Motion paper at subparagraphs (a) and (d)

were the focus of the argument in both the High Court and in this Court. These read as follows:-

> "(a) A Declaration that the Respondent has acted *ultra vires* in purporting to conduct an investigation of alleged discriminatory acts (within the meaning of the Employment Equality Acts 1998 to 2004) against the Notice Party herein which fall outside the scope of the terms of the complaint made by the Notice Party received by the Respondent on 4th August, 2006;
>
> ...
>
> (d) A Declaration that the Respondent is limited to investigating complaints of discrimination made by the Notice Party which have been lawfully referred to it and which occurred within a period of six months from 4th August, 2006."

Declarations (b) and (c) as set out in the said Motion are omitted from this judgment on the basis that they seek essentially the same relief as that intended by para. (a), above, namely, that the equality officer be required to confine her investigation to the two specific incidents of discrimination contained in the complaint referred to the Equality Tribunal on the 4th August, 2006. Thus their inclusion would add nothing to this appeal.

13. However, before leaving the reliefs as sought, in particular that outlined at para. (d), above, one should note the potential distinction for investigation purposes between a complaint "which has been lawfully referred" to the Tribunal and one "which has occurred" within six months from the date of the EE1 form. If a complaint is out of time and thus fails to satisfy a condition precedent, and remains so found

after inquiry, then it cannot be said to have been "lawfully referred" to the Tribunal, such that it may properly be investigated for redress purposes (see para. 19 *infra*). The effect of such a ruling would be that the rejected complaint, from that point on, could not be considered as a potential discriminatory act. It would therefore have to be disregarded to that end. On the other hand, as paras. 20-26 of this judgment show, the Tribunal, in certain circumstances, may be fully justified in looking into acts or incidents of discrimination which long pre-dated the six-month period. This is a point which I will further refer to later in the judgment.

14. The bare recital of the above declarations is not of itself sufficiently explanatory of the precise point which, at the substantive level, is directly behind this appeal. In order to help elucidate that issue, it is therefore necessary, firstly, to outline some of the grounds upon which leave was granted and, secondly, to set out sections of the legislation and my interpretation of the relevant provisions thereof. Having done so, I will then identify what I believe is the core point of the VEC's argument.

15. The formal grounds relied upon in support of the application for the reliefs above set out included the following:

> "(a) The Respondent acted unlawfully and in excess of its jurisdiction in refusing to limit its investigation into complaints of discrimination brought by the Notice Party herein against the Applicant on grounds of his gender and sexual orientation to the incidents the subject matter of a complaint received by the Respondent on the 4th August, 2006;

(b) The Respondent acted unlawfully and in excess of its jurisdiction in refusing to limit its investigation into complaints of discrimination brought by the Notice Party herein against the Applicant on grounds of his gender and sexual orientation to incidents occurring after the 16th December, 2005, being the date nominated by the Notice Party as being the first occurrence of discrimination;

(c) The Respondent erred in law and acted outside jurisdiction in purporting to investigate alleged discriminatory acts (within the meaning of the Employment Equality Acts 1998 to 2004) against the Notice Party herein which allegedly occurred prior to the 16th December, 2005".

16. In summary form the grounds of appeal allege that McGovern J. erred in law and/or in fact in holding 1) that the issue before him related to the furnishing of further and better particulars of the complaint made on the 4th August, 2006; 2) that Mr. Brannigan's September, 2007 submission came within the terms of the complaint received in August, 2006; 3) that, in the alternative, the September, 2007 submission represented a lawful and timely amendment of Mr. Brannigan's original complaint; 4) that Ms. Murtagh had not made a final determination on the issue of the temporal limit of the complaint; and, finally, 5) that the learned judge failed to address the issue of the jurisdiction of the Equality Tribunal to investigate matters which had not been the subject of a complaint to the Director of the Equality Tribunal in accordance with the terms of the 1998 Act.

The Legislation:

17. The 1998 Act and its subsequent amendments were introduced against the backdrop of what may in short be regarded as the Equal Pay Directive (C.D. 75/117/E.E.C. of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women) and the Equal Treatment Directive (C.D.76/207/E.E.C. of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions). As such, domestic interpretive provisions must reflect this context. Apart from being conscious of that background, however, I do not see that the principle of conforming interpretation is otherwise directly in play on the live issue before us. Therefore, the EU dimension against which the legislation was enacted is not on point as such.

18. The 1998 Act provides for the appointment of a Director of the Equality Tribunal, who is to perform the functions conferred on him or her under the Act, and also provides that the office of such person shall be known as the Equality Tribunal (s. 75(1) and (2) of the 1998 Act). That Director can appoint from amongst his staff any person to be an "equality officer", and can in respect of that individual delegate to him or her any function conferred on the Director under the 1998 Act or any other relevant enactment (s. 75(4B). No issue arises in this case as to the status of Ms. Murtagh, or as to the validity of the delegation so made by the Director.

19. It is quite clear that neither the 1998 Act as a whole nor any of its relevant sections are self-executing, in the sense that the individual standing of an applicant and the subject matter of the complaint must fall within its provisions before the

Tribunal can exercise the jurisdiction vested in it. In a case such as the instant one, the effect of this is that, firstly, the complainant must commence the process of seeking redress by referring the case to the Director (s. 77(1)(a)); secondly, he must show that he has been discriminated against on any one or more of the grounds set out in s. 6(2) of the Act, or that he has been victimised within the provisions of s. 74(2) thereof; and, thirdly, he must establish, if in issue, that each of the other qualifying requirements are satisfied. In this case the only contested condition is that referable to the time period.

20. Under s. 77(5)(a) of the 1998 Act, a claim for redress in respect of discrimination "may not be referred under the section after the end of the period of 6 months from the date of occurrence of the discrimination or … as the case may be, the date of its most recent occurrence". Subsection (6A), inserted by s. 32 of the Equality Act 2004, provides that:-

> "(6A) For the purpose of this section—
>
> (a) discrimination … occurs—
>
> (i) if the act constituting it extends over a period, at the end of the period,
>
> (ii) if it arises by virtue of a term in a contract, throughout the duration of the contract, and
>
> (iii) if it arises by virtue of a provision which operates over a period, throughout the period."

It is clear, therefore, that the "six month period" applies whichever provision may be invoked.

21. The 1998 Act also has some relieving measures regarding the time limit for submitting a claim. For example, where the delay has resulted from a misrepresentation by the respondent, the date of occurrence shall be regarded as the date when the misrepresentation came to the notice of the complainant (s. 77(6) of the Act). In addition, the 6 month period can be extended by the Director or by the Circuit Court for a further period of equal duration, in total not exceeding twelve months, for reasonable cause (s. 77(5)(b) of the Act). If granted, such an extension would not otherwise affect the date of occurrence for limitation purposes. No such application has ever been made in this case.

22. It has not been suggested, nor could it be, that the outer limit of the six month period within which "the case" seeking redress must be lawfully referred to the Tribunal (s. 77(1) of the 1998 Act) can, as a matter of discretion, be extended other than as above noted, even where the complainant is a lay individual and is one entirely unassisted by legal representation. In addition, the statutory measure does not operate as a defence point or its equivalent only (see para. 13 *supra*). It must therefore be treated as a condition precedent to the exercise of the Tribunal's jurisdiction and cannot be stood down, save in accordance with the provisions of the Act. Accordingly, there will be cases where, because of this time period, evidence is excluded as of itself being the basis of discrimination for redress purposes. This simply implements legislative policy, presumably enacted having regard to the varying and at times competing interests involved.

23. At the outset it is important to understand that both ss. 77(5)(a) and (6A) are intended to capture quite different circumstances (*County Cork VEC v Hurley*

EDA1124 (Labour Court, 26th July, 2011)). Subsection (6A) deals with situations where a single act occurs and where it continues to occur over a lengthy period, such as discrimination based on a regime, rule, practice or principle of an ongoing nature. A term in a contract is a good specific example of the provision's more general meaning. In such a case the six month period initiating the process will only start to run when the offending regime or practice ceases; or, put another way, the discriminatory act will be regarded for limitation purposes as having occurred only when such basis has ceased to exist.

24. On the other hand, s. 77(5)(a) of the 1998 Act deals with a situation in which there are a series of separate acts or omissions on the part of, say, an employer, which, whilst not forming part of a regime, rule, practice or principle ("regime or practice"), are sufficiently connected so as to constitute a continuum of discrimination. In effect, this deals with a situation whereby there are separate manifestations of the same disposition to discriminate (Bolger, Bruton and Kimber, *Employment Equality Law* (Dublin, 2012) at para. 16–47). In such a case, once a complaint is made within six months from the date of the last act or omission, all conduct found to form part of the continuum will be regarded as having occurred within time.

25. At the level of principle, therefore, where such a regime or practice exists or where a sufficient linkage can be established between separate acts, it is possible to plead matters which have occurred on a date or dates far beyond the six month period. In theory, such could extend for several years prior to the date of complaint. Even if that should occur, however, provided that the circumstances intended to be covered by the subsections are established, all such incidents will be regarded as being within

time and thus will be within the competence of the Equality Tribunal to investigate for redress purposes. However, one should note the specific provisions of s. 82(1) of the 1998 Act in respect of the periods for which compensation may be given.

26. Finally, it is clear from the aforegoing that when bringing a complaint, it is necessary to bear in mind the question of when the six month period begins to run: subject to the alleviating measures mentioned above, it will be either from the most recent date of the offending conduct (subs (5)(a)) or from the ending of the discriminatory regime or practice (subs (6A)). In cases of isolated complaints this should be easily discernible for the purposes of the provision first mentioned, and, likewise, there should be no real difficulty in establishing when a particular regime or practice has ceased. Much the same situation should apply even where the acts or omissions said to constitute discrimination have been ongoing over an extended period, even over a number of years.

27. Although the 1998 Act has subsequently been amended by the Workplace Relations Act 2015 ("the 2015 Act"), it is clear that the later enactment has no application to a claim referred to the Director under s. 77 of the 1998 Act prior to the 1st October, 2015 (s. 83(2) of the 2015 Act).

The Precise Point:

28. In the context, *inter alia*, of my interpretation of the provisions of s. 77 of the 1998 Act, it cannot be the VEC's true intention to argue that a literal meaning should be given to the latter aspect of the second declaration prayed for (para. 12 *supra*), as it is palpably not the case that only incidents of discrimination which have actually

"occurred" within the six month period can be investigated into. This seems to be accepted by the VEC itself as despite the wording of that particular relief it acknowledges that the December, 2005 incident can be inquired into. I am therefore assuming that the appellant is not making this argument but if it is, it is in my view plainly wrong. Rather, I believe that both declarations when read together are intended to convey the proposition that the scope or remit of a complaint must be determined by what has lawfully been referred to the Tribunal within that six month period.

29. What therefore is to be made of the situation, as here, where a claim, specific to two particular instances, is validly made within time but where notification of other instances, said to form part of an overall continuum, is given for the first time significantly after the six month period has expired. I refer to a 'continuum' in the context of s. 77(5)(a) for, whilst this remains in the first instance a matter for the Tribunal to decide, it is very difficult to see how Mr. Brannigan's complaint could at all fall within subs (6A) of s. 77 of the 1998 Act. Put succinctly, does the Equality Tribunal have jurisdiction over events which were not the subject matter of a timely notification, but rather were bolted on at a much later date?

30. Again, approaching the issue in a slightly different way, one can ask whether the Tribunal, where a claim for redress, specifying two particular incidents, is made within time, has jurisdiction to investigate, for the purposes of finding continuous discrimination under either subs (5)(a) or subs (6A) of s. 77 of the 1998 Act, other incidents within the same discriminatory ground which were said to have occurred on occasions during the previous ten years but which have only been notified to the

Tribunal well outside the six month period? This I believe to be the real point. As so understood this notification point is therefore the contested jurisdictional issue between the parties.

EE1 Form:

31. As is evident from the aforegoing (para. 19 *supra*), the initiating step for engaging with the provisions of the 1998 Act is that an applicant "... seeks redress by referring the case to the Director" (s. 77(1) of the 1998 Act). In the absence of any statutory rules to facilitate such a process, the Tribunal itself, in the form of guidelines, has drafted and published what is an appropriate form to use in this regard. It is, of course, the "EE1 Form" which, as above stated, Mr. Brannigan used to lodge his complaint in this case. On the page which requires details of the complaint (para. 7 *supra*), there is a printed footnote indicating that time limits apply and referring the applicant to the published explanatory notes which are said to be applicable. At Note 4, the Tribunal refers to the six month period and gives an example of when it ends in a single incident situation and also when it ends where the discrimination extends over a period of time. Although the commentary is in no way binding, nevertheless it is both informative and instructive in alerting the reader to be conscious of such period.

32. I agree with the view that there is nothing sacrosanct about the use of an EE1 Form to activate the jurisdiction of the Tribunal. I see no reason why any method of written communication could not, in principle, serve the same purpose; in fact the Tribunal itself has so held in *A Female Employee v. A Building Products Company* DEC-E2007-036. Indeed, it is arguable that even a verbalised complaint would be sufficient to this end. The point at issue, however, is not about the form of initiation

and certainly not whether its content is rigidly prescriptive or not. I can readily understand how, if utilised by a lay individual, the entirety of a complaint in terms of scope and detail may be somewhat lacking. Evidently it would defeat the spirit of the legislation if "court formalities" were required: as Hedigan J. said in *Clare County Council v. Director of Equality Investigations & Ors* [2011] I.E.H.C. 303, one cannot expect lay persons to articulate complaints in the same way as professionally qualified advocates. None of these general matters are in issue as such. Nor is it on point to ask whether the Tribunal can assist in this respect or, as put somewhat disparagingly by the VEC, can reformulate the complaint. This is not really the issue. Rather, the substantive dispute is that as set out at paras. 28-30 *supra*.

33. There is no doubt but that the EE1 Form, or the terms of complaint, refers only to two specific incidents, the first of which is stated to have occurred in December, 2005, and the second in March, 2006. Thus, on its face and without more, the outer time limit for seeking redress is six months from the incident in March, 2006, i.e. September of that year. That a complaint as such was made within this time cannot be disputed; indeed, Mr. Brannigan could have varied or altered that complaint or made an entirely new one at any time up to the end of that period. That did not occur; instead he made a further submission one year later, in September, 2007, which unarguably considerably extends the incidents of alleged discrimination as outlined in the EE1 Form. In that submission Mr. Brannigan referred, *inter alia*, to:-

- the then principal calling him honky tonks in 1997;
- disparaging remarks made when his long time partner called at the school in October, 1998;
- discriminatory treatment in 1999;

- how the VEC dealt with complaints by students in April, 1999;
- being called a queer and bastard, although dates are not given, nor details mentioned.

These are but examples, as is evident from the 2009 submission where, in addition to outlining further incidents, the term "continuing discrimination" is used for the first time.

34. The substantive question remains: in light of the statutory provisions which I have mentioned and in the context of the relevant dates, *i.e.* six months from the latest incident, which period expired on the 10th September, 2006, can the matters identified in either or both of the submissions above referred to, in and of themselves be investigated by the equality officer for the purposes of redress. It is these matters which constitute what is termed the "historical evidence" in this judgment (see also para. 8 *supra*).

Role of Tribunal:

35. It is both a trite and historical principle of law that a creature of statute must live by the statute. Its jurisdiction is found solely within the provisions of the enabling Act. It has no inherent capacity, unlike, say, that of a constitutional court. It is therefore bound by what has been conferred on it. It has no further competence and it cannot create, add to or enlarge the jurisdiction so vested in it. *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218. It is bound by what jurisdiction it has and must act accordingly.

36. Therefore, when considering the substantive issue, it must be remembered that the Tribunal inquires into referred incidents of discrimination: it looks at prohibited conduct of which it is notified. It has no function in a situation such as this to embark upon a wide ranging inquiry into discrimination generally, or to generally investigate such discrimination; it does not conduct investigations *proprio motu* into discrimination which has not been the subject of a statutory referral to the Tribunal. Rather, it determines what lawfully has been referred to it with a view to providing redress to that applicant for any discrimination as found. The Tribunal cannot as such freelance its inquiry.

37. Once a complaint is made to the Director within the six month period, then "that" complaint has been made within time: it can thus be said that it has been lawfully referred. However, an issue might still arise, as it does in this instance, as to what is lawfully within the scope or remit of such complaint. Such an issue must be resolved, but by whom? Almost invariably it will be the entity, body or tribunal so created. In this case that competence is expressly recognised, or at least can be strongly inferred from the provisions of s. 79(3A) of the 1998 Act. That provision, in its material parts, reads as follows:-

> "(3A) If, in a case which is referred to the Director … a question arises relating to the entitlement of any party to bring or contest proceedings under that section, including:-
>
> (a) whether the complaint has complied with the statutory requirements relating to such referrals,
>
> (b) …
>
> (c) …

or

(d) any other related question of law or fact,

the Director may direct that the question be investigated as a preliminary issue and shall proceed accordingly."

Whilst the focus of that provision is on the manner in which any disputed question might be resolved, i.e. as a preliminary issue, nonetheless it would seem quite futile to have such a measure unless the officer in question could adjudicate on such matters.

38. Even in the absence of this statutory provision, however, I would be quite prepared to imply such a jurisdiction from the conferring provisions of the Act. Where, as in this case, a body is entrusted with the power to investigate and thereafter to adjudicate, it must in my view likewise have the authority to determine whether a claim is or is not within its jurisdiction. This must be taken as the situation unless the legislation stipulates otherwise: no such indication appears in this case.

39. The judgment of Davitt P. in *The State (Attorney General) v. Judge Durcan* [1964] I.R. 279 supports the proposition that a statutory body, such as a tribunal, is the appropriate entity to determine in the first instance whether the claim before it is within its jurisdiction. The learned President stated at p. 289 of the report that:-

> "[W]here the Legislature clearly provides that a Court is to have a limited jurisdiction dependent upon the existence of a certain state of affairs, the Court, before purporting to exercise its jurisdiction, will inquire and decide whether the requisite state of affairs does exist; but its decision is not the factor upon which its jurisdiction depends. If its decision is wrong and the requisite state of affairs does not exist in fact, then what the Court does in

purported exercise of its jurisdiction is done without, and in excess of, jurisdiction."

Similarly, it was acknowledged in *Ryanair v. The Labour Court* [2007] 4 I.R. 199 that the Labour Court was the appropriate body to inquire into its own jurisdiction, albeit that it is not entitled to make legal errors when doing so.

40. The VEC has also submitted that if the equality officer should find that the historical evidence comes within the six month period, then by such finding she would in effect be conferring a jurisdiction not vested in her by the 1998 Act. I reject that submission. In my view, it is a misunderstanding of her role in this context. It is the legislature which has given the officer power to make such a finding, and which has also provided for the consequences of that finding (paras. 23-25 *supra*). If such should come to pass, the resulting jurisdiction would be statutory based and not self created by the officer in question.

The Preliminary Hearing Issue:

41. In a slightly different context, I have earlier referred to s. 79 of the 1998 Act (para. 37 *supra*), but that provision is also relevant for different reasons. Under subs. (3A) of that section, as one can see, the Director is given power to determine by way of a preliminary issue any of the matters therein mentioned.

42. No formal application has ever been made for the holding of such a hearing but, at least on one reading, the submission made by the VEC at the commencement of the inquiry, though advanced very late in the day, may be considered to be such a

request. That was refused by Ms. Murtagh. It is clear that the provision in question is discretionary and that she is not bound in any way to accede to such a request.

43. Even without such a statutory provision, however, I would be quite satisfied that, subject to overall fair procedures, an equality officer has a sizeable degree of latitude in deciding how the hearing before her should be conducted. This conclusion is supported also by the decision in the case of *Aer Lingus Teoranta v. Labour Court* [1990] I.L.R.M. 485 where it was held, albeit in the context of the Labour Court, that such a body could decide whether the complaints were made within time or not, either by way of a preliminary inquiry or as part of a unitary hearing involving also the merits of the case. Walsh J., speaking for the Court, put the matter as follows: "The Labour Court is quite free to have [a preliminary] hearing if it wishes but I do not think it is correct to claim that it must have such a hearing." I respectfully agree and would apply the same *dicta* to s. 79 of the 1998 Act.

44. The type of decision made by Ms. Murtagh in this case can also be regarded as somewhat akin to a case management type decision, rather than one raising any issue of law. Even so, however, and whilst I would be very slow to interfere with an officer's procedural autonomy, nonetheless that is not to say that she is totally at large in what decision she might make. There could, for example, be cases which would greatly benefit both the parties and the Tribunal in terms of efficiency, expedition and cost savings if the issues, or at least a decisive issue, were determined on a preliminary basis, rather than by way of a full hearing. Whilst I am not in any way suggesting that if faced with such circumstances her decision would be other than appropriate, I simply make the point to emphasise that, in certain admittedly rather

exceptional circumstances, such a procedural decision may be amenable to judicial review. In the overall context, however, a significant degree of self determination will be respected, subject to the overriding principles of natural and constitutional justice (see *Calor Teoranta v. McCarthy* [2009] I.E.H.C. 139).

45. It must be noted that whilst at the outset of these proceedings the VEC made certain submissions on this point, nonetheless that body ultimately acknowledged that the actual decision so made by the officer could not be regarded as being a misapplication of her powers under s. 79 of the 1998 Act. Therefore, the resolution of this appeal does not turn on that particular decision so made by Ms. Murtagh.

Conclusion:

46. The critical issue of substance which remains alive between the parties is whether the legislative process demands, howsoever achieved, that the incident or series of incidents in respect of which redress can lawfully be sought must be notified within the statutory time limit, obviously with due regard to the date of occurrence, if that should be appropriate. If it does, is it correct to say that any matter notified outside of this period, whether or not of the same general nature as those asserted within the period, cannot of itself constitute an act of discrimination? It follows, if such be the case, that an equality officer would have no jurisdiction to investigate such matters for that purpose. Certainly, if this analysis is correct, any claim which does not meet this condition precedent cannot be admitted as such.

47. However, even if that proposition is correct, the same does not mean that such evidence cannot be received in any circumstances. That is not the situation. If such

evidence is tendered for a reason or purpose not contemplated by the limitation period, then it will not be declared inadmissible on that ground. The instant case is a good example of the distinction which I make. It is accepted by the VEC that the historical evidence may be offered for a purpose or reason which does not offend s. 77 of the 1998 Act. Such a purpose might, for example, be by way of background, or to enlighten or inform the content of the EE1 Form. In fact, any evidence which is relevant to and has probative value in respect of any facts in issue in relation to matters captured by the complaint, if timely made, could in principle be admitted. It is to prevent the use of such evidence to ground a discriminatory act for redress purposes which s. 77 is focused on.

48. It is not seriously in issue but that Ms. Murtagh has not made a "formal" decision regarding either the admissibility of the historical evidence or the use to which it may be put, which as pointed out are two quite distinct issues. In other words, she has not determined the substantive point as raised by the VEC in its submission to her. In fact, such a contention would be wholly unsustainable given the evidence of the equality officer which has not been contradicted. In several different paragraphs of her affidavit she states and frequently repeats the averment that she has made no decision on that crucial issue. She goes on to point out that when all of the evidence is heard, she will at that point make the decision on this contested issue. That being so it is quite clear, given the views which I have previously expressed, that she is the person vested with the lawful authority to make such decision in the first instance. Consequently, despite the force of the VEC's submission that by the course of conduct pursued she should be regarded as having made an "informal" decision,

rejecting its view point, I am satisfied that such an inference cannot override the stated position of the officer.

49. Having said that, however, and despite the discretion which the equality officer undoubtedly has, I must confess that I have considerable difficulty in understanding why she feels it necessary to hear the entirety of the evidence before determining the contested issue. I could readily see why such a course would be entirely appropriate if the issue was whether or not certain acts could be linked to other acts for the purposes of establishing a continuum under s. 77(5)(a) of the Act, or as part of her inquiry into a regime or practice of ongoing discrimination under s. 77(6A) of the Act, as both provisions are understood in the case law. If either were in issue, then of course embarking upon a full hearing in appropriate circumstances would be understandable.

50. But that is not the inquiry which she must address. It is, as previously stated, whether, irrespective of the nature of the historical evidence and irrespective of whether or not it might form a continuum under either provision, such matters in their own right can, in the absence of notification within time, be the subject matter of a lawful investigation by her for discriminatory purposes. Perhaps there is some reason not immediately obvious which I am missing as to why she decided to proceed as she has: in any event, though not without some hesitation, I believe that no judicial intervention should take place before a decision is made on the VEC's application.

51. In addition, in accordance with long established principle, there is a presumption that both the process of making the decision and the decision itself will

have due regard to natural and constitutional justice and, furthermore, will be made in accordance with law and therefore within the jurisdiction conferred on her under the 1998 Act. Accordingly, there could be no basis for this Court to intervene and in some way anticipate or infer that she will act unlawfully. In these circumstances, the appeal will have to be dismissed.

52. Given this conclusion, it would not be appropriate to make any comment on the facts as disclosed, much less on whether the relevant statutory provisions permit the reception of the historical evidence as of itself forming the basis for a discriminatory finding. This appeal is not an appeal on the discrimination claim and neither is it any form of a consultative case stated or the like. Moreover, the Court is not asked for a view as to how Ms. Murtagh should decide the application standing before her upon which she emphatically claims that no decision has yet been made. In fact, it was strongly submitted on behalf of the Tribunal and supported by the notice party that in the first instance such a decision should be made by her, and her alone, and that she intends to do so in accordance with law. That is how the appeal was presented and essentially argued. Whilst I appreciate that the approach which I have adopted may give rise to further litigation, I have no reason to believe that it necessarily will. In fact, I sincerely hope that it does not.

53. Accordingly, I do not believe that any views on the substantive law should be offered. I therefore regard many of the observations made by the learned trial judge as being purely *obiter*: in particular in this regard, I would expressly decline to endorse his views which I have summarised at paras. 9(iv) and (v) above. I do so because at the forefront of the respondent's case is that such matters are, in the first instance,

solely for the Tribunal to decide. Therefore, noting the nature of these proceedings, it would be to infringe that right to offer any advisory views on the course which she should take and the decision which she should make. I therefore reserve for another case any views which I may have on these issues.

54. In the same context, it should also be noted that no application to amend the terms of complaint has been made. This is not what is facing the equality officer. If it was, quite different considerations might come into play and some reference to court procedure may or may not be appropriate, depending on the circumstances. What she has to decide is whether the correct interpretation and application of, *inter alia,* ss. 77, 79 and 82 of the 1998 Act permits the classification of the historical evidence to come within the EE1 Form for redress purposes. This evidently is quite distinct from entertaining an application to amend that form. Again, therefore, I will make no comment on what the law might be if such an application had been made. In these circumstances, I would again regard the observations made by the learned trial judge relative to this point as being purely *obiter*.

55. The effect of this decision, therefore, is that the inquiry must be resumed, it being hoped that with the cooperation of all the parties, it can be brought to a swift conclusion in the near future. How best to process the continuation of the investigation is, of course, a matter for Ms. Murtagh. Furthermore, if the VEC wishes to submit that there is an overlap for the purposes of s. 101 of the 1998 Act between the plenary proceedings and the instant inquiry, then evidently that matter can be raised and addressed by both parties if such should arise.

56. For the above reasons the appeal will be dismissed.

Barry McKelvey, Plaintiff v. **Iarnród Éireann/Irish Rail**, Defendant [2019] IESC 79, [S.C. No. 178 of 2018]

Supreme Court 11 November 2019

Employment law – Interlocutory injunction – Disciplinary process – Fair procedures – Legal representation – Entitlement to legal representation at internal disciplinary hearing – Test for intervention in ongoing disciplinary process – Whether court intervention restraining commencement of disciplinary process appropriate – Whether application for relief premature – Whether legal representation necessary – Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 (S.I. No. 146) – Industrial Relations Act 1990 (No. 19), s. 42.

The plaintiff, an employee of the defendant, was subject to an investigation concerning the misappropriation of company property. As a result of that investigative process, the defendant proposed to commence disciplinary proceedings alleging theft. Solicitors on behalf of the plaintiff asserted an entitlement to represent him at any hearings that might take place as part of that disciplinary process. However, the defendant stated that it did not consider that the plaintiff was entitled to be so represented since there was no provision for legal representation in the defendant's disciplinary code; rather, this code provided for representation by a fellow employee or a trade union official.

On application by the plaintiff, the High Court (Murphy J.) granted an injunction restraining the defendant from commencing disciplinary proceedings in respect of the plaintiff unless his entitlement to be legally represented was granted. The defendant appealed to the Court of Appeal (Irvine, Whelan and Baker JJ.), which allowed the appeal and discharged the injunction (see [2018] IECA 346). The plaintiff was granted leave to appeal to the Supreme Court (see [2019] IESCDET 50).

Held by the Supreme Court (Clarke C.J., MacMenamin, Dunne, Charleton and O'Malley JJ.), in dismissing the appeal, 1, that where an employee sought to restrain a disciplinary process on the basis that there was an implied entitlement to legal representation that was being denied, the court had to determine whether it was clear at that stage in the disciplinary process concerned that the process could not be regarded as fair unless the employee was afforded legal representation. A court should not restrain a disciplinary process prior to its conclusion unless it was clear, at the stage when an injunction was sought, that something had occurred that was sufficiently serious and incapable of being cured so that there was no realistic prospect of a legally sustainable conclusion being reached at the end of the process.

Rowland v. An Post [2017] IESC 20, [2017] 1 I.R. 355 applied.

2. That a regime, whether contractual or statutory, that provided for a disciplinary process contained an implied term, if there was no express term to the same effect, that the relevant process would be fair; however, precisely what was required to ensure that a process was fair was dependent on a variety of factors and might well vary from case to case.

3. That when considering whether any process was fair, in the context of representation, the question was not whether a particular type of representation might give some added value, but whether its absence could be said to leave the person concerned without an adequate level of representation; the level that would be considered adequate would depend on an overall assessment of all of the circumstances of the process envisaged.

R. v. Secretary of State for the Home Department, Ex p. Tarrant [1985] Q.B. 251 and *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682 approved. *The State (Healy) v. Donoghue* [1976] I.R. 325 and *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635 considered.

4. That the proper approach to the question of whether a disciplinary process could be regarded as unfair because of the absence of an entitlement to legal representation was for the court to consider the seriousness of the charge and of the potential penalty; whether any points of law were likely to arise; the capacity of a particular person to present his or her own case; any procedural difficulty; the need for reasonable speed in making the adjudication; the need for fairness between the parties; and any other appropriate factors. These considerations were not matters that needed to be separately established but rather were factors to be taken into account in an overall assessment as to whether a fair process could take place without legal representation. The overarching principle was that legal representation would only be required as a matter of fairness in exceptional cases.

Burns v. Governor of Castlerea Prison [2009] IESC 33, [2009] 3 I.R. 682 explained.

5. That an internal disciplinary process was not a criminal trial. While the process had to be fair, the formal rules of evidence or the procedures that governed either criminal or civil proceedings did not necessarily apply. What was required was that the plaintiff and his trade union representative be given a reasonable opportunity to challenge the evidence against him on any reasonable basis.

Per Charleton J. (concurring): While criminal trial rights were not universally applicable to all inquiries, there were minimum standards which, despite anything written in a contract of employment, could not be infringed. These were set at a level which recognised that the introduction of criminal trial structures into a procedure that was supposed to be implemented by people without legal training, but through the application of fairness, common sense and shrewdness, was not required as a matter of law.

6. That the fact that the allegation was one of theft and an adverse result to the process could result in dismissal was a factor to be taken into account but did not, of itself, bring a case into a category where it could be shown that legal representation was necessitated.

7. That although the fact that theft could also be a criminal offence was a relevant factor, it was a factor that was of limited weight because any result of a disciplinary process could have no bearing on a criminal trial where the guilt of an accused would have to be established beyond reasonable doubt.

Obiter dicta, per Charleton J.: 1. The place to start, and often to end, was the contract of employment: if the contract or the statute governing a person's employment contained a procedure whereby the employment could be terminated, it usually would be sufficient for the employer to show that he had complied with that procedure.

Mooney v. An Post [1998] 4 I.R. 288 approved.

2. Where the grievance procedure contained in the contract of employment clearly stated that the employee was entitled to be represented at a disciplinary hearing by a

colleague or a registered trade union official but not by any other person or body unconnected with the enterprise, that, as a matter of contract, disposed of the argument that the procedures involved require the presence of lawyers.

3. Such cases as supported the proposition that a lawyer was sometimes, but very rarely, necessary in employment matters were derived from public law and should be confined within a public law context.

In re Haughey [1971] I.R. 217, *In re Pergamon Press Ltd.* [1971] 1 Ch. 388, *The State (Healy) v. Donoghue* [1976] I.R. 325, *R. v. Secretary of State for the Home Department, Ex p. Tarrant* [1985] Q.B. 251, *R. v. Board of Visitors of H.M. Prison, The Maze, Ex p. Hone* [1988] A.C. 379, *Mooney v. An Post* [1998] 4 I.R. 288, *Atlantean Ltd. v. Minister for Communications and Natural Resources* [2007] IEHC 233, *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682 and *Shatter v. Guerin* [2019] IESC 9 considered.

Cases mentioned in this report:

Atlantean Ltd. v. Minister for Communications and Natural Resources [2007] IEHC 233, (Unreported, High Court, Clarke J., 12 July 2007).

Becker v. St. Dominic's Secondary School [2006] IEHC 130, (Unreported, High Court, Clarke J., 13 April 2006).

Burns v. Governor of Castlerea Prison [2009] IESC 33, [2009] 3 I.R. 682.

Carmody v. Minister for Justice [2009] IESC 71, [2010] 1 I.R. 635; [2010] 1 I.L.R.M. 157.

Connolly v. McConnell [1983] I.R. 172.

McKelvey v. Iarnród Éireann [2018] IECA 346, (Unreported, Court of Appeal, 31 October 2018).

In re Haughey [1971] I.R. 217.

McNamee v. Revenue Commissioners [2016] IESC 33, (Unreported, Supreme Court, 22 June 2016).

Mooney v. An Post [1998] 4 I.R. 288.

In re Pergamon Press Ltd. [1971] 1 Ch. 388; [1970] 3 W.L.R. 792; [1970] 3 All E.R. 535.

R. v. Board of Visitors of H.M. Prison, The Maze, Ex p. Hone [1988] A.C. 379; [1988] 2 W.L.R. 177; [1988] 1 All E.R. 321.

R. v. Secretary of State for the Home Department, Ex p. Tarrant [1985] Q.B. 251; [1984] 2 W.L.R. 613; [1984] 1 All E.R. 799.

Rowland v. An Post [2017] IESC 20, [2017] 1 I.R. 355.

Shatter v. Guerin [2019] IESC 9, (Unreported, Supreme Court, 26 February 2019).

The People (Attorney-General) v. Kirwan [1943] I.R. 279; (1943) 77 I.L.T.R. 169.

The State (Healy) v. Donoghue [1976] I.R. 325.

Determinations of the Supreme Court mentioned in this report:

McKelvey v. Iarnród Éireann [2019] IESCDET 50, (Unreported, Supreme Court, 25 February 2019).

Appeal from the Court of Appeal

The facts have been summarised in the headnote and are more fully set out in the judgments of Clarke C.J. and Charleton J., *infra*.

By application for leave and notice of appeal dated 7 December 2018, the plaintiff sought leave pursuant to Article 34.5.3° of the Constitution to appeal to the Supreme Court from the judgment ([2018] IECA 346) and order of the Court of Appeal (Irvine, Whelan and Baker JJ.), dated 31 October 2018 and 12 November 2018 respectively, allowing the defendant's appeal and setting aside the order and judgment of the High Court (Murphy J.) dated 28 July 2017.

By determination dated 25 February 2019, the Supreme Court (O'Donnell, MacMenamin and Finlay Geoghegan JJ.) granted the plaintiff leave to appeal ([2019] IESCDET 50).

The appeal was heard by the Supreme Court (Clarke C.J., MacMenamin, Dunne, Charleton and O'Malley JJ.) on 17 October 2019.

Jim O'Callaghan S.C. (with him *Kieran J. O'Callaghan*) for the plaintiff.

Frank Callanan S.C. (with him *Cathy Maguire*) for the defendant.

Cur. adv. vult.

Clarke C.J. 11 November 2019

1. Introduction

[1] There are very many recent cases in which both first instance and appellate courts have had to consider the circumstances in which it is appropriate to grant injunctions in the context of workplace disciplinary proceedings. It might well have been thought that the law in this area is reasonably well settled. However, the particular, and important, issue which came into

focus in these proceedings before both the High Court and the Court of Appeal was the question of the entitlement of an employee who was the subject of disciplinary proceedings to be legally represented at an internal hearing to be conducted by his employer as part of an agreed code.

[2] The plaintiff/appellant ("Mr. McKelvey") is an employee of the defendant/respondent ("Iarnród Éireann"). In circumstances which it will be necessary to outline in a little more detail in due course, he was initially subject to an investigation concerning what was said to be the potentially irregular purchase of fuel using a company card. As a result of that investigative process, Iarnród Éireann proposed to commence disciplinary proceedings alleging, in substance, misuse of the card in question amounting to what might reasonably be called theft of fuel. Solicitors on behalf of Mr. McKelvey raised various issues concerning the process but, so far as the appeal to this court is concerned, asserted an entitlement to represent Mr. McKelvey at any hearing or hearings which might take place as part of that disciplinary process. Iarnród Éireann made clear that they did not consider that Mr. McKelvey was entitled to be so represented.

[3] In those circumstances, an injunction was sought from the High Court to prevent the disciplinary process going ahead. A number of grounds were relied on, including the assertion that Mr. McKelvey was entitled to legal representation and that Iarnród Éireann had declined to recognise this fact. For the reasons set out in its judgment delivered on 28 July 2017, the High Court (Murphy J.) granted Mr. McKelvey an injunction in the following terms:

> "It is ordered that the defendant Iarnród Éireann/Irish Rail be restrained from commencing with the disciplinary hearing in respect of the said plaintiff unless his entitlement to be legally represented is granted."

[4] Iarnród Éireann appealed to the Court of Appeal. For the reasons set out in the judgment of Irvine J. (Baker and Whelan JJ. concurring) ([2018] IECA 346), the appeal was allowed and the injunction discharged. Thereafter, Mr. McKelvey sought and obtained leave to appeal to this court. It is appropriate, therefore, to start with the basis on which leave to appeal was granted.

2. The leave to appeal

[5] In the application for leave filed, it was asserted by Mr. McKelvey that leave to appeal to the Supreme Court should be granted on the basis that the issue of the circumstances in which an employee ought to be afforded

the benefit of legal representation at a workplace disciplinary hearing was a matter of general public importance. Mr. McKelvey further sought to query the extent to which an employer can rely on the code of practice issued under the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 (S.I. No. 146) in order to refuse a request for legal representation. In the respondent's notice, Iarnród Éireann, opposing the application for leave, asserted that Mr. McKelvey's application for an interlocutory injunction was premature and that the decision of the Court of Appeal should be further affirmed on this ground.

[6] In a determination of this court dated 25 February 2019 ([2019] IESCDET 50), leave was granted on the grounds set out in the application for leave, on the basis that an issue of general public importance had been raised. The court held, at para. 6 thereof, that:

> "… the court is satisfied that the question of the circumstances in which it can be said that an employee or office holder, other than a prison officer, is entitled to legal representation in disciplinary proceedings raises an issue of general importance which merits consideration by this court."

[7] For reasons which I hope will become apparent, it is clear (and was not an issue of any dispute between the parties) that the entitlement to be legally represented at internal disciplinary proceedings can be dependent on facts associated with the nature of the allegations which form the subject of the process and on the likely course of the process itself. For that reason, it is important to provide some background as to the disciplinary process which Mr. McKelvey sought to restrain.

3. The disciplinary process

[8] Mr. McKelvey had been an employee of Iarnród Éireann since 1999 and was promoted to the position of per way inspector in 2013. He was assigned to division 3, where his responsibilities included managing employees charged with maintaining the Cork to Dublin railway line. In the course of his work, he had been provided with fuel cards to facilitate the refuelling of company vehicles and machinery. Other Iarnród Éireann employees also have the use of such cards.

[9] In July 2016, concerns arose within Iarnród Éireann regarding the level of expenditure on fuel cards issued to the employees within division 3. In broad terms, the apparent irregularities in fuel purchasing involved the purchase of fuel in amounts significantly higher than that of other divisions, indicating excessive use of the fuel cards, the purchase of both diesel and

unleaded petrol using small plant cards, in circumstances where such cards were normally used to purchase small quantities of unleaded petrol to fuel small plant equipment, and the purchase of fuel in locations and at times which did not appear to be consistent with proper usage nor in accordance with the activities of the division.

[10] As a result, a preliminary investigation into the matter was carried out, in the course of which a number of employees were interviewed. Mr. McKelvey was interviewed on a number of dates between August 2016 and February 2017, the notes of which meetings have been exhibited to the court by way of affidavit. It is apparent that the concerns of Iarnród Éireann regarding the purchasing irregularities were put to Mr. McKelvey and that his individual usage of fuel cards was queried. It was suggested by Mr. McKelvey, in response, that such purchases could have been made by other staff members using his cards.

[11] By letter dated 13 March 2017, Mr. McKelvey was informed that he was being suspended on basic pay until further notice as a result of the investigation into the use of fuel cards. Two other employees were also suspended on the same basis. On 8 May 2017, Iarnród Éireann formally commenced disciplinary proceedings against Mr. McKelvey by issuing a Disciplinary Advice Form A document in respect of the charge of:

> "Theft of fuel through the misuse of a company fuel card(s), which has resulted with the company suffering a significant financial loss."

[12] The allegations levelled against Mr. McKelvey, which it is understood that he will have to meet at the disciplinary hearing, are set out in a document which could be properly characterised as a charge sheet, as contained in the "evidence file" furnished to him by Iarnród Éireann at his request in May 2017. This document refers to both individual transactions made using the fuel cards which were provided to Mr. McKelvey (being both, it appears, a small plant card to fuel small plant equipment and a personal fuel card to fuel a company vehicle for business use) and broader patterns of fuel purchasing between 2015 and 2016 involving the use of Mr. McKelvey's fuel cards and the fuel cards assigned to division 3.

[13] In that document, it is asserted that excessive amounts of fuel were purchased using Mr. McKelvey's fuel cards during this time and at various locations around the country. It is said that Mr. McKelvey's fuel cards were often in use at weekends, on public holidays and during periods when he was on annual leave and that they were occasionally used in different locations in quick succession. The details included a suggestion that a large number of transactions were made on Mr. McKelvey's personal fuel card between 2015 and 2016, totalling 3,386 litres of diesel, many of which indicated purchases

apparently in excess of the fuel tank capacity of his car. For a number of months in 2015, the small plant card provided to Mr. McKelvey was used to purchase diesel, as against usual practice as outlined above, but from September 2015 onwards, the card was said to have been used to purchase large amounts of petrol. Further, upon the expiry of Mr. McKelvey's small plant card in 2016, it was alleged that Mr. McKelvey proceeded to use cards assigned to division 3 to purchase excessive amounts of fuel. Mr. McKelvey is also alleged to have used a vehicle in division 3 without authorisation on one specific occasion. This contention is not important for the purposes of these proceedings.

[14] In response, Mr. McKelvey stated during his interviews that the large amounts of diesel purchased were for the purposes of fuelling the tower lights equipment and that another possible explanation for the patterns of fuel purchasing was that his fuel cards were taken and used by other staff members without his knowledge. In this respect, the evidence file also alleges that Mr. McKelvey attempted to influence staff to say that they had used his fuel cards but that the staff concerned refused to do so and denied that they would ever have used the cards. This contention had not been put to Mr. McKelvey during the course of the investigation.

[15] Following the receipt of the Form A document in May 2017, Mr. McKelvey requested a personal hearing. Correspondence was subsequently exchanged between Iarnród Éireann and solicitors acting on behalf of Mr. McKelvey, in the course of which it was requested that Mr. McKelvey be allowed representation by a solicitor and counsel at the disciplinary hearing, given what was said to be the complexity of the allegation and what Mr. McKelvey perceived was a lack of information in relation thereto. In particular, in an affidavit sworn by Mr. McKelvey, it is apparent that he considers the fact that two other employees were accused of the same offence to be a significant "complicating factor", in circumstances where he had not been furnished with their statements and was unaware whether the disciplinary hearing would involve all three accused employees.

[16] Mr. McKelvey's request for legal representation was refused by Iarnród Éireann on the basis that there was no provision for representation by solicitor and/or counsel in the formal procedures prescribed by the Grievance and Disciplinary Policies and Procedures of Iarnród Éireann ("the Iarnród Éireann Disciplinary Code"). Rather, this code provides the employee with "the right to representation by fellow employee or trade union representative". In an affidavit which is before this court sworn by Mr. Danaher, an employee of Iarnród Éireann, it is deposed that Mr. McKelvey's trade union representative, Mr. Cullen, is considered to be an experienced

official, highly familiar with Iarnród Éireann's disciplinary procedures. Mr. McKelvey deposes that Mr. Cullen's representation of his co-accused in the disciplinary hearing gives rise to a conflict.

[17] It should be noted that, at this juncture, a separate dispute had arisen between the parties in relation to the provision, in advance of the proposed hearing, of documentary evidence concerning the allegation made against Mr. McKelvey. However, this dispute is not relevant to this appeal. Prior to the proposed date of the disciplinary hearing, Mr. McKelvey had been provided with the "evidence file", which comprises the charge sheet referred to above, a spreadsheet entitled "Tower Lights on Site 2015/2016" and an untitled spreadsheet recording hundreds of transactions made using the fuel cards of division 3. In accordance with the procedures outlined in the Iarnród Éireann Disciplinary Code, Mr. McKelvey should be furnished with any outstanding documentation which he considers relevant at the commencement of the hearing and can request an adjournment to the hearing in order to consider same.

[18] The procedures contained within the Iarnród Éireann Disciplinary Code were agreed between Iarnród Éireann and the relevant trade unions representing its employees and were accepted by a ballot vote of staff in 1994. It was accepted by the parties that the code is in compliance with the code of practice set out in the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 (S.I. No. 146), the purpose of which is to provide guidance to employers, employees and their representatives on the general principles which apply in the operation of grievance and disciplinary procedures and which itself is silent as to the question of legal representation of employees during a workplace disciplinary process. Paragraph 4.4 of the code set out therein defines an "employee representative" as including "a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise".

[19] This statutory instrument was published pursuant to s. 42 of the Industrial Relations Act 1990. Subsections (4) and (5) thereof, as amended, provide:

> "(4) In any proceedings before a court, the Labour Court, the Commission, the Employment Appeals Tribunal, Director General of the Workplace Relations Commission or a rights commissioner, a code of practice shall be admissible in evidence and any provision of the code which appears to the court, body or officer concerned to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

(5) A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings."

[20] Notwithstanding that the Iarnród Éireann Disciplinary Code refers only to an employee's right to representation by a fellow employee, it has not been disputed by the parties that Iarnród Éireann has a discretion to permit Mr. McKelvey to be legally represented at the disciplinary hearing. Further, it is not disputed that the Iarnród Éireann Disciplinary Code was notified to Mr. McKelvey as part of his contract of employment.

[21] It was against that background that these proceedings were launched. It will be necessary to examine the legal principles in more detail in due course, both in the context of analysing the decisions of the High Court and of the Court of Appeal and of setting out the basis on which I would propose that this court address the matter. However, in brief summary, there are two questions of law which potentially arise on this appeal, both of which derive from legal propositions to be found in recent case law. It is perhaps appropriate to briefly set out those propositions at this stage.

4. The legal principles

[22] In the course of both the written and the oral procedure before this court, it was accepted by both sides that the decision of Geoghegan J., speaking for this court in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682, represented the law concerning the entitlement to have legal representation at a disciplinary process such as that which is at issue here. There was some debate between counsel as to the proper interpretation of what this court decided in *Burns v. Governor of Castlerea Prison*, but it is clear that both the High Court and the Court of Appeal also operated, quite correctly, on the basis that the fundamental principles applicable to the question of whether there is an entitlement to legal representation can be found in *Burns v. Governor of Castlerea Prison*.

[23] The second legal principle which is of some relevance is the question of the appropriateness or otherwise of a court intervening either before or during (as opposed to at the end of) a disciplinary process. In that regard, the most recent decision of this court is to be found in my judgment in *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355.

[24] While it will again be necessary to refer in a little more detail to the judgment in that case in due course, it is fair to say that the basic principle identified is to the effect that courts should be reluctant to intervene while a disciplinary process is ongoing but rather should wait until the process has

come to an end and then decide whether the result of that process is sustainable in law. However, the judgment in *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355 also recognises that there may be cases where it is clear that the process has, as it were, "gone off the rails" to such an extent that there could be no reasonable prospect that any ultimate determination could be sustainable in law. In such cases, it is clear that the court can and should intervene at an interlocutory stage to prevent a process continuing in circumstances where the result of that process will almost certainly be redundant.

[25] It was in the context of those broad principles that the courts below determined the issues arising, although clearly taking a different view as to the proper application of those principles to the circumstances of this case. It is next appropriate, therefore, to consider the reasoning of both the High Court and the Court of Appeal in reaching those different conclusions.

5. The judgments in the lower courts

[26] As mentioned above, both the High Court and Court of Appeal considered that the fundamental principles applicable to the question of whether there is an entitlement to legal representation were to be found in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682. In the High Court, Murphy J. relied in particular upon a set of criteria to be considered in the context of a request for legal representation, as first identified by Webster J. in *R. v. Secretary of State for the Home Department, Ex p. Tarrant* [1985] Q.B. 251, and approved by Geoghegan J. in *Burns v. Governor of Castlerea Prison* as a series of factors which should serve as "starting off points" from which to approach such a request. These were set out at para. 14, p. 688, of the judgment of Geoghegan J. as:

"1. the seriousness of the charge and of the potential penalty;
2. whether any points of law are likely to arise;
3. the capacity of a particular prisoner to present his own case;
4. procedural difficulty;
5. the need for reasonable speed in making the adjudication, that being an important consideration; and
6. the need for fairness as between prisoners and as between prisoners and prison officers."

[27] Applying those criteria to the facts of these proceedings, and in light of what was described as the "complexity" of the case, the High Court judge held that it was clear that Mr. McKelvey satisfied the test for the provision of legal representation and she granted the reliefs sought. Each criterion, as set out above, was considered in turn; first, it was held that the charge

of theft alleged against Mr. McKelvey was very serious and that both the potential penalty of dismissal and the potential for reputational damage which the charge carried were significant. The High Court judge then found that multiple points of law were likely to arise in the disciplinary hearing, including issues of alleged flaws in the investigation, of imprecision in the charges levelled against Mr. McKelvey and of whether the defendant must establish loss.

[28] In respect of the third criterion, the High Court judge considered, in light of what she considered to be the convoluted facts and multiple witnesses likely to be involved in the hearing, that "[t]he notion that the plaintiff has the capacity to navigate such a process unaided is frankly ridiculous". In terms of procedural difficulty, the High Court judge found that the procedures to be adopted during the disciplinary hearing were unclear and this was therefore an area in which Mr. McKelvey might well require the assistance of legal representation.

[29] Addressing the need for reasonable speed in making the adjudication, it was held that while allowing legal representation would slow the disciplinary process down, the negative impact of this delay on Iarnród Éireann was "relatively minor" due to the fact that Mr. McKelvey was suspended. Finally, in respect of the need for fairness as between the parties, the High Court judge found that as Iarnród Éireann had chosen to allege theft against Mr. McKelvey, he had an entitlement to defend himself and to rebut the charges.

[30] Irvine J., delivering judgment in the Court of Appeal, held that the High Court judge erred in law and in fact in concluding that Iarnród Éireann incorrectly exercised its discretion in refusing Mr. McKelvey legal representation. Irvine J. held that while the criteria as considered in the High Court were a useful starting point from which to approach the issue, the core question which is to be determined in proceedings such as these, as set out by Geoghegan J. in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682, is whether a disciplinary hearing could be said to be unfair or in breach of the principles of natural and constitutional justice by reason of the fact that the employee does not have legal representation. In particular, Irvine J. relied on the proposition set out at para. 13, p. 688, of Geoghegan J.'s judgment, that "[t]he cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional".

[31] Following the principle that it is undesirable to involve lawyers in workplace investigations, in light of the delay and increased costs which would result, unless it is established that there is something exceptional

about the matters in question, Irvine J. held that there were no special or exceptional circumstances to warrant the conclusion that Mr. McKelvey would not receive a fair hearing in the absence of legal representation. In reaching this conclusion, she addressed the criteria which were considered by the trial judge in light of the evidence.

[32] While it was held that the charge alleged against Mr. McKelvey was properly classified as serious, Irvine J. considered that it was likely that the High Court judge ascribed undue weight to this factor. Further, it was held that the possibility that criminal proceedings may be instituted as a result of the conduct under investigation was not a particularly significant factor, as any finding made against Mr. McKelvey in the course of the disciplinary hearing would not be admissible as evidence against him in any such proceedings and it did not mean that the disciplinary hearing was of an exceptional nature, particularly given that the charge of theft was considered to be of a relatively straightforward nature. Irvine J. also considered that, in the circumstances of workplace disciplinary procedures, there was nothing exceptional about the sanction of dismissal to which Mr. McKelvey might be subjected, nor about the consequences of any adverse findings for his reputation and future employment prospects and, as such, these factors could not be dispositive of his entitlement to legal representation.

[33] Irvine J. disagreed with the conclusion of the High Court judge that multiple points of law were likely to arise in the course of the disciplinary hearing. It was held that the circumstances did not involve any issues of legal complexity; there was no evidence to suggest that any legal issue was likely to arise in respect of any possible flaws which there may have been in the preliminary investigation, as the charge will have to be established based on evidence adduced at the disciplinary hearing, and in addition, Irvine J. did not consider that there was anything imprecise about the charge of theft. Finally, issues of proof were held to involve questions of fact and it was considered that proof of loss would follow as a matter of fact if the evidence established that Mr. McKelvey used his fuel card for the improper purchases of fuel.

[34] Furthermore, it was held that there was no evidence to support the finding that Mr. McKelvey lacked the capacity to defend his interests at the disciplinary hearing, in circumstances where he was to be represented by Mr. Cullen, an experienced trade union official. Finally, Irvine J. rejected the High Court finding that there was a lack of clarity surrounding the procedures to be deployed at the disciplinary hearing and held that this was not a consideration to be correctly taken into account in the context of Mr. McKelvey's request for legal representation, particularly in light of the procedures

clearly set out in Iarnród Éireann's Disciplinary Code. It was stressed that should an issue of legal complexity arise in the course of the disciplinary hearing, it would still be open to Mr. McKelvey to seek that the hearing be postponed in order to enable him to obtain legal representation.

[35] As noted earlier, Mr. McKelvey raised a number of issues before the High Court. One of the orders which he sought was that the disciplinary hearing be restrained pending the provision of documentation to him. However, the trial judge considered that this application was premature given that the hearing had not yet commenced and that the Iarnród Éireann Disciplinary Code provided for the provision of documentation at the beginning of the process.

[36] Insofar as the question of legal representation was concerned, neither the High Court nor the Court of Appeal dealt expressly with the question of the appropriateness or otherwise of intervening in advance of or during the disciplinary process. However, at the hearing before this court, it was accepted by both parties that the principle identified in *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355 was such that the court should only intervene if it was clear that legal representation was required. It seems to me that such was the correct approach. If it is clear that legal representation is required in a disciplinary process, then a denial of such representation would undoubtedly meet the criteria identified in *Rowland v. An Post*, for it would be equally clear that it would be highly unlikely that any decision made at the end of such a process would be sustainable. On the other hand, if it is not clear that legal representation is necessarily required, then it would follow that it would be premature for the court to intervene, for the court should not assume that legal representation would be wrongfully refused in circumstances where it had subsequently become clear that the process necessitated such representation in order that it be fair.

[37] In the light of that analysis, I turn next to the principles applicable to legal representation at internal disciplinary processes.

6. The principles applicable to legal representation

[38] I should start by indicating that I see no reason to depart from the approach adopted by Geoghegan J. in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682. No argument was made on this appeal on behalf of Iarnród Éireann to the effect that it did not have a discretion to allow legal representation in a disciplinary hearing and that such representation might be required where it might be necessitated in accordance with the principles set out in *Burns v. Governor of Castlerea Prison*. In those

circumstances, it does not seem to me that questions arise for resolution on this appeal as to whether it may be possible to exclude by contract any entitlement to legal representation in a private law employment dispute. For like reasons, no issues arise as to the extent to which different considerations might apply where an employer is a statutory undertaking. Finally, no disputes seem to me to arise in this case as to the type of language which would need to be set out in a disciplinary process in order to exclude a right of legal representation in all circumstances (assuming that this is legally possible). I would, therefore, leave those and related questions over to a case in which they clearly arose and were the subject of argument on behalf of the parties.

[39] It follows that I accept, at least for the purposes of this case, that there may be circumstances in which, in line with the reasoning in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682, Mr. McKelvey might be entitled to legal representation in the context of the type of disciplinary process which he faces. Before going on to consider the various factors which might be relevant in an assessment of whether an entitlement to legal representation exists, which were identified in *Burns v. Governor of Castlerea Prison* by reference to the judgment of Webster J. in the United Kingdom in *R. v. Secretary of State for the Home Department, Ex p. Tarrant* [1985] Q.B. 251, it does seem to me to be clear that the overarching principle identified by Geoghegan J. is to be found at p. 688 of his judgment, where he states:

> "13. …The cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional … In any organisation where there are disciplinary procedures, it is wholly undesirable to involve legal representation unless in all the circumstances it would be required by the principles of constitutional justice."

[40] It is, of course, clear that a regime (whether contractual or statutory) that provides for a disciplinary process will contain an implied term (if there is no express term to the same effect) that the relevant process will be fair. However, it is also clear that precisely what is required to ensure that a process is fair in that sense will depend on a variety of factors and may well vary from case to case. The statement of Geoghegan J. to the effect that legal involvement may be necessary in some limited circumstances but ordinarily will not be necessary involves a finding that it is only in those cases where legal representation is necessary to achieve a fair hearing that any implied entitlement to such representation can be said to exist.

[41] In passing, it should be observed that a disciplinary scheme can, of course, make express provision for an entitlement to legal representation

and, if it does, an employee will undoubtedly be entitled to be represented by a lawyer if such comes within the scope of whatever the scheme provides. Likewise, an employer will always be entitled to allow someone to be represented by a lawyer even if the person concerned may not have a legal entitlement in that regard. However, these proceedings are concerned with a disciplinary scheme which does not confer an express entitlement to a lawyer and where the employer does not wish to allow representation. It follows that the ultimate issue which any court has to determine in a case such as this is as to whether disciplinary proceedings continuing without legal representation would amount to unfair proceedings and thus be in breach of the implied term as to fairness. It follows, in turn, that such a breach could only be established where it can be shown that legal representation is "necessary" to ensure a fair process.

[42] It seems to me that the criteria of "necessity", as thus identified, requires further explanation. There may be many cases where the forensic skills of an experienced advocate with a legal qualification may enable the presentation of a case in a more favourable light. But it seems to me that to say that a case might be somewhat better presented by a lawyer falls a long way short of saying that the presence of a lawyer is necessitated in order for the process to be fair.

[43] It can hardly be doubted that the particular skills brought to bear by the most experienced and able counsel may add something to a case, whether in the courts or anywhere else, over and above that which might be brought to bear by a fully competent but not, perhaps, quite so experienced advocate. Even in the sphere of criminal law, not every accused will be able to have the benefit of the most outstanding defence counsel of the day. The fact that such a counsel might arguably bring something added to the case over and above its conduct by a perfectly competent and suitably experienced colleague could not lead to a contention that a trial was unfair simply because it might have been possible to find someone who might have been able to bring something additional to the table.

[44] When considering whether any process is fair, in the context of representation, the question is not whether a particular type of representation might give some added value but whether its absence can be said to leave the person concerned without an adequate level of representation. The level which will be considered adequate will depend on an overall assessment of all of the circumstances of the process envisaged. In that context, I would, at the level of principle, agree with the submission made by counsel for Mr. McKelvey to the effect that the proper approach to the approval by Geoghegan J. of the criteria identified in *R. v. Secretary of State for the Home*

Department, Ex p. Tarrant [1985] Q.B. 251 does not involve treating those criteria as elements which need to be necessarily separately established but rather that they, and any other appropriate factors, go into the overall evaluation made in the context of reaching an assessment as to whether legal representation is necessary in order for the process to be fair (as opposed to a consideration of whether legal representation might give some added value).

[45] It follows that the appropriate assessment to be made is as to whether it has been demonstrated that, in all of the circumstances of this case, legal representation is truly necessary in that sense. Before going on to apply that principle to the facts of this case it is, perhaps, worth mentioning the case of *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635. While that case did involve the question of the level of legal representation to which an accused was entitled (rather than an entitlement to legal representation in the first place), and while it also involved a summary criminal trial, it seems to me that nonetheless some guidance can be obtained from the approach of the court. The issue was as to whether the accused was entitled under the legal aid scheme to counsel as well as a solicitor in the context of a summary trial of charges under the provisions of the Diseases of Animals Acts 1966, as amended, the European Communities (Registration of Bovine Animals) Regulations 1996, and the Brucellosis in Cattle (General Provisions) Order 1991, as amended. These charges involved the alleged wrongful movement and irregular registration of cattle. The evidence before the court came first from the solicitor assigned under the legal aid scheme to represent Mr. Carmody. He indicated that he was an experienced solicitor and regularly represented persons in summary trials before the District Court. However, he indicated that, in the particular circumstances of the case in question, he did not feel that he could do a proper job in defending the accused. That position was supported by an affidavit from a particularly experienced local solicitor who equally indicated that he almost always did his own defence work in the District Court but that he, too, would have instructed counsel in the case in question. Furthermore, it was clear that the prosecution intended to be represented by counsel. It was in the light of that powerful body of evidence, that the court concluded that it was necessary, in order that there be a fair trial, that counsel be instructed.

[46] That decision was, of course, against the background of the constitutional position identified in *The State (Healy) v. Donoghue* [1976] I.R. 325, which made clear that, in certain circumstances, an accused who could not provide for their own defence was entitled, as part of the requirement that they be tried in due course of law, to have legal assistance provided at the State's expense. As part of that entitlement, the court in *Carmody v. Minister*

for Justice [2009] IESC 71, [2010] 1 I.R. 635 held that there were circumstances, admittedly unusual, where such an entitlement might extend to the requirement to have counsel instructed in summary District Court proceedings on the basis, in substance, that a trial without that level of legal representation would not be fair nor would it be a trial "in due course of law". But it is clear that there was very substantial evidence before the court to indicate that experienced criminal defence solicitors did not consider that they would be able to provide an adequate defence without instructing counsel. Doubtless there may be cases which are likely to be tried in the District Court on a summary basis where it might be said that the instruction of experienced defence counsel might add something to the defence. However, it is clear from *Carmody v. Minister for Justice* that it is necessary to go much further. It must be shown that the instruction of counsel is necessary in order for there to be a fair trial. If such considerations apply in the context of a criminal trial where the constitutional right to liberty is at play, then they apply with much greater force in the context of an internal disciplinary process.

[47] It follows that it is next necessary to consider whether there are any circumstances established on the evidence in this case which make clear that legal representation is necessary to ensure a fair process rather than, potentially, being merely of some possible advantage to the relevant employee.

[48] In addition, it is necessary to have regard to the principles identified in *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355. What is sought here is an interlocutory injunction to restrain a disciplinary process before it has begun. The same principles apply here as would apply in respect of an attempt to restrain an ongoing disciplinary process before it has come to its natural conclusion. The process should only be restrained where it is clear that things have gone sufficiently off the rails such that no decision at the end of the process is likely to be sustainable in law.

[49] In passing, I would add that it seems to me that the principle identified in *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355 really forms part of the balance of convenience consideration that goes into the overall assessment which is to be made at an interlocutory stage, which in turn leads to the fashioning of a result which runs the least risk of injustice. The regular halting of a disciplinary process because of the possibility that something might have gone wrong (on merely the basis of an arguable case) potentially operates to defeat the orderly conduct of employer/employee relations and thus leads to a material risk of injustice to the relevant employer if an injunction is granted but the claim ultimately fails. However, requiring a process to continue in circumstances where it is almost inevitable that the result will have to be set aside at the end creates a real risk of injustice.

[50] The overall question which must be asked in this case is, therefore, as to whether it is clear at this stage that allowing this disciplinary process to go ahead without legal representation would result in a final decision which, if averse to Mr. McKelvey, would be most unlikely to be sustainable in law.

[51] In that context, it is not appropriate to consider mere speculation as to issues or questions which might arise in the course of a hearing. Almost any disciplinary process, no matter how simple, might theoretically take a turn which would give rise to very difficult legal questions where the benefit of legal advice and assistance might be necessary. But the theoretical possibility of such an eventuality does not justify a decision that legal advice and representation is necessary from the beginning in order that there be a fair process. As the Court of Appeal pointed out, nothing in the judgment of that court was to be taken as indicating that Mr. McKelvey might not, at some stage, become entitled to legal representation if the situation demanded it. The question both for the courts below and for this court is as to whether it is clear at this stage that Mr. McKelvey cannot have a fair process without legal representation — is legal representation necessary rather than merely potentially being of some advantage? I turn now to that question.

7. The circumstances of this case

[52] At its heart, the allegation against Mr. McKelvey is relatively straightforward. It is said that he used, or allowed to be used, his fuel cards in an improper way so as to obtain either for himself or others fuel which was not intended to be used for the purposes of his employment. That allegation is easy to understand.

[53] The evidence from which it might be inferred that such conduct occurred is undoubtedly a little more complex. It involves an analysis of the patterns of the use of the cards concerned. In addition, it may well be that issues may arise concerning the truth or otherwise of the suggestion that others may have used Mr. McKelvey's cards without his permission, or that, alternatively, he attempted to get others to say that they had done so. But these again are straightforward questions of fact.

[54] In addition, the procedures to be followed are well established and would be well known to any experienced trade union official who was experienced in the conduct of disciplinary procedures involving Iarnród Éireann. I have to say that I cannot see anything in either the allegations, the likely evidence or the process likely to be followed which would place these disciplinary proceedings beyond the competence of an experienced trade union official.

[55] It should be recalled that an internal disciplinary process such as this is not a criminal trial. While the process must be fair, the formal rules of evidence or the procedures which govern either criminal or civil proceedings do not necessarily apply. The position of persons who may also have been the subject of investigation and the question of any evidence which they might give is not necessarily governed by the procedures or rules of evidence which would apply in a similar situation in the courts. Of course, the credibility of such persons may, in an appropriate case, be questioned on the basis of their own possible involvement. But they do not necessarily have to be treated in exactly the same way as a potential accomplice, co-accused or co-defendant in court proceedings. What is required is that Mr. McKelvey and his trade union representative be given a reasonable opportunity to challenge the evidence of any such persons on any reasonable basis. In those circumstances, it does not seem to me that there is, at least at present, any real basis for suggesting that legal issues of any substance will emerge.

[56] It is true that the allegation is one of theft and that an adverse result to the process could result in dismissal. That is undoubtedly a factor to be taken into account, but it does not seem to me that it can, of itself, bring the case into a category where it can be shown that legal representation is necessitated. The fact that theft may also be a criminal offence is of some marginal relevance but is, in my view, of limited weight having regard to the fact that any result of this disciplinary process could have no bearing on a criminal trial where the guilt of an accused would need to be established beyond reasonable doubt. If, coupled with the seriousness of the allegation and of the potential consequences, there are particularly difficult issues of law or extremely complex facts, then the cumulative effect of each of those matters might lead, in an exceptional case, to the view that legal representation was required. However, it does not seem to me that this is such a case.

[57] There is nothing in the evidence which would lead to the sort of conclusion which this court reached in *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635, which was to the effect that the representation being provided (in that case, a solicitor without counsel) was inadequate to secure a fair trial. Likewise, I am not satisfied that there is anything in the evidence in this case which would satisfy a court that representation by an experienced trade union official would not be adequate to secure a fair process.

[58] That leads finally to a consideration of the point made to the effect that it may be that the trade union official concerned might have a conflict of interest by reason of the fact that there may be others accused of similar offences whose interests may not coincide with those of Mr. McKelvey, such

that the trade union official concerned could not fairly and legitimately represent those competing interests. That may or may not turn out to be the case. But if such a conflict does transpire, there is nothing in the evidence to suggest that another experienced trade union official might not be able to take over the role of representing Mr. McKelvey so as to remove any risk of conflict of interest should it arise. To suggest that there will necessarily be a conflict of interest is purely speculative. But to suggest that such a conflict could not be resolved should it arise is to place a further speculation on top of the first.

[59] In all those circumstances, I am not satisfied that it has been established that there is a clear case that the representation of Mr. McKelvey in these disciplinary proceedings by an experienced trade union official would not be adequate to meet the needs of a fair process. It follows in turn that, in my view, the circumstances which would justify the grant of an interlocutory injunction at this stage are not made out.

8. Conclusions

[60] For the reasons set out in this judgment, I have concluded first that the true question which the court must address is as to whether this is a case where it is clear at this stage in the disciplinary process involving Mr. McKelvey that the process concerned could not be regarded as fair unless he were to be afforded legal representation. As already noted, Mr. McKelvey seeks to restrain a process which, in substance, has only just begun. It is well settled that a court should not restrain a disciplinary process prior to its conclusion unless it is clear at the stage when an injunction is sought that something has occurred which is sufficiently serious and incapable of being cured so that there was no realistic prospect that a legally sustainable conclusion could be reached at the end of the process.

[61] I am also satisfied that the proper approach to the question of whether a disciplinary process can be regarded as unfair because of the absence of an entitlement to legal representation is as set out in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682. I am also satisfied that the various considerations identified in *Burns v. Governor of Castlerea Prison* are not matters which need to be separately established but rather are factors to be taken into account in an overall assessment as to whether a fair process can take place without legal representation. I am also satisfied that the observation to be found in the judgment in *Burns v. Governor of Castlerea Prison* to the effect that legal representation will only be

required as a matter of fairness in exceptional cases provides overall guidance to the proper approach.

[62] For the reasons set out earlier in this judgment, and applying the approach adopted in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682, I am not satisfied that it has been established that this is the sort of clear case where it can now be said that a fair process cannot ensue without legal representation. On that basis, I am satisfied that the Court of Appeal was correct to allow the appeal from the High Court in this case and to decline to grant Mr. McKelvey an injunction restraining the process. As I have noted, it does not seem to me that this necessarily would bar Mr. McKelvey from asserting at a subsequent stage in the process that he was entitled to legal representation because of the way in which the process had evolved.

MacMenamin J.
[63] I agree with Clarke C.J.

Dunne J.
[64] I also agree with Clarke C.J.

Charleton J.
[65] While the analysis in this judgment reaches the same conclusion as that of Clarke C.J., that this employee has no entitlement to be legally represented at a disciplinary hearing about alleged misappropriation of property, a different analysis of the legal route is possible. Contract governs the relationship between the parties even though a dismissal may be the result of the disciplinary process against an employee. Whereas, because of the position of Iarnród Éireann, as a publicly supported national transport company running the nation's railway network, public law applies, nothing in the employment contract made between Barry McKelvey and the company requires that criminal trial rights of representation by lawyers and a right to cross-examine should intrude into the issue of his conduct as an employee. Essentially, the company wish to enquire into what is claimed to be the theft of company property. If that theft is supported as probable and the employee as an actor in the misappropriation, the ultimate penalty of dismissal will be contemplated. Preliminary enquiries have already been made and certain facts, apparently, uncovered. In response, the employee has given an explanation. It

is now proposed to have an employment hearing in the context of disciplinary procedures that were agreed upon collectively. At that disciplinary hearing the employee may, as a matter of his contract, be represented by a fellow employee or by a trade union official. There is no requirement in the contract, or by the application of public law, for acceding to the employee's request that a solicitor and barrister represent him at his own expense.

Background

[66] It is best to mention the facts only briefly. These are subject to findings that may or may not be made at the disciplinary hearing. Hence, what follows is merely an outline and, in any event, the papers make presumptions as to knowledge which is perhaps well known in the company but with which, as the argument on appeal demonstrated, even the best of outside legal representatives may struggle

[67] Two interviews are recorded with the employee in the appeal papers. The second will be referenced here as it seems based on a process of investigation that gained detail over time. The employee was with the company for about 20 years and had become a works inspector at Kildare. Prior to that, he was in Carlow. On the railways, various machines are driven by fuel-powered generators. This is not surprising given the need to work at a distance from stations on railway track, rolling stock and supporting signalling equipment. These include power spanners, impact wrenches, boring machines and light towers to illuminate work in the deep countryside. For this, credit cards chargeable to the company are issued to employees at inspector level. It appears that staff at this employee's level, in travelling, can fill up their cars on the cards. All are PIN protected, the same way as any ordinary card but not as securely, it is claimed, since the cards may be shared among people of the same grade and the PIN also passed on. What is concerned here, in part, is petrol usage from 2014 through to 2016. An allegation is made of a shift from petrol to diesel over 2014 through to 2015. Some use may have been made of the card at a distance of 100km from the home station. Some use may have been made simultaneously of a card or cards at two locations distant from each other at or around the same time. A large amount of fuel is involved. Another central focus of the enquiry is that the usage of diesel fuel is inconsistent with purchases for travel for work and this is claimed to be worth considering because of the 53-litre capacity of the employee's car and the purchase on one fill of considerably more fuel than that. As to explanations given, this is not a criminal trial process and hence the contractual duty of care and fidelity requires the employee to state what the

answer to an issue is; see the judgment of Barrington J. in *Mooney v. An Post* [1998] 4 I.R. 288 at p. 298 and that of Clarke J. in *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355 where at para. 43, p. 368, he states that a "Bart Simpson" attitude does not accord with the nature of an employment contract. The explanations given by the employee include that someone else was using the card, that the card was left behind in the depot and taken by another, that fuel was stored in jerry cans for legitimate purposes and that on occasion the employee forgot his wallet in which the card was left. As with many such reports, the person doing the enquiry and the employee share a common knowledge that tends to puzzle outsiders. Here, the proper usage for company or employee vehicles on company business is unexplained, the equipment and how it is fuelled is based on a shared understanding and the significance of distance from a depot must be known to people within the company, as must the system generally.

[68] Another issue raised by the employee is that the company has statements from some fellow employees and, apparently, they claim that on occasion the employee approached them and asked them to say that they had borrowed his card. That issue is asserted to raise a difficult point of law. In reality it does not. Evidence, whether in a criminal trial setting or in the more informal situation of a disciplinary hearing, should be probative. That means that in terms of logic it supports a conclusion being drawn from it, either on its own or through the consideration of that evidence with other evidence. It can be an admission for a person to ask another person to cover for him or her so as to make it appear that he or she had no connection with an incident. That is because, as a matter of logic, to ask someone to assert something wrongly so as to take responsibility on another's behalf can justifiably lead to the conclusion that the person making the request required an answer at variance with reality. Obviously, whether this happened or not is not something within this court's competence on appeal, but it should be a fact that is capable of being found or not. No legal issue is engaged. If a proposed piece of evidence is merely prejudicial, such as that an employee has a particular sexual orientation, that has no place in logic in terms of proving that there has been a breach of employment duties. In criminal cases, prior convictions by an accused are not ordinarily admitted in evidence. But a prior conviction can logically help lead to a conclusion relevant to the case. Thus, in *The People (Attorney-General) v. Kirwan* [1943] I.R. 279 it was logical to prove that the accused had learned butchery while serving a sentence for a prior offence, since the victim of the murder with which he was charged had been dismembered with professional skill. It is not merely prejudice and neither

is it a big issue as to whether a person asked another to take responsibility for something he is suspected to have done.

Contract

[69] There are few enough employees, apart from those on fixed-term contracts, gardaí and members of the Defence Forces being examples, who do not come within the scope of entitlement to redress under s. 2 of the, heavily amended, Unfair Dismissals Act 1977. Section 14(1) provides that an "employer shall, not later than 28 days after" entering "into a contract of employment with an employee, give to the employee a notice in writing setting out the procedure which the employer will observe before and for the purpose of dismissing the employee". Representation is at the core of this since subs. (3) provides that the procedure referenced is one "that has been agreed upon by or on behalf of the employer concerned and by the employee concerned or a trade union or an excepted body within the meaning of the Trade Union Act 1941, representing" the employee or which has "been established by the custom and practice of the employment concerned". Under subs. (2), employees should be notified of any alterations in procedure.

[70] It is thus to be expected that through collective agreement, or by custom, both employees and employers will be able to look to a written document in the event that an issue arises, to use the language of s. 6 of the 1977 Act, in relation to "the capability, competence or qualifications of the employee for performing work of the kind which" the employee "was employed by the employer to do" or "the conduct of the employee" or "the redundancy of the employee" or restrictions by law requiring dismissal, such as the employment of non-pharmacists in filling prescriptions. To again use the language of the legislation, at s. 6, the employer must show that a dismissal was fair and that will not be so unless "having regard to all the circumstances, there were substantial grounds justifying the dismissal".

[71] Dismissal is therefore about substance; whether an employee is competent or qualified to do the job, or whether misbehaviour is involved. Section 5(b) of the Unfair Dismissals (Amendment) Act 1993 introduced an entitlement to the Workplace Relations Commission to look at procedure and as to "the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal" and "the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure" agreed for dismissal. In *Connolly v. McConnell* [1983] I.R. 172, at p. 178, a basic approach to disciplinary

proceedings was set as requiring that employers must not remove an employee "without first according to him natural justice". Thus an employee "must be given the reasons for [any] proposed dismissal, and an adequate opportunity of making his [or her] defence to the allegations made against him [or her]". Hence, there should be as full an investigation of the relevant events as is reasonable in the circumstances before disciplinary action is taken, the employee should be notified of this so as to enable an answer to be given by him or her and to have the matter impartially decided.

[72] There may be employment situations where more than those centrally important principles are required by agreement or statutory instrument to be observed, for instance in the Garda Disciplinary Code, there involving what is, in terms of procedures, essentially a civil trial on a stated "charge". Just because, however, some employees or some sectors have a different or enhanced approach, does not mean that employment disciplinary or grievance hearings should move towards a tribunal-of-inquiry model of legal representation, cross-examination and evidential objections: that will not help anyone. What should be involved, instead, is a search for the truth with the employee enabled to make a contribution to that process by stating whatever explanation is available to him or her. After all, while this is not a two-stage process where rights are afforded at a second stage, as in *McNamee v. Revenue Commissioners* [2016] IESC 33 and the cases therein cited, once a complaint is validly made to the Workplace Relations Commission, the burden of justifying dismissal is on the employer through the calling of evidence, and the parties may there be legally represented.

Procedures

[73] Many contracts incorporate the Industrial Relations Act 1990 code of practice on grievance and disciplinary procedures, as set out in the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 (S.I. No. 146). That was the case here. These do not include any entitlement to legal representation. Instead, as helpfully recounted in Meenan, *Employment Law* (Round Hall, 2014) at pp. 885–886:

> "18-04 … the general procedures for dealing with issues reflect the varying circumstances of enterprises and organisations, which must comply with the general principles of natural justice and fair procedures, which include that employee grievances are fairly examined and processed; details of any allegations or complaints are put to the employee

concerned; the employee concerned is given an opportunity to respond fully to any such allegations or complaints; the employee concerned is given an opportunity to avail of the right to be represented during the procedure; and the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by or on behalf of the employee and any other relevant or appropriate evidence, factors or circumstances. Section 3 of the code records the necessity to ensure that disciplinary matters are dealt with in accordance with natural justice. Paragraph 6 of Pt 4 of the Schedule then sets out, depending on the organisation, the matters which ought to be satisfied so as to ensure compliance with the principles of natural justice and fair procedures. These include '[t]hat the employee concerned is given the opportunity to respond fully to any such allegations or complaints' and '[t]hat the employee concerned is given the opportunity to avail of the right to be represented during the procedure'."

[74] Thus, the place to start, and often to end, is the contract of employment. That much is clear from the judgment of Barrington J. in *Mooney v. An Post* [1998] 4 I.R. 288 where at p. 298 he said:

"If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure. If the contract or the statute contains a provision whereby an employee is entitled to a hearing before an independent board or arbitrator before he can be dismissed then clearly that independent board arbitrator must conduct the relevant proceedings with due respect to the principles of natural and constitutional justice. If however the contract (or the statute) provides that the employee may be dismissed for misconduct without specifying any procedure to be followed, the position may be more difficult.

Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions."

[75] Because, in other cases, or indeed in this one, concessions have been made whereby a duty to call live evidence has been accepted as part of procedures, or where this has been incorporated in a collective agreement, or where cross-examination is allowed on a case-by-case basis, these entitlements are specific to individual hearings. An instance of that is *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355, but the procedures that are

mentioned in that case, in the context of an argument for ever more elaborate procedures, are not of general application.

[76] A difficulty may arise where an employment contract is silent as to grievance procedures, thus involving a breach of s. 14(1) of the Unfair Dismissals Act 1977. No comment is here made as to whether the appropriate course is to apply the standard grievance procedure promulgated under the Industrial Relations Act 1990. That would appear to many to be a sensible course, bearing in mind the procedures were invented to assist in coming to the truth and, in a proper case, are not an end in themselves. Here, the grievance procedure clearly states that an employee is entitled to be represented at a disciplinary hearing and that for "the purposes of this Code of Practice" that "includes a colleague of the employee's choice and a registered trade union official". In case that might be ambiguous, the definition proceeds to state that an employee is not entitled to be represented by "any other person or body unconnected with the enterprise". As a matter of contract, that disposes of the argument by the employee that the procedures involved require the presence of lawyers.

[77] Issues may arise where standard procedures are not those sensibly derived from the 1990 Act but are, instead, incorporated into a contract of employment given to an employee at the commencement of his or her employment or are negotiated collectively with the trade union involved. Mistakes can be made. One of these might be that a person making the accusation of, for instance, bullying, is entitled to sit on the final hearing deciding on whether there was misconduct and what the results should be. It might be argued that a sensible interpretation of the contract, perhaps based upon the officious bystander rule, would lead to a sensible solution. Another situation, which has occurred in practice, was that the decision of a father would be appealed under the contract to an appellate body entirely composed of that man's son. With good sense, these issues can be resolved so that a fair determination can take place with the object of arriving at the truth.

[78] But such examples propose that there are minimum standards which, despite anything written in the contract, cannot be infringed. As much is said by Barrington J. in *Mooney v. An Post* [1998] 4 I.R. 288 but these are set at a level which recognises that the introduction of criminal trial structures into a procedure that is supposed to be implemented by people without legal training, but through the application of fairness, common sense and shrewdness, is not required as a matter of law. Such cases as support the proposition that a lawyer is sometimes, but very rarely, necessary in employment matters are derived from public law and should be confined within a public law context that is specifically limited.

[79] Thus, in *R. v. Secretary of State for the Home Department, Ex p. Tarrant* [1985] Q.B. 251, while those facing a disciplinary process were prisoners, and therefore subject to such penalties as close confinement for two months and the loss of liberty by the release date being put back through removing remission for up to six months, the reality of the case was that a lawyer was seen as necessary because the prison authorities decided to propose a charge of mutiny; a concept akin in complexity to that of treason. Thereafter, the research in this case has struggled to find any case which followed that precedent because more sensible courses have been followed, most especially that of simply asking whether certain facts did or did not occur. Hence, in *R. v. Board of Visitors of H.M. Prison, The Maze, Ex p. Hone* [1988] A.C. 379, the two applicants were prisoners and were charged respectively with throwing a cup of tea into a prison officer's face and assaulting another prison officer, causing severe injuries to his face. In essence, these were allegations of fact; if true, and if charged as such, they would constitute criminal offences of assault causing harm. Lord Goff, at pp. 391–392, rejected the proposition that anyone charged with a crime, or the equivalent thereof in terms of facts to be proven in a civil context, and liable to punishment would be entitled as a matter of natural justice to legal representation. In the public law sphere, the context determined what the requirements of natural justice would be. Similarly, in *Burns v. Governor of Castlerea Prison* [2009] IESC 33, [2009] 3 I.R. 682, while approving a list of factors derived from *R. v. Secretary of State for the Home Department, Ex p. Tarrant* [1985] Q.B. 251, Geoghegan J., in this court, was not prepared to impose legal representation for a disciplinary hearing related to the proper charging of expenses and claiming of overtime.

[80] Finally, it is worth noting that in a public law context, where an inquiry on behalf of the community takes place, it is not necessarily the case that a procedure derived from *In re Haughey* [1971] I.R. 217 is necessary. Yet, it is precisely there that some discussions of what are or are not fair procedures begin and, furthermore, with the consideration of the case in a completely separate sphere, namely *The State (Healy) v. Donoghue* [1976] I.R. 325 judgment of Gannon J. at p. 334 about legal aid on serious criminal charges. Clarke J. in *Atlantean Ltd. v. Minister for Communications and Natural Resources* [2007] IEHC 233 describes basic procedures applicable where someone is to lose rights. A person so affected "is entitled to" some reasonable notice of what might be described as "the charge against him", with cross-examination or a public hearing not coming into the equation necessarily, that person must "be given an opportunity to answer [the charge] and the chance to make submissions". That idea, fair notice and a chance to

comment, with no doubt an objective investigation as part of the matrix, is also key to *Mooney v. An Post* [1998] 4 I.R. 288. Then there is the practice, derived from the decision of the English Court of Appeal in *In re Pergamon Press Ltd.* [1971] 1 Ch. 388. That concerned an investigation in the public interest by statutory company inspectors about the conduct of a company collapse and how directors, including Robert Maxwell, abided by directors' ethics. There, in that very serious process, the procedure followed was to make enquiry in the absence of representation by those who may be blamed for public misdemeanours and with no right by them to cross-examine. Instead, on this procedure, a report is drawn up and a draft of preliminary findings together with the material on which this is based is sent to any person who may be criticised. In seeking and in considering whatever comments followed, the duty to consider representations is fulfilled. The various judgments in *Shatter v. Guerin* [2019] IESC 9 emphasise that what might be called full criminal-trial rights are not necessary in all circumstances and return instead to the duty to take on board the point of view and of fact of a person who may lose rights and to record that viewpoint and fairly consider it before reaching a conclusion; a procedure echoing *In re Pergamon Press Ltd.* even though what was involved in *Shatter v. Guerin* was not supposed to be an inquiry at all.

[81] These are issues which may require consideration in an appropriate case and are merely outlined as to the central point involved, which is that criminal trial rights are not universally applicable to all inquiries.

Injunction

[82] The principles as to allowing a measure of appreciation to tribunals to act in good faith in the choice of procedures, where not obvious from an employment contract, not to assume unfairness and deprecating premature interventions by application to court, as derived from the judgments of Clarke J. in *Becker v. St. Dominic's Secondary School* [2006] IEHC 130 and *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355, have not been challenged on this appeal. These stand as a proper interpretation of the circumstances where the courts should or should not intervene to divert a disciplinary procedure derived from contract from its ordinary course. Essentially, it is only where something has gone so wrong that contract rights to fair procedures are lost and cannot be corrected that an intervention by the courts is justified.

Result

[83] The plaintiff is entitled by contract to have a fellow employee assist him at the disciplinary hearing, or to be represented by a trade union official. By contract, no other or outside individual may represent him.

O'Malley J.
[84] I agree with Clarke C.J.

[*Reporter's note*: The judgment of the High Court (Murphy J.) in these proceedings was delivered *ex tempore* on 28 July 2017.]

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Úna Ruffley, Plaintiff v. **The Board of Management of St. Anne's School**, Defendant [2017] IESC 33, [S.C. No. 24 of 2016]

Supreme Court 26 May 2017

Employment law – Bullying – Test – Definition of workplace bullying – Meaning of "repeated" behaviour – Meaning of "inappropriate" behaviour – Meaning of "behaviour reasonably capable of undermining dignity at work" – Whether unfair disciplinary process resulting in psychiatric injury actionable as workplace bullying without evidence of malicious intent – Whether conduct not witnessed by other persons capable of undermining dignity of employee – Industrial Relations Act 1990 (Code of Practice Detailing Procedures For Addressing Bullying in The Workplace) (Declaration) Order 2002 (S.I. No. 17).

The Industrial Relations Act 1990 (Code of Practice Detailing Procedures For Addressing Bullying in The Workplace) (Declaration) Order 2002 defines "workplace bullying", in para. 5 to the Schedule, as follows:-

> "Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying."

The plaintiff was employed by the defendant as a special needs assistant. Following an incident where she was found to have locked the door of a room in which she was working with a pupil, and a second incident relating to a paperwork error, the plaintiff was subjected to a disciplinary process, which led to a final written warning being issued. The plaintiff maintained that locking the door in such circumstances was a common practice amongst special needs assistants and that she had never been told not to do so.

The plaintiff complained that the manner in which the disciplinary process was conducted offended against the principles of natural justice, *inter alia* as she was not given the precise details of the complaint against her, she was not given an opportunity to be heard, and when the plaintiff sought to appeal, the same body considered the appeal. She also made a number of complaints concerning the conduct of the school principal, including that in a meeting between only the two of them, the plaintiff was subjected to denigration that "belittled, humiliated and reduced her to tears".

Following a further incident, where the plaintiff was reprimanded by the school principal, the plaintiff left her employment on sick leave and did not return to work at the school or elsewhere following her departure. The plaintiff claimed that the conduct of the defendant in relation to the disciplinary process amounted to workplace bullying

constituting negligence and breach of the employer's duty of care, as a result of which she had suffered psychiatric injury.

The High Court (Ó Néill J.) found in the plaintiff's favour and awarded damages totalling €255,276 (see [2014] IEHC 235). The defendant appealed and the Court of Appeal (Ryan P. and Irvine J.; Finlay Geoghegan J. dissenting) allowed the appeal on the basis that the conduct of the defendant did not amount to workplace bullying, as defined (see [2015] IECA 287). The plaintiff sought to appeal to the Supreme Court and was granted leave to appeal on two questions: (1) whether an unfairly carried out disciplinary process resulting in psychiatric injury was, in itself, capable of being actionable in damages on the basis that it amounted to workplace bullying without evidence of malicious intent on the part of the employer; and (2) whether behaviour not witnessed by other persons in the workplace was capable of undermining the dignity of an employee (see [2016] IESCDET 52).

Held by the Supreme Court (Denham C.J., O'Donnell, McKechnie, MacMenamin, Dunne, Charleton and O'Malley JJ.), in dismissing the appeal, 1, that the terms "repeated", "inappropriate" and "reasonably capable of undermining dignity at work" in the definition of bullying in the 2002 Order should not be viewed as separate and self-standing issues as if in a statutory definition. While each component could usefully be considered separately and sequentially, they took their colour from each other and the concepts were incremental. Accordingly, while analysis might be facilitated by looking at the separate elements, the 2002 Order provided a single definition and a single test: was the defendant guilty of repeated inappropriate behaviour against the plaintiff which could reasonably be regarded as undermining the individual's right to dignity at work?

Per Charleton J. (Denham C.J., O'Donnell, MacMenamin, Dunne, Charleton and O'Malley JJ. concurring): That the test required all of the elements to be fulfilled. It should be considered sequentially. It was objective, not subjective.

Glynn v. Minister for Justice [2014] IEHC 133, [2014] E.L.R. 236 approved.

2. That the concept of repeated behaviour could usefully be contrasted with an isolated or once-off incident, but it could not be defined negatively, as merely something that is not "once-off" or "isolated". It was not enough to point to two different events. In order for behaviour to be "repeated", there must have been a pattern of behaviour and what must have been repeated was behaviour that was inappropriate and that undermined personal dignity.

3. That it was not enough to satisfy the requirement of repeated behaviour that what was alleged to constitute unfair procedures was comprised of a number of different steps unless each of those steps could be said in itself to be inappropriate and to undermine human dignity.

4. That inappropriate behaviour did not necessarily need to be unlawful, erroneous or a procedure liable to be quashed or otherwise wrong in law; it was instead behaviour that was inappropriate at a human level. The test looked to the question of propriety in human relations, rather than legality, and was illustrated by the more familiar examples of bullying: purposely undermining an individual, targeting them for special negative treatment, the manipulation of their reputation, social exclusion or isolation, intimidation, aggressive or obscene behaviour, jokes that were obviously offensive to one person, intrusion by pestering, spying and stalking – those examples all shared the feature that they were unacceptable at the level of human interaction.

5. That the making of a decision to impose a disciplinary sanction on an employee following an unfair disciplinary process could not, without more, be "inappropriate" for the purposes of a workplace bullying claim.

6. That the requirement of conduct "undermining dignity at work" was a separate, distinct and important component of the definition of bullying which identified the interests sought to be protected by the law and, just as importantly, limited the claims that might be made to those that could be described as outrageous, unacceptable, and exceeding all bounds tolerated by decent society.

7. That the requirement that the behaviour be repeated, inappropriate and undermining of dignity was a test that used language deliberately intended to indicate that the conduct which would breach it was both severe and normally offensive at a human level.

Per Charleton J. (Denham C.J., O'Donnell, MacMenamin, Dunne, Charleton and O'Malley JJ. concurring): That men and women were to be judged with the appropriate measure of appreciation for human nature and that, hence, conduct was be judged according to the standard of human beings, and not of angels. The standard also had to be set at a level where giving advice, telling people off, temperamental reaction or emotional interaction were not allowed to disrupt the duty of managers to see that work was done, and the entitlement to healthy satisfaction that actually justifying one's wages represented.

8. That while the "singling out" or "targeting" of an individual for disciplinary purposes was capable of being a component of bullying, the use of the verbs in those formulations was important and it was not enough that, after the fact, it was possible to say that a person had objectively been treated differently and worse than others in a similar situation.

9. That where an employer was not aware of a general practice of non-compliance with a disciplinary rule when a disciplinary process was initiated, the process could not be treated as a singling out of the plaintiff. If, following the initiation of the process, an employee raised the contention that other employees had also broken the rule, a failure to investigate that allegation could go to the fairness of the procedures followed by the employer but fell short of the type of conduct captured by a bullying claim.

10. That conduct which occurred in private could be a component of a claim for bullying. It was possible to treat someone inappropriately and undermine their dignity, without that conduct being witnessed. However, any element of humiliation in public would strengthen a claim.

Obiter dicta, *per* O'Donnell J.: 1. A disciplinary process could in theory constitute bullying if it were established that the process had been instituted maliciously, and as part of a campaign to victimise an individual, even if the process itself was conducted in accordance with the rules of fair procedures, and irrespective of the outcome of the process.

2. An employer was entitled to expect ordinary robustness from its employees.

Croft v. Broadstairs and St Peter's Town Council [2003] EWCA Civ 676, (Unreported, Court of Appeal of England and Wales, 15 April 2003) approved.

3. The law in the developing field of workplace bullying was somewhat anomalous. The parties accepted without question that no separate tort of bullying existed and that workplace bullying was a sub-species of an employer's duty of care. However, the courts had recognised the concept of "corporate bullying", for which the employer

could be directly responsible. Furthermore, an employer could be liable for direct and deliberate conduct in circumstances where the bully was not so liable and no indemnity could be sought. The developments in the field, while anomalous, indicated some important felt constraint upon a more widespread liability.

4. So long as the cause of action for bullying remained a subhead of the employer's duty of care, it was difficult to see that intent on the part of the bully was an essential feature of the claim: the employer owed a duty of care to the employee to protect him or her from conduct or matters causing distress amounting to a recognisable psychiatric injury.

5. To establish corporate liability for bullying, the conduct had to be intentional and calculated to cause distress.

Obiter dictum, *per* Charleton J.: There was no distinctive tort of bullying or harassment. The question was to be resolved in the context of employer's liability, by asking whether the employers took reasonable care not to expose the plaintiff to the risk of injury from such conduct.

Cases mentioned in this report:-

Attorney-General v. Gilbert [2002] 2 N.Z.L.R. 342.

Bowen v. Hall. (1881) 6 Q.B.D. 333.

Browne v. Minister for Justice [2012] IEHC 526, [2013] E.L.R. 57.

Croft v. Broadstairs and St Peter's Town Council [2003] EWCA Civ 676, (Unreported, Court of Appeal of England and Wales, 15 April 2003).

Cromane Seafoods Ltd. v. Minister for Agriculture [2016] IESC 6, [2017] 1 I.R. 119; [2016] 2 I.L.R.M. 81.

Donoghue v. Stevenson [1932] A.C. 562.

Dowson v. Chief Constable of Northumbria Police [2010] EWHC 2612, (Unreported, High Court of England and Wales, Simon J., 20 October 2010).

Earl v. H.D. Smith Wholesale Drug Co., (United States District Court for the Central District of Illinois, Springfield Division, 22 June 2009).

Eastwood v. Magnox Electric plc [2004] UKHL 35, [2005] 1 A.C. 503; [2004] 3 W.L.R. 322; [2004] 3 All E.R. 991.

Ferguson v. British Gas Trading Ltd. [2009] EWCA Civ 46, [2010] 1 W.L.R. 785; [2009] 3 All E.R. 304.

Fleming v. Ireland [2013] IESC 19, [2013] 2 I.R. 417; [2013] 2 I.L.R.M. 73.

Glynn v. Minister for Justice [2014] IEHC 133, [2014] E.L.R. 236.

Hatton v. Sutherland [2002] EWCA Civ 76, [2002] 2 All E.R. 1.

Hay v. O'Grady [1992] 1 I.R. 210; [1992] I.L.R.M. 689.

Kelly v. Bon Secours Health System Limited [2012] IEHC 21, (Unreported, High Court, Cross J., 26 January 2012).
Khorasandjian v. Bush [1993] Q.B. 727; [1993] 3 W.L.R. 476; [1993] 3 All E.R. 669; [1993] 2 F.C.R. 257; [1993] 2 F.L.R. 66; [1993] Fam. Law 679.
Koehler v. Cerebos (Aust) Ltd. [2005] HCA 15, (2005) 222 C.L.R. 44.
McGee v. Attorney General [1974] I.R. 284; (1973) 109 I.L.T.R. 29.
Meskell v. Córas Iompair Éireann [1973] I.R. 121.
Naidu v. Group 4 Securitas Pty Ltd. [2005] NSWSC 618, (Unreported, Supreme Court of New South Wales, 24 June 2005).
Norris v. The Attorney General [1984] I.R. 36.
Nyhan v. Commissioner of An Garda Síochána [2012] IEHC 329, (Unreported, High Court, Cross J., 26 July 2012).
O. v. Rhodes [2015] UKSC 32, [2016] A.C. 219; [2015] 2 W.L.R. 1373; [2015] 4 All E.R. 1.
Quigley v. Complex Tooling & Moulding Ltd. [2005] IEHC 71 & [2008] IESC 44, [2009] 1 I.R. 349.
Quinn's Supermarket v. Attorney General [1972] I.R. 1.
Rookes v. Barnard [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367.
Ruffley v. Board of Management of St. Anne's School [2014] IEHC 235, (Unreported, High Court, Ó Néill J., 9 May 2014).
Ruffley v. Board of Management of St. Anne's School [2015] IECA 287, (Unreported, Court of Appeal, 8 December 2015).
Rylands v. Fletcher (1868) L.R. 3 H.L. 330.
Sweeney v. Board of Management of Ballinteer Community School [2011] IEHC 131, (Unreported, High Court, Herbert J., 24 March 2011).
Vairy v. Wyong Shire Council [2005] HCA 62, (2005) 223 C.L.R. 422; (2005) 221 A.L.R. 711.
Wainwright v. Home Office [2003] UKHL 53, [2004] 2 A.C. 406; [2003] 3 W.L.R. 1137; [2003] 4 All E.R. 969.
Walsh v. Securicor (Ireland) Ltd. [1993] 2 I.R. 507.
In re a Ward of Court (withholding medical treatment) (No.2) [1996] 2 I.R. 79; [1995] 2 I.L.R.M. 401.
Wilkinson v. Downton [1897] 2 Q.B. 57.
Womack v. Eldridge 215 Va. 338 (1974); 210 S.E.2d 145 (1974).
Yapp v. Foreign and Commonwealth Office [2014] EWCA Civ 1512, [2015] I.R.L.R. 112.

Determinations of the Supreme Court mentioned in this report:-

Ruffley v. Board of Management of St. Anne's School [2016] IESCDET 52, (Unreported, Supreme Court, 27 April 2016).

Appeal from the Court of Appeal

The facts have been summarised in the headnote and are more fully set out in the judgment of O'Donnell J., *infra*.

On 28 April 2011, the plaintiff instituted proceedings seeking damages for bullying and harassment. On 9 May 2014, the High Court (Ó Néill J.) granted the relief sought (see [2014] IEHC 235).

The defendant appealed to the Supreme Court against the judgment and order of the High Court. By order made on 4 July 2014, the Supreme Court directed the defendant to pay a sum of €100,000 to the plaintiff pending the hearing of the appeal, as a condition of placing a stay on the remainder of the order of the High Court. The defendant's appeal was subsequently transferred to the Court of Appeal pursuant to the provisions of Article 64 of the Constitution.

The Court of Appeal (Ryan P. and Irvine J.; Finlay Geoghegan J. dissenting) allowed the appeal (see [2015] IECA 287).

By application for leave and notice of appeal dated 8 March 2016, the plaintiff sought leave to appeal the decision of the Court of Appeal to the Supreme Court. The Supreme Court (Denham C.J., Charleton and O'Malley JJ.) granted the plaintiff leave to appeal against the decision of the Court of Appeal on 27 April 2016 on two specified grounds (see [2016] IESCDET 52).

The appeal was heard by the Supreme Court (Denham C.J., O'Donnell, McKechnie, MacMenamin, Dunne, Charleton and O'Malley JJ.) on 15 and 16 December 2016.

Patrick Keane S.C. and *Marguerite Bolger S.C.* (with them *Cathal Ó Currain*) for the plaintiff.

Kieran Fleck S.C. and *Mark Gerard Connaughton S.C.* (with them *Adrianne Fields*) for the defendant.

Cur. adv. vult.

Denham C.J. 26 May 2017

[1] I have read the judgments about to be delivered by O'Donnell and Charleton JJ. and I agree with them.

O'Donnell J.

[2] This case has already been the subject of a detailed High Court judgment ([2014] IEHC 235, (Unreported, High Court, Ó Néill J., 9 May 2014)) and three considered judgments of the Court of Appeal (*Ruffley v. Board of Management of St. Anne's School* [2015] IECA 287, (Unreported, Court of Appeal, 8 December 2015)). Normally in such circumstances, it would not be necessary to repeat the facts in particular detail. However, this is an unusual case, and since there has been considerable disagreement as to how to characterise the facts in this case, it is necessary to give some account of the background to this complex case.

[3] By the time of the events in 2009 and 2010 which are the subject matter of these proceedings, the plaintiff, Úna Ruffley, had been employed as a special needs assistant ("SNA") in St. Anne's School at the Curragh, County Kildare for more than ten years, without notable incident. That school, although treated as a national school, catered exclusively for children with intellectual disabilities and indeed took children from the age of 4 up to 18 years of age. The school had been founded by KARE, an organisation of parents of children with physical and intellectual disabilities. St. Anne's was under the patronage of KARE, and the chief executive of that body, Mr. Christy Lynch, was also the chairman of the board of management of St. Anne's.

[4] St. Anne's is a small institution catering for between 70 and 75 children, and in 2009 employed 14 teachers and 26 SNAs. The school also had available to it external services such as occupational therapy. It was not in dispute that until the events here described, she had performed her work satisfactorily and enjoyed good relations with the teachers, other SNAs and the principal, Ms. Dempsey, who figures significantly in the account of this case.

[5] For about five years prior to September 2009, the school had a sensory room used to develop the sensory perception of pupils by exposing them to a variety of experiences such as music, vibration, movement, light and colour. The room had previously been used as a store room for computer equipment. It could be locked from the outside with a key, although the evidence was that was never used. It could also be closed from the inside by simply turning a lock to either open or close the door in

a fashion which it was said was similar to that in use on a standard toilet door. That lock gave rise to a dispute which has meant that the plaintiff has not worked in St. Anne's or anywhere else for more than six years now, and which has led, through an eleven day hearing in the High Court, and a two day appeal to the Court of Appeal, to this court.

The events

[6]

(i) *14 September 2009*

On this day the plaintiff was in the room working with a young pupil. Unusually, as he was normally an extremely active child who suffered from attention deficit hyperactivity disorder (ADHD), he fell fast asleep. The plaintiff went out and phoned the teacher Ms. Rachel Bramhall, to ask for instructions. She was told to leave the child asleep, and if he had not awoken within 20 minutes to bring him back to the class. The teacher, however, being concerned, contacted the headmistress in turn. Ms. Dempsey went to the room where she discovered that the door had been locked from the inside, and only gained entry on her third attempt. However, the issue of the door being locked was not raised then.

(ii) *15 September 2009*

The following day the plaintiff attended work and was asked by Ms. Dempsey to come to her office. Once there, Ms. Dempsey informed her that she was handling the incident as a disciplinary matter. The plaintiff initially thought that this was because the child had been asleep, but Ms. Dempsey explained it was because the door had been locked. It appears from Ms. Dempsey's note referred to in the judgment of the High Court that the plaintiff said at this point that she hoped the principal would deal with the other SNAs that did this. The principal's response was apparently that this was another issue for another day. The plaintiff was requested to return to the office at 2.30 p.m. and informed that someone could attend with her, if she wished.

(iii) *15 September 2009: 2.30 p.m.*

The plaintiff returned to the principal's office accompanied by Ms. Louise Webb, a fellow SNA. The principal had also arranged for Ms. Bramhall, the teacher involved, to be there also. The plaintiff accepted that she had locked the door and said it had been her practice to do so for a number of years both to prevent other pupils entering and disrupt-

ing the session and to prevent children, some of whom were very active, from running out of the room. Such children were often described as "runners" and as it happened the child involved here was known to be a "runner". The plaintiff also claimed that the door had been locked on other occasions including one in April 2009, when she alleged the principal had brought visitors to the room. Ms. Dempsey responded apparently that she had never been aware that the room had been locked and, if so, would have raised the issue. There was some further discussion of the care of the child in question. It is not suggested that any specific disciplinary action was discussed or suggested at this meeting.

(iv) *18 September 2009*
There was a further meeting between the plaintiff, the principal, and Ms. Bramhall. This meeting discussed the care to be given to the child, and it was agreed that over a four week period the plaintiff would complete a weekly form indicating the manner in which the therapy for the child had progressed.

Letter of 18 September 2009 (?)
It is important to note at the outset, that this letter is disputed. The principal gave evidence however that she had handed a letter to the plaintiff dated 18 September 2009. That letter recorded that as the plaintiff did not appear clear as to the protocol surrounding the use of the room "we are not going to take disciplinary action". The letter also recorded however that the plaintiff's care of the child in question would be reviewed over a three month period. It continued "if the required improvement is not made or if there is any such breach of discipline in any aspect of your work performance, this may result in disciplinary action". The plaintiff emphatically denied ever having received the letter and the trial judge accepted she had not been given that letter then or since.

(v) *Four weeks later (October 2009)*
In the review, Ms. Bramhall observed that the plaintiff had ticked a box on the forms indicating that she had succeeded in getting the child to lie on the swing, which was an item of equipment in the room, and one recognised measurement of progress. This was queried by Ms. Bramhall, and the plaintiff immediately confirmed that she was wrong

and asked to correct the form. The teacher refused to do so and recorded this matter on the form as a "miscommunication".

(vi) *19 October 2009*
A further meeting took place between the plaintiff and the principal Ms. Dempsey. The plaintiff contended that the events of this meeting took place on 12 November 2009, but the trial judge considered that she was wrong in this regard at least. At the meeting, the principal challenged the plaintiff in relation to the completion of the form, in part erroneously because she thought the child was not supposed to use the swing. She considered that the incorrect completion of the form amounted to falsification and a further disciplinary issue which justified her in bringing the matter to the board. The trial judge found that the plaintiff made it clear at this meeting that she considered she was being treated unfairly. The trial judge considered that the form and the plaintiff's error in that regard had been used by the principal "as a trap for the plaintiff" (para. 35).

(vii) *12 November 2009*
There was a further meeting between the plaintiff and the principal as a result of which the plaintiff was moved to another teacher's classroom. According to the principal, this was necessitated because Ms. Bramhall with whom the plaintiff had been working was leaving the school. It was not suggested that there was anything sinister in this move, and the new teacher confirmed that the plaintiff had worked satisfactorily in the classroom thereafter.

(viii) *23 November 2009: board meeting*
The principal considered that she should bring the matter of the plaintiff's performance to the attention of the board meeting which was held on this date. She spoke to the chairman, Mr. Lynch, in advance, who readily agreed to the matter being raised as he considered that the locking of the door was wholly unacceptable because of the child protection implications involved. The plaintiff was told in advance of the meeting that the matter was going to be raised, but not given any further details. In the discussions with the board, the plaintiff was not identified. The minutes of the board meeting recorded that the principal outlined "issues" she had with an individual SNA. She wanted the support of the board to issue a verbal or written warning and the board agreed. Evidence was given in relation to this meeting by both the

principal Ms. Dempsey, and the chairman Mr Lynch. It appears that the other four members of the board, who it was suggested were parents of children attending the school, wanted the plaintiff to be instantly dismissed and it took some persuasion from Ms. Dempsey and the chairman to dissuade them.

The para. 48 findings

At para. 48 of his judgment, the trial judge made important findings about this meeting:-

> "The evidence of Ms. Dempsey was that she outlined the full history of the matter to the board. The extreme, if not, downright intemperate, reaction of the board to whatever they were told, suggests that as a matter of probability, the account given by Ms. Dempsey to the board of the history of the matter was almost certainly untrue, highly biased, coloured, and grossly and unfairly damnified the plaintiff. Whilst I would readily accept that the members of the board would be hyper-vigilant on all issues relating to child protection, and rightly so, as a group of probably fair-minded people, I do not think they would have reached conclusions so adverse to the plaintiff, unless grossly misled as to the true circumstances prevailing."

There is no doubt that the plaintiff was not informed of the detail of what was said, was not invited to the meeting, or allowed to be represented or given any opportunity of having her views conveyed to the board. The trial judge concluded at para. 50:-

> "To say that the conduct of Ms. Dempsey in relation to the lead up to this board meeting and what happened at it was a departure from all the norms of natural justice is a feeble understatement."

(ix) *21 December 2009*

Nothing, however, was said to the plaintiff in the immediate aftermath of the meeting. It appears that the principal was to obtain advice and liaise with human resources in KARE. On 21 December 2009, just before the Christmas holidays, she informed the plaintiff that she was to get a final stage part four warning and would be given a formal notification in the new year. When asked how long the warning would remain in place, Ms. Dempsey told the plaintiff that it would be on her file for six months.

(x) *18 January 2010*
Whilst on yard duty, the plaintiff was asked to come to a meeting in the principal's office with the principal and Mr. Lynch. The plaintiff was accompanied by a fellow SNA. She was told by Mr. Lynch that she would receive a final stage part four warning which would be on her record for eighteen months. This period was specified because it appeared that this was provided for in the disciplinary policy and the reference to six months given before Christmas was a mistake. The trial judge found that the plaintiff indicated dissatisfaction and said she had been in touch with her union, IMPACT, and she wanted to appeal the decision.

(xi) *20 January 2010*
The plaintiff called to the principal's office and was handed a copy of the letter from the board of management signed by Mr. Lynch. While the letter informed the plaintiff of the sanction, and the period of 18 months during which it would remain on her file, it contained the following statement:-

> "This warning is being issued as a result of the investigation which was carried out at the request of the board of management into an incident that occurred on 14 September 2009, whereby you locked yourself and a child into the sensory room."

The trial judge pointed out in his judgment that no investigation had been held into the matter whether at the request of the board or otherwise.

(xii) *27 January 2010*
The plaintiff was asked to come to a meeting with Ms. Dempsey which it was said was to get "closure" on the matter. There was a total conflict of evidence as to what transpired. The trial judge, at para. 65, accepted the plaintiff's evidence that she was subjected to a variety of denigration which "belittled, humiliated and reduced her to tears" (see para. 64).

(xiii) *29 January 2010*
The plaintiff's union representative, Mr. Phillip Mullen of IMPACT, wrote to Mr. Lynch referring to the final warning issued and stating that they wished to appeal on the following grounds:-

"(1) Process: we believe that the process applied to the investigation did not accord [the plaintiff] the right to adequately defend herself.
(2) The procedures in place in St. Anne's had not made it clear that locking the safety room was a health and safety breach. That is not to say it was acceptable, but rather, that the practice was known and had not been objected to previously.
(3) Sanction: We believe that given the circumstances a final written warning is too severe a sanction in this case.
I would very much welcome an opportunity to elaborate on these points at your convenience and would appreciate if you would let me have copies of the relevant documentation (disciplinary procedure, original complaint, minutes of meetings, *etc*.).
I would also appreciate if you could confirm if any other disciplinary matters relating to [the plaintiff] are outstanding.
I look forward to your early response."

(xiv) *23 March 2010*
A meeting was arranged between Mr. Lynch, Ms. Dempsey, the plaintiff and Mr. Mullen. As a result of the meeting Mr. Lynch asked the principal to ascertain whether or not there was a practice of locking the door. Ms. Dempsey said she had asked approximately 70% of SNAs, none of whom admitted to locking the door. Immediately after this meeting the plaintiff devised a rudimentary questionnaire which she distributed to her colleagues. It only contained two questions: "Have you ever locked the sensory room door?" and "Have you ever been asked by Pauline Dempsey 'have you ever locked the sensory room door?'". Four colleagues answered, all of whom answered the first question "yes". One of the colleagues answered the second question "no".

(xv) *22 April 2010*
Mr. Mullen wrote to Mr. Lynch attaching a copy of the questionnaire and asking that it be taken into account and asking to be informed of the board's decision.

(xvi) *26 April 2010*
There was a board meeting which discussed the letter.

(xvii) *20 May 2010*
Mr. Lynch wrote to Mr. Mullen responding that the board stood over its original decision.

(xviii) *8 June 2010*
There was a further board meeting which referred to the correspondence and appears to have endorsed the decision to stand over the original sanction. The trial judge was satisfied that the board did not give any meaningful consideration to the contention that there was a common practice of locking the room.

(xix) *27 May 2010 or 22 June 2010*
A letter was sent to the school by the plaintiff's solicitors. There is confusion as to the date on the letter, but none as to the contents. The letter required the board to acknowledge that it had received confirmation from other staff that it was "common practice that the sensory room was locked" and demanded an apology to the plaintiff. It appears that it was contended in this letter that the plaintiff had been bullied and harassed.

(xx) *24 September 2010*
The board sent a lengthy reply to the plaintiff's solicitors. On the question of any practice of locking the door, it said:-

> "Whilst it may very well may be that from time to time it would appear that certain members of staff have, on very rare occasions, seen fit to lock the door of the sensory room at St. Anne's School, this is not the policy of the school and it is strongly advised that members of staff not do this, for reasons, as we are sure you will understand, that include the safety and wellbeing, not only of the children, but also of the staff member concerned."

The letter concluded:-

> "You are correct in saying that IMPACT represented your client at various points in the course of correspondence about this matter. It was indicated to your client at that time that so long as everything ran smoothly, there should be no reason to revisit these matters. The fact that they are now being revisited is a matter entirely for your client who failed to see what, if anything is to be gained at this stage in continuing with this correspondence."

The trial judge considered, at para. 78, that this paragraph of the letter was a "further rebuff" by the defendant of the plaintiff's primary asser-

tion namely that the locking of the sensory door was a common practice among SNAs; a practice which the earlier paragraph appeared to implicitly, if not expressly, acknowledge to have existed.

(xxi) *24 September 2010*
The principal appears to have informed staff on this occasion that the door of the sensory room should not be locked. Thereafter there was further correspondence between the solicitors and the school. The trial judge concluded that the plaintiff had done her utmost to pursue her grievance through the internal procedure of the defendant.

[7] The matters set out above appear to be the matters upon which the trial judge made his findings of liability. However, he also recorded a further event of 27 September 2010, when a further incident occurred within the school. The plaintiff contended that she had arrived on time but had moved her car because there was car park line painting going on. When she went back into the school, she was reprimanded by the principal for being late. As the trial judge observed this would normally be a trivial incident and of little consequence, but for the plaintiff it was the last straw and she left work on that occasion and, regrettably has not returned to the school, or, it appears, worked anywhere else.

Observations on the facts

[8] I have set out the events in this case comprehensively because much of the difference of opinion in this case depends on the assessment of the cumulative impact of the individual events, many of them unremarkable in themselves. It is, I think, useful to analyse these matters in a little more detail. Although the entire process complained of occupied a year between September 2009 and September 2010, all the incidents of direct engagement with the plaintiff occurred between September 2009 and March 2010 (with the exception of the events just recorded which occurred in September 2010 leading to the plaintiff taking sick leave). Indeed, the meetings between the plaintiff, Ms. Dempsey, and others occurred between September and January 2010. Some of these meetings cannot reasonably be the subject of any complaint such as the meeting on 18 September 2009, agreeing that the plaintiff's care of the child would be monitored or the meeting of 12 November 2009, to rearrange the plaintiff's work with a new teacher. Other matters recorded such as the communication of an incorrect period of time for the duration of the warning do not appear significant. The trial judge's most trenchant criticisms were directed towards the

procedure. This analysis suggests that the plaintiff's essential complaint was what was done (*i.e.*, the procedures adopted or the lack of them) rather than the manner in which it was done (personal remarks, or offensive behaviour *etc.*). Indeed the object of most criticism is a meeting (23 November 2009) at which the plaintiff was not present and was not identified by name to the members of the board and whose identity was not known to anyone other than the principal and the chairman. What is alleged therefore is that the disciplinary process should not have been contemplated or continued once she raised the question of other SNAs locking the door, the treatment of the incorrect completion of the form as a serious matter justifying the reactivation of the disciplinary issues, the fact that she was not represented at the board meeting which decided to issue the warning to her, the excessive nature of that sanction, and the fact that the board considered an appeal against its own decision. The Court of Appeal was correct in my view therefore to identify the core issue as whether a claim for unfair procedures leading to an unfair result could itself amount to bullying.

Fair procedures

[9] One difficulty of this case however is that although it was framed with a heavy emphasis on fairness of procedures, (and indeed it was conceded that the procedures were flawed, even botched), the claim was not directed to a declaration of invalidity of a process or any sanction. There was therefore no close analysis of the precise manner in which a requirement for fair procedures was not adhered to. This was a small school. The core incident itself was not in dispute. The principal was the witness to the fact that the door was locked, and that was not disputed as a matter of fact. Nor indeed does it appear to be disputed that it was inappropriate and improper to lock the door. It is said, and I agree, that once the plaintiff maintained that this was a common practice among SNAs, that that question should have been addressed at least having regard to the sanction to be imposed, and on the judge's view, in order to consider whether the disciplinary process should be pursued at all. There is also no doubt that at a minimum, the plaintiff ought to have been able to have been able to put her side of the story to the board, and put forward any evidence in support of her position. I do not think that any elaborate hearing was required, but in any event none was provided. Perhaps one of the difficulties of this case is, paradoxically, if there had been a stark conflict of evidence, it might have been more apparent that a hearing was necessary.

However, no hearing of any sort was held. Furthermore, it was probably undesirable that Ms. Dempsey should take any part in the decision (even though it appears that she argued for a lesser sanction). Although her account was not being contested in relation to the question of whether the door was locked or not, and no allegation had yet been made against her, nevertheless she was a participant in the matter. For all these reasons, and perhaps more, the procedure was clearly defective and liable to be so declared by any court. For my part however, I do not see anything malicious in the way in which this was carried out, and more importantly there was no such finding by the judge. It is not unusual in small institutions which do not have extensive human resources expertise (and sometimes even in businesses with such expertise), that errors can be made, particularly in cases which appear obvious, and where the sanction does not involve suspension or dismissal.

[10] It is also said that the fact that the board considered the plaintiff's appeal was itself a further egregious breach of fair procedures. Certainly, if this was considered to be an appeal it would be plainly wrong that the same body would hear an appeal against itself. However, Mr. Mullen of IMPACT who made the "appeal" appears to have directed it to the board, and did not raise any issue as to the composition of the board hearing the matter. It is not suggested there is a provision for appeal in the disciplinary procedures which applied, nor is an appeal a necessary component of a fair procedure. In the nature of this school, there could be no prospect of an internal appeal to another body. However, if this process was simply considered to be a review, or a reconsideration of a decision, then it is not so obviously flawed as a procedure. I do not think that too much should be read into the use of the word "appeal" by Mr. Mullen, unless it was specifically contended that this disciplinary code required such an appeal and was being invoked. If the board had reconsidered the entire matter and removed the sanction, I do not think it would be said that the procedure was itself flawed simply because the board had reconsidered the issue, even under the rubric of "appeal".

[11] In my view, the reconsideration by the board of this matter did not cure the defects of the original board meeting decision of 23 November 2009, but in my view at least, it did not itself constitute a separate heading of unfair procedures. Overall, what occurred here, in my view at least, is an unfortunately not unusual instance of a flawed procedure. Many similar examples are regularly encountered in courts. Many defective and flawed procedures are carried out and where appropriate the courts will declare them invalid or quash them pursuant to judicial review. Here however the

plaintiff claims that these matters have had a serious impact on her mental health and seeks to recover substantial damages as a result.

[12] The plaintiff had experienced two earlier incidents of depression, one post-partum, and one in reaction to bereavements. During the period of the events set out above, she suffered from headaches, insomnia, diarrhoea and anxiety which her G.P. put down to bullying-related stress. Evidence was given by a psychiatrist, Dr. Byrne, that her past periods of depression meant that she was predisposed to further depressive illness. The trial judge was satisfied that she suffered from an anxiety and depressive disorder resulting in a high state of anxiety, loss of confidence and inability to cope with life. On review in 2014, she was found to be suffering from a severe anxiety state and severe depression although the judge thought it probable that at this stage the impending litigation was worsening her symptoms. He also concluded, at para. 94, that it was probable that "when this litigation is concluded, there is likely to be significant improvement in her anxiety and depressive state."

[13] The trial judge concluded that the matters set out above constituted bullying. He accepted the definition of bullying found in the Industrial Relations Act 1990 (Code of Practice Detailing Procedures For Addressing Bullying in The Workplace) (Declaration) Order 2002 (S.I. No. 17) as follows:-

> "Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying."

This has been accepted as an appropriate working definition for the purposes of the claim.

[14] At para. 63, the trial judge concluded that the treatment throughout the process of the plaintiff by the principal was entirely "inappropriate" within the meaning of the definition. At para. 88, he concluded:-

> "Thus, in my opinion, the plaintiff has demonstrated to my satisfaction that the inappropriate behaviour of the defendants was not merely an isolated incident but was persistent over a period of in excess of one year. There can be no doubt but that this persistent, inappropriate behaviour of the defendants wholly undermined the plaintiff's dignity at work."

Accordingly he concluded at paras. 95 to 97 that she was entitled to damages calculated as follows:-

Psychiatric injury to date	€75,000.00
Future psychiatric injury	€40,000.00
Loss of earnings up to 6 March 2014	€93,276.39
Future loss of earnings	€47,000.00
Total:	€255,276.39

Proceedings on appeal

Court of Appeal

[15] The Court of Appeal by a majority (Ryan P. and Irvine J.; Finlay Geoghegan J. dissenting) allowed the defendant's appeal ([2015] IECA 287). It appears to have been accepted however that there was no evidence supporting the claim to future loss of earnings and that amount should be deducted leaving the award in issue at €208,276. Ryan P. reviewed the evidence carefully and in some detail. His conclusions on the matter were set out succinctly at pp. 26 to 28 of his judgment:-

"74. This was not a case of bullying because:-

(i) the motive was child protection in a school devoted exclusively to children with special needs;

(ii) it was accepted all round that it was legitimate in the interests of child protection to ensure that the sensory room door was not locked – see the comments of the trial judge and of Mr. Mullen, the trade union official;

(iii) the chairman, Mr. Lynch, thought that the plaintiff, as an experienced special needs assistant, should have known not to lock the door; this view does not have to be held to be correct and it was not disputed that it was honestly held;

(iv) the defence that others also locked the door was mitigation but not a full answer to the complaint;

(v) the individual encounters may reasonably be viewed in a different light e.g. the report by Ms. Bramhall on the plaintiff's completion, inaccurately, of the Form 6, which undermines the conclusion that the process constituted bullying;

(vi) this was a disciplinary process, perhaps arising from a misunderstanding, but honestly pursued in the interests of the children;

(vii) there was nothing in the process of investigation that constituted a sustained campaign maliciously pursued in order to intimidate or humiliate or denigrate the plaintiff;

(viii) the person who would have been most alert to bullying was Mr. Mullen, the plaintiff's trade union representative, who did not suggest that this was such a case;

(ix) at worst this was a botched disciplinary process and not a case of repeated offensive behaviour intended to destroy the plaintiff's dignity at work;

(x) the definition of bullying has to be stretched beyond breaking point to fit this case;

(xi) if the trial judge's conclusions are permitted to stand, this judgment will widen the tort of bullying to all kinds of situations that it was never intended to cover;

(xii) the definition is carefully drafted so as to convey the particular nature of the activity that is the subject of the wrong and which is required to be addressed by the employer. It is important that the courts should respect the precision of the definition and its limitations and confine it to the proper circumstances in which it applies. This is not such a case."

[16] For her part, Irvine J., having conducted a careful review of the evidence and the law, agreed with the conclusions of Ryan P. She focused on the requirement that the conduct be repeated, inappropriate and undermine dignity. She considered in particular that to constitute repetition, the events relied on had to be reasonably proximate to each other otherwise there might be no more than individualised stated events. She gave the example where three events occurring within a month of each other might amount to bullying, whereas the same three events occurring over a three year period would not. She did not consider, at para. 46, p. 17, that the conduct of a body acting outside its jurisdiction should be considered to be "inappropriate" in the sense intended by the definition of bullying. She accepted however that a right to dignity at work entitled a person to be treated with reasonable fairness. She also considered that while in most cases of bullying there would be a public element to the undermining of the dignity of the individual, it was not essential that the conduct occur in public. Irvine J. concluded however that the matters alleged here did not amount to bullying. She was critical of the inferences drawn by the trial judge. Two in particular are illustrative. First, she addressed the conclusion that it could be inferred from what the High Court concluded at para. 48 of that judgment was the "downright intemperate" sanction imposed that the

board at its meeting of 23 November 2009, had been given an "almost certainly untrue, highly biased, coloured" account by Ms. Dempsey of the plaintiff's conduct which "grossly and unfairly damnified the plaintiff". Of this Irvine J. said at pp. 31 and 32:-

> "74. Once again, I regret to say I am not satisfied that this inference can objectively be sustained by reference to the evidence. First, there was Mr. Lynch's unchallenged evidence that Ms. Dempsey favoured the imposition of a grade 2 or grade 3 warning and was against a more severe sanction. Secondly, even when it could be stated with absolute certainty that the board was fully aware of the plaintiff's case, namely that other SNAs locked the door and that she had not been instructed not to do this, it was unwilling to withdraw the sanction which it had considered appropriate to impose. Thirdly, it was never suggested to Mr. Lynch, the chairman of the board, in the course of cross-examination, that Ms. Dempsey had presented the case to the board in the manner so found by the trial judge."

[17] Irvine J. was also not prepared to accept the inference that no proper consideration was given to the facts of the plaintiff's case before the board rejected her appeal. At pp. 36 and 37 of her judgment she said:-

> "82. As to the inference drawn by the trial judge that no proper consideration was given to the facts of the plaintiff's case before the board rejected her appeal, I have to say that this is an inference about which I have grave reservations particularly in circumstances where Mr. Lynch, the chairman of the board, was never challenged on the matter.
>
> 83. Leaving that fact aside, I ask myself what could be the matters to which the trial judge considered the board did not give consideration? It had received in writing the case made by IMPACT in its letter of 29 January 2010. That letter referred to the fact that [the plaintiff] was making the case that it had not been made clear to her that it was a health and safety breach to lock the sensory room door and that the practice had not previously been objected to. The board also had the second letter from IMPACT enclosing the result of [the plaintiff's] questionnaire of 22 April 2010, to demonstrate that other SNAs had also engaged in the same practice. It also had the details of the submissions made by Mr. Mullen on [the plaintiff's] behalf at the meeting set up following the receipt of the appeal.
>
> 84. It seems to me that the trial judge's inference that the plaintiff's case was not properly considered can only be ascribed to his sub-

jective view that such was the strength of the plaintiff's case that the board would have reversed its decision if it had properly applied its mind to the full facts.

[18] The conclusion to which Irvine J. came was set out at p. 41 of her judgment:-

"94. All of these factors afforded the plaintiff substantial grounds upon which she might have instituted plenary proceedings seeking a declaration as to the invalidity of both the original decision of the board and the decision which it made on the appeal. For whatever reason, she chose to eschew such an approach in favour of an action for damages for breach of duty on the part of her employer in respect of bullying in the workplace.

95. However, the fact that the board may have conducted the investigative and disciplinary process in the hopelessly flawed manner last described does not bring its conduct anywhere close to meeting the definition of bullying as set out in *Quigley v. Complex Tooling & Moulding Ltd.* [2005] IEHC 71 & [2008] IESC 44, [2009] 1 I.R. 349. On the facts of this particular case, objectively ascertained, the defendant could not be considered guilty of the type of repetitive inappropriate conduct which undermined the plaintiff's right to dignity in the workplace for a period of over a year as was found by the trial judge."

[19] Finlay Geoghegan J. dissented. Her judgment is particularly relied on by the plaintiff in this appeal. She observed at para. 8, p. 3, that while the claim was often referred to colloquially as a claim for bullying, it had been said that there was no separate tort of bullying or harassment (see: *Kelly v. Bon Secours Heath System Limited* [2012] IEHC 21, (Unreported, High Court, Cross J., 26 January 2012) and *Nyhan v. Commissioner of An Garda Síochána* [2012] IEHC 329, (Unreported, High Court, Cross J., 26 July 2012)). The claim was a species of a claim for breach of the general duty owed by an employer to an employee. She considered at para. 8, p. 4, that the necessary "proofs on the part of a plaintiff may differ" depending on whether the alleged perpetrator was a fellow employee or whether the conduct alleged to constitute bullying was carried out by the employer or management. She cited with approval an extract from a leading work, McMahon & Binchy, *Law of Torts* (4th ed., Bloomsbury Professional, 2013), at para. 18.80:-

> "There is no distinctive tort of bullying or harassment: the question is to be resolved, in the context of employers' liability, by asking whether the employers took reasonable care not to expose the plaintiff

> to the risk of injury from such conduct. The answer will depend in large part on what facts ought to have been known to the employer. Naturally, matters are different where the plaintiff's claim is that he or she is the victim of 'corporate bullying', where the allegation is that the management of the enterprise is implicated in the bullying activity. Such claims have succeeded in some recent cases, and failed in others."

[20] In a careful judgment, Finlay Geoghegan J. addressed this definition. She concluded at para. 20, p. 9, that "repeated" behaviour was to be contrasted with the "isolated incident" or the "once-off" incident also referred to in the code of practice. While the consideration of what behaviour would constitute "repeated" for the purposes of the test "must depend on an assessment of all the facts", a disciplinary process which continued over a number of months with several interactions between the plaintiff, the principal, and the chairman, could not "be considered to be either an isolated incident or a once-off incident".

[21] Finlay Geoghegan J. also considered at para. 18, p. 8, that it was also difficult and probably dangerous to try and define at a level of principle what would be the threshold for "inappropriate" behaviour. In a workplace context that had to depend on the relationship and relative positions of the individual and the "full factual context". She was satisfied however that the behaviour here was indeed inappropriate.

[22] Finally, Finlay Geoghegan J. addressed the question of conduct undermining the right to dignity at work. At pp. 10 and 11, she found that satisfied by the breach of fair procedures in this case:-

> "22. Whereas on the facts of this case the court is considering the right of the plaintiff as [an] employee to dignity at work in a context of her treatment by the principal of the school and the board of management in relation to a disciplinary process, such right to dignity must include, it appears to me, a right to be treated with respect, fairly and not less favourably than other colleagues in a similar position. It must include a right not to be singled out for disciplinary treatment in relation to a practice which whilst not acceptable was engaged in by other similar colleagues. It is obvious that an employee must expect, in a situation where it is contended that her performance has been less than what is expected or required that she may be subjected to a disciplinary process. However, it appears to me that her right to dignity at work includes a right to be treated with respect and fairly in the above sense and not singled out unfairly from colleagues in a similar position in such [a] disciplinary process."

[23] At para. 43, p. 18, of her judgment, Finlay Geoghegan J. made it clear that she was not relying on the inferences drawn by the trial judge at para. 48 of the High Court judgment, which had been challenged by the defendant. However, she considered that the remaining evidence justified a finding of bullying, and accordingly upheld the award of damages subject only to the deduction of the award in future loss of earnings.

Supreme Court

[24] In its determination *Ruffley v. Board of Management of St. Anne's School* [2016] IESCDET 52, the Supreme Court granted the plaintiff leave to appeal on two questions:-

1) whether an unfairly carried out disciplinary process resulting in psychiatric injury is, in itself, capable of being actionable in damages on the basis that it amounts to workplace bullying without evidence of malicious intent on the part of the employer; and
2) whether behaviour not witnessed by other persons in the workplace is capable of undermining the dignity of an employee.

During the hearing of the appeal, it became apparent that to address only these issues might not result in a complete resolution of the case, since even if both questions were answered positively that would not necessarily lead to the overturning of the decision of the Court of Appeal. Accordingly the court invited the parties to address the question more comprehensively and to consider if the finding of bullying by the High Court was sustainable, because if that were the case, it would follow that the decision of the Court of Appeal should be reversed. However, this meant that the court did not perhaps have the range of materials and depth of submissions as might have been provided if the broader issue had been addressed from the outset, and so my conclusions as to the law must be subject to some qualification and the possibility of refinement in future cases.

[25] It should be noted that prior to the granting of leave in this case, there had already been some brief discussion in this court about what constitutes bullying in the workplace in *Quigley v. Complex Tooling & Moulding Ltd.* [2005] IEHC 71 & [2008] IESC 44, [2009] 1 I.R. 349. In that case the plaintiff had worked in a business for 21 years and had become the fourth most senior employee. The business changed hands on a number of occasions before being acquired by the defendant, and later closed down. Evidence was given by the plaintiff and others of the "terrible domineering demeanour" of the new plant manager towards the plaintiff (para. 24, p. 356). A shop steward described the "animosity" of the plant

manager towards the plaintiff (para. 24, p. 356). Other evidence was given of humiliating behaviour by the plant manager and the new managing director when discussing a voluntary redundancy package, and of humiliating and demeaning references to the plaintiff being made to other employees about the plaintiff. The manager often stood on a box only eight feet behind the plaintiff's work station "with the effect of intimidating the plaintiff" (para. 13, p. 354). Other remarks were made suggesting the plaintiff was not capable of performing even basic functions, and needed "some broom training" (para. 13, p. 355). Neither the plant manager nor the former managing director were called in evidence so the detailed evidence of victimisation was not challenged.

At p. 371, Fennelly J. accepted counsel for the defendant's submission that:-

> "[14] … bullying must be:-
> - repeated;
> - inappropriate;
> - undermining of the dignity of the employee at work."

Fennelly J. elaborated further on the issue of bullying in the context of causation, observing at p. 372 that:-

> "[19] 17. The plaintiff cannot succeed in his claim unless he also proves that he suffered damage amounting to personal injury as a result of his employer's breach of duty. Where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury."

[26] The trial judge in this case referred to the above *dicta* of Fennelly J. in *Quigley v. Complex Tooling & Moulding Ltd.* [2005] IEHC 71 & [2008] IESC 44, [2009] 1 I.R. 349. Although Fennelly J. recognised the "comparative novelty of the cause of action" in *Quigley v. Complex Tooling & Moulding Ltd.* [2005] IEHC 71 & [2008] IESC 44, he observed at para. 5, pp. 368 and 369, that the court "[had] not been asked to decide any principles of law" because "[t]he parties were *ad idem* as to the nature of the wrong of harassment or bullying and the standard which should be applied". In any event, the appeal was allowed on a question of causation. It is the case that Fennelly J. stated that the conduct there amply met the criteria of being repeated, inappropriate and undermining of the dignity of the plaintiff at work. It will be useful to compare the facts of *Quigley v. Complex Tooling & Moulding Ltd.* to the current proceedings, but it remains the case that this case presents the first opportunity for the Supreme Court to give extended consideration to the law of bullying in the workplace.

Discussion

[27] This case raises a number of issues. First, as counsel for the plaintiff observed at the outset of the appeal, the case may appear to be a storm in a teacup. The core issue, whether a door should have been locked, or perhaps more precisely what the school (principal, chairperson, and board) should have done once it became aware of the fact and that the plaintiff was contending that this was a common practice, seems a relatively minor and routine matter that ought to have been capable of being addressed in a small school where personal relationships were important and where the plaintiff had worked for ten years. Hindsight is easy, but it is difficult to think that it would not have been better for all sides if this had been sorted out with more sensitivity and goodwill at any of the number of points on which it may have been possible to resolve it without litigation, and perhaps most obviously when the plaintiff's union became involved. That would have avoided the stress and considerable expense of a High Court action extending over 11 days trawling through the minutiae of personal relationships.

[28] I think it is clear that the case is not one that fits squarely into the core understanding of bullying at work. Although questions of unfair dismissal and bullying can overlap (such as in *Quigley v. Complex Tooling & Moulding Ltd.* [2005] IEHC 71 & [2008] IESC 44, [2009] 1 I.R. 349 and *Eastwood v. Magnox Electric plc* [2004] UKHL 35, [2005] 1 A.C. 503, referred to therein), I am not aware of any case which presents the issue raised in this case of unfair procedures being alleged, without more, to constitute bullying or where a bullying claim relied on similar matters. Although there is an oblique reference at para. 61 of the High Court judgment that the behaviour of the principal was hard to understand without an element of bad faith, it is not alleged or found that there was any individual personal animosity traceable to any incident or event. The behaviour was considered to be "strange", "odd" and "difficult to understand" but not malicious. Indeed the board was unaware of the identity of the plaintiff when it made the initial decision, so there can be no inference of personal animus on the part of the other board members. Yet they were the members pressing for the most severe sanction. With the exception of the incident on 27 January 2010, when the plaintiff was reduced to tears, and to which the High Court judge does not appear to have attributed critical significance, there is no suggestion of personally offensive behaviour. It is not suggested that there was ridicule, personal antagonism, or exclusion from a group. Nor was there shouting in public, or the making of

disparaging remarks in public or private about work, appearance, gender or sexuality, status or racial origin. There is no allegation of intimidation or the circulation of damaging gossip, or the use of aggressive and obscene language or repeated requests to do tasks which were either menial or impossible to perform in the time required. Here the complaint relates to unfair procedures in a disciplinary process including what was alleged to be the unfair singling out of the plaintiff for punishment for conduct which others had admitted to, and which the trial judge considered a common practice and perhaps in any event, not unduly serious. This is not to say that such matters cannot constitute bullying, but rather that it compounds the difficulty of this case, that it involves conduct which on any view is at the margins of conduct alleged to be bullying.

[29] It is apparent that the plaintiff is a sensitive person. There is no suggestion however that the employer here was aware of the earlier episodes of depression, or that the case should be approached in that light, *i.e.*, that the school should have known that the plaintiff had a predisposition to such matters. It is also disturbing that the remedy (in this case protracted litigation), if not worse, then certainly resembles the wrong in its impact on the individual concerned. It is apparent that by the time the case came on in the High Court, the plaintiff's experience of stress, anxiety and depression were bound up with the stress necessarily involved in court proceedings so that the judge considered that the symptoms recounted on examination were attributable to the litigation as much as the original complaints about the school. Furthermore, the trial judge was confident that once the case was resolved, it would be possible for her to return to work within six months even though she had at that point been absent for almost four years. It may be said that this is an unavoidable consequence of any claim that goes to court, but it is certainly the case that court proceedings, with all the pressures involved, are a less than ideal method of dealing with complaints of workplace stress. It should also be recognised that such cases impose their own stresses on other people involved because necessarily their own characters and reputation will come under scrutiny in a more personal way than in an ordinary personal injuries claim.

[30] A further feature which is not unconnected to the stresses involved are the considerable costs involved of a hearing of this nature which has now extended over 14 days in 3 courts. If the High Court judgment is upheld then the award of damages and costs and the defendant's own costs, will on any view be very substantial indeed. On the other hand, if the Court of Appeal decision is upheld, and if it followed that costs were awarded against the plaintiff, then that could easily be ruinous for her. Even if only

required to bear her own costs, and her lawyers, as lawyers acting for individuals in unsuccessful cases often do, were willing to reduce their fees, the financial impact would still be very substantial indeed.

[31] In my view, these features of the case mean that this case, difficult in itself as a factual controversy, must be looked at more broadly. At some level this novel case will set a benchmark for all bullying claims. The purpose of the law of tort, and in particular the identification of new claims or areas of liability, is not merely to adjust matters fairly between the individual parties (difficult though as that may be in a particular case) but by doing so to enable other cases to be settled without proceeding to a hearing, and many more to be avoided entirely. As Dean Guido Calabresi memorably observed, if a person is held liable for the damage and loss they caused to others, this person will eventually refrain from carrying out the harmful activity: Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70 Yale L.J. 499. One justification therefore for the law of torts and the stresses and costs it entails is that it provides a potent incentive to alter general behaviour. It is necessary therefore to have regard to the impact, well beyond this case, of any finding or rejection of liability.

[32] Normally in such circumstances it will become particularly important to pay close attention to the facts of the case. However, this case illustrates two truths which may not be immediately apparent to the law student encountering the common law through the medium of reported decisions. First, cases do not come pre-packaged under the headings in the text books. It is not simply a case of concluding which side has acted well, and who has been injured and who should pay. It is an important issue to consider how the case should be analysed as a matter of law. Here for example, as Irvine J. observed, there is little doubt that the disciplinary process engaged in by the school here was flawed, and that a court if asked to do so would have declared the disciplinary sanction invalid. It is not necessary to speculate on the range or type of proceedings or the extent of remedies involved. However, it does not follow from the fact that the plaintiff was wronged by the defendant in some sense, that therefore the plaintiff should recover in excess of €200,000 damages. That is so, even if it is accepted that the plaintiff's depression, anxiety and stress were caused in whole or in part by the treatment she received. To take just one obvious example, in the field of administrative law where judicial review on the grounds of fair procedures is commonplace, invalid administrative action does not given rise itself to a claim for damages.

[33] It is also important to keep in mind the role of fair procedures in this case. They clearly loom large in the High Court judge's assessment of

the case, and were relied on to a significant extent in the dissenting judgment of Finlay Geoghegan J. in the Court of Appeal. However, it is not necessary to establish a breach of fair procedures to succeed in a bullying claim, and conversely, the presence of unfair procedures does not establish bullying. Bullying often involves a question as to how something was done rather than what was done. In theory it is possible that a disciplinary process conducted in accordance with the rules of fair procedures might still constitute bullying, even irrespective of the outcome of the process. An ostensibly fair process and punishment for an established breach may constitute bullying if it is established it was instituted maliciously, and as part of a campaign to victimise an individual. It is important therefore not to blur the distinction between these two different claims by assuming that there is any logical connection between a breach of procedures and a claim of bullying entitling a party to substantial damages.

[34] Furthermore, when appellate courts refer to the facts, and when the facts of a case, if reported, are presented in a compressed format in a headnote, it is easy to think that these are fixed and immutable points. On this approach, fact-finding may be difficult, but once found, facts are hard-edged and clear. But this case illustrates something the fact-sceptic branch of legal realism identified some time ago: facts are more malleable and the lines between fact, inference, supposition and speculation are more blurred than the confident finding of facts and pinning down of conclusions in a judgment might suggest. It seems clear that the two judges who would have upheld the plaintiff's claim in this case viewed, and more importantly, characterised, the events in this case quite differently from the two judges in the Court of Appeal who rejected the plaintiff's claim. One side sees the plaintiff as unfairly subjected to a disciplinary process which itself was unfair. The sanction produced was so severe and a refusal to reduce it so incomprehensible that the whole process can only be explicable as bullying. On the other hand, the majority of the Court of Appeal viewed the evidence as portraying a bungled, perhaps seriously bungled, disciplinary process but carried out in relation to an incident the school was entitled to consider serious, and by people including the board, whose integrity there was no reason to impugn.

[35] This difference of approach makes it difficult to review the facts, and indeed to apply the traditional tools of appellate review. In this case, many of the findings of the trial judge are bound up in and difficult to distinguish from inferences he drew. It is very clear that the trial judge took a very strong view of the facts in favour of the plaintiff, and against the defendant.

[36] In fact little if anything turns on this appeal on the finding of contested primary facts in this case which is the area in which an appellate court will most readily defer to the trial court. It appears to me that there are perhaps only three areas in which there were contested issues of fact resolved by the trial judge: two in favour of the plaintiff, and one in favour of the defendant, but that none of these conclusions appear to have had a significant impact on the outcome of the case. The trial judge accepted the plaintiff's evidence that Ms. Dempsey had not handed to her a letter dated 18 September 2009 at the meeting on that date, or indeed at all. In another case this might be significant. However the terms of the letter are not themselves particularly important to the resolution of this case. Of course, if the trial judge had found that the letter had been deliberately fabricated after the event, to in some way cover or bolster the defendant's position, that might be significant, and indeed have an impact on the assessment of the credibility of witnesses, if that had been an issue. However, no such finding was made, and the case is not dependent on the credibility of witnesses. Instead it is largely dependent on the assessment of facts which themselves are not in contest. In fairness to all parties, I should also observe that there was a degree of confusion on both sides as to the exchange of correspondence and the sequence of events.

[37] The second issue is when the plaintiff and Ms. Dempsey met to consider the teacher's review of the plaintiff conducted by Ms. Bramhall and recorded on an SNA staff assessment form. The plaintiff described the events as occurring at a meeting on 12 November 2009, but the judge was satisfied that the meeting occurred on 19 October 2009. Again, in other circumstances this might be significant, but nothing appears to turn on it, at least for the purposes of the trial judge's conclusions. Finally, there was a total conflict of evidence between the plaintiff and Ms. Dempsey as to what occurred at a meeting on 27 January 2010. In that regard the trial judge accepted, at para. 64, the plaintiff's evidence that she was subjected to a "considerable variety of denigration which belittled, humiliated and reduced her to tears". It would certainly be helpful for the purposes of appellate review if in addition to the conclusion of denigration, belittling, and humiliation, the specific matters alleged to have been said were set out, but this is clearly a matter in respect of which the judge was entitled to make a finding as between the conflicting accounts. However, while denigration, belittling, humiliation and reducing a person to tears, even in a private meeting, is clearly potentially relevant to any claim of bullying, it does not appear to have loomed large in the trial judge's conclusion because before recounting his findings in respect of that meeting, the trial

judge had in the immediately preceding paragraph already concluded that the "treatment of the plaintiff throughout this process by Ms. Dempsey was entirely 'inappropriate' within the meaning of the definition of bullying in the workplace." Nevertheless, I accept that the finding at para. 64 in favour of the plaintiff in respect of the meeting of 27 January 2010 is something within the province of the trial judge: there was conflicting evidence and he accepted entirely one version. I also accept for the purposes of this judgment that such a finding of conduct, even occurring at a private meeting between only two individuals, is capable of constituting conduct which is inappropriate and capable of undermining the plaintiff's dignity at work, and therefore if repeated, capable of constituting bullying. To that extent this is a finding of primary fact, and therefore important, although not central, to the conclusion of the trial judge.

[38] I accept this finding with some reluctance however, because cogent criticisms have been directed towards the analysis of the facts in the High Court and in particular the finding at para. 48 of the judgment that at the meeting of 23 November 2009, Ms. Dempsey outlined the history of the matter to the board, which was "almost certainly untrue, highly biased, coloured, and grossly and unfairly damnified the plaintiff". As already noted, Finlay Geoghegan J., who otherwise upheld the conclusions of the High Court judge, did not rely on the finding at para. 48 because it was challenged by the defendant. It is necessary to explain in a little more detail why that is so, and why in my view Finlay Geoghegan J. was certainly correct, at a minimum, to avoid relying on that finding.

[39] This finding cannot really be characterised as an inference, but rather as speculation alleged to follow ineluctably from certain facts. The finding here is alleged to follow from the fact that a group of reasonable people could not possibly have come to the "downright intemperate" conclusion which they did, namely, if not a recommendation for the decision to dismiss the plaintiff then at least the issuance of a final stage part four warning, unless the account they had been given was almost certainly untrue, highly biased, coloured, and grossly and unfairly damnifying of the plaintiff. There are however a number of difficulties with this conclusion. First, the only evidence given of the events at the meeting of 23 November 2009 was that given by Ms. Dempsey and Mr. Lynch. Neither gave any evidence that would allow the judge to conclude that what Ms. Dempsey said to the board was untrue and highly biased. This is a conclusion derived entirely therefore from the judge's view of what he describes as the extreme reaction of the board. This conclusion is dubious as a matter of logic (there could be other reasons, whether good or bad, for

the board's reaction other than an unfair account by Ms. Dempsey, such as that, rightly or wrongly, they took a more serious view of the matter than the judge did) but, as the majority of the Court of Appeal pointed out, it is in any event difficult to square with other uncontested facts: first, that Ms. Dempsey and Mr. Lynch did not encourage the board in its conclusion, but sought a lesser sanction and sought to dissuade the board from recommending dismissal; second, that the plaintiff was not identified by name and there could be therefore no question of any personal animus at least on the part of the other members of the board; and finally, that when the board was apprised of the case being made on behalf of the plaintiff, namely that the sanction was too severe in and of itself, and in the circumstances where other SNAs had engaged in the practice, the board nevertheless reaffirmed its decision. But there is perhaps an even more fundamental objection, which must have particular weight in a case such as this, concerned at its heart with fair procedures: this assertion was not put to either Ms. Dempsey or Mr. Lynch in cross-examination on behalf of the plaintiff or indeed by the judge, even though the conclusion arrived at in the judgment, of an untruthful, biased, and grossly unfair account, is one necessarily damaging to Ms. Dempsey's reputation, and also and inescapably meant that Mr. Lynch's account of the meeting must have been, at a minimum, both partial and inaccurate in a very material respect.

[40] I cannot accept therefore the finding at para. 48 of the High Court judgment as a finding of fact. Furthermore, I consider that an erroneous conclusion arrived at by an experienced trial judge who had so clearly and obviously engaged carefully with the facts of this case, is its own warning against any over-simplification of the facts in this case. It is apparent however, that Finlay Geoghegan J. in the Court of Appeal was able to uphold the trial judge's finding without relying on the finding at para. 48. I have some reservations about this course because it is not clear to me that a court can apply the normal test of deference towards the findings and assessments of the trial judge if it has concluded that in some important and material respect findings have been made which cannot be supported. This must apply particularly in a case such as this which is dependent upon there being a number of incidents and a pattern of behaviour which can satisfy the legal requirement of repeated inappropriate behaviour undermining dignity at work. If one or more incidents relied on by the trial judge is properly rejected by an appellate court, can the overall conclusion of the trial court, that there had been repeated conduct sufficient to establish bullying, be one to which the appellate court must continue to defer? It is apparent that something similar occurred in relation to the inference drawn

by the trial judge at para. 75 that he was satisfied that the board did not give any meaningful consideration to the case being made by the plaintiff. As is pointed out by Irvine J., this was not put to Mr. Lynch in cross-examination either. I am not convinced therefore that it is appropriate to merely subtract these findings and then consider whether the balance of matters can justify a finding of liability when we do not and cannot know if the trial judge would himself or herself have so considered. However, given the importance of this case both to the individuals and more widely, I think it is desirable to proceed to consider the other issues in the appeal on the assumption that it is possible to excise para. 48, and consider if the remaining matters can support a finding of bullying.

[41] I regret to say that it appears to me also that despite the welter of evidence of the day-to-day interactions, and the communications and correspondence between the parties, there is nevertheless an absence of evidence on an issue which I consider to be important, if not central. An important component of the High Court finding of bullying was that the original incident – the locking of the sensory room door – was a relatively trivial matter which ought to have been resolved simply, and did not itself merit being brought to the board. In this regard the trial judge takes a contrary view to the principal, Ms. Dempsey, and the chairman, Mr. Lynch, who both considered it should be brought to the board's attention, and by definition, the other members of the board who treated the matter so seriously. This accordingly involves the trial judge substituting his judgment for that of the decision-makers. It is rare for courts to do this, when asked to review the decision of a decision-maker otherwise than by way of direct appeal. The guarantee of fair procedures is based on the theory that if fair procedures are followed, a fair result will ensue, but there is inevitably a range of decisions which a reasonable decision-maker may take even if a judge on the same material would not make the same decision. A court exercising judicial review is not a court of appeal on the merits. A similar test is applied when reviewing the fairness of dismissals from employment. If procedural fairness is to be a component of the tort claim, a similar approach should apply.

[42] Here it is very clear that the trial judge considered that the decision of the board was not only reached after an unfair and flawed procedure, but was a decision which was wrong in the sense that it was a decision that he himself would not have come to. It may be inferred that he would also have considered that it was a decision to which no reasonable board could properly have come. But that is a conclusion on an issue which, at a minimum, would have been greatly assisted by evidence from

experienced care professionals as to whether the practice of locking the door from the inside was a breach of proper procedures and perhaps critically, if it was, how serious a matter it was.

[43] The manner in which the High Court dealt with the first component of this issue is worthy of some note. Initially the judgment simply records the plaintiff's surprise at being reprimanded because it was said no instruction had been given either to lock or not lock the room. These and further references seem to suggest that the appropriateness of the conduct was a matter of some reasonable debate. However, at para. 42 the trial judge accepted, readily, that it was reasonable of the defendant both for health and safety reasons and more probably for reasons of child protection to insist on a prohibition of locking the door. Later, at para. 44, "with the benefit of due consideration and also hindsight", it was acknowledged that it could "easily be said that … the overriding necessity to observe child protection standards … meant, unequivocally, that … this door should never be locked". Later again however, it is stated at para. 58 that the locking of the door was something "the defendant was entitled to regard as unacceptable". Given the importance of this issue, it could have benefitted from independent evidence which might have established the seriousness or appropriateness of the conduct beyond dispute. There seems little doubt however, that the locking of the door in this way was not acceptable conduct. Indeed, that is precisely what the Mr. Mullen, the plaintiff's union representative, acknowledged when he argued merely that the punishment was too severe. If there is any doubt it is worth considering for a moment what analysis might have been offered in court if in an individual case a child had sought to leave the room and had become agitated and distressed or suffered an injury because of the fact that the door was locked. Again, it is worth considering what the position would be if it had been alleged that a child had been abused in some way while restrained in the room. It is easy in either case to imagine that the practice of locking of the door would have been the subject of very severe criticism, and the fact that it was not in accordance with KARE practice would have been emphasised, and the absence of a specific prohibition in a code of conduct treated as irrelevant.

[44] The judgment ultimately does seem to proceed on the basis that the practice was unacceptable, although in my view it would have been desirable that such a conclusion had the support of independent evidence. However there was no evidence whatsoever on what is perhaps a critical question at the heart of much of the division of opinion in this case: how serious a default was this as a matter of best practice? That question was central to this case because the trial judge found, at para. 62, that the

disciplinary process should not have taken place at all and, at para. 48, that the board's response in treating the issue as serious was "extreme, if not, downright intemperate". At a minimum, these conclusions would have been more soundly grounded if there had been evidence as to the seriousness with which such an incident should or could be viewed by a reasonable employer of SNAs caring for children with intellectual disabilities. On the other hand, if there was evidence in addition to that offered by Mr. Lynch, that the practice was regarded as a serious default which should have been known by any conscientious SNA, then the case could be viewed in a very different light.

[45] I accept that a specific component of the trial judge's conclusion that the process should not have taken place was his view that there was a common practice among SNAs of locking the door and that accordingly the plaintiff had been "singled out" for punishment unfairly. Again the evidence however is less than clear-cut. There were 26 SNAs employed in the school (para. 5 of the High Court judgment). The plaintiff devised a rudimentary questionnaire containing two questions the first of which was "Have you *ever* locked the sensory room door?" (emphasis added). The questionnaire was answered by only four SNAs who all answered "yes". The evidence of the plaintiff and the SNAs who gave evidence was to the effect that more SNAs would have answered affirmatively if they had been able to do so anonymously. Later in the judgment this limited evidence becomes a finding at para. 62 that "there was a *common* practice of doing this" (emphasis added), and indeed at para. 87 that the board was "aware that *several* other SNAs also occasionally locked the sensory room door" (emphasis added). At para. 41, there is a finding that "there was a *general* practice amongst many of the SNAs, *probably a majority*, of locking the sensory room door" (emphasis added). Again, in my view, the evidence recounted in the judgment is a less than secure basis for the conclusion that there was a general practice among the majority of SNAs of locking the sensory room door, even though that was fundamental to the finding that the process should not have been commenced, and that the plaintiff was singled out. Even on the plaintiff's case this was not the type of clear-cut singling out or targeting for a punishment that is sometimes discussed in an employment context, and which can give rise to a finding of unfair dismissal. A classic case is where it is known as a matter of fact that a certain practice is widespread, but in that knowledge, only one person is selected for punishment, in circumstances which give rise to the reasonable inference that the objective is not to put an end to conduct, but to victimise the individual. In the field of unfair dismissal, consistency in applying

procedures may be a component of unfairness. If an employer has previously tended to interpret a disciplinary rule lightly, a sudden decision to dismiss employees for breaking the rule may be unfair (see Redmond, *Dismissal Law In Ireland* (Butterworth Ireland Ltd., 1999), para. 13). Here however, even on the plaintiff's case, it is not suggested that Ms. Dempsey, still less the board, was aware when the disciplinary process was initiated, of the general practice found by the trial judge based on the limited evidence set out above, and therefore, at least in its initiation, the disciplinary process cannot be treated as a singling out of the plaintiff. What happened was something rather more complex: the plaintiff, having been found to have been engaging in a practice which it appears to have been accepted, even if grudgingly, was inappropriate and unacceptable, and when informed that the matter was being treated as a disciplinary matter, raised the contention that other (unspecified) people had done this on other occasions (also unspecified). The trial judge found that this allegation should have been investigated and that of course goes to the fairness of the procedures followed, but, as Irvine J. suggested in the Court of Appeal, it is certainly a less clear-cut example of being singled out for punishment. Once again it may ground a finding of imperfect and flawed procedures, but it falls short in my view of the type of conduct captured by a bullying claim.

[46] One further observation is necessary. One issue left unresolved by the decision of the High Court is any plausible explanation for the conduct criticised. Most cases of workplace bullying involve bullying by an individual or a group excluding and victimising a person, and which in either case the employer fails to prevent or remedy. There may also be so called "corporate bullying" involving a superior, or indeed management more generally, in the treatment of the individual. Where more than one person is involved as where the individual is ostracised, or subjected to ridicule, it will usually involve some obvious concerted action. However, here, it is not clear what is being alleged or indeed found in this regard. It is not for example alleged merely that Ms. Dempsey bullied the plaintiff, and the school failed to prevent or remedy it. It is clear that Mr. Lynch is also criticised and found culpable although it is not suggested he was involved from the outset. Nor is it suggested that the remaining members of the board were misled by Ms. Dempsey, alone or together with Mr. Lynch, but instead it appears the members of the board were criticised as somehow being participants themselves in the bullying. It seems, although it is not clear, that the teacher Ms. Bramhall may also have been considered a party

to the bullying insomuch as she was not prepared to allow the plaintiff correct the weekly forms.

[47] If this case was merely about unfair procedures, then the fact that there were a number of disparate actors would not pose a difficulty, and indeed at some level might enhance the claim: the school would be responsible for the procedures followed, and the cumulative impact of them, and any lack of cohesion and organisation might only give weight to the plaintiff's case. However, it is I think rather different where it is alleged that reprehensible conduct at a personal level such as bullying is involved. It is not clear if the individuals (Ms. Dempsey, Mr. Lynch, Ms. Bramhall, and the other four members of the board) are alleged to have separately engaged in bullying, or in some form of collective action, or that there was some hidden arrangement or agreement between them arising perhaps out of some pre-existing animus. The absence of any explanation why these different people became parties to a pattern of what was considered to be wholly inappropriate behaviour undermining the dignity of the plaintiff as a person, makes it difficult to defer too readily to the conclusions of the trial judge. Accordingly, I think it is difficult to address this merely at the level of the facts found and inferences drawn, although there is considerable force, in my view, in the analysis of those findings in the judgments of the majority in the Court of Appeal. This appeal can be best approached and resolved on a question of law: do the facts found, or not in contest in the High Court, amount to bullying at law?

[48] In this regard the trial judge's approach was to record the facts as found by him, and his strong view of them, and then conclude that this amounted to bullying, without any extended consideration of the law. Thus at para. 63, he determined that the treatment of the plaintiff was "inappropriate". Later at para. 88, having stated at para. 87 that the board persisted in its unfair and inappropriate treatment of the plaintiff, he concluded:-

> "Thus, in my opinion, the plaintiff has demonstrated to my satisfaction that the inappropriate behaviour of the defendants was not merely an isolated incident but was persistent over a period of in excess of one year. There can be no doubt but that this persistent, inappropriate behaviour of the defendant wholly undermined the plaintiff's dignity at work."

[49] On this approach the only analysis of the question of undermining of dignity at work is that it is treated as a necessary consequence of the finding of any inappropriate conduct which was itself persistent. While I recognise that this is a developing area of law, and the facts and evidence in this case were perhaps unusually difficult, I do not think it is sufficient to

resolve the legal issue in this way. The requirement of undermining of dignity is an important part of the definition. The matter is dealt with in greater detail in the analysis of the dissenting judgment in the Court of Appeal of Finlay Geoghegan J. and it will be necessary to turn to that in due course. Before doing so, it will I hope be useful to look at the question of liability for bullying in a somewhat broader perspective.

A detour: is there a separate tort of bullying or harassment?

[50] While it does not arise directly on this appeal, I consider that the statement of law, accepted without question in this case, that no separate tort of bullying exists or can exist, that bullying is in a sense a subspecies only of an employer's duty of care, but that there can be nevertheless a concept of "corporate bullying" for which the employer is directly responsible, is more than a little puzzling and worthy of some consideration. I discuss these matters, however, not to raise further uncertainties as to the law, but rather because these matters and the questions they raise cast a helpful light, in my view, on the issues to be determined in this case.

[51] There is no doubt that in addition to specific duties imposed by statute, an employer owes extensive duties of care to an employee at common law. Those duties include the duty to provide a safe place of work, a safe system of work, to ensure fellow employees are competent, and that equipment used in the workplace is safe. That duty can clearly extend beyond the direct actions of the employer, and to the actions of other individuals which are or ought to be foreseeable, including the actions of other employees, or indeed third parties. Thus for example, employers have been held responsible for a failure to foresee and take steps to prevent criminal assaults suffered by an employee: *Walsh v. Securicor (Ireland) Ltd.* [1993] 2 I.R. 507. Another example might be the employee horseplay cases. If the employer knows or ought to have known of the practice, and did not take effective steps to prevent or stop such practices, then an employer may be liable to the injured employee. In addition, an employer may also be vicariously liable for the acts of an employee without proof of fault on the employer's part if the actions of the other employee are so closely connected with the employment as to justify the imposition of vicarious liability. But in either case, at least in theory, the fellow employee is also a tortfeasor, either negligent in respect of the safety of another, or, in some cases, the perpetrator of a deliberate wrong in the nature of an assault for which the employer is vicariously liable. It is not necessary here to discuss the mechanism by which the law as devised to

avoid perhaps the full logical consequences of this so that an employer cannot normally seek contribution and indemnity for the acts of an employee tortfeasor, but the theory that the co-employee is guilty of a tort remains an important component of the basis upon which liability, vicarious liability or in negligence, is imposed upon an employer. It is, I think, difficult to conceive of circumstances under which an employer may be held liable for the conduct of another person where that person's conduct is not in itself, at least in theory, itself a tort.

[52] However, if bullying conduct is not itself wrongful (or at least actionable), and is only a subspecies of the employer's duty of care to an employee, certain surprising consequences follow. First, it would mean that actions for bullying could only occur in the employment context. Yet it is plain that there are other areas in which bullying can be encountered. Second, if we take for this purpose a clear-cut example of an extreme case of individual vindictive bullying by one person of another, and where one employee cruelly and mercilessly torments another, with perhaps serious psychiatric consequences for the victim – the bully would nevertheless have no liability to the victim even if the bully was also sufficiently wealthy to pay compensation, and even if, on this hypothesis, the employer was not. Furthermore, under this scenario an employer could escape liability by demonstrating that it had taken all reasonable steps to prevent the bullying. In such a case, a victim of concealed bullying would have no remedy even if the bullying was closely connected to the employment and even if in similar circumstances an employer would be vicariously liable for physical rather than psychiatric injury caused to a victim. Finally, there is a difficulty in reconciling the contention that bullying is only actionable as a subclass of the employer's duty of care with the statement that the employer can nevertheless be liable for something labelled "corporate bullying". In such circumstances, it appears that an employer (who can be a single individual) may be made liable for conduct which is voluntary, deliberate and direct. This is not negligence or a breach of a duty of care, any more than deliberate assault is a breach of some separate duty of care. It is instead a separate intentional tort. It appears rather anomalous therefore that an employer can be liable for direct and deliberate conduct, in this case bullying, when in any other circumstance a bully is not.

[53] It is clear therefore, that the law as stated in this developing field is somewhat anomalous. This is not by any means a fatal objection however, as it is now well recognised, that the lifeblood of the law has not been logic but rather felt experience. The fact that the law has not pursued the logic of a proposition to a remorseless conclusion may often be an

indicator, not of lack of principle, but rather of some important felt constraint upon more widespread liability. Disturbances in the pattern of the common law are often instructive instances, meriting investigation rather than merely anomalies to be removed.

[54] It seems likely that these developments in the law in Ireland reflect forces and considerations which may be detected in developments in the jurisprudence of other common law countries. It is useful therefore at this point to briefly survey some relevant developments in other jurisdictions which may cast a light upon the issues to be decided in this case.

International comparisons

[55] The question of liability for intentional or negligent infliction of mental distress has been a difficult topic for the law of torts since at least the decision in *Wilkinson v. Downton* [1897] 2 Q.B. 57. By the 1990s some consideration had been given to the development of a separate tort of harassment in cases such as *Khorasandjian v. Bush* [1993] Q.B. 727. In the United Kingdom those developments were overtaken by statute, and the enactment of the Protection from Harassment Act 1997, which created both criminal and civil liability for harassment. Subsequently, it was confirmed that there was no scope for the further development of the common law. The statute itself did not define harassment but it included "causing the person distress" (s. 7(2)). It has been held that the conduct "must be grave" and that in any event "in life one has to put up with a certain amount of annoyance: things have got to be fairly severe before the law, civil or criminal, will intervene": *Ferguson v. British Gas Trading Ltd.* [2009] EWCA Civ 46, [2010] 1 W.L.R. 785 at paras. 17 and 18, p. 791. Later again, Lord Hoffman observed in *Wainwright v. Home Office* [2003] UKHL 53, [2004] 2 A.C. 406 at p. 426:-

> "46 … In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation."

In *Dowson v. Chief Constable of Northumbria Police* [2010] EWHC 2612, (Unreported, High Court of England and Wales, 20 October 2010), Simon J. offered a summary of the necessary features of a claim under the legislation at para. 142:-

"(1) There must be conduct which occurs on at least two occasions,
(2) which is targeted at the claimant,

(3) which is calculated in an objective sense to cause alarm or distress, and
(4) which is objectively judged to be oppressive and unacceptable.
(5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
(6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: 'torment' of the victim, 'of an order which would sustain criminal liability'."

[56] In *Hatton v. Sutherland* [2002] EWCA Civ 76, [2002] 2 All E.R. 1, which concerned the field of workplace stress claims, Hale L.J. offered a further detailed list of factors to be considered before any claim for damages for workplace stress. This is undoubtedly an aspect of the employer's duty of care to an employee. Such workplace stress encompasses bullying, but clearly includes other factors. These matters are helpfully considered in Cox, Corbett and Ryan, *Employment Law in Ireland*, chapter 16, "Legal Obligations for the Employer in Respect of Workplace Stress and Bullying" (Clarus Press, 2009), pp. 565 to 615. In *Hatton v. Sutherland* [2002] EWCA Civ 76 at para. 43, pp. 19 and 20, Hale L.J. set out 16 propositions which can I think be understood as permitting claims for stress or bullying, but also seeking to limit and control such claims. It is for example noteworthy that one principle was that identified at (11), that an employer who offered a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.

[57] The law has developed differently in other common law jurisdictions. In the United States of America, the early development of the law in the early 20th century was influenced by the legal realists and their acceptance of contemporaneous developments in psychiatry. Accordingly, U.S. law in a number of states was willing to accept the possibility at least of claims for intentional or negligent infliction of an emotional injury. Dean William Prosser was a key influence in this development. The most striking thing for present purposes however, is that notwithstanding a willingness to contemplate recovery for emotional distress and psychiatric injury, the law still sought significant limiting devices such as Prosser's concept of "extreme outrage". Thus, *Prosser and Keeton on the Law of Torts* (5th ed., West Publishing Co., 1984) at pp. 60 and 61, expressed the general principle in striking terms:-

"In special situations of extreme misconduct recovery is allowed

…

> So far as it is possible to generalise from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. The requirements of the rule are rigorous, and difficult to satisfy."

[58] This approach is reflected in *Restatement of the Law (Second) Torts* (American Law Institute Publishers, 1977), which provides at § 46:-

> "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

The conduct in question must be "conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable" (§ 46(g)).

[59] It is not necessary to engage in a further survey of these difficult issues and the development of the law of tort to which so much learning has been devoted in common law countries. It is sufficient for present purposes to observe, that in dealing with claims that an individual who claims to suffer a mental or psychiatric injury as a result of the wrongful act of another, the common law has proceeded cautiously. In those cases where recovery is permitted, the common law has sought to set a number of limiting devices, and in particular a requirement that the injury must be measurable and the conduct severe. It is not surprising that this should be so. Returning to the observations made at the outset of this judgment, litigation is extremely costly and demanding, both in financial terms and in the resources which must be applied to it. In addition to this there is the broader cost of claims which must be settled because a plausible claim can be made, and the further social cost that the possibility of such litigation will inevitability lead to the adjustment of behaviour as parties seek to avoid the risk of exposure to costly claims. Where this results in the improvement of workplace practice and behaviours, and the protection of individuals from intolerable behaviour, it is a proper and valuable function of the law of tort. If however, the test adopted leads schools or employers to avoid pressing disciplinary matters so as to avoid the risk of exposure to liability, then the cost is negative. Few people subjected to reprimand or discipline accept it stoically: it is human nature to be offended and indeed to experience a sense of injustice and resentment, all the more so if there is some justification. If bullying claims may be maintained in any such circumstance, and are not clearly and precisely defined, then prudent

employers may opt to avoid the action which exposes them to the risk. This is not to say that bullying should be tolerated, or that victims should not be compensated nor indeed that employers should not adapt their behaviour to protect employees from bullying either direct or indirect. It does suggest however, that as Oliver Wendell Holmes observed, quoting Plato's *Phaedrus*, that when making a new rule, the law should seek "to carve nature at its joint". In this case that means setting a test which achieves the objective of compensating the victim of a serious wrongdoing, deterring damaging behaviour, and encouraging prudent and sensible practices without encouraging a proliferation of claims more generally, and inhibiting workplace activity to an excessive degree.

[60] Turning to the legal issue which arises in this case, it is I think significant that the claim relates to a disciplinary process, and circumstances which are not encompassed by the classic conceptions of workplace bullying. It is undoubtedly a case at the margins at best, and as a result may help define the limits of actionable claims. Here the Court of Appeal set itself the question "[c]ould a flawed disciplinary procedure which goes on over a number of months and takes a number of steps ever be considered to be 'repeated inappropriate behaviour' for the purposes of the definition?" With the addition that the conduct must also be capable of undermining the person's right to dignity at work, this is, I consider, the correct question as a matter of law.

[61] I agree with Finlay Geoghegan J. in particular that this issue involves a careful focus on at least three terms used in the Industrial Relations Act 1990 (Code of Practice Detailing Procedures For Addressing Bullying in The Workplace) (Declaration) Order 2002 (the "2002 Order"):-

(i) repeated behaviour;
(ii) inappropriate behaviour; and
(iii) behaviour reasonably capable of undermining dignity at work.

I also agree that each component can usefully be considered separately and sequentially. However I would caution against viewing these three matters as separate and self-standing issues as if in a statutory definition. To some extent these terms take their colour from each other and the concepts are incremental. It is, in my view, important, for example, to recognise that in considering the question of repeated conduct, it is necessary to remember that what is required to be repeated is inappropriate conduct undermining the individual's dignity at work and not merely that the plaintiff be able to point to more than one incident of which he or she complains. Ultimately, while analysis may be facilitated by looking at the separate elements, it must be remembered that it is a single definition and a

single test: was the defendant guilty of repeated inappropriate behaviour against the plaintiff which could reasonably be regarded as undermining the individual's right to dignity at work?

[62] I sympathise with the cautious approach which Finlay Geoghegan J. adopted and which led her to suggest that the consideration of whether conduct was both inappropriate and repeated must depend on the relationship and the relative decisions of the individuals and the "full factual context" (para.18, p. 8), and on an "assessment of all the facts." (para. 20, p. 9). Many difficult cases force courts to make qualifications such as this, but unless an appellate court can offer some more precise definition, it offers little guidance not merely to lower courts, but, as importantly, to litigants and potential litigants. If everything depends upon the facts (and necessarily the view courts take of them), then it will not be possible to determine whether bullying has occurred, in any case, until the final court of appeal has made its determination. It will also not be possible to advise plaintiffs whether or not to pursue claims, or defendants whether or not to defend them, with any confidence. As a result, the number of claims which will be advanced, and settled at some level, will necessarily proliferate. It is therefore necessary to look carefully at the concepts involved.

[63] In my view, a telling feature of the definition used in the 2002 Order and adopted in the case law is the distinctive language used in the statutory definition. At each point the statutory drafter has chosen a term at a markedly elevated point in the register: conduct must be repeated, not merely consist of a number of incidents; it must be inappropriate, not merely wrong; and it is not enough that it be inappropriate and even offensive: it must be capable of being reasonably regarded as undermining the individual's right to dignity at work.

[64] At para. 20, p. 9, of her judgment, Finlay Geoghegan J. contrasted the phrase "repeated" with the last sentence in the definition which required that the conduct be something other than an "isolated incident of the behaviour": it "may be an affront to dignity at work but, as a once-off incident, is not considered to be bullying." The judge continued, "[it] therefore appears to me that 'repeated' in the definition is being used for the purpose of connoting behaviour which is more than either an 'isolated incident' or a 'once off incident'". I agree that the concept of repeated behaviour can usefully be contrasted with an isolated or once-off incident, but I do not think it can be defined negatively, as merely something that is not "once-off" or "isolated". It is not enough to point to two different events. What must be repeated is inappropriate behaviour undermining the personal dignity of the individual. That is relevant in this case in two

respects. First, it is noteworthy that the plaintiff relies on the conduct of a number of different individuals. Second, the core complaint relates to a flawed disciplinary process, or unfair procedures. In considering such unfair procedures as part of a claim for the invalidity of a disciplinary process, it is appropriate to take into account a number of events. But the reality of the plaintiff's claim here is that overall the process was unfair. It is not sufficient in my view to say that because that process extended over a period of time and a number of different events that it necessarily therefore satisfied the requirement that the conduct be "repeated". Again, this can best be understood by considering a classic case of bullying. There may be individual and occasional incidents of a superior speaking aggressively, losing his or her temper, or making jokes or comments which are hurtful or offensive. This in itself does not give rise to a claim of bullying. It is when a pattern of behaviour emerges that it can be said that the behaviour is repeated for the purposes of a definition. What must be repeated is the behaviour which is inappropriate and which undermines personal dignity. It is not enough that what is alleged to constitute unfair procedures is comprised of a number of different steps unless each of those steps can be said in themselves to be inappropriate and undermine human dignity. However, I do not consider this to be the most important aspect of the case because to some extent it is dependent upon the question as to whether a defective and flawed disciplinary process can be "inappropriate behaviour" for the purposes of the definition.

Inappropriate behaviour

[65] It is suggested that the behaviour here is inappropriate because it was in breach of fair procedures. I cannot agree. Inappropriate behaviour does not necessarily need to be unlawful, erroneous or a procedure liable to be quashed or otherwise wrong in law: it is instead behaviour which is inappropriate at a human level. The test looks to the question of propriety in human relations, rather than legality. Again, the more familiar examples of bullying illustrate this. Purposely undermining an individual, targeting them for special negative treatment, the manipulation of their reputation, social exclusion or isolation, intimidation, aggressive or obscene behaviour, jokes which are obviously offensive to one person, intrusion by pestering, spying and stalking – these examples all share the feature that they are unacceptable at the level of human interaction. That in turn is consistent with the concept of human dignity being protected. I agree that the judge's finding that Ms. Dempsey humiliated the plaintiff and reduced

her to tears at the meeting of 27 January 2010 is a finding of behaviour that is inappropriate in this sense. By contrast, the fact that the board proceeded to make a decision to impose a disciplinary sanction on the plaintiff without informing her of that possibility, the matters relied on, or giving her an opportunity to present her case, was unfair, flawed and liable to be quashed or declared invalid and unlawful. However, it cannot in my view be said, without more, to be inappropriate in the sense in which that word is used in the definition.

Dignity at work

[66] Perhaps the most important aspect of the definition is the question of undermining dignity at work because it relates closely to the value which is sought to be protected by the law. As I understand it, that is the idea that there is dignity in and at work. The fact that a person may be employed by another and may be required to accept instructions, discipline and control during the working day, does not mean that they are to be treated either by the employer, or fellow workers, in a way which undermines their essential dignity as a human person. This is, in my view, a central feature of the test. It is noteworthy therefore, that both the High Court judge and the dissenting judge in the Court of Appeal do not appear to approach this limb of the definition as providing any separate or additional test. Thus, Finlay Geoghegan J. considered at para. 22, pp. 10 and 11, that "in relation to a disciplinary process such right to dignity must include, it appears to me, a right to be treated with respect, fairly and not less favourably than other colleagues in a similar position". She concluded "[h]owever, it appears to me that her right to dignity at work includes a right to be treated with respect and fairly in the above sense and not singled out unfairly from colleagues in a similar position in such disciplinary process". The plaintiff argues therefore that the fact that the disciplinary process was unfair is enough to satisfy this component of the definition.

[67] In my view, the manner in which the plaintiff's argument approaches this limb of the test drains it of much of its meaning. The conduct is said to be repeated because more than one event is relied upon. It is inappropriate because it is in breach of fair procedures, and accordingly, it must be undermining of dignity at work. This is illustrated by para. 88 of the trial judge's conclusion:-

> "There can be no doubt but that this persistent, inappropriate behaviour of [the defendant] wholly undermined the plaintiff's dignity at work."

In my view for the reasons already set out, it seems to me that the requirement of conduct undermining dignity at work is a separate, distinct and important component of the definition of bullying which identifies the interests sought to be protected by the law, and just as importantly limits the claims which may be made to those which can be described as outrageous, unacceptable, and exceeding all bounds tolerated by decent society.

[68] The word dignity carries a considerable charge with a distinct moral component. The preamble of the 1937 Constitution was, it appears, the first time the word was used in the context of a fundamental rights guarantee. It has now come to be seen as a vital component in the protection of human rights in the post-war world. It is, for example, no coincidence that dignity is afforded a preeminent status in the post-war constitutions of both Germany and Israel. In the Irish context, it has been invoked in the context of marital privacy (*McGee v. Attorney General* [1974] I.R. 284), the criminalisation of male homosexuality (*Norris v. The Attorney General* [1984] I.R. 36 (Henchy J. dissenting)), the withdrawal of treatment from a patient in a permanent vegetative state (*In re a Ward of Court (withholding medical treatment) (No.2)* [1996] 2 I.R. 79), and the prohibition on assisted suicide (*Fleming v. Ireland* [2013] IESC 19, [2013] 2 I.R. 417). Walsh J. said in *Quinn's Supermarket v. Attorney General* [1972] I.R. 1, at pp. 13 and 14, that the guarantee of equality under Article 40.1 was not a:-

> "… guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community".

The denial of fair procedures is never a trivial matter but I do not think it can be comfortably said in this case to be undermining of human dignity, particularly when it is the same breach of procedures which is also contended to be inappropriate. More importantly I consider that the requirement that the procedure be repeated, inappropriate and undermining of dignity is a test which uses language deliberately intended to indicate that the conduct which will breach it is both severe, and normally offensive at a human level.

[69] I am aware that Finlay Geoghegan J. lays stress on the fact that she considered the plaintiff had been treated unfairly by reference to other SNAs. She considered at para. 22, pp. 10 and 11, that a right to dignity at work included a right to be treated "with respect, fairly and not less favourably than other colleagues in a similar position", and not to be "singled out unfairly from colleagues in a similar position in such disciplinary process". I accept that the "singling out" or "targeting" of an individual for disciplinary purposes is capable of being a component of bullying. However, the use of the verb in these formulations is important. It is not enough in my view that after the fact it is possible to say that a person has objectively been treated differently and worse than others in a similar situation, even if that, in certain circumstances, may give rise to a different claim. I accept for example as set out at para. 45 above that in the context of dismissal proceedings, an apparent deviation from prior practice may itself be evidence of unfairness. But in many cases in which it can be said a person has been "targeted" or "singled out" for disciplinary sanction and which constitutes at least part of a finding of bullying, the fact of a general practice will have been known to the superior prior to the initiation of any disciplinary process, and in such circumstances may give rise to the inference that the disciplinary proceedings are not being pursued *bona fide* because of a concern about the practice or behaviour, but rather as a form of punishing and perhaps humiliating the individual concerned.

[70] In my view that is not what occurred here. While I have some concerns about the manner in which the limited evidence in this case becomes converted into a finding of general practice, it is not suggested that Ms. Dempsey, still less the board, were aware of any such practice, limited or general, at the time the disciplinary process was initiated against the plaintiff. In Ms. Dempsey's case, she went to the sensory room, could not gain access, and therefore had immediate first hand evidence of what the plaintiff had done. In relation to both Mr. Lynch and the board, it is not suggested that they were aware of any practice. On the contrary, it is suggested that they should have been told by Ms. Dempsey of the point raised by the plaintiff that other SNAs had done this. But that in my view cannot constitute targeting or singling out of the plaintiff. It is suggested that once aware of this fact, Ms. Dempsey, Mr. Lynch and the board ought to have conducted a more thorough examination of the extent to which there was a practice among other SNAs. Somewhat surprisingly, the trial judge goes so far as to conclude that this meant that the disciplinary process against the plaintiff should not have proceeded at all. But any such investigation was only relevant to the extent of the sanction to be imposed

on the plaintiff: as was submitted on her behalf by her union, the part four final warning was alleged to be "too severe". Of its nature, any such inquiry would not have yielded evidence as clear cut and direct as emerged when Ms. Dempsey sought access to the sensory room on 14 September 2009. It is of course suggested in retrospect that the sanction imposed on the plaintiff was disproportionate having regard to the evidence that was available or potentially available in relation to the practices of other SNAs. This, if comprehensively established, might well sustain a challenge to the sanction imposed. In my view however it would significantly expand the concept of bullying if this type of analysis were sufficient to establish that charge.

[71] It may be that lurking in the plaintiff's case, and the acceptance of it by the trial judge, and the dissenting judgment in the Court of Appeal, is indeed a belief that Ms. Dempsey, Mr. Lynch and the rest of the board were not *bona fide* in their pursuit of the disciplinary process which was in fact targeted at and intended to victimise the plaintiff. If this suggestion is to be made by the plaintiff, it should be made explicitly, put to all the relevant parties, and then be the subject of an express finding by the trial judge setting out the evidence leading to such a conclusion to allow appellate review. The judgment in the High Court, while forceful in favour of the plaintiff, stops well short of such a conclusion. At their height, the facts found in the High Court judgment which are capable of being upheld on appeal do not constitute bullying. Accordingly, the appeal must be dismissed.

[72] It may also be appropriate here to address the two questions upon which leave to appeal was granted. It is the case for example that in jurisdictions where there is a separate tort then, as set out in the *Restatement of the Law (Second) Torts* (American Law Institute Publishers, 1977), it is necessary to show some intent to injure and cause distress or recklessness at least. That is necessary under the rule in *Wilkinson v. Downton* [1897] 2 Q.B. 57. In the cases where the conduct does meet the high threshold required, this may not indeed be a particularly onerous requirement, given the presumption that a person intends the natural and probable consequences of his or her actions. In most cases of bullying it will be obvious that there is malicious intent. However so long as the cause of action remains a subhead of the employer's duty of care, it is difficult to see that intent on the part of the bully is an essential feature of the claim: the employer owes a duty of care to the employee to protect them from conduct or matters causing distress amounting to a recognisable psychiatric injury. That duty also extends to workplace stress claims which may have

no individual actor involved. It is difficult to see why, if the employer's duty is to protect an employee from conduct which is damaging, there should be a necessity that the conduct be actuated by malicious intent. The so-called corporate liability for bullying is slightly different. The conduct must be intentional and calculated to cause distress. I would reserve the question whether malice, in the sense of intent to injure, is an essential component of such a claim. But even if not, malice is not certainly irrelevant. A claim for bullying will certainly be strengthened significantly by proof of malice. This was illustrated by *Quigley v. Complex Tooling & Moulding Ltd.* [2005] IEHC 71 & [2008] IESC 44, [2009] 1 I.R. 349 where it was recorded at para. 13, p. 354, that the manager said he would "sort out the granddads". Consciousness on the part of the victim (and others) that they are being pursued vindictively will certainly make it easier to establish that conduct was inappropriate and undermined dignity at work. On the second question, I consider further that conduct which occurs in private can be a component of a claim for bullying. It is possible to treat someone inappropriately, and undermine their dignity, without that conduct being witnessed. Again however any element of humiliation in public will certainly strengthen a claim.

Resolution of this case

[73] The difficulties in this case are not however limited to the findings of fact or the legal definition of bullying. The plaintiff succeeded in this case at first instance. The High Court refused any stay on its award. The Supreme Court (to which appeal then lay) imposed a partial stay on the judgment on terms that the defendant was obliged to pay the plaintiff the sum of €100,000. That occurred over two and a half years ago. The plaintiff has not been in employment since she left this school in 2010. There is furthermore the conclusion upon which all judges who have heard this matter are agreed, that the disciplinary procedures followed by the school were inadequate and impermissible, and could and would have been declared invalid in proceedings brought for that purpose. The entire process including the seven years of litigation has been extremely stressful to the plaintiff who it seems likely is particularly vulnerable to such stresses. While in my view the matters alleged here do not give rise to a successful claim for bullying, I readily acknowledge that the degree of judicial disagreement demonstrates that this is by no means clear-cut. In those circumstances, it may be necessary to hear argument as to any consequential orders but I should indicate a provisional view that I would be very

slow to order the plaintiff to repay to the defendant the sum of money paid as a condition of obtaining the partial stay, or to pay costs. It may indeed be necessary to reflect the fact that the plaintiff would have been justified in coming to court to have it determined that the procedures applied to her were flawed. It would be desirable that the parties could reach their own agreement on these matters but in the event that there is no such agreement, I would be prepared to hear argument and make a final decision in that regard.

McKechnie J.
[74] I agree with O'Donnell J.

MacMenamin J.
[75] I agree with O'Donnell and Charleton JJ.

Dunne J.
[76] I also agree with O'Donnell and Charleton JJ.

Charleton J.
[77] Of itself, bullying is not a tort. That obnoxious perversion of the ordinary human duty of give and take may, nonetheless, give rise to tortious liability. No overall theory of what constitutes a tort has yet emerged from the apparently random declaration of individualised wrongs that mark out the parameters of this area of law. Generally it is because people are expected to behave in a particular way in relation to matters under their control, or are required to organise their affairs so as to avoid harming others, or have a responsibility fixed at law towards those who act on their behalf, which mark out the individual principles upon which a series of disparate civil wrongs are based. As Professor Winfield in *The Province of the Law of Tort* (Cambridge, 1931) put the matter at p. 32:-

> "Tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally and its breach is redressible by an action for unliquidated damages."

[78] Crime and tort had a common origin in the taking charge by an increasingly ordered society, through its judicial system, of private retribution for personal wrongs. In the formation of such rules defining liability,

people were instructed through individual decisions as to how the rule of law would both replace individual reaction and place into the category of a wrong any attempt at repayment of one wrong by another. Historically, this began by giving civil as well as criminal remedies for wrongs to the person and this was later extended to a person's reputation. The development of tort law has been piecemeal. Prior to the decision in *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330, issues as to the use or abuse of land were more properly an aspect of the duties and responsibilities of servient and dominant interests. Interference with contractual relations emerged out of the decision in *Bowen v. Hall.* (1881) 6 Q.B.D. 333, perhaps because in some circumstances it would be unjust to answer a claim of wrong with a "no privity" defence. In reaction possibly to the balance of influence as between the interests of society and the representation of employees, intimidation was recognised as a tort in *Rookes v. Barnard* [1964] A.C. 1129. Whereas up to *Donoghue v. Stevenson* [1932] A.C. 562, negligence was an element of tortious liability, thereafter it became a defined aspect of an overarching wrong, subject only, it appears, to public policy limiting its application. So much did the tort of negligence apparently emerge as the answer to every plaintiff's needs, pleaded as it has been as an alternative to every other defined wrong, this court had to warn in the majority judgments in *Cromane Seafoods Ltd. v. Minister for Agriculture* [2016] IESC 6, [2017] 1 I.R. 119 that this tort has not dissolved the existing definitions of other wrongs or submerged them.

Inflicting illness by manipulating emotion

[79] It was with the decision in *Wilkinson v. Downton* [1897] 2 Q.B. 57 that a joke in very bad taste, leading to the unfortunate plaintiff almost losing her reason and suffering obvious physical effects, could give rise to liability. A practical joke is of its nature designed to cause at least momentary amazement, if not shock, but, as in that case, it can go too far: so far that the law must find a remedy. Hence, as Professor Heuston comments at pp. 32 and 33 of the classic 17th edition of *Salmond on the Law of Torts* (17th ed., Sweet & Maxwell, 1977):-

> "… the law of torts is not a static body of rules, but is capable of alteration to meet the needs of a changing society. One word of warning should be added. It is often rather hastily assumed that any desirable alteration in the law of torts must result in the expansion of the field of liability. But social needs may require contraction as well as expansion. Thus it can hardly be doubted that the courts have been

> justified in refusing to introduce new heads of tortious liability to enable a witness to be sued for perjury, or conspiracy to defame. Again a tort may be invented or discovered only to have little use made of it. So for a century little has been heard for excluding the plaintiff from a public office to which he is legally entitled."

[80] No overall theory has emerged as to why the courts should develop a tort. In our system, it may be because a wrong under the Constitution has been committed, but only where no existing remedy will provide redress, as in *Meskell v.Córas Iompair Éireann* [1973] I.R. 121. Professor Fleming instances moral wrong as the foundation for liability in tort, morphing into the principle that there should be no liability without fault: Sappideen and Vines eds., *Fleming's The Law of Torts* (10th ed., Thomson Reuters, 2011) at paras. 1.40 to 1.50. Professor Heuston comments that reasonable foresight has not come to be used as the overarching principle which it was once thought to be, while public policy has had a restraining influence in addition to the traditional analysis of the conduct of the defendant and the legitimacy of the interest of the plaintiff: see Heuston ed., *Salmond on the Law of Torts* (17th ed., Sweet & Maxwell, 1977) at p. 33, cited above.

[81] As O'Donnell J. remarks in the principal judgment, the range of the expansion of tort liability and its extension into relationships at a distance from the conduct found to be at fault is part of the scheme of the law to order society. It is only on a careful analysis of the balance of not only where legitimate activity should be protected, but also where those who suffer in consequence of the wrongs of others should be compensated, that decisions as to redress for civil wrong develop. Hence, usual dangers such as flooding are tolerated in the tort of the escape of dangerous things; but the building of a repository for toxic gas will lead to a different decision on liability. Making a joke is socially acceptable, and bad taste is tolerated, but sending a person into immediate distress to the detriment of their long-term health is not. Commenting negatively on those who enter willingly into the discourse of public life is different to factual but inaccurate statements about those same individuals under the law of defamation. Whereas vulgar abuse is unpleasant, it is only actionable where it assumes the shape of an assertion of fact that takes away another's character.

[82] In considering, therefore, any extension of the law on negligent or intentional infliction of harm into the workplace, decisions must be informed by what has so often been said in the context of family disputes: that men and women are to be judged with the appropriate measure of

appreciation for human nature and that, hence, conduct is be judged according to the standard of human beings, and not of angels.

[83] There are two strands of potential liability for a plaintiff to employ against a bully. Firstly, conduct may be so egregious, deliberate and malicious as to engage the rule in *Wilkinson v. Downton* [1897] 2 Q.B. 57. In so far as there may be a debate as to whether corporate bullying is a separate tort, this first strand of liability seems to provide the answer. For an employer to persistently and repeatedly engage in unnecessary and nasty conduct over an appreciable time outside the ordinarily tolerated range of correction or discipline necessary in the workplace, in such a way as to undermine the employee's dignity, so that coming to work becomes not merely difficult but dreaded, according to the standards of robust human reaction, is to engage that tort where organic depression or other physical illness is the consequence. The standard has to be set at a level where giving advice, telling people off, temperamental reaction or emotional interaction is not allowed to disrupt the duty of managers to see that work is done, and the entitlement to healthy satisfaction that actually justifying one's wages represents. In this context, joining in an unacceptable standard of conduct may engage an employer in the intentional infliction of harm.

[84] That line of liability, however, does not seem to be one which has been analysed to a plaintiff's success in any written decision concerned with bullying to date. Most probably that is so because the tort retains an intentional element which most often may be inferred from the evidence, if it is not otherwise admitted, perhaps in an internal workplace email, but where, as in the original case, the conduct carries obvious connotations. The analysis in the various judgments of the Supreme Court of the United Kingdom in *O. v. Rhodes* [2015] UKSC 32, [2016] A.C. 219 also indicates a debate as to the precise elements of this tort. In that and in other English cases, there has been doubt cast on the definition provided in Heuston and Buckley, eds., *Salmond and Heuston on the Law of Torts* (21st ed., Sweet & Maxwell Ltd., 1996) at p. 215, which provides that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it". The principle, however, must remain that an individual who, through utterly unacceptable conduct, deliberately distresses another to the point where they suffer a recognised psychiatric condition, is liable in damages.

[85] In the United States of America, the application of the tort of intentional infliction of emotional distress in the employment context has

confined liability. The elements of this tort are set out in *Womack v. Eldridge* 215 Va. 338 (1974) at para. 28:-

> "… a cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe."

[86] In *Handbook of the Law of Torts* (4th ed., West Publishing Co., 1971), Prosser comments at p. 56 that so far "as it is possible to generalise from the cases", liability will only be established on the basis of "conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind". In *Earl v. H.D. Smith Wholesale Drug Co.* (United States District Court for the Central District of Illinois, Springfield Division, 22 June 2009), it was acknowledged at p. 9 that courts will "recognize a workplace claim for intentional infliction of emotional distress only in the most extreme circumstances".

[87] The second strand of potential liability is that which protects employees from harm in the workplace. An employer is obliged to take reasonable care to protect employees from injury. That duty however is not absolute; it is not that of an insurer. The duty is to remove risks which can be removed, to train employees for the workplace tasks and to organise the workplace in such a way as injury may be avoided. Employees have a duty to take care but, generally in workplace accidents, it is usually not an absence of care or training by an employer which establishes liability, but instead carelessness imputed to the employer through vicarious liability in an action where one employee causes injury to another. Injury can be caused by bullying.

[88] In New Zealand and in Australia, the law is based on the general safety of employees and the duty of employers to secure it. Necessarily, the conduct whereby a recognised psychiatric illness will attract damages, if shown to have been caused by conduct at work, has been restricted. In *Attorney-General v. Gilbert* [2002] 2 N.Z.L.R. 342, the Court of Appeal

held at para. 72, p. 357, that general legislation providing for safety at work makes "no distinction between physical, psychiatric or psychological illness or injury." At para. 83, pp. 359 and 360, the court consequently held that the employer must take reasonably practicable steps to ensure that employees do not suffer from psychological harm resulting from work-place stress:-

> "An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks."

[89] This exercise involves a court reconstructing what an employer ought to have known at the time when repeated actions by fellow employees were undermining the plaintiff's dignity at work. That is a traditional tort exercise. In *Koehler v. Cerebos (Aust) Ltd.* [2005] HCA 15, (2005) 222 C.L.R. 44, the Australian High Court held at para. 35, p. 57, that "[t]he relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable" (emphasis in original). As a result, the "central inquiry remains whether, in all the circumstances, the risk of a plaintiff … sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful" (para. 33). As Hayne J. put it in *Vairy v. Wyong Shire Council* [2005] HCA 62, (2005) 223 C.L.R. 422, at para. 126, p. 461, when a plaintiff makes a claim for damages for personal injury caused by the defendant's negligence, the court becomes engaged in an inquiry into "breach of duty", hence the court "must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered." What this involves is an "attempt, after the event, to judge what the reasonable person *would* have done to avoid what is now known to have occurred" (emphasis in original). Conduct giving rise to liability in that jurisdiction seems to be of an extreme kind.

[90] In *Naidu v. Group 4 Securitas Pty Ltd.* [2005] NSWSC 618, (Unreported, Supreme Court of New South Wales, 24 June 2005), the plaintiff was a security operative, assigned to a TV news channel, and later became the defendant's assistant, the defendant being the news channel's security and fire manager. In this role, the defendant subjected the plaintiff to racist and demeaning name calling, aggressive and threatening communications,

indecent sexual acts, sexual harassment, and directed him to work unpaid hours which cut his sleep to unsustainable levels. The plaintiff was threatened on multiple occasions that he would lose his employment if he did not accede to his manager's requests. The manager also said he would kill the plaintiff and repeatedly threatened his life if he told anyone about the indecent sexual acts and other bullying behaviours. The manager also threatened him with physical violence and subjected him to racial abuse, requiring him to work on Saturdays at his property, work for which the plaintiff was not getting paid. The Supreme Court of New South Wales found that the plaintiff's employers owed him a duty of care and that the treatment of the plaintiff amounted to workplace bullying, to such an extent that Adams J. found at para. 205 that it was "reasonably foreseeable that such an illness might well result from the infliction of that conduct upon the plaintiff". He described the behaviour of the defendant, the manager, at para. 17 as "so extreme" that "he well knew, or would have known had he reflected as any reasonable man should have" that the result of what the judge described as prolonged misconduct "could reasonably be expected to expose him to the real risk of such psychological injury".

[91] In this jurisdiction, the High Court has correctly emphasised in a series of decisions that what is involved in bullying as a compensatable wrong is a breach of the standard of care owed by an employer to employees: see *Sweeney v. Board of Management of Ballinteer Community School* [2011] IEHC 131, (Unreported, High Court, Herbert J., 24 March 2011); *Kelly v. Bon Secours Health System Limited* [2012] IEHC 21, (Unreported, High Court, Cross J., 26 January 2012); *Nyhan v. Commissioner of An Garda Síochána* [2012] IEHC 329, (Unreported, High Court, Cross J., 26 July 2012); and *Browne v. Minister for Justice* [2012] IEHC 526, [2013] E.L.R. 57. An employer has a general duty of care towards employees. In McMahon & Binchy's *Law of Torts* (3rd ed., Butterworths, 2000) at para. 18.105, the authors state that:-

> "An employer may be personally liable for sexual harassment or bullying of an employee, either on the basis that the employer ought to have been aware of the offending employee's propensity to act in this way or on the basis of an unreasonable failure to provide a safe system of work."

[92] In the 4th edition (Bloomsbury Professional, 2013), it is correctly stated at para. 18.80 that:-

> "There is no distinctive tort of bullying or harassment: the question is to be resolved, in the context of employers' liability, by asking whether the employers took reasonable care not to expose the plaintiff

> to the risk of injury from such conduct. The answer will depend in large part on what facts ought to have been known to the employer. Naturally, matters are different where the plaintiff's claim is that he or she is the victim of 'corporate bullying', where the allegation is that the management of the enterprise is implicated in the bullying activity. Such claims have succeeded in some recent cases, and failed in others."

[93] With regard to forming the elements of a tort of wrongful conduct that embraces workplace bullying, the common law in Ireland has not developed through judicial decision according to necessity and justice but instead has been subject to an intervention in the shape of para. 5 of the schedule to the Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002 (S.I. No. 17). This defines workplace bullying as "repeated inappropriate behaviour", which may be "direct or indirect, whether verbal, physical or otherwise" engaged in by an individual or a group against the plaintiff at the workplace and which "could reasonably be regarded as undermining the individual's right to dignity at work." Whereas under the strand of tort liability derived from *Wilkinson v. Downton* [1897] 2 Q.B. 57, an isolated but sufficiently grave incident from which intention to cause severe distress may suffice if psychiatric injury results, bullying is by its nature a repeated activity. A consideration of workplace codes of practice from other jurisdictions tends to reveal the same elements – behaviour completely beyond the tolerable, that undermines dignity at work, and which is repeated so that it forms a pattern which genuinely undermines a person's ability to come to work and serve in his or her position.

[94] Whether the courts were obliged, pursuant to the statutory mechanism under which this code of practice was established, to accept this definition has not been argued in this case. In the light of the relevant case law, this seems beside the point. The definition was accepted by the High Court in *Quigley v. Complex Tooling and Moulding Ltd.* [2005] IEHC 71 & [2008] IESC 44, [2009] 1 I.R. 349, where the plaintiff claimed that he had been a victim of workplace bullying by his manager, which allegedly resulted in mental distress and psychiatric injury. The plaintiff was awarded damages. In the Supreme Court, the award of damages was overturned on the basis that causation of the plaintiff's depression had not been proved to have resulted from the bullying, but was rather ascribable to him having lost his job when the factory went out of business. At para.17, p. 372, Fennelly J., however, accepted the code of practice definition and described what the plaintiff had been subjected to as "a unique amalgam of

excessive and selective supervision and scrutiny … unfair criticism, inconsistency, lack of response to complaint and insidious silence".

[95] The test requires all of the elements to be fulfilled. It should be considered sequentially. It is objective. Not subjective. It cannot be right to formulate liability on the basis of how people see the conduct of their colleagues in the workplace, but instead only on the basis of how that conduct would be objectively viewed: see *Glynn v. Minister for Justice* [2014] IEHC 133, [2014] E.L.R. 236 at p. 248. An employer is entitled to expect ordinary robustness from its employees: *Croft v. Broadstairs and St Peter's Town Council* [2003] EWCA Civ 676, (Unreported, Court of Appeal of England and Wales, 15 April 2003). Correction and instruction are necessary in the functioning of any workplace and these are required to avoid accidents and to ensure that productive work is engaged in. It may be necessary to point to faults. It may be necessary to bring home a point by requesting engagement in an unusual task or longer or unsocial hours. It is a kindness to attempt to instil a work ethic or to save a job or a career by an early intervention. Bullying is not about being tough on employees. Appropriate interventions may not be pleasant and must simply be taken in the right spirit. Sometimes a disciplinary intervention may be necessary. In *Yapp v. Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112, the Court of Appeal of England and Wales considered a disciplinary procedure which was alleged to have resulted in the plaintiff suffering from depression. Underhill L.J. noted at pp. 126 and 127:-

> "104 It is a normal characteristic of the employment relationship that employees may be criticised by the employer and sometimes face disciplinary action or other such procedures. And in an imperfect world it is not uncommon for such criticism or disciplinary process to be flawed to some extent: there will be a spectrum from minor procedural flaws to gross unfairness. The message of [*Croft v. Broadstairs and St Peter's Town Council* [2003] EWCA Civ 676, (Unreported, Court of Appeal of England and Wales, 15 April 2003)] is that it is not usually foreseeable that even disciplinary action which is quite seriously unfair will lead the employee to develop a psychiatric illness unless there are signs of pre-existing vulnerability."

These facts

[96] In every respect, and by ordinary human standards, the school authorities were at fault in their treatment of the plaintiff. She was a valued special needs assistant. By no standard could it have been expected that she

would have subjected any of the children in the school to any form of ill-treatment. As there is no full transcript before the court, it has not been possible to work out whether the door which was locked on 14 September 2009 incorporated a glass panel. Most school doors do but this, apparently, was a storage room called into action due to pressure for space. She was worried about the child running from the room, and the evidence was that he had that propensity, and she chose a remedy which was contrary to the not very well publicised school policy: that a child and a teacher should not be behind a locked door. Had the child bolted out the door and perhaps escaped into the street, it is possible that there could have been either disquiet or injury. Then there would really be need for an inquiry. Other people, completely responsible people, had locked the door in these circumstances. Once the informal survey conducted on her behalf disclosed that her offence was not unique, and that is what the survey did, any attempt at disciplinary action against her should have come to a complete stop. It was then the responsibility of those in charge to acknowledge, and this does not require any formal process, that there was a fairly widespread practice of teachers and special needs assistants locking themselves into a room with children; and that because this could expose them to false claims or could frighten the children, this practice should immediately stop. Thereafter, but only thereafter, a breach of that policy might become serious.

[97] In the age of judicial review, disciplinary procedures are necessarily subject to procedural infirmity and may fail due to the principles which are so ingrained in lawyers, being alien to those who are engaged in administration or education. It is also well to take into account the degree to which emotion on both sides may have influenced what has gone wrong here. O'Donnell J. is correct to call para. 48 of the judgment of Ó Néill J. into question. While in most circumstances this could be regarded as coming within the principle set out in *Hay v. O'Grady* [1992] 1 I.R. 210 at p. 217, being that inferences of fact drawn from witnesses should be treated by appellate courts with especial respect, in reality other explanations were reasonably forthcoming for what had occurred. These include emotional reaction, worry about possible claims and genuine concern for the children. People in such circumstances do not need to have their emotions whipped up but perhaps an equal explanation is that the school board just became overwrought.

[98] In all of this, instead of sensibly stepping back, the school authorities allowed the juggernaut of disciplinary action to continue in an unfair fashion and this included an incident where no closure was brought to

matters and where one particular meeting was fraught with emotion of an unpleasant kind directed against the plaintiff.

[99] What is involved here was a disciplinary process where the school authorities, for reasons best known to themselves, entrenched themselves in a dugout of justification whereby they could admit no fault. This is not bullying. The conduct was not at that extreme and repetitive level. It is, instead, a disciplinary process that has gone wrong. It must clearly be acknowledged, however, that the reason that it went wrong had nothing to do with the plaintiff but was entirely down to a lamentable failure to re-think by the school.

[100] The consequence of this has been obvious emotional distress caused to someone who should otherwise have been valued. Her contribution to the education of those with learning difficulties should be acknowledged by the court. The school should acknowledge that it was in the wrong and the plaintiff should be encouraged to return to her duties. There has been enough litigation about this matter and this part of it is not at all to the credit of the school in any way.

Costs and discretion

[101] Not every wrong, even one which results from unfair or unfortunate circumstances, gives rise to a cause of action. Given that the test for bullying is of necessity to be set very high, these are not circumstances which can attract damages. There are, however, circumstances under which the discretion of the court in relation to costs under O. 99 of the Rules of the Superior Courts 1986 can enable an acknowledgement that extreme circumstances have occurred. This can result in, and could reasonably be argued to mean here that, the costs of the litigation in the High Court and in the Supreme Court being awarded to the losing party. The circumstances that might justify this, in this one exceptional instance, also include that the relevant law has been clarified by the litigation in a manner which would be of benefit to existing and future cases and to insurers, none of whom can claim, in consequence, this exceptional circumstance. It is also rare for a court to come across an instance where one side is completely at fault, but fails to acknowledge any such failing even in the context where Ó Néill J. was required to make particularly trenchant findings of fact.

[102] The issue as to costs requires separate consideration, but by no sensible reckoning was this litigation complex. This was an ordinary tort case involving the resolution of straightforward facts: was a door locked, why was it locked, was it a breach of procedures to lock the door, was the

plaintiff the only person to lock the door while inside with a child, how would school authorities ordinarily react to such a minor breach of procedures, was it necessary to invoke a formal investigation and reprimand, was a disciplinary note justified, should that have been backed away from once the facts became clear that it was not just the plaintiff who had made that understandable mistake, what happened at the meeting of the school board, and what happened on the various occasions when the plaintiff and the school authorities met? In terms of discovery, it is hard to see more being involved than the gathering of internal human resources management and disciplinary files together with a trawl of relevant emails. In the light of whatever submissions are made as to the principal judgment of O'Donnell J. and this judgment, the costs issue and the final form of the order should then be decided.

O'Malley J.
[103] I also agree with O'Donnell and Charleton JJ.

[*Reporter's note*: On 17 July 2017, the Supreme Court heard the submissions in relation to costs and the question of repayment of the €100,000 paid to the plaintiff by the defendant pursuant to the Supreme Court's order of 4 July 2014. The Supreme Court ordered the defendant to pay 50% of the plaintiff's High Court costs, and made no order in relation to the repayment of the €100,000 paid to the plaintiff by the defendant.]

Solicitors for the plaintiff: *Burns Nowlan.*

Solicitors for the defendant: *Mason Hayes & Curran.*

Alan O'Connor, Barrister

C1989/L.R.M 393

Walsh J.
Federman J.
McCarthy J.

No. 248 & 252/1988

THE SUPREME COURT

000731

HALAL MEAT PACKERS (BALLYHAUNIS) LTD.

v.

EMPLOYMENT APPEALS TRIBUNAL

EX-TEMPORE JUDGMENT delivered on the 14th day of November 1989 by WALSH J.

This is an appeal from the order of Mr. Justice Murphy. The order is supported by a very detailed and a very carefully written judgment. The result of his order was that he refused to quash the order in respect of the main argument in this case but did give relief in respect of the sum involved, so the latter matter does not arise for consideration here.

With regard to the main issue here, that is to say the question of what happened at the Tribunal, I take the view that Mr. Justice Murphy was incorrect in his conclusions and I would allow the appeal.

This case arises from a matter which came before the Employment Tribunal, which is one of a number of tribunals

set up to relieve people of what is regarded as the undue technicalities of courts and the expense and the delay. It has a fairly rapid procedure and it sits locally, and is, in many ways, intended to be somewhat informal.

This present case indicates a degree of formality, and even rigidity, which is somewhat surprising. It is a rather ironic turn in history that this Tribunal which was intended to save people from the ordincary courts would themselves fall into a rigidity comparable to that of the common law before it was modified by equity. When we come to deal with what is the main point in the case, so far as the High Court decision is concerned, it is the question of "erring within jurisdiction". I must confess that I am not very impressed by that because everything depends on what the error is. However there is not any jurisdiction in any court or tribunal to be unfair. The question here is whether what happened was so unfair as to be a fundamental issue in the case.

This arises out of an alleged dismissal from employment

determined to be a constructive dismissal which is what it was claimed to be by the applicant before the Tribunal. I want to make it clear that nothing in the decision of this Court in any way offers any view on the merits or the facts of the case so far as the facts concern the dismissal or the relationship between Mr. Neary and his former employers.

Proceedings were launched before the Tribunal by the originating notice which was issued was dated the 12th August 1987. The documents indicate that the beginning of August seems to be a holiday period in Ballyhaunis and that, in a letter, Mr. Neary had been somewhat indignant about the fact that there seemed to be nobody to deal with the case around the beginning of August. Be that as it may it was received by the solicitors' office in Ballyhaunis on the 20th August 1987 and an appearance was entered twenty four days later, namely, the 14th September 1987 which was out of time. This was acknowledged on the 15th September. Eventually the papers were sent back looking for more particulars of the claimed defence

and then a number of mishaps seemed to have occurred for which nobody can really be blamed. These type of mishaps, non-delivery of letters and matters like that was coupled with the fact that the Secretariat of the Employment Tribunal did not fully furnish all the documentation, which turned out to be necessary, for the hearing in Ballyhaunis. These are matters which happen from time to time, but that is all the more reason why the system should remain as flexible as possible because when the Tribunal goes out to hear these cases it is exercising its jurisdiction in the very useful way of coming to the people. Thus one of the advantages of coming to the people is that matters of this kind can be checked almost immediately if it is all on the spot. Nevertheless the point was taken at the Tribunal that because the appearance was out of time that it should not be permitted. Reliance was placed on Rule 5, and the Tribunal took a rather rigid view in that they felt they were precluded from doing otherwise than to refuse in effect to hear the defence. It is not apparent that

they gave their minds to considering the question of their discretion to do so which they have by reason of a rule made subsequent to the original rule. They were entitled to extend the time at their discretion. There is a very useful rule in the Rules of the Superior Courts which says that "non-compliance of these rules" shall not invalidate any proceedings unless the Court so orders. It is somewhat odd to find practically the reverse in a tribunal of this nature. Be that as it may it does not appear that this question of the discretion was seriously considered by them. They felt bound to do what they did and in my view they were erroneous in that. The matter at issue here was a most fundamental one namely, the right of a party to meet the case made against them. Attention has been drawn to the provisions of section 8, subsection 1 of the Unfair Dismissals Act, 1977, whereby they are bound to hear both sides. Nevertheless it must be conceded that rules and regulations can be made which will regulate how that may be done. One may reach a point where because of recalcitrance or reluctance of one party or the other

to bring forward the necessary materials to the Tribunal to enable the satisfactory hearing of a claim to be accomplished. The Tribunal might just have to dispose of the matter without that material. That however is quite different from taking an absolutely rigid view on the basis that, irrespective of the merits of the matter, once the time has passed nothing can be done. This is a fundamental matter which has been the subject of many cases in our Courts, not least in the decision of this Court in the case of In re Padraig Haughey 1971 I.R. 217. One cannot effectively prevent persons from being heard in their own defence must less prevent them cross examining the other side's case.

There is a distinction also to be drawn between the right to test your opponent's case and the right to put up a case, as has arisen in this Court several times. Counsel may not be permitted to make points which were not made in the High Court save in exceptional circumstances. But at no time is it envisaged that one is not permitted to try to demolish the arguments of the other side.

In this case the Notice of Appearance appears to me to be in a somewhat odd form. It already has two readymade answers written into it, apparently circulated by the Tribunal. One is that one claims or pleads that the four statutes referred on the top of the notice are not either together or separately conceded as being applicable to the case. Even if there was nothing else in the case that is an objection. The alternative is that one is not making that point. The Secretariat of the Tribunal sent the matter back to the solicitor for further grounds. It was not rejected out of hand nor did the Tribunal do so then. Up to that stage the case appeared to be quite alive and the Tribunal wished to learn the grounds of the case to be made by the respondents.

Furthermore there is the fact that the Tribunal has power to decide the case against an applicant, not simply on the grounds advanced even by the defendant but on any other grounds which seem proper to them and which may have arisen in the case before them. It appears to

me that an effort to restrict a respondent, even in this indirect way, from pleading anything or arguing anything, except what he has expressly pleaded, is not in accordance with the tenor of the Act.

In this case it is my opinion that the rigidity went far beyond "erring within jurisdiction". It amounted in effect to a refusal to accept jurisdiction to hear half of the case. It went even further in refusing the respondent the right to cross-examine the case being made against him. It is the duty of all adjudicating bodies to act justly. That is a constitutional obligation imposed on all tribunals as on all the Courts set up under the Constitution. By definition all unfair procedures must necessarily be an infringement of the fundamental rights of the citizens as to have fair procedures in all adjudications determining rights or imposing obligations. What the ultimate justice in this case is I do not know. We are not concerned with that. What the Court is concerned with at the moment is that the procedure adopted led to what the High Court Judge described as "the awesome consequence which completely shut out the defendants".

There is a query, partly raised by myself, as to what the Circuit Court can do in such an event. I am impressed by the view expressed by Judge Clarke in Mulvey v. Kennedy and Fox 1989 ILT 28 as to what could be done in such a case but the matter was not argued to any great extent here. It is not a fundamental point in the case and the learned High Court Judge expressed some doubts about what could be done in a Circuit Appeal concerning the point at issue here. This Court is not at present in a position to give a definitive judgment on the full extent of the Circuit Judge's jurisdiction. The words used are not quite the same as those dealing with the jurisdiction in appeals to or from the Circuit Court and other cases. Be that as it may I am satisfied that in refusing to exercise a discretion in this case the Tribunal failed in one of the most fundamental requirements of justice namely, to give a fair hearing. There was no particular difficulty about it. All the parties were there. There was no hint of any prejudice or injustice to anybody. The case was made before the Tribunal by

Dr. Redmond that this was merely a device to get in a matter which had not been expressly pleaded namely, the question of the alleged fraud in the Revenue. We are not here to decide what the facts of that are but on the case law of the Tribunal in Farrell's case, it appears it would be a material factor in deciding whether they would deal with the case at all. Once the point had been made known to the Tribunal I think they should have taken more notice of the matter. But even if that matter was never raised the suggestion that the appearance was only put in by the defendants for that purpose it really is not the point in this case. The point in this case is that the employers wish to make a case. It does not matter whether it is a good case or a bad case but they were at the hearing and they were ready to make their case. Nobody was going to be taken by surprise. If there was to be a surprise then there was no difficulty in adjourning it until the matter could be studied more fully by the parties involved.

In all the circumstances of the case I am satisfied

that the order of certiorari should go on the grounds that this fundamental requirement of justice was not observed. There had not been a proper hearing of the case by reason of the refusal to permit cross-examination and the discretion to hear the other side had not been exercised.

I would allow the appeal on those grounds.

28-11-89

THE SUPREME COURT

000742

Walsh J.
Hederman J.
McCarthy J.

(248/252/88)

HALAL MEATS PACKERS (BALLYHAUNIS) LTD

- V -

EMPLOYMENT APPEALS TRIBUNAL

EX-TEMPORE Judgment of McCarthy J., delivered the 14th day of November 1989.

I agree that this appeal should be allowed.

The most fundamental requirement of justice is that both sides should be heard; so far as this employer is concerned that he, the other side, should be heard. The requirement of section 8 sub-section 1 of the 1977 Act, appears to bear that out even if it did not expressly so state; it would have to be modified in order to comply with the constitutional requirement of fair procedures. Mr. O'Reilly as I understand it has sought to challenge the making of the order on two grounds:-

1. That in effect the fair procedures argument is being used for the purpose of raising an illegality in regard to the

contract which might deny Mr. Neary his right to be treated as being a dismissed employee within the terms of the Act and

2. That the existence of the Circuit Appeal itself constitutes a bar or a reason for exercising a discretion in regard to the granting of an Order of Certiorari.

Whilst to some it may appear that the raising of the illegality by the employer has a shabby nature to it in making a defence to a man who, if his case is well-founded, has been wrongfully dismissed. That is in no way an answer to the fundamental question as to whether or not fair procedures were used at the time when the Employment Appeals Tribunal made its decision not to hear Mr. O'Dwyer or any witnesses or to allow him to take part in the procedure before it. So far as the Circuit Appeal point is concerned, I am far from concluding that the existence of a Circuit Appeal in any circumstances negatives the duty of the High Court, and consequently, this Court to embark on an inquiry as to whether or not an Order of an inferior tribunal, District Court or otherwise was made within jurisdiction. The Circuit Appeal cannot cure a defect that was fundamental to the procedure itself; I would wait for another day to decide

whether or not under any circumstances the existence of an appeal to the Circuit Court can itself be used to deny a discretionary order which must ordinarily be made out of the requirements of justice. The appeal must be allowed and the Order of Certiorari should go.

Alan Burns and **John Hartigan**, Applicants v. **The Governor of Castlerea Prison**, Respondent; **The Minister for Justice, Equality and Law Reform**, Notice Party
[2009] IESC 33, [S.C. No. 132 of 2006]

Supreme Court 2nd April, 2009

Prisons – Prison officers – Discipline – Oral hearing – Legal representation – Governor – Exercise of disciplinary jurisdiction – Whether accused entitled to legal representation – Whether governor having discretion to permit legal representation – Factors to be considered – Prison (Disciplinary Code for Officers) Rules 1996 (S.I. No. 289), r. 8(2).

Rule 8(2) of the Prison (Disciplinary Code for Officers) Rules 1996 provides as follows:-

"The accused officer shall be present throughout an oral hearing and may put forward his or her answer to the allegation and call any relevant witness."

The applicants were prison officers against whom complaints were made, as a consequence of which the respondent held a disciplinary hearing. The respondent decided, at the hearing, that the Prison (Disciplinary Code for Officers) Rules 1996 did not allow for legal representation and found that the applicants had breached discipline and imposed a penalty on the applicants. The applicants sought and obtained leave to seek judicial review of the respondent's decision on the ground that, *inter alia*, legal representation ought to have been granted to them.

The High Court (Butler J.) quashed the penalty determination by the respondent (see [2005] IEHC 76). The respondent appealed to the Supreme Court.

Held by the Supreme Court (Denham, Geoghegan and Kearns JJ.), in allowing the appeal, 1, that in any organisation where there were disciplinary procedures, it was undesirable to involve legal representation unless in all the circumstances such was required by the principles of constitutional or natural justice.

2. That, as a starting point, the criteria to be considered in the context of a request for legal representation were the seriousness of the charge and of the potential penalty, whether any point of law were likely to arise; the capacity of a particular prisoner to present his own case; any procedural difficulty; the need for reasonable speed in making the adjudication; and the need for fairness as between prisoners and as between prisoners and prison officers. But ultimately the essential point for a governor to consider was whether legal representation was needed in the particular circumstances of the case.

Reg. v. Home Sec., Ex p. Tarrant [1985] 1 Q.B. 251 approved.

3. That the cases for which the governor of a prison would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional and not necessarily related to the objective seriousness of the charges if the issues of proof were ones of simple fact.

4. That a decision not to deal with a matter under r. 5 of the Prison (Disciplinary Code for Officers) Rules 1996 would not provide an entitlement to legal representation in every case where an oral hearing under r. 8 was held.

Obiter dictum: That a "Memorandum of Understanding" linked to the Prison (Disciplinary Code for Officers) Rules 1996 could not be used for the purpose of interpreting the Rules.

Curley v. Governor of Arbour Hill Prison [2005] IESC 49, [2005] 3 I.R. 308 followed.

Cases mentioned in this report:-

Curley v. Governor of Arbour Hill Prison [2005] IESC 49, [2005] 3 I.R. 308.

Garvey v. Minister for Justice, Equality and Law Reform (Unreported, High Court, Ó Caoimh J., 5th December, 2003).

Reg. v. Home Sec., Ex p. Tarrant [1985] 1 Q.B. 251; [1984] 2 W.L.R. 613; [1984] 1 All E.R. 799.

Appeal from the High Court

The facts have been summarised in the headnote and are more fully set out in the judgment of Geoghegan J., *infra*.

On the 31st July, 2003, the High Court (Murphy J.) granted leave to the applicants to apply for judicial review for an order quashing the respondent's decision. The High Court (Butler J.) heard the matter on the 22nd and 23rd February, 2005, and an order quashing the respondent's decision was made on the 3rd February, 2006. By notice of appeal dated the 12th April, 2006, the respondent appealed to the Supreme Court. The appeal was heard before the Supreme Court (Denham, Geoghegan and Kearns JJ.) on the 23rd March, 2009.

James O'Reilly S.C. (with him *Andrew James Walker*) for the respondent.

Roddy Horan S.C. (with him *Paul Murray*) for the applicants.

Cur. adv. vult.

Denham J. 2nd April, 2009

[1] I agree with the judgment about to be delivered by Geoghegan J.

Geoghegan J.

[2] The net question which arises on this appeal is whether a prison officer, against whom complaints have been made of alleged breaches of the Prison (Disciplinary Code for Officers) Rules 1996, is entitled to legal representation at an oral hearing before the governor of the prison established under the Rules of 1996. The issue comes before this court in the form of an appeal from an order of the High Court (Butler J.) quashing a penalty determination by the respondent in an application for judicial review brought by the applicants, the two accused prison officers.

[3] Rule 8(2) of the Rules of 1996 reads as follows:-

> "The accused officer shall be present throughout an oral hearing and may put forward his or her answer to the allegation and call any relevant witness."

The mandatory part of that sub-rule required the accused prison officers to be present at the hearing. In obedience to that provision, both applicants were present but the respondent, conducting the hearing, was informed that they were only present for that reason and were not going to participate in the hearing as the respondent had, both in prior correspondence and at the hearing itself, expressly refused them legal representation. Significantly, the express grounds given by the respondent for the refusal was that the Rules of 1996 did not provide for legal representation.

[4] The High Court Judge took the view that the charges were sufficiently serious to warrant legal representation and that in those circumstances such representation ought to have been provided notwithstanding the absence of any specific mention of such representation in the rules. I will be giving details of the charges in due course and I will also return to the judgment of Butler J. I would like to refer first to the legal case put forward on behalf of the respondent in this court.

[5] Counsel for the respondent argued strongly in support of the view which the respondent had taken that, under the rules, legal representation is not provided for and is, therefore, not permissible. The rules do provide for advocacy assistance but only from officers within the prison service. It would appear, however, that, as in this particular case, it was common practice for trade union representatives to act as advocates. It was not clear to me as to whether they were in the nature of seconded officers of the prison service. Counsel for the respondent, in accordance with his instructions, was anxious to protect the principle enunciated by the respondent that the rules did not permit legal representation and he fully conceded that that was the ground on which the respondent refused it. For this reason, he appeared understandably reluctant to engage with the court on the question of whether, even if the norm would be to disallow legal representation, there would be a discretion open to the respondent to permit it in an

appropriate case. Examples of the kind of cases where it might arise were usefully listed by Webster J. in *Reg. v. Home Sec. Ex p. Tarrant* [1985] 1 Q.B. 251. I would adopt that list as a broad guideline and I will return to it later on in this judgment.

[6] Counsel for the applicants has sensibly agreed that if this court takes the view that the respondent had a discretion as to whether to allow legal representation or not, this court can then go on to decide whether in all the circumstances the decision which the respondent in fact made would have been the correct one on any exercise of that discretion. This will avoid futile and unnecessary expense in returning the matter either to the respondent or to the High Court.

[7] I turn now to the basic facts of which it is necessary only to give a brief outline. The applicants were, at all material times, prison officers in Castlerea prison. On the 26th April, 2002, they were detailed to escort a prisoner from the prison to Merlin Park hospital in Galway for a medical examination. The applicants left the prison with the prisoner at 10.25 a.m. on that morning and returned to the prison at 6.25 p.m. that evening. As a consequence of a report made following a routine check by Assistant Governor Melvin three days later, the Assistant Governor reported that he had discovered that "the prisoner's business" was completed at 12.40 p.m. and that the escort returned to the prison at 6.35 p.m. There was an immediate *prima facie* allegation that the length of time in which the applicants were on the escort was wholly excessive with the consequence of an improper overtime claim. When Assistant Governor Melvin reported to the respondent, the latter directed further investigations. Statements were made in due course by the applicants. The investigations culminated in complaint forms pursuant to the Rules of 1996 being sent to the applicants on the 15th July, 2003. The complaints were threefold and read as follows:-

"1. that on the 26th April, 2002, while assisting on the escort to Merlin Park Hospital, Galway i/c of prisoner Anthony Massey, you made a false and inaccurate statement with intent to deceive;
2. that on the 26th April, 2002, while assisting on an escort to Merlin Park Hospital, Galway i/c of prisoner Anthony Massey, you failed to carry out your duties in a prompt and diligent manner;
3. that on the 26th April, 2002, while assisting on an escort to Merlin Park Hospital, Galway, you knowingly solicited an unauthorised gratuity."

In each of these complaint forms, the accused officers were referred to a summary of the evidence on which the allegations were based in Assistant Governor Melvin's report of the 25th April, 2002.

[8] Following on the oral hearing already referred to, identical letters were written to each of the applicants by the respondent dated the 8th July, 2003, and in the following terms:-

> "I refer to the oral hearing held on the 7th July, 2003, in accordance with the Prison (Disciplinary Code for Officers) Rules 1996 on charges issued against you on the 15th January, 2003.
>
> In response to the charges as outlined against you, you stated through your advocate that you were 'not taking any part in the hearing because of deprivation of legal representation'.
>
> As pointed out to you at the hearing and indeed to your legal representatives in a correspondence of the 18th June *anno*. the code does not allow for any such legal representation in these matters.
>
> I am satisfied, based on the evidence presented and in the absence of any rebuttal of this evidence, that the alleged breaches of discipline have been proved.
>
> I am satisfied that there was unnecessary delay on the departure and intentional delay during the escort.
>
> Your conduct on this escort was totally unacceptable, created unnecessary overtime and contravened Governor's orders regarding escorts.
>
> As a consequence of your breaches of discipline I am reprimanding you with entry on your record sheet and I am recommending to the Minister that you should suffer reduction in pay by way of forfeiture of one increment for twelve months."

[9] The letter was then signed by the respondent, Daniel J. Scannell. Further letters in identical terms dated the 8th July, 2003, and also signed by the respondent were sent to each of the applicants and each of those letters read as follows:-

> "Following upon the adjudication of charges placed against you on the 7th July, 2003, I am directing, for operational reasons, that future duties assigned to you shall be performed within the prison complex. This direction shall be reviewed after a period of twelve months.
>
> I am satisfied that the time you spent on the escort was excessive and that a reasonable return time would be 3.30 p.m. as against 6.35 p.m. as you claimed. You are required to make good these three hours overtime payment which has been paid to you."

[10] Nothing particularly turns on this, but I would be quite satisfied that stipulations contained in that second letter did not form part of the penalty as such but did, of course, arise as a consequence of what happened. The prison authorities clearly decided that if the applicants were unreliable escorts their duties should henceforth be internal. It was an operational decision as it is clearly stated to be. The requirement of

reimbursement of three hours overtime payment was also simply a claim for a sum considered now to be due to the State.

[11] The applicants obtained leave to seek judicial review of the respondent's decision. That judicial review was based on some additional grounds over and above the ground that legal representation ought to have been granted. However on the appeal the legal representation issue was the only issue and that is the only matter with which I intend to deal. On that primary issue the operative part of the judgment of Butler J. in the High Court makes clear that the High Court Judge quite rightly was of the view that the absence of reference to legal representation in the rules did not necessarily preclude it (see [2005] IEHC 76, Unreported, 16th March, 2005). He claimed to be reinforced in that view by the judgment of Ó Caoimh J. in *Garvey v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Ó Caoimh J., 5th December, 2003) where in a somewhat analogous situation that judge held that if the code was to exclude legal representation it could easily have done so by the use of clear and plain language. While that observation is valid, the Constitution itself might require legal representation in exceptional cases irrespective of the wording. The High Court Judge pointed out that Ó Caoimh J. in *Garvey v. Minister for Justice, Equality and Law Reform* in considering the very same rule had observed as follows at p. 41:-

> "While these rules provide for representation by a fellow officer, I am satisfied that they do not either expressly or impliedly restrict any right to legal representation."

[12] Butler J. rightly followed this approach. The question which I have to consider is whether he was correct in his view that on any proper exercise of the discretion by the respondent, legal representation would have been permitted. Butler J. expressed his views this way:-

> "The breaches with which the applicants stood accused were not in the least trivial, in that, at the very least, they suggested dishonesty on the part of the applicants in carrying out their duty. The potential penalties which the applicants faced included recommendations for a reduction in rank and dismissal from the prison service. I am satisfied that in the instant case natural or constitutional justice required that the applicants should be entitled to legal representation."

[13] While there is obviously room for legitimate difference of opinion as to the proper exercise of a discretion in any given set of circumstances, I would take the view that legal representation was clearly unnecessary in this case. On one view, none of the charges were serious enough in the objective sense. However, I am reluctant to use that terminology given that at least one of them involves the alleged making of a deliberately false statement with intent to deceive. From a human point of view, that is a

serious allegation in the mind of an accused but in the context of the factual matrix to this case, the charges could very easily be defended without a lawyer. The issues were factual issues connected with the day to day running of the prison. It is difficult to see why a lawyer would be required. The rules specify who is to be an advocate and, therefore, subject to the overall obligation of fairness, they should be followed. The cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional. They would not necessarily be related even to the objective seriousness of the charges if the issues of proof were purely ones of simple fact and could safely be disposed of without a lawyer. In any organisation where there are disciplinary procedures, it is wholly undesirable to involve legal representation unless in all the circumstances it would be required by the principles of constitutional justice.

[14] I mentioned earlier in this judgment the case of *Reg. v. Home Sec. Ex p. Tarrant* [1985] 1 Q.B. 251. The criteria to be considered in the context of a request for legal representation as set out by Webster J. in that case have stood the test of time in the United Kingdom and I think that on a *prima facie* basis they could safely be adopted in this jurisdiction. I would add a rider however. In listing them, I am merely suggesting that they are the starting off points to be considered. Even if the case falls within one of these categories, in the context say of the Rules of 1996, the respondent would still be entitled to consider whether a fair hearing would require a lawyer. The six matters suggested by Webster J. are as follows:-

1. the seriousness of the charge and of the potential penalty;
2. whether any points of law are likely to arise;
3. the capacity of a particular prisoner to present his own case;
4. procedural difficulty;
5. the need for reasonable speed in making the adjudication, that being an important consideration; and
6. the need for fairness as between prisoners and as between prisoners and prison officers.

[15] I would approve of that list but it is a list merely of the kind of factors which might be relevant in the consideration of whether legal representation is desirable in the interests of a fair hearing. Ultimately, the essential point which the relevant governor has to consider is whether from the accused's point of view legal representation is needed in the particular circumstances of the case. I would reiterate that legal representation should be the exception rather than the rule. In most cases the provisions of the Rules of 1996 will simply apply.

[16] There are two other matters which I should mention. The first is that in the hearing in the High Court (see [2005] IEHC 76), Butler J. on the

prompting of counsel had regard to a document called "Memorandum of Understanding" which preceded the Rules of 1996, in interpreting those rules. However, since the delivery of the judgment of the High Court in this case on the 16th March, 2005, this court, in a judgment delivered on the 18th July, 2005, by Hardiman J. and with which McCracken and Laffoy JJ. concurred in the case of *Curley v. Governor of Arbour Hill Prison* [2005] IESC 49, [2005] 3 I.R. 308, has held that the "Memorandum of Understanding" may not be used for the purpose of interpreting Rules of 1996. For that reason, I have made no reference to that memorandum but at any rate consideration of it would have made no difference to the view I take on this appeal.

[17] The second matter relates to an argument made on behalf of the applicants based on rule 5 of the Rules of 1996. That rule reads as follows:-

> "Nothing in these rules shall affect the right of a Governor or any officer whose duties include the supervision of another officer to deal informally (whether by advice, caution or admonition as the circumstances may require) with a breach of discipline of a minor nature."

[18] The argument was made that since the respondent thought fit to hold an oral hearing under r. 8 and not deal with the matter under r. 5, he was thereby accepting that the breaches of discipline in this case were not of a minor nature and that it further followed from that that any hearing in relation to them required legal representation. I would wholly reject that argument. Indeed if it was sound, the effect of it would be that there would be an entitlement in every case where there was an oral hearing to have legal representation. That would be contrary both to the clear intention of the Rules and to any requirement of constitutional or natural justice.

[19] For the reasons which I have set out therefore, I would allow the appeal and I would consider that the court should make an order setting aside the order of the High Court quashing the respondent's decision.

Kearns J.

[20] I agree with Geoghegan J.

Solicitor for the respondent: *The Chief State Solicitor*.

Solicitors for the applicants: *Gallagher Shatter Solicitors*.

Brian Kelly, Barrister

The Minister for Education and Skills, Applicant v. **The Labour Court**, Respondent and **Anne Boyle** and **Committee of Management of Hillside Park Pre-school**, Notice Parties [2018] IESC 52, [S.C. No 47 of 2017]

Supreme Court 1 November 2018

Employment law – Part-time workers – Teachers – Employer – Comparator – Less favourable treatment – Contract of service – Whether teacher and full-time comparator sharing same employer – Whether Minister employer – Whether relationship between teacher, committee of management and Minister constituting contract of service between teacher and Minister – Payment of Wages Act 1991 (No. 33), s. 1 – Employment Equality Act 1998 (No. 21), ss. 2 and 77 – Protection of Employees (Part-Time Work) Act 2001 (No. 45), ss. 3, 7 and 9.

Section 9(1) of the Protection of Employees (Part-Time Work) Act 2001 provides that a part-time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee.

Section 3(1) of the 2001 Act defines an "employee" as "a person of any age who has entered into or works under … a contract of employment …"

Section 3(1) of the 2001 Act further defines "contract of employment" as meaning:-

> "(a) a contract of service or apprenticeship, and
>
> (b) any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act, 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract),
>
> whether the contract is express or implied and, if express, whether it is oral or in writing".

Section 3(1) of the 2001 Act further defines an "employer" as meaning, "in relation to an employee, the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment, subject to the qualification that the person who under a contract of employment referred to in paragraph (b) of the definition of 'contract of employment' is liable to pay the wages of the individual concerned in respect of the work or service concerned shall be deemed to be the individual's employer".

Section 7(2) of the 2001 Act makes provision for the identification of a "comparable employee" in relation to a part-time employee:-

> "(2) For the purposes of this Part, an employee is a comparable employee in relation to the employee firstly mentioned in the definition of 'part-time employee' in this section (the 'relevant part-time employee') if—

(a) the employee and the relevant part-time employee are employed by the same employer or associated employers and one of the conditions referred to in subsection (3) is satisfied in respect of those employees …"

The first notice party worked as a teacher at a pre-school for children from the Traveller community. Funding for Traveller pre-schools was provided by the applicant by means of a grant to assist management committees in engaging staff. The first notice party's salary was discharged both from a grant received by the second notice party from the applicant and from funds of the second notice party that were raised through fund-raising efforts. The grant was paid by the applicant into a bank account held in the name of the second notice party and covered 98% of the first notice party's salary. This method of payment was phased out by the applicant over several years and was replaced by a system of direct payments by the applicant to the teachers concerned.

Following the introduction of a universal pre-school scheme, the applicant ceased grant-aiding segregated pre-schools for children from the Traveller community. The pre-school managed by the second notice party closed thereafter and the first notice party was made redundant.

The first notice party sought access from the applicant to the National School Teachers' Superannuation Scheme. The applicant refused the first notice party access to the scheme on the basis that she was not a national school teacher employed in a national school.

The first notice party brought a complaint to a rights commissioner seeking that the terms and conditions of the superannuation scheme be applied to her. She argued that she was being treated less favourably than what she asserted was a full-time comparator, being a national school teacher working in an "early start" unit in a primary school. The first notice party submitted that she was a relevant part-time employee as she and her comparator shared the same employer, namely the applicant. The rights commissioner concluded that the applicant was not the first notice party's employer or an associate employer within the meaning of the 2001 Act.

The first notice party appealed the decision of the rights commissioner to the respondent. The respondent concluded that the first notice party and her comparator were both employed by the applicant. The respondent directed that the applicant should admit the first notice party to the superannuation scheme.

The applicant challenged the decision of the respondent by way of judicial review in the High Court, arguing that the respondent erred in law in concluding that the first notice party and her chosen comparator were both employees of the applicant. The High Court (O'Malley J.) concluded that school teachers whose salaries were publicly funded had to be deemed, for the purposes of the 2001 Act, to be employed by the applicant ([2015] IEHC 429). Consequently, the High Court upheld the finding of the respondent that the first notice party was employed on the same basis as national school teachers, that the first notice party had been treated less favourably than her full-time comparator, and that she was therefore entitled to redress under the 2001 Act. However, the High Court held that the respondent was not empowered to order that the first notice party be admitted to the superannuation scheme. The matter was remitted to the respondent for further consideration as regards the question of compensation.

The applicant appealed to the Court of Appeal. The Court of Appeal agreed with the conclusions of the High Court regarding the status of the applicant as employer of both the first notice party and her comparator ([2017] IECA 39).

The applicant was granted leave to appeal to the Supreme Court on the question as to whether the applicant could be said to be an employer of the first notice party in relation to pay-related matters for the purposes of the 2001 Act ([2017] IESCDET 58).

Held by the Supreme Court, in allowing the appeal and quashing the determination of the respondent, 1, that it was not possible to characterise the relationship between the applicant and the first notice party as involving a contract of service to which the applicant was a party. The ordinary meaning of a "contract of service" implied an arrangement whereby one party agreed to work for the other and, subject to the terms of the contract, under the control of that person as to how they carried out their work. The applicant had no entitlement to direct the type of work that the first notice party was to do and, applying the ordinary and natural meaning of "contract for service", it was the school management that was the other party to her contract of employment.

O'Keeffe v. Hickey [2008] IESC 72, [2009] 2 I.R. 302 considered.

2. That while there might be circumstances where a minister would incur a liability in respect of persons whom a minister chose to pay directly, or where the minister was effective paymaster even though the payment may be made by an intermediary, each such case had to be considered in the light of established legal principles applicable to the area in question. In the context of the 2001 Act and its reliance on the term "contract of service" (with only one, non-applicable exception in relation to agency workers), it was not intended that other categories of persons, beyond those who could, as a matter of contract law properly construed, be regarded as an employer involved in a contract of service with a claimant, should come within its scope.

Obiter dictum, per Clarke C.J. (*nem. diss.*): As a matter of statutory construction, the fact that an officer of the State took a different approach to the interpretation and application of two different statutes that were worded in the same fashion did not, of itself, require the court to take that fact into account in coming to a view as to what the legislation meant.

Cases mentioned in this report:-

Blackrock College v. Browne [2013] IEHC 607, (Unreported, High Court, Hedigan J., 20 December 2013).

Catholic University School v. Dooley [2010] IEHC 496, [2011] 4 I.R. 517.

Fox v. Higgins (1912) 46 I.L.T.R. 222.

McEneaney v. Minister for Education [1941] I.R. 430.

Minister for Education and Science v. Labour Court [2015] IEHC 429, [2015] 26 E.L.R. 278.

Minister for Education and Skills v. Labour Court [2017] IECA 39, (Unreported, Court of Appeal, 24 February 2017).

O'Keeffe v. Hickey [2008] IESC 72, [2009] 2 I.R. 302; [2009] 1 I.L.R.M. 490.

Sullivan v. Department of Education [1998] 9 E.L.R. 217.

Wiley v. The Revenue Commissioners [1989] I.R. 350.

Determinations of the Supreme Court mentioned in this report:-
Minister for Education and Skills v. Labour Court [2017] IESCDET 58, (Unreported, Supreme Court, 19 June 2017).

Appeal from the Court of Appeal

The facts have been summarised in the headnote and are more fully set out in the judgment of Clarke C.J., *infra*.

By application for leave and notice of appeal dated 29 March 2017, the applicant sought to appeal to the Supreme Court, pursuant to Article 34.5.3° of the Constitution, the judgment dated 24 February 2017 and order dated 10 March 2017, and perfected on 16 March 2017, of the Court of Appeal (Finlay Geoghegan, Peart and Hogan JJ.) ([2017] IECA 39).

By determination dated 19 June 2017, the Supreme Court (Denham C.J., Clarke and MacMenamin JJ.) granted leave to appeal ([2017] IESCDET 58).

The appeal was heard by the Supreme Court (Clarke C.J., O'Donnell, McKechnie, MacMenamin and Dunne JJ.) on 28 June 2018.

Feichín McDonagh S.C. (with him *Cathy Smith*) for the applicant.

Peter Ward S.C. (with him *Mairéad McKenna*) for the first notice party.

Cur. adv. vult.

Clarke C.J. 1 November 2018

1. Introduction

[1] The unusual triangular or tripartite arrangement whereby much education in Ireland is funded and controlled has given rise to a number of important and difficult legal questions over the years. The practical manner in which that system operates is not in dispute, but the legal rights and obligations which derive from it have given rise to difficult issues. While it will be necessary to refer to the facts of this case in due course and while there is one aspect of the relationship between the parties to this case which is, perhaps, somewhat different to what might be described as an entirely typical

situation in the field, nonetheless the broad system applies in a very great number of situations within the State-funded educational system.

[2] At its most basic, schools are under the management and day-to-day control of management boards or the like, although the precise structure may vary somewhat as and between primary and secondary schools. In very many cases the salaries of all teachers are, however, paid directly by the applicant/appellant ("the Minister") with the terms and conditions of employment being agreed from time to time between the Minister and representatives of teachers, or, in the absence of such agreement, being fixed by the Minister. Even in the case of fee-paying secondary schools, a significant number of teachers' salaries are paid in that way by the Minister, with the fees contributed by parents going to additional expenditure, whether relating to the employment of a larger number of teachers than governmental schemes support or additional facilities or courses.

[3] At its simplest, the triangular or tripartite system means that, for the purposes of ordinary day-to-day control including hiring, allocation of duties and the like, teachers have their contractual relations with a board of management. The relationship of the majority of teachers (that is, those who are paid by the Minister) with their paymaster can, however, complicate matters to the extent that legal issues can arise as to how to characterise as a matter of law the relationship between a teacher whose salary is paid by the State and the Minister who is responsible for making those payments and, to a very large extent, also fixes the terms on which those payments are to be made.

[4] It will again be necessary to set out in somewhat greater detail the way in which courts and other bodies with decision-making power in the employment law field have approached those legal issues. However, the narrow question which arises on the facts of this case concerns the proper legal characterisation of that relationship for the purposes of the Protection of Employees (Part-Time Work) Act 2001 ("the 2001 Act"). In simple terms, the question is as to whether the Minister can be regarded as an employer of the first notice party/respondent ("Ms. Boyle") for the purposes of that legislation, or at least for the purposes of that legislation insofar as it relates to financial or pay matters.

[5] That question has been before a rights commissioner, the Labour Court, the High Court on judicial review and the Court of Appeal. The decision of the Labour Court was in favour of Ms. Boyle and held that the Minister was an employer for those purposes. Both the High Court and the Court of Appeal refused the Minister an order quashing that decision on the grounds of being erroneous in law. It is as against that decision of the Court

of Appeal that the Minister has brought an appeal to this court. In order to understand the precise basis on which the matter comes before this court, it is, perhaps, appropriate to start with a brief outline of the course of these proceedings to date.

2. The course of the proceedings to date

[6] In 2009, Ms. Boyle sought access from the Minister to the National School Teachers' Superannuation Scheme ("the Superannuation Scheme"). This scheme was established under the Teachers Superannuation Act 1928, and provides pension benefits to teachers employed in national schools. The Minister refused access to Ms. Boyle on the basis that she was not a national school teacher employed in a national school. Rather, Ms. Boyle was a qualified secondary teacher who was working as a teacher at Hillside Park, which was a pre-school for children from the Traveller community.

[7] On 16 March 2009 Ms. Boyle brought a complaint to a rights commissioner seeking that the terms and conditions of the Superannuation Scheme be applied to her. She argued that she was being treated less favourably than what she asserted was a full-time comparator, being a national school teacher working in an "early start" unit in a primary school. This unfavourable treatment was said to be contrary to s. 9(1) of the 2001 Act. Ms. Boyle argued in support of this position that she was a relevant part-time employee as she and her comparator shared the same employer, namely the Minister. The rights commissioner concluded that the Minister was not Ms. Boyle's employer within the meaning of s. 3(1) of the 2001 Act, nor an associate employer within the meaning of s. 7(5) of that Act. For reasons which will become clear, it was essential in the context of this claim that Ms. Boyle and her asserted comparator had the same or an associated employer. The rights commissioner therefore rejected the complaint as not well founded.

[8] Ms. Boyle appealed the decision of the rights commissioner to the Labour Court. In its decision, the Labour Court first addressed the issue of whether the Minister ought to be regarded as Ms. Boyle's employer for the purpose of her complaint. The Labour Court stated that it was bound by the decision of the High Court in *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517. The Labour Court concluded that, as a consequence of the decision in *Catholic University School v. Dooley* [2010] IEHC 496, the Minister was to be regarded as Ms. Boyle's employer. Secondly, the Labour Court considered whether Ms. Boyle and her chosen comparator were engaged in like work for the purposes of s. 9(1) of the 2001 Act. Ultimately, the court concluded that Ms. Boyle and her comparator were both

employed by the Minister, thus satisfying s. 7(2)(a) of the 2001 Act. Furthermore, the court concluded that Ms. Boyle and her comparator were engaged in work of equal value within the meaning of s. 7(3)(c) of the 2001 Act. Consequently, the Labour Court concluded that Ms. Boyle's complaint was well founded and that the decision of the rights commissioner ought to be reversed. The Labour Court directed that the Minister should admit her to the Superannuation Scheme, effective from 21 September 2008 and pay her €10,000 in compensation.

[9] The Minister subsequently sought to challenge that decision of the Labour Court by way of judicial review in the High Court, arguing that the Labour Court acted contrary to fair procedures, acted *ultra vires*, and that it erred in law in concluding that Ms. Boyle and her chosen comparator were both employees of the Minister. It followed, it was said, that the Labour Court was incorrect to direct that Ms. Boyle be admitted to the Superannuation Scheme and also that the Labour Court erred in awarding compensation for discrimination found to have been suffered by Ms. Boyle. The High Court ([2015] IEHC 429, [2015] 26 E.L.R. 278) concluded that school teachers whose salaries are publicly funded must be deemed, for the purposes of the 2001 Act, to be employed by the Minister. Consequently, the High Court upheld the finding of the Labour Court to the effect that Ms. Boyle was employed on the same basis as national school teachers, that Ms. Boyle had been treated less favourably than her full-time comparator, and that she was therefore entitled to redress under the 2001 Act. However, the High Court held that the Labour Court was not empowered to order that Ms. Boyle be admitted to the Superannuation Scheme. The matter was remitted to the Labour Court for further consideration as regards the question of compensation.

[10] The Minister appealed the above decision of the High Court to the Court of Appeal. The Court of Appeal ([2017] IECA 39) agreed with the ultimate conclusions of O'Malley J. in the High Court regarding the status of the Minister as employer of both Ms. Boyle and her comparator. In particular, Hogan J. concluded that the relationship between the Minister and Ms. Boyle gave rise to an implied contract of employment between the two parties in relation to pay-related matters. The Court of Appeal further agreed with the High Court in holding that the Labour Court was not empowered to order Ms. Boyle's admittance to the Superannuation Scheme.

[11] While it will be necessary to analyse the reasoning of the various relevant bodies or courts in due course, it is appropriate next to turn to the basis on which the Minister obtained leave to appeal to this court.

3. The grant of leave to appeal

[12] On 29 March 2017, the Minister applied for leave to appeal to this court, which leave was granted on 19 June 2017 ([2017] IESCDET 58). The court granted leave to the Minister to pursue the appeal on the following ground:-

> "[W]hether, in all the circumstances of this case, the Minister can be said to be an employer of Ms. Boyle in relation to pay-related matters for the purposes of the 2001 Act."

[13] Ms. Boyle did not seek leave to cross-appeal on the question of admittance to the Superannuation Scheme. That issue, therefore, no longer forms part of the case.

[14] While the issue on which leave was granted is substantially one of law, it is necessary to consider that legal question against the backdrop of the facts which, as noted earlier, were not in serious contention. I therefore set out the agreed facts.

4. The agreed facts

[15] Hillside Park was a segregated pre-school in Galway which provided for children from the Traveller community. It was set up in 1981 by a committee under the patronage of the local bishop. That committee ("the Management Committee") is the second notice party but did not take an active role in these proceedings as it is, in effect, now defunct. Ms. Boyle worked in Hillside from 1989 until the pre-school closed in 2011. Hillside opened for three hours a day, five days a week, during the normal school year. During her time there, Ms. Boyle was the only teacher in the school.

[16] Hillside Park was managed by the Management Committee which was a voluntary committee. The Management Committee controlled Ms. Boyle in the discharge of her duties. It should be noted that the Management Committee was not a board of management in respect of a recognised school, as provided for in Part IV of the Education Act 1998. Furthermore, as was noted above, while Ms. Boyle was qualified to teach in a post-primary school, she was not a qualified national school teacher. Hillside Park was not a national school, nor any other type of recognised school within the meaning of the Education Act 1998. It should be further noted that Ms. Boyle was herself a member of the Management Committee, and that correspondence between the Minister and the committee was often sent to Ms. Boyle's home address.

[17] Funding for Traveller pre-schools was provided by the Minister by means of a grant to assist management committees in engaging staff. Ms. Boyle's salary was discharged both from the grant which the Management Committee received from the Minister and from funds of the Management Committee which were raised through fundraising efforts. The grant from the Minister equated to 98% of the salary of a national school teacher *pro rata* to the number of hours worked. The grant was paid by the Minister into a bank account held in the name of the Management Committee. This included the amount payable as employer's PRSI. The Minister also paid a *per capita* grant in respect of the children enrolled in the pre-school and an equipment grant to the Management Committee. Ms. Boyle's entitlement to sick leave, maternity leave, annual leave and compassionate leave was determined by the extent to which the grant payable by the Minister provided for such leave periods.

[18] In 2006, as a result of a new Traveller education strategy, there was a change in educational policy to the effect that inclusive pre-school education of children was favoured over segregation of Traveller children. The Minister decided to cease grant-aiding segregated pre-schools for children from the Traveller community following the announcement in 2009 of a universal pre-school scheme which was to commence the following year.

[19] As noted above, the complaint at the heart of these proceedings was brought by Ms. Boyle to a rights commissioner on 16 March 2009.

[20] In 2011, following the cessation of funding for segregated Traveller pre-schools, and the death of the founder of the school (Mr. Neylon), Hillside Park closed. Ms. Boyle received a redundancy payment of €18,000 directly from the Minister in the summer of 2011. This equated to her statutory redundancy entitlement.

[21] As is clear from the above, for at least the vast majority of her time at Hillside Park, Ms. Boyle's salary was not paid directly by the Minister. Rather, an arrangement was come to between the Minister and Hillside Park to the effect that the Minister would pay a grant equating to 98% of the salary of a national school teacher to cover Ms. Boyle's salary, with Ms. Boyle's entitlements to annual leave, sick leave and the like being determined in effect by the Department of Education ("the Department"). It follows that there was a significant engagement between the parties from time to time concerning aspects of Ms. Boyle's entitlements. A brief history of that engagement is also potentially of relevance to the issues which arise in this case.

[22] As noted above, Ms. Boyle was a member of the Management Committee. As it happens, some of the correspondence referred to below is addressed to the committee, or the chairperson, but was sent to Ms. Boyle's

home address. Similarly, it appears that in some instances Ms. Boyle received correspondence addressed directly to her at her home address rather than receiving the correspondence on behalf of the committee.

[23] Between 1989 and 1992 Ms. Boyle was paid an hourly rate. In 1992, however, the Minister introduced a scheme establishing "Pro-Rata Pay and Conditions for Eligible Part-Time Teachers in Special Schools and other Institutions". The scheme was open only to part-time teachers who were wholly or mainly dependent for their livelihood on their earnings from part-time teaching, and who were fully qualified, or part-time teachers who, though not fully qualified, had been sanctioned in their posts by the Department and who had at least one year's service prior to 1 September 1990. The *pro rata* aspect was by reference to the earnings of full-time national school teachers.

[24] The terms of the scheme specifically stated that it did not provide for any amendments to the then current regulations in relation to superannuation. It also stated that "[t]he employment or re-employment of a teacher under the scheme is a matter for the employer *i.e.*, the management authorities of special schools or other institutions".

[25] On 30 September 1992 a letter was sent to Ms. Boyle from the Department setting out the differences in her entitlements under the existing part-time teacher rate and the new scheme referred to above. The letter advised Ms. Boyle that "the main advantage of the EPT [eligible part-time] scheme is the fact that you will be on a fixed annual salary which will continue to be paid during periods of sick leave or maternity leave". Ms. Boyle's application to the scheme was acceded to.

[26] Ms. Boyle became an "eligible part-time" teacher in 1992. Her salary was set at the first point of the scale with an allowance for her degree and her higher diploma in education. Ms. Boyle was informed that, as she was not a fully qualified national teacher, she would remain on this point of the scale.

[27] On 26 April 1996 a letter was sent to Ms. Boyle from the Department concerning her application to receive an allowance for a master's degree in education, which degree had been conferred on Ms. Boyle in 1995. Ms. Boyle was advised that, as it was not possible to hold three qualification allowances under the existing salaries scale for teachers, her master's qualification would be substituted for one of the two existing allowances. Consequently, the grant payable in respect of Ms. Boyle's salary was increased.

[28] In 2000 the Minister decided that, due to a shortage of teachers, qualified secondary teachers taking up posts in national schools in a temporary or substitute capacity would be paid at a rate applicable to qualified

primary teachers. This was set out in circular 0024/2000. Ms. Boyle successfully applied to be included in the new arrangement and accordingly was placed on the second point of the scale. Thereafter, the incremental salary scale was applied to her and she continued to progress through the incremental scale for the rest of her employment. However, the grant remained capped at 98% of what would have been payable had she been employed by a national school.

[29] As noted above, the way in which the grant provided by the Minister was disbursed was via a system of payment of a grant to the school as opposed to direct payment to the teacher to whom the grant related. However, in 2008 the Department issued circular 2008/88, which altered the grant system on a phased basis to direct payments to the teacher. This was done with a view to reducing the administrative burden on schools and also to help ensure the terms of the 2001 Act were fully implemented for part-time teachers. This new direct payment system was implemented in January 2011 for Traveller pre-schools.

[30] On 12 January 2010 a letter was sent from the Department to the chairperson of the Management Committee explaining that the grant in respect of Ms. Boyle's salary was reduced proportionately so as to reflect the reduction in the salary of national school teachers provided for under the Financial Emergency Measures in the Public Interest (No. 2) Act 2009 ("FEMPI").

[31] In November 2010, in a circular (0070/2010) sent by the Department, it was explained, in relation to a question as to whether certain staff who had not been subject to the pension levy introduced in earlier legislation were subject to pay reductions under FEMPI, that all staff employed by a recognised school or VEC come within the definition of public servant "solely for the purposes of the Act." Under the heading of "categories of staff who will now be affected" the circular referred to "teachers employed in Traveller preschools".

[32] Against that factual backdrop it is then necessary to look at the relevant legal issue which arose at each stage of these proceedings. The legal framework operates within the ambit of the 2001 Act to which it is now necessary to turn.

5. The 2001 Act

[33] It is first appropriate to look at the relevant provisions of the 2001 Act itself. The long title of the 2001 Act states that it is an act "to provide for

the implementation of Directive 97/81/EC of 15 December 1997 [the part-time workers Directive] …"

[34] Section 9(1) of the Act provides:-

"Subject to subsections (2) and (4) and section 11(2), a part-time employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable full-time employee."

[35] Section 7(1) defines the term "part-time employee" as follows:-

"'[P]art-time employee' means an employee whose normal hours of work are less than the normal hours of work of an employee who is a comparable employee in relation to him or her".

[36] Section 3(1) defines the term "contract of employment" as meaning:-

"(a) a contract of service or apprenticeship, and

(b) any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act, 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract),

whether the contract is express or implied and, if express, whether it is oral or in writing".

[37] The term "employee" is defined as:-

"… a person of any age who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer; and for the purposes of this Act, a person holding office under, or in the service of, the State (including a civil servant within the meaning of the Civil Service Regulation Act, 1956) shall be deemed to be an employee employed by the State or Government, as the case may be, and an officer or servant of a local authority for the purposes of the Local Government Act 2001 (as amended by the Local Government Reform Act 2014), or of a harbour authority, or health board, or a member of staff of an education and training board shall be deemed to be an employee employed by the authority or board, as the case may be."

[38] The term "employer" is defined as follows:-

"'employer' means, in relation to an employee, the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked

under) a contract of employment, subject to the qualification that the person who under a contract of employment referred to in paragraph (b) of the definition of 'contract of employment' is liable to pay the wages of the individual concerned in respect of the work or service concerned shall be deemed to be the individual's employer."

[39] Section 7(2) of the 2001 Act makes provision for the identification of a "comparable employee" in relation to a part-time employee:-

"(2) For the purposes of this Part, an employee is a comparable employee in relation to the employee firstly mentioned in the definition of 'part-time employee' in this section (the 'relevant part-time employee') if—

(a) the employee and the relevant part-time employee are employed by the same employer or associated employers and one of the conditions referred to in subsection (3) is satisfied in respect of those employees,

(b) in case paragraph (a) does not apply (including a case where the relevant part-time employee is the sole employee of the employer), the employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant part-time employee, to be a type of employee who is to be regarded for the purposes of this Part as a comparable employee in relation to the relevant part-time employee, or

(c) in case neither paragraph (a) nor (b) applies, the employee is employed in the same industry or sector of employment as the relevant part-time employee is employed in and one of the conditions referred to in subsection (3) is satisfied in respect of those employees,

and references in this Part to a comparable full-time employee in relation to a part-time employee shall be construed accordingly."

[40] Section 7(3) of the 2001 Act goes on to provide:-

"(3) The following are the conditions mentioned in subsection (2)—

(*a*) both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,

(*b*) the work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each, either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and

(*c*) the work performed by the relevant part-time employee is equal or greater in value to the work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions."

[41] Section 16 of the 2001 Act makes provision for the making of complaints under the Act to a rights commissioner. Section 17 concerns appeals from decisions of a rights commissioner to the Labour Court.

[42] It is important, therefore, to note the structure of the Act. In order for a successful claim to arise under the legislation it is necessary that one of the three conditions set out in s. 7(2) of the 2001 Act is met. As can be seen, each of those provisions involves a comparison with what is described in the legislation as a comparator who is in substance a full-time employee meeting the conditions set out in one or other of the subsections of s. 7(2).

[43] As already noted, in the circumstances of this case, a decision was made under s. 7(2)(a) which requires both the claimant employee and the comparator to be in the same employment. As also noted earlier, the comparator in this case was a qualified national school teacher who worked in an "early start" unit for pre-school age children within a national school. Thus, in order for the Labour Court to have been correct to come to the conclusion that s. 7(2) was met, it would be necessary also to conclude that both Ms. Boyle and that other relevant teacher had the same or an associated employer, with it following that, for practical purposes, it would be necessary to determine that, as a matter of law, both could be regarded as being in the employ of the Minister.

[44] It is in that specific legal context that the question of whether it can properly be said that Ms. Boyle was, at least for financial and pay purposes, an employee of the Minister comes into proper focus. That is, thus, the net issue which this court has to determine.

[45] As part of the process of considering that question, it is necessary to have regard to a number of decisions of both courts and other bodies in the employment law sphere which have considered the status of persons in the triangular or tripartite teacher-type arrangements which are at the heart of these proceedings and their legal relationship with the Minister for the purposes of other legislation. I would propose, therefore, to review the case law on other legislation in that context.

6. The case law on other legislation

[46] In their submissions, counsel for Ms. Boyle have highlighted at least two instances where they argue that the Minister has accepted that he

is the appropriate respondent to claims made by teachers on pay-related matters. First, under the Payment of Wages Act 1991 ("the 1991 Act") and secondly under the Employment Equality Acts 1998-2015 ("the Employment Equality Acts").

[47] *Sullivan v. Department of Education* [1998] 9 E.L.R. 217 is a decision of the Employment Appeals Tribunal, on appeal from a decision of a rights commissioner, concerning a complaint made under the 1991 Act. The claimant teacher argued that she had been wrongly denied access to a particular qualification allowance and that this amounted to an unlawful deduction of wages within the meaning of the 1991 Act. The Minister contended among other things that he was not the employer of the claimant, but was merely a "paying agent". At this stage, it is worth briefly setting out the relevant provisions of the 1991 Act before turning to the decision of the tribunal.

[48] Section 1(1) of the 1991 Act defines the term "contract of employment" as follows:-

> "(a) a contract of service or of apprenticeship, and
>
> (b) any other contract whereby an individual agrees with another person to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract) whose status by virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual, and the person who is liable to pay the wages of the individual in respect of the work or service shall be deemed for the purposes of this Act to be his employer,
>
> whether the contract is express or implied and if express, whether it is oral or in writing".

[49] The term "employee" is defined as:-

> "a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and references, in relation to an employer, to an employee shall be construed as references to an employee employed by that employer; and for the purpose of this definition, a person holding office under, or in the service of, the State (including a member of the Garda Síochána or the Defence Forces) or otherwise as a civil servant, within the meaning of the Civil Service Regulation Act, 1956, shall be deemed to be an employee employed by the State or the Government, as the case may be, and an officer or servant of a local authority for the purposes of the Local Government Act 2001 (as amended by the Local Government Reform Act 2014), a harbour authority, a health board or a member of

staff of an education and training board shall be deemed to be an employee employed by the authority or board, as the case may be."

[50] Finally, the term "employer" is defined as:-

"… the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment."

[51] The tribunal rejected the Minister's argument in *Sullivan v. Department of Education* [1998] 9 E.L.R. 217 that he was not the employer of the complainant for the purposes of the 1991 Act. The tribunal set out its conclusions in this regard in the following terms at p. 222:-

"The Tribunal does not accept that the Department is not the employer. The board of management or other managing authority of a school may well have a role in the day to day running of the school and indeed in engaging teachers, interviewing etc. The reality is that such boards of management or other managing authority in relation to State schools have little or no role when it comes to the question of remuneration of teachers which is a most important element and aspect of the relationship between teachers and their employers. The Tribunal considers that the role of the Department of Education goes beyond that of 'paying agent'. The Department is empowered to negotiate teachers' salaries and qualification allowances and makes policy decisions in relation to the type of degree which Ms. Sullivan and other teachers have studied for in relation to the status of such degree as regards qualification allowances. The Department has a role in the whole area of maintaining appropriate pupil/teacher ratio indirectly and regulates the number of teachers in any particular school as in the scheme of redeployment. If ultimately redeployment in the case of any particular teacher cannot be settled by agreement, the Minister is empowered to withhold the grant of the sum of money which would go towards paying that particular teacher's salary and effectively has the power to deprive a particular teacher of his or her salary."

[52] Later, in its decision in *Sullivan v. Department of Education* [1998] 9 E.L.R. 217, the tribunal stated at p. 222:-

"Furthermore because of the minimal role which the board of management or other managerial authority exercises in relation to the whole question of teachers' remuneration especially in the case of a full-time teacher it follows that where a teacher has a complaint/query in relation to his or her salary or takes issue with it the teacher in question is likely to end up dealing with the Department and not the school. When it comes to the question of remuneration, for the Department to say that it

> is not the employer would effectively mean that as far as the question of remuneration would go the teacher would have no employer which is inconceivable. If a deduction is made from a teacher's salary the school is likely to say that it, having no role in the question of payment of remuneration, cannot be considered to have made such deduction and the Department may say that it is not the employer for the purposes of any aspect of the teacher's employment. It is inconceivable that all of the teachers in the country should not have the benefit of the Payment of Wages Act 1991. It is difficult to see how the board of management could, short of ordering the Department to make a deduction, actually make a deduction from any particular teacher's remuneration."

[53] Thus, counsel for Ms. Boyle place reliance on the conclusions of the tribunal in this context as supporting their argument that the Minister is Ms. Boyle's employer for the purposes of the 2001 Act. Indeed, it was pointed out that the Minister now accepts the conclusions of the tribunal in *Sullivan v. Department of Education* [1998] 9 E.L.R. 217 in this regard. However, it must be noted that there are differences in the wording of the relevant definitions in the 1991 Act and the 2001 Act, and the Minister points to these differences as justification for distinguishing claims arising under each Act from one another. In particular, the definition of "contract of employment" in the 1991 Act refers to:-

> "… any other contract whereby an individual agrees with another person to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract) whose status by virtue of the contract is not that of a client or customer of any profession or business undertaking carried on by the individual, *and the person who is liable to pay the wages of the individual in respect of the work or service shall be deemed for the purposes of this Act to be his employer*, whether the contract is express or implied and if express, whether it is oral or in writing" (emphasis added).

[54] Such a deeming clause is absent from the definition of "contract of employment" in the 2001 Act. It is important to note, however, that the 2001 Act does have a different deeming provision concerning agency workers. Counsel for the Minister suggested that the presence of one deeming provision but the absence of a deeming provision such as appears in the 1991 Act points strongly against any contract of employment being implied or deemed to exist with a person liable to pay wages.

[55] Counsel for Ms. Boyle also refer to the decision of the Workplace Relations Commission ("WRC") in *Horgan v. Department of Education and Skills* (DEC-E2016-041, Workplace Relations Commission, 4 March 2016).

The dispute in that case concerned a claim by the complainants, who were primary school teachers, that they were discriminated against by the Department of Education and Skills, the Department of Finance, the Department of Public Expenditure and Reform, the Government of Ireland, Ireland and the Attorney General on the grounds of age in relation to their rates of remuneration. They contended that they performed "like work" to a named comparator and were entitled to equal remuneration under the Employment Equality Acts. Again, an aspect of this decision was the question of whether the respondents were the proper respondents for the purpose of the applicable legislation.

[56] Section 77(4)(b) of the Employment Equality Act 1998 ("the 1998 Act", which forms part of the Employment Equality Acts) states that, "[i]n this Part, in relation to a claim referred under any provision of this section", "the respondent" is defined as the person "who is alleged to have discriminated against the complainant or, as the case may be, who is responsible for providing the remuneration to which the equal remuneration term relates or who is responsible for providing the benefit under the equality clause or who is alleged to be responsible for the victimisation".

[57] Section 2(1) of the 1998 Act defines "employer" as:-

> "'[E]mployer', subject to subsection (3), means, in relation to an employee, the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment".

[58] Subsection (3) states:-

> "For the purposes of this Act—
>
> (a) a person holding office under, or in the service of, the State (including a member of the Garda Síochána or the Defence Forces) or otherwise as a civil servant, within the meaning of the Civil Service Regulation Act, 1956, shall be deemed to be an employee employed by the State or Government, as the case may be, under a contract of service,
>
> (b) an officer or servant of a local authority for the purposes of the Local Government Act, 1941, a harbour authority, a health board or a member of staff of an education and training board shall be deemed to be an employee employed by the authority or board, as the case may be, under a contract of service,
>
> (c) in relation to an agency worker, the person who is liable for the pay of the agency worker shall be deemed to be the employer."

[59] At para. 3.1 of the WRC decision in *Horgan v. Department of Education and Skills* (DEC-E2016-041, Workplace Relations Commission, 4

March 2016), it is noted that the respondents submitted that they were not the correct respondents, and that the correct respondents were the boards of management of the schools where the complainants were working at the time they referred their claims. However, later in the decision, at para. 4.1, the WRC notes:-

> "The complainants named six respondents who, in their written submissions, they contend all have responsibility for the pay of the complainants. Whilst in their written submission the respondents contended that the correct respondents are the Boards of Management of the schools where the complainants were first appointed as teachers. At the hearing the Department of Education and Skills conceded that they were responsible for the remuneration of the complainants."

[60] Again, counsel for Ms. Boyle argue that this creates a somewhat strange situation in that the Minister has acknowledged that he is the proper respondent to claims made by teachers in relation to pay-related matters arising under the Employment Equality Acts but does not acknowledge the same in relation to Ms. Boyle's claim under the 2001 Act. However, counsel for the Minister submit that the Minister has merely acknowledged that he is the appropriate respondent within the definition of that term in the Employment Equality Acts. The Minister submits that this is not the same as conceding that the Minister comes within the definition of "employer" as that term is used in the 2001 Act. The Minister submits that there is therefore no inconsistency in approach between the stance taken in relation to the Employment Equality Acts and that adopted in the present case. It should, however, be noted that there would be a significant question about the extent to which a court could properly be influenced in objectively construing a statute even if it were shown that a party, such as the Minister, had adopted inconsistent interpretations of similarly worded legislative provisions.

[61] At this stage it might also be useful to refer to the decision of the High Court in *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517. That case concerned a claim under the 2001 Act brought by part-time teachers who were paid by their school out of privately raised funds. They chose as their comparators full-time teachers at the same school but whose salaries and benefits were paid by the Department of Education. There was no dispute as to the fact that the claimants were treated less favourably. The Labour Court upheld the claim and the school appealed to the High Court on a point of law. An aspect of the appeal in the High Court was a question as to whether the claimants had chosen an appropriate comparator for the purposes of the 2001 Act. This in turn required an analysis of whether

it could be said that the claimants and their comparators were employees of the same employer.

[62] In her judgment in the High Court, Dunne J. engaged in an analysis of the relevant legislative provisions and case law, particularly the decision of the Supreme Court in *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302. *O'Keeffe v. Hickey* concerned the issue of vicarious liability in the context of the tripartite relationship between teacher, school and the Department. Dunne J. stated in this regard at p. 540:-

> "[50] There is no doubt that the school is the employer of the claimants. Bearing in mind the decision in *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 I.R. 302, it appears that the school is also the employer of the chosen comparators for the purpose of issues of vicarious liability. That decision highlights the unusual tripartite relationship between the department funded teacher, the Department and the school. However, the provisions of s. 24 of the Education Act 1998 are also of importance. Section 24 (3) makes it clear that the task of appointing teachers funded by the State falls on the board of management of a school. Section 24 (5) makes it clear that the terms and conditions of teachers funded by the State shall be determined by the Minister, with the concurrence of the Minister for Finance.
>
> [51] In a private school there will be a cohort of Department funded teachers and usually there will also be a cohort of privately paid teachers. The paymaster for each cohort is different. In *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 I.R. 302, the unusual nature of the tri-partite agreement was described; the board of management was found to be the employer of the teacher concerned in that case, which involved the question of vicarious liability, although the teacher was paid by the Department. There is no tripartite arrangement in the case of the claimants."

[63] Dunne J. later went on to consider the decision in *Sullivan v. Department of Education* [1998] 9 E.L.R. 217, which was referred to above. Dunne J. stated at p. 541:-

> "[52] The decision in that case highlights the different and complicated employment arrangements as between department funded teachers and privately funded teachers. One wonders what relief, if any, could have been obtained by the claimant in that case had she pursued her case against the school concerned as opposed to the Department. It is hard to see how the tribunal in that case could have come to any other conclusion. The recognition of qualifications and the payment of a qualification allowance was always a matter to be dealt with by the Department of Education, because it set the criteria for the payment of that

allowance. That case provides one small example of the different contractual arrangements that exist between department funded teachers and the school in which they are employed and privately funded teachers and the school in which they are employed."

[64] Dunne J. concluded that the Department had to be viewed as the employer of the chosen comparators in *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517. This conclusion was expressed as follows at pp. 541 and 542:-

"[53] Although the chosen comparators appear to come within the definition of comparable full time employees as defined in the legislation, I have come to the conclusion that because of the fact that the Minister for Education determines the terms and conditions of the department funded teacher and the school determines the terms and conditions of the privately paid teachers, the Labour Court has fallen into error in finding that the claimants were entitled to choose a full time department funded teacher as a comparator. The school has no hand, act or part in determining the salary and other terms and conditions of the department funded teacher. In determining the employer for the purpose of the legislation in relation to agency workers, the legislation expressly provides that the party paying the worker is, for the purposes of the legislation, the employer. I think the school is in an analogous position. I do not accept that the chosen comparators have the same type of employment contract or relationship as the claimants with the school. To that extent, it seems to me that the Department has to be viewed as the employer of the chosen comparators for the purpose of the legislation."

[65] It might be noted that the decision in *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517 was followed by Hedigan J. in *Blackrock College v. Browne* [2013] IEHC 607, (Unreported, High Court, Hedigan J., 20 December 2013). However, it should be said that the operative part of the judgment of Dunne J. in *Catholic University School v. Dooley* was concerned with whether the chosen comparators had the same type of employment contract. The court found that the Labour Court was in error in determining that the claimants in that case were entitled to choose a full-time Department funded teacher as a comparator. The clear and obvious comparator in that case was a full-time privately funded teacher. There was however no discrimination between those two groups. It is clear that the result in *Catholic University School v. Dooley* can be sustained without the conclusion that the Minister was the employer in that case. The analysis relating to the identity of the claimant's employer for the purposes of the Act was, to

that extent, *obiter*, for the claim would have failed on the basis of the choice of an inappropriate comparator in any event.

[66] Having reviewed the relevant case law I now propose to analyse the issues which arise.

7. Analysis

[67] Counsel for the Minister did draw attention to the fact that different language was used by various decision-makers and courts to describe the legal nature of the relationship between Ms. Boyle and the Minister in the circumstances of this case. The Labour Court simply considered itself bound by the decision of the High Court in *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517. O'Malley J., in the High Court in this case, concluded at para. 147, p. 54, that persons in a position such as Ms. Boyle "must be deemed" to be employed by the Minister. Hogan J., writing for the Court of Appeal, concluded that the relationship between the parties gave rise to an implied contract of employment in relation to pay related matters.

[68] I am not, however, convinced that too much turns on the different language used. In substance each of the tribunals or courts concerned were required to consider whether the relationship was such as to bring the Minister within the ambit of employer for the purposes of the 2001 Act. It seems to me to follow that the provisions of that Act must be central to any analysis. As noted earlier it is necessary, in order for a sustainable decision of breach of the 2001 Act to arise, that both the claimant and the comparator are employees and, in the case where, as here, the finding is made under s. 7(2)(a), that they are employees of the same or an associated employer. An employee is defined by reference to someone who has "a contract of employment". That term is in turn defined as being a contract of service or apprenticeship or, in circumstances not relevant to this case, certain situations arising in the context of employment agency.

[69] It follows, therefore, that in order for a claimant under the 2001 Act to succeed, at least in circumstances where reliance is placed on s. 7(2)(a), then that person must have a contract of service with the same employer as the comparator put forward.

[70] It seems to me to follow that the real question which arises is as to whether there is any sense in which it can be said that Ms. Boyle, and indeed the primary teacher comparator put forward, can be said to have a contract of service with the Minister. If that cannot be said to be the case as a matter of law, then it is clear that no finding of breach of the 2001 Act can properly

be made in the circumstances of this case. The net question is, therefore, whether the unusual relationship which exists between a teacher, a board or committee of management and the Minister can properly be construed as involving, at least in part, a contract of service between a teacher and the Minister. In addition, there is the added question which arises where, as here, the Minister did not always pay the teacher directly but rather paid a grant to a school based on a calculation by reference to the teacher's salary, bearing in mind of course that this system was gradually phased out (see para. 29 above). Before going on to consider that question it is appropriate to look to the reasons why both the High Court and the Court of Appeal were satisfied that the Labour Court was correct to conclude as it did.

8. The decisions of the High Court and the Court of Appeal

[71] As noted previously, the decision of the High Court was delivered by O'Malley J. ([2015] IEHC 429, [2015] 26 E.L.R. 278). The trial judge began her analysis by reviewing the relevant authorities, including *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302, *Catholic University School v. Dooley* [2010] IEHC 496, [2011] 4 I.R. 517, and the decision of this court in *McEneaney v. Minister for Education* [1941] I.R. 430. She went on to note that much of the focus in the authorities is on the relationship between the school management and the teacher. O'Malley J. states at pp. 310 and 311:-

> "130. … it is clear beyond argument that the former holds responsibility for hiring, discipline and dismissal. These aspects are the ones that are likely to give rise to issues of vicarious liability, since that is a concept that is related to control of an employee's behaviour. Questions as to the responsibility of the State for the actions of teachers have been answered in the light of this aspect of the triangular relationship."

[72] O'Malley J. then turned to the question of funding of the education system in Ireland, noting that this system is funded to a significant degree by the State. However, at p. 311, it is further noted that the State has a large degree of control over the conditions under which the funds it provides may be disbursed, particularly with regard to the paying of teachers' salaries:-

> "131. … [The State] sets the rules according to which it pays the salaries of teachers, where they are not paid out of privately sourced funds. Salaries will not be paid by the Department unless the teachers chosen by the management have the qualifications required by the Department, and unless the allocation of posts by the Department to the school in question permits appointments to be made. The rates of pay, including allowances for qualifications, posts of responsibility and so

on, are negotiated by the Department in a collective bargaining process under the auspices of a statutory body (the Teaching Council) rather than being set by the individual school management bodies negotiating with individual teachers. In other words, the Department carries out, in respect of State funded teachers, the role normally carried out by an employer with regard to payment of employees."

[73] O'Malley J. further noted the point made above, in the context of the Employment Appeals Tribunal decision in *Sullivan v. Department of Education* [1998] 9 E.L.R. 217, to the effect that the State now concedes that it is to be considered the employer for the purposes of the Payment of Wages Act 1991. O'Malley J. stated at p. 311:-

"132. … It is of course the case that the definitions in that Act are different to those under consideration, but the definition from the Payment of Wages Act … is premised on the concept of a person who is 'liable to pay the wages'. The Minister is, therefore, accepting that he is that person. This position is now confirmed by the provisions of the Education Act 1998 as amended, s. 24 of which provides for the powers of the Minister in relation to teachers' pay.

133. This, in my view, is one of the results of the unique tripartite arrangement in relation to education in this State. In relation to teachers whose salaries are paid by the State the role of employer is, uniquely, split. Part of it is played by the management of an individual school and part by the Department of Education. The former has the right to hire, discipline, dismiss and generally direct a teacher in the day-to-day running of the school. The Department, on the other hand, sets the rules about, and pays, the salaries. Since it thereby takes on what would normally be the rights of an employer in relation to pay, it follows, in my view, that it carries the legal duties of an employer associated with pay."

[74] Following this discussion, O'Malley J. went on to consider the factual reality of how the tripartite relationship between teacher, school and State operates. She stated at p. 312:-

"137. If the Department did not act in this manner, it is difficult to imagine how the school system could function. It is not just the sheer impracticality of making individual members of boards of management legally responsible for teachers' payment issues in State-funded schools – if that were the law, and it was known to be such by members of school boards, it would seem unlikely that they would be willing to act. The situation in this regard is as the Supreme Court [in *McEneaney v. Minister for Education* [1941] I.R. 430] saw it in 1940s Ireland, when it described the proposition put forward by the Minister as 'quite at variance

with reality'. There is also the fact that the school boards, unlike other employers, do not have control over the salary rates paid to their employees. It is therefore difficult to see how they could be responsible for paying them. As Dunne J. said of the EAT decision in [*Sullivan v. Department of Education* [1998] 9 E.L.R. 217], that case could hardly have been decided any other way, given the unlikelihood that a claim could be made against the school in relation to a matter controlled by the Department."

[75] Regarding the fact that Ms. Boyle was not employed in a school recognised under the Employment Act 1998, O'Malley J. did not consider this to support the Minister's contention that he was not Ms. Boyle's employer. She stated at p. 313:-

"140. … there is no legislation, or other rule of law, to prevent the Minister from entering into the kind of arrangement under which Ms Boyle was employed for over 20 years. During that time, she was paid at a rate determined by the Minister. In accordance with rules promulgated from time to time by the Minister, she was paid qualification allowances by the Department, put on a 12-month salary with provision for sick leave and maternity leave, put on an incremental scale, and, ultimately, paid redundancy. While she was still in employment the Department adopted a policy of phasing in direct payment to teachers in her position, rather than via the management committee. All of this is consistent with the legal responsibility of an employer for pay-related issues.

141. The Minister argues that Ms Boyle has no entitlement to a pension because she was not a national school teacher, and the pension scheme is limited to national school teachers. It seems to me that this is a matter that goes to the appropriateness of the remedy rather than Ms Boyle's substantive rights under the Act. If one accepts, as I do, that for *the purposes of the Act* she must be deemed to be employed by the Minister, then what she has to do is demonstrate that she has been treated less favourably than full-time employees who are doing comparable work within the definition of the Act. The Labour Court found in her favour on this aspect, and that finding is not challenged in these judicial review proceedings. The mere fact that she worked in a different type of establishment cannot in itself be a bar to redress, and the Minister would bear the burden of showing that there was objective justification for the different treatment" (emphasis in original).

[76] As a result of the foregoing, O'Malley J. concluded that school teachers whose salaries are publicly funded must be deemed, for the purposes of the 2001 Act, to be employed by the Minister for Education.

[77] The decision of the High Court was appealed to the Court of Appeal. As noted earlier, Hogan J. delivered the judgment of that court. Hogan J. engaged in a review of the jurisprudence concerning the tripartite relationship between teacher, school and the State. In particular, it might be noted that Hogan J., in considering *McEneaney v. Minister for Education* [1941] I.R. 430 and *Fox v. Higgins* (1912) 46 I.L.T.R. 222, referred, at para. 59, p. 20, to "a note of realism" in these early Supreme Court decisions "looking beyond the contractual formalities to the substance of that relationship".

[78] Following this review of the authorities, Hogan J. turned to consider the question of whether the Minister is an employer of Ms. Boyle for the purposes of the 2001 Act. At the outset, Hogan J. stated at p. 29 that there is no easy answer to that question:-

> "78. … Specifically, the nature of the triangular pact identified by Gibson J. in *Fox v. Higgins* (1912) 46 I.L.T.R. 222 over 100 years ago still defies any standard conceptual analysis, at least for the purposes of the general law of contract."

[79] Hogan J. went on to consider the fact that it is the Minister who pays the salary of the teacher and all other employment benefits. Furthermore, Hogan J. noted at para. 80, p. 30, that when the decision was taken in 2009 to cut the pay of public servants, it was not suggested that as teachers "were not employees of the Minister, the Oireachtas had no business in interfering with the contractual arrangements agreed between schools and their employees". Hogan J. went on to state at p. 30:-

> "81. That in itself should be a powerful practical indicator that the national school teachers are, indeed, employees of the Minister, at least for the purposes of pay-related issues arising from social and employment legislation such as the 2001 Act which has been enacted for the benefit of such employees. One might otherwise ask: why is the Minister engaged in the payment of these salaries and benefits for persons who are for all purposes the employees of others? This is scarcely gratuitous benevolence on the part of the Minister, but rather reflects an underlying reality which transcends the formal contract of employment between the school and its teachers."

[80] Hogan J. then turned to O'Malley J.'s analysis in the High Court with regard to how the triangular or tripartite relationship should be viewed in different legal contexts and in particular the practical division of labour between the board of management of a school and the Minister with regard

to certain aspects of the employer/employee relationship – the management taking responsibility for the day-to-day running of the school and control of teachers in the discharge of their duties, and the Minister being responsible for the payment of salaries and the making of rules in that regard. Hogan J. noted that this division is not inconsistent with the conclusions of the majority of the Supreme Court in *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302.

[81] Hogan J. went on at p. 34 to consider the somewhat unusual position of Ms. Boyle:-

> "87. It is true, of course, that the position of Ms. Boyle was slightly further removed from the Minister than that of the ordinary primary teacher. For most of the period of her employment, 98% of her salary was paid by the Minister to the school's management committee rather than to her directly. But even then this was just a method of payment which was in the course of being phased out by the Minister and was, over time, to be replaced by a system of direct payments by the Minister to the teachers concerned."

[82] Furthermore, Hogan J. noted that Hillside Park was not a recognised national school, but went on to state at p. 35:-

> "88. … Ms. Boyle's appointment and employment for over 20 years was nonetheless contingent on the approval and consent of the Minister and she was paid at a rate determined by the Minister in the manner envisaged by s. 24(2) of the 1998 Act (as amended). Furthermore, in accordance with rules promulgated from time to time by the Minister, she was paid qualification allowances by the Minister with provision for sick leave and maternity leave and was placed on an incremental scale."

[83] Hogan J. further noted in this regard that it was a decision of the Minister to withdraw funding for segregated Traveller pre-schools which ultimately led to the closure of Hillside, and which in turn brought about the termination of Ms. Boyle's employment. Furthermore, the Minister paid Ms. Boyle's redundancy.

[84] Hogan J. went on to record his approval of O'Malley J.'s comments in the context of the practical operation of the 2001 Act and the protections it affords employees. In particular, Hogan J. referred to the comments in the High Court judgment, which are quoted earlier, concerning the impracticality of making individual members of boards of management legally responsible for teachers' payment issues and the fact that, were the Minister's position to be accepted and were the Minister to set without justification rates of pay which are less favourable to part-time employees, the only

redress available to such employees would be as against the school. Hogan J. concluded at pp. 36 and 37 in this regard:-

> "91. Viewed from these perspectives, it seems idle to deny that as a matter of reality the Minister was in substance the employer of Ms. Boyle, at least so far as matters relating to remuneration and employment legislation designed for the benefit of part-time employees such as the 2001 Act is concerned. It is true that there was no actual express contract of employment between the parties, but I find myself coerced to conclude in these circumstances that there must have been an implied contract of employment between the Minister and Ms. Boyle in relation to pay-related matters within the meaning of the definitions of 'contract of employment' and 'employee' contained in s. 3(1) of the 2001 Act.
>
> 92. It follows in turn that in view of that statutory definition that there must have been an implied contract of service between Ms. Boyle and the Minister in relation to pay-related matters. But this should not in itself be a surprising conclusion. If, for example, Ms. Boyle had not performed her teaching duties, could she have expected that the Minister would have been under a continuing obligation to pay her? Or, to take the example given by O'Malley J., if pay-rates had been introduced for part-time teachers which could not be objectively justified in comparison with the pay paid to full-time teachers, is to be said that the part-time teacher's only remedy was against the school? The very fact that the answers to these questions are so obviously in the negative illustrates in its own way why it would be unrealistic to conclude that there was anything other than an implied contract of service between these the Minister and the teacher, at least for pay-related matters in the context of the 2001 Act."

[85] Finally, Hogan J. compared the definitions of "employers" in the 1991 Act and the 2001 Act and in particular the lack of a deeming provision in the latter instance, as referred to earlier in this judgment. Hogan J. set out several reasons which he considered explain the difference between these two statutory definitions. First, he noted that the 1991 Act is a "particular, special" act, which is not necessarily to be construed in common with the 2001 Act. Hogan J. considered this view to be supported by the fact that the 2001 Act makes provision for the collective construction of several pieces of employment legislation, but does not refer to the 1991 Act. Secondly, Hogan J. stated at pp. 38 and 39 :-

> "97. It is clear that the deeming technique employed in the 1991 Act is not expressed to be general and all encompassing. It is rather more specific in its purpose and range: it is a deeming provision used for the

purposes of the 1991 Act and for that purpose only. The fact that this artificial deeming technique was not replicated in the 2001 Act does not lead to the inexorable conclusion that there was no such implied contract of service between the Minister and the teacher for the purposes of the 2001 Act if the legal realities of the relationship between the parties in truth suggest otherwise."

[86] Finally, it is noted that the purpose of the 2001 Act, as set out in its long title, is to transpose a variety of EU directives. As such, the use of an artificial deeming technique in the earlier, purely national, piece of legislation should not be held to mean the 2001 Act, which was drafted in the context of the transposition of EU law, should be interpreted in light of the 1991 Act.

[87] Ultimately, Hogan J. concluded at pp. 39 and 40:-

"99. It is also true that all of this leads to the rather unsatisfactory conclusion – at least viewed from the perspective of orthodox principles of contract law – that Ms. Boyle had two employers and, furthermore, that whereas she had an express contract with the school, her contract with the Minister was merely implied. Nor is it satisfactory that Ms. Boyle must be regarded to be an employee of the Minister only for some purposes (such as, for example, availing of employment protections in matters relating to pay and remuneration contained in the 1991 Act and 2001 Act respectively) and not for others (such as vicarious liability as *per O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302). Yet any other conclusion seems at variance with the underlying realities and would represent the triumph of contractual formalism over the substance of employment rights. In the context of the employment rights conferred by the 2001 Act – which in turn sought to transpose an EU Directive designed to protect a group of vulnerable employees in relation, *inter alios*, to pay related matters – it is surely the substance of that employment relationship which should count."

[88] It should be noted that both the High Court and the Court of Appeal concluded that the Labour Court was not empowered to order that the Minister admit Ms. Boyle to the superannuation scheme. However, as this point was not pursued by Ms. Boyle on appeal to this court, the reasoning of the lower courts in this regard is not relevant for present purposes.

[89] In the light of those decisions the issue for this court really comes down to a question of whether the reasoning which led both the High Court and the Court of Appeal to conclude, in substance, that there was a contract for service between the Minister and Ms. Boyle was correct. I turn to that question.

9. Discussion

[90] It is important to recall, as noted earlier, that, in order for the decision of the Labour Court to be correct in law, it is necessary that both Ms. Boyle and the comparator teacher be regarded as employees of the Minister for the purposes of the 2001 Act. There are, of course, additional factors which arise in the case of Ms. Boyle which do not apply in the case of many teachers. So far as most teachers are concerned, the payment of their salary, as well as the fixing of its terms and conditions, is always actually done by the Minister. In the case of Ms. Boyle there was, at least when she was first employed and for a significant period, an added layer of distance. It is true that the grant paid by the Minister to Hillside Park covered almost all of Ms. Boyle's salary (98%) and that the grant in question went up and down by reference to the salary which someone in the position of Ms. Boyle might have been paid had she been a teacher paid in the ordinary way by the Minister (at least as the arrangements between the parties ultimately developed). Certainly, as a matter of form there is, therefore, a significant difference between her case and that of any teacher whose salary was at all times paid directly by the Minister, although, as has been noted above, this system of payment to the school as opposed to the teacher was phased out gradually over several years.

[91] It is also important to note that, while the particular arrangements which applied in Ms. Boyle's case were somewhat unusual, the issues which arise in this case have the potential to affect a much wider category of employment arrangement. There are a wide range of situations where, to a greater or lesser extent, a third party may be said to provide the funding for a contract of employment. Obviously the direct payment by the Minister of many teachers involves a particularly striking example. However, many employees in the health sector are, in effect, funded by Government with a greater or lesser degree of State control over terms and conditions. Likewise, charities or NGOs may provide funding which, in substance, allows for the payment of staff providing services which are considered to be of benefit to the aims of the organisation concerned. Again, the degree of control over financial terms and conditions may vary from case to case. Most third parties (including the State in this context) which provide funding are likely to at least impose some relatively detailed conditions as to the financial terms on which employees whose contracts may be funded out of a financial provision made are to be employed. Such funders are unlikely to give a blank cheque to the organisations which they support. There are likely, therefore, to be many cases where there is at least an indirect funding in substance of a

contract of employment and a material measure of control by the funder over the financial terms and conditions of the contract of employment.

[92] Be that as it may, it is necessary also to analyse the particular features of the arrangements which applied in this case and which are relied on to support the suggestion that the practical reality of the situation was such that Ms. Boyle could be regarded as having had a contract of service with the Minister. It is true, as just noted, that as a matter of practical reality Ms. Boyle's salary was fixed by the Minister. However, that being said it is worth recording that there was evidence that other teachers involved in Traveller pre-school education, who were employed in schools run by Barnardos, were admitted to the general Barnardos pension scheme. Therefore, at the level of principle, the fact that Hillside Park did not provide for a pension for its sole teacher, Ms. Boyle, was dependent not on any rule or practice emanating from the Minister but rather on the fact that it would seem that Hillside Park did not have access to the same level of resources as were available to Barnardos. The lack of a pension scheme for Ms. Boyle was, therefore, more a matter of the resources available to Hillside Park rather than any issue connected with the Minister.

[93] As I understand the evidence, the resources made available by the Minister to Barnardos in respect of any individual teacher in a Traveller preschool context were the same as those available to Hillside Park. The difference stemmed from the fact that Barnardos had access to additional resources. It is possible, therefore, in my view, to exaggerate the extent to which all of the terms and conditions on the financial side which were applicable to Ms. Boyle can be said to have been definitively determined by the Minister. They were at least in material part influenced by the financial resources available to Hillside Park (or more accurately the lack of them) when compared to other similar employers.

[94] It also seems to me to be necessary to pay particular regard to what this court decided in *O'Keeffe v. Hickey* [2008] IESC 72, [2009] 2 I.R. 302. It is true that the specific legal issue which was under consideration in that case involved the question of whether the Minister or the State could be said to be vicariously liable for the wrongful acts of someone working in a school. But the reasoning of this court in that case was clear. It was accepted that the contract of the wrongdoer in question was with the management of the relevant school rather than with the Minister. While that finding was a means towards the end of determining whether vicarious liability arose, it was nonetheless an essential part of the reasoning of the court. I do not see any reason to depart from the rationale of *O'Keeffe v. Hickey*. Other questions might arise as to whether there might be any other basis, rather than through

the route of a contract of employment, whereby wrongdoing on the part of a teacher might be visited on the State. Those issues do not arise in the circumstances of this case. Furthermore, as already noted, the wording of any particular statute may have the potential to impose a liability on persons who may not, strictly speaking, be an employer in the ordinary sense in which that term is used. However, *O'Keeffe v. Hickey* is clear and recent authority for the proposition that, in the ordinary way, it is the school management rather than the Minister who is taken to be the other party to a teacher's contract of employment.

[95] The question of other statutory regimes leads me next to consider the argument based on the fact that the Minister appears to have accepted rulings of other decision makers or courts which placed liability on the Minister in the context of the other statutory employment regimes to which reference has been made. However, in that context I am satisfied that there are, as counsel for the Minister pointed out, material differences in the wording of the relevant legislation which fixed the Minister with liability under that other legislation but which is different to the language used in the 2001 Act.

[96] As counsel noted, the 1998 Act in its definition of "respondent" includes a wide range of potential parties, including a person "who is responsible for providing the remuneration" or a person who is "alleged to be responsible for the victimisation". Thus, under the 1998 Act, a person may be a respondent even if not an employer as such.

[97] Likewise, the definition of "contract of employment", for the purposes of the 1991 Act, clearly includes any person "who is liable to pay the wages" of the relevant person.

[98] There are no similar provisions in the 2001 Act, and it does not seem to me that the ultimate conclusions which were reached under other legislation, differently worded, are of any particular weight in construing the definition of a contract of service for the purposes of this legislation. Indeed, the very fact that the legislator, in the 2001 Act, went so far as to provide one deeming provision (being that in respect of agency workers) is an indication that it was not intended that other categories of persons beyond those who can, as a matter of contract law properly construed, be regarded as an employer involved in a contract of service with a claimant, should come within the scope of the Act.

[99] On that basis I am satisfied that there is no inconsistency between the position which the Minister has adopted in respect of this legislation compared with the position which the Minister appears to accept applies under the other legislation in the employment field to which reference has been made. However, I would go further. Even if there were some inconsistency

there must be significant limitations on the extent to which any such difference of approach on the part of a Minister could impact on the proper construction of a statute. Certainly, as a matter of statutory construction, the fact that an officer of the State has taken a different approach to the interpretation and application of two different statutes which are worded in the same fashion could not, of itself, require the court to take that fact into account in coming to a view as to what the legislation means.

[100] While it is not necessary to consider the point in this case because, for the reasons already identified, I am not satisfied that there is any inconsistency of approach, there might be questions as to whether a legitimate expectation might arise in some circumstances of that type although, here again, a party might run into difficulties such as those encountered in *Wiley v. The Revenue Commissioners* [1989] I.R. 350 where this court held that there could be no legitimate expectation to the effect that a previous error would be repeated.

[101] A contract of service is a term which has formed part of the law of contract for a very considerable period of time. It ordinarily refers to an employer as the person who can direct the way in which an individual providing services is to do their job. Its most important function, as a formal legal term, is to distinguish such arrangements from a so-called "contract for services" where an independent contractor agrees to provide services but not with the degree of control over the way in which they are to work which applies in the case of a contract of service.

[102] The ordinary meaning of the term "contract of service" implies an arrangement whereby one party agrees to work for the other and, subject to the terms of the contract, under the control of that person as to how they carry out their work. In its ordinary and natural meaning, and applying that definition to the facts of this case, it seems to me that Hillside Park was the other party to the contract for service with Ms. Boyle. It might theoretically be possible that a person might work under a contract for service where there were two parties on the other side as it were, although the absence of any examples is telling. Certainly the axiom that a man cannot serve two masters reflects much of the law as well as common sense. As with any contract, a contract for service ultimately depends on its terms both for its construction and for how it should properly be characterised. The real question is as to whether it is possible to say that the tripartite or triangular arrangement which applied in this case can properly, as a matter of law, be construed as involving the Minister as at least an employer of Ms. Boyle, for there is no basis on which it could be said that Hillside Park was not itself an employer. It should also be emphasised that any contract of service involves a

reciprocal arrangement between employer and employee whereby the employee agrees to do work under the legitimate direction of the employer. It is accepted that, in the circumstances of this case, the Minister had no entitlement to direct the type of work which Ms. Boyle was to do.

[103] The Court of Appeal placed significant reliance on the fact that Hillside Park had no control over the financial terms and conditions applicable to Ms. Boyle's contract. For the reasons already analysed, I am not sure that that is quite as fully the case as the Court of Appeal appeared to consider. If, for example, to take the hypothetical case mentioned by Hogan J., the Minister sought to impose terms of employment concerning pay and financial conditions which were unlawful, then Hillside Park would not, in my view, have been obliged to impose those terms on Ms. Boyle. Rather it could have made clear to the Department that it was not willing so to do and that it would provide Ms. Boyle with lawful terms and conditions. If, in such a scenario, the Minister was not prepared to provide funding to permit Hillside Park to make whatever payments would have been required to comply with law then, of course, it might have been necessary for Hillside Park to bring Ms. Boyle's contract to an end. But in truth such a situation is no different than applies in the case of any grant-aided employment as, indeed, demonstrated by what actually happened in this case. As soon as grant aid provided under the former policy of segregated pre-school Traveller education was withdrawn, the school closed and Ms. Boyle was made redundant.

[104] All in all, I have come to the view that it is not possible to characterise the relationship between the Minister and Ms. Boyle in all the circumstances of this case as involving a contract of service to which the Minister was a party. To do so would involve an extension of the law of contract beyond any known boundaries. I accept that for various legal purposes, including statutory regimes, there may well be circumstances where a Minister may incur a liability in respect of persons whom a Minister chooses to pay directly or where the Minister is the effective paymaster even though the payment may be made by an intermediary. But each such case must be considered in the light of established legal principles applicable to the area in question. It is for that reason that the result may differ depending on the precise legal or statutory scheme under consideration.

[105] But in the context of this legislation and its reliance on the term "contract of service" (with only one, non-applicable, exception being in relation to agency workers), I think it would be stretching things much too far to suggest that there is a contract of service involving the Minister.

[106] I should finally touch on the issues of European law mentioned by the Court of Appeal. It is, of course, the case that this legislation is designed

to transpose mandatory measures of European law into Irish law. However, there is no suggestion that this is a case where European law would mandate that Ms. Boyle would be entitled to succeed in these proceedings and that the only problem standing in her way is because of the wording of an Irish transposing measure. On the contrary, it is clear that Ms. Boyle would not be entitled to succeed in a case where Irish legislation exactly replicated EU law in this area. She could only succeed, if at all, because of what might be said to be a quirk in the Irish legislation. In that context I do not see that there is an EU dimension to this case at all.

10. Conclusions

[107] While there can be no doubt that the unusual tripartite or triangular relationship which exists between the Minister, a board or committee of management and a teacher in much of the Irish educational context gives rise to difficult questions concerning the proper interpretation or characterisation of that relationship for various legal purposes, I am, however, satisfied that this case comes down to one of deciding whether it can be said that the Minister is involved in a contract of service with Ms. Boyle.

[108] For the reasons analysed in this judgment I am not satisfied that the relationship between the parties can be so characterised. There are significant differences between the 2001 Act and other legislative regimes in which the Minister has been held to have been responsible in an employment context. Even on the facts of this case Ms. Boyle is somewhat more remote from the Minister than many teachers for she was not, at the time of her initial employment and for the vast majority of her time at the school, paid directly by the Minister but rather by Hillside Park out of a grant provided by the Minister. Other employees of a different employer supported by the same grant scheme provided their employees with improved terms and conditions in the form of access to a pension scheme. To make that point is not to criticise Hillside Park, for they just did not have the resources to provide enhanced terms. However, that possibility emphasises the fact that, even at the financial level, Ms. Boyle's terms and conditions were not, at the level of principle, wholly governed by the Minister.

[109] It being the case that the finding of the Labour Court was based, as it had to be, on a decision that Ms. Boyle was employed by the Minister, I can only conclude that the finding of the Labour Court was wrong in law and must be quashed.

[110] I would, therefore, allow the appeal and would hear counsel further on the precise order which should be made.

O'Donnell J.
[111] I agree with Clarke C.J.

McKechnie J.
[112] I also agree with Clarke C.J.

MacMenamin J.
[113] I also agree.

Dunne J.
[114] I also agree.

[*Reporter's note*: The decision in *Horgan v. Department of Education and Skills (DEC-E2016-041)* (Workplace Relations Commission, 4 March 2016) is available on the website of the Workplace Relations Commission, www.workplacerelations.ie]

Solicitor for the applicant: *The Chief State Solicitor.*

Solicitors for the first notice party: *Hayes Solicitors*.

Caroline A. Carney, Barrister

Charles Mooney, Plaintiff v. **An Post,** Defendant [S.C. No. 132 of 1994]

Supreme Court 20th March, 1997

Employment - Dismissal - Natural Justice - Fair procedures - Criminal proceedings against employee - Employee acquitted - Employee dismissed - Whether entitled to oral hearing - Whether employee entitled to rely on acquittal in criminal case as answer to civil complaint - Whether dismissal in breach of fair procedures.

The plaintiff had been employed by the defendant as a postman for fifteen years. In 1984, the defendant received complaints about the plaintiff's conduct. Following investigations, criminal charges were proffered against the plaintiff. In 1985, the plaintiff was acquitted of all charges.

Following his acquittal, the plaintiff failed to answer certain queries raised by the defendant. The plaintiff sought the holding of an oral inquiry by the defendant into the allegations being made against him. The defendant refused to hold such an inquiry. The plaintiff was dismissed in 1987.

The plaintiff contended that he was entitled to rely upon his acquittal in the criminal case to defeat the civil complaint against him. He further argued that the dismissal was in breach of fair procedures in that he was entitled to have the matters of complaint investigated at an oral hearing before an independent chairman.

Held by the Supreme Court (Hamilton C.J., O'Flaherty and Barrington JJ.), in dismissing the appeal, 1, that it would be absurd if a party who had failed to establish a proposition beyond all reasonable doubt should, by that fact alone, be debarred from attempting to establish the same proposition on the balance of probabilities.

McGrath v. Commissioner of An Garda Síochána [1991] 1 I.R. 69, distinguished.

2. That, while an employee was entitled to the benefit of fair procedures, what they demanded depended upon the terms of his employment and the circumstances surrounding his proposed dismissal.

3. That the minimum the employee was entitled to expect was to be informed of the charge against him and to be given an opportunity to answer it and to make submissions.

4. That, while the plaintiff was not entitled to a hearing before the board of the defendant, nor to see the report of an investigating officer, it was clear that he did receive the benefits of fair procedures.

Glover v B.L.N. Ltd. [1973] I.R. 388; *Gunn v. Bord an Choláiste Náisiúnta Ealaíne is Deartha* [1990] 2 I.R. 168 considered.

5. That dismissal proceedings were not criminal proceedings and that it was not sufficient for a person in the position of the plaintiff to make no statement to the defendant concerning the matters alleged against him. To attempt to introduce the procedures of a criminal trial into an essentially civil proceeding served only to create confusion.

Cases mentioned in this report:-

Glover v B.L.N. Ltd. [1973] I.R. 388.

Gunn v. Bord an Choláiste Náisiúnta Ealaíne is Deartha [1990] 2 I.R. 168.

McGrath v. Commissioner of An Garda Síochána [1991] 1 I.R. 69; [1990] I.L.R.M. 817.

Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66.

Appeal from the High Court.

The facts are summarised in the headnote and are fully set out in the judgment of Barrington J., *infra.*

By notice of appeal dated the 31st March, 1994, the plaintiff appealed the order of the High Court (Keane J.) which delivered its judgment in favour of the defendant on the 11th February, 1994, (H.C. Nos. 7308P of 1994 and 10482P of 1997). The appeal was heard by the Supreme Court (Hamilton C.J., O'Flaherty and Barrington JJ.) on the 14th February, 1997.

Brendan Grogan S.C. (with him *Paul McDermott*) for the plaintiff.

Maurice Gaffney S.C. (with him *Miriam Malone*) for the defendant.

Cur. adv. vult.

Hamilton C.J. 20th March, 1997

I agree with the judgment of Barrington J. about to be delivered.

O'Flaherty J.

I also agree with the judgment of Barrington J. about to be delivered.

Barrington J.

The facts

As appears from the judgment of the trial judge in the present case, the plaintiff was employed as a postman by the defendant and had been so employed for a period of fifteen years at the time of the events giving rise to these proceedings. Until the enactment of the Postal and Telecommunications Act, 1983, his status was that of a civil servant who could be dismissed at will by the Government. Under that Act, the control and operation of the national postal service was transferred from the Minister for Posts and Telegraphs to the defendant which was incorporated as a company under the Companies Acts, 1963 to 1991, pursuant to s. 9(1) of the Act. The Act of 1983 also provided that the plaintiff's terms and conditions of employment should continue to be regulated by the provisions of the Civil Service Regulation Act, 1956.

On the 27th March, 1984, a complaint was received from an employee of a haulage firm, Groupage Ltd., at Coolock industrial estate, that a postman had been seen acting suspiciously on waste ground at that company's property that morning. An investigation branch officer and a detective garda from Coolock garda station visited the premises. A number of badly mutilated postal packets as well as fragments of cheques and postal orders (made payable to the Irish Messenger) had been found earlier. At least 80 postal packets were involved.

On the 30th March, 1984, the haulage firm employee positively identified the plaintiff, after seeing approximately 100 postmen, as being the person whom she had seen acting suspiciously on the 27th March, 1984. She later made a signed statement to that effect. Part of the defendant's problem in this case was that this lady, Mrs. Gaughan did not, initially, wish to get involved in any proceedings which might be brought against the plaintiff and gave her co-operation in return for an undertaking that she would not be called upon to give evidence.

On the 4th April, 1984, the defendant, in order to check on suspicions which it now entertained concerning the plaintiff, prepared three test postal packets and had them placed among items due to be dealt with by the plaintiff. Two of these items were due for delivery by him and were delivered. The third item, containing two United States five dollar bills and addressed to the "Apostleship of Prayer" should have been rejected by the plaintiff. The plaintiff did not, however, reject it and this test item was never delivered and was never subsequently found.

The plaintiff was then interviewed by the defendant's investigating officer who described his attitude as "both aggressive and obstructive". This description has been criticised by counsel for the plaintiff on the grounds that the plaintiff clearly submitted to a search of his person and consented to a search of his home. It would appear however that the investigating officer was referring to the fact that the plaintiff denied all knowledge of the missing test packet and of the mistreated postal packets recovered from waste ground at Coolock on the 27th March, 1984, and when asked if he had been at the said waste ground on the day and time referred to replied that he could not "remember back to yesterday week".

The plaintiff did however agree to take part in an identification parade, and on the 4th April, 1984, he was identified at an identification parade by another employee of the haulage company, Groupage Ltd., as being the person he had seen on the 27th March, 1984, in the vicinity of the waste ground where the mistreated postal packets were discovered. This employee however refused to place his hand on the plaintiff's shoulder at the identification parade because of the fact that both men lived in the same area.

Later on the 26th October, 1984, and the 8th November, 1984, statements were obtained by an investigation officer from two further employees of Groupage Ltd. who had initially refused to co-operate in the investigation but who said that they had observed a postman on the waste ground in question on the 27th March, 1984. One of these employees stated that he saw a postman acting in a suspicious manner at the waste ground and that he had a bunch of envelopes in his hand and that he had moved away when the witness approached. Another of these employees said he had seen a postman tearing up papers on the date in question.

On the 18th December, 1985, the plaintiff was acquitted by a jury of all charges arising out of the complaints in these proceedings.

A protracted correspondence took place between the plaintiff and his solicitors on the one part and the defendant and its solicitors on the other part. This correspondence is set out in considerable detail in the judgment of the learned trial judge. In the course of the correspondence the defendant made perfectly clear to the plaintiff the nature of the allegations against him and the general nature of the evidence on which it was based. They furnished him with copies of written statements which they had received from witnesses but with the names of the witnesses deleted. The plaintiff also had the book of evidence prepared for his trial. The defendant offered him an opportunity to make a statement or representations and warned him that, in the absence of any explanation from him, it might

draw adverse inferences from the evidence already in its possession. The plaintiff and his solicitor, on the other hand, while denying the charges, concerned themselves with procedural matters and demanded an inquiry presided over by an independent chairman and an oral hearing at which the plaintiff would be entitled to cross-examine through counsel any person prepared to give evidence against him. The defendant refused to grant such an oral hearing but did offer to meet the plaintiff and his solicitor in the presence of the investigating officer and to discuss the evidence against the plaintiff and to hear any reply or any representations that he might wish to make. The plaintiff did not take up this offer.

As already stated the correspondence between the parties was protracted and was analysed by the learned trial judge. Nevertheless one should refer to some salient letters. On the 13th January, 1986, the defendant wrote to the plaintiff in the following terms:-

"Dear Mr. Mooney,

It is proposed to recommend to the Board of this company that you be dismissed from your post as postman.

As a result of detailed investigations, we are of the opinion that you wilfully mistreated postal packets on the 27th March, 1984, at Coolock industrial estate. This opinion is based on the statements of four people who worked on the estate. We are also of the opinion that you were responsible for the disappearance of a postal packet addressed to the Apostleship of Prayer, 37 Leeson Street, St. Stephen's Green, containing two American five dollars bills on the 3rd April, 1984. This opinion is based on statements made by members of the staff of this company.

In order to afford you an opportunity of furnishing any further explanation or making any representations you wish to offer or make, no further action will be taken by us for a period of fourteen days.

Yours faithfully,"

On the 17th September, 1986, the defendant wrote to the plaintiff's solicitors, a letter headed:-

"*Re: Charles Mooney.*

Dear Sir,

Please refer to your letter of the 8th July, 1986, about the above.

Before proceeding further with this matter we are prepared to give Mr. Mooney and his legal representatives an opportunity of

meeting company management concerned in the case so that he can seek clarification of any points of which he may be in doubt and to respond in any way he may wish to the points put to him in my letter of the 13th January, 1986. I should mention that we will arrange to have Mr. J. Cosgrave present at any meeting which might take place. Mr. Cosgrave is the officer who carried out the investigations into the case and is fully familiar with all aspects of it.

If you wish such a meeting to take place perhaps you would ring me to arrange a mutually convenient time and date.

Yours sincerely,

R. Bergin,

Head of Personnel Services."

The plaintiff not having taken up this offer, the defendant wrote again on the 30th December, 1986, in the following terms:-

"*Re: Charles Mooney.*

Dear Sir,

Please refer to your letter of the 14th November, 1986, about the above.

We will meet Mr. Mooney and his legal representatives and will be prepared to listen to matters which they and any other relevant persons may wish to place before us. As frequently pointed out before the matter of Mr. Mooney's dismissal is now in question but insofar as you wish to say anything about his suspension we would be prepared to listen to and consider those matters as well.

We will arrange for Mr. Joseph Cosgrave, the officer who investigated the matter to attend so that he may give assistance as required.

I am satisfied that your client is being afforded a fair opportunity to make all appropriate representations and inquiries by means of the above procedure. I am concerned that this matter should, in fairness to your client and An Post, go ahead at the earliest opportunity.

Please contact me so that a suitable early date can be arranged upon which the above hearing can be held.

If I do not hear from you within twenty-one days I would be obliged to consider Mr. Mooney's case and if I consider Mr. Mooney should be dismissed, so recommend, without having your further assistance in the matter.

Yours sincerely,

R. Bergin, Head of Personnel."

No reply having been received to the above letter, the Board of the defendant at its meeting on the 4th March, 1987, decided to dismiss the plaintiff from his employment.

On the 15th April, 1987, the defendant in response to a query from the plaintiff's solicitors wrote as follows:-

"Dear Sirs,

I refer to your letter dated the 31st March, 1987. In the letter of the 13th January, 1986, An Post sought your client's explanation in relation to a number of matters. No satisfactory explanation was received and your client was dismissed by the Board of An Post for the matters set out in that letter.

Yours faithfully,"

Findings of fact

On the evidence before him the learned trial judge made certain findings of fact. He held:-

1. That there was not the slightest doubt that the plaintiff was informed by the defendant fully and accurately of the charges against him.
2. That the plaintiff was afforded an ample opportunity to adduce evidence and to make representations.
3. That the defendant took into account any representations made by or on behalf of the plaintiff.

There was ample evidence to support all these findings of fact and none of them can be impeached in this court.

Legal issues

There are only two issues in the present case which create any difficulty. These are whether the plaintiff was entitled to rely upon his acquittal in the criminal case to defeat the civil complaint against him and, secondly, whether, in all the circumstances of this case, the plaintiff was entitled to have the matters of complaint investigated at an oral hearing before an independent chairman.

Plaintiff's acquittal on criminal charges

Counsel for the plaintiff submitted that his contention that the plaintiff's acquittal on the criminal charges was a sufficient answer to the civil complaints was supported by the decision of this court in *McGrath v. Commissioner of An Garda Síochána* [1991] 1 I.R. 69.

McGrath v. Commissioner of An Garda Síochána was an application by way of judicial review for an order of prohibition. The applicant, a member of An Garda Síochána, was charged before the District Court with embezzlement of three sums of money received by him by virtue of his employment, contrary to s. 17(2)(b) of the Larceny Act, 1916. The charges related to three sums of money paid to him on foot of court orders imposing fines. The applicant admitted that he had not issued official receipts for any of those payments; as a result, the orders have been returned to the District Court as unexecuted and persons who had paid their fines had been in peril of being imprisoned on foot of those orders. While the applicant had not issued official receipts for the fines it would appear that, in at least some cases, he had issued unofficial receipts.

He was returned for trial before the Circuit Court and was acquitted by a jury on all three charges. He subsequently received notification that he was to be charged with breaches of garda discipline, including three charges of corrupt or improper practice; the particulars alleged failure to account for the three sums of money which were the subject matter of the criminal charges.

The applicant applied by way of judicial review for an order prohibiting the respondent from holding an inquiry into the alleged breaches of discipline.

It appears that some of the breaches of discipline alleged against the applicant arose out of the mere fact that he had been *charged* in court with embezzlement. In the High Court, Lynch J. held that such a complaint could not lie because any disgruntled person could bring charges against a member of An Garda Síochána and no matter how emphatic the acquittal, the fact that such proceedings had been brought could be alleged to be a breach of discipline. He found such a proposition to be so untenable as to merit granting an order of prohibition in relation to those charges. He also granted an order of prohibition against charges alleging "corrupt practice" though he allowed charges alleging "improper practices" to stand.

The Commissioner did not appeal against so much of the order of Lynch J. as had granted an absolute prohibition against proceeding with the charges of breach of discipline based on the mere fact of having been

charged. It is clear however that the fact that such oppressive charges had been brought influenced the attitude of the Supreme Court towards the balance of the case.

The Commissioner did appeal against so much of the order of Lynch J. as had prohibited him from proceeding with charges of "corrupt" as distinct from "improper" practices. The Supreme Court rejected this appeal partly because it doubted if the facts disclosed could support a charge of "corrupt" practices. But the judgment of Hederman J. (who delivered the principal judgment in the case) also contains (at p. 72) the following significant passage:-

> "The hearing of the alleged breaches of discipline before the disciplinary inquiry would seek to repeat the same ground as in the criminal trial. It was conceded by counsel for the respondent that this had never been done in practice in the past and could not be done under the new regulations in the future: See reg. 38 of the Garda Síochána (Discipline) Regulations, 1989, (S.I. No. 94) - in force from the 1st June, 1989, but not applicable to the present proceedings by virtue of reg. 5 thereof which deals with proceedings which were commenced and which had not been concluded before the commencement of those Regulations."

Hederman J. went on to find at p. 74 that for "this member of the garda" to be tried again before a disciplinary tribunal on charges identical to those in respect of which he had been acquitted by a jury would "having regard to the narrow purview within which the inquiry must be held ... involve a form of unfair and oppressive procedures which calls for the intervention of the Court". He added "I expressly abstain from finding that there is any question of *res judicata*."

Finlay C.J. concurring in the judgment of Hederman J. stressed that to permit the garda investigation to proceed into a complaint of corrupt practices would "in the particular circumstances of this case amount to an unfair procedure".

Griffin and McCarthy JJ. agreed with these conclusions. McCarthy J. went on to add at p. 75:-

> "Lest it be considered that acquittal on a criminal charge necessarily precludes a disciplinary investigation into the facts arising out of which a criminal charge was brought I reject such a proposition."

The learned trial judge therefore was right in concluding that *McGrath v. Commissioner of An Garda Síochána* [1991] 1 I.R. 69, was not a precedent to which the plaintiff in the present case could usefully appeal. Moreover and even assuming the employer in the present case and

the prosecutor in the criminal trial were the same person, it would be absurd if a party who had failed to establish a proposition beyond all reasonable doubt should, by that fact alone, be debarred from attempting to establish the same proposition on the balance of probabilities.

Oral hearing

Two passages which appear in the judgments in *Gunn v. Bord An Choláiste Náisiúnta Ealaíne is Deartha* [1990] 2 I.R. 168, have caused difficulties to trial judges in that they cast doubt on the relevance to Irish law of the speech of Reid L.J. in *Ridge v. Baldwin* [1964] A.C. 40 and on the reasoning of Kenny J. in *Glover v. B.L.N. Ltd.* [1973] I.R. 388.

The first is a passage which appears in the judgment of Walsh J. (at p. 181) reads as follows:-

> "There is one other matter I wish to refer to, to clear up what appears to be misapprehension concerning the application of the rules of natural justice or of constitutional justice. The application of these rules does not depend upon whether the person concerned is an office holder as distinct from being an employee of some other kind. I mention this because it is a subject which is referred to in the course of the judgment of the learned judge of the High Court in his reference to *Glover v. B.L.N. Ltd.* [1973] I.R. 388. The quality of justice does not depend on such distinctions."

The second is that of McCarthy J. which appears at p. 183 and reads as follows:-

> "I share the view of Walsh J. that, in the absence of any particular prescribed procedure, the principles of natural justice or constitutional justice would govern the relationship between the plaintiff and An Bord. These principles are not the monopoly of any particular class."

The third member of the court, Griffin J. agreed with both of these judgments.

It has been said that, because the Supreme Court held that the plaintiff in that case was in fact an office holder that the passages quoted were in fact *obiter*. But the purpose of the passages was to emphasise that the difference between employee and office holder was not the determining issue as to whether the principles of natural and constitutional justice applied. Certainly the court appears to have gone out of its way to emphasise this point. It appears to me that what the court was saying is

that society is not divided into two classes one of whom - office holders - is entitled to the protection of the principles of natural and constitutional justice and the other of whom - employees - is not. Dismissal from one's employment for alleged misconduct with possible loss of pension rights and damage to one's good name, may, in modern society, be disastrous for any citizen. These are circumstances in which any citizen, however humble, may be entitled to the protection of natural and constitutional justice.

The terms natural and constitutional justice are broad terms and what the justice of a particular case will require will vary with the circumstances of the case. Indeed two of the best known precepts of natural and constitutional justice may not be applicable at all in certain cases. As the learned trial judge has pointed out the principle of *nemo judex in sua causa* seldom applies in relation to a contract of employment where the employer judges the issue and is an interested party. Likewise it is difficult to apply, to a contract of employment, the principle of *audi alteram partem* which implies the existence of an independent judge who listens first to one side and then to the other.

If the contract or the statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he has complied with this procedure. If the contract or the statute contains a provision whereby an employee is entitled to a hearing before an independent board or arbitrator before he can be dismissed then clearly that independent board or arbitrator must conduct the relevant proceedings with due respect to the principles of natural and constitutional justice. If however the contract (or the statute) provides that the employee may be dismissed for misconduct without specifying any procedure to be followed, the position may be more difficult.

Certainly the employee is entitled to the benefit of fair procedures but what these demand will depend upon the terms of his employment and the circumstances surrounding his proposed dismissal. Certainly the minimum he is entitled to is to be informed of the charge against him and to be given an opportunity to answer it and to make submissions.

It is significant that in *Gunn v. Bord an Choláiste Náisiúnta Ealaíne is Deartha* [1990] 2 I.R. 168, Walsh J. dealing with the submission that the dismissal of the plaintiff was effected by means of a procedure which violated the plaintiff's rights to fair procedures stated at p. 179:-

> "With regard to the submissions the first thing to be observed is that the statute itself provided no procedures for dismissals, and there-

fore no question of any departure from any procedure laid down by statute arises. If no other procedure were provided then the matter would have to be judged in the light of the circumstances which attended the dismissal, and it is quite clear that persons cannot be dismissed from what is in effect public office by a procedure which did not inform them of the grounds of their dismissal or afford them an adequate opportunity to rebut, or attempt to rebut, any accusations of misconduct which would justify a dismissal."

This passage re-echoes a passage from the judgment of Walsh J. in *Glover v. B.L.N. Ltd.* [1973] I.R. 388 at p. 425, where he said:-

"The plaintiff was neither told of the charges against him nor was he given any opportunity of dealing with them before the board of directors arrived at its decision to dismiss him. In my view this procedure was a breach of the implied term of the contract that the procedure should be fair, as it cannot be disputed, in the light of so much authority on the point, that failure to allow a person to meet the charges against him and to afford him an adequate opportunity of answering them is a violation of an obligation to proceed fairly."

In the present case the plaintiff was employed by the defendant on the same terms as those on which he had formerly been employed by the Government. Formerly he held office at the will of the Government and could have been dismissed by the Government. If however he were to be dismissed for misconduct he would have been entitled to know what the charges against him were and to have had an opportunity to answer those charges. On the other hand, he would never have been entitled to a hearing by the Government nor could he complain if the Government had acted, as no doubt it would have acted, not only on the evidence in the case but also on the report of one of its inspectors. He would not, normally, have been entitled to see the report of the Government's investigating officer and neither is he, in the circumstances of the present case, entitled to a hearing before the board of the defendant or to see the report of the investigation officer. On the other hand, it is clear from the findings of the trial judge that he has received the benefits of the fair procedures referred to in the passages quoted above from the judgments of Walsh J.

The matter however does not rest there. The plaintiff claims that he is entitled to the benefit of an oral hearing before an independent arbitrator and to cross-examine, by counsel, those prepared to give evidence against him. This claim calls for a closer examination of the nature of the plaintiff's employment and of the circumstances surrounding his dismissal.

The plaintiff was a postman which is a position of trust. The defendant received complaints which caused it to have misgivings about the integrity of the postal service and about the conduct of the plaintiff. It appears to me that the defendant was entitled to expect a candid response from the plaintiff when they put these misgivings to him and that it was not sufficient for the plaintiff simply to deny responsibility and to say that he could not "remember back to yesterday week".

On the 4th April, 1984, the plaintiff made a statement to the gardaí in the following form:-

> "I have been cautioned that I am not obliged to make a statement or to answer any question and that anything I do say would be taken down in writing and may be given in evidence. I understand that. I have given Detective Sergeant McLoughlin permission to carry out a search of my house and that's the only statement I want to make."

It was of course the plaintiff's right to remain silent while the criminal proceedings were hanging over him. But the plaintiff was acquitted on the 18th December, 1985, and from then until the date of his dismissal on the 4th March, 1987, the plaintiff made no further statement concerning the matters alleged against him. The plaintiff raised no issue of fact which needed to be referred to a civil tribunal. It is important to emphasise that the dismissal proceedings were not criminal proceedings and it was not sufficient for a person in the position of the plaintiff simply to fold his arms and say:-

> "I'm not guilty. You prove it."

To attempt to introduce the procedures of a criminal trial into an essentially civil proceeding serves only to create confusion.

It is necessary also to consider the position of the defendant. It was not in a position to set up an independent tribunal with power to *subpoena* witnesses even had it wished to do so. At the same time it had received serious complaints from members of the public touching the integrity of the postal services. The defendant could not responsibly ignore these complaints even though the members of the public did not wish to become involved before any court or tribunal. Under these circumstances it appears to me that the defendant was entitled to receive a proper explanation from the plaintiff and that they did not receive it.

What happened in the High Court in the present case can have no effect upon the validity of the disciplinary proceedings conducted by the defendant. It is however interesting to note that the plaintiff did not give evidence in the High Court. Mrs. Gaughan, on the other hand, dropped her cloak of anonymity and she gave evidence in accordance with her

statement that the plaintiff was the postman she had seen attempting to dispose of a letter on waste ground at Coolock on the 27th March, 1984. She was not cross-examined.

I would dismiss the appeal.

Solicitors for the plaintiff: *O'Hanrahans.*

Solicitor for the defendant: *Hugh O'Reilly.*

Dermot Manning, Barrister

Ciarán Culkin, Plaintiff v. **Sligo County Council**, Defendant and **The Irish Human Rights and Equality Commission**, *Amicus Curiae* [2017] IECA 104, [C.A. No. 103 of 2015]

Court of Appeal 29 March 2017

Employment – Equality – Discrimination – Equality claim and personal injuries claim arising from same facts – Statutory provisions – Rule in Henderson v. Henderson – Whether claim before Equality Tribunal precluded common law claim for personal injuries – Employment Equality Act 1998 (No. 21), ss. 77(1) and 101(1) and (2).

Practice and procedure – Striking out proceedings – Abuse of process – Multiplicity of proceedings – Whether claim before Equality Tribunal precluded common law claim for personal injuries – Whether personal injuries claim arising from same underlying facts as equality claim an abuse of process – Whether plaintiff abusing process of court by raising issues that had been or could have been raised before statutory tribunal.

Section 77(1) of the Employment Equality Act 1998, as amended, provides:-

"A person who claims-

(a) to have been discriminated against or subjected to victimisation,

(b) to have been dismissed in circumstances amounting to discrimination or victimisation,

(c) not to be receiving remuneration in accordance with an equal remuneration term, or

(d) not to be receiving a benefit under an equality clause,

in contravention of this Act may, subject to subsections (3) to (9), seek redress by referring the case to the Director."

Section 101 of the 1998 Act, as amended, provides *inter alia*:-

"(1) If an individual has instituted proceedings for damages at common law in respect of a failure, by an employer or any other person, to comply with an equal remuneration term or an equality clause, then, if the hearing of the case has begun, the individual may not seek redress (or exercise any other power) under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be.

(2) Where an individual has referred a case to the Director … under section 77(1) and either a settlement has been reached by mediation or the Director … has begun an investigation under section 79, the individual—

(a) shall not be entitled to recover damages at common law in respect of the case …"

The plaintiff was a former employee of the defendant. He contended that during his employment he had been subjected to bullying, victimisation and isolation at work and that as a consequence he had been left with psychological and physiological symptoms.

The plaintiff made a complaint to the Equality Tribunal pursuant to the provisions of the 1998 Act, stating that he was subject to discriminatory treatment for several years, which culminated in a constructive dismissal. The plaintiff subsequently issued High Court proceedings in which he sought damages for personal injuries arising from his employment.

The plaintiff's complaint before the Equality Tribunal was heard and was rejected. Subsequently, by motion on notice, the defendant sought to have the plaintiff's personal injuries proceedings in the High Court struck out as an abuse of process or for being a duplication of the plaintiff's case before the Equality Tribunal.

The High Court (Kearns P.) considered that to allow the plaintiff to proceed with his common law claim would be to breach the rule in *Henderson v. Henderson* (1843) 3 Hare 100 and would also fail to give effect to the intention of the legislature in relation to s. 101(2)(a) of the 1998 Act. Accordingly, the plaintiff's personal injuries claim was dismissed (see [2015] IEHC 46).

The plaintiff appealed to the Court of Appeal.

Held by the Court of Appeal (Peart, Irvine and Hogan JJ.), in allowing the appeal, 1, that s. 101 of the 1998 Act served to bar complementary claims for discrimination before the Equality Tribunal and at common law in respect of claims based on failure to comply with an equal remuneration term or an equality clause. It did not bar subsequent personal injuries claims *per se* where an earlier discrimination claim before the Equality Tribunal had failed.

2. That it was necessary when considering the meaning of s. 101 of the 1998 Act to give it a holistic interpretation, applying the interpretive principle of *noscitur a sociis*. The phrase "entitled to recover damages at common law in respect of the case" in s. 101(2) of the Act was referable back to the language of s. 101(1), *i.e.* a claim at common law in respect of the failure to comply with an equal remuneration claim or an equality clause.

The People (Attorney-General) v. Kennedy [1946] I.R. 517 applied.

3. That the rule in *Henderson v. Henderson* required that the plaintiff must have been able to have brought forward his claim in the second proceedings in the first proceedings, and this rule was not automatically applicable in the special case of separate claims required to be made under a statutory scheme on the one hand and at common law on the other, even where both claims arose from the same set of underlying facts.

Henderson v. Henderson (1843) 3 Hare 100 applied. *S.M. v. Ireland* [2007] IESC 11, [2007] 3 I.R. 283 considered.

4. That the plaintiff could not have combined a common law claim for personal injuries along with the statutory claim for discrimination in the one set of proceedings. Just as the Equality Tribunal had no jurisdiction to entertain the common law claim, the High Court had no first instance jurisdiction to adjudicate upon the statutory claim for discrimination or harassment under the 1998 Act.

Obiter dictum, *per* Hogan J.: It would be open to the court of trial to determine that a subsequent personal injuries claim – or, at least, parts of that claim – should fail on

the ground that it amounted in substance to a collateral attack on a decision of the Equality Tribunal.

Cases mentioned in this report:-

A.A. v. Medical Council [2003] 4 I.R. 302; [2004] 1 I.L.R.M. 372.

Culkin v. Sligo County Council [2015] IEHC 46, (Unreported, High Court, Kearns P., 6 February 2015).

Cunningham v. Intel Ireland Limited [2013] IEHC 207, [2013] 24 E.L.R. 233.

Henderson v. Henderson (1843) 3 Hare 100; [1843-60] All E.R. Rep. 378; 67 E.R. 313.

Landers v. Director of Public Prosecutions [2004] IEHC 31, [2004] 2 I.R. 363.

S.M. v. Ireland [2007] IESC 11, [2007] 3 I.R. 283; [2007] 2 I.L.R.M. 110.

The People (Attorney-General) v. Kennedy [1946] I.R. 517.

Riordan v. An Taoiseach (No. 2) [1999] 4 I.R. 343.

Appeal from the High Court

The facts have been summarised in the headnote and are more fully set out in the judgment of Hogan J., *infra*.

In September 2009, the plaintiff made a complaint to the Equality Tribunal pursuant to the provisions of the Employment Equality Acts 1998 to 2008. In February 2011, whilst that claim was in being, the plaintiff issued a personal injuries summons in the High Court against the defendant.

The plaintiff's case before the Equality Tribunal was rejected on 14 August 2014.

By notice of motion dated 28 July 2014, the defendant sought an order striking out the plaintiff's proceedings before the High Court as an abuse of process or duplication of the plaintiff's equality claim against the defendant. By order dated 6 February 2015, the High Court (Kearns P.) struck out the plaintiff's claim for personal injuries (see [2015] IEHC 46).

By notice of appeal dated 4 March 2015, the plaintiff appealed to the Court of Appeal from the order dismissing his claim for personal injuries.

By order of 12 January 2016, the Court of Appeal granted liberty to the Irish Human Rights and Equality Commission to appear as *amicus curiae*.

The appeal was heard by the Court of Appeal (Peart, Irvine and Hogan JJ.) on 9 March 2017.

Michael Forde S.C. (with him *Timothy F. Sheehan*) for the plaintiff.

Helen Callanan S.C. (with her *Mairéad McKenna*) for the defendant.

Siobhán Phelan S.C. for the *amicus curiae*.

Cur. adv. vult.

Peart J. 29 March 2017

[1] I have read the judgment about to be delivered by Hogan J. and I agree with it.

Irvine J.

[2] I also agree with Hogan J.

Hogan J.

[3] Few issues have dominated our law of civil procedure over the last two decades or so as have those arising from a multiplicity of litigation. The law reports from this recent period are teeming with examples of where the courts have been obliged to wrestle with issues of *res judicata*, issue estoppel *per rem judicatam*, the rule in *Henderson v. Henderson* (1843) 3 Hare 100 and abuse of process.

[4] This appeal presents a slightly different version of this problem of the multiplicity of litigation in different *fora*: can a plaintiff present a complaint of discrimination in the workplace before the Equality Tribunal on the grounds of harassment, victimisation and exclusion from the body of workplace and then, in the event that this complaint should prove unsuccessful, ultimately sue the employer for personal injuries arising out of the same alleged set of facts? In the High Court Kearns P. considered that this multiplicity of litigation was *per se* abusive and violated the rule in *Henderson v. Henderson* (1843) 3 Hare 100. He accordingly struck out the personal injuries proceedings as an abuse of process: see *Culkin v. Sligo County Council* [2015] IEHC 46 (Unreported, High Court, Kearns P., 6 February 2015). The plaintiff now appeals to this court against that decision. Before exploring these issues it is, however, first necessary to set out the background to the litigation.

[5] The plaintiff is a retired engineer who was employed by Sligo County Council ("the Council") in various capacities over a period of 39 years. He had first commenced work with the Council as an apprentice technician in 1970. He attained two diplomas in engineering during the course of his employment, together with an undergraduate engineering degree. The plaintiff was promoted a number of times until he reached the rank of senior executive technician. The plaintiff contends that he began experiencing difficulties at work in or around 1996 when a new supervisor was appointed.

[6] His case against the Council was that he was subjected to bullying, victimisation and isolation at work. It was thus claimed that information regarding training courses and opportunities was deliberately withheld from him; that malicious rumours were spread about him; that he was ordered to perform tasks below his level of competence; that he was excluded and isolated socially; that he was denied pay increments and promotion opportunities; that his opinions and views were neglected despite his experience, and that he was generally treated with hostility. The plaintiff alleged that this behaviour has left him suffering with a number of psychological and physiological symptoms.

[7] The plaintiff retired from the Council in May 2009. On 10 September 2009 the plaintiff made a complaint to the Equality Tribunal pursuant to the provisions of the Employment Equality Acts 1998 to 2008. The plaintiff's complaint form to the Equality Tribunal states that he was subject to discriminatory treatment in relation to "access to employment, promotion/regrading, training, conditions of employment, discriminatory dismissal [and] victimisation", culminating in a constructive dismissal. After completing his engineering degree in 2005, the plaintiff applied for a number of engineering positions only to be deemed "not qualified" for promotion. He complained that he was continuously frustrated in his attempts to obtain relevant engineering experience within the Council because of his age and his disability, which he contends was induced by historic bullying and harassment. He instituted a grievance procedure in early 2000 but states that this was unsatisfactorily concluded in 2005 following "gross procrastination". It is the plaintiff's position that the respondent failed to deal appropriately with systematic bullying and exclusion until he was ultimately constructively dismissed in May 2009.

[8] The plaintiff also pursued a personal injuries case in addition to his equality complaint. He accordingly obtained an authorisation from the Personal Injuries Assessment Board in relation to his High Court proceed-

ings on 19 November 2010 and a personal injuries summons against the Council issued on 2 February 2011.

[9] The plaintiff's case before the Equality Tribunal was heard on 25 July 2012, 9 April 2013, 10 April 2013, 26 June 2013 and 21 July 2014. Mr. John Moran, senior executive officer in the defendant Council, has stated on affidavit that a preliminary submission was made to the Equality Tribunal expressing the Council's view that the matters before the Equality Tribunal were the same as those being pursued in the High Court proceedings and that the plaintiff was precluded from pursuing both claims.

[10] Mr. Moran averred that rather than seeking to have the matter before the Equality Tribunal adjourned however, the plaintiff requested that the equality officer nonetheless continue to hear the case. This may well be so, but it should also be noted that this issue does not appear to feature in the decision of the Equality Tribunal dated 14 August 2014. In any event, this issue is fundamentally an issue of law and is governed by the interaction of the relevant statutory provisions (namely ss. 77 and 101 of the Employment Equality Act 1998 ("the 1998 Act")) with standard legal principles such as *res judicata* and the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

The relevant statutory provisions

[11] It is next necessary to examine the relevant statutory provisions. The procedure for making a complaint to the Equality Tribunal is governed by the 1998 Act, as amended. Section 77(1) of the 1998 Act provides:-

> "A person who claims-
>
> (a) to have been discriminated against or subjected to victimisation,
>
> (b) to have been dismissed in circumstances amounting to discrimination or victimisation,
>
> (c) not to be receiving remuneration in accordance with an equal remuneration term, or
>
> (d) not to be receiving a benefit under an equality clause,
>
> in contravention of this Act may, subject to subsections (3) to (9), seek redress by referring the case to the Director."

[12] Section 101 of the 1998 Act addresses the question of alternative avenues of redress and provides as follows:-

> "(1) If an individual has instituted proceedings for damages at common law in respect of a failure, by an employer or any other person, to comply with an equal remuneration term or an equality clause,

then, if the hearing of the case has begun, the individual may not seek redress (or exercise any other power) under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be.

(2) Where an individual has referred a case to the Director … under section 77(1) and either a settlement has been reached by mediation or the Director … has begun an investigation under section 79, the individual-

(a) shall not be entitled to recover damages at common law in respect of the case, and

(b) if he or she was dismissed before so referring the case, shall not be entitled to seek redress (or to exercise, or continue to exercise, any other power) under the Unfair Dismissals Acts 1977 to 1993 in respect of the dismissal, unless the Director … having completed the investigation and in an appropriate case, directs otherwise and so notifies the complainant and the respondent."

The High Court judgment [2015] IEHC 46

[13] In his judgment Kearns P. placed particular emphasis on the earlier judgment of Hedigan J. in *Cunningham v. Intel Ireland Limited* [2013] IEHC 207, [2013] 24 E.L.R. 233. In *Cunningham v. Intel Ireland Limited* [2013] IEHC 207, the plaintiff had instituted a claim for discrimination against the defendant in relation to access to employment, promotion and regrading, conditions of employment, and harassment. The Equality Tribunal rejected the complaint and, as in the present case, an appeal to the Labour Court was pending at the time of the application before Hedigan J. It was claimed that the same events caused the alleged personal injury and the defendant objected to having to defend the same claim in two sets of proceedings. Hedigan J. stated that all matters and issues arising from the same set of facts or circumstances must be litigated in the one set of proceedings save for special circumstances. The judge held at p. 237:-

"10. … it is clear from her own pleadings and submissions in the two sets of proceedings that both her employment claim and her personal injury claim arise out of the same matters, *i.e.* alleged mistreatment in her working environment. This, she alleges, commenced on the announcement of her pregnancy, continued through her commencement of maternity leave, through that leave and culminated in her dissatisfaction with the way she was treated on her return to work.

The plaintiff in issuing these personal injury proceedings after her employment equality complaints, in my view, drew an artificial distinction which does not stand up to analysis.

11. In terms of the reliefs sought, the claim in the personal injury proceedings is for compensation for the stress and the health problems arising therefrom. It is clear that such a remedy may be awarded by the Labour Court in the employment equality proceedings …

12. Thus the plaintiff is not precluded from recovering compensation in the Labour Court in respect of the personal injury she alleges she has suffered. Moreover, the defendant herein has stated unequivocally in open court in this application that they will not oppose the plaintiff bringing into her claim before the Labour Court her complaints dating from her announcement of her pregnancy."

[14] Having referred with approval to the reasoning in *Cunningham v. Intel Ireland Ltd.* [2013] IEHC 207, Kearns P. proceeded to state at pp. 9 to 11:-

"I have carefully considered the relevant statutory provisions and the submissions of both parties and am satisfied that the plaintiff's personal injuries proceedings must be dismissed. The rule in *Henderson v Henderson* (1843) 3 Hare 100 is well established and is frequently applied as part of the policy of the courts to avoid double litigation of the same issues, as considered by the Supreme Court in *A.A. v. Medical Council* [2003] 4 I.R. 302. This rule is in the interests of all parties to a case, who should not be expected to prosecute or defend the same proceedings repeatedly, and to the public, who have an interest in ensuring that court time is not wasted.

The plaintiff in these proceedings issued a complaint before the Equality Tribunal on 10 September 2009. His EE1 form details the nature of the bullying he was allegedly subjected to and he was afforded a four day hearing before the Equality Tribunal. At the outset of the Equality Tribunal hearing, following a preliminary submission by the defendant, the option of pursuing his Equality Tribunal complaint or his common law claim was made clear to the plaintiff and he opted to pursue a remedy before the Equality Tribunal. I am satisfied that the plaintiff is now estopped from resiling from this position after having had his claim rejected by the Equality Tribunal.

To allow the plaintiff to proceed with his common law claim would be to breach the rule in *Henderson v. Henderson* and, in my view, would also fail to give effect to the intention of the legislature in relation to s. 101(2)(a) of the Employment Equality Act 1998. As sub-

> mitted by counsel for the defendant, s. 77(1) cases are purely statutory in nature. To interpret the provision in the manner contended for by the plaintiff would render subs. (a) entirely redundant, for there is no entitlement to recover damages at common law in respect of such cases. The term 'case' therefore must be taken to include the underlying facts which give rise to the complaint …
>
> The matters complained of in the plaintiff's common law and Equality Tribunal proceedings both date from the time a new supervisor was appointed and arise from the very same alleged incidents of mistreatment. The rule in *Henderson v. Henderson*, coupled with the provisions of s. 101(2)(a), requires that where there is such a considerable degree of overlap the plaintiff should be precluded from pursuing his High Court proceedings. The plaintiff's right of appeal to the Labour Court remains, and his right to an effective remedy is therefore unaffected.
>
> For the reasons outlined above, the plaintiff's personal injuries claim is dismissed."

The scope of the rule in Henderson v. Henderson (1843) 3 Hare 100

[15] In the light of the judgment of Kearns P. it is necessary next to reconsider the modern application of the rule in *Henderson v. Henderson* (1843) 3 Hare 100. The general approach of the courts to the issue of a multiplicity of proceedings has been, broadly speaking, to adopt a merits-based approach. In other words, doctrines designed to prevent a multiplicity of proceedings and thereby ensuring the administration of justice is not abused – such as the rule in *Henderson v. Henderson* – are applied flexibly and not by reference to some inexorable and unforgiving logic. The courts have generally fought shy of adopting an *ex ante*, automatic exclusion of any second set of proceedings and much will depend upon whether the second proceedings raise questions which might sensibly and reasonably have been raised in the first proceedings.

[16] All of this is illustrated by the judgment of Kearns J. for the Supreme Court in *S.M. v. Ireland* [2007] IESC 11, [2007] 3 I.R. 283. As this is probably the leading contemporary decision on the essentially non-automatic nature of the rule in *Henderson v. Henderson* (1843) 3 Hare 100, it may be convenient to set out the court's reasoning at a little length. In *S.M. v. Ireland* [2007] IESC 11 the plaintiff had originally been charged with a set of sexual offences under s. 62 of the Offences against the Person Act 1861 ("the 1861 Act"). He then sought an order of prohibition restrain-

ing the prosecution on the grounds of undue delay, but these judicial review proceedings did not succeed. Some time later the plaintiff was then charged with a second tranche of s. 62 offences in relation to different complainants. At that point the plaintiff sought to challenge the constitutionality of s. 62 of the 1861 Act, but was later met with the objection that he had thereby breached the rule in *Henderson v. Henderson* in that he might have – but did not – raise this constitutional question in the first judicial review proceedings.

[17] While this argument initially prevailed in the High Court, the Supreme Court disagreed. Kearns J. observed that the issue of the constitutionality of the section could not have been challenged in the judicial review proceedings. In any event, no proceedings had been issued by the plaintiff concerning the second tranche of s. 62 offences which concerned other complainants.

[18] Kearns J. then continued thus at pp. 294 and 295:-

> "[36] Ultimately, the key issue in the case is to consider whether the order granting dismissal of the plaintiff's claim for abuse of process is justified by application of the rule in *Henderson v. Henderson* (1843) 3 Hare 100.
>
> [37] As already noted, the rule in *Henderson v. Henderson* (1843) 3 Hare 100 effectively means that a litigant may not make a case in legal proceedings which might have been but was not brought forward in previous litigation. In that case Wigram V. C. formulated that principle as follows at pp. 114 to 115:-
>
> > 'In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'"

[19] Kearns J. then continued thus at pp. 295 and 296:-

"[38] The purpose of the rule is to uphold an important principle of public policy which demands, in the interests of justice, that defendants are not exposed to successive suits where one would do …

[40] However, it is equally clear on the authorities that the rule in *Henderson v. Henderson* (1843) 3 Hare 100 must not be applied in a rigid or mechanical manner so as to deprive the court of any discretion to hold otherwise in an appropriate case …

[42] It follows therefore that a limitation such as that provided for by the rule in *Henderson v. Henderson* (1843) 3 Hare 100 should not be blindly or invariably applied, particularly where there are special circumstances in the case which would suggest that the imposition of the limitation would be either unfair, excessive or disproportionate. Thus in *Landers v. Director of Public Prosecutions* [2004] IEHC 31, [2004] 2 I.R. 363 the rule in *Henderson v. Henderson* was not applied in circumstances where the applicant, who had been charged with road traffic offences, brought judicial review proceedings in which an order was granted restraining the District Court Judge from further conducting the trial of the applicant. No order was sought prohibiting the prosecution of the applicant and, on being informed that the charges against him would be heard before another District Court Judge, the applicant issued fresh judicial review proceedings seeking an order to restrain the respondent from further prosecuting him. The respondent contended that the applicant was not entitled to prohibition by reason of his failure to seek it in the first set of judicial review proceedings, but this contention was rejected on the basis that the applicant and his advisors could not reasonably have anticipated that the [Director of Public Prosecutions] would seek to prosecute afresh having regard to existing jurisprudence in relation to an unconstitutional first hearing in the District Court."

[20] At p. 296, Kearns J. noted that by contrast:-

"[43] In *A.A. v Medical Council* [2003] 4 I.R. 302 no reason was ever advanced as to why the point ultimately taken (*i.e.*, the absence of legal aid) had not been raised in the earlier proceedings. There had been no change of circumstances in the intervening period insofar as the applicant was concerned. The applicant's financial position had not worsened in the interval; he was impecunious at all material times."

[21] Kearns J. then concluded at pp. 297 and 298:-

"[45] It seems to me that in the instant case the defendants have failed to put forward any evidence or reasoning to support a case of

abuse or misuse of process based on any collateral attack of a decision made in the prior judicial review proceedings …

[46] The current plenary proceedings … raise a discrete constitutional point which could not 'sensibly' have been raised as part of the judicial review proceedings. An explanation, albeit not the most meritorious, has been offered as to why the point was not adverted to at an earlier time. However, that does not lead inexorably to a conclusion that the raising of the constitutional issue at a later time was an abuse of process. Nor can the present proceedings be characterised as dishonest or tantamount to the unjust harassment of any party. The defendants themselves have merely contended that the plaintiff could have raised his constitutional point either in the judicial review or in parallel plenary proceedings brought at the same time.

[47] Unlike *A.A. v. Medical Council* [2003] 4 I.R. 302, there were changed circumstances operating in the plaintiff's case, because eight additional charges involving different complainants were added to those which were the subject matter of the judicial review. There has been no litigation of any sort to date in relation to the second tranche of charges.

[48] Secondly, the parties to the present proceedings are not the same, given that the [Director of Public Prosecutions] was the opposing party in the judicial review proceedings but is not a party to the plenary proceedings. Furthermore, the plaintiff is not here seeking to reopen the same subject of litigation. He is not seeking to challenge a related procedural defect which might, and which should have been argued in the context of his delay type judicial review in 1998. What the plaintiff seeks to achieve in the present proceedings is a discrete and distinct subject of litigation, namely, that of seeking to have the statutory sentencing regime as set out in s. 62 of the Offences against the Persons Act 1861 declared unconstitutional. The *dictum* of Barrington J. in *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R. 343 makes it clear that this was not a relief to be claimed appropriately in the judicial review proceedings.

[49] Finally, any case on the 'parallel proceedings' argument seems to me to have the fatal flaw that such proceedings could not address charges not yet in being at the time of the judicial review proceedings and in respect of which no legal proceedings were ever brought. In another case, however, that argument might well prove conclusive in favour of a defendant."

[22] The reasoning of the Supreme Court in *S.M. v. Ireland* [2007] IEHC 11, [2007] 3 I.R. 283 is very instructive so far as the present case is concerned. That decision not only stresses the non-automatic nature of the rule in *Henderson v. Henderson* (1843) 3 Hare 100, but it also focuses on the type of *relief* which might sensibly have been sought and obtained in the first set of proceedings. This, of course, was the background to *Henderson v. Henderson* itself precisely because in that case the claim in relation to the account of the intestate's estate had already been determined by the Newfoundland Supreme Court. The English courts then ruled in respect of a second set of proceedings that, absent special circumstances, the matter could not then be re-opened before them. This, of course, is what Wigram V.C. had in mind when he spoke, at p. 115, of the rule applying to prevent the parties "to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not …"

[23] The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is thus closely linked with the doctrine of issue estoppel and estoppel *per rem judicatam*. In fact, the rule might be said to represent a potentially wider application of both of these doctrines in that it captures both the strategic withholding of claims which might have been usefully brought forward in the first set of proceedings (along with the negligent failure to do just that) as well as subsequent litigation which amounts either to a direct or collateral attack on the earlier judgment.

[24] Nevertheless, as I have already stated, the focus of *Henderson v. Henderson* (1843) 3 Hare 100 is on the relief which might have been obtained in the first proceedings. This is why the rule is not automatically applicable in the special case of separate claims which are required to be made under a statutory scheme on the one hand (such as in the present case) and regular personal injuries claims on the other, even if both claims arise from the same set of underlying facts. To repeat once again, the rule in *Henderson v. Henderson* requires that the plaintiff must have been able to have brought forward the claim in the second proceedings in the first proceedings.

[25] This is where I fear that both Kearns P. in the present case and Hedigan J. in *Cunningham v. Intel Ireland Ltd.* [2013] IEHC 207, [2013] 24 E.L.R. 233 have, with respect, fallen into error. Even if he had wanted to, the plaintiff could not have combined a common law claim for personal injuries along with the statutory claim for discrimination in the one set of proceedings. Just as the Equality Tribunal had no jurisdiction to entertain the common law claim, the High Court had no first instance jurisdiction to

adjudicate upon the statutory claim for discrimination or harassment under the 1998 Act.

[26] The discrimination and harassment claim before the Equality Tribunal must, in any event, be linked to one or more of the nine specific grounds identified in s. 6(2) of the 1998 Act, namely, gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. The corollary of this is that the Equality Tribunal has no jurisdiction under the 1998 Act to deal with a claim for free standing claim for discrimination or harassment which is independent of these specific statutory grounds. Putting this another way, while the Equality Tribunal has jurisdiction to deal with a harassment claim which was linked with the gender of the claimant, it would, for example, have no such jurisdiction where the claim simply was that the victim had been harassed by a fellow employee who just happened to dislike him or her.

[27] It follows, therefore, that the discrimination claim and the personal injuries claim are different claims, with different time limits and different rules as to both liability and quantum. As Ryan has put it, the identification of "the ambit of the two (or more) sets of proceedings pursued by a litigant, and in particular whether that ambit overlaps impermissibly, would appear to be central to the determination of whether *Henderson* … precludes the bringing of … further claims" (Ryan, "*Parallel Proceedings in Employment Law: An Analysis of the High Court Judgments in Cunningham and Culkin*" (2015) 38 D.U.L.J. 219, at p. 224). In that sense, therefore, it was simply not possible for the plaintiff to have brought forward his "whole case" before the Equality Tribunal in the sense envisaged by Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 100 simply because that statutory body would have had no jurisdiction to entertain a workplace personal injuries claim.

Conclusions on the Henderson v. Henderson issue

[28] It follows, therefore, that I consider that Kearns P. was in error inasmuch as he applied what in effect was an *ex ante* and automatic application of the rule in *Henderson v. Henderson* (1843) 3 Hare 100 so as to bar the present personal injuries claim *in limine*. That, admittedly, is not to say that the plaintiff can proceed entirely unhindered to pursue his personal injuries claim against the Council. It may be, for example, that the trial judge hearing the personal injuries case would conclude that that case should ultimately fail because it amounted in substance to a collateral attack on the earlier Tribunal decision. But that is not at all the same thing

as saying that the claim should be struck out *in limine* on *Henderson v. Henderson* grounds.

Section 101 of the 1998 Act

[29] One may, in any event, arrive at this conclusion independently by reference to the language of the 1998 Act itself. Section 101 of the 1998 Act addresses the issue of complementary remedies.

[30] The key subsection so far as the present case is concerned is that contained in s. 101(2)(a). This provides that where a case under s. 77(1) – which includes a case for discrimination and harassment – has been referred to the Equality Tribunal and the case has either been settled following mediation or the Director of the Equality Tribunal has commenced an investigation under s. 79, then the claimant "shall not be entitled to recover damages at common law in respect of the case".

[31] The argument here – which found favour in the High Court – is that s. 101(2)(a) should be interpreted as precluding a common law claim for personal injuries where the individual has already pursued a claim before the Equality Tribunal. It is true that, as Kearns P. noted in his judgment, the claims before the Equality Tribunal are entirely statutory in nature. He considered that the words of s. 101(2)(a) ("in respect of the case") must refer to the *facts* of the underlying claim and not simply to the *relief* claimed before the Equality Tribunal. Any other conclusion would, he thought, render these words of the subsection effectively otiose and redundant, since a claimant could never have recovered at common law in respect of a claim of which the Equality Tribunal had jurisdiction.

[32] I agree that if the subsection is viewed in isolation it might well lend itself to this interpretation. But I think that the section must be viewed as a whole and particularly with reference to the immediately preceding subsection, namely, s. 101(1). Section 101(1) addresses the converse case of where a plaintiff makes a claim for damages at common law in respect of a failure "by an employer or any other person, to comply with an equal remuneration term or an equality clause", by providing that if then the hearing of the case has begun, the individual "may not seek redress … under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be".

[33] It is, however, necessary to give s. 101 a holistic interpretation, as any endeavour to look at s. 101(2)(a) in isolation and without regard to the statutory provision which immediately precedes it may serve to give a

misleading construction. As Black J. explained in The *People (Attorney-General) v. Kennedy* [1946] I.R. 517, at p. 536:-

> "A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.
>
> If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of *ejusdem generis* and *noscitur a sociis* utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given a quite different meaning when viewed in the light of its context."

[34] If one applies this principle in the context of s. 101, it is plain that the phrase "entitled to recover damages at common law in respect of the case" in s. 101(2)(a) is referable back to the language of s. 101(1), *i.e.*, a claim at common law in respect of the failure to comply with an equal remuneration claim or an equality clause. Not only is this natural sequence of language for the reader of the section – because, at the risk of stating the obvious, s. 101(2)(a) comes immediately after s. 101(1) – but any other conclusion would also lead to an absurdity. It would mean, for example, that a claimant could pursue a personal injuries claim which was unrelated to a failure to comply with an equal remuneration term or an equality clause and then be free to pursue a discrimination claim before the Equality Tribunal (s. 101(1)) but that a claimant who first pursued a discrimination claim before the Equality Tribunal was not free to maintain a personal injuries claim before the courts (s. 101(2)(a)).

[35] It is, accordingly, by checking the meaning of s. 101(2)(a) by reference to the context of s. 101(1) in the manner indicated by Black J. in *The People (Attorney-General) v. Kennedy* [1946] I.R. 517 that the meaning of the phrase "damages at common law in respect of the case" becomes clear. In this context, the language of s. 101(2)(a) refers to that already described in s. 101(1), namely, a claim for damages at common law in respect of the failure to comply with an equal remuneration term or an equality clause. When viewed in the light of s. 101(1), these words in s. 101(2)(a) must, accordingly, be regarded as having the more limited meaning I have suggested and not the wider, broader meaning which found favour in the High Court. As thus construed, the construction of s. 101(1) and s. 101(2)(a) presents virtually a textbook example of the application of

the interpretative principle of *noscitur a sociis* ("known by its companions").

Conclusions on s. 101 of the 1998 Act

[36] Summing up, therefore, s. 101 serves to bar complementary claims for discrimination before the Tribunal and at common law in respect of claims based on failure to comply with an equal remuneration term or an equality clause. But it has no wider meaning and, specifically, it does not bar subsequent personal injuries claims *per se* where an earlier discrimination claim before the Tribunal has failed.

Overall conclusions

[37] For the reason stated, therefore, I would allow the appeal insofar as Kearns P. held that the personal injuries claim must automatically fail *in limine* as an abuse of process by reason of the plaintiff's failure to prevail before the Equality Tribunal. But, for the reasons I have also stated, it would also be open to the court of trial to determine that the personal injuries claim – or, at least, parts of the claim – should fail on the ground that it amounted in substance to a collateral attack on the decision of the Equality Tribunal.

Solicitor for the plaintiff: *John Gerard Cullen.*

Solicitors for the defendant: *Hegarty & Armstrong.*

Solicitor for the *amicus curiae*: *Gwendolen Morgen.*

Michael Hughes Dillon, Barrister

THE COURT OF APPEAL
Civil

UNAPPROVED
Neutral Citation Number: [2022] IECA 124
Appeal Number: 2020/53

Whelan J.
Costello J.
Haughton J.

BETWEEN/

KARSHAN (MIDLANDS) LIMITED T/A DOMINO'S PIZZA

APPELLANT

- AND –

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 31st day of May 2022

Introduction

1. This appeal was brought by Karshan (Midlands) Ltd. ("Karshan") from the judgment and order of O'Connor J. made in the High Court on 21 January 2020 in a case stated by the Tax Appeals Commissioner for an opinion pursuant to s. 949AQ of the Taxes Consolidation Act 1997 ("TCA") heard over three days in July 2019. The decision of the Appeal Commissioner made on 8 October 2018 had determined that pizza delivery drivers engaged by Karshan who had worked during the years of assessment 2010 and 2011 ("the relevant years") had done so pursuant to contracts of service and as such were taxable pursuant to Schedule E of the TCA.

Consultative case stated

2. The case stated posed nine questions for the opinion of the High Court. Questions 1 to 4 were as follows: -

> "(1) Whether upon the facts proven or admitted I was correct in law in my interpretation and application of the concept of mutuality of obligation as set out at pages 20 – 28 (paras. 53 – 87 of my determination).
>
> (2) Whether upon the facts proved and admitted I was correct in law to determine that it was not necessary to consider whether the overarching contract contained mutuality of obligation, for the reasons set out at pages 49 – 52 (paras. 156 – 166) of my determination.
>
> (3) Whether upon the facts proved or admitted I was correct in law in the interpretation and application of the concept of "integration" contained at paras. 36 - 39 (paras. 114 – 125) of the determination.
>
> (4) Whether upon the facts proved or admitted, I was correct in law in the interpretation and application of the concept of "substitution" contained at pages 30 - 34 (paras. 90 – 105) of the determination."

The trial judge responded "yes" to the above questions. It followed from same that the answers provided by the trial judge to questions 5 to 9 – as to whether the Appeals Commissioner had in each stated respect erred in law – were in the negative.

3. For the reasons outlined hereafter, I am satisfied that the High Court judge correctly answered each of the questions posed and rightly concluded that the Appeals Commissioner was correct in her conclusions that the relationship between the appellant and the driver in each case gave rise to a contract of service. I differ in certain respects with the trial judge in

regard to some aspects of the approach whereby he reached his determination on the case stated but not his conclusions. Accordingly, I would dismiss the appeal on all grounds.

4. It is to be borne in mind that the findings of the Commissioner in the first instance were not to be disturbed by the High Court unless there was no evidence on which she could have reasonably reached the conclusions which she did or she erred in her application of the law. As was stated by Hamilton C.J. in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1997] IESC 9, [1998] 1 I.R. 34:-

> "Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions as is now usually the case with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the Courts to review their decisions by way of appeal or judicial review." (pp. 37-38)

Background

5. The consultative case stated arose in the context where the central issue confronting the Appeals Commissioner was whether drivers engaged in the delivery of pizzas for the appellant (Karshan) in the relevant years were independent contractors working under contracts for services or whether, as the Appeal Commissioner determined, they worked under contracts of service and as such were employees.

6. Karshan is engaged to the manufacturing and delivery of pizzas and both elements are integral to its business model. The relevant retail outlets are situated at Athlone, Mullingar and Tullamore. Delivery of takeaway food within each catchment hinterland requires

drivers. Without doubt drivers are integral to and a central element of the company's organisation.

7. Each driver was obliged to execute an overarching contract of open ended and indefinite duration. In addition, the Appeals Commissioner found that individual contracts were operated in practice in the course of dealing between the drivers and the individual branches whereby the individual drivers submitted details of their availability and in reliance on same the pizza shop manager prepared weekly rosters. Acceptance of the offer to work for the roster period was communicated when the roster was circulated to the individual drivers each week by the store manager.

8. Karshan contend that the said delivery drivers work under contracts for services. The Revenue Commissioners argue that on its true construction the contractual relationship between Karshan and its pizza delivery drivers constituted a hybrid contract, comprising of two distinct elements - each considered separately below - the anterior overarching contract and the discrete individual contracts operating under the overarching contract in respect of specific weekly assignments of driving work giving rise to contracts of service. The overarching terms were intended to apply both to the general engagement and to each individual contract entered into.

9. The practical issue is whether Karshan should deduct income tax and other relevant contributions from the payments it makes to drivers whom it engages to effect delivery of pizzas at its Domino pizza outlets in the Midlands. The liability to make such deductions depends on establishing that the relationship between the company and each driver is governed by a contract of employment (otherwise a contract of service) rather than a contract for services under which they would operate as independent contractors. The Appeals Commissioner assessed the appellant company on the basis that the drivers are in effect

employees engaged under contracts of service. The appellant contends that she erred and that the drivers are self-employed.

Asymmetrical nature of overarching agreement

10. Statements in written agreements disavowing any intention to create a relationship of employment cannot prevail over the true legal effect of the agreement's terms. In that behalf, regard must be had to the asymmetrical nature of a transaction where one party is the exclusive author of the instrument and the other can only generate an income in an arrangement with the company by signing the document. Hence the labels to be found in the overarching agreement cannot by themselves be determinative of any issue as to status.

11. The contract under consideration here was asymmetrical being crafted and framed by Karshan and its legal advisers with no input from the individual drivers. Since the contracts were all identical and there was no evidence to the contrary, it can reasonably be inferred that same were offered to prospective drivers on a "take it or leave it" basis.

Terms of Overarching agreement

Clauses 1 and 17

12. Clause 1 and Clause 17 stated that the driver was being retained by the appellant as an independent contractor. The categorisation of a relationship by the parties themselves can be taken into account but is not dispositive of status which falls to be determined as a mixed question of fact and law. Insofar as Clauses 1 and 17 describe the driver as an "independent contractor", it is to be borne in mind that the drivers had no input whatsoever into the drafting of the agreement. Ultimately, categorisation is an objective test and it is manifest that parties cannot establish a particular categorisation merely by describing it in such a fashion.

13. In regard to the issue of the weight to be afforded to a bare statement such as Clause 1 of the agreement, assistance can also be gleaned from decisions such as that of the English

Court of Appeal in *Autoclenz Limited v. Belcher* [2009] EWCA Civ. 1046, upheld on appeal by the UK Supreme Court in *Autoclenz Limited. v. Belcher* [2011] UKSC 41, which reaffirmed that in determining the issue of status a court or tribunal must always take an objective approach. Further, that decision is authority for the proposition that a person should not be estopped from contending that he was an employee "merely because they have been content to accept self-employed status for some years." (para. 57) This approach was supported by Lord Clark's judgment in the Supreme Court.

14. This approach to the characterisation of the relationship between parties has well-established pedigree including the judgment of Elias L.J. in *Quashie v. Stringfellows Restaurant Limited* [2012] EWCA 1735 at para. 52 where he observed: -

> "It is trite law that parties cannot by agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen to characterise the relationship, and in a case where the position is uncertain, it can be decisive…"

Also relevant in this regard is the judgment of Lord Denning in *Massey v. Crown Life Insurance Co.* [1978] 2 All E.R. 576 which accords with *Calder v. H. Kitson Vickers & Sons (Engineers) Ltd* [1988] I.C.R. 259. This analysis accords in turn with the views of Keane J. in the Supreme Court in *Henry Denny* that "each case must be considered in light of its particular facts" (p. 49). The input, if any, of the individual into the terms of any contract is such a "particular fact".

15. In reality, the only way to obtain work as a driver in a Midland Domino's pizza branch was to execute the overarching contract. It was tendered on a "take it or leave it" basis. There

is no suggestion that drivers or representatives of drivers had any input into the content of the contracts including Clauses 1 or 17.

Clause 3

16. This clause provides that the company would pay drivers depending on the amount of deliveries which were successfully undertaken by them. However, in addition remuneration was being paid for "branded promotion through the wearing of fully branded company supplied clothing and/or the application of company logos affixed temporarily to the contractor's vehicle" as *per* Clause 3 of the overarching contract. This applies throughout the entire shift and not just to apparel being worn during the course of a delivery.

Thus, attending at the pizza shop in uniform constituted active engagement in the core work of the appellant. The uniform comprised of a crew shirt, baseball cap, name tag and driver jacket. According to the evidence, managers checked the uniforms to ensure they were in order. The rate of pay in respect of the wearing of uniform was on an hourly basis: "The brand promotion or advertising rate was €5.65 per hour" (para. 34 of determination). That payment was augmented depending on the amount of deliveries undertaken during the shift. However, an hourly rate was payable even if there was no driving work at all arising and accordingly it was available to both sides to calculate in advance once the available hours were communicated by the driver to the manager and the roster was drawn up accordingly. Obviously the additional sum in respect of the amount of deliveries remained to be ultimately calculated. Thus, this manner of payment coupled with the fact that during downtime between deliveries, the clear evidence of at least one of the company's managers was that he required drivers to make pizza boxes and a driver was subject to a significant sanction for refusing to do so, namely, being sent home with an ensuing loss of their hourly rate of payment and the opportunity to make deliveries during that shift. That fact, coupled with the overall analysis of Clause 3 and in light of the evidence before the Commissioner pointed to

a significant integration of drivers into the company's enterprise. It further points to the relevant level of control consistent with the relationship of employer and employee subsisting between the parties.

Clause 5

17. It is contended by the appellant in support of the appeal:-

> "Clause 5 provided that the drivers would insure their own vehicles (although Clause 4 stated if the driver did not have his own vehicle that he could apply to rent a company vehicle from the appellant)." (p. 9)

This contention was not established in my view. It would appear from the evidence that was adduced that Clause 4 never operated as between the parties and in practice no delivery vehicles were available for rent from the company. Furthermore, Clause 5(a) significantly modifies the initial obligation to insure and expressly states: -

> "If the contractor does not have the appropriate business use insurance the company is prepared to offer same (third party only) at a pre-determined rate."

In its totality, Clause 5 could point more towards the relationship of employer and employee, particularly insofar as the company anticipates that an individual driver could encounter difficulties, financial or otherwise, in obtaining business use insurance, and agrees to discharge same "at a pre-determined rate". The assumption of a further obligation on the part of the driver to discharge the business use insurance premia to the company might be expected to incentivise the submission of availability sheets on an ongoing basis in connection with the creation of rotas and rosters to facilitate the discharge of that sum to the company.

Clause 9

18. Clause 9 provides:-

> "The company points out to the contractor that in keeping with all self-employed individuals the financial risks and/or rewards associated with providing the services as outlined in this contract are strictly under the control of the contractor, and the company bears no responsibility whatsoever for same. In particular, the company does not warrant a minimum number of deliveries. Consequently, the contractor undertakes to operate his/her own accounting system. He furthermore agrees to provide a weekly invoice with the information necessary to agree the amount owed by the company."

19. This clause must be stress tested against the evidence. The Appeals Commissioner identified in the Determination including at paras. 110 and 111 several countervailing factors which pointed towards the existence of a contract of service. The said provisions betrayed a grip by Karshan on a driver's economy inconsistent with him being a truly independent contractor. Requirements imposed by Karshan on a driver under the overarching agreement including uniforms, branded apparel, vehicle markings, restrictions on freedom to work specified in clause 11, were capable of constituting, in the language of Wilson L.J. in *Pimlico Plumbers v. Smith* [2018] UKSC 29 at para. 48 "…lapses which shed light on [the] true nature" of the agreement between the parties. It is apparent from para. 110 of the determination that the Appeals Commissioner is alive to the relevance of such factors to the exercise she was undertaking.

20. The evidence was that on an approximately weekly basis the rosters were circulated. For the hours rostered, the driver was entitled to the remuneration which at the time in respect of the branding promotion aspect entitled a payment of €5.65 per hour with a delivery rate

fixed per drop in addition. Drivers gave evidence that in practice the company pre-prepared invoices for the drivers to sign. This is arguably more consistent with a relationship of employer/employee. Whereas Clause 9 did not warrant a minimum number of deliveries, it has to be borne in mind that it could not do so since they could not definitively anticipate in advance the number of orders as might be placed on any given day or evening for a food delivery. However, what is not stated but was the case, is that when the weekly roster was drawn up by the company based on the availability sheets and circulated to the drivers, the company did warrant to pay for the specified number of hours in relation to the brand promotion/advertising aspect at €5.65 per hour.

Clause 11

21. Clause 11 **is** of crucial importance in that it cast obligations on the driver during the periods between his work on rostered driving assignments for Karshan and not

just during the performance of the successive or discrete rostered assignments as were provided to him in the weekly rosters. It is indicative of an ongoing level of subordination of the driver to the Karshan even on the days and times between rostered assignments. Its terms are considered in detail below.

Clause 12

22. The substitution clause on its face, considered in the context of the latter part of Clause 14, appears to confer a right of substitution on the driver. The Commissioner and the High Court judge (at para. 55) erred in finding that the overarching agreement "required" the driver to find a substitute when unavailable. However, that error in itself does not operate to alter the validity of the Commissioner's conclusion at para. 164 or the High Court judgment at para. 60. On its true construction, this clause created a right on the part of the driver to proffer a substitute if the narrow circumstances contemplated arose. Such right does not

necessarily reduce the binding nature of the work contract and does not eliminate its obligational core. It does not amount to a genuine entitlement on the part of the individual to subcontract the work out to whomsoever he/she chose. This is consistent with the company exercising a far higher degree of control than the language of Clause 12 implies. That degree of control over substitution is more consistent with the relationship of employer and employee. Substitution for a shift when a driver was unavailable did not alter the contractual obligation of the driver to work the balance of the unworked shift for the rostered period.

23. Personal performance was the norm but it was not an absolute requirement. Decisions such as *Mirror Group Newspapers Limited v. Gunning* [1986] I.C.R. 145, *Sheehan v. Post Office Counters Limited* [1999] I.C.R. 73 and, from the point of view of tax, *IRC v. Post Office Limited* [2003] I.R.L.R. 199 have construed the definitional requirement of personal performance of imposing merely an obligation that personal performance must be the "predominant purpose" of the contract rather than an absolute requirement. In this case Karshan offered no evidence that personal performance was other than the norm.

I am satisfied that the trial judge was correct in his conclusion not to interfere with the decision of the Commissioner in regard to the operation of Clause 12. The worker had a right but not an obligation to engage a substitute. As stated above, I am satisfied that there was no evidence to suggest that the substitutes were conventionally third parties with no contractual relationship with the appellant. Otherwise it could not be said that such an individual was "capable of performing the contractor's contractual obligations in all respects" as Clause 12 itself mandated.

Clause 14

24. This exclusion clause is noteworthy. It indicates that there is no obligation on the part of the company to offer work. This speaks to the inherent and subtle imbalance between the rights of the company and those of drivers within the overarching agreement which in its terms and tenor favours the company. Significantly, as stated above, Clause 14 does not state anywhere that there is no obligation on the driver to accept work. A far more modified position is ordained for the driver by its terms. It is crafted in favour of the company. The use of the word "unavailability" does not connote freedom to gratuitously refuse to carry out a previously agreed rostered shift. There is an ongoing obligation operating at all material times under the overarching agreement that the driver makes himself available for work on "certain days and certain times" of his own choosing to be identified by him and communicated to the company. Submission weekly by the driver of an availability sheet represents the discharge of that ongoing obligation.

As an exclusion clause, Clause 14, in the overarching contract requires to be stress-tested as to its effect against the operational reality of the relationship between the parties. The overarching contract falls to be interpreted in a realistic manner and in accordance with the operating facts. That is what the trial judge did. The construction advanced by the appellant that the clause conferred a freedom on a driver to work when he or she chose is not supported by the language of the clause. No driver gave evidence of so operating or understanding the said term. The trial judge was entitled to prefer the common sense construction contended for by Revenue, which he implicitly did; that Clause 14, in its true context, objectively viewed and in light of the evidence, implicitly required a driver to initiate an individual agreement with the company in relation to his availability for work.

General principles for ascertaining employment status

25. The *locus classicus* for the definition of a contract of service is the judgment of MacKenna J. in *Ready Mixed Concrete v. Minister of Pensions* [1968] 2 Q.B. 497 which identified the three key elements of a contract of service as being: -

(i) The servant agrees that, in consideration of a wage or other remuneration, he would provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with it being a contract of service.

26. The *Ready Mixed* test has demonstrated its resilience and has withstood the test of time because of its inherent flexibility and overall applicability to a significant variety of scenarios in both the Revenue and employment domain. The *Ready Mixed* principles are to be understood in this jurisdiction in the context of later jurisprudence including the judgments of the Supreme Court in *Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 and Edwards J. *Minister for Agriculture v. Barry* [2008] IEHC 216 and *inter alia*, the principle of mutuality of obligation.

27. In light of the extensive jurisprudence including the taxonomy posited by Edwards J. at para. 44 of *Minister for Agriculture and Food v. Barry* ("*Barry*"), and the observations of the Supreme Court in *Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 ("*Denny*"), the ascertainment of the true status of an individual in the context of work or alleged employment *prima facie* necessitates in the first instance a thorough

examination of the facts and circumstances, not alone in relation to any formal written contract but in relation to the operational day to day arrangements that obtain.

Economic Reality & Work Contracts

28. *Harvey on Industrial Relations and Employment Law* (LexisNexis Butterworths, 2021) notes the importance of a court having regard to the economic reality of the relationship between the parties. The approach is explained thus at paragraph 35: -

> "The particular advantage of the economic reality test is that it enables the court to see through the disguise with which the parties sometimes clothe their relationship. An employer may prefer to arrange a contract for services rather than a contract of employment, for it can thereby escape many statutory restrictions and free itself from its proper responsibilities. The worker may readily acquiesce, for the independent contractor enjoys a favourable tax position as compared with the employee; and the worker may be willing to sacrifice the long term security of the employment protection laws for the short term advantage of a larger pay packet. Even if the parties honestly believe they have a contract for services, the court may say they have a contract of employment."

29. The gig economy can throw into sharp relief the inequality of bargaining power between an individual who seeks work and those in a position to provide it. It is appropriate therefore that strict commercial law principles governing the construction of contracts not be unduly rigidly applied in the context of work. In my view, work-type cases require to be considered more broadly and account can be taken of factors such as whether the contract was prepared entirely by the company alone which drafted all documentation without any input from the individual providing the work or where there was no opportunity offered or available to vary any contract terms or where a contract was presented on a "take or leave

it" basis or where the individual offering to work did not obtain independent legal advice prior to entering into or signing an agreement in determining the true nature of such an agreement. What has to be ascertained is, in its totality, the true nature of the agreement concluded between the parties as gleaned from the documentation and from the operation of the agreement in question in practice over time.

Construction of Contracts as to Status

30. Our Supreme Court, in the analogous context of landlord and tenant law, has repeatedly made clear that in construing an agreement as to status the terms of a written agreement will not necessarily determine the matter. In *Whipp v. Mackey* [1927] I.R. 372 at p. 382, Kennedy C.J. observed;

> "Neither the application of the term "rent" to the annual payment nor the description of [*the grantee*] as "the tenant" would be sufficient to determine the character of the document as a grant or demise, or agreement for a grant or demise, rather than a licence or agreement for a licence."

31. As was made clear by Griffin J. in *Gatien Motor Co. Ltd v. Continental Oil Co. Ireland Ltd*. [1979] I.R. 406, the court in evaluating any written agreement said to be probative as to status between parties attaches significant weight as to whether it was negotiated at arm's length;

> "The parties negotiated at arm's length, both were fully legally advised, and the Caretaker's Agreement which was signed by [*the tenant*] expressed the intention of the parties and was entered into at the behest of the solicitors for the tenant". (p. 415)

It is to be inferred from that judgment that purposive approaches to construction are required for contracts where there is a material imbalance between the parties in the negotiation of the written agreement and the availability of independent legal advice.

Kenny J. in that case observed at p. 420;

> "The existence of the relationship…is determined by the law on a consideration of many factors and not by the label which the parties put on it."

32. The Supreme Court has demonstrated that it is astute to the risks that a written agreement as to status may not represent the true status of the parties. In *Irish Shell & B.P. Ltd v. Costello* [1981] I.L.R.M. 66, a majority of the court found that a purported licence had created the relationship of landlord and tenant, Griffin J. stating at p. 70;

> "Although a document may be described as a licence it does not necessarily follow that, merely on that account, that it is to be regarded as amounting only to a licence in law."

33. In this regard, in the context of work-related contracts, I find helpful the observations of Lord Clark in the English Supreme Court in *Autoclenz Limited v. Belcher* [2011] UKSC 41 – a decision that echoes the dicta of the Irish Supreme Court in *Gatien Motor Co. Ltd v. Continental Oil Co. Ireland Ltd*. [1979] I.R. 406 - that the court will have regard to inequality between the parties and access to independent legal advice in evaluating a contract's ostensible terms - where Clark L.J. observed at para. 34: -

> "The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para [92] as follows:
>
> > 'I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which

the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so…'"

The judgment continued:-

"35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

34. Briggs J. in *Weight Watchers (UK) Ltd v. Revenue and Customs Commissioners* [2012] STC 265 observed at para. 20:-

"…before leaving *Autoclenz Ltd. v Belcher*, it is necessary to note that the Supreme Court also resolved an issue which had emerged in previous decisions about whether in the employment context the court was constrained by an apparently complete written contract to conclude that its terms represented the true agreement, unless the application of the traditional doctrine of sham (which required proof that both parties intended the written contract to paint a false picture) permitted a different conclusion. The Supreme Court held that no such constraint is rigidly to be implied in the employment context because of the normally superior bargaining position of the employer, and its consequential ability to dictate the terms to be included in the written contract: see per Lord Clarke at [20]–[35]. In passing, he approved the

following passage in the judgment of Elias J in *Kalwak v Consistent Group Ltd.* [2007] IRLR 560:

> '[57] The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p. 369)
>
> > "Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so."
>
> [58] In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> [59]. … Tribunals should take a sensible and and robust view of these matters in order to prevent form undermining substance …'

[21] Lord Clarke concluded, at [35] as follows:

> 'So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This

may be described as a purposive approach to the problem. If so, I am content with that description.'"

Context not Label

35. Where, as in the instant case, the written (overarching) agreement does not reflect the sum total of the key elements of the work relationship between the parties, it is necessary to consider the evidence as to the individual personal work relations and in particular to look beyond the label imposed on the arrangement particularly where one party alone has drafted the agreement, to evaluate whether on its true construction an agreement accords with the label ascribed to it by its drafter.

36. It is not the function of a court to re-cast a party's bargain. That said, the denomination or characterisation accorded to an agreement or the ostensible intentions of the parties embodied therein ought not preclude a thorough examination of the true circumstances underpinning its creation and operation so that an informed determination as to its true characterisation can be arrived at.

37. There are a variety of scenarios which can emerge and the prism through which one considers an arrangement can pivot that assessment in one direction or another. Work might be carried out under a single contract which, on the facts when properly considered and understood, might fall to be classified as either a contract of service or a contract for services. Alternatively, on each occasion that work is performed the individual might be considered to have entered a new contract which, again depending on the circumstances, might fall to be classified as either a contract for services or a contract of service. A third potential scenario (which arises in the instant case) is what in effect has come to be known in practice as a *hybrid* or overarching contract whereby there is "an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work" (*Weight*

Watchers UK Limited v. HMRC [2011] UKUT 433 TCC, para. 30). As in the instant case, generally speaking, overarching contracts are in writing whilst the individual arrangements are conventionally not in written terms. Another possible hybrid contractual relationship was contemplated by Edwards J. at para. 44 of *Barry*, although on the facts of this case, the described scenario is not particularly relevant.

38. From an employment perspective, the authors Maeve Regan and Ailbhe Murphy in *Employment Law* (2nd edn, Bloomsbury Professional, 2017), at para 2.30 comment:-

> "The parties may agree that the relationship is one of employment or otherwise. However, any label such as 'independent contractor' or 'employee' is a conclusion as to the nature of the relationship. The label means nothing if the reality of the relationship does not accord with it. As Murphy J held in *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare*:
>
> > '[The provisions of the contract are] not of decisive importance. In my view their value, if any, is marginal. These terms are included in the contract but they are not contractual terms in the sense of imposing obligations on one party in favour of the other. They purport to express a conclusion of law as to the consequences of the contract between the parties. Whether Ms Mahon [the shop demonstrator engaged by Denny] was retained under a contract of service depends essentially on the totality of the contractual relationship express or implied between her and the appellant and not upon any statement as to the consequence of the bargain.'"

<u>Discrete Contracts</u>

39. Revenue's contention in the instant case is that on each occasion when a driver is rostered by the shop manager, an individual contract comes into existence which operates as

a contract of service. The issue is whether individual rostered weekly assignments worked by a driver, in respect of which the Appeals Commissioners claimed the company was liable for the payment of income tax, did or did not amount to a contract of service in its own right. A similar issue was considered by Waite L.J. in *McMeechan v. Secretary of State for Employment* [1997] I.R.L.R. 353 *at* 564 – 565: -

> "That is a question which, though it remains essentially one of fact and degree (*O'Kelly's* [1983] IRLR 369 case at p.382 …) …is one which largely falls to be determined on the interpretation of the conditions.
>
> Those must however be construed according to the context afforded by a specific, as opposed to a general, engagement."

40. The issue whether the individual rostered weekly contracts in their operation constitute contracts of employment is legally distinct from the issue as to whether the overarching contract itself gives rise to a contract of service. It is to be observed that the terms of the overarching contract are not decisive in that assessment, but they are certainly relevant and were considered by the High Court judge.

41. The Appeals Commissioner concluded that the individual contracts were contracts of service and that it was unnecessary to proceed to consider the overarching contracts in that regard. Logically, given the hybrid nature of the agreement, it is sufficient for Revenue's purposes if *either* the overarching contract or the individual contract is one of service as long as that is also the contract pursuant to which the remuneration or sums in question have been paid. As is evident from para. 164 of the Determination, a discrete bilateral contract came into existence weekly on foot of which work was done and payment was calculated and discharged.

42. In the judgment of Waite L.J. in *McMeechan*, the focus of the court's consideration was a single stint of four days' work carried out in the month of January 1992. Relying, *inter alia*, on the English textbook *Harvey on Industrial Relations and Employment Law*, Waite L.J. considered that where a claim relates to pay for a single stint it was logical to "relate the claim to employment status to the particular job of work in respect of which the payment is sought". He noted that *Harvey* had stated, "The better view is not whether the casual worker is obliged to turn up for, or do, the work but rather, if he turns up, and does the work, whether he does so under a contract of service or for services." (paragraph A [53]) He concluded that there was no incongruity in determining that the individual was an employee in respect of each stint actually worked even if he was not an employee under the general terms of engagement *i.e.* the overarching contract.

43. The judgment of the English Court of Appeal in *McMeechan* is also instructive in regard to its analysis of the earlier decision of *O'Kelly*. Waite L.J. noted that in *O'Kelly* the overarching contract and the individual work contracts had been considered separately. This he considered to be the correct approach, citing with approval the view expressed by Sir John Donaldson M.R. in *O'Kelly* that it was an irresistible inference that a Tribunal determining the status of a claimant is under a positive duty in such circumstances to consider the terms of <u>both</u> the overarching contract and the individual contract. I agree.

44. Such an approach applies in the instant case where the overarching terms were intended to apply both to the general engagement and to each individual contract entered into. The parties are thus entitled to have the contractual status of each determined separately. This does not mean that the Appeals Commissioner was obliged to separately determine the status of the overarching contract. Had Revenue contended that drivers were employees taxable under Schedule E in the periods between individual contracts the position would have been different.

45. Mark Freedland FBA and Nicola Kountouris in *The Legal Construction of Personal Work Relations* (Oxford University Press, 2012) explore the binary divide that has emerged over time to signify the dichotomy between a contract of employment and a contract for services. Though it is an English text book, nevertheless its analysis is useful. At p. 107 they observe:-

> "Three basic approaches seem to compete or interact with each other:
>
> (1) the working person is to be regarded as an employee employed under a contract of employment if but only if he or she works under the control of the employer (using the idea of control in a loose and extended sense);
>
> (2) the working person is to be regarded as an employee employed under a contract of employment if but only if he or she is integrated into the organization of the employer; and
>
> (3) the working person is to be regarded as an independent contractor employed under a contract or contracts for services if but only if he or she is in business on his or her own account."

46. The authors use the terminology of "working person" as "a categorically neutral one to identify the relational roles of the persons who, in the context of contracts of employment, figure as 'employees'". The authors continue at p. 107 –

> "There is a deep lack of resolution between these three approaches, and moreover therefore the disagreements about the way in which any of these approaches, or any combination of them, is to be operated. Further doctrines emerge which seem to modify or elaborate those three basic approaches to the test for the binary divide but without making their application or their interrelationship especially clearer. These modifications may be expansive or restrictive of the scope of employment under a

contract or contracts of employment. The 'economic reality test' seems to be an inclusionary modification to the effect that a personal work relationship is to be regarded as giving rise to a contract of employment if there is an 'economic reality' of dependence by the working person for security of employment and income upon the work-purchaser, even if there is an appearance of absence either of control over the working person on the part of the work-purchaser or of integration into the organisation of the work-purchaser. On the other hand, the court's 'mutuality of obligation test' is an exclusionary modification, amounting to a rule that employment under a contract or contracts of employment exist only if the working person and the work-purchaser are in a state of continuing mutuality of contractual obligation."

47. The authors posit that some features of a personal contract for services "seem to be ascertained by deducing that they must be different from or indeed opposite to the corresponding attributes of the contract of employment." They continue at p. 111 –

> "This would seem to be especially true with regard to certain structural features and implied terms which are deemed to be expressive of the fundamental nature of the contract of employment; it seems accordingly to be assumed that personal contracts for services must have different or opposite structural features, or implied terms in those particular respects."

They identify three key areas: -

> "Firstly, almost throughout its development during the last twenty years, the implied obligation of mutual trust and confidence seems to have been regarded as a special attribute of the contract of employment: it seems to have been assumed that no such implied obligation would attach to a contract for services, even if that were a personal contract for services."

Secondly, the authors note: -

> "… the emergence during the last decade or so of a doctrine to the effect that the notion of mutuality of obligation applies either in a unique way or at least with special force to the contract of employment. Hence we encounter the view that the presence of mutuality of obligation has become not only a prerequisite for the existence of a contract of employment but also a basis for distinguishing between the contract of employment and the contract for services. In this way it has become an assumption that the contract for services, even when it is a personal contract, does not exhibit mutuality of obligation in the way that the contract of employment must necessarily do."

The authors further contend that the obligations of mutual trust and confidence and of mutuality of obligation:-

> "…can both be regarded as in some sense derived from the idea of the contract of employment as a specially personal one, and so also might we regard the special application of the doctrine of restraint of trade to contracts of employment, and also the special approach to remedies for wrongful termination which has developed with regard to contracts of employment." (p. 112)

Grounds of appeal 1 & 2 – Mutuality of obligation

48. Karshan contends for six distinct errors by the High Court judge on his approach to mutuality of obligation. Citing paras. 50 and 51 of the High Court judgment it is asserted:-

> "The High Court (O'Connor J.) erred in its application of the law concerning mutuality of obligation. The High Court adopted an approach which is significantly out of line with the existing binding precedents on mutuality of obligation, and fails to distinguish sufficiently, or at all, those binding precedents." (p. 4 of submissions)

Mutuality of obligation – General principles

49. Edwards J. in *Barry* observed:-

> "The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. It was characterised in *Nethermere (St Neots) Ltd v Gardiner* [1984] I.C.R. 612 … as the 'one *sine qua non* which can firmly be identified as an essential of the existence of a contract of service'…in *Carmichael v. National Power plc* [1999] I.C.R. 1226 at 1230 it was referred to as 'that irreducible minimum of mutual obligation necessary to create a contract of service.' Accordingly the mutuality of obligation test provides an important filter." (para. 47)

50. Edwards J. in *Barry* confirmed that the English jurisprudence on mutuality of obligation was part of Irish law and one important factor in establishing the legal nature of a work relationship. On its own, it is never outcome-determinative as to status. Edwards J. in *Barry* does not reference the terms of any particular clauses contained in the written agreement between the parties. The decision is entirely consistent with the principle that the ongoing working or operational practice between the parties may demonstrate the necessary mutuality of obligation irrespective of the express terms of any written agreement between the parties.

51. Analysis of the true nature of the relationship between the parties involves an evaluation as to whether there are mutual obligations on the part of the company and the

individual concerned. In a case such the present, where the individual contract was not in writing, the ascertainment of its true operational terms is informed primarily by the ongoing nature of the relationship and the course of conduct and dealings between the parties over time. There is no authority for the proposition that exact symmetry is essential to mutuality of work-related obligation.

52. In *Windle v. Secretary of State for Justice* [2016] EWCA Civ. 459 Underhill J. in the English Court of Appeal held that in determining whether a claimant is an employee an essential question is not to what extent he is acting "under direction" or is in a "subordinate" position while at work. Underhill L.J. observed at para. 23: -

> "…the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status…Of course it will not always be so…its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances."

53. The judgment in *Windle* followed the earlier decision of Elias L.J. in *Quashie v. Stringfellows Restaurant Limited* [2012] EWCA Civ. 1735 which had held: -

> "10. An issue that arises in this case is the significance of mutuality of obligation in the employment contract. Every bilateral contract requires mutual obligations; they

constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in [*Mc*]*Meechan v Secretary of State for Employment* [1997] IRLR 353 and *Cornwall County Council v Prater* [2006] IRLR 362.…

12. …However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, *the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee*. This was the way in which the employment tribunal analysed the employment status of casual wine waiters in *O'Kelly v Trusthouse Forte plc* [1983] IRLR 369, and the Court of Appeal held that it was a cogent analysis, consistent with the evidence, which the Employment Appeal Tribunal had been wrong to reverse." (emphasis added)

54. It may be borne in mind that the observations of Elias L.J. in *Quashie* were directed towards facts which contended that an unfair dismissal had taken place. Further, it is to be borne in mind that the judgment pertained to status and whether the claimant could be characterised as a "worker" pursuant to s. 230(3) of the Employment Rights Act (UK) 1996, a provision with no counterpart in this jurisdiction. That provision has no relevance to this

case. That said, the *dicta* regarding mutuality of obligation are germane to the exclusionary modification aspect of the assessment of whether a contract of service exists or not on given facts.

55. Is it material or relevant that either side could hypothetically walk away without sanction at the conclusion of a roster period? In my view it is not, since all the material individual contracts considered by the Appeals Commissioner had been fulfilled. The options of the parties regarding future individual contracts are not germane to the issue. The question is rather whether the fact that either side could choose not to fulfil individual contracts and the extent to which, if at all, that occurred in practice without any possibility of sanction is material.

56. The *McMeechan* decision as well as the other jurisprudence relied upon, though not binding on this court, is of course of interest in the context of the evolution of the common law in this particular area. That line of authority demonstrates that it is not necessary to find mutuality of obligation in the overarching contract provided it is located within the context of each single engagement entered into thereunder, and further: -

(1) The question of whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.

(2) In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work in the event that it is offered or indeed where there are to be found clauses expressly negating any such obligation is not in and of itself determinative that a single engagement cannot give rise to a contract of employment and the relationship of employer and employee.

(3) The nature of each contract is a distinct question to be examined and considered in light of the facts.

(4) A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact carried out by the worker for payment.

The decision reinforces the correctness of the view of the Commissioner at paras. 156-160 and in particular at para. 164 of the Determination.

57. The appellants cited in argument the decision of Upper Tribunal in *Commissioners for Her Majesty's Revenue and Customs v. Professional Game Match Officials Limited* [2020] UKUT 147 (TCC) which at the date of this appeal hearing was under appeal to the English Court of Appeal. Since the decision in the said appeal was delivered subsequently to this hearing and consequently was not the subject of argument its relevance, if any, to the matters in issue herein will fall to be considered on another occasion.

58. The evidence in this case demonstrated that the completed roster when submitted to the driver amounted to an acceptance by the appellant of the offer he/she had previously made when he/she initially signified the days and times of availability for work for the week in question. That process gave rise to a bilateral contract on each separate occasion which ended at the conclusion of the transaction covered by the roster in question and when invoices were submitted for payment.

Weight Watchers

59. One would have thought that the statement of Briggs J. at para. 42 of *Weight Watchers UK Limited v. HMRC* [2011] UKUT 433 TCC was uncontroversial:

> "Putting it more broadly, where it is shown in relation to a particular contract that there exists both the requisite mutuality of work-related obligation and the requisite degree of control, then it will *prima facie* be a contract of employment unless, viewed

as a whole, there is something about its terms which places it in some different category. The judge does not, after finding that the first two conditions are satisfied, approach the remaining condition from an evenly balanced starting point, looking to weigh the provisions of the contract to find which predominate, but rather for a review of the whole of the terms for the purpose of ensuring that there is nothing which points away from the *prima facie* affirmative conclusion reached as the result of satisfaction of the first two conditions."

It is unnecessary to approach the definition of the obligation which is required on the employer's side upon too narrow a basis. Briggs J. cited with approval the judgment of Sir Christopher Slade in *Clark v. Oxfordshire Health Authority* [1998] I.R.L.R. 125. At para. 27 Briggs J. noted:

"In *Clark v Oxfordshire Health Authority* (1997) 41 BMLR 18,

[1998] IRLR 125, in the Court of Appeal, it was held that the requisite

mutuality of obligation must subsist 'over the entire duration of the relevant

period': see per Sir Christopher Slade (41 BMLR 18 at 24, [1998] IRLR 125,

para 22). In its context, the reference in the passage quoted above to 'the

relevant period' meant the period of the existence of the contract alleged to amount to a contract of employment."

60. It is noteworthy that Sir Christopher Slade in *Clark* had also stated at para. 41:-

"…The mutual obligations required to found a global contract of employment need not necessarily and in every case consist of obligations to provide and perform work. To take one obvious example, an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods

as work are not offered would in my opinion, be likely to suffice. In my judgment, however …what the authorities require is to hold that some mutuality of obligation is required to found a global contract of employment."

61. The decision in *Weight Watchers* suggests that a contract which entitles a worker to find a replacement for an agreed shift but where the company actually pays is not inconsistent with an employment relationship.

62. The headnote for the *Weight Watchers'* decision in Simon's Tax Cases succinctly notes;

"In relation to any specific meeting or series of meetings, leaders conducted them pursuant to specific contracts for the taking of those meetings. In addition to those meeting-specific contracts, there was an over-arching or umbrella contract (constituted by the conditions, the MOA and the policy booklets) between WWUK and each leader, dealing in particular with obligations of leaders affecting them otherwise than when taking meetings. The umbrella agreement was no more than an agreement to agree, requiring a further and distinct contract-making process for the conduct of any particular meeting or series of meetings. The initiative was on the leader who had to propose the relevant timing, date and venue of any meeting or series of meetings for WWUK's agreement. Those meeting-specific agreements satisfied the mutuality of obligation condition. The condition which permitted a leader not to take a particular meeting was not unfettered; the leader was required to show some good reason for proposing not to take a meeting, to

seek to find a suitably qualified replacement, to notify WWUK if he was unable to do so, and to conduct all subsequent meetings in the series which had been agreed. That condition did not make the replacement leader the original leader's delegate but gave rise to a new contract in relation to that particular meeting between WWUK and the replacement leader. Further, looking at the contractual provisions as a whole, there was sufficient control by WWUK over the leaders. On a review of the contractual relationship between WWUK and its leaders as a whole, the indicators of employment constituted by the requisite mutuality of obligation and degree of control were not overridden by some other relevant aspect of the relationship. On balance, the leaders were employees of WWUK rather than independent contractors."

63. In my view there is a strong analogy with the instant case. The overarching agreement was an agreement to agree and the rosters embodied the "further and distinct contract-making process". It contained provisions – such as Clause 11 - which affected, restricted or controlled drivers at times outside those when they were actually delivering pizzas. The initiative was on the driver to propose his "days" and "times" of availability to drive for Karshan's agreement and there is a strong alignment with Clause 6 of the *Weight Watchers* contract in that regard. The roster once agreed satisfied the mutuality of obligation condition. It obliged Karshan to engage the driver for the shifts and to pay him accordingly and required him to attend for driving duties save where "at short notice" he became "unavailable". Under the discrete contract the freedom of a driver not to drive was not unfettered and was envisaged to arise exceptionally where "unavailability" arose "at short notice". This connotes exceptionality and is not consistent with a general unfettered right not to show up

for a rostered shift. Since unavailability for one shift did not terminate the discrete rostered contract there was a continuing obligation to work the subsequent shifts remaining on the roster. While the worker was not obliged to find a replacement there was a qualified entitlement to propose a driver who met the criteria of being "capable of performing the contractor's obligations in all respects". The appellant's argument that *Weight Watchers* is distinguishable on its facts does not stand up to scrutiny.

64. In my view the substitution provision was analogous to that in *Weight Watchers* in its operation. Briggs J. observed at para 33 – 34:-

> "[33] At the other end of the spectrum, contracts for work frequently provide that if the worker is for some good reason unable to work, he or she may arrange for a person approved by the employer to do it, not as a delegate but under a replacement contract for that particular work assignment made directly between the employer and the substituted person. In *MacFarlane v Glasgow City Council* [2001] IRLR 7, a qualified gymnastic instructor was entitled, if unable to take a particular class, to arrange for a replacement from a register of coaches retained by the council, upon the basis that the replacement would be paid for taking the class directly by the council, rather than by the originally appointed instructor. The Employment Appeal Tribunal had no difficulty in concluding, distinguishing *Tanton*, that this provision was not necessarily inconsistent with a contract of employment between the council and the instructor.
>
> [34] The true distinction between the two types of case is that in the former

the contracting party is performing his obligation by providing another person to do the work whereas in the latter the contracting party is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead."

65. It is to be borne in mind that each individual case is substantially fact-driven. The case-law is of general interest but often decisions are no more than examples of a court's application of broad underlying principles to very specific and often highly individualised sets of facts. It is not necessarily profitable or indeed prudent to mine the authorities in the expectation of extrapolating a definitive answer to the issues raised in this appeal.

66. It is to be borne in mind that the term "mutuality of obligation" does not have a single universal definitive meaning. It can operate differently in different contexts. There is a risk of selectively extrapolating judicial observations from a myriad of different authorities to illustrate a proposition. The assignment of mutual obligation – which the Respondents correctly acknowledge is the *sine qua non* of an employment relationship - to an arrangement is in each case substantially fact dependent.

67. The terms of an overarching agreement are to be construed against evidence of any sustained course of dealing between the parties and the terms and operation of any individual contract. In general, the existence or non-existence of a contract of service ought not to be decided by a rule of thumb but rather by an evaluation of all the various *indicia* having due regard to the authorities and having regard to the distinguishability of cases decided in various areas such as revenue and employment law.

68. A key factor to be taken into account in assessing the issues in this appeal is what was/were the actual contract(s) governing the relationship between the parties? Whilst the

relationship in question was governed by the overarching contract there were also individual contracts triggered and operated on foot of the weekly rosters and performed by the drivers and the company as bipartite arrangements. The sums which are the subject matter of the claim by revenue were paid pursuant to the individual contracts.

Mutuality of obligation – Alleged error no. 1

69. The first alleged error in relation to the trial judge's approach to mutuality of obligation is stated thus: -

> "The conclusion of O'Connor J. to the effect that *Minister for Agriculture and Food v Barry* [2008] IEHC 216 can be distinguished because the claims in *Barry* were for redundancy payments is not borne out by either the wording of the judgment in *Barry* itself or indeed by the subsequent decision of the High Court in *McKayed v Forbidden City Limited trading as Translations.ie* [2016] IEHC 722.
>
> *McKayed* did not concern eligibility for redundancy payment but instead dealt with the claim under the unfair dismissal's legislation. There is no suggestion in either *Barry* or *McKayed* that the legal statement of the nature of mutuality in *Barry* was limited to any such context of statutory redundancy payments or other statutory employment rights protection. On the contrary, the language of mutuality in *Barry* and *McKayed* is universal and all encompassing: mutuality is a *sine qua non* for all contracts of service. This is not dependent on the context in which the issue of mutuality of obligation is raised for determination in the absence of any different statutory test." (p. 5 of the Notice of Appeal)

This criticism is unduly wide and also unsound. The characterisation of the status of an individual as an employee or an independent contractor can be context dependent.

Context

70. The jurisprudence, particularly in England and Wales, confirms that an employment tribunal or court may regard an individual as an employee for the purposes of, say, unfair dismissal or redundancy, notwithstanding the fact that the revenue authorities have determined that that individual is self-employed for tax purposes. The decision in *Airfix Footwear Limited v. Cope* [1978] I.R.L.R. 396, [1978] I.C.R. 1210, which was cited by Edwards J. in *Barry* is illustrative of that principle.

71. Furthermore, one legal forum be it an employment tribunal or otherwise may, depending on context, regard the same individual as an employee for certain purposes but not for others. There are many authorities in this regard including *Denham v. Midland Employers Mutual Assurance Limited* [1955] 2 Q.B. 437, [1955] 2 All ER 561 a decision of the English Court of Appeal and *Cross v. Redpath Dorman Long (Contracting) Limited* [1978] I.C.R. 730. These and other cases illustrate the principle that for instance, depending on the facts and the context in which the issue falls to be determined, there may be held to be a sufficient degree of control to render an individual vicariously liable for the torts of another on a master and servant basis but nonetheless insufficient control to render that same entity liable to pay employers contributions in respect of the individual.

72. The trial judge's statement at para. 51 that "overarching and hybrid contracts require more ongoing commitments in unfair dismissal, redundancy and other labour rights cases due to the statutory triggers based on defined periods of employment" is correct as *Airfix*, *Denham* and *Cross v. Redpath* show.

73. To contend, as the appellant appears to, that the absence of a statement in either *Barry* or *McKayed* "that the legal statement on the nature of mutuality in *Barry* was limited to any

such context of statutory redundancy payments or other statutory employment rights protection" constitutes evidence that the observations of Edwards J. are of "universal or all-encompassing application" is unsound. Edwards J. at no point contended or implied that his observations were intended to be of universal application.

Mutuality of obligation – Alleged error no. 2

74. The appellant contends that "in concluding that mutuality existed, the trial judge appears to regard this conclusion as determinative of the question of whether the drivers were employees". This is asserted to be inconsistent with the approach of the High Court in *Barry* where Edwards J. cautioned: -

> "If mutuality of obligation is found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further." (para. 13)

The appellant continues –

> "O'Connor J.'s judgment does not explain how the decision of the High Court in *McKayed* where a contract of service was rejected on facts even more compelling in pointing towards that status than those in the instant case – can be distinguished from the facts of this case." (p. 5 of the Notice of Appeal)

A consideration of the judgment of the High Court under appeal as a whole does not support this contention, however. A case such as *McKayed*, an alleged statutory unfair dismissal, considered hereafter, turns on its own particular facts and the specific language and provisions of the written contract in that case.

75. The appellant complains that the judge regarded a conclusion on the issue of mutuality of obligation as determinative of the nature of the relationship itself. A failure by the trial judge to exhaustively and expressly engage with various *dicta* in the *Barry* decision does not

support such a complaint. The High Court judge had clearly read and gave adequate consideration to *Barry*. The High Court judge gave significant attention to the mutuality of obligation issue in the context of the multiple individual contracts. That reflects the importance accorded to it by the appellant. He also properly engaged with the other issues arising such as whether a finding that the overarching contract encompassed mutuality was necessary, substitution, integration, and the inter-relationship between the written overarching agreement and "how the contract worked out in practice" and he correctly did so in a manner consistent with the decisions in *Henry Denny* and *Castleisland Cattle Breeding v. Minister for Social Welfare* [2004] IESC 40, [2004] 4 I.R. 150.

76. Indeed, a substantial aspect of the judgment focuses on the approach that the High Court should adopt towards previous decisions of that court including the decisions of Clarke J. in the matter of *Worldport Ireland Limited (in liquidation)* [2005] IEHC 189, *Khadri v. Governor of Wheatfield Prison* [2012] IESC 27. The fundamental difference between the cases lies in the tenor and language of the contract in each case.

77. Contrary to the contentions advanced on behalf of the appellant, neither in his judgment or in his conclusions, did the trial judge treat mutuality of obligation as, in and of itself, determinative of the question as to whether the drivers were employees.

78. The decision in *McKayed* turns on its own facts, which cannot be said to be "even more compelling" than the facts of the instant case. The issue centred on an alleged unfair dismissal rather than tax law. Another significant distinguishing factor is that *McKayed* was an appeal from the Employment Appeals Tribunal, the expert body nominated by statute to decide the issue of status in that case. That body after a comprehensive hearing had concluded that the plaintiff was not an employee of the defendant. It is noteworthy that Ní Raifeartaigh J. did not disturb that finding. Significantly, in the context of the facts of the

instant case, in *McKayed* there was no evidence of rosters of work being prepared and agreed weekly on an ongoing basis.

79. On the facts Ní Raifeartaigh J. concluded that there was no mutuality by reason that the plaintiff's contract did not guarantee him work from the defendant. Her observation at para. 39 that, "the fact that work was given regularly for a period of time is not determinative of whether one party has had a legal obligation to provide the other party with work" is indeed true in the context of the facts. However, the fact that in a given case an individual worked regularly over an appreciable period of time in return for remuneration can, in light of the economic reality and when coupled with other factors, including the control test and the *indicia* of the integration test be a significant indicator that a contract of service exists and that the relationship between the parties is that of employer and employee. Observations made in specific or exceptional cases such as in the decision in *McKayed v. Forbidden City Limited trading as Translations* [2016] IEHC 722 ought not to be elevated into universal propositions.

Mutuality of obligation – Alleged error no. 3

80. The third alleged error is characterised thus: -

> "O'Connor J.'s conclusion that the Appeal Commissioner's decision in relying upon *Weight Watchers UK Limited v HMRC* [2011] UKUT 433 TCC 'did not go against Irish law but rather recognised the necessity to adapt modern means of engaging workers' was incorrect in:
>
> (i) making reference to 'workers' which is the statutory intermediate category at issue in *Weight Watchers* under s. 230 of the Employment Rights Act, 1996 but which is of no application in Irish employment law and

(ii) being inconsistent with the separation of powers in that any such policy change is a matter for the legislature and not the courts." (p. 5 of the Notice of Appeal)

Reliance was placed by the appellant on a judgment of Underhill L.J. in *Uber BV v. Aslam* [2018] EWCA Civ. 2748, where he cautioned that if a court concludes that the scope of protection does not go far enough then "the right answer is to amend the legislation", adding at para. 164 that "courts are anxious so far as possible to adapt the common law to changing conditions, but the tools at their disposal are limited, particularly when dealing with statutory definitions."

81. Dealing with the last point first, reliance is being placed here on a dissenting judgment of the English Court of Appeal. Underhill L.J's view did not find favour with either the majority of that court itself. However, while the decision of Underhill L.J. in *Uber BV v. Aslam* [2018] EWCA Civ. 2748 was relied on, it is noted that following the conclusion of the hearing of this appeal a judgment of the UK Supreme Court was delivered in that case. Consideration of that decision's relevance to any issue arising in this appeal will fall to be considered on another occasion.

82. The findings of the High Court judge were based on his evaluation of the correctness of the approach of Appeals Commissioner to the construction exercise undertaken. Legislation was not required to construe the terms of the contractual relationship. Neither does such an exercise in this instance trench on the separation of powers. O'Connor J. did not find that the Appeals Commissioner had proceeded to "adapt the law" in the strict sense. The complaint selectively distorted the import of the judge's findings in that regard. Reading the judgment in the context of the determination, the judge's observations mean nothing more than that the Appeals Commissioner used the approach of "looking beyond the label" imposed by Karshan on the arrangement to identify the true nature of the relationship

between the parties. This approach was approved by Murphy J. in the Supreme Court decision in *Henry Denny* and reflects other Supreme Court decisions such as *Gatien* and *Irish Shell.*

83. It is readily understood by any reasonable reader of the judgment under appeal that the use of the word "workers" by the High Court judge is to be taken as connoting an individual engaged under contract of service or an individual carrying out tasks in return for remuneration depending on the context. On no reasonable construction could the word "workers" in the High Court judgment be construed as referring to a statutory category under UK legislation which has no analogue under Irish law. The judge was obviously aware of the distinction as para. 62 of the judgment makes clear. Cases from England and Wales that consider the concept of mutuality of obligation sometimes concern statutory "workers" and some such judgments are of assistance to the issue. Nowhere was the construction of that concept misapplied by the trial judge as the appellant contends.

Mutuality of obligation – Alleged error no. 4

84. The fourth contention is characterised thus:-

> "The learned trial judge did not determine the appellant's arguments that the Commissioner (at para. 49 of her determination) misapplied *Weight Watchers UK Limited v Revenue and Customs Commissioners* [2011] UKUT 433 TCC, [2011] All ER (D) 229 in the absence of an identified contractual obligation on a driver to make oneself available for work. The judge did not determine the arguments concerning the Commissioner's important finding that a driver was contractually obliged to initiate an agreement based on this judgment. The relevant finding made by the judge was:

‘49. The description by the Commissioner about an obligation for drivers to initiate an agreement should be taken in context. The court understands that the initiation of the relevant contract for each roster depended on a driver making himself available. The Commissioner did not err in characterising the overarching and hybrid agreements.’”

85. The objection continues: –

> “The focus of argument was – as it must be – on any alleged obligation to initiate, not whether same occurred as a matter of practice. In finding that ‘the case is concerned with whether the Commissioner misstated or misunderstood the law about the mutuality of obligation’ the judge ignored the arguments that arguments were also made about the manner in which the law was applied to the facts of the case.” (p. 6 of the Notice of Appeal)

86. These complaints are not sustainable, and no error is identified in the approach of the trial judge in his assessment in turn of the approach of the Commissioner. Perhaps the trial judge’s process of analysis and reasoning could have been more thoroughly laid out. It is to be understood from his judgment that the trial judge did analyse the *Weight Watchers* decision, the Commissioner’s treatment of it and, considered the criticisms of same by the appellant unpersuasive. In my view he was correct in that regard for, *inter alia*, the reasons identified at para. 50 of his judgment.

87. No Irish authority was identified by the appellant which was inconsistent with or expressly rejected the reasoning of Briggs J. in *Weight Watchers UK Limited v. Revenue and Customs Commissioners*. The conclusion of Briggs J. in *Weight Watchers* that cancelling a shift did not relieve the individual of work -related obligations is consistent with common sense. The same outcome could readily have been arrived at by the Appeal

Commissioner based on the ordinary principles of contract interpretation irrespective of *Weight Watchers.*

88. The appellant contends that the Commissioner "became hopelessly confused because of her reading of Weight Watchers." (p. 37 of Transcript) that assertion was not made out. I am satisfied that "unavailability" "at short notice" for a single shift did not relieve a driver from his other obligations including the rostered. Furthermore the evidence of Mr. Paliulis that " there would be follow up if an employee did not attend work having been rostered." (para. 24. of Determination) contradicts Karshan's contention. Since Karshan was free to accept or reject the next offer of availability by a driver to work a roster of days, that reality operated as a powerful ongoing disincentive – if not an implicit sanction -for failure of a driver to work the agreed shifts.

89. I am not satisfied that the trial judge ignored arguments made regarding the manner in which the Commissioner applied the jurisprudence to the facts of the case. Indeed, a fair minded consideration of paras. 49 to 66 inclusive demonstrates that he broadly engaged with the jurisprudence and considered the approach of the Commissioner to its application in arriving at her determination.

90. Paragraphs 53 to 55 of the judgment are clear: -

> "The written overarching contract did indeed require a driver to initiate an agreement with the appellant.
>
> 54. I cannot criticise the Commissioner's findings that –
>
> (i) A driver who wanted to work had to put his name on the availability sheet.
>
> (ii) Once rostered by the appellant, there was a contract which retained mutual obligations.

55. In the circumstances the right to cancel a shift at short notice imposed obligations to engage a substitute and work out the remainder of the shifts in the series."

91. Implicit in the High Court's findings was that the Appeals Commissioner was correct in concluding that that there was an obligation on the driver to trigger individual contracts. There was clear evidence supporting that conclusion.

92. Take for instance Clause 14: "The company does not warrant or represent that it will utilise the contractor's services at all". There is no reciprocal provision that the driver does not warrant or represent that they will work for the company at all. That is very significant. If one delves more closely into the contract a combination of clauses 14 and 12, considered in the context of the established hebdomadal practice of drivers submitting time sheets of their availability which operated on an ongoing basis, it does become clear that operationally the mutual understanding, expectation and intention of the parties was that the driver had an ongoing contractual obligation to make himself available by filling out weekly availability sheets. If Karshan intended that a driver had no obligation to drive then one would expect Clause 14 to state "The driver does not warrant or represent that he will ever drive for the company at all", or words to that effect.

93. The language of Clause 14 in that regard viewed against the ongoing practice as found by the Commissioner regarding the creation of rosters is instructive. At Clause 14 the company "recognises the contractor's right to make himself available on only certain days and certain times of his own choosing". Hidden in plain sight within the delimiting language ("only certain days") of that clause is the implicit ongoing positive obligation of the driver to make himself available to drive on "certain days". This contrasts fundamentally with cases such as O'Kelly where workers reserved the right not to work and the company reserved the equal right not to engage them. The deftness of the drafting does not dilute the positive obligation on the driver to "make himself available" for work which is embedded in the

language of the clause. The ongoing weekly engagement via creation and circulation of rosters reflected the actual terms of that clause. The judge was entitled to find that the Commissioner had not misunderstood or misapplied the law.

94. The trial judge was correct in his assessment of the Commissioner's approach in having regard to what occurred in practice. It independently corroborated her reasonable construction of Clause 14, namely the ongoing obligation imposed on the driver underpinning the words "the contractor's right to make himself available on only certain days and certain times of his own choosing" on its true operational construction. At para 38 she had found, "Based on the witness evidence together with the documentary evidence, I find … as a material fact that practice was that drivers would fill out an "availability sheet" approximately one week prior to a roster being drawn up."

Mutuality of obligation – Alleged error no. 5

95. The fifth error contended for is that:-

> "The learned trial judge erred in holding that 'mutuality of obligation can occur under an overarching contract' in circumstances where the Appeal Commissioner found that it was not necessary to consider whether the overarching contract contained mutuality of obligations." (p. 6 of the Notice of Appeal)

96. The judgment demonstrates that the trial judge was in no doubt as to the determination of the Commissioner. At para. 13 he observed:-

> "The Commissioner held in this case that there was an overarching contract supplemented by individual contracts in respect of each assignment or roster of work. The requirement of mutuality was satisfied in the individual contracts."

His approach was comprehensive in that regard and was correct. An analysis of the overarching contract from the perspective of mutuality of obligation can be relevant and can

have a reinforcing impact in arriving at a rounded and comprehensive view of the true nature of the relationship between the parties – but it is not necessary to establish mutuality with regard to the overarching contract where it is demonstrated to exist in each of the individual agreements.

Mutuality of obligation – Alleged error no. 6

97. The appellant contends that:-

> "The learned trial judge erred in holding that mutuality of obligations existed in circumstances where the workers were not obliged to make themselves available for work and were not compelled to attend work and the appellant was not obliged to provide work." (p. 6 of the Notice of Appeal)

98. This assertion is wrong and premised on an erroneous understanding of the individual contracts. The company had an ongoing need for pizza drivers as an integral part of its daily operations.

Obligations of Driver

99. The following obligations can be inferred from Clause 14:

(a) the driver had an ongoing obligation to make himself available to drive (Clause 14);

(b) that obligation extended to "certain days" (Clause 14) (noted to be plural) on which he made himself available;

(c) the driver had to commit to identified shifts - the "certain times" within the days in question that he made himself available;

(d) The driver's obligation to make himself available to drive was given effect to by submitting in advance the days and times of availability for a forthcoming week

(e) The company created driving rosters based on stated availability of the driver thereby creating binding individual contracts with each.

(f) The company circulated the rosters to the drivers in advance each week.

(g) The company was obliged to provide work for "the days and times" (Clause 14 of Overarching Agreement) specified in the weekly roster circulated.

(h) If the driver should become unavailable to drive for a pre-agreed shift, he was obliged to notify the company in advance.

(i) The company was obliged to pay the worker - a "drop rate" of €1.20 plus an additional 20 cent payable to the driver in respect of insurance.

(j) By wearing the necessary Domino's branded promotion apparel the company was obliged to pay the driver an hourly "advertising rate" of €5.65.

Thus it cannot be stated that the driver had no obligation on foot of the reasonable construction of the overarching agreement to make himself available to drive.

100. The operational modalities whereby that obligation was discharged were gleaned by the Commissioner from the evidence of the nine witnesses who testified. Their evidence demonstrates that the performance of Clause 14 (i.e. assignments of work) was effected by the filling out of the availability sheets approximately one week prior to a roster being drawn up by the company. This roster was found to be drawn up by the store manager and based on the availability sheets. Merely because it was the driver rather than Karshan who triggered the process by submitting the availability sheet prior to the creation of each roster does not

detract from its significance. That factor is crucial to understanding the operating dynamic underpinning the relationship between the company and the drivers.

101. Rosters came into being and were devised based on two factors:

(a) the availability sheets of the driver submitted for the relevant days/times each week; and,

(b) the anticipated need of the company for food deliveries for the like time frame.

In that context, Clause 14 of the overarching agreement is text which falls to be construed in context. Hypothetically, the company did not warrant that it would utilise a driver's services but there was no evidence that the company in practice ever operated Clause 14 to withdraw work hours previously agreed under a roster created after a driver had indicated days of availability to drive. Presumably that clause could be availed of were the company not open for any reason on a given day/week and when, accordingly, it had no need for drivers. In practice, the creation of the individual contracts arose after the drivers submitted details of availability as required by Clause 14 which enabled the creation and circulation of the rosters.

102. For the Appeals Commissioner to determine that a contract of service existed, it was not necessary that she should find that the appellant was "required to accept any such invitation or offer". It was sufficient that the evidence demonstrated that such offers were routinely accepted. There was no evidence adduced on behalf of the appellant at the hearing that store managers ever disregarded indications of drivers' availability when fixing rosters.

103. Further it is material that there was, apparently, no evidence put before the Commissioner that the company ever purported to repudiate an agreement once a roster had been created and circulated to drivers, agreeing to work times ("certain days and certain times") chosen by them. There was no evidence that the company thereafter ever purported

to unilaterally prevent a driver from working a pre-agreed shift except for a threat to send home a driver for failure of a driver to make up pizza boxes. Thus, the first sentence of Clause 14 came to be modified in practice on each occasion that the manager created a roster which accepted some/all of the days/hours offered by a driver to drive.

104. The ongoing obligation of the drivers to make themselves available for work is located in the true construction of Clause 14, as stated above. In the opening words of Clause 14, it is expressly stated that "the company does not warrant or represent that it will utilise the contractor's services at all". The omission of a reciprocal statement that a driver was not obliged to ever be available for work at all, coupled with the actual balance of Clause 14, is fatal to the appellant's contention in this regard. If it were intended that the drivers were never obliged to make themselves available for work, that would have been expressly stated. The finding at para. 38 (a) of the determination is entirely consistent with the tenor of Clause 14.

105. Regarding the appellant's contention that workers were "not compelled to attend work", neither the language of the overarching contract nor the evidence with regard to the operation of the individual contracts support that contention. Clause 14 "recognises the contractor's right to make himself available on only certain days and certain times of his own choosing". However, nowhere does it state that having indicated his availability for the said "certain days and certain times" in question, he is then entirely free to habitually or routinely proceed not to show up for work. The language in Clause 12 references unavailability "at short notice". This speaks to some exceptionality that might arise. Unavailability in the context of Clause 14 pertains to "a previously agreed delivery service" which arises under a binding individual contract. This strongly indicates that it is a single once-off state of affairs rather than the driver who had submitted his availability and received a designated roster being entitled to decide not to work a shift or the balance of a roster for

the week in question. Work obligations under the individual contract resume once the exigency has passed in accordance with the ordinary principles of contract law.

106. Para. 81 of the Appeals Commissioner's determination ought not to be taken out of context but rather is to be read in light of the totality of the Determination and the fact that the findings and conclusions were expressly confined to the individual contracts actually worked. True enough the company had no obligation to offer work as Clause 14 of the Overarching Agreement makes clear. But in practice, the operative ongoing arrangement under the hybrid agreement meant that the driver was obliged to submit weekly availability details in advance based upon which the company invariably created the weekly rosters allocating driving work to the said drivers giving rise to binding contracts for work and wages which encompassed, *inter alia*, mutuality of obligation between the parties *albeit* triggered by the driver rather than the company.

107. Counsel for the appellant argued that the test must be applied before the workers actually "do the work". No authority for this proposition was identified. It merely aims to retrofit a hypothetical version of the relationship between the parties that did not occur in practice. It requires the court to disregard the way in which individual contracts actually came about and were concluded in practice whereby the employer in circulating the weekly roster assumed an obligation to provide work to the employee who had triggered Clause 14.

108. At the level of the individual contract, once the company accepted the offer to work by circulating the roster, the parties were contractually bound to perform it subject to any exceptional eventuality. There was no evidence that, having provided a roster, the company ever considered itself at liberty to repudiate same by declining to permit a driver who had become "unavailable at short notice" on one day of a roster to work the balance of that agreed roster. Thus, this contended error is not supported by any evidence and is misconceived.

109. A further factor is that, in circumstances where drivers were standing around waiting for pizza orders, the evidence was that the appellant would ensure that the drivers would only get one delivery on any occasion when another driver was also awaiting a delivery assignment. This tends to point towards an understanding on the part of the appellant of an obligation to provide actual delivery work and behave in an equitable fashion as between drivers notwithstanding that, for instance, two deliveries might efficiently and more cheaply be carried out by one driver on the occasion in question. Such conduct points towards a mutuality of obligation and an underlying mutual trust and confidence between the parties which is consonant with contract of service.

Rostering

110. Key findings of fact on the part of the Commissioner led her to conclude that the drivers worked under multiple contracts of service and were taxable in relation to the emoluments arising therefrom in accordance with s. 112 TCA without having to determine conclusively whether there was mutuality of obligation under the overarching agreement. That conclusion, in my view, was inevitable and entirely sufficient for the Appeals Commissioner's purposes and arose from the witness evidence, referred to at paras. 21, 22 and 23 of the Determination and findings of fact on the part of the Commissioner referred to at para. 38 (a) of the Determination, particularly in relation to the ongoing obligation on the driver to trigger individual contracts and the rostering process. Particularly significant in that regard was that the witnesses who gave evidence included the appellant's own operations director, Mr. Fergus McDonnell, Mr. Martynas Paliulis, a former store manager and area manager with the appellant's sister company, and Mr. Arkadiusz Milczarek, a former driver of the appellant company. Thus her findings at para. 49 of the Determination was based on a clear and logical foundation having due regard to the evidence combined with para. 14 of the Overarching Agreement and her analysis of, *inter alia*, the decision of Briggs J. in *Weight*

Watchers (UK) Ltd at para. 42- 48. At para. 38 she had made clear that her material findings of fact were; "Based on the witness evidence together with the documentary evidence … as a material fact that practice was that drivers would fill out an "availability sheet" approximately one week prior to a roster being drawn up.".

111. The appellant faults the High Court's decision to uphold of the findings of the Commissioner in regard to rostering, contending that there is no finding as to the basis on which a driver was rostered. However, I conclude that such criticism does not withstand scrutiny. This was a hybrid agreement. A key material finding of fact by the Commissioner at para. 38(a) of her determination was that the "practice was that drivers would fill out an "availability sheet" approximately one week prior to a roster being drawn up indicating their availability for work and that the roster would be drawn up by a store manager based on the availability sheets". Thus, the substance of the transactional relationship embodied in the individual discrete contracts was predicated on the prior identification by the driver of anticipated availability for driving work and the prior identification by the manager of anticipated driving needs on a weekly (or so) basis.

112. In my view the trial judge was entitled to uphold the Commissioner's determination even on the basis alone that the language of Clause 14 did impose an obligation on the driver to initiate the agreement via engagement with the roster. The Commissioner had heard the witnesses in regard to, *inter alia*, rostering at para. 38(a). The rosters created contracts. The Commissioner was entitled to conclude, as she did at para 49 "[o]nce the appellant rostered a driver for one or more shifts of work, there was a contract in place in respect of which the parties retained mutual obligations." The trial judge was correct in his analysis and conclusions in this regard at para. 53 and 54 of his judgment.

113. Mutuality of obligation was not the only criterion to be fulfilled and the individual contracts operating as outlined herein met all of the other relevant criteria including control,

integration, obligations of mutual trust and confidence subsisting between the parties and the relationship of employer and employee accorded with the economic reality of the arrangement in all material respects.

The reasoning in *Pimlico Plumbers* and *Autoclenz*

114. At para. 81 of the Determination, the Commissioner said she had regard to the reasoning in *Pimlico Plumbers* and *Autoclenz,* to the effect that a clause which provides that the provider of work has no obligation to offer work and the putative recipient no obligation to accept work does not mean that mutuality of obligation is absent, and that same was of assistance to her analysis and approach accords with settled Irish jurisprudence long before *Autoclenz* and *Pimlico Plumbers* were decided as the decisions of the Irish Supreme Court outlined above and J.C.W. Wylie *Landlord and Tenant Law* (3rd edn, Bloomsbury Professional, 2014) in his observations at para. 2.30 illustrate:-

> "…the courts are well aware of the danger that the written agreement, however explicit its terms, may not represent the true agreement of the parties. In particular, unlike in the *Gatien* case, the parties may not be in an equal bargaining position and fully advised, so that the courts are astute to spot the "sham" agreement and will not be blinded by clever draftsmanship."

115. The Commissioner cannot be criticised in her approach at para. 81 *et. seq*.- particularly in light of the jurisprudence above. Her approach in that limited aspect is entirely consistent with the jurisprudence of the Supreme Court outlined above. I construe Clause 14 as imposing an obligation on a driver to submit details of days and hours of availability.

116. The decisions of the UKSC in *Autoclenz* and *Pimlico Plumbers* was informed by landlord and tenant jurisprudence and the challenge of "sham" arrangements. Lord Clark

S.C.J. in *Autoclenz* found that the written documentation was not the same as the "true agreement" that subsisted between the parties. He observed that:

> "…the relevant bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.

117. The decision in *Autoclenz* echoes the Supreme Court's observations in cases such as *Gatien Motor Co v. Continental Oil*, particularly since Autoclenz demonstrates the assistance to be derived from landlord/tenant jurisprudence in evaluating the economic reality in contracts with apparent bargaining imbalances between the parties in employment law. This "purposive" approach to characterisation is entirely consistent with the jurisprudence from the Supreme Court in the field of landlord and tenant law and clearly entitled the Appeals Commissioner to disregard 'terms inconsistent' with independent contractor status in the written overarching contract insofar as those terms did not reflect the reality of the working arrangements

Ground of Appeal 2 – Mutuality of Obligation under the Overarching Contract

118. In light of her conclusions regarding the individual contract, the Appeals Commissioner did not need to proceed to determine whether, *inter alia*, mutuality of obligation was established under the overarching contract. The appellant has not identified any basis on which Appeals Commissioner was obliged to separately determine mutuality of obligation under the overarching contract. Had Revenue contended that drivers were employees taxable under Schedule E in the periods between individual contracts the position would have been different.

119. Was the driver obliged to accept engagements under the roster? The appellant contends that the driver was not so obliged. However, the tenor of the overarching agreement, the inferences to be drawn from its structure, considered in the context of the genesis of individual contracts coupled with the absence of evidence of any kind suggesting that assignments previously agreed to and rostered were routinely or normally declined by drivers without valid reason and with no consequence for their continued engagement by the company for driving activity undermines that contention.

120. It is clear from the jurisprudence, particularly the judgment of Murphy J. in *Henry Denny* (with which the Chief Justice agreed) that great care is to be taken where a document purports to express a conclusion of law as to the consequences of its execution between the contracting parties. The initial commencement and recitals indicate that the company wished to subcontract the delivery of pizzas, promote its brand logo and the parties are characterised as "the company" and "the contractor" respectively. The labels attached are not to be taken at face value or probative, without more, as to status. Hence, at Recital No. 1 the phrase, "The contractor shall be retained by the company as an independent contractor" is not dispositive of any issue.

121. The continuing mutual obligations on the part of the company appear to include that he/she – the contractor – is retained by the company (Recital 1). From the company's perspective it assumes the obligation to pay the driver "according to the number of the deliveries successfully undertaken and in addition to pay for brand promotion as specified in Clause 3." The significance of this is considered below.

122. Analogous to the facts in the instant case, the company in the *Denny* case maintained a panel of individuals. A retail store would contact the local customer service manager requesting a demonstration on a specified day or days as required. Three or four days prior to a demonstration day in a supermarket a demonstrator from the panel was telephoned

enquiring as to availability to provide her services on a particular day at a particular shop premises. The Supreme Court found that she worked under a contract of service. As Keane J. found: -

> "Generally speaking, neither the demonstrator nor the appellant knew prior to this time whether or not a demonstration was to be given at any particular shop or store during the immediately following weekend. If the demonstrator was available, it was agreed that the service should be provided." (p. 39)

123. Indeed, in the instant case it could be said that drivers by submitting their schedules of availability in advance for the purposes of creations of rosters on a weekly basis approximately, enjoyed a far greater continuity of expectation of work that did a demonstrator on one of the *Henry Denny* panels.

124. Whilst the overarching contract contemplates the availability of a delivery vehicle for rent, in practice this clause did not operate between the parties. No inference as to status arises from that fact.

125. The obligation imposed at Clause 7 accords at least as much with the contract of employment as with the contract for services insofar as the driver acknowledges that when effecting deliveries by motorbike or moped, "it is necessary to use and wear protective clothing, helmets and other items as approved and mandated by the Department of the Environment or such regulatory authority as such department may approve of." Were the company of the view that the driver was truly an independent contractor, the company would be unlikely to control the driver's conduct or require the use and wearing of protective clothing. The necessity for a provision in the contract in terms of Clause 7 would likely not arise were the relationship on its true and strict construction, that of a contract for services.

Implicit permanent duration

126. The overarching agreement is not expressed anywhere on its face to be a temporary arrangement, neither is it expressed that it will determine or be extinguished after any specific period of time, duration or event. It encompasses a state of affairs and an intention that the relationship between the parties thereunder will be open ended and of indefinite duration.

127. The putting in place by Karshan of insurance for the benefit of the driver in a manner provided for at Clause 5(a) speaks to the anticipated continuous nature of the arrangement between the parties. Each party anticipates some continuity and is not consistent with a unitised or "spot" exchange of work for remuneration akin to a "once-off" taxi journey. Clause 5(a) is consistent with an expectation of a continuing contractual relationship between the parties.

128. Furthermore, Clause 6 also accords with the mutual commitment and anticipated expectation implicit in a continuing arrangement. It obliges, in the event that the driver has insurance withdrawn, that the company is to be notified immediately "so that the company is aware that the contractor might not be in a position to continue to provide services under this agreement".

Hybrid agreement

129. The issue as to whether a contract of employment in truth came into existence could not be resolved merely by an analysis of the overarching agreement alone. The trial judge had to consider whether in fact there was evidence before the Commissioner entitling her to find that the contractual relationship between the parties comprised a hybrid agreement

consisting of what had variously been described as an overarching contract supplemented by individual contracts in respect of assignments of work.

130. The presence of mutuality of obligation *per se* is not the sole qualifying test for the existence of a contract of employment. Its absence is, however, fatal. Its presence opens the gateway to comprehensively evaluating the relationship including aspects such as control and integration. As Edwards J. has made clear in *Barry*, the court has to have regard to all the circumstances in the round, evaluating the facts in their operational context before determining whether on its true construction it gave rise to a contract of employment.

131. The existence, kind and degrees of continuing mutual obligation to be located within a work supply relation is ultimately a matter of construction of the operational arrangement rather than an evaluation of the apparent craftsmanship, deft deeming and skill inherent in the language of the overarching agreement itself. As the commissioner found at para. 164 it was located within the individual contracts.

Continuity of relationship contemplated even when driver not engaged in driving

132. The continuity of the relationship in the sense of continuously spanning both periods when the driver was "driving" or "at work" and periods when he/she was not, when viewed from the perspective of the continuing obligations operating and imposed on either party speaks potentially to continuous mutuality of obligation subsisting even under the overarching agreement.

133. For instance, on days when no driving work was being provided or required, the company continued to maintain the "appropriate business use insurance" for the benefit of the driver in accordance with Clause 5(a) of the overarching agreement and the worker had a continuing obligation to defray the "predetermined rate" for same. Likewise, the obligation of the driver to provide information of events that might compromise or cause the lapse of

an insurance policy was a continuing obligation to be found in Clause 6 and operated and could only be construed as being directed towards the clear anticipation on the part of the company of an ongoing mutual expectation that "the contractor would be in a position to continue to provide services under the agreement." This speaks to the intended nature and contours of an ongoing relationship as anticipated on the part of the company.

134. In construing Clause 11 in its totality, the continuing obligations and concomitant lack of freedom inherent in its provisions operated to circumscribe the work options available to the driver at all times throughout the duration of the overarching agreement and operated for the benefit of the company. In its intent and operation, Clause 11 was consistent only with a continuing obligation imposed on a driver of a kind that it characteristic of a contract of service which subsisted for so long as "this contract is in force".

135. When considered from an operational context on a week-by-week basis, whilst the appellant is correct that Clause 12 conferred a right on the driver to effect a substitution should they become "unavailable at short notice", it did not impose an obligation to do so.

Ground of appeal 3 - Integration

136. The appellant further contends that the trial judge erred in his approach to the test of integration as follows: -

> "The appellant contends that the relevant enquiry under the 'integration' test is not solely whether the kind of work done by the putative employee is integral to the business of the putative employer, but rather asks whether the particular individual putative employee concerned is himself or herself so personally integrated into the business of the putative employer as to lead to the conclusion that the contract amounts to a contract of service. See generally *Re. Sunday Tribune Limited* [1984] IR 505." (p. 6 of the Notice of Appeal)

137. It will be recalled that the trial judge considered the *Sunday Tribune* decision and arguments at paras. 44 and 45 of his judgment. The contention of the appellant was that drivers were to be regarded as "only accessory" to the business of the appellant:-

> "If the broader integration test had been applied [i.e. did the drivers from part of the appellant's organisation?] there should have been a finding of contracts for services between the drivers and the appellant because the drivers, as opposed to their work, were not integrated into the business of the appellant."

138. Unsurprisingly, this construct of the integration test did not find favour with the trial judge.

139. The *Sunday Tribune* decision arising from the winding up of the Sunday Tribune almost 40 years ago in 1982 is instructive insofar as there were three individual claimants who sought priority for sums due in the context of the winding up. The first was a subeditor of the newspaper. The second wrote a weekly column which was submitted to the newspaper for publication and the third wrote articles from time to time as might be commissioned separately by the company. Carroll J. had no difficulty in finding that the first and second claimants ought to be construed as employees rendering their debts preferential debts in the winding up.

140. Carroll J. observed: -

> "The determining factor is whether the work which was done by each claimant was done on foot of a contract of service which created the relationship of employer and employee or whether it was done on foot of a contract for services which did not create that relationship. The court must look at the realities of the situation in order to determine whether the relationship of employer and employee in fact exists, and it must do so regardless of how the parties describe themselves: see *Ferguson v John*

Dawson & Partners [1976] 1 W.L.R. 1213. The simple test is whether the employer possessed the right not only to control what work the employee was to do but also the manner in which the work was to be done. However, the test is no longer of universal application. In the present day, when senior staff with professional qualifications are employed, the nature of their employment cannot be determined in such a simplistic way." (p. 508 of the judgment)

141. Carroll J. cited *Beloff v. Pressdram Limited* [1973] 1 All E.R. 241, a decision in the context of journalists, and the judgment of Denning L.J. in *Stevenson, Jordan and Harrison Limited v. McDonald* [1952] 1 T.L.R. 101 which is considered to be the source of the "integration test" where at p. 111 it was stated: -

"…under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work although done for the business, is not integrated into it but is only accessory to it."

142. It is to be observed that the test laid down by Lord Denning has oft been criticised for its vagueness. It appears that his intention was that the integration test as articulated by him would replace the control test (cf. *Bank Voor Handel En Scheepvaart Nv v. Slatford* [1953] 1 Q.B. 248, [1951] 2 All E.R. 777, CA). Ultimately, over time, the so called integration test did not entirely supplant the control test which tends to be a factor coupled with mutuality of obligation considered essential to the existence of a contract of service both in this jurisdiction an in England and Wales.

143. Having considered the relevant dicta in *Stevenson, Jordan and Harrison Limited v. McDonald* and *Beloff*, Carroll J. observed regarding the first claimant: -

> "…His employment satisfies the simple test of control by the employer. He worked at specified times under the guidance of the chief sub-editor and to his instructions. The fact that he worked part time does not change the nature of his employment. A person may be an employee even though employed part time: *Market Investigations v Minister of Social Security* [1969] 2 Q.B. 173." (p. 510)

A similar view was taken of the second journalist. In regard to the third journalist, the judge considered that she was an independent contractor, "She was under no obligation to contribute on a regular basis". (p. 510)

144. That key determination contrasts starkly with the facts in the instant case. Drivers were integral to the company's day to day pizza delivery business. Delivery was its unique selling point. Without drivers its business model could not operate. I am satisfied further, that in contrast with a third individual in the *Sunday Tribune* case, each driver had an obligation to fill in an availability sheet at approximately one week intervals on foot of which a roster was drawn up by the appellant. In each case, it was drawn up by the store manager based on the availability sheets. That is what happened in practice, as was found by the Commissioner, and that was what was implicitly required from the driver in each case having due regard to Clause 14 of the overarching agreement.

145. Hence the factual matrix of the third claimant in *Sunday Tribune* is wholly distinguishable with the facts in the instant case. The drivers had more in common with the first and second claimants in that case, both of whom were held to be employees than the third claimant because they were contractually obliged to submit weekly or so availability sheets and work the ensuing rostered days.

146. In his judgment, the trial judge had regard to the material distinguishing element in the instant case from the facts in *Sunday Tribune* which Revenue had asserted, namely that in

the *Sunday Tribune* case each of the reporters had different roles within the newspaper. By contrast, in this appeal the drivers were engaged under similar terms and conditions which fact, Revenue correctly contended, also supported the integration of the drivers.

147. Insofar as the appellant contends that the trial judge erred in his interpretation and application of the concept of "integration", the judge clearly articulated the appellant's relevant contentions at *inter alia* para. 44 of the judgment. It was open to the trial judge to evaluate the approach adopted by the Commissioner including her consideration of *Uber BV v. Aslam*. I am satisfied that the trial judge was correct, firstly, at para. 63 when he observed:-

> "Despite the indignation expressed on behalf of the appellant, the distinction between 'a worker' and an 'employee' in the UK legislation was not central to the reliance placed by the Commissioner on the *Uber* and the other UK judgments cited in the determination for the integration and mutuality issues."

Secondly, he correctly noted: –

> "This case stated is not a judicial review of the procedures adopted by the Commissioner. The court repeats that the appellant bears the onus of satisfying this court that the Commissioner erred in her application of the law in relation to integration." (para. 64)

148. The trial judge was correct in his approach. It was self-evidently clear that the Commissioner was alive to the relevance under UK legislation of the concept of "worker" and the statutory definition. She sets this out expressly at para. 117 of her determination. The factors identified by the trial judge at para. 65 as having been taken into account by the Commissioner at paras. 120 to 125 of her determination supported her finding as he correctly concluded. There was ample evidence before the trial judge entitling him to find that the

Commissioner was correct in law in the interpretation and application of the concept of integration as stated in the determination.

The issues of control and integration

149. The issue of control of the individual contracts is to be approached from the perspective of whether it can be said, having due regard to the totality of the evidence, that there was a sufficient framework of control in light of the relationship between the parties. The terms of the overarching contract are potentially relevant to the question as to whether there was a sufficient framework of control in respect of individual contracts.

150. The operation of the rosters and the weekly allocation of work under the individual contracts could operate as a significant lever with which to influence the performance by drivers of their individual engagements and is plainly capable of being relevant to the questions of control and integration.

151. The individual contract was formed when the driver submitted to the branch manager a schedule of available dates and times for the relevant week. The branch manager then created a shift rota for the week and circulated it to the drivers. That amounted to acceptance on the part of the company under the ordinary law of contract. The driver showed up for work on the nominated shift and was integrated into the company's enterprise by the activities engaged in including activities such as the making up of pizza boxes and the wearing of branded apparel and the attachment of branding to their vehicle. There was no evidence that a branch manager on receipt of an availability sheet from a driver had ever failed to roster such a driver for driving duties in the relevant week.

152. A practical limitation on the ability to intervene in the real time performance of a task does not in and of itself mean that there is not sufficient control to create the relationship of employer and employee. What is significant is the entitlement of the company to give

directions or to impose sanctions such as sending a driver home for refusal to make up pizza boxes. The company had control over the manner drivers dressed, the time drivers were there as specified in the roster, the number and extent of deliveries drivers were to undertake and the particularities with regard to insurance *etc*. in relation to vehicles.

153. It is noteworthy that there was no provision that the contract would end if a driver did not accept an offer to drive or failed to show up for a rostered period.

154. In addition to the specific driving assignments under the individual contracts, its terms continued to operate for the duration of the entire week in question in circumstances where the driver had an obligation to prepare and create weekly invoices and submit same to the company. Arguably each individual contract was completed when the invoices for the drivers in question were submitted. It would appear that the local branch was actively involved routinely in the preparation and filling out of such invoices in question which is reflective of control and integration of the drivers into the company's enterprise.

155. On its true construction the overarching agreement goes far beyond providing a mere framework for a series of successive *ad hoc* contracts for services. By contrast with much of the case law relied upon, where the requirement for services could be exceptional, episodic or occasional *e.g.* banqueting staff for special events and weddings (*O'Kelly*) tour guides for power stations (*Carmichael*) the need for drivers was a continuing and fixed requirement integral to the business being operated by the company.

156. The undisputed evidence of the appellant's own witness was that a manager was entitled to call upon a driver who was awaiting a driving job to fold pizza boxes. This evidence was not contested or disputed by any witness. Furthermore, it is significant that the evidence of the consequence for a driver who refused to make up pizza boxes was not disputed either namely, that the manager or assistant manager was entitled to send the driver

home for the remainder of that shift. That was a considerable sanction consistent with the relationship of employer and employee.

157. That fact demonstrates the degree of control exercised by the company over the driver, the extent of the driver's integration into the company's enterprise and the lack of freedom on the part of the driver to decline to do other work on the premises. It is not correct in the circumstances to suggest, as the appellant has done, that there was no evidence either of any obligation on the part of the driver to assemble boxes or of any payment or any other consideration for doing so. In particular the company's witness, Mr. Milczarek gave evidence that where drivers refused to make boxes the managers would issue a warning to such a driver that they would be sent home. This demonstrates that the drivers were under the company's control and were expected to engage in activities integral to the company's enterprise in pizza making as well as delivery and failure to do so would potentially have economic consequences. The risk of being sent home in the event of a driver refusing to assemble boxes did have an immediate and direct potential impact on payments.

The enterprise test in context of control and integration

158. In this context, the decision of *Market Investigations Limited v. Minister of Social Security* [1969] 2 Q.B. 173, [1969] 2 W.L.R. 1 (considered by Carroll J. in *Sunday Tribune*) is of no little significance. It was considered also in the *Barry* and *McKayed* judgments referenced above. In essence, the question is: was the driver in business on his own account and their own boss (akin almost to a taxi driver of pizzas) rather than an employee?

159. *Market Investigations* involved a consultative case stated. At p. 8 Cooke J. observed:-

> "I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B. was entitled to exercise over A. in the performance of the work would be a decisive factor. However, it has for long

been apparent that an analysis of the extent and degree of such control is not in itself decisive."

The court cited cases and examples illustrative of the proposition that in certain instances "the absence of control and direction in that sense can be of little, if any, use as a test." Cooke J. continued:-

> "If control is not a decisive test, what then are the other considerations which are relevant? No comprehensive answer has been given to this question, but assistance is to be found in a number of cases."

Having considered some of the authorities he noted –

> "The observations of Lord Wright, of Denning L.J. and of the judges of the [US] Supreme Court suggest that the fundamental test to be applied is this:
>
> > 'Is the person who has engaged themself to perform these services performing them as a person in business on his own account?'" (p. 9)

The analysis continued;

> "If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for

investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

Applying the principles to the facts before him, Cooke J. noted:-

> "It is apparent that the control which the company had the right to exercise in this case was very extensive indeed. It was so extensive as to be entirely consistent with Mrs. Irving's being employed under a contract of service. The fact that Mrs. Irving had a limited discretion as to when she should do the work was not in my view inconsistent with the existence of a contract of service…Nor is there anything inconsistent with the existence of a contract of service in the fact that Mrs. Irving was free to work for others during the relevant period. It is by no means a necessary incident of a contract of service that the servant is prohibited from serving any other employer." (p. 11)

In the instant case, *inter alia,* **Clause 11** of the overarching agreement is strongly indicative of significant continuing control by the company over the driver inconsistent with a contract for services.

Control and Clause 11

160. Clause 11 of the overarching contract imposes significant limitations on the driver's freedom to work which operated continuously even at times and days between individual contracts when the driver was not rostered by the company. The structure of the clause is noteworthy, not least the usage of the words "at the same time" in the second sentence. Those words however, derive their colour and meaning from the first sentence in Clause 11 which modify the words as follows: "at the same time as this contract is in force".

161. This points towards the existence of a very high level of control by the company over the freedom of the driver to take other driving work even in the time between individual

contracts. It places restraints on the general freedom of a driver to earn a livelihood as a driver performing like work. It prohibits delivery of "similar type products into the same market area from a rival company at the same time where a conflict of interest would be possible." This is a continuing obligation on the part of the driver for the benefit of the company for which the driver receives *per se* no remuneration or compensation. It is noteworthy that this continuing obligation is not expressly confined to the delivery of pizzas for rival companies but extends to anything that might be characterised as "similar type products" to those being delivered for the appellant. "Similar type products" are nowhere defined in the overarching agreement.

162. Thus, at all material times while the overarching contract is operative – and not just during the operation of individual contracts – the Clause 11 restrictions imposed on the driver continue. It is consistent with the existence of continuing obligations of mutual trust and confidence characteristic of a contract of service. The continuing obligation of the driver to the company embodied in this clause in and of itself is, arguably, inconsistent with a driver being characterised as an independent contractor. The point was not argued. It is raised merely to illustrate the importance of approaching the issue of status in light of the totality of the terms governing the relationship between the parties. It is understandable that the appellant might object to the close analysis being carried out by the trial judge of the overarching contract. I am not satisfied that the trial judge was precluded from considering its tenor and whether it shed light on the distinct issues arising in relation to the individual contracts such as control and integration, in addition to mutuality of obligation. The issue is also considered at para 175 *post*.

163. The Commissioner's relevant findings in that regard were noted at para. 17 of the judgment under appeal. It was appropriate for the trial judge to look at the overarching contract from the perspective of mutuality of obligations since it was a hybrid contract and

indeed that is borne out by the jurisprudence, including para. 30 of *Weight Watchers*. The trial judge specifically cites that *dicta* at para. 21 of his judgment. The approach of the judge was correct in law. That the ambit of his consideration was in part wider than that of the Appeals Commissioner reflects its comprehensiveness. It was indicative of his careful approach to the issues presented in the consultative case stated. The contentions of the appellant to the contrary in substance amount to an argument that in any given case an unduly narrow construct be imposed on the legal exercise of ascertaining whether a work-wage bargain has been concluded between parties so as to give rise to a contract of service. There is no authority identified for such a proposition or for such an approach.

Ground of appeal 4 – Substitution

164. The appellant contends that the trial judge erred in interpreting and applying the law and the facts regarding substitution. The error is characterised thus: -

> "At para. 58 of the judgment the learned trial judge erred in holding that:-
>
> > 'The reliance by the appellant on the Supreme Court judgment in *Castleisland* conveniently overlooks the fact that the inclusion of terms requiring approval for substitutes occurred in that social welfare appeal due to the necessity to comply with statutory regulations for artificial inseminators. The appellant imposed the terms about substitution.' (p. 6)
>
> In *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] 4 I.R. 150 the Supreme Court (Geoghegan J.) expressly stated at pp. 161-162:
>
> > 'I see no significance whatsoever…in the inclusion in the contract of terms which require the approval of *Castleisland* to any substitute inseminator or the ability to assign the contract. Indeed, even if there were no statutory

regulations they would obviously be in the interests of Castleisland's business to ensure competence and therefore to include such a provision.'"

The appellant continues:-

> "Nowhere in the judgment of the High Court does the learned trial judge explain why he rejected the contention that the distinction posited in *Weight Watchers Ltd.* between two distinctive forms of substitution is not recognised in Irish Law.
>
> That distinction is between a situation where on the one hand, there is a right to substitute in a manner which allows for another person wholly or substantially to do the promised work, and on the other, a situation where a contract provides that in the event of the worker being unable to work he or she may arrange for a person approved by the employer to do it, not as a delegate but under a replacement contract made directly between the employer and the substituted person." (p. 7)

At para. 8 of the judgment the trial judge noted that "the appellant confined its challenge under the 'substitution' and 'terms of the written contract' to the application of the law by the Commissioner."

165. At the appeal hearing, counsel on behalf of the appellant acknowledged (p. 28 of the transcript): -

> "…the finding by the Commission as a matter of fact was that frequently the driver didn't nominate a substitute and it was the company itself which nominated the substitute."

166. Clause 12 of the Overarching Agreement envisages substitution arising where the driver became "unavailable at short notice"; language which speaks to an unexpected or unforeseen exigency. There is a limited right conferred on the driver to engage a substitute delivery person in such circumstance. It is not a right at large. It was very extensively

fettered. In practice, as is clear from Clause 12, only other drivers who had executed an overarching agreement and were on the books of the company as drivers met the threshold since a substitute had to be "capable of performing the contractor's obligations in all respects". (emphasis added)

167. In practice, neither under individual contracts nor under the terms of the overarching agreement did a driver have a general right or entitlement to substitute another to work a shift save in the exceptional circumstances and terms provided. It was a conditional right. This is reinforced by the final sentence of Clause 14 of the overarching agreement which obligated the driver to notify the company in advance of any unavailability to undertake a previously agreed delivery service. There was no evidence adduced by the appellant to suggest that the right of substitution was exercised otherwise than on a limited or occasional basis. Whilst the observation of the Commissioner complained of by the appellant was indicative of an obligation to find the substitute, the determination when read in its entirety elsewhere clearly demonstrates that she was aware that the terms of the agreement between the parties did not impose such an obligation.

Finding of Commissioner on Substitution

168. The Commissioner's analysis is to be found at para. 24, 38(b), 82 and 90 of the Determination. At para. 24 it was noted that," [d]rivers were *entitled* to substitute another of the Appellant's drivers in the event they were unavailable to attend for a registered work shift." (emphasis added). Para. 38(b) stated "I find as a material fact that the substitution clause *permitted* drivers to substitute another of the appellant's drivers when they were unavailable…" (emphasis added). Para. 90 states "…if a driver was rostered for a shift but was unable to turn up, he had an *entitlement* under clause 12 of the written agreement, to arrange for the work to be done by another…" (emphasis added).

169. Para.82, which attracted particular criticism by the appellant warrants being considered in full; "…the ***right*** of the driver to cancel a shift was qualified by the ***requirement*** to engage a substitute, to provide advance notification to the appellant and to work out the remainder of the shifts in the series which had been agreed" (emphasis added). It considers three distinct factors in the context of her analysis of the right to cancel a driving shift. Two factors, namely, providing advance notification and the obligation to work out the remaining shifts were requirements but the engagement of a substitution was not. Thus the statement is partially correct. It is clear from her analysis of Clause 12 of the written agreement and paras. 24, 38(b) and 90 in the Determination that the Commissioner was well aware that substitution was an "entitlement" or "permitted" and not a "requirement". The reference to a requirement to engage a substitute (repeated in para. 105) is not correct. However that error does not undermine her overall conclusions has no bearing on the conclusion at para. 155 "…that these contracts are contracts of service."

170. In my view in light of the terms of the agreement the trial judge erred at that part of para. 55 where he finds that obligation were imposed on the driver cancelling a shift at short notice to find a substitute. However, that error is also not material to the outcome. The more limited the right of substitution a worker has, the more consistent the contract is with the obligation for personal performance inherent in a contract of service.

171. Wilson L.J. in *Pimlico Plumbers* observed at para 22;

> "… in his classic exposition of the ingredients of a contract of service in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, Mac[K]enna J added an important qualification. He said at p 515:

> ‘Freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service, though a limited or occasional power of delegation may not be …’”

He cited Atiyah’s *Vicarious Liability in the Law of Torts* (1st edn., Butterworth, 1967), in which it was stated at p. 59 that “it seems reasonably clear that an essential feature of a contract of service is the performance of at least part of the work by the servant himself”. The decision of Barr J. in *McAuliffe v. Minister for Social Welfare* [1995] 2 I.R. 238 also supports MacKenna J.’s proposition.

172. The appellant placed reliance on para. 76 of the determination which observed: -

> “The appellant contended that the drivers had no obligations whatsoever as they could choose not to turn up for any shift, safe in the knowledge that no sanction will be imposed. However, the contract envisages cancellation ‘*should the Contractor be unavailable at short notice’*, together with the requirement of advanced notification in accordance with Clause 14. Thus, the contract aims, to some extent, to regulate the circumstances of cancellation by a driver”

173. At p. 40 of the transcript it is stated on behalf of Karshan –

> “…Clause 12…doesn’t impose any obligation on the contractors. On the contrary, it is saying that even should the contractor be unavailable and even if he is unavailable at short notice, the company accepts that he still has the right to engage a substitute delivery person. And of course, *a fortiori*, he has the same right if in fact he gives a longer notice period to the company.
>
> So, whether he gives a short notice period or a long notice period makes no difference. He doesn’t have any obligations in consequence of that. On the contrary, Clause 12 is giving him a right and an entitlement.”

174. The analysis of the Commissioner, for instance at paras. 90 – 102, rejects the appellant's contentions as "incorrect". The ambit of time encompassed by the words "at short notice" in Clause 12 is nowhere defined. The dominant feature of the contract was an obligation of personal performance by the driver. A driver's facility to appoint a substitute was confined to significantly limited circumstances: implicitly the substitute had to come from the ranks of Karshan drivers, in other words from those bound to Karshan by an identical suite of obligations as the overarching contract's words demonstrate, "such person must be capable of performing the contractor's contractual obligations in all respects" (Clause 12). Paras. 103-104 of the Determination correctly analyses the substitution issue. In the words of Wilson L.J. in *Pimlico Plumbers* at para. 34;

> "It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done."

175. The scenario postulated at para. 76 of the determination as representing the position of the appellant before the Commissioner discloses a fundamental error at the heart of the appellant's position. Contrary to what is contended, once the drivers submitted their availability sheets and the rosters were furnished and circulated to them there was a binding individual contract between the parties and the ordinary rules of contract applied as between the drivers and the company. A gratuitous failure to turn up for work for a shift was a breach of contract. Whether or not a sanction would be imposed is wholly immaterial to the issue. It was in the hands of Karshan what stance to take in such circumstances. Substitution and cancellation are two distinct propositions. Insofar as para. 82 of the determination is criticised, a perusal of the determination in its entirety (particularly paras. 24, 90 and 38(b)) demonstrate, that the Commissioner was under no misapprehension as to the true meaning and operational effect of the key relevant clause, namely Clause 12, in the agreement.

176. She correctly identified that a significant distinguishing factor from the *Ready Mixed Concrete v. Minister for Pensions* case (which has been long accepted as good law in this jurisdiction) was that in *Ready Mixed* the court had concluded that a driver was an independent contractor in circumstances where a clear substitution clause had provided that in the event the driver was unavailable he had a general entitlement to engage others to work for him in driving the vehicle and the person appointed by the driver would work for and be paid by the driver and not by the driver's employer.

177. The facts in *Castleisland* are distinguishable. The individuals had been employed by the Department of Agriculture under contracts of service. Each was offered redundancy on negotiated optional terms. One option was six times the statutory redundancy entitlement on the basis of a severance. Another option provided for twice the statutory redundancy on the basis that they would thereafter be free to take other work and operate as independent contractors. The claimants in question had executed contracts for valuable consideration expressly stating that they were independent contractors. Conducting artificial insemination of animals in a context of preserving the health and welfare of the national herd in accordance with regulatory control and the terms of relevant statutory instruments cannot fairly be compared to the activity of delivering food from takeaways to customer's homes or places of work. *Castleisland* is distinguishable on its facts.

178. Thus the factual matrix underpinning the *Castleisland* decision is fundamentally different. In the instant case overarching contracts were presented on a "take it or leave it" basis. There was no evidence that drivers or any driver the subject of the determination had hitherto worked as an employee of the appellant. In reality, drivers did not have the entitlement to substitute other drivers in their place such as to give rise to a subcontracting of the work in a manner inconsistent with the existence of a contract of employment.

179. I am satisfied on its true construction that each driver assumed a personal obligation to carry out the work of delivering the take away food to customers both under the overarching agreement and by the terms of the individual contracts. Nowhere is there an unfettered right to substitute another person to do the work of driving characteristic of a contract for services. The tenor of Clauses 12 and 14 implicitly speak to the exceptionality of an exigency arising whereby a driver would become unavailable at short notice and what might ensue and is characteristic of employment contracts and not indicative of a contract for services.

180. In general, a conditional right to substitute another to perform the activity in question may or may not be inconsistent with personal performance depending on the conditionality in question. *Castleisland* turns on its own facts given the statutory regime and regulatory requirements that obtained. The right to engage a substitute expressly provided for in Clause 12 was quite narrow. The substitute was drawn from the company's panel or bank of drivers: "such person must be capable of performing the contractor's contractual obligations in all respects" (emphasis added). This illustrates that there was no unfettered discretion to substitute at will. The entire tenor of Clause 12 speaks to its exceptionality; that it was capable of arising on an occasional basis and the substitution activity, albeit being possible, was not an obligation imposed on the driver. The company paid the substitute directly.

181. Contrary to the contentions of the appellant all those factors are relevant, in particular the latter factor. An entitlement/right of substitution confined to a circumstance where the driver was unable to carry out the work at short notice on the facts of this case was consistent with personal performance. In practice, the absence of any express obligation to find a substitute coupled with an absence of opportunity for profit by sub-contracting which is characteristic with being in business on one's own account, supports the respondent's contention rather than that of the appellant.

182. The trial judge recounted the objections on the part of the appellant with the determination of the Commissioner to rely on the reasoning of Briggs J. in *Weight Watchers (UK) Limited* and the assertions and contentions of both parties are set out in detail *inter alia* at paras. 15 and 21 of the judgment. He noted at para. 39: -

> "The appellant contends that the distinction posited in *Weight Watchers* between two distinct forms of substitution is not recognised in Irish law. The appellant further submits that the right of an employer to approve substitutes does not indicate an employment relationship. The fact that the appellant exercised a significant measure of control of the drivers' choice of delegates is insufficient to indicate the existence of an employment relationship, according to the appellant."

183. It would have been preferable had the trial judge analysed the *Weight Watchers* decision with greater particularity, it is implicit from his judgment that he preferred the submissions of the Revenue Commissioners in relation to this issue including that in reality pizza drivers did not have freedom to substitute but rather could nominate a replacement approved by and paid directly by the company. That approach is entirely consistent with *Ready Mixed* as in *Weight Watchers*, the substitution clause in the overarching contract did not permit the driver to discharge his contractual obligations in relation to the delivery of a pizza by the provision of another driver's services.

184. Despite the objections of the appellant, it did not identify any authority where, in the case of substitution, the fact that a substitute was not paid directly by the company was held not to be a relevant consideration in deciding status of the individual being substituted or in carrying out the multifactorial analysis as to whether a contract of service had come into existence between the parties. It is a material factor. In the ledger of *indicia* of factors, if payment for the substitute driver was not made to the driver being substituted in the first

instance, it tends to suggest that the latter is an employee rather than an independent contractor.

185. The actual operation of the individual contracts does not support the assertion that such a degree of independence and autonomy was vested in the driver. In practice, the right to substitute was very narrow and only arose in exceptional circumstances where the driver became "unavailable at short notice". The evidence suggests that implicitly substitution had to be by another of the company's drivers who had already signed an overarching contract with the company since the substitute had to be capable of performing the contractual obligations "in all respects". The substitution clause did not enable a driver in any circumstance to deliver the promised driving work by another person and get paid for it himself as would be characteristic of a contract for services. Instead where, implicitly for a good reason, the driver was "unavailable at short notice" to work a shift he had a qualified right not to work that shift and another person, identified either by himself or the company could do it, not as a delegate but under a replacement contract with the company for that specific shift. This accords with *Weight Watchers* analysis incl. paras. 32-34.

186. A case such as *Independent Workers Union of Great Britain v. Central Arbitration Committee (Roofoods trading as Deliveroo as an interested party)* [2021] EWCA Civ. 952 ("*Deliveroo*") is wholly distinguishable concerning as it did provisions of the European Convention on Human Rights and issues around trade union recognition as well as payment for the substitute's shift directly to the unavailable driver – which do not arise in this case. Karshan sought to rely on its terms (p. 83 of transcript). I do not consider it to materially assist in resolving any issue in this appeal. Lest I am wrong, I would make the following observations. In that case the crafting of the substitution clause resulted in the negating of the necessary element of personal service; the crucial factor being that when a driver became unavailable he had total freedom to find a substitute driver and thereafter received the

payment directly for the substitute's work from the company and in turn was free to deduct a percentage of that payment for himself (circa 15% - 20%) passing on the balance to the substitute. Thus, crucially, as in the *Ready Mixed* decision itself which is acknowledged to be good law in this jurisdiction, the Deliveroo driver was at liberty to send along another in substitution for himself and payments were made directly to the driver to be shared with the substitute factors which all pointed to substitution operating in the context of a contract for services in stark contrast to the position in this case. The decision merely reflects the independent contractor identified by Briggs J. in Weight Watchers at para 32 who delivers promised work via another person and gets paid for it himself – a scenario which has no application in the instant case.

187. By contrast, in the instant case substitution was significantly fettered under the express language of the overarching agreement. The driver had to be "unavailable at short notice". The word "unavailable" is telling, connoting as it does that the worker was not in a position to do the work as distinct from freely electing not to do it. The choice of substitution was very limited and the payment was always made directly to the substitute by the company. The exercise conferred no opportunity for profit on the driver as would be characteristic of an independent contractor.

188. In contrast to the *Deliveroo* and *Ready Mixed* cases, drivers for the appellant did undertake to personally do the work or services in question. That obligation became binding and certain on each occasion when the roster was circulated. The lack of any contractual obligation on the part of a driver to find a substitute undermines the appellant's contentions.

189. The judge observed at para. 37, "[t]his Court is only concerned with the application of the law which concerns "substitution" and is not concerned with the findings of fact made by the Commissioner." The High Court judge correctly concluded that:

"60. This factor of substitution does not avail the appellant as is urged on its behalf. The appellant has failed to satisfy this Court that the Commissioner erred in her application of the law in this regard."

Ground of appeal 5 – Contentions regarding natural and constitutional justice

190. The appellant contends that the trial judge erred in concluding that the Appeals Commissioner did not err in law in having regard to UK/English authorities which were decided after the appeal hearing before the Appeals Commissioner was completed in July 2016, and in failing to invite the parties to address her in relation to those authorities. The error contended for is: -

"The High Court should have held that the approach adopted by the Appeal Commissioner in this regard was not consistent with natural and constitutional justice and, in particular, fails to respect the *audi alteram partem* principle." (p. 7)

191. This ground of appeal was not pursued to any extent at the hearing.

Ground of appeal 6 – The application of UK authorities

192. The appellant contends that:-

"The High Court erred in concluding that the Appeal Commissioner did not err in law in having regard to United Kingdom/English authorities which are based on a different statutory regime, namely, s. 230 of the Employment Rights Act 1996 and… the…intermediate category of 'worker' as defined per that legislation." (p. 7)

193. Reliance was placed in particular on s. 230(3) of the UK Employment Rights Act 1996. The judge reviewed the approach of the Commissioner to the authorities such as the English decision in *Uber*. I am satisfied the trial judge was correct in his view that the Commissioner was entitled to consider the *Uber* decision and the distinction in the UK Act was not central to the Commissioner's consideration in the context of mutuality and integration. She was

demonstrably alive to the fact that a different statutory dispensation operates in England and Wales and in particular a distinction obtains between a "worker" and an "employee" under the UK statute as she expressly pointed out. The *Uber* decision was capable of providing assistance to the Commissioner. Some English decisions, such as that of Mr. Recorder Underhill in *Byrne Bros (Formwork) Limited (No 5) v. Baird* [2002] I.C.R. 667, suggest that at least insofar as mutuality of obligation is concerned, the criteria relevant to assessing statutory "worker" status can be substantially similar to those for assessing whether a contract of service/employee status exists. It appears she considered *Uber* primarily in the context of the Integration Test which, it appears, is common to both statutory "workers" and employees.

194. The analysis by the English court in *Uber* of various principles were relevant and worthy of consideration by the Commissioner in deciding whether the relationship was in essence to be located in the field of dependent work relationships or whether it was in essence a contract between two independent business undertakings. I am satisfied that the trial judge was correct in his assessment and the criticisms of the Commissioner in that regard are not well made. *Uber BV* is of limited legal relevance in Ireland for two reasons. Firstly, the decision was fact-specific and secondly, under Irish law there is no intermediate category of worker falling between an employee and an independent contractor. But, as the trial judge correctly observed, the Commissioner's consideration of aspects of the judgment was in the context of mutuality of obligation and integration. Her approach was comprehensive. She took no shortcuts and engaged in a comprehensive assessment of all relevant factors in deciding as to which side of the boundary this particular case lay.

195. It would have been surprising in all the circumstances had the Commissioner omitted to consider the *Uber* decision. I reiterate that that case turned on its own particular facts. Reading the determination in its entirety, the High Court judge could be satisfied that the

Commissioner was alive to the limitations of jurisprudence from England and Wales focused exclusively on statutory "workers" so found within the 1996 Act. That does not detract from the relevance of the said jurisprudence in the limited manner considered by the Commissioner in this instance as the trial judge correctly found.

196. The appellant further contends that "decisions such as *Uber*, which have identified drivers to be workers – and not employees – pursuant to an entirely distinct statutory regime in English law cannot safely or appropriately be relied upon in determining employment status in this jurisdiction". However, the relevant English jurisprudence she considered went well beyond a mere analysis of the English statutory regime and, as the trial judge correctly found, the Commissioner was entitled to have regard to same insofar as it was considered to be relevant. There was ample jurisprudence otherwise to support her conclusions and the trial judge was right not to interfere with it.

Ground of appeal 7 – Decision of the Social Welfare Appeals Office

197. The appellant contends: -

> "The High Court erred in holding that the Appeal Commissioner did not err in law in determining that she was not bound by a previous decision of the Social Welfare Appeals Office dated 19 August 2008 and when finding that the Social Welfare Appeals Office and the Tax Appeals Commission are different adjudication bodies subject to different statutory regimes, where she erred in law in failing to give any or adequate weight to the said previous decision as set out at pages 5 – 8 (paragraphs 11 – 20) of her determination". (p. 8)

The error contended for is that "greater weight should have been afforded by the High Court to this pertinent factual context in the interests of legal consistency." (p. 8)

198. I am satisfied that this ground of appeal is unmeritorious and can be swiftly dealt with. The appellant had sought at the original hearing to rely on a decision of the Social Welfare Appeals Office made in August 2008 which concluded that an individual delivery driver for K & M Pizza Ltd. was to be regarded as an independent contractor for social welfare purposes.

199. There was no evidence put before the Commissioner or the court as to the exact terms and conditions on foot of which the said individual operated as a delivery driver for K & M. Each of these cases is fact driven. It would be surprising to suggest that the Commissioner was bound in the context of tax by a decision of the Social Welfare Appeals Office concerning a pizza delivery driver in the context of welfare law unmoored from any facts and details of the actual terms and conditions on foot of which they were engaged to carry out driving in the first place. This ground of appeal is not maintainable.

Grounds of appeal 8 & 9 – Terms of express agreement

200. Under these grounds of appeal, the appellant firstly contends that: -

> "There are factual errors regarding substitution evident in the judgment, involving reliance on the Appeal Commissioner's determination, which are relevant to the question of deference."

The appellant contends that there was no requirement under the overarching contract for a driver to engage a substitute from the appellant's pool of previously approved drivers, and that the trial judge and Commissioner erred in suggesting otherwise, at paras. 42, 52 and 55 and paras. 105 and 82 of the judgment and determination, respectively.

201. These grounds require some analysis of the overarching contract. It is a question of nuance. The driver was not prohibited from suggesting a substitute driver. The driver was entitled to propose a substitute driver. The driver was not required to find the substitute

driver. I am satisfied that the trial judge's and Commissioner's interpretation of the substitution clause was not a material error and did not affect the validity of her conclusions. Clause 12 states of such a substitute: "such person must be capable of performing the contractor's contractual obligations in all respects." An individual could only be said with confidence to be "capable of performing" the said contractual obligations "in all respects" if they had entered into a binding agreement with the appellant in like terms to those entered into by the driver. The language in Clause 12 necessarily contemplates that the substitute will effectively be bound by all the obligations and duties arising under the overarching agreement. Since a stranger has no privity and would be oblivious to all of the obligations and since the substitution arises in the context of an exigency where a driver becomes "unavailable at short notice", the most practical construction is the one deployed by the Commissioner and the High Court, namely that the replacement driver came from the pool of drivers maintained by the appellant.

202. In light of Clause 12, the burden rested on the appellant to demonstrate at the hearing by adducing appropriate evidence that a driver was not entitled to select a substitute driver from the world at large to carry out driving duties. There is no record that such evidence was adduced. The burden did not rest with the Commissioner to call evidence. The burden rested with the company to demonstrate how substitution under the contract operated in practice. If they omitted to put before the Commissioner such evidence, she was perfectly entitled to rely on the evidence and terms of the overarching contract, as she did at para. 105 of her determination.

203. Paragraph 55 of the trial judge's decision must be seen in context where elsewhere in his judgment (for instance paras. 35 and 60) the right of substitution was characterised as permissive in nature.

204. The objections to the use of the word "required" in para. 82 of the determination is overstated when set against the determination as a whole, as for instance summarised in the High Court judgment at paras. 2(i), 2(v), 34, 35, 39, 40, 59. The appellant's criticisms of the of the trial judge's judgment in this regard are not made out.

205. Secondly, the appellant asserts that the Appeals Commissioner failed to properly weigh the significance of Clauses 1 and 17; 2; 3; 5; 9; 12, and 14 of the overarching agreement. The Commissioner's detailed analysis of, *inter alia*, *Autoclenz* properly engages with Clauses 1 and 17. The Determination is replete with comprehensive analysis of Clauses 12 and 14. As regards remuneration and Clause 3 it is fully addressed, including for example at para. 16 of the determination. As is demonstrated at paras. 12-24 inclusive above, the Overarching Agreement and its material terms were fully engaged with by the Commissioner and this ground of appeal is not made out.

Conclusion

206. I am satisfied that as a matter of law the High Court judge was entitled to find that the Commissioner was correct in her interpretation and application of the mutuality of obligation principle along with the other constituent *indicia* of the contract of service including but not limited to integration and control. In light of the evidence and her findings, she was entitled to elect not to proceed to reach any conclusion on other issues including mutuality of obligation under the overarching contract. This did not preclude the judge from separately considering the issue of such mutuality of obligation within the overarching agreement.

207. On a true construction of the facts in light of the evidence before the Appeals Commissioner as to how the arrangement between the parties operated in practice, the trial judge was entitled find as regards the individual contracts that the Commissioner had been correct to conclude there was indeed an "irreducible minimum" of continuing mutual

obligation which, when combined with the other relevant factors such as control and integration, the operation of substitution and so forth was sufficient to establish that the relationship between the parties constituted a contract of service and the drivers were employees to the extent found by the Appeals Commissioner. This conclusion was arrived at wholly independently of whether the overarching contract in and of itself gave rise to a contract of employment.

208. The Appeals Commissioner correctly analysed the inter-relationship arising in practice between the written overarching contract and the individual contracts between the parties. To work as a driver it was necessary to firstly sign the overarching contract. This offered the only gateway to an individual contract. The evidence was that all drivers signed the overarching agreement. The corollary is that the company relied on the panel of drivers who had executed the overarching agreement as the sole source of supply of drivers for its pizza delivery business.

209. Ultimately, it is necessary to have regard to the jurisprudence in this jurisdiction including the Supreme Court decision in *Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Barry*, as the High Court judge did. In light of those decisions, he was correct to find that there was evidence before the Appeals Commissioner which entitled her to reach her conclusions.

210. Insofar as the element of control was concerned though in and of itself it was not determinative of status, it was a factor to be taken into consideration in analysing aspects of the contract such as the limitations on the right to substitute. The degree of control exercised by the company over the work done and the manner by which it was to be discharged by the drivers was significant and was indicative of integration of the drivers into the business enterprise in a manner consistent with the existence of a contract of service. Clause 11 is especially relevant in that regard.

211. The analysis of the Appeals Commissioner of the integration test was heavily criticised by the appellant. True enough, the concept of "worker" within s. 230(3)(b) of the UK Employment Rights Act 1996 is not mirrored in any legislation in this jurisdiction. The Appeals Commissioner did not suggest that it was. She clearly indicates that the Act of 1996 under reference was "UK" legislation. As the High Court judge correctly found, the "worker"/"employee" dichotomy was not central to the focus of Commissioner's consideration of jurisprudence from England and Wales. He was correct in concluding that she did not err in her treatment of the said authorities. The use of the word "worker" by the Appeals Commissioner is unfairly characterised as reference to the English statute. The context demonstrates that this was not so.

212. It follows that I very respectfully disagree with the analysis and conclusions in the majority judgments for the reasons stated above. I would have dismissed the appeal on all grounds.

THE COURT OF APPEAL

APPROVED
Neutral Citation Number: [2022] IECA 124
Court of Appeal Record Number 2020/53

Whelan J.
Costello J.
Haughton J.

BETWEEN

KARSHAN (MIDLANDS LIMITED) TRADING AS DOMINO'S PIZZA

APPELLANT

- AND -

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 31 day of May, 2022

1. This is an appeal of the order of the High Court of 21 January 2020 in respect of a case stated by way of appeal for the opinion of the High Court pursuant to s. 949AQ of the Taxes Consolidation Act 1997 ("the TCA"), and of a judgment delivered on 20 December 2019, [2019] IEHC 894. The case stated arose following an oral hearing in July 2016 by a Tax Appeal Commissioner ("the Commissioner"). The central issue in the appeal is whether delivery drivers who deliver pizzas for the appellant are employees of the appellant. The Commissioner made a determination on 8 October 2018 that pizza delivery drivers engaged by the appellant:

(1) worked during the relevant tax years of assessment (2010 and 2011) under contracts of services and are taxable under Schedule E of the Taxes Consolidation Act 1997 ("the TCA"); and

(2) did not work under contracts for services, thereby being self-employed, and taxable pursuant to Schedule D of the TCA, as the appellant had contended.

2. The appellant appealed the determination to the High Court by way of case stated. The High Court (O'Connor J.) dismissed the appeal and the appellant has appealed to this court. This is my judgment in respect of the appeal.

Background

3. The appellant trades as Domino's Pizza. It manufactures and delivers pizzas and ancillary food items to customers who place orders by telephone, internet and by attending at their stores. The appellant engages drivers to deliver the pizzas to its customers. Each driver entered into a written agreement with the appellant. It recites that:-

> *"... the company wishes to subcontract the delivery of pizzas, the promotion of its brand logo and the contractor [each driver] is willing to provide these services to the company on the terms hereinafter appearing."*

4. The agreement states that the contractor shall be retained by the company as an *"independent contractor"* within the meaning of and for all purposes of that expression (Clause 1). At Clause 17, the contractor confirms that he or she is aware that any delivery work undertaken for the company *"is strictly as an independent contractor"*. The driver acknowledges that the company *"has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies [they] may receive under this agreement"*.

5. Each driver is required to provide his or her own delivery vehicle in a roadworthy and safe condition. Clause 4 states that a driver could rent a delivery vehicle from the company on certain terms. Clause 5 requires the contractor to insure the vehicle with a reputable insurance company within the State for business use. If the driver does not have

the appropriate business insurance, the company *"is prepared to offer same (third party only) at a pre-determined rate."*

6. At Clause 3, the company agrees to pay the contractor according to the number of deliveries successfully undertaken, *"[i]n addition the company shall pay for brand promotion through the wearing of fully branded company supplied clothing and/or the application of company logos affixed temporarily to the contractor's vehicle."* Clause 9 states *"... the company does not warrant a minimum number of deliveries."* The driver is entitled to engage in a similar contract delivery service for other companies at the same time as the contract is in force, but this right *"does not extend to delivering similar type products into the same market area from a rival company at the same time, where a conflict of interest would be possible"* (Clause 11). Clauses 12 and 14 were the focus of the debate between the parties and I set them out in full:-

> *"12. The Company accepts the Contractor's right to engage a substitute delivery person should the Contractor be unavailable at short notice. Such person must be capable of performing the Contractor's contractual obligations in all respects.*
>
> *...*
>
> *14. The Company does not warrant or represent that it will utilise the Contractor's services at all; and if it does, the Contractor may invoice the Company at agreed rates. The Company, furthermore, recognises the Contractor's right to make himself available on only certain days and certain times of his own choosing. The Contractor, in turn, agrees to notify the company in advance of his unavailability to undertake a previously agreed delivery service."*

The agreement may be terminated without notice (Clause 15).

7. In addition, the drivers were required to sign a document entitled *"Social Welfare and Tax Considerations"* which the Commissioner held provided:-

"This is to confirm that I am aware that any delivery work I undertake for Karshan Limited is strictly as an independent contractor. I understand that, as such, Karshan Limited has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies I may receive from this or any of my other work related activities."

8. The drivers were also required to sign a document entitled *"Promotional Clothing Agreement"* which provided for a deposit to be paid in respect of a branded crew shirt, baseball cap, name tag and driver jacket.

9. In her written determination, the Commissioner set out the oral evidence and the terms of the written contract between the appellant and the driver. At para. 38 of her determination, the Commissioner set out her findings of fact based on the evidence from the witnesses, together with the documentary evidence. Her findings were:

(a) that the practice was that drivers would fill out an *"availability sheet"* approximately one week prior to a roster being drawn up indicating their availability for work, and that the roster would be drawn up by a store manager based on the availability sheets;

(b) that the substitution clause permitted drivers to substitute another of the appellant's drivers when they were unavailable and that the substituted driver would be paid by the appellant in respect of this shift of work. The substitute could also be arranged by the appellant, if required;

(c) that drivers were required to wear a fully branded uniform of a cap, shirt, jacket and name tag; that they were also required to wear black trousers and black shoes and to be presentable in their appearance generally; that this was subject to checks by managers and that a deposit was requested by the appellant in

respect thereof. In addition, drivers were provided with branded magnetic signs to affix to their cars as brand promotion for the appellant;

(d) the drivers were required to provide their own vehicles for delivery and there were no company cars available for rent by drivers;

(e) drivers were required to use their own phones in contacting customers, where necessary;

(f) drivers were required to provide certification of business use insurance, and where a driver did not possess such insurance, the appellant would provide insurance for a charge on the appellant's policy. The appellant required drivers to ensure that their NCT certificates were up to date;

(g) the appellant limited the number of pizzas[1] that drivers could deliver to two per time and managers would intervene to preclude a driver taking two deliveries if other drivers were waiting to take a delivery;

(h) some drivers folded boxes while waiting for deliveries and some drivers were requested to do so by their managers;

(i) in the case of many drivers, the appellant would prepare invoices that the drivers would sign;

(j) the drivers clocked-in and clocked-out on the computerised system in use in the appellant's business using their driver numbers and this and other relevant information was collated and maintained by the appellant;

(k) on commencement of a shift, drivers would be provided with a cash float by the appellant which the driver would return at the end of his shift;

[1] This is an error as she clearly means deliveries.

(l) the drop rate was €1.20 per drop with an additional 20c payable for insurance, and the drop rate was stipulated by the appellant and was not negotiable. The brand promotion/advertising rate was €5.65 per hour.

10. In addition to these express findings of fact, the Commissioner recorded the evidence that the drivers were entitled to substitute another of the appellant's drivers in the event that they were unable to attend for a rostered work shift. Mr. Paliulis, store manager, gave evidence that there would be *"follow up"* if an *"employee"* did not attend for work, having been rostered. He stated that if a driver failed to turn up, it was the manager's obligation to find a replacement and that the replacement would be paid for the work. The Commissioner records that two drivers gave evidence that they employed an accountant to look after their records and others gave evidence that the appellant would pre-prepare invoices that the drivers would sign. The appellant stated that the clocking-in/clocking-out system was not for time recording purposes but was to allow the appellant to maintain a record in relation to which drivers attended and on which days and to correlate this information with invoices.

11. The Revenue Commissioners submitted to the Commissioner that the written agreement did not accurately reflect the true agreement between the parties as evidence indicated that certain matters did not take place in accordance with the terms of the written contract. The Commissioner held that in its day-to-day operations there were three departures from the terms of the written agreement:-

(1) there were no company vehicles available for rent although the contract stipulated that company vehicles may be rented by drivers for the purposes of carrying out their duties (Clause 4);

(2) not all drivers prepared invoices for submission to the appellant as required by the contract. There was evidence from several drivers that the appellant prepared invoices which the drivers signed;

(3) some drivers were asked to perform work which was not stipulated in the contract, *i.e.* the assembly of boxes in store while waiting for a delivery.

12. The Commissioner determined that the drivers worked under multiple contracts of services and were therefore taxable in relation to the emoluments arising from their service in accordance with s. 112 and Schedule E of the TCA. Her determination will be considered in detail later in this judgment. The appellant asked the Commissioner to state a case for the opinion of the High Court which she did, raising a number of questions as follows:-

"I. Whether, upon the facts proved or admitted, I was correct in law in my interpretation and application of the concept of mutuality of obligation set out at pages 20-28 (paragraphs 53-87) of my determination.

II. Whether, upon the facts proved or admitted, I was correct in law to determine that it was not necessary to consider whether the umbrella contract contained mutuality of obligation, for the reasons set out at pages 49-51 (paragraphs 156-166) of my determination.

III. Whether, upon the facts proved or admitted, I was correct in law in the interpretation and application of the concept of 'integration' contained at pages 36-39 (paragraphs 114-125) of the determination.

IV. Whether, upon the facts proved or admitted, I was correct in law in the interpretation and application of the concept of 'substitution' contained at pages 30-34 (paragraphs 90-105) of the determination.

V. Whether I erred in law and acted in breach of natural and constitutional justice in having regard to authorities which were decided after the appeal hearing was completed in July 2016, and in failing to invite the parties to address me in relation to those authorities which were handed down after the appeal hearing completed in July 2016.

VI. Whether I erred in law having regard to United Kingdom/English authorities which are based on a different statutory regime, namely, section 230 of the Employment Rights Act 1996 and, in particular, the reference therein to an intermediate category of 'worker' as defined per that legislation.

VII. Whether I erred in law in determining that I was not bound by a previous decision of the Social Welfare Appeal's Office dated 19 August 2008 and when finding that the Social Welfare Appeals Office and the Tax Appeals Commission are different adjudication bodies subject to different statutory schemes, whether I erred in law in failing to give any or adequate weight to the said previous decision as set out at pages 5-8 (paragraphs 11-20) of my determination.

VIII. Whether upon the facts proved or admitted, I erred in law by failing to give proper weight to the actual terms and conditions of the express agreement as between the appellant and the drivers.

IX. Whether upon the facts proved or admitted, I erred in law in my findings in respect of; the manner in which rosters were set, requests to drivers to fold boxes, the nature of the ordering system, the nature of substitution, sanction for unreliability, payment of an hourly rate, clocking-in, nature of prohibition of work for others and opportunity to make profit."

The decision of the High Court

13. The High Court identified four core issues arising from the case stated:

(i) Mutuality of obligations;

(ii) Substitution;

(iii) Integration; and

(iv) Terms of the contract, specifically that the Commissioner failed to give proper weight to the actual terms of the contract.

14. The trial judge first identified the jurisdiction of the High Court on an appeal by way of case stated. He quoted the well-known passage of Kenny J. in *Mara v. Hummingbird Limited* [1982] ILRM 421, at p. 426:-

> *"A case stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayers purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The Commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way.* ***If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the Commissioner.*** *If the conclusions from the primary facts are ones which no reasonable Commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally,* ***if his conclusions show that he has adopted a wrong view of the law, they should be set aside****. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be*

set aside unless the inferences which he made from the primary facts were ones that no reasonable Commissioner could draw." (emphasis added)

15. He then referred to the Supreme Court decision in *Ó Culachain (Inspector of Taxes) v. McMullan Brothers Ltd.* [1995] 2 I.R. 217. Blayney J., speaking for the court, held that the following principles apply when a court has before it a case stated seeking its opinion as to whether a particular decision was correct in law:-

> *"(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.*
>
> *(2) Inferences from primary facts are mixed questions of fact and law.*
>
> *(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.*
>
> *(4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.*
>
> *(5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."*

16. The trial judge stated, on the question of mutuality of obligation, that he understood the determination of the Commissioner to be that *"the initiation of the relevant contract for each roster depended on a driver making himself available"*. He held that, in so concluding, the Commissioner did not err in her characterisation of the umbrella and hybrid agreements (para. 49).

17. At paras. 50-51 he held:-

"50. The Court is not persuaded that mutuality of obligations always requires an obligation to provide work and to complete that work on an ongoing basis in the manner contended for by the appellant. "Ongoing" does not necessarily connote immediate continuation or a defined period of ongoing. There is no binding precedent to suggest that the ongoing basis between the appellant and the drivers does not meet the criteria required. The appellant bears the burden of establishing that the application of "ongoing" as found by the Commissioner was an error of law. This case is concerned with whether the Commissioner misstated or misunderstood the law about the mutuality of obligations. The Commissioner, in relying upon [Weight Watchers (UK) v. Revenue & Customs Commissioners [2011] UKUT 433 (TCC), [2011] All ER (D) 229 (Nov)] did not go against Irish law but rather recognised the necessity to adapt to modern means of engaging workers. The appellant agreed to provide work when the appellant needed the driver, who notified the appellant about his or her availability. The Commissioner considered the facts and applied her understanding of the law which the appellant has not established to have been incorrect. The appellant has not discharged its burden to establish that the Commissioner misunderstood or misapplied the law in Ireland concerning the concept of mutuality.

51. The reference in [Minister for Agriculture v. Barry [2008] IEHC 216, [2009] I.R. 215] to the need for an ongoing series of mutual obligations should be understood having regard to the claims in Barry which related to redundancy entitlements that depended on length of service. Revenue correctly submits that hybrid contracts of employment are relevant in tax or PRSI cases such as that now before the Court. Undoubtedly, umbrella and hybrid contracts require more ongoing commitments in unfair dismissal, redundancy and other labour rights cases due to the statutory

triggers based on defined periods of employment. The Commissioner took the facts into account when applying the law which is admittedly difficult to summarise for all circumstances. Mutuality of obligations can occur under an umbrella contract which is modified by the operation of ongoing relationships that carry obligations for both sides of the contract of employment."

18. At para. 53, he held that the written *"umbrella"* contract required a driver to initiate an agreement with the appellant. He accepted the Commissioner's finding that once rostered by the appellant there was a contract which *"retained mutual obligations"*. The right to cancel a shift at short notice *"imposed obligations to engage a substitute and to work out the remainder of the shifts in the series"*. He held that the drivers had *"ongoing obligations"*. He therefore concluded that the Commissioner did not err in her determination under the heading of mutuality of obligation.

19. The appellant argued that the drivers had a right of substitution pursuant to Clause 12 of the written agreement but that there was no *requirement* on a driver to arrange for the work to be done by another person. It submitted that the right of substitution was inconsistent with a contract of employment. The trial judge held that the Commissioner did not err in holding that the drivers did not hire assistants and that rather one driver was replaced by another driver from the appellant's pool of drivers:-

"The substitute was paid by the appellant. A substitute was not a sub-contractor of the driver. Moreover, the driver and the substitute left it to the appellant to prepare invoices for them respectively."

20. He held that the Commissioner did not err in determining that:-

"[t]he absence of an ability to genuinely subcontract is a factor which indicates that the drivers worked under contracts of service as opposed to contracts for services."

21. In *Re Sunday Tribune Ltd* [1984] I.R. 505, the High Court applied the *"integration"* test to determine whether or not a person works under a contract for services, *i.e.* whether a person is employed as part of the business and his or her work is done as an integral part of the business. The appellant argued that the Commissioner erred in her application of this test when she focussed on whether the kind of work done by the drivers (*i.e.* pizza deliveries) is integral to the business of the appellant rather than whether the drivers formed part of the appellant's organisation. The trial judge held that the Commissioner had regard to the integration of the drivers into the business of the appellant and that her reasoning was not flawed. In particular, she looked at the requirement for the drivers to:

(i) Wear uniforms and place logos on their cars;

(ii) Reassure customers that they were dealing with personnel of the appellant;

(iii) Maintain a coherent operation under the care of the appellant;

(iv) Take telephone orders from the appellant and not customers of the appellant.

22. The High Court dismissed the appellant's arguments that the Commissioner failed to have adequate regard to the terms of the written agreement in the following terms:-

> *"66. Written terms in an umbrella agreement, which can be used piecemeal or in ways which will suit the practicalities of those who engage and those who work, were interpreted by the Commissioner at first instance with an eye on the reality of the relationships between drivers and the appellant. The words of Keane J. in Henry Denny (p. 53) about the written terms having "marginal" value echo in this regard. Moreover, Geoghegan J. in Castleisland at p. 150 referred to the necessity to "...look at how the contract is worked out in practice as mere wording cannot determine its nature". In short, this Court sees no real merit in the submissions made on behalf of the appellant under this heading. The Commissioner found the facts,*

summarised her understanding of the law and applied same without an error which has been established to the satisfaction of this Court."

23. Accordingly, the High Court dismissed the appeal and replied to the nine questions in the case stated that the Commissioner:

1. Correctly interpreted and applied the concept of mutuality of obligation.
2. Was correct in determining that it was not necessary to consider whether the "umbrella" contract contained mutuality of obligation.
3. Correctly interpreted and applied the concept of "integration ".
4. Correctly interpreted and applied the concept of "substitution ".
5. Did not err in having regard to authorities which were decided after the appeal hearing was completed in July 2016, or in failing to invite the parties to address her on those authorities.
6. Did not err in law in having regard to the United Kingdom/English authorities which are based on s. 230 of the UK Employment Rights Act 1996 and on an intermediate category of "worker" as defined by that legislation.
7. Did not err in law in determining that she was not bound by a previous decision of the Social Welfare Appeals Office, or that she did not err in law in failing to give any or adequate weight to the said previous decision.
8. Did not err in law by failing to give proper weight to the actual terms and conditions of the express agreement as between the appellant and the drivers.
9. Did not err in law in diverse findings regarding: the manner in which rosters were set, drivers folding boxes, the nature of the ordering system, the nature of substitution, sanction for unreliability, payment of an hourly rate, clocking-in, the nature of prohibition of work for others and opportunity to make a profit.

The determination of the Commissioner

24. The trial judge correctly identified the principles to be applied by the High Court and this court on appeal in relation to a case stated. The court must determine, *inter alia*, whether the decider erred in law. For this reason, I turn to the detail of the determination of the Commissioner after considering the judgment of the High Court. I have already set out the findings of fact of the Commissioner. The primary findings of fact are not challenged. It is her inferences from the primary facts and her application of the law to the primary facts, the written agreement and the inferences drawn from both which are challenged by the appellant. It is necessary therefore to consider the determination of the Commissioner in greater detail in light of the principles in *Mara v. Hummingbird* and *Ó Culachain*.

25. The Commissioner took as her starting point the decision in *Minister for Agriculture v. Barry* [2008] IEHC 216[2], [2009] 1 I.R. 215. The Commissioner noted that the High Court held that the analysis must start with a consideration of whether the relationship was subject to one or more contracts. She quoted para. 43 where Edwards J. stated:-

> *"43. In each instance it was incumbent on the tribunal to ask three questions. The first question was whether the relationship between each respondent and the appellant was subject to just one contract, or to more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract."*

26. She then quoted the following para. 44:-

> *"As I have stated, there were various possibilities. It was, of course, possible that each of the respondents, respectively, was employed under a single contract which, upon a thorough examination of the circumstances, might fall to be classified as either a*

[2] The Commissioner gives the incorrect citation.

contract of service or a contract for services. However, another possibility was that on each occasion that the temporary veterinary inspectors worked they entered a new contract, and these contracts, depending on the circumstances, might fall to be classified as contracts of service or contracts for services. A third possibility is that on each occasion that the temporary veterinary inspectors worked they entered a separate contract governing that particular engagement, which might be either a contract of service or a contract for service, but by virtue of a course of dealing over a lengthy period of time that course of dealing became hardened or refined into an enforceable contract, a kind of overarching master or umbrella contract, if you like, to offer and accept employment, which master or umbrella contract might conceivably be either a contract of service or a contract for services or perhaps a different type of contract altogether."

27. She concluded that this was authority for the proposition that individuals carrying out work may work under multiple individual contracts as opposed to one single contract. She noted the respondent's argument that, in this instance, there was an over-arching umbrella contract *"of the type referred to by Edwards J."* and that the umbrella contract, represented by the written agreement, was supplemented by multiple individual contracts in respect of each assignment of work, with each assignment involving one or more shifts of work depending on the particular agreement. The respondent relied upon the decision in *Weight Watchers (UK) Limited & Ors. v. Revenue & Customs Commissioners* [2011] UKUT 433 (TCC), [2011] All ER (D) 229 (Nov). The Commissioner quoted where Briggs J. stated:-

"Contractual arrangements for discontinuous work may, at least in theory, fall into at least three categories. The first consists of a single over-arching or umbrella contract containing all the necessary provisions, with no separate contracts for each period (or piece) of work. The second consists of a series of discrete contracts, one

for each period of work, but no over-arching or umbrella contract. The third, hybrid, class consists of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work. In this hybrid class, it may be (and is, in the present case) sufficient if either the over-arching contract or the discrete contracts are contracts of employment, provided that any contract or contracts of employment thus identified sufficiently resolve the question in dispute. Where, as here, the question is whether the PAYE regime and the applicable national insurance regime apply to the work done by the Leaders, it is clearly sufficient if there is identified either a single over-arching contract of employment or a series of discrete contracts of employment which, together, cover all the periods during which the Leader's work is carried out."

28. She quoted para. 79 of the judgment of Briggs J.:-

"... the FTT [First Tier Tribunal] concluded that, in relation to any specific meeting or series of meetings, Leaders conducted them pursuant to specific contracts for the taking of those meetings, rather than pursuant to any general umbrella agreement. Further, I am equally satisfied that the FTT concluded that, in addition to meeting-specific contracts, there was indeed an overarching or umbrella contract between WWUK [Weight Watchers (UK)] and each Leader, dealing in particular with obligations of Leaders affecting them otherwise than when taking meetings."

29. The Commissioner then answered the first question Edwards J. said should be addressed by holding that the contractual arrangements in this case fall within the hybrid category described by Briggs J. at para. 30 of the judgment in *Weight Watchers*. At para. 45 of her determination she said:-

"... I find that the structure of the contractual arrangements in this appeal comprises one overarching umbrella contract supplemented by multiple individual contracts in respect of assignments of work."

30. She held that the legal basis for holding that there were individual contracts arising under umbrella contracts in these types of hybrid contractual arrangements was to be found in para. 81 of the judgment in *Weight Watchers* where Briggs J. held that the First Tier Tribunal (FTT) was:-

"... correct to conclude that there were meeting-specific contracts between WWUK and its Leaders. I consider that the key to that conclusion lies in Condition 6, which requires the Leader to obtain WWUK's specific approval ... in relation to the fixing of the time, date and place of any meetings or series of meetings. Furthermore, the first sentence of Condition 6 refers expressly to that process being one which requires the Leader to agree to take any such meetings. It follows in my judgment that in relation to any particular meetings or series of meetings, the umbrella agreement constituted by the Conditions, the MOA and the Policy Booklets is no more than an agreement to agree, requiring a further and distinct contract-making process for the conduct of any particular meeting or (more usually) series of meetings. Condition 6 plainly places the initiative for concluding such meeting-specific contracts upon the Leader, who must propose the relevant timing, dating and venue of any meeting or series of meetings for WWUK's agreement."

31. On the basis of these authorities, she concluded at para. 49 of her determination:-

"Thus in the within appeal, the umbrella contract required a driver, in accordance with Clause 14 thereof, to initiate an agreement with the Appellant in relation to his availability for work by 'mak[ing] himself available on only certain days and certain times of his own choosing'. Once the Appellant rostered a driver for one or more

shifts of work, there was a contract in place, in respect of which the parties retained mutual obligations."

32. She said that there was no impediment to separate engagements of work constituting contracts of service, citing *Quashie v. Stringfellows* [2013] I.R.L.R. 99.

33. She then considered whether mutuality of obligation was present. She quoted para. 47 of Edwards J.'s judgment in *Barry*:-

"The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. … Accordingly, the mutuality of obligation test provides an important filter. While one party to a work relationship contends that the relationship amounts to a contract of service, it is appropriate that the court or tribunal seized with that issue should in the first instance examine the relation in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation, it is not necessary to go further; whatever the relationship is, it cannot amount to a contract of service."

34. She noted that the mutuality of obligation is *"an irreducible minimum of a contract of service"*, quoting *Brightwater Selection (Ireland) Limited v. Minister for Social and Family Affairs* [2011] IEHC 510. She said that the parties agreed that while an individual is working there is a contract in existence in which the mutuality of obligation is present. She said that the mutuality of obligation requirement must be satisfied in respect of the entirety of each contract *i.e.* it *"must be present for the period of the existence of the contract alleged to amount to a contract of employment and not just in respect of the period of time when the work is being carried out by the drivers."* Relying on para. 31 of

Weight Watchers to the effect that this irreducible minimum must subsist *"throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done"* she held that individual contracts resulted from the driver notifying the appellant of his availability for work and the appellant placing his name on the roster in respect of a specific shift or series of shifts (para. 64). She accepted the submission of the respondent that the fact that a driver could exercise a choice in respect of the shifts for which he was available did not alter the fact that the relationship between the driver and the appellant was, and is, governed by these contracts and they contained mutual obligations to perform personal service. She accepted that mutuality *"was present for the entire duration of such contracts"*, notwithstanding the provisions of Clause 12 and Clause 14 of the written agreement.

35. She held:-

> *"75. The import of the above clauses is that they do not set out expressly the circumstances in which a driver is at liberty not to turn up for a shift for which he is rostered. In accordance with the dicta of Briggs J. [in Weight Watchers]… the contract assumes that there are or may be such circumstances so that, without breach of contract, the driver may propose not to take a particular shift.*
>
> *76. The appellant contended that the drivers had no obligations whatsoever as they could choose not to turn up for any shift, safe in the knowledge that no sanction would be imposed. However, the contract envisages cancellation 'should the contractor be unavailable at short notice' together with a requirement of advance notification in accordance with Clause 14. Thus the contract aims to some extent, to regulate the circumstances of cancellation by a driver."*

36. She referred to Condition 10 in the contract in *Weight Watchers* as similarly providing for advanced notification in relation to cancellation. She considered *Weight*

Watchers and two other English cases, *Pimlico Plumbers Limited v. Smith* [2018] UKSC 29, [2018] 4 All ER 641 and *Autoclenz Ltd v. Belcher & Ors.* [2011] UKSC 41, [2011] 4 All ER 745 and then she concluded in paras. 81-84 as follows:-

> *"81. While there are differences in Pimlico and in Autoclenz (i.e. the contract in Pimlico specified a minimum number of hours to be worked while the contract in Autoclenz did not actually reflect what was agreed between the parties) the reasoning in these cases is of assistance insofar as it does not support the proposition that if there is such a clause (i.e. a clause which provides that the provider of work has no obligation to offer work and the putative recipient no obligation to accept work) that mutuality of obligation is absent.*
>
> *82. In this appeal, the right of a driver to cancel a shift was qualified by the requirement to engage a substitute, to provide advance notification to the Appellant and to work out the remainder of the shifts in the series which had been agreed.*
>
> *83. I agree with the reasoning of Briggs J. in Weight Watchers (UK) Ltd. and I conclude that a contract which provides drivers with the right to cancel shifts at short notice does not relieve a driver of work related obligations in the manner contended for by the Appellant.*
>
> *84. Thus I determine that the requirement of mutuality of obligation was satisfied in the individual contracts entered into between the Appellant and the drivers, each contract representing an assignment of work (comprising one or more shifts), and that these obligations were not invalidated by clauses 12 and/or 14 of the written agreement, and were not invalidated on any other basis."*

37. On this basis, she was satisfied that mutuality of obligation was present for the duration of the individual contracts.

38. She held at para. 164 of her determination:-

"164. The multiple individual contracts, comprising contracts of service, are taxable in accordance with section 112 TCA 1997. It is not necessary to embark upon an analysis of the nature of the umbrella contract and whether it is a contract <u>of</u> or <u>for</u>. It is not necessary to consider whether the umbrella contract contained mutuality of obligations." (emphasis as in original)

39. She did not analyse the over-arching written contract to ascertain whether mutuality of obligation was present. Having found that mutuality of obligation was present in the discrete individual contracts, she then proceeded to analyse whether they were contracts of service or contracts for services.

40. She started by quoting from the judgment of Keane J. in *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1999] 1 I.R. 34. While it is a lengthy quote it is appropriate to reproduce it in this judgment:-

"... The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as the Act of 1981, is to be regarded as a contract "for service" or a contract "of services" have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a "servant" and "independent contractor". However, there is a consensus to be found in the authorities that ***each case must be considered in the light of its particular facts and of the general principles which the courts have developed****: see the observations of Barr J., in McAuliffe v. Minister for Social Welfare[1995] 2 I.R. 238.*

At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that test does not always provide satisfactory guidance. In Cassidy v. Ministry of Health [1951] 2 K.B. 343, it was

pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see Queensland Stations Property Ltd v. Federal Commissioner of Taxation [1945] 70 C.L.R. 539.

In the English decision of Market Investigations v. Min of Soc Security [1969] 2 Q.B. 173, Cooke J., at p. 184 having referred to these authorities said:-

> *"The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service.* ***No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases****. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."*

It should also be noted that the Supreme Court of the Irish Free State in Graham v. Minister for Industry and Commerce [1933] I.R. 156, had also made it clear that the essential test was whether the person alleged to be a "servant" was in fact working for himself or for another person.

It is, accordingly, clear that, while ***each case must be determined in the light of its particular facts and circumstances****, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive.* ***The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.****"* (emphasis added)

41. The Commissioner referred to the fact that a number of tests had been developed by the courts to establish whether an individual is working under a contract of service or a contract for services. She then applied these various tests to the appeal before her. She considered the question of substitution and personal service, control, integration, the enterprise test, the opportunity to profit, bargaining power and the categorisation of employment status by the parties. In relation to substitution, she noted that if a driver was rostered for a shift but was *"unable to turn up"* he had an entitlement under Clause 12 of the written agreement to arrange for the work to be done by another of the appellant's drivers. In such a situation, the driver who performed the work who was not originally

rostered would be paid for the work. Alternatively, the appellant could arrange for another one of its drivers to perform the work.

42. She considered a number of authorities where the significance of a right of substitution was considered. In *Pimlico Plumbers*, the individual plumber was permitted to substitute another Pimlico operative and the court held that the contract was one for personal services. In *Ready Mixed Concrete v. Minister for Pensions* [1968] 2 QB 497, a delivery driver was entitled to appoint a substitute who worked for the driver as opposed to the driver's employer and in those circumstances the court held that the driver was an independent contractor. In *McAuliffe v. Minister for Social Welfare* [1995] ILRM 189, the substitution clause permitted the individuals to substitute a relief driver to be paid by the driver. The court concluded that the individuals involved were independent contractors and not employees. In *Henry Denny,* if the shop demonstrator was unable to do the work herself *"she was required"* to arrange for the work to be performed by someone else approved by the company, and she was found to be working under a contract of service. In *Tierney v. An Post* [2000] 1 I.R. 536, a sub-post office master was required to obtain the permission of An Post for the employment of any person in the post office, and the court concluded that it was a contract for services. In *Weight Watchers*, the substitution clause required team leaders to find a *"suitably qualified replacement"* in the event that they were unavailable. The Commissioner said that Briggs J. held that the substitution clause in *Weight Watchers* (which permitted either a leader or Weight Watchers (UK) Limited to find a suitably qualified replacement to do the work) did not make the replacement leader the original leader's delegate, but gave rise to an entirely new contract in relation to that particular meeting between Weight Watchers (UK) Limited and the replacement leader.

43. In relation to this appeal, the Commissioner held that the driver may find a substitute to contract directly with the employer to do the work in circumstances where the substitute received payment for the work, as opposed to the original driver. At para. 97 she said:-

"In other words, the driver is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he find a substitute to contract directly with the employer to do the work instead."

44. At para. 100 she concluded that the substitution clause in this case was similar to that in *Weight Watchers*:-

"... and the same legal consequences arise. The substitution of one of the appellant's other drivers, by the original rostered driver or by the appellant, gives rise to an entirely new contract between the appellant and that other driver in relation to that particular work assignment."

45. She concluded on the issue of substitution as follows:-

"101. The appellant in the within appeal submitted that the substitution clause was wide enough to permit, without breach of contract, the drivers never to turn up for work at all and the substitution clause was therefore consistent with drivers being independent contractors. This is plainly incorrect. Any drivers substituted in the context of the within appeal would have been remunerated directly by the appellant for carrying out contractual obligations for the appellant. They were not sub-contractors for the original driver.

102. Where an original driver was replaced by a substitute, the agreement between the substitute and the appellant constituted a new contract and it replaced any contract between the original driver and the appellant in respect of that particular shift. This arrangement was akin to the swapping of shifts between drivers. It does not suggest that the drivers' contract with the appellant was a contract for services

unless, inter alia, the original rostered driver was being remunerated by the appellant for the work being done by the substitute driver, but this was not the case.

…

105. In this appeal, if a driver was rostered for a shift but was unable to attend, he was required to arrange for the work to be done by another person approved by the appellant, i.e. another of the appellant's drivers. Once the original rostered driver confirmed his unavailability, the substitute entered into a contract with the appellant and was paid directly by the appellant for performing the work. The absence of an ability to genuinely sub-contract is a factor which indicates that the drivers worked under contracts of service as opposed to contracts for services."

46. The Commissioner considered the issue of the employment status of the drivers from the perspective of integration. She referred to the decision in *Re Sunday Tribune Limited* [1984] I.R. 505, at p. 507, where Carroll J. held that:-

"The test which emerges from the authorities seems to me, as Denning L.J. said, whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it...".

47. The Commissioner said that in order to ascertain how integrated an individual is in respect of a business, one must identify and consider the core aspects of the business. She said the component of delivery to the business was extremely important. The appellant's business comprised two core aspects, namely; the production of pizzas and the delivery of pizzas. She rejected the idea that it was possible in the circumstances for a business to outsource to contractors the very service it was established to provide: *"it is not simply a pizza business, it is a pizza delivery business."* On that basis, she held that the work of the drivers was integral to the business and not merely accessory to it. She was of the view

that if the contractors were truly independent of the appellant, they would not be wearing Domino's branded clothing, would not be driving Domino's branded vehicles and would not be using Domino's imprinted bags for the pizzas. She was of the view that the Domino's logo would be predominantly, perhaps fully, absent in the process of delivering the pizza.

48. As regards the categorization of employment status by the parties, the Commissioner noted that it was well-established that minimal weight would be attributed to the categorisation given by the parties to their working relationship. She referred to the decision of Murphy J. in *Henry Denny* and the decision of Geoghegan J. in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] 4 I.R. 150 and *Barry*. At para. 152, she concluded that the law was clear in relation to the matter of categorisation. She said:-

> *"... Legal analysis must take into account the terms of the written contract but must focus also on the operation of the contract, the correct legal interpretation of its terms and the indications which arise on foot of the relevant legal tests and their application."*

49. At para. 155 she determined:-

> *"... that the framework in the within appeal is one of an overarching umbrella contract supplemented by individual contracts in respect of assignments of work. As regards the individual contracts, I have conducted an analysis based on the components of: substitution and personal service, control, integration, the enterprise test, opportunity to profit and bargaining power. The application of these tests leads to the conclusion that these contracts are contracts of service. The law is unambiguous as regards the minimal weight to be attached to the description of the drivers in the written contract as 'independent contractors'. I determine that the*

individual contracts entered into between the appellant and its drivers in respect of assignments at work involving one or more shifts, comprise contracts of service."

50. Accordingly, she concluded that the drivers worked under multiple contracts of service and were taxable in relation to the emoluments arising therefrom, in accordance with s. 112 of the TCA.

The appeal

51. As I have stated, the company appealed by way of case stated to the High Court and the Commissioner stated a case raising nine questions for the determination of the High Court. The High Court determined that there were, in effect, four core issues for determination; mutuality of obligations, substitution, integration and whether the Commissioner failed to give proper weight to the actual terms of the contract. The High Court upheld the decision of the Commissioner in full. The appellant appealed the decision of the High Court to this court in respect of each of the nine issues set out in the case stated, though the appeal focussed on the four core issues identified by the trial judge.

Case law

52. In *Henry Denny*, Keane J. (as he then was) said that each case must be determined in light of its particular facts and circumstances (p. 50). In *Castleisland Cattle Breeding Society Limited v. The Minister for Social & Family Affairs* [2004] 4 I.R. 150, at para. 23, Geoghegan J. held:-

"... There is nothing unlawful or necessarily ineffective about a company deciding to engage people on an independent contractor basis rather than on a "servant" basis but, as this court has pointed out in Henry Denny Ireland Limited v. Minister for Social Welfare [1998] 1 I.R. 34 and other cases, ***in determining whether the new contract is one of service or for services the decider must look at how the contract is worked out in practice as mere wording cannot determine its nature.***

> ***Nevertheless, the wording of a written contract still remains of great importance. It can, however, emerge in evidence that in practice the working arrangements between the parties are consistent only with a different kind of contract or at least are inconsistent with the expressed categorisation of the contract.*** *In this case, apart from matters of minor detail, the written contract seems to have been the contract that actually worked."* (emphasis added)

53. It is thus important both to consider the terms of the written agreement between the appellant and the drivers, and whether in practice the working arrangements between the parties are consistent only with a different kind of contract or at least are inconsistent with the express categorisation of the contract. Terms and conditions *describing* the relationship between the parties are, in the words of Murphy J. in *Henry Denny*, of marginal value as *"they are not contractual terms in the sense of imposing obligations on one party in favour of the other. They purport to express a conclusion of law as to the consequences of the contract between the parties."* This observation does not apply to the *substantive* terms of the written agreement. It is therefore of considerable significance that the Commissioner determined that in three specific respects – and no more – the operation of the agreement "day to day" differed from the written terms. It follows that, save in these three specific instances, the written agreement was the contract actually operated by the parties to it.

54. Before considering how the written terms of the agreement and the working arrangements of the parties should be characterised, one must first determine whether the Commissioner erred in law in concluding that the threshold test of mutuality of obligation was satisfied in this case by the multiple individual contracts and that it was not necessary to consider whether it was met in the over-arching agreement.

55. The parties agreed that *"mutuality of obligation"* is a *sine qua non* of an employment relationship. The concept was first discussed in *Barry* by Edwards J. In that case, the respondents were veterinary surgeons who worked for the Minister as temporary veterinary inspectors at meat plants in County Cork. Following closure of the plants, the respondents claimed to be entitled to redundancy payments. These were contingent on them having been employees who were employed at all material times by the Minister under a contract of service. Edwards J. noted that the work relationship between each of the respondents and the Minister was a very unusual one, and he did not regard it as a straight choice between a single contract of service and a single contract for services: there were wider possibilities and it was unjustifiable to limit the possibilities to just two. He then set out paras. 43 and 44, which are quoted at paras. 25 and 26 above. It is important to note that he contemplated three possible scenarios. The third possibility envisaged by Edwards J. was that on each occasion that the temporary veterinary inspectors worked, they entered a separate contract governing that particular engagement, *which might be either a contract of service or a contract for services,* but by virtue of a course of dealing over a lengthy period of time that course of dealing became hardened or refined into an enforceable contract, a kind of over-arching or master umbrella contract to offer and accept employment. This master or umbrella contract could be either a contract of service or a contract for services, or perhaps a different type of contract altogether. In that case, there was in fact no over-arching master contract comparable to the written agreement in this case and Edwards J. made no finding that an over-arching contract had come into existence in *Barry*. The only contracts under discussion in *Barry* were the individual short contracts with each temporary vet, which could have been either contracts of service or contracts for service.

56. Edwards J. proceeded to consider the issue of mutuality of obligation and it is worth quoting what he said in full:-

"47. The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. It was characterised in Nethermere (St Neots) Ltd. v. Gardiner [1984] I.C.R. 612 at p. 632 as the "one sine qua non which can firmly be identified as an essential of the existence of a contract of service." Moreover, in Carmichael v. National Power plc. [1999] I.C.R. 1226 at p.1230 it was referred to as "that irreducible minimum of mutual obligation necessary to create a contract of service". Accordingly the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further: whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further."

57. In *Mansoor v. Minister for Justice, Equality and Law Reform* [2011] 1 I.R. 562, the High Court (Lavan J.) dismissed the claim of the plaintiff that he was an employee of the defendant on the grounds of the absence of mutuality of obligation. The plaintiff was a doctor who provided medical services at a garda station in respect of the taking of blood or urine samples from persons suspected of committing drink/driving offences. Lavan J. quoted *Barry*, that if there is no mutuality of obligation it is not necessary to go further in the analysis as, whatever the relationship is, it cannot amount to a contract of service. The

focus of the case was on whether the Minister was under an obligation to provide work for Dr. Mansoor, though it also addressed the issue of whether Dr. Mansoor was required to work if called on to attend at a garda station. At para. 22 of the judgment, he held that the test was not satisfied in the case before him:-

> *"22. … It is clear that the defendants were not obliged to give the plaintiff work. Nor could the defendants possibly predict the number of drink driving offences that may occur on any given night. In addition, it was open to the defendants to call a number of general practitioners to assist them and although the plaintiff, along with a number of other general practitioners may have been on a contact or duty list, were the plaintiff to declare that he were unavailable for work, he could face no sanction or rebuke from the defendants. He simply would not be paid. The plaintiff performed a set task for a fixed sum. Likewise, if the defendants elected to engage a different general practitioner on any given occasion, the plaintiff would have had no reasonable grounds for objecting to this."*

58. He therefore found that the plaintiff was at all material times an independent contractor.

59. In *Brightwater Selection (Ireland) Limited v. Minister for Social and Family Affairs* [2011] IEHC 510, Gilligan J. considered whether an employment agency was the employer of the workers whom it placed with third parties. Ms. Keenan registered with an employment agency, Brightwater. Brightwater arranged for an interview for Ms. Keenan for a position in the administration department of UCD and she was subsequently offered a temporary position as a financial accountant. Her only interaction with Brightwater consisted of filing weekly timesheets and the corresponding payment by Brightwater of Ms. Keenan's salary into a designated bank account. Brightwater deducted and paid the tax and the employee and employer's element of social insurance contributions. There was

no obligation on Brightwater to provide work for Ms. Keenan, nor any corresponding obligation on Ms. Keenan to work on behalf of Brightwater. Brightwater claimed that it was due a refund of the employer's element of the social insurance contributions it had paid in respect of agency workers, and the case of Ms. Keenan was selected as a test case for determining the insurability of agency workers and the associated entitlement to a refund. Gilligan J. cited the decision of Lord Irvine L.C. in *Carmichael and Leese v. National Power Plant* [1999] 1 W.L.R. 2042 in relation to part time guides:-

> *"… that the documents did no more than provide a framework for a series of successive ad hoc contracts of service or for services which the parties might subsequently make; and that when they were not working as guides they were not in any contractual relationship with the C.E.G.B. The parties incurred no obligations to provide or accept work, but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other. ... The words imposed no obligation on Mrs. Leese and Mrs. Carmichael, but intimated that casual employment on the pay terms stated could ensue as and when the C.E.G.B.'s requirements for the services of the guides arose.*
>
> *…*
>
> *If this appeal turned exclusively – and in my judgment it does not – on the true meaning and effect of the documentation of March 1989, then I would hold as a matter of construction that no obligation on the C.E.G.B. to provide casual work, nor on Mrs. Leese and Mrs. Carmichael to undertake it, was imposed. There would therefore be an absence of the irreducible minimum of mutual obligation necessary to create a contract of service …".*

60. Gilligan J. then cited, with approval, the decision of Edwards J. in *Barry* and, in particular, his description of the requirement of mutuality of obligation. At paras. 48 and 49, Gilligan J. said:-

> *"48. Mutuality of obligation exists where there is an obligation on a body to provide work to an individual, and a corresponding obligation on the individual to perform the work. ...*
>
> *49. The mutuality consideration is by no means a determinative test, but is an irreducible minimum of a contract of service. Although the existence of mutuality of obligation is not determinative, without mutuality no contract of service can exist."*

61. In *McKayed v. Forbidden City Limited t/a Translations.ie* [2016] IEHC 722, Ní Raifeartaigh J., in the High Court, again considered the mutuality of obligation test. The plaintiff in that case was a translator. He received work over a period of approximately two and a half years. The company provided training for him and he was paid an hourly rate which reduced over time. He was told by the company where to attend and where to work. He was not registered for VAT, and the name and logo of the company were displayed on his identification badge when he was working. He was to provide the company details and phone number when working and not his own. He submitted invoices at the request of the company. Sick pay, holiday pay and pension contributions were not covered by the company. He could be called at any time, 24-hours, seven days a week. The defendant argued that there was an absence of the mutuality of obligation necessary for an employment contract and therefore Mr. McKayed was not an employee of the company. The plaintiff argued that the evidence supported the existence of mutuality of obligation and that the requirement subsisted in an implied agreement for future work on an ongoing basis between the parties as well as in the terms of the written document. He argued that over the course of dealings between the parties, a mutual obligation had built

up whereby the applicant was paid for the work done and was obliged to provide his own work and skill in the performance of a service for the employer, and the employer had an obligation into the future to provide him with work. The High Court considered the prior authorities and the appropriateness of departing from *Barry* in the context of *In the matter of Worldport Ireland Limited (in liquidation)* [2005] IEHC 189 and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27. At para. 31 of her judgment she held:-

> *"... The issue of how to determine whether a contract of employment exists has been before many courts on many occasions, and while there have been many differences of opinion at different times and in different places, the position today in this jurisdiction is that the approach identified in Barry, and applied in [Mansoor] and Brightwater, is appropriate. While the Supreme Court in the Denny case did not refer to the 'mutuality of obligations' test, presumably because of the facts of the case, there is nothing in that case which indicates that the test may not usefully be used as a filtering mechanism to identify clear cases of a relationship other than an employment relationship."*

62. She then applied the mutuality of obligation test to the facts before her. She held, at para. 34, that the defendant agreed *"merely to try to give the plaintiff work but that there was no guarantee of work, in circumstances where the defendant itself had no control over the amount of work that might come to it from the Garda Síochána or other State entities"*. She noted that the appellant was entitled to work for others as well as the defendant. She rejected the argument that an obligation to provide work to the plaintiff arose from the fact that work had, in fact, been given to him on a regular basis for a particular period by the defendant. At para. 39 she said:-

> *"... If this approach were determinative of the issue, none of the previous authorities in which this issue had arisen could have reached any conclusion other than that the*

individuals in question were employees, be they veterinary inspectors, shop demonstrators, casual hotel workers, or home-workers for a clothes company, as they had all carried out work on a regular basis for a period of time; but that is not how those cases were approached by the various courts which examined them. In other words, ***the fact that work was given regularly for a period of time is not determinative of whether one party had a legal obligation to provide the other party with work.****"* (emphasis added)

63. She concluded that the defendant, the putative employer, was not under a contractual obligation to furnish the plaintiff with any, or any particular, volume of work into the future and that the requisite mutuality of obligation for an employment contract was therefore absent.

64. The Commissioner did not address these authorities, other than *Barry*, in any detail. Her determination instead placed great emphasis on the decision of the Upper Tribunal in *Weight Watchers*. It is to this authority I now turn.

Does *Weight Watchers* apply?

65. In view of the reliance by the Commissioner, the High Court and the respondent on the judgment of The Upper Tribunal in *Weight Watchers (UK) Limited & Ors.*, it is necessary to consider the judgment in detail and to determine whether the Commissioner erred in law in her application of the case to the facts in these proceedings. At para. 30, Briggs J. set out the three theoretical categories into which contractual arrangements for discontinuous work may fall, which I have quoted at para. 27 above. In relation to the hybrid class, Briggs J. held that it may be sufficient if either the over-arching contract *or* the discrete contracts are contracts of employment, *provided* that any contract or contracts of employment thus identified, sufficiently resolve the question in dispute. In that case, the question in dispute was whether the PAYE regime, and the applicable national insurance

regime, applied to the work done by the Leaders. Briggs J. held, in para. 31, that in cases of discrete contracts for periods of work it is necessary to show that *"the requisite irreducible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done."* Where the discrete contract is for a series of separate events the *"relevant period"* during which mutuality of obligation must subsist is the whole of the period of the discrete contract.

66. Applying this analysis to the facts in this case (assuming for the purposes of the argument that there are a series of discrete contracts and not simply one written agreement), the irreducible minimum of mutual work-related obligations must subsist for each rostered period (of one or more shifts) and mutuality of obligation must subsist throughout the whole of the rostered period, typically a week.

67. Briggs J. rejected the argument in *Weight Watchers* that there was only a single over-arching or umbrella contract with no separate process of contracting for each meeting or series of meetings in para. 81 of his judgment (which is set out at para. 30 above). In so doing, he relied on Condition 6 of the written contract which provided:-

> *"The Leader shall, in his/her discretion fix the time, date and place of any Weight Watchers meetings as he/she agrees to take. All arrangements for the hire of halls or other meeting places require specific approval from the Area Service Manager. Such arrangements will be in the name of Weight Watchers who will be responsible for paying all hiring charges."*

68. Briggs J. emphasised the fact that the condition *required* the Leader to agree to take any such meetings and required the Leader to obtain WWUK's specific approval in relation to the fixing of the time, date and place of any meetings or series of meetings. This led Briggs J. to conclude that, in relation to any particular meeting or series of

meetings, the umbrella agreement constituted no more than an agreement to agree, requiring a further and distinct contract making process for the conduct of any particular meeting or series of meetings.

69. WWUK argued that even if there were specific contracts for each series of meetings, nonetheless the contracts did not satisfy the test of mutuality of obligation. It argued that even after agreeing a series of meetings, the Leader could simply decide not to conduct one or more or all of them. Thus, there was no contractual obligation on the Leader to work, even after making an agreement relating to a series of meetings. Briggs J. rejected this argument based upon an express term of the contract:-

> *"88. … The language of Condition 10 does not set out expressly the circumstances in which a Leader is at liberty not to take a particular meeting. Rather, it assumes that there are or may be such circumstances so that,* ***without breach of contract****, the Leader may propose not to take a particular meeting. Since those circumstances are not confined to cases of inability to take the meeting, it may reasonably be inferred that a Leader may propose not to take a particular meeting due to circumstances falling short of inability, such as a family wedding or funeral, in which the Leader is for good reason unwilling to take that particular meeting****. But such a proposal by no means leaves the Leader free of any work-related obligation to WWUK, either in relation to that meeting or the series of meetings which she has agreed to take.***
>
> *89. First, in relation to the particular meeting, the Leader is by implication* ***obliged*** *first to try and find a suitably qualified replacement and secondly, if that fails, to request Weight Watchers' assistance by giving her ASM as much prior notice as possible.* ***It is only when the replacement Leader has been found (by the original Leader or Weight Watchers) or in default, the particular meeting cancelled, that***

the original Leader's work-related obligations in relation to that meeting entirely cease.

90. Secondly, it is plain from ***the language of Condition 10*** *that where, as usual, a series of meetings has been agreed, a proposal by a Leader not to take a particular meeting* ***leaves her obligation to take the remainder of the series intact.*** *It is in my judgment absurd to suppose that a Leader could, because of Condition 10, first agree to conduct a series of meetings and then, without notice to Weight Watchers, simply fail to attend any of them, without a breach of contract."* (emphasis added)

70. A number of points arise from these passages. Briggs J.'s starting point was whether a Leader was *"at liberty"* not to take a particular meeting once the Leader had agreed to that meeting or series of meetings. Secondly, he implies a requirement that the Leader must have *"good reason"* for failing to take a meeting. Accordingly, once a Leader has agreed to take a particular meeting or series of meetings, the Leader is obliged, by implication, first to try to find a suitably qualified replacement and secondly, to request *"the assistance"* of the company by giving her contact as much prior notice as possible. If neither the Leader nor Weight Watchers have organised a replacement, then the particular meeting will be cancelled. It is at that point that the original Leader's *"work-related obligations in relation to that meeting entirely cease"*, but not before. Finally, Briggs J. held that the substitution clause (condition 10) could not be construed to entitle the Leader to agree to conduct a series of meetings and then simply fail to attend to take any of them, without a breach of contract. He rejected the argument that the Leader's right not to take a particular meeting was unfettered. At para. 92 he held:-

"92. … It was fettered as a matter of ***implication by the need to show some good reason for proposing not to take a meeting,*** *albeit a reason which might fall short of inability. It was further fettered by the continuing obligations to seek to find a*

suitably qualified replacement, to notify the ASM if unable to do so, so as to seek Weight Watchers' assistance, and to conduct all subsequent meetings in the series which had been agreed." (emphasis added)

71. He held that there was mutuality of obligation and the substitution clause did not alter this conclusion.

72. In my judgment, the contract(s) in this case differ(s) critically from the contract(s) in *Weight Watchers.* It is always important to bear in mind the observations of Keane J. in *Henry Denny* that each case must be determined in light of its particular facts and circumstances, and so these differences can be decisive in any given case. The critical differences in my view are as follows:

(1) Briggs J.'s analysis places great weight on obligations on the Leaders under the terms of the contracts, both the umbrella contract and the meeting-specific agreements. He held that Condition 6 expressly required the Leader to agree to take meetings and this led to his conclusion that the condition *"plainly places the initiative"* for concluding the meeting-specific contracts upon the Leader. In addition, Condition 6 requires the Leader to obtain WWUK's specific approval in relation to the fixing of the time, date and place of any meetings or series of meetings. There are no such equivalent terms in the contractual arrangement under consideration here and the Commissioner made no findings of fact that there were such terms. Rather, at para. 49 of the determination she interpreted the written agreement between the parties and held that Clause 14 *"required"* a driver to initiate an agreement with the appellant in relation to his availability for work. This is a matter of the construction of the contract rather than a finding of fact, and I shall return to the construction of the contract in due course. It is sufficient for present

purposes merely to note the significant differences between Condition 6 and Clause 14.

(2) Briggs J. rejected the argument that there was an absence of mutuality of obligation in the meeting-specific agreements. He did so on the basis that the substitution clause in the agreement (Condition 10) between each Leader and WWUK did not warrant such a conclusion, rather than on an express clause stating that the company was not obliged to offer any work and the Leader was not required to perform any work offered, such as Clause 14. It was accepted by the respondent that Clause 14 did not oblige the appellant to provide work to the drivers, nor the drivers to work for the appellant. This express clause precluded the conclusion reached by Briggs J. in relation to a contract which contained no such equivalent clause.

(3) Briggs J. held that a Leader did not have an unfettered right not to take a particular meeting and this meant that there was an obligation on a Leader to work within the meaning of the mutuality of obligation test. He said the Leader's right to refuse to work was fettered as a matter of implication by the need to show some *"good reason"* for proposing not to take a meeting. In this case, there is no requirement on a driver to show good reason for not undertaking a delivery service. Clause 12 expressly confers a right to engage a substitute delivery person should the driver be unavailable at short notice. It was not argued, and the Commissioner did not hold, that, as a matter of implication, the driver could only do so on the basis of some *"good reason"*. Thus, the first fetter identified by Briggs J. does not apply in this case.

(4) Briggs J. held that there was a continuing obligation on a Leader to seek to find a suitably qualified replacement. On the other hand, Clause 12 in the contract in these proceedings confers a *right* to engage a substitute driver but does not confer an

obligation so to do. The driver agrees in Clause 14 to notify the company in advance of his unavailability to undertake a previously agreed delivery service. Taking this term at its height, this could be construed as an obligation to notify the company in advance of his unavailability. But I do not accept that an obligation to give notice of a driver's unavailability to undertake a previously agreed delivery service thereby becomes an obligation to perform work within the meaning of the jurisprudence on mutuality of obligation. It is, by definition, an obligation of notice, not of performance of work.

(5) The final fetter identified by Briggs J. was the obligation to conduct all subsequent meetings in the series which had been agreed. Briggs J. held that the Leader's right to substitute was not an unfettered right and the right of substitution in relation to a particular meeting did not absolve the Leader of the obligation to take the remainder of the series of meetings. There is no such obligation on a driver to work the remaining shifts for which he may have been rostered by the appellant. First, the contention that a driver may fail to attend without breaching any contract is not based on a right of substitution (as in *Weight Watchers*), but rather is based primarily on Clause 14. Counsel for the respondent accepted that there is a want of mutuality of obligation in the written agreement. He argued that mutuality of obligation arises in the specific roster contracts. However, he did not assert that if a driver failed to attend for any time allotted to him on the roster, he was in breach of contract. He accepted that even after a roster had been drawn up, and an individual discrete contract arose between the appellant and each rostered driver, the driver was not obliged to work at the time for which he was rostered. This absence of obligation is supported by the fact that there was no sanction if a driver failed to attend or indeed if he failed to notify the appellant of his unavailability. The evidence found by the

Commissioner was simply that a manager would *"follow up"*. It was accepted that this could simply be to ensure that there had not been a failure of communications. There was thus no finding that if a driver failed to attend at a time he or she was rostered by the appellant, that this constituted a breach of contract by the driver.

73. In my judgment, the Commissioner erred in her analysis and application of *Weight Watchers* to the contractual arrangements as found by her in this case and the High Court erred in failing to identify this error.

The true terms of the Contract

74. Before proceeding to analyse mutuality of obligation in the circumstances of this case, it is important to record that the Commissioner held that the written agreement between the appellant and the drivers *"reflect[ed] the true agreement of the parties"* save in three respects. The first, relating to the non-availability of company cars for hire, is not relevant to the issue of mutuality of obligation. The second and third matters were that the appellant prepared the invoices for some drivers which were signed by those drivers, and that in some instances the drivers were asked to, and performed, work which was not stipulated in the contract, *i.e.* they assembled boxes while waiting for deliveries. As these were deviations which applied to *some* drivers and not all, the Commissioner correctly did not hold that the practice of the parties was inconsistent with the written agreement, or that it was modified by these changes. The reliance placed by the respondent on these findings is misplaced. They do not establish how the contract was worked out in practice, in the words of Geoghegan J. in *Castleisland Cattle Breeders*, merely that the terms were not always followed to the letter. As Geoghegan J. held in that case, the wording of a written contract remains of great importance, though if there is evidence that *in practice* the working arrangements between the parties are consistent only with a different kind of contract or are inconsistent with the expressed categorisation of the contract, this will

override that written categorisation. However, in this case there was no evidence of any practice which was inconsistent with the terms of the written agreement. This is very significant in light of the Commissioner's finding that the written agreement reflected the true agreement between the parties save for these three issues, none of which is relevant to the question of mutuality of obligation.

Did the Commissioner err in holding that the threshold test of mutuality of obligation was satisfied?

75. In my judgment, the Commissioner erred in her construction of the contract between the appellant and the drivers and thereby fell into error in concluding that the mutuality of obligation test was satisfied in this case. She did so predominantly because she misapplied *Weight Watchers* to the case without fully appreciating or giving due weight to the differences between the facts in the two cases, but also because she misinterpreted the written agreement.

76. The written agreement did not oblige the drivers to work and therefore they were not *required* to initiate an agreement with the appellant, contrary to her determination at para. 49. This conclusion is contrary to the express terms of Clause 14, and there was no basis to conclude that this clause did not reflect the agreement of the parties. Indeed, counsel for the respondent accepted that the drivers were not obliged to work under the terms of the written agreement. His argument was that the only means of giving effect to that agreement was for the driver to initiate engagement by indicating when he would be prepared to work. It then fell to the appellant to decide whether or not to roster the individual at all, or at any of the times he or she nominated. He contended that this was how the determination ought to be read. While this may be so as a matter of language, it is not in fact how the Commissioner proceeded and does not reflect the fact that in so doing

she was applying the decision in *Weight Watchers* where there was an express contractual obligation on the Leaders to initiate the individual contracts as found by Briggs J.

77. More fundamentally, while she records the requirement that mutuality of obligation must subsist for the entirety of the period of the discrete contract, and the fact that the parties agreed that it was not sufficient to show mutuality of obligation while the work was being undertaken, she did not analyse the arrangements in this case from this perspective. She simply accepted that mutuality was present for the entire duration of the contracts she found arose from the submission of an availability sheet by a driver, and the creation of a weekly roster by the appellant. She made no findings as to the terms of the contracts which she held arose as a result of the rostering arrangements, and she did not find as a fact that the terms of the written agreement did not apply to these individual contracts. She accepted by implication that the individual contracts were governed by the terms of the written contract and she made no findings which would entitle her, or a court, to hold that the written agreement did not apply.

78. She then concluded that neither Clause 12 nor Clause 14 altered her conclusion; but, she did so by misconstruing the clauses and she thereby erred in law. She approached the clauses by saying that they did not set out expressly the circumstances in which a driver *is not at liberty to turn up for a shift*, without actually considering whether he was in fact obliged "to turn up for a shift" at all. If there was no such obligation, then the clause would not address the circumstances in which a driver could fail to turn up for work, so to say it did not address this point does not answer the question. The central question remained whether the driver was obliged to perform work. Clause 14, as was acknowledged by counsel for the respondent, does not impose an obligation on the driver to work. In Clause 14, a driver agrees to notify the appellant, in advance, of his unavailability to undertake a previously agreed delivery service. This does not imply that

he may only be unavailable for some (good) reason, as in *Weight Watchers*. It follows that there is no implied term that if he is simply unavailable for whatever reason and fails to turn up, that he will breach his contract. The Commissioner did not find that there was in fact such an implied term in the individual discrete contract. The clause only requires the driver to notify the appellant if he will be unavailable to undertake a previously agreed delivery, it does not require him to undertake the delivery absent a good reason for not doing so. The appellant recognises the right of the driver to make himself available on only certain days and certain times of his own choosing. The notification requirement does not, in my view, fetter this freedom of the driver not to work if he so chooses.

79. The Commissioner rejected the argument of the appellant on the basis that the contract envisaged *"cancellation 'should the contractor be unavailable at short notice' together with a requirement of advance notification"* and that this regulated the circumstances of cancellation by the driver. This conclusion is based upon a misconstruction of the two clauses. Clause 12 confers a right on a driver to engage a substitute driver should he become unavailable at short notice. It does not impose an obligation to do so, despite the fact that, on occasion, the Commissioner wrongly refers to this is an obligation or requirement. It does not restrict in any way his freedom not to make himself available for work (whether at short notice or otherwise). Accordingly, it is not relevant to the assessment of whether there is an obligation on a driver to perform work offered to him by the appellant. As the agreement in Clause 14 to notify the appellant if a driver is unavailable is likewise unfettered, it follows, in my judgment, that the Commissioner erred in her construction of the agreement. She did so due to a failure to give full effect to the differences between the facts in this case and those in *Weight Watchers*, and to have due regard to the actual agreement of the parties.

80. At para. 81 of the determination, she said that the reasoning in *Pimlico Plumbers* and *Autoclenz,* to the effect that a clause which provides that the provider of work has no obligation to offer work and the putative recipient no obligation to accept work does not mean that mutuality of obligation is absent, were of assistance to her analysis. However, this conclusion is contrary to the Irish authorities *Barry, Mansoor, McKayed* and *Brightwater,* all of which state clearly that for mutuality of obligation to be present there must be an obligation to provide work on one party, and an obligation to perform the work on another party. She does not consider these authorities in her analysis at this point and her failure to do so, and her misstatement of the law in Ireland as a result, is an error of law by the Commissioner.

81. The Commissioner erred in paras. 82 and 83 of the determination. As I have said, the driver's "right to cancel a shift" (even if it may be so described) was not qualified by any *requirement* to engage a substitute or by a requirement to provide advance *notice* to the appellant. He or she was not under an obligation *"to work out the remainder of the shifts in the series which had been agreed"* because a driver remained free at all times not to work, regardless of the rostering arrangements. Counsel for the respondent accepted that, notwithstanding the fact than an individual may be rostered to attend for a particular shift, the driver was under no obligation to "turn up". As this was based upon Clause 14, it logically applies to every period of time for which a driver was rostered on any occasion.

82. Further, if a driver was not obliged to work a rostered shift, the requirement that mutuality of obligation subsists for the duration of the individual discrete contracts cannot be satisfied. The implications of the absence of an obligation on a driver to work a particular rostered shift were not correctly identified by the Commissioner.

83. There was no sanction for any failure to attend for any shift; at most, there would be *"follow up"* in such circumstances. It was accepted by counsel for the respondent that this

did not necessarily entail any sanction. Thus, there was no basis in fact for concluding that a driver could be sanctioned for failure to undertake a previously agreed delivery service. The Commissioner failed to give any weight to the absence of a sanction for a failure to attend for work, and the implications of this for the contention that a failure to attend would amount to a breach of contract by a driver. There was, in fact, no basis for the Commissioner to conclude that there was an obligation to work out the remainder of the shifts, contrary to her conclusion in para. 82.

84. In *Barry*, Edwards J. identified the relevant obligations as the obligation of the employer to provide work for the employee and the corresponding obligation on the employee to perform work for the employer. These are the obligations which are at issue in assessing mutuality of obligation. They are not to be confused with the obligation to perform the work once undertaken and to pay for the work so undertaken. Counsel for the appellant submitted that the test must be applied before the workers actually *"do the work"*. One must ascertain whether the employer has an obligation to provide work to the employee prior to actually reaching agreement to provide and to perform that work. Counsel submitted that the Commissioner and the High Court erred in merely looking at the obligations between the parties as they arose at the moment when "the [driver] turns up in the depot [of the appellant] and is assigned a particular delivery job". At that point, there was an obligation on the driver to deliver the pizza and on the appellant to pay the agreed fee. Counsel submitted that these obligations were not the obligations that are necessary to satisfy the mutuality of obligation test in this context. If that were so, then every contract for services would be converted into, and treated as, an employment contract because even in a contract for services, both parties assume obligations to each other. I agree. Furthermore, this analysis is consistent with the requirement that the obligations exist for the relevant period of the individual contracts and not merely for the

potentially shorted period while the work is actually being performed. It further underscores the error in the approach of the Commissioner in this case, in my view.

85. The Commissioner did not address the question whether the appellant was obliged to provide work for the drivers under the individual contracts, nor make any findings in relation to this aspect of the working arrangements of the parties. This is an important omission as there must be an obligation on the putative employer to provide work, not merely an obligation on the worker to perform the work (*Mansoor; McKayed*). There was no obligation on the appellant to utilise the services of a driver even if the driver offered to make himself available for work by completing the availability sheet for any particular week. The appellant was free to roster any driver it chose and to decline the offer of any individual driver to attend at any given time. The mutuality of obligation on the part of the appellant therefore depended upon the terms of the individual contracts created by the rostering of drivers for one or more shifts. It must apply for the duration of the individual contract and it was not sufficient if the obligations only applied during the shorter periods when the work offered was actually being performed. Examples of an availability sheet and a roster were not included in the case stated and there was no suggestion that they included any written terms of agreement. This meant that the Commissioner was required to infer, from the practice of the parties, the terms of these individual contracts insofar as they supplemented or differed from the written agreement. She made no particular findings as to the terms of the individual contracts as such. While the rostering was no doubt prepared on the basis of informed expectation of a particular number of orders occurring during a given shift, the appellant could not predict the number of deliveries which would be required on any given shift (as in *Mansoor*). If it turned out that there was in fact no need for the services of a driver on any particular shift, the driver had no cause for complaint that he was not afforded an opportunity to work. It is important to

acknowledge that even if he did not make any deliveries, he would nonetheless be paid the promotional sum due for wearing the uniform of the appellant. These facts ought to have been assessed by the Commissioner and she ought to have set out why she concluded that mutuality of obligation applied to the appellant in these circumstances. She did not address the judgment in *McKayed* . In that case, the defendant had agreed merely to try to give the plaintiff work but that there was no guarantee of work as the putative employer had no control over the amount of translation work that might be required by An Garda Síochána or other state entities, the plaintiff was entitled to work for others and, while work had regularly been provided, the High Court held that this did not amount to a legal obligation to provide the other party with work. Each of these factors was present in this case also. If she was to reach a conclusion which differed to that of the High Court on similar facts she was required to explain why she distinguished the facts in the appeal before her from the facts in *McKayed.* Despite these criticisms, I conclude, on the basis of *Ó Culachain,* that there is evidence pointing towards one conclusion, and evidence pointing to the opposite; her implicit conclusion, that there was an obligation on the appellant to provide work under the individual contracts, is not one which no reasonable Commissioner could have arrived at and it is not possible to say that this point was based on a mistaken view of the law, and therefore her decision on this point ought not to be overturned.

86. Notwithstanding this conclusion, in relation to the obligation of the appellant to provide work to the drivers listed on the rosters, for the reasons given above, I conclude that the Commissioner erred in law in her assessment of and her conclusion that mutuality of obligation existed in the multiple individual contracts in this case, and that the trial judge erred in law when he failed to identify this error. In my judgment, there was no mutuality of obligation for the relevant period of the multiple individual contracts and

therefore the irreducible minimum for a contract of service to exist was in fact absent in this case. While the Commissioner did not determine whether mutuality of obligation was met in the umbrella agreement, counsel for the respondent accepted that it was not, and, in my judgment, he was correct to concede the point. That being so, there was no mutuality of obligation in the over-arching agreement either. It follows that, as a matter of law, the agreements cannot have been contracts of service and the drivers were therefore not employees and their emoluments were not taxable pursuant to Schedule E for the relevant years of assessment.

87. A number of English authorities were opened to the court by the parties in relation to this issue, but I do not consider it necessary to discuss them in this judgment. The task of this court in this case stated is to determine whether the Commissioner erred in law in her interpretation of the working arrangements of the parties. I have done so by reference to her reasoning and the relevant Irish authorities, and those English authorities upon which she relied. I have not analysed the issue by reference to the English cases as it was not necessary to the task in hand. Having said that, it is important to observe that these authorities must be used with caution in the Irish context. There has been significant statutory intervention in England and many of the authorities turn on the statutory definition of a "worker", an intermediate category between an employee and an independent contractor, which does not exist in Irish law.

88. I have also not addressed the appellant's argument that the Commissioner erred in holding that there were individual discrete contracts entered into by the appellant and the individual drivers who were rostered for work on any given week. The issue for this court is to answer the questions in the case stated and it must do so by reference to the determination and the case stated. As I have concluded that the Commissioner erred in her finding that mutuality of obligation existed in the discrete individual contracts, and there

was no argument that the over-arching agreement met the test, it was simply unnecessary so to do. I have proceeded on the assumption that this was the correct analysis without finding that it, in fact, was correct.

Substitution

89. The appellant argued that the fact drivers are permitted to arrange for a substitute to carry out their work is a factor that weighs in favour of them being independent contractors as opposed to employees. The substitution clause in this instance is Clause 12 where the appellant accepts the driver's *"right to engage a substitute delivery person should the [driver] be unavailable at short notice"*. The Commissioner was inconsistent in her interpretation of this clause. At para. 38(b) of the determination, she found that the substitution clause *"permitted"* drivers to substitute another, and at para. 90 she held that a driver has *"an entitlement"* to arrange a substitute. On the other hand, at para. 82 she found that there was a *"requirement"* to engage a substitute and, at para. 105, that a driver was *"required to arrange"* a substitute. As I have said, the latter findings were incorrect. The right to engage a substitute applied *"should the [driver] be unavailable at short notice"*. The driver could be unavailable for any reason and on any occasion. He was not obliged to engage a substitute but if he chose to exercise his right to do so, the substitute *"must be capable of performing [driver's] contractual obligations in all respects"*. This was a limitation on the choice of substitute available to a driver, but there was no such fetter on the right to engage a substitute once it had arisen, *i.e.* when the driver became unavailable at short notice. If a substitute was arranged, the substitute was paid by the appellant and the original driver was not paid. The appellant's case was simple: an unfettered right to substitute another one was inconsistent with an obligation of personal performance and thus, inconsistent with a contract of service.

90. The Commissioner identified two lines of authority from the Irish and English case law she cited. If a worker was *required* to arrange a substitute and the substitute was paid directly by the company, that was more consistent with a contract of service (*Henry Denny*). On the other hand, if the worker was *permitted* to engage a substitute and the substitute was paid by the original worker, this was more consistent with a contract for services (*Ready Mixed Concrete; McAuliffe*). She considered the analysis by Briggs J. at paras. 32-34 in *Weight Watchers* as discussed in para. 42. She correctly said that the driver *"may find a substitute to contract directly with the employer to do the work in circumstances where the substitute receives payment for the work as opposed to the original driver."* The difficulty is that the second sentence in this paragraph is incorrect. She states *"[i]n other words, the driver is relying upon a qualified right not to do or provide the work in stated circumstances, one of the qualifications being that he finds a substitute to contract directly with the employer to do the work instead."* The driver is not obliged to find a substitute and the driver is not reliant upon a *"qualified right"* not to do or provide the work. There are no *"stated circumstances"* which limit the driver's right not to do or provide the work. Accordingly, she failed to recognise that the substitute clause in this case falls between the two categories identified in the earlier authorities. In this case, the driver is permitted to engage a substitute, but the substitute is not a sub-contractor of the driver; the substitute would perform a replacement contract directly with the appellant. As a result of her failure properly to construe Clause 12, her conclusion that the *"type of substitution clause is consistent with a contract of service"* is flawed.

91. The Commissioner recorded at para. 101 of her determination that the appellant argued that the substitution clause was wide enough to permit, without breach of contract, the drivers never to turn up for work at all, and that the substitution clause was therefore consistent with the drivers being independent contractors. She rejected the submission as

being *"plainly incorrect"* on the grounds that any drivers substituted would have been remunerated directly by the appellant for carrying out contractual obligations for the appellant. They were not sub-contractors of the original driver. There was an entirely new contract between the appellant and the other driver in relation to that particular work assignment. She interpreted the authorities to mean that the driver's contract with the appellant was not a contract for services *"unless, inter alia, the original rostered driver was being remunerated by the appellant for the work being done by the substituted driver"* and as this was not the case, it was a factor which indicated that the drivers worked under contracts of service as opposed to contracts for services.

92. The appellant argued that the Commissioner erred at para. 102 in asserting a legal necessity for the originally rostered driver to pay the substitute in order for that contract to be a contract for services. It argued that the real issue was: does the right of substitution negate a contract of service?

93. The appellant relied on the very recent decision of the Court of Appeal in England and Wales in *The Independent Workers Union of Great Britain v. The Central Arbitration Committee and Roofoods Limited trading as Deliveroo ("Deliveroo")* [2021] EWCA Civ 952. The issue in the case was whether the Deliveroo "worker" was a worker within the statutory definition of the Trade Union and Labour Relations (Consolidation) Act 1992. Underhill L.J. stated that an essential part of the definition was that a putative worker *"should agree to perform work or services "personally" for the other party … [p]rima facie if the express terms of the contract permit the putative worker to provide the work or services in question through someone else, i.e. a substitute, that requirement is not satisfied."* Underhill L.J. noted that this requirement was subject to two qualifications:-

> *"7. First, it is established in the case-law that the requirement of personal performance may be satisfied notwithstanding that the worker has a right to engage a*

substitute in some, limited, circumstances. The position is summarised at para. 84 of the judgment of Sir Terence Etherton MR in Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51, [2017] ICR 657, as follows:

> *"Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."*

8. Second, in Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] ICR 1157, the Supreme Court held that the employer was not entitled to rely on a substitution clause in order to deny a claim for worker status if it did not reflect the true agreement between the parties and was in that sense a sham. The principles underlying the decision in Autoclenz have recently been elucidated in Uber v Aslam , to which I will have to return below."

94. Underhill L.J. held that the CAC was entitled to conclude that the riders in question were not in an employment relationship with Deliveroo:-

> *"The particular feature on which it relied was its finding that riders are, genuinely, not under an obligation to provide their services personally and have a virtually unlimited right of substitution."*

95. He held that an obligation of personal service (subject to the limited qualifications acknowledged in *Pimlico Plumbers*) is *"an indispensable feature of the relationship of employer and worker".*

96. The appellant argued that the drivers are not under an obligation to provide their services personally, and they have a virtually unlimited right of substitution under Clause 12, and this negates the existence of a contract of service.

97. The Commissioner, and this court on appeal, is required to consider all the facts and circumstances of the particular working arrangements. While the Commissioner erred in concluding that the drivers were obliged to engage a substitute if they found themselves unavailable to work at short notice, I do not believe that this error is fatal to her overall conclusions in relation to substitution. The drivers were permitted to substitute another of the appellant's drivers if they were unavailable and the substitute could also be arranged by the appellant if required. The substitute driver would be paid by the appellant in respect of the shift actually worked and the original driver would not be paid. In these circumstances, it was open to the Commissioner to conclude that this was more akin to the swapping of shifts between drivers. The Commissioner was required to consider how the contract worked out in practice (*Castleisland Cattle Breeding*) and her conclusion, that the arrangement was akin to the swapping of shifts rather than through substitution by way of subcontracting, was a conclusion which, on the facts, it was open for her to arrive at. I do not accept that the right to engage a substitute simpliciter automatically negates a contract

of service. It is necessary to consider how the clause could work in practice and whether it was a genuine right of substitution. In this case, the drivers had an unfettered right of substitution but no particular interest in ever exercising this right: the substitute would be paid for the work, not the originally rostered driver. The driver was not obliged to turn up for work and was subject to no sanction if he did not attend when rostered to work. He simply lost the opportunity to be paid for deliveries carried out and brand promotion. There was evidence pointing towards an unfettered right of substitution and evidence that it was not a genuine right of substitution. Applying the fifth point in *Ó Culachain*, it was open to the Commissioner to conclude as she did, and this court on appeal from a case stated ought not to interfere with her conclusions. For this reason, I would reject the arguments of the appellant on this point and I conclude that the Commissioner did not err in law in relation to the actual right of substitution in these proceedings, notwithstanding her error in the interpretation of Clause 12.

Integration

98. The degree to which a putative employee is integrated into the business of a putative employer is a matter which is relevant in assessing whether the working arrangements amount to a contract of service or for services. Carroll J. described the integration test in *Re Sunday Tribune Limited*, cited at para. 46 above. This was cited by the Commissioner at para. 115 of her determination. The appellant submitted that the relevant enquiry under the *"integration"* test is not solely whether the kind of work done is integral to the business but asks rather whether the particular individual concerned is himself or herself so personally integrated into the business of the putative employer as to lead to the conclusion that the contract amounts to a contract of service. The appellant argued that the Commissioner erred by focussing on the extent to which the function of pizza delivery was

integral to the appellant's business, rather than on the extent to which the individual drivers were themselves integrated into the business of the appellant.

99. The Commissioner found that the appellant's business comprised two core aspects; the production of pizzas and the delivery of pizzas, and therefore delivery was a core function of the business. Applying the test in *Sunday Tribune*, the Commissioner said *"I do not consider that the delivery service can be considered accessory to the production of the pizzas because, Domino's is not simply a pizza business, it is a pizza delivery business".* She therefore concluded that:-

> *"... where it can be established that a driver carries out a service which the business was established to provide, the work of the drivers is integral to the business and is not merely accessory to it. The integral nature of the work of the drivers to this business raises the implication that in ordinary course they would be employees. Domino's has purported to outsource their delivery function but at the same time in requiring drivers to wear branded uniforms, to brand their vehicles and to carry bags imprinted with the company logo, they seek to reassure customers that they are dealing with Domino's personnel. The branding also serves as a form of promotion of the business of the appellant."*

100. She concluded that if they were truly independent contractors that this would not occur. She concluded that:-

> *"Domino's pizza delivery service is integral and fundamental to their business. It follows that the work of the drivers in delivering the pizzas is an integral part of the business and is not merely accessory to it."*

101. The appellant argued that in so concluding she failed properly to apply the integration test as determined by Carroll J. in *Sunday Tribune*. In that case, the liquidator of the company applied to court to determine if three reporters were employees of the

company. If the integration test applied by the Commissioner had been adopted, and it was only necessary to consider whether the work they performed was integral or accessory to the business of the newspaper, all three reporters would clearly have been employees, since writing newspaper articles is the essence of a newspaper. However, that was not the outcome in *Sunday Tribune*. One journalist was required to attend and participate in the company's editorial conferences. Carroll J. stated that *"her employment was an integral part of the business of the newspaper"* and concluded, on this basis, that she was an employee. On the other hand, the third journalist had provided regular articles for the newspaper, but each article was commissioned separately by the company. Carroll J. found that she was not an employee because she did not satisfy the control test, nor was she an integral part of the business of the newspaper. At p. 510 she said:-

> *"I am of opinion that her employment was not an integral part of the business of the newspaper. In my opinion, she was a freelance contributor who secured commissions in advance. She was under no obligation to contribute on a regular basis. Presumably, if she did not negotiate a commissioned article, the company's editor would get articles from some other source. Therefore, I am satisfied that she was not employed under a contract of service but was an independent contractor in respect of the articles she did provide."*

102. The appellant argues that the drivers were in a very similar situation to the third claimant in *Sunday Tribune*. They too are under no obligation to work on a regular basis and if they do not work, the appellant will engage the services of another driver. The third journalist was a freelance contributor who secured commissions in advance. If she was commissioned to write a piece of a certain length, she did so, and she was paid on the basis of the house agreement between the company and the National Union of Journalists.

103. The appellant relied on the decision in *Deliveroo* as authority for the proposition that it is possible to outsource the delivery of food, even though Deliveroo's business involved the delivery of prepared food and drink from restaurants and other food outlets to customers' homes or other premises. The collection and delivery of items is carried out almost entirely by cyclists referred to as "riders". After initial assessment and training, riders enter into a written supplier agreement with Deliveroo and download an app which enables them to indicate when they are available to be offered work in a zone for which they are registered. There is no obligation on a rider to be available at any particular times or for any particular duration. If they are available, the app will offer jobs on the basis of which rider is closest to the point of collection. The rider has three minutes in which to decide whether to accept: again, there is no obligation to do so. If they do accept, they then collect and deliver the food and are paid on a fee per delivery basis. There were strict uniform requirements, a Deliveroo-branded equipment pack and high vis jackets. The essential physical tools of the job, the phone and the bike, were provided by the rider.

104. The appellant argues that *Deliveroo* is authority for the proposition that the reliance by the Commissioner on the fact that drivers were expected to wear uniforms and to place a temporary logo on their vehicles when making deliveries, did not mean that the drivers were employees of the appellant or that they could not be independent contractors.

105. In fact, in para. 82 Underhill L.J. held:-

> *"... Even if I were wrong to treat the absence of a right of personal service as decisive, it may be that the CAC's decision could be supported on the alternative basis that it was decisive when taken together with these features. However, I am reluctant to decide the case on that basis, even by way of alternative, in circumstances where there was no such overall assessment by the CAC."*

106. It seems to me therefore that *Deliveroo* cannot be an authority for the proposition which was put forward as an alternative basis for finding the deliverers to be contractors, but on which Underhill L.J. declined to decide the case.

107. In my judgment, it was open to the Commissioner to have regard to the fact that the drivers did not simply deliver the pizzas on the equivalent of a commission basis. They were provided with uniforms they were expected to wear, and they were expected to place a temporary logo on their vehicles when making deliveries. In effect, they had two roles: delivery of pizzas and brand promotion. They entered into a separate agreement in relation to brand promotion and were paid separately for this service. In my judgment, it was open to the Commissioner therefore to conclude that the drivers were integrated into the business of the appellant, notwithstanding the fact that it is possible to outsource a delivery business, as argued by the appellant, or the fact that it is possible to have genuinely independent contractors who wear branded uniforms. I therefore conclude that there was no error on the part of the Commissioner in her conclusion on this issue.

Consideration of the terms of the written agreement

108. I do not propose to address this heading separately as I have considered the terms of the written agreement already in the context of the discussion of mutuality of obligation and substitution.

The appeal from the decision of the High Court

109. The High Court concluded that the Commissioner did not err in her determination in relation to the nine issues raised in the case stated. In my judgment, she erred in relation to the assessment of mutuality of obligation. The High Court also erred, in my opinion, in its approach to the mutuality of obligation test. At para. 50, the trial judge said that he:-

> *"... is not persuaded that mutuality of obligations always requires an obligation to provide work and to complete that work on an ongoing basis in the manner*

contended for by the appellant. "Ongoing" does not necessarily connote immediate continuation or a defined period of ongoing. There is no binding precedent to suggest that the ongoing basis between the appellant and the drivers does not meet the criteria required. The appellant bears the burden of establishing that the application of "ongoing" as found by the Commissioner was an error of law." (emphasis as in original)

110. Contrary to this dicta, Irish authorities on mutuality of obligation are unambiguous in requiring an ongoing reciprocal commitment to provide and perform work on the part of the employer and the employee respectively.

111. The decision of the Commissioner is not based on any finding that there is an *"ongoing"* requirement, and indeed this seems to be based on a misreading of *Barry*. The conclusion of the High Court, that *Barry* can be distinguished because the claims therein were for redundancy payment, is not borne out by any reading of the judgment, nor the subsequent decisions in *Mansoor*, *Brightwater* and *McKayed*, which have applied the dicta in *Barry* uniformly in a variety of contexts. There is no suggestion in any of the authorities that the dicta on the nature of mutuality in *Barry* was limited to the context of statutory redundancy payments or other statutory employment rights protection. On the contrary, the language of mutuality was universal: mutuality is a *sine qua non* for all contracts of service. It is not dependant on the context in which the issue of mutuality of obligation is raised for determination in the absence of any different statutory test.

112. Further in para. 50, the trial judge said that:-

"The Commissioner, in relying upon Weight Watchers did not go against Irish law but rather recognised the necessity to adapt to modern means of engaging workers."

113. To adapt the law is to modify or change it. The Commissioner did not purport to do so. It was not open to her to adapt the law to modern means of employment at all. She

certainly was not entitled to do so by opting to follow English law rather than established Irish precedent to the contrary. It was not open to the High Court to introduce such a significant change (or indeed this court) either. Such a change is for the Oireachtas and must be prospective.

114. For the reasons I have already explained, I believe that the Commissioner erred in her reliance upon *Weight Watchers*. More fundamentally, it was not open to either the Commissioner or the High Court to affect a policy change. In this regard, the observations of Underhill L.J. in his dissenting judgment in *Uber BV v. Aslam* [2018] EWCA Civ 2748, at paras. 164 and 166, well express the point I wish to make:-

> *"164. The question whether those who provide personal services through internet platforms similar to that operated by Uber should enjoy some or all of the rights and protections that come with worker status is a very live one at present. There is a widespread view that they should, because of the degree to which they are economically dependent on the platform provider. My conclusion that the claimants are not workers does not depend on any rejection of that view. It is based simply on what I believe to be the correct construction of the legislation currently in force. If on that basis the scope of protection does not go far enough the right answer is to amend the legislation. Courts are anxious as far as possible to adapt the common law to changing conditions, but the tools at their disposal are limited, particularly when dealing with statutory definitions. … [**I]n cases of the present kind the problem is not that the written terms misstate the true relationship but that the relationship created by them is one that the law does not protect.** Abuse of superior bargaining power by the imposition of unreasonable contractual terms is, of course, a classic area for legislative intervention, and not only in the employment field.*
>
> *…*

166. Even if it were open to the Courts to seek to fashion a common law route to affording protection to Uber drivers and others in the same position, I would be cautious about going down that road." (emphasis added)

115. I agree with these sentiments and they are, of course, reinforced by the separation of powers established under the Constitution.

116. Insofar as it may be possible to read para. 51 of the judgment of the High Court as implying that the principle in *Barry* is qualified or modified in some way by reason of the fact that it arose in the context of determining whether or not the individuals concerned were entitled to redundancy entitlements which depended on their length of service, I would hold that this is an error.

Conclusions

117. In my judgment, the Commissioner erred in finding that there was mutuality of obligation in the contractual arrangements between the appellant and the drivers. That being so, it was not possible that the drivers were engaged on a contract of service and this conclusion ought to have been dispositive of the issue before her.

118. The trial judge erred in upholding her determination and in failing to identify her errors in that regard, and in the other matters I have set out above.

119. In my judgment, it was open to the Commissioner to reach the conclusions she did in relation to both substitution and integration as there was evidence she was entitled to accept to support her conclusions and, applying the principles in *Ó Culachain*, neither the High Court nor this court ought therefore to overturn her decisions in respect of these two issues.

120. The findings on substitution and integration are not determinative of the status of the drivers as the want of mutuality of obligation precludes them from being employees of the appellant.

121. Haughton J. in a concurring judgment has indicated that he also would allow the appeal. Whelan J. in a dissenting judgment has indicated that she would not allow the appeal. Accordingly, the court will allow the appeal and set aside the judgment and order of the High Court and the decision of the Appeal Commissioner. It will make a declaration that pizza delivery drivers engaged by the appellant who worked during 2010 and 2011 did so under contracts for services as self employed independent contractors. As the appellant has been successful on the appeal, the provisional view of the court is that costs should follow the event and the appellant should be entitled to the costs of the appeal and of the High Court. If any party wishes to contend that the court should make a different order it may within ten days of the issuing of this judgment request the office of the Court of Appeal to arrange a short hearing in relation to the form of the order and/or the costs of the appeal. If the hearing does not result in an alteration of the indicative order, the party requesting the hearing may be required to pay the additional costs thereby incurred.

THE COURT OF APPEAL

UNAPPROVED
Neutral Citation Number: [2022] IECA 124
Court of Appeal Record Number 2020/53

Whelan J.
Costello J.
Haughton J.

BETWEEN

KARSHAN (MIDLANDS LIMITED) TRADING AS DOMINO'S PIZZA

APPELLANT

- AND -

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Haughton delivered on the 31st day of May, 2022

Contents

Introduction

1. This is an appeal by the appellant ("Karshan") from the judgment and order of O'Connor J. in the High Court on the Case Stated by the Tax Appeals Commissioner ("the Commissioner") concerning whether Karshan's pizza delivery drivers worked under contracts of service subject to PAYE and PRSI in accordance with s.112 of the Taxes Consolidation Act, 1997 (as amended) ("TCA 1997"), or whether they were self-employed independent contractors chargeable to tax under Case 1 Schedule D in respect of income of a trade. The appeal before the Commissioner concerns assessments in respect of 2010 and 2011, and the arrangements in place between Karshan and its drivers in those tax years.

2. I have had the advantage of reading in draft the judgments to be delivered by my colleagues Whelan J. and Costello J.

3. I am in broad agreement with the judgment of Costello J., and I too would allow this appeal.

4. In her judgment Costello J. sets out the background facts, including the relevant clauses of the written agreement entered into by each driver with Karshan, and two additional documents, one headed "Social Welfare and Tax Considerations", and the other entitled "Promotional Clothing Agreement". She also sets out the "Material findings of fact" as found by the Commissioner at para. 38 a – i of her Determination, after hearing evidence from witnesses. It is not necessary to repeat these materials here, although I will refer to certain elements later in this judgment.

Mutuality of obligation

5. Key to the issue is whether there is 'mutuality of obligation' in the relationship between the parties because this is a *sine qua non* of the employment relationship. As Edwards J. put it in *Minister for Agriculture v. Barry [2009] 1 I.R. 215* at page 230 –

"The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then there is no contract at all or whatever contract there is must be a contract for services, or something else, but not a contract of service….".

6. Edwards J. went on to agree with the characterisation of the requirement as "one *sine qua non* which can firmly be identified as an essential of the existence of a contract of service"[1] and "that irreducible minimum of mutual obligation necessary to create a contract of service."[2]

7. That this was the appropriate 'gateway' test was accepted by the parties in argument before us, and has been approved and applied in a number of High Court decisions[3]. However the test appears to be evolving in England particularly arising from recent appeals from the Upper Tribunal (Tax and Chancery) and Court of Appeal, a subject to which I will return briefly towards the end of this judgment.

8. In *Weightwatchers (UK) Ltd and ors v Revenue and Customs Commissioners* [2011] UKIT 433 (TCC), Briggs J. (as he then was), in a decision to which I shall refer in more detail, held at para. 31 that in cases where there is an overarching contract for discontinuous work, with discrete contracts for periods of work, it is necessary to show

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[1] *Nethermore (St Neots) Ltd v Gardiner* [1984] I.C.R. 612 at p. 632, *per* Stephenson L.J. (Court of Appeal).

[2] *Carmichael v National Power plc* [1999] I.C.R. 1226 at p.1230, *per* Irvine L.J. at para.18. This was a House of Lords decision that affirmed the decision of the Industrial Tribunal that occasional work as tour guides of Blyth Power Station worked under contracts of services, and the case for employment "founders on the rock of absence of mutuality". Irvine L.J. observed in relation to the correspondence offering casual employment:

> "10….In substance [the tribunal] held that the documents did no more than provide a framework for a series of successive *ad hoc* contracts of service for services which the parties might subsequently make; and that when they were not working as guides they were not in any contractual relationship with the C.E.G.B. The parties incurred no obligations to provide or accept work but at best assumed moral obligations of loyalty ibn a context where both recognised that the best interests of each lay in being accommodating to the other."

[3] See *Mansoor v Minister for Justice* [2010] IEHC 389, *Brightwater Selection (Ireland) Ltd v Minister for Social and Family Affairs* [2011] IEHC, and *McKayed v Forbidden City Ltd* [2016] IEHC 722, which are addressed in the judgment to be delivered by Costello J.

that "the requisite irreducible minimum of mutual work-related obligation subsists throughout each relevant discrete contract, not merely during the potentially shorter period when the contracted work is actually being done".

9. In the present case there is an overarching written agreement, or general agreement ("the Agreement") between Karshan and each deliverer, the terms of which are agreed facts. As appears from the recital, the scope of the Agreement is " the delivery of pizzas" and "the promotion of the brand logo" which are "services" which the Contractor "is willing to provide…to the company", and clause 1 provides that "The Contractor shall be retained by the Company as an 'independent contractor' within the meaning of and for all the purposes of the said expression".

10. The respondent accepted, rightly in my view in light of certain terms to which I refer to later in this judgment, that the Agreement of itself does not satisfy the requirement of mutuality of obligation, and that the periods between rosters (as opposed to between shifts on one roster) when the Agreement was still in force were periods when the drivers were not to be treated as employees for the purposes of Schedule E. However this view is expressed *obiter* because whether the Agreement on its own meets the requirement of mutuality is a distinct legal issue which the Commissioner did not consider it necessary to determine, and it is not a question posed in the Case Stated.

11. Beneath the umbrella of this Agreement are a series of discrete contracts which arise either, as the respondent contends, at the time when a driver is placed on a roster for work on one or more shifts, typically for one week, or, as Karshan contends, only when the driver actually commences a work shift. The Case Stated concerns the Commissioner's determination in relation to these discrete contracts. If there is mutuality of obligation then, depending on the application of tests such as the degree of control over the worker, the level of integration of the work undertaken, and the opportunity to profit, these

discrete contracts may be contracts of service/employment, or contracts for services. If there is not mutuality of obligation then the appeal succeeds and it is not necessary to consider the application of the further criterion of an employment relationship.

12. It is clear therefore that it was appropriate and necessary for the Commissioner, as she did, to receive and assess evidence looking beyond the Agreement in order to ascertain what occurred in practice in the series of engagements undertaken by deliverers, described by the Commissioner as "multiple individual contracts for assignments of work", and to make appropriate findings of fact, in order to determine the issue of law and for the purposes of the Case Stated.[4]

13. At the heart of the issue is whether an individual contract with mutual obligations comes into being after a driver indicates availability for work and at the time Karshan places the driver on a roster of shifts, as contended for by the respondent. This was what was determined by the Commissioner, with whom the High Court agreed on the Case Stated.

14. However, in my view she fell into error, as did the trial judge, in their analysis of the terms of the Agreement and their effect on the issue of mutuality of obligation when considering the discrete contracts. This error was not so much that the terms of Agreement were not considered – they were, in some detail - but rather that inadequate weight was given to the plain meaning of contractually agreed written terms that were incorporated into each of the individual contracts of engagement, and as a consequence in my view her material findings of fact in relation to practice were not considered properly in context. I am also of the view that both the Commissioner and the trial judge erred in their application of the reasoning of Briggs J. in *Weightwatchers* to the facts of

[4] See Geoghegan J. in *Castleisland Cattle Breeding Society Ltd v Minister for Social and Family Affairs* [2011] IEHC 510.

the present case. In these respects I also respectfully disagree with the analysis in the judgment of Whelan J.

15. It hardly needs stating that parties to a work arrangement enjoy freedom to contract, and the starting point must be consideration of the terms of the formal contract actually agreed between the parties and executed by them, which the parties intend are to be incorporated into and govern the relationship between them in each individual engagement of the deliverer under which he/she provides services.

16. In saying this it must be accepted that this is a standard format agreement, prepared by Karshan's lawyers for execution by both Karshan and the putative deliverer in the presence of witnesses, and one which the deliverer is required to sign if he/she wants delivery work. In this sense there is inequality of bargaining power, and Karshan dictates the terms – Whelan J. describes it as the "asymmetrical nature of the overarching agreement."

17. However, I respectfully differ from Whelan J. insofar as she suggests in her draft judgment that giving effect to the terms of the Agreement may amount to an unduly rigid application of commercial principles governing the construction of contracts. While it is, from the putative deliverer's perspective, a 'take it or leave it' contract, it clearly has attractions to drivers. It is easy to see the appeal of such a contract to a person with their own car, motorbike or bicycle, and availability to work evenings or weekends. In particular, and as we will see, key terms give deliverers flexibility and control in relation to choosing the shifts that they wish to work, making it attractive to students, or others working during the day and seeking to supplement their income, but not necessarily wishing to be tied to regular shifts, and having the freedom not to work e.g. in the run up to or during exams, or when taking holidays. On the other side, it has clear advantages for Karshan, apart from considerations of taxation and employee rights; it can enter into

Agreements with more drivers than it could provide delivery work for, and in that way ensure that it is never short of deliverers, and at little or no additional cost to its enterprise. As Whelan J. herself observes, it is not the function of the court to re-cast a party's bargain.

18. It must also be accepted that it is a well-established principle[5] that the expression of intention in contract documentation, and how the parties themselves describe their relationship, will not be accepted as decisive or conclusive in law. The Supreme Court applied this principle to an employment context in *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34.

19. Nevertheless the law must accord appropriate deference to what the parties have actually agreed in a written document. As Geoghegan J. stated in *Castleisland Cattle Breeding Society Ltd v Minister for Social and Family Affairs* [2004] 4 IR 150, at p.161 in a passage quoted in part in the Commissioner's Determination:

> "…There is nothing unlawful or necessarily ineffective about a company deciding to engage people on an independent contractor basis rather than on a 'servant' basis but as this court pointed out in *Henry Denny* …and other cases, in determining whether the new contract is one of service or for services the decider must look at how the contract is worked out in practice as mere wording cannot determine its nature. Nevertheless the wording of a written contract still remains of great importance. It can, however, emerge in evidence that in practice the working arrangements between the parties are consistent only with a different kind of contract or at least are inconsistent with the expressed categorisation of the contract. In this case, apart from

[5] The relevant decisions of the Supreme Court are discussed by Whelan J. under "Construction of Contracts as to Status" at paragraphs 30-32 of her judgment.

matters of minor detail, the written contract seems to have been the contract that was actually worked."

20. Paying close attention to the agreed written terms is particularly important where, as here, the individual engagements by drivers appear for the most part to be carried out in accordance with those written terms, albeit that the Commissioner found some differences in practice. This is a subject to which I will return later, but in essence I am of the view that the differences found by the Commissioner do not impact on the issue of mutuality of obligation.

21. Turning to the Agreement, there are provisions that are very clearly aimed at characterising the deliverers as "independent contractors", including an express term to that effect in clauses 1 and 17, the description of the deliverer as "the Contractor", the reference to the "subcontract [out of] delivery of pizzas, and the description of deliverers as "self-employed individuals".

22. These characterisations are clearly intended by the parties to avoid creating a contract of service. While they cannot be determinative of the question, it would be wrong to ignore them entirely. It is appropriate to take into account the express provisions that each deliverer is to "operate his/her own accounting system" (clause 9) and that Karshan "has no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies I may receive under this agreement". These clearly set out for the deliverer what is expected of him/her in terms of their tax affairs as an independent contractor in the event that they sign the agreement and undertake work. They are supplemented and confirmed in a second document that drivers were required to sign titled "Social Welfare and Tax Considerations". It will also be readily apparent to any driver entering in the Agreement that it will not entitle them to benefits such as holiday entitlement or sick pay that are characteristics of employment.

23. Of greater importance are other terms that demonstrate an intent to create an ongoing relationship which is not intended to have mutuality of obligation, and that in my view signify an intent not to import such mutuality into the series of engagements of the deliverer arising under the umbrella of the Agreement. Of central importance in my view are the following provisions:

> "9. The Company points out that in keeping with all self-employed individuals the financial risks and or rewards associated with providing the services as outlined in this contract are strictly under the control of the Contractor, and the Company bears no responsibility whatsoever for same. In particular, the Company does not warrant a minimum number of deliveries.
>
> "11. The Company accepts the Contractors right to engage in a similar contract delivery type service for other companies at the same time as this contract is in force."
>
> "12. The Company accepts the Contractor's right to engage a substitute delivery person should the Contractor be unavailable at short notice. Such person must be capable of performing the Contractor's contractual obligations in all respects.
>
> "14. The Company does not warrant or represent that it will utilise the Contractor's services at all; and if it does, the Contractor may invoice the company at agree rates. The Company, furthermore, recognises the Contractor's right to make himself available on only certain days and certain times of his own choosing. The Contractor, in turn, agrees to notify the Company in advance of his unavailability to undertake a previously agreed delivery service.
>
> "15. The Company reserves to itself the right to terminate this Agreement forthwith…"

I have underlined certain phrases because these were highlighted by the Commissioner in her reasoning, to which reference is made below.

24. Read together, and having regard to the Agreement as a whole, in my view these provisions mean that a Contractor 'signs up', but has no obligation to make himself or herself 'available' for work. They mean that Karshan may choose not to roster him/her for, or allocate, any delivery work at all – and the contractor has no remedy in law. In my view the plain and ordinary meaning of clause 14 goes further – even if a Contractor is rostered and turns up for work, Karshan is under no obligation to avail of his/her services – whether for delivery work or wearing company branded clothing. It means that the Contractor has the *right* to make himself available for work, and equally the right not to offer his/her name for any roster – this is a matter "of his own choosing", without obligation other than that of notification "in advance of his unavailability". I agree with Costello J. that, taken at its height, this could be construed as an obligation to give advance notice of a driver's unavailability, but it does not become an obligation to perform work with the meaning of the jurisprudence on mutuality of obligation. It also means that even if a driver puts his/her name down as available, and is rostered for work, there is no obligation to turn up for the rostered work. It is notable (but not determinative) that if that happens there is no sanction available to Karshan, nor is there any sanction for failing to notify Karshan in advance of unavailability The only consequence of absenteeism and/or failure to notify of unavailability would seem to be that a contractor might not be rostered again, or Karshan might terminate the Agreement – although neither of these consequences necessarily follows and no evidence or findings touched on this. Further the plain and ordinary meaning of the wording in clause 12 is that the Contractor has a *right* to engage a substitute if unavailable at short notice, but cannot be compelled to engage one. It is also expressly clear that a driver can do similar contract delivery work for other operators.

25. These were in substance the arguments pursued by Karshan before the Commissioner[6], in the High Court and in submissions to this court. The Commissioner disagreed and found that there was mutuality of obligation, on reasoning that found favour with the High Court.

26. One question that exercised this court during oral submissions was what might amount to repudiation or repudiatory conduct on the part of a driver, and specifically whether, if a driver failed to turn up for a shift for no reason (or for no good reason), this would be a repudiatory breach of contract. Counsel for the respondent accepted that a driver could fail to turn up for a shift for no reason, and that there would be no sanction, and a new contract would come into existence with the substitute driver. He also accepted that the umbrella Agreement could only be terminated in accordance with clause 15, in which Karshan reserved to itself the right to terminate "forthwith".

Where the Commissioner fell into error

27. At this point it is necessary to refer to parts of the Commissioner's Determination to identify where, in my view, she fell into error. The Commissioner made the following key finding of fact (upon which there can be no dispute):

> "a. I find as a material fact that, practice was that drivers would fill out an 'availability sheet' approximately one week prior to a roster being drawn up indicating their availability for work and that the roster would be drawn up by a store manager based on the availability sheets."

28. The Commissioner then considers "*Was mutuality present?"* from para.57 onwards. In that paragraph she observes that "The authorities are clear on the fact that while an

[6] As recorded at para.61 and 76 of the Commissioners Determination. See also para.s 13 – 19 of the Judgment under appeal.

individual is working, there is a contract in existence in which mutuality of obligation is present and both parties to the appeal agreed that this was the case."[7]

29. This proposition is not controversial and was not disputed by Karshan. It is not disputed that *once the work is undertaken* there is an obligation to pay for the work that is done – but that is a mutuality that applies equally to a contract for services, and is not the mutuality of obligation under consideration, which concerns the obligation to provide work, and the mutual obligation to perform work.

30. The Commissioner then states:

> "59. For a contract to exist the mutuality of obligation requirement must be satisfied in respect of the entirety of each contract. In other words, mutuality must be present for the period of the existence of the contract alleged to amount to a contract of employment and not just in respect of the period of time when the work is being carried out by the drivers."

31. This follows the approach taken by Briggs J. in *Weight Watchers* and is not a proposition that is disputed.

32. She then records in para. 61 the submission on behalf of Karshan that mutuality was absent because there was no obligation "on the driver to provide work[8]", and if the driver didn't show up for work no sanction could be imposed by the Karshan, and equally Karshan had no obligation to provide work to the drivers.

33. The Commissioner then accepted certain submissions of the Respondent:

> "64. The Respondent submitted that each individual contract commenced once the Appellant accepted notification by the driver of his availability for work in respect of

[7] The Commissioner at para.58 quotes from Elias J. in *Stephenson v Delphi Diesel Systems* [2003] 1 ICR 471 at para.13.

[8] As Karshan provided the work, the reference here is infelicitous and the Commissioner either intended to say there was no obligation on the driver to *undertake* work or that there was no obligation on *Karshan* to provide work, but the overall sense of the paragraph is clear enough.

a specific shift (or a series of shifts) and placed his name on the roster in respect thereof. The Respondent submitted that this agreement was the basis of the resulting contract and I accept this submission on behalf of the Respondent.

65. The Respondent submitted that the fact that a driver could exercise a choice in respect of the shifts for which he was available did not alter the fact that the relationship between the driver and the Appellant was and is governed by contract and contains mutual obligations to perform personal service. The Respondent submitted that mutuality was present for the entire duration of such contracts and I accept this submission on behalf of the Respondent."

34. The Commissioner then draws on the decision of Briggs J. in *Weight Watchers*[9]. There "Leaders" were engaged by Weight Watchers which promoted meetings of those wishing to lose weight. Leaders were required to arrange and conduct the meetings. Weight Watchers appealed the determinations that the leaders were subject to PAYE and a contribution similar to PRSI. There was an umbrella contract between Weight Watchers and each Leader, supplemented by multiple individual contracts in respect of each assignment of work, with each assignment involving one or more shifts of work.

35. The Commissioner in the present appeal considered clause 12 (the right to engage a substitute if unavailable at short notice) was comparable to condition 10 in *Weight Watchers* which provided:

"If the leader does not propose to take any particular meetings on any particular occasion and is unable to find a suitably qualified replacement, Weight Watchers (UK) Ltd will if so requested by the Leader, attempt to find such replacement and for this purpose the Leader will give the Area Service Manager as much prior notice as possible."

[9] Op cit.

36. Briggs J held that this condition might entitle a Leader to -

> "…propose not to take a particular meeting due to circumstances falling short of inability, such as a family wedding or funeral, in which the Leader is for good reason unwilling to take that particular meeting. But such a proposal by no means leaves the Leader free of any work-related obligation to WWUK, either in relation to that meeting or the series of meetings which she has agreed to take."

37. He considered that the Leader was by implication obliged first to try to find a suitably qualified replacement, and secondly, if that failed, to request assistance from the WWUK Area Service Manager with as much notice as possible – and only when a replacement was found or, in default the meeting cancelled, did the original leader's work-related obligation in relation to that meeting entirely cease.

38. Briggs J also held, in para. 90 that Condition 10 meant that "…where, as usual, a series of meetings has been agreed, a proposal by a Leader not to take a particular meeting leaves her obligation to take the remainder of the series intact."

39. The Commissioner then emphasises certain wording in clauses 12 and 14 of the Agreement, which I have underlined above, and finds –

> "76. The Appellant contended that the drivers had no obligations whatsoever as they could choose not to turn up for any shift, safe in the knowledge that no sanction would be imposed. However, the contract envisages cancellation "*should the Contractor be unavailable at short notice",* together with a requirement of advance notification in accordance with clause 14. Thus the contract aims to some extent, to regulate the circumstances of cancellation by a driver. In this regard I note the condition 10 in the Weight Watchers (UK) Ltd case similarly provided for advance notification in relation to cancellations".

40. The Commissioner then refers to two UK Supreme Court cases of *Pimlico Plumbers Ltd & anor v Smith* [2018] UKSC 29 and *Autoclenz ltd v Belcher & others* [2011] UKSC 41. While acknowledging that they differ factually from the case before her, she found them of assistance as not supporting the proposition that mutuality of obligation is absent where there is a clause providing that the provider of work has no obligation to offer work, and the putative recipient has not obligation to accept the work. She reached her conclusion that the requirement of mutuality was satisfied, stating:

> "82. In this appeal, the right of a driver to cancel a shift was qualified by the requirement to engage a substitute, to provide advance notification to the Appellant and to work out the remainder of the shifts in the series which had been agreed.
>
> 83. I agree with the reasoning of Briggs J. in *Weight Watchers (UK) Ltd* and I conclude that a contract which provides drivers with the right to cancel shifts at short notice does not relieve a driver of work related obligations in the manner contended for by the Appellant."

41. I find this reasoning unconvincing. Firstly the Commissioner made no finding that Karshan was obliged to provide work to drivers, a key requirement of mutuality.

42. Secondly, on the terms of her primary finding of fact considered in the context of the Agreement, it was not open to the Commissioner to conclude that rostering created a contractual obligation to turn up and to render personal service. There is nothing remarkable about the Commissioner's finding of fact as to the practice of drivers indicating availability and then being rostered for certain shifts. Some form of communication between a driver and a Karshan manager was required in order for Karshan to sensibly roster drivers from the panel of drivers who signed Agreements. As counsel for Karshan argued, this merely implements the Agreement, it doesn't modify it. I do not consider that it necessarily follows that the moment a driver is rostered by the

manager a discrete contract comes into being and the driver then has a legal obligation to work any shift, still less all of the shifts, for which they have been rostered, or that Karshan has the corresponding legal obligation to give them work on such shifts. Such an inference in my view flies in in the face of the express wording in the Agreement, and the freedom that the contracting parties clearly intended to be conferred on drivers to work or not to work, and on Karshan to provide or not to provide work. In this respect I differ slightly from Costello J. and incline to the view that no reasonable Commissioner would have concluded on the basis of her finding on rostering that a contract with mutual obligation came into being at the moment the driver's name was placed on the roster. In my view the combination of indicating availability and resultant rostering created no legal obligation on either party, and to borrow the words of Irvine L.J. in *Carmichael & anor v National Power Plc [1999] 1 WLR 2042*, Karshan and the drivers "at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other."

43. Thirdly, it is not correct to say that a driver cancelling a shift was subject to any *requirement* to engage a substitute. This was a misconstruction of Clause 12. The learned High Court judge also erred in finding that the right to cancel a shift at short notice "imposed obligations to engage a substitute and to work out the remainder of the shifts in the series." The Commissioner's finding of fact in respect of Clause 12 was that it –

> "*permitted* drivers to substitute another of the appellant's drivers when they were unavailable and that the substituted driver would be paid by the appellant in respect of this shift of work. The substitute could also be arranged by the appellant, if required." [Emphasis added]

The Commissioner adds, in para. 50 of her Determination, that "This arrangement was akin to the swapping of shifts between drivers."

44. Clause 12 confers a contractual right on the driver to engage a substitute, but places no *obligation* on them to do so, even where the driver is not available at short notice. It is, as the finding states, permissive of substitution/swapping. I cannot see how clause 12, or the Commissioner's findings in relation to its operation in practice, can have the effect of creating discrete contracts with mutuality of obligation at the moment of rostering. The originally rostered driver remained free not to turn up for work.

45. This is also an important point of distinction from the facts in *Weight Watchers* where the wording of clause 10 placed, as Briggs J. found, an implied obligation in the first instance on a Leader who did "not propose to take any particular meetings on any particular occasions" to try and find a suitably qualified replacement – Weight Watchers UK Limited having a fall back duty to "attempt to find a replacement" if so requested. I therefore cannot agree with Whelan J. that the implied obligation found by Briggs J. pursuant to clause 10 with is analogous to clause 12 in the instant appeal.

46. Each case must of course be decided on its own facts, and I consider the analogy with *Weight Watchers* unhelpful on a broader basis. That case concerned a very different form of work, where trained Leaders were required to set up meetings - Briggs J. found this to be the effect of Condition 6 – and the agreement and conditions in that case contained no provision equivalent to Clause 14 of the Agreement in the instant appeal. Moreover if the Leader did not turn up to lead the session the customers would (absent a replacement) be left disappointed. By comparison the failure of a driver to turn up for a rostered shift has the consequence that Karshan may (or may not) be short one driver, with little or no consequence beyond some delay in delivery time for Karshan's customers. It is easier to understand why the Briggs J. was more inclined to view a proposal by a Leader not to take a session as *not* leaving the Leader without any work-related obligation in relation to that meeting, and it is notable that on the plain language of Condition 10 he found that

a proposal by a Leader not to take one session did not relieve the Leader from the obligation to take the remainder of the series of meetings. I agree with Costello J. that there are no equivalent terms in the contractual arrangements under consideration here.

47. I therefore agree with Costello J. that the Commissioner, and by extension the High Court, misapplied *Weight Watchers.* In the present case the mutuality of obligation only applied when work was actually being undertaken – it did not apply during the extended period covered by the rosters. I also agree that the trial judge erred in para.50 where he stated that he "….is not persuaded that mutuality of obligations always requires an obligation to provide work and to complete that work on an ongoing basis as contended for by the appellant. 'Ongoing' does not necessarily connote immediate continuation or a defined period of ongoing…".

48. In the High Court the trial judge considered that in relying on *Weight Watchers* the Commissioner "did not go against Irish law but rather recognised the necessity to adapt to modern means of engaging workers." Like Costello J. I also consider that the English cases need to be approached with caution given the statutory intervention in that jurisdiction. It is preferable that if there is to be significant change in this jurisdiction that it should be undertaken by the Oireachtas rather than by incremental adaption by the courts based on developments in the English caselaw.

The findings of difference between the Agreement and day to day operations

49. In para. 39 of the Case Stated the Commissioner found as material facts three differences between the Agreement terms and the day to day operations. I do not consider that these material differences assist the respondent.

50. The first was that there were in fact no company vehicles available for rent, despite clause 4 which provided that "…If the contractor does not have his own vehicle he 'may apply to rent a company delivery vehicle' from Karshan ". This provision contemplates the

possibility of application for such rental, but the fact that no vehicles were in fact available is a deviation from the Agreement that does not in my view have any bearing on the question of mutuality of obligation.

51. The second finding was that not all drivers prepared invoices for submission to Karshan, despite clause 9 which required the Contractor "to provide a weekly invoice". The first difficulty with this finding is that it implies that some drivers actually did submit invoices. That aside in my view it also has little or no bearing on the question of mutuality of obligation in relation to work.

52. The third finding was that "some drivers were asked to perform work which was not stipulated in the contract i.e, the assembly of boxes in store, while waiting for a delivery". Again this finding is qualified – only "some" drivers were asked to do this, which implies others were not. It is not therefore a finding that supports mutuality of obligation in relation the contractual arrangement between Karshan and drivers in general.

53. Accordingly to the extent that the Commissioner makes these findings that the Agreement was operated somewhat differently in practice to the written terms, in my view none of these differences or variations impact on the question of mutuality of obligation.

Evolution of the test of mutuality of obligation in UK caselaw

54. I said I would return briefly to the test of mutuality of obligation. It should be recalled that before this court both parties accepted that the 'gateway' test was as enunciated by Edwards J., in *Barry* at page 230 i.e. –

> "The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer".

55. The test of mutuality of obligation appears to have undergone some refinement in the tribunals and courts of England and Wales, and this emerges from the recent judgment of Laing L.J. in in the Court of Appeal in *Commissioners for Her Majesty's Revenue and Customs v Professional Game Match Officials Limited* [2021] EWCA Civ 1370, That is a decision which postdates the hearing of this appeal.

56. However the changes in approach, or perhaps a more nuanced approach that than enunciated by Edwards J. in *Barry*, were not argued by the respondents. In their written Submission at para. 34 the respondent expressly agrees that mutuality of obligations is the *sine qua non* of an employment relationship "and this principle is well recognised in the authorities set out by the Appellant at paragraphs 23 to 28 of its Submissions". Those paragraphs refer to and quote passages of the judgment of Edwards J. In *Barry*, of Lavan J. in *Mansoor*, Gilligan J. in *Brightwater*, and Ní Raifeartaigh J. in *McKayed*, the Irish caselaw that was also central to Karshan's oral submissions to this court.

57. While the respondents adopt the reliance placed by the Commissioner and the High Court on *Weight Watchers*, and in his judgment Briggs J. does refer to certain authorities later relied on by Laing J. in her judgment in *Professional Game,* and also relied on by Whelan J. in her judgment – including the judgments of Waite L.J. in *McMeechan* [1997] IRLR 353, Sir Christopher Slade in *Clark v. Oxfordshire Health Authority* (1997) 41 BMLR 18, [1998] IRLR 125, and *Cornwall County Council v Prater* [2006] IRLR 362– this was not the focus of argument by the respondent.

58. Accordingly I am of the view that it is not for this court to decide this appeal on principles of 'mutuality of obligation' as they have evolved in UK caselaw and legal texts, including (but not limited to) the Court of Appeal decision in *Professional Game* delivered since this appeal was argued, on the basis of arguments which were not pursued before the

High Court, or before this court. These arguments may well arise for consideration in a future case.

Conclusion

59. In light of my agreement with Costello J. that the requirement of mutuality of obligation is absent from the arrangements/discrete contracts under which drivers undertake delivery shift work, it is not necessary to consider whether the further indicia of a contract of employment are satisfied. The Commissioner upon the facts proven or admitted was *not* correct in law in her interpretation and application of the concept of mutuality of obligation. I would therefore allow this appeal, and answer the first question posed in the Case Stated "No".

Patrick J. O'Reilly v The Irish Press, Ltd.

High Court.

15 March 1937

[1937] 71 I.L.T.R 194

Maguire P.

11th and 15th March, 1937

Master and Servant — Wrongful Dismissal — Usage — Custom as to Notice—Chief Sub-Editor and Night Editor—Daily Newspaper—Journalist Profession—Usage of six months' notice—Not established—Reasonable Notice—Six months.

The Court, in this case, held that the plaintiff, Chief Sub-Editor and Night Editor of a Daily Newspaper, failed to prove a usage or custom entitling him as Chief Sub-Editor to six months' notice, but held that he was, as Chief Sub-Editor and Night Editor, entitled to six months' notice as reasonable notice.

J. M. Fitzgerald, K.C., and Joseph J. Mooney, for the plaintiff.

Cases cited:—

Brennan v. Gilbart-Smith, 8 T. L. R. 284;

Lowe v. Walter, 8 T. L. R. 358;

Grundy v. Sun Printing and Publishing Association, 33 T. L. R. 77, Chamberlain v. Bennett, 8 T. L. R 234.

Martin Maguire, K.C., Wm. Black, K.C., and Diarmaid Fawsitt for the defendants

Cases cited:—

Blanckensee & Son v. Saqui, 33 T. L. R. 246;

Mackenzie v. Dunlop, 3 Macq. H. L. 22;

Nelson v. Dahl, 12 Ch D 568 at p. 576;

Willans v. Ayers, 3 A. C. 133;

Holcraft v. Barber, 1 Car & Kir 4;

McCabe v. Pathé Frères Cinema, 35 T. L. R. 313;

Wilson v Ucelli, 45 T. L. R. 395;

Halsbury, vol 10, page 237, par. 448.

Maguire, P.

The plaintiff in this action claims damages for wrongful dismissal from his post as Chief Sub-Editor and Night Editor of the “Irish Press,” a well-known daily newspaper. Happily, I am not concerned with the reasons which led to his dismissal. The only issue I have to try is whether he was entitled to receive more than three months' notice to terminate his services with the defendants. The amount of damages to which he is entitled will be determined by the length of notice which I decide he is entitled to receive less by such sum as I hold he could reasonably have earned since his dismissal

The plaintiff, in his evidence, gave me the history of his journalistic career. It is of little help in the case, for although prior to his joining the “Irish Press” he twice held, and lost, the position of Chief Sub-Editor in a newspaper office, the circumstances under which he left were such that the question of length of notice did not arise. His first post of this kind was with a newspaper in Cork which went out of existence. After its disappearance the plaintiff left Cork and apparently did not worry about his rights as regards the length of notice to which he was entitled. The next occasion on which he held a post of this kind was when he was with the “Evening Herald.” From this post he was dismissed for

dereliction of duty, and in any event his experience as regards length of notice to be given would have been of little help in this case, as I understand that the term of his contract relating to the length of notice he was to receive or give was embodied in a written agreement. He has experienced many changes since then. Moving freely from place to place seems to be accepted as part of the lot of a journalist. They are the unusual type of rolling stones which gather moss.

Having filled a variety of positions on different newspapers he joined the “Irish Press” in the year 1931. He was informed of his appointment by letter from Mr. Frank Gallagher, dated the 21st July, 1931. The relevant part of this letter is as follows:—“You know with what pleasure I send you this formal letter of appointment to our sub-editing staff at a weekly salary of £8 8s. 0d.”

In the month of January, 1932, the plaintiff was promoted to be Night Editor and his salary was increased to £10 10s 0d. a week. He was later appointed Chief Sub-Editor and thenceforward filled the positions of Chief Sub-Editor and Night Editor, with, however, no further increase of salary. He remained on that basis down to the 20th July, 1936, when he was dismissed from his post. With the grounds on which he was dismissed I am not concerned. The proprietors of the “Irish Press” thought proper to dismiss him, giving him three months' notice and informing him that he would receive his salary each week as it became due until the three months expired. To this the plaintiff objected. He contended that he was entitled to six months' notice. So the matter stands when it comes before me. As regards his right to receive six months' notice, the plaintiff relies on what he claims to be the established custom or usage of the *194 journalist profession. In his statement of claim he alleged that usage entitled him to twelve months' notice. That claim, has, however, been modified at the bar to a claim that he was entitled to six months' notice, or the equivalent salary.

As was said by Mr. Martin Maguire, a custom or usage of any kind is a difficult thing to establish. Before a usage such as is contended for here can be held to be established it must be proved by persons whose position in the world of journalism entitles them to speak with certainty and knowledge of its existence. I have to be satisfied that it is so notorious, well known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties.

I am satisfied that I would be entitled on the evidence of Mr. Frank Gallagher, Mr. Quilty, Mr. O'Sullivan, and other witnesses, if their evidence stood alone, to hold that there is a usage which, in the absence of agreement in writing, requires six months' notice on either side to terminate the contract and employment of a Chief Sub-Editor. Mr. Gallagher said that this was universally known and acknowledged and that he would be surprised if a Chief Sub-Editor ever got less than six months' notice Mr. Quilty, formerly Editor of the “Independent,” gave evidence on similar lines. Mr. O'Sullivan, and Mr. Anderson, of the “Evening Mail,” supported this and said six months was the recognised period of notice. Other witnesses connected with well known newspapers gave evidence to the same effect. The only actual instance of which evidence was given where the question of length of notice is said to have come in question was the case of a man named Hugh Doyle, now deceased. Mr Doyle, a brother of Hugh Doyle, stated that his brother, a Chief Sub-Editor on a Dublin newspaper many years ago had contested an effort to dismiss him on three months' notice but he claimed to be entitled to six months' notice and finally gained his point. The evidence, however, was not very clear or satisfactory. Mr. Quilty, who has been employed on the same paper, had not heard of the case and said that he could not deny or support what was said by Mr Doyle

There was, however, equally positive testimony by other witnesses against the existence of such a custom. Mr Herlihy, Editor of the “Irish Press,” who has been in journalism for a long number of years, says he never heard of six months' notice being required or given. He must have been unaware of any such usage as is claimed by the plaintiff when he advised or allowed his present employers to give only three months' notice in this case. Mr. Smyllie, Editor of the “Irish Times,” says that he never heard of any custom in relation to the length of notice to be given to a Chief Sub-Editor.

All the witnesses impressed me very favourably. They told the truth, and there was no attempt to dress up the evidence in any way.

The absence of evidence of actual instances to show the length of notice given to or by Chief Sub-Editors does not surprise me. Having regard to the relatively small number of such posts it was natural that instances of dismissal or resignation of Chief Sub-Editors should be exceedingly rare. A Chief Sub-Editor generally goes higher and seldom goes down or out. This appears to be one explanation why there are no decided cases on this point and no instance in actual practice except the doubtful one already referred to.

The absence of actual instances of the usage in practice would not, however, preclude me from holding that the usage existed if I were satisfied that it was well known and universally recognised.

As I have already stated, it is necessary in order to establish a custom of the kind claimed that it be shown that it was so generally known that anyone concerned should have known of it, or could easily have become aware of it.

With some hesitation and considerable regret I must hold that the evidence before me has not established such notoriety or general acquiescence for the usage as to enable me to hold it established. I say “with considerable regret” because I would be glad to decide the case on usage. Apparently a usage with regard to dismissal of sub-editors and editors can be established As regards Chief Sub-Editors, notwithstanding the fact that several witnesses knew of the existence of a usage in certain circles governing the length of notice to be given I have come to the conclusion that there was not that universality of acceptance of the usage in the newspaper world in general that is required to establish it as a usage. Accordingly, I must turn to deal with the other side of the case, namely, what is reasonable notice. This question gives me considerable difficulty.

The position of Chief Sub-Editor apparently is a very responsible one. The evi *195 dence as to the duties of a Chief Sub-Editor satisfies me that the success or failure of a newspaper, as a newspaper proper, depends to a great extent upon the competence, judgment, and taste of the Chief Sub-Editor. The reason why there had been so few instances of the dismissal of Chief Sub-Editors is that most newspaper managers take extraordinary care to see that they get for this post men who were tried, experienced, and gifted with the qualities which would ensure success. In deciding the functions of a Sub-Editor much help cannot be got from evidence as to the functions of an Editor. The title “Editor” seems to have taken on a special meaning. It is a position of dominance and control of general attitude of a paper towards all important problems and questions of the day. The work of a Sub-Editor is different. As I understand from the various witnesses, the Chief Sub-Editor is in control of the news side of the paper, excepting the financial and sports news He is subject to the general direction of the Editor He “tastes” the news, as Mr Quilty graphically put it; he is the architect of the paper. He has, perhaps, fifteen or more Sub-Editors under him, to whom he allots different columns for the following day's paper. His work is to see that the news is presented in a striking and attractive manner. He supervises the work of the Sub-Editors in regard to sub-titles and spacing. He must know and appreciate the general policy of the paper and must guide the actions of the sub-editorial staff accordingly. He must also keep the Editor informed of important items of news to which it may be necessary to refer in the leading articles. His work, therefore, differs from that of the Editor, who has to guide the general policy of the paper and must watch that his paper does not take a different line one day from what it took the previous day. Although his work is different it is clear that it is of great importance to the successful running of the paper that it should be well done.

In this case, in addition to being Chief Sub-Editor, the plaintiff was Night Editor He had, however, only to do with the executive side of the paper. As Mr Gallagher put it, “when the Editor was away, Mr O'Reilly took over charge of the floor.” The amount of responsibility placed on him seems to justify a distinction as to the length of the notice he was entitled to receive being made between him and an ordinary Chief Sub-Editor, and more so between him and an ordinary Sub-Editor. Having taken into account all these matters and weighing them as best I can, I think that the plaintiff was entitled to six months' notice. I estimate £25 as the amount he should have earned since he became unemployed. He is entitled to damages estimated at the amount of six months' salary—that is £273. He is further entitled to the £10 10s. 0d. for the week of his employment during which he was dismissed Against this the above sum of £25 must be allowed. I give judgment for £258 10s. 0d.

On the application of Mr. Mooney, under Section 12 of the Courts of Justice Act, 1936, his Lordship granted a certificate allowing costs on the High Court Scale.

Representation

Solicitor for plaintiff: David H. Charles.

Solicitors for defendants: Little, O hUadhaigh and Proud.

Reported by Manus Nunan, Barrister-at-Law

THE HIGH COURT

[2014 No. 34 CA]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

JAMES REILLY

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered the 17th day of April, 2015

Introduction

1. In these proceedings, the defendant ("Mr. Reilly") alleges that he was unfairly dismissed by the plaintiff ("the bank") from his employment and has brought a claim pursuant to the Unfair Dismissals Act 1977 (as amended) ("the Act"). The claim originally came before the Employment Appeals Tribunal ("the EAT"), where it was seven days at hearing over a period of about a year. An appeal was brought from the decision of the EAT to the Circuit Court, which took eight days and in turn, the order of the Circuit Court was appealed to this court when the matter was at hearing for ten days. This is without taking account of an initial investigation, a two stage disciplinary process and two internal appeals.

2. By my reckoning, Mr. Reilly has given oral evidence on some eight occasions over a six year period in relation to this matter. Enormous costs have been incurred that Mr. Reilly at least can ill afford. This must be viewed as oppressive to say the least and calls into question the State's obligations under Article 6 of the European Convention on Human Rights regarding the right to a fair and expeditious trial. Not

for the first time has this court been critical of this unacceptable situation – see the remarks of Charleton J. in *JVC Europe Limited v Panisi* [2011] IEHC 299. Although as a matter of law an appeal lies from the Circuit Court to the High Court under the Act of 1977, a general reading of the Act appears to suggest an underlying assumption that the Circuit Court should be the final tribunal of appeal. It appears to me that it is well past time that this issue was addressed.

Background Facts

3. Mr. Reilly, who is now 33 years of age, is from Blanchardstown, County Dublin. After leaving school, he commenced employment with the bank on the 23rd of April, 2001 as an entry grade bank official. He rose through the ranks quickly. Within a year, he had won a customer service award for the north Dublin region. By 2004, he was promoted to senior bank official at the age of 22, which was a significant achievement. His ability, particularly in the field of consumer lending, was recognised outside the bank. He was approached by Ulster Bank in 2005 offering the position of sales manager and Halifax offered him the position of branch manager. In 2006, he was placed in an acting sales manager role which was formalised in September, 2007, when he was appointed as a sales manager at the age of 25. This would be equivalent in rank to what would formerly have been described as an assistant branch manager. Mr Reilly's achievement in this regard was extremely unusual if not unique.

4. Most of the facts in this case are not in dispute but in particular, the fact that Mr. Reilly was an excellent employee with an exemplary record who was diligent and hard working.

5. From in or around 2002, Mr. Reilly had his own email address at the bank. His use of that address was subject to the bank's code of conduct and other policy documents to which I shall refer further.

6. In early February, 2009, a chain email captioned "Hangover Brilliance" was forwarded to an individual in the bank who forwarded it in turn to four members of staff in the bank including Mr. Reilly. One of those staff members sent the email on to persons both inside and outside the bank and it ultimately made its way into the ESB group email system, where it was detected by an IT security manager.

7. On the 5th of February, 2009, the ESB security manager alerted the bank's head of IT security, Mr. Brian Leahy, of an email abuse in the following terms:

> "Brian,
>
> I note from the email below that two Bank of Ireland people were involved in forwarding this around the town. We are tackling the ESB names."

8. As a result of this communication, Mr. Leahy immediately contacted the bank's Group Industrial Relations Department ("GIR") and spoke to Mr. Brian Kelly of that department. In fact, Mr. Kelly was employed within a subset of GIR, namely the Employment Advisory Service ("EAS"). On receiving this information, Mr. Kelly instructed Mr. Leahy to "lift" the mail boxes of the two bank employees who had forwarded the hangover brilliance email. This did not include Mr. Reilly.

9. Lifting a mail box is a term for making a forensic copy of the entirety of the mailbox in question so that the content is of that moment "fingerprinted" and frozen in time. It cannot thereafter be interfered with. The process can be, and was in fact, undertaken without the knowledge of the mailbox user. Recognising that this is a significant invasion of the privacy of the individual concerned and something not to be undertaken lightly, lifting a mailbox cannot take place until it is expressly authorised in writing by three different individuals. A form must be completed which

is known as an SDAR and for the authorisation to be complete, the form must be signed by a member of bank IT security, a member of GIR and also a member of HP security, Hewlett Packard being the custodians of the bank's email system.

10. When the two mailboxes in question were lifted, a colleague of Mr. Kelly's in EAS, Ms. Margaret Keogh, since deceased, went to view these two mailboxes at the bank's IT headquarters in Cabinteely, County Dublin. Arising out of Ms. Keogh's viewing of the two mailboxes, Mr. Kelly then requested that a further three mailboxes be lifted, one of which was that of Mr. Reilly.

11. The SDAR in respect of the latter three mailboxes was signed off on the 17th February, 2009 and on the same date, the mailboxes were lifted and viewed by Ms. Keogh. When she did so, Ms. Keogh discovered a number of inappropriate emails with attached images in Mr. Reilly's mailbox. Ms. Keogh took what he felt was a representative sample of six of these emails.

12. Evidently, Ms. Keogh had some discussion about these emails with her immediate superior, Mr. Graham Fagan and he or she in turn with Mr. Gerry Mitchell, the head of GIR, as later the same day, or possibly early the next day, the 18th of February, 2009, Mr. Mitchell telephoned Mr. Cyril Macken, who was at that time the head of the bank's 21 North Dublin branches, which included Blanchardstown. Following that contact, Mr. Macken telephoned Mr. David Donnelly, the Blanchardstown branch manager, and instructed him to put Mr. Reilly on special paid leave with immediate effect. Later that afternoon, Mr. Reilly was summoned by Mr. Donnelly to his office where Ms. Breda Byrne, the customer service manager was also present.

13. Mr. Donnelly told Mr. Reilly that on the instructions of Head Office, he was obliged to suspend him with immediate effect and asked him to hand over his keys of

the branch. He said that an issue had arisen in relation to emails but he didn't know anything about it.

14. The next day, the 19th of February, 2009, Mr. Reilly contacted his union, the Irish Bank Officials Association ("IBOA") and was put in touch with Mr. Ciaran Mahon for advice and representation. Mr. Mahon was also a Bank of Ireland employee and part-time union official.

15. At the same time, Mr. Macken appointed another bank official, Mr. Paddy Lonergan, to investigate the matter on his behalf.

16. When the mailboxes referred to were lifted, in addition to Mr. Reilly's mailbox, the mailboxes of four other members of staff at Blanchardstown were also found to contain inappropriate material. Of those five members of staff, three, including Mr. Reilly, were suspended. Mr. Lonergan was charged by Mr. Macken with investigating all five cases.

17. On the 27th of February, 2009, Mr. Mahon met with Mr. Kelly to discuss Mr. Reilly's case and that of another bank employee's that he was representing. Mr. Kelly showed Mr. Mahon the offending email images and told him that the bank was viewing the matter as serious as this was a rising trend. Also, on the 27th of February, 2009, Mr. Kelly wrote to Mr. Reilly to advise him that the investigation meeting with Mr. Lonergan would take place on the 12th of February, 2009. Mr. Lonergan began his investigation and appears to have been assisted throughout, where necessary, by Mr. Kelly.

18. The investigation meeting with Mr. Lonergan took place on the 12th of March, 2009. Present were Mr. Reilly, Mr. Lonergan, Mr. Mahon, and Mr. Kelly. In the course of the meeting, Mr. Lonergan put the relevant images to Mr. Reilly for his comments. Mr. Reilly did not deny sending them although he had no particular recollection in relation to some of them. He said he was aware of the email policy but

didn't read it. He said he was gay although he tried to mask this fact by sending some of the emails concerned. He suggested that other senior people in the branch had been sending such emails also.

19. Subsequent to the investigation meeting, on the 18th of March, 2009, Mr. Lonergan travelled to the IT department in Cabinteely to view the entirety of Mr. Reilly's mailbox. He says he did so in order to satisfy himself that the sample that had been selected by Ms. Keogh was representative. In the course of this inspection, Mr. Lonergan selected one additional email with an attached image to be included in the sample.

20. In his report, Mr. Lonergan found that the bank's email policy had been breached by Mr. Reilly and that the content of the relevant emails could reasonably be regarded as pornographic, indecent, obscene, offensive, rude and generally distasteful. He considered that they had the potential to reflect unfavourably on the bank. Mr. Lonergan's report was submitted to Mr. Macken, who, on the 2nd of April, 2009, wrote to Mr. Reilly requesting him to attend a first disciplinary meeting to be held under stage one of the relevant disciplinary procedures. The stage one meeting took place on the 23rd of April, 2009. At this meeting, Mr. Reilly said that emails of this nature were going around everywhere and he described the volume that he would delete off his system as phenomenal. He said there was a huge circle of people sending the emails and he might have sent some on so as to cover up his orientation. He described them in terms of being "banter" between colleagues.

21. Mr. Macken conveyed his decision to Mr. Reilly by letter of the 5th of May, 2009, in which he said that he viewed his behaviour in sending the emails as gross misconduct and an extremely serious breach of the bank's email policy which warranted the potential disciplinary sanction of dismissal. Before making his final decision, he invited Mr. Reilly to a further meeting known as a stage two meeting.

The purpose of this meeting was to facilitate Mr. Reilly in making any representations he wished in relation to the potential sanction of dismissal. The stage two meeting took place on the 13th of May, 2009, when similar issues were raised and discussed, including Mr. Reilly's excellent work record.

22. Following that meeting, Mr. Macken conveyed his final decision to Mr. Reilly by letter of the 26th of May, 2009, which was to dismiss him with immediate effect. The disciplinary procedure provided for an appeal from this decision to the chief executive of the bank or his nominee. Mr. Gerry Reeves was nominated to hear the appeal, which he did on the 20th of August, 2009. A number of points were made on behalf of Mr. Reilly at the appeal which included a suggestion that the bank had not treated Mr. Reilly in a manner consistent with other comparable cases and the sanction imposed was unduly severe and harsh. Mr. Reilly's exemplary record was again stressed as was the devastating impact dismissal would have on his life. This appeal was unsuccessful, as was a further final external appeal to Mr. Ray McGee, an independent third party and former deputy chairman of the Labour Court. That appeal was heard on the 13th of January, 2010.

23. It is worthy of some comment that before the appeal to Mr. Reeves was heard, Mr. Reilly wanted an opportunity to view his mailbox in IT headquarters accompanied by Mr. Mahon to assist him in analysing the contents. Mr. Mahon was refused permission to attend and was even refused the customary time off for attending to his union duties on that occasion. Mr. Reilly therefore had to attend on his own to view the mailbox under the supervision of Mr. Leahy and Ms. Keogh. To say the least, this must have been a very awkward and uncomfortable experience for him without Mr. Mahon's moral support and it is hardly surprising that he left before his allotted time expired. It is difficult to understand what loss would have been on the

bank to allow Mr. Mahon attend also and why it was felt necessary to adopt such a rigid approach.

The Employment Documents

24. It was common case that Mr. Reilly was bound by his contract of employment to observance of the bank's group code of conduct and in particular of a document entitled "Group Information Security Email Usage", dated the 12th of February, 2008. This document provided (at p. 2):

> "Group email systems are provided for in the conduct of group business...
>
> - In email communications, users must not engage in any activity, which is illegal, offensive, disruptive or likely to have negative repercussions for the Group...
>
> The Group reserves the right to monitor and give reasonable grounds for investigation, intercept, access and disclose messages created, received, stored or sent over the group email systems at any time without notice. You agree that the Group may undertake such monitoring and may use such methods and equipment as it considers necessary or appropriate."

25. The document continues (at p. 5):

> "Your usage of the Group email systems should not involve you in any activity that is illegal, offensive or likely to have negative repercussions for the group. Particularly, you must not use, retain, distribute or disseminate any images, text, materials or software that:
>
> - Are or might be considered to be indecent or obscene.
> - Are or might be offensive or abusive in that their content is or can be considered to be a personal attack, rude, sexist, racist, pornographic or generally distasteful...

- Adversely impact on the image of the Group."

26. Finally (at p. 7):

"9: Policy violation.

If you fail to comply with the requirements of this policy, and/or otherwise misuse and/or abuse the Group email systems, you may be liable to disciplinary action up to and including dismissal. The Group will treat any breach of this policy in a serious manner. At the same time, your conduct and/or actions may be illegal and you may be personally liable for the consequences."

27. The bank also relied on a further document entitled "Disciplinary Procedures" which included the following provision:

"Gross misconduct.

In cases of gross misconduct, an employee may be dismissed without recourse to the earlier steps in the disciplinary procedures. In a situation which may be potentially deemed as gross misconduct, a full investigation will be carried out. An employee may be placed on special paid leave during such an investigation.

Full investigation and careful consideration of the facts will be carried out without undue delay and this may include consultation with any witnesses and the preparation of written statements as appropriate. If the employee's manager is a witness or the only witness to an alleged case of misconduct, that manager will not conduct the investigation or play a part in the disciplinary decision making process.

If an employee has been found to have committed gross misconduct, there may be mitigating factors which mean that a less serious sanction than dismissal is appropriate. Mitigating factors will be considered bearing in

mind the principles of fairness and consistency which underline these disciplinary procedures.

Among the matters which may be described as gross misconduct which may be a cause for dismissal are:-...

4. Breach of Group code of conduct or policies (e.g. group email policy, harassment and bullying policy, etc.)."

28. Although not a contractual document, the bank also placed reliance on a notice by the IBOA, dated the 14th of November, 2006 and addressed to all IBOA members in the Bank of Ireland group. This stated the following:

"Re: use of internet/email and company mobile phones.

Members should be aware that there has been a significant increase in the number of staff being disciplined by the bank for breaches of its email/mobile phone policy. The disciplinary sanctions imposed on staff range from written warnings up to dismissal depending on the severity of the incident.

Members should be aware that the company email and mobile phones are for work related use and should not be used to send material which is not work related.

IBOA are instructing members to familiarise themselves with the bank's internet/email policy and to ensure that their use of the bank's computers/mobile phones comply with this policy."

29. Mr. Reilly, however, disputed that he had ever actually seen this document.

The Emails

30. Mr. Reilly's mailbox was analysed for a two-year period between February, 2007 and February, 2009. His sent or outbox contained 1139 documents of which 29 were considered to be inappropriate. Ms. Keogh extracted the original sample of six

emails from the outbox and one further was selected by Mr Lonergan. As previously stated, the Hangover Brilliance email which led to Mr. Reilly's mailbox being examined was received by him but not forwarded. In the order they were presented to the court, the first email was captioned "Tsunami". Attached to it were several images of naked women posing on a beach. The EAT, in its determination, described these as being in the nature of soft pornography of a type that might be found in some tabloid newspapers. Mr. Reilly's evidence was that, given his personal orientation, he had no interest in these images.

31. The second email is captioned "Anything to Declare?" The single image attached depicts a man holding a shopping bag with the head of a small Asian child superimposed so that the child appears to be in the bag. On its face, whilst the image is somewhat bizarre, it could not be seen as pornographic, obscene or indecent. It is only when one is made aware that the subject is a former celebrity and notorious paedophile that its intended meaning becomes evident.

32. Mr. Lonergan considered that this image was the most serious of all the images. He described it as being in a category of its own, different from all the others. For reasons which have never been adequately explained, the distribution list for this image was separated from it leaving only the image. This meant that when it was put to Mr. Reilly at the various investigation and disciplinary meetings, it was not possible to detect the source of this email. It was only after Mr. Reilly was dismissed and had commenced proceedings that the distribution list eventually became available. This showed that the email had originated in the bank's Head Office in Baggot Street, from where it had been forwarded to another bank official who was known to Mr. Reilly. That official forwarded the email to a number of others within the bank and it was forwarded by at least three further bank personnel before it reached Mr. Reilly. There was no evidence that the official in question was ever

investigated and in fact, he was subsequently promoted to the level of branch manager.

33. The third email is captioned "Adult Funnies" and includes various images which are vulgar, crude and tasteless. They all purport to be humorous although the humour is of a somewhat juvenile nature.

34. The fourth email is captioned "Mastercard Moments" and has attached to it two images of people in public situations inadvertently exposing themselves. The images include text which purports to be humorous comment. The fifth item is an email with an attached image which shows a group of obese people engaging in sexual activity. The original caption on this email when sent to Mr. Reilly was "What Really Happens at Weight Watchers Meetings!" Mr. Reilly forwarded this email to three male colleagues in the Blanchardstown bank including one with the initials I.W. Before doing so, Mr. Reilly altered the subject line so that it then read "I. in his first brothel". I.W. was a junior colleague of Mr. Reilly and a friend of his. Mr. Lonergan was particularly concerned about this email, which he felt might be considered as bullying by Mr. Reilly of his junior colleague. However, that view was not apparently shared by Mr. Macken.

35. The sixth email had an attached image of two naked men sitting on a couch. This appears to have been sent by Mr. Reilly from his mobile phone to his bank email address and was then forwarded on by him to his personal email address. It was not circulated to anybody else. Mr. Reilly explained this by saying that he accidentally forwarded the email to his bank address when he intended it to go to his private address.

36. The seventh and final email which was the additional item selected by Mr. Lonergan had attached an image of an extremely large naked woman. Mr. Reilly

forwarded this to another colleague in the branch but amended the subject caption so that it read "Put I's head on this and send it on". This was a further reference to I.W.

Legislation

37. Insofar as relevant to these proceedings, the Unfair Dismissals Act 1977 (as amended) provides as follows:

> "6.—(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal…
>
> (4) Without prejudice to the generality of *subsection (1)* of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:…
>
> *(b)* the conduct of the employee,…
>
> (6) In determining for the purposes of this Act whether the dismissal of an employee was an unfair dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in *subsection (4)* of this section or that there were other substantial grounds justifying the dismissal.
>
> (7) Without prejudice to the generality of *subsection (1)* of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so—
>
> *(a)* to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal,…

7.—(1) Where an employee is dismissed and the dismissal is an unfair dismissal, the employee shall be entitled to redress consisting of whichever of the following the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers appropriate having regard to all the circumstances:

(a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal, or

(b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or

(c) (i) If the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under s. 17 of this Act) as is just and equitable having regard to all the circumstances, ...

(2) Without prejudice to the generality of *subsection (1)* of this section, in determining the amount of compensation payable under that subsection regard shall be had to—

(a) the extent (if any) to which the financial loss referred to in that subsection was attributable to an act, omission or conduct by or on behalf of the employer,

(b) the extent (if any) to which the said financial loss was attributable to an action, omission or conduct by or on behalf of the employee,

(c) the measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the loss aforesaid,...

(f) the extent (if any) to which the conduct of the employee (whether by act or omission) contributed to the dismissal."

38. It is thus clear that the onus is on the employer to establish that there were substantial grounds justifying the dismissal and that it resulted wholly or mainly from one of the matters specified in s. 6(4), which includes the conduct of the employee or that there were other substantial grounds justifying the dismissal. Section 6(7) makes clear that the court may have regard to the reasonableness of the employer's conduct in relation to the dismissal. That is however not to say that the court or other relevant body may substitute its own judgment as to whether the dismissal was reasonable for that of the employer. The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned – see *Royal Bank of Scotland v. Lindsay* UKEAT/0506/09/DM.

39. I respectfully agree with the views expressed by Judge Linnane in *Allied Irish Banks v. Purcell* [2012] 23 ELR 189, where she commented (at p. 4):

"Reference is made to the decision of the Court of Appeal in *British Leyland UK Ltd v. Swift* [1981] IRLR 91 and the following statement of Lord Denning MR at page 93:

> 'The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view.'

It is clear that it is not for the EAT or this court to ask whether it would dismiss in the circumstances or substitute its view for the employers view but to ask was it reasonably open to the respondent to make the decision it made rather than necessarily the one the EAT or the court would have taken."

The Decision to Suspend Mr. Reilly

40. The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career. As noted by Kearns J. (as he then was) in *Morgan v. Trinity College Dublin* [2003] 3 I.R. 157, there are two types of suspension, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire. In Mr. Reilly's case, his evidence was that rumours and

reports circulated about him ranging from possibly being involved in fraud to participation in a tiger kidnapping.

41. Thus, even a holding suspension ought not be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question. It will normally be justified if seen as necessary to prevent a repetition of the conduct complained of, interference with evidence or perhaps to protect persons at risk from such conduct. It may perhaps be necessary to protect the employer's own business and reputation where the conduct in issue is known by those doing business with the employer. In general, however, it ought to be seen as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process. Indeed, this is explicitly recognised by the bank's own disciplinary procedures in force at the relevant time. The procedures provide, under the heading "Special Paid Leave", as follows:

> "An employee may be placed on special paid leave in order to facilitate the proper conduct of the disciplinary procedures."

42. The corollary presumably therefore is that an employee ought not be suspended where suspension is not necessary to facilitate these matters.

43. In the present case, the circumstances surrounding the decision to suspend Mr. Reilly are far from clear. As previously noted, three staff members including Mr. Reilly were suspended and two were not, where all five were being investigated for breach of the bank's email policy.

44. Mr. Kelly's evidence was that neither he, Ms. Keogh, their immediate superior Mr. Fagan, head of EAS, or his superior Mr. Mitchell, head of GIR, made the decision to suspend the three staff members. It would not be within their competence to do so. Mr. Kelly was adamant that all the relevant decisions were made by Mr. Macken, with whom he had no contact at that juncture. Neither Mr. Fagan or Mr. Mitchell was

called to give evidence in this case. Mr. Kelly said in evidence that he had no involvement in the matter prior to Mr. Reilly being suspended on the 18th of February, 2009. He said Ms. Keogh was the person who had viewed the mailboxes in question and extracted the sample emails. Ms. Keogh was not called to give evidence at the EAT or Circuit Court although she was present at both.

45. When Mr. Macken gave evidence, he was asked in cross-examination when he first became involved in the matter and he said that it was when he got a call from Gerry Mitchell. In the course of that call, Mr. Macken established that there was a problem with misuse of the email system in the Blanchardstown branch and that it was serious. Following the call, Mr. Macken then contacted the branch manager, Mr. Donnelly, with instructions to immediately suspend three of the five staff members concerned.

46. When Mr. Donnelly summoned Mr. Reilly later that day, the only thing he was able to tell Mr. Reilly about the reason for the suspension was that it was to do with email usage. Mr. Reilly's evidence in that regard was uncontroverted, as neither Mr. Donnelly or Ms. Byrne, who was also present, were called to give evidence.

47. Later in his evidence, Mr. Macken confirmed that the first time he actually saw the material in issue upon which he decided to dismiss Mr. Reilly was when he received Mr. Lonergan's report some six weeks later. Consequently, when Mr. Macken made the decision to suspend Mr. Reilly, all he knew about the case was what Mr. Mitchell told him. Mr. Mitchell in turn presumably only knew what he had been told by Ms. Keogh either directly or through Mr. Fagan unless he viewed all the emails and images himself, although there is no evidence of that.

48. What seems all the more remarkable about Mr. Macken's decision, made in the absence of access to any of the relevant evidence, was that he felt able to come to the conclusion that where five people were being investigated in Blanchardstown for the

same offence, i.e. breach of the email policy, three of them required to be suspended to facilitate that investigation and two did not. Furthermore, to my mind it has not been demonstrated by the bank how Mr. Reilly's suspension was necessary in order to facilitate the proper conduct of the disciplinary procedures. None of the factors I have identified above were present in his case. The mailbox with the offending emails was forensically frozen and could not be further interfered with by Mr. Reilly. Nobody had complained about Mr. Reilly's conduct and indeed it seems likely that nobody knew about it other than those in receipt of the relevant emails. None of those individuals were called to give evidence. It seems highly probable that the danger of repetition of the conduct complained of was to all intents and purposes nil once Mr. Reilly had been made aware of the issue. Mr. Reilly was evidently mystified, not to say shocked, by the suspension as was Mr. Mahon after him. Mr. Mahon is an extremely experienced bank official and union representative whose evidence impressed me. He was diligent and conscientious about his duties and was careful to keep a journal in relation to all relevant events in the cases he was handling. When I asked him about Mr. Reilly's suspension, he said:

> "So I just couldn't see what the logic was of sending people home to aid an investigation. It didn't aid an investigation."

49. Like Mr. Mahon, I can perceive no logic in the course adopted by Mr. Macken. No evidence has been adduced by the bank as to why it was necessary to suspend Mr. Reilly, less still justify the manner in which it was done. After an exemplary career in the bank, Mr. Reilly was summoned at a moment's notice by the manager to be told he was being suspended. Mr. Donnelly gave him virtually no information as to the reason other than saying he was acting on the instructions of Head Office and it was something to do with emails and without being afforded even the most basic opportunity to offer an explanation or defend himself, he was marched out the door

never to return. Indeed, even if Mr. Reilly had a valid explanation, there was little point in him proffering it to Mr. Donnelly, who had been presented with a fait accompli by Head Office. I cannot accept the proposition advanced by counsel for the bank that Mr. Reilly had no entitlement to natural justice or fair procedures in any shape or form at this stage of the proceedings. Whilst of course it must be correct to say that the full panoply of fair procedures may not have been engaged at that stage, I cannot accept that basic fairness did not require at least a rudimentary explanation of the reason for the suspension which admitted of the possibility of some exculpatory response.

50. In the light of the foregoing, I cannot conceive how Mr. Macken could have independently arrived at the decision to suspend Mr. Reilly and two others whilst not suspending a further two staff members accused of the same misconduct. It seems to me that the conclusion is irresistible that either somebody else made the decision and directed Mr. Macken to implement it or alternatively it was suggested to him as the appropriate thing to do and he simply accepted that without further ado. Furthermore, the only possible explanation for selecting three out of the five employees concerned for suspension was that the view was taken that the contents of their mailboxes represented more serious misconduct than that of the two who were not suspended. If that is so, it must follow as a logical consequence that the suspensions were nothing to do with the pending investigation and disciplinary process but rather were an expression by the bank of its view of the seriousness of the matter and its resolve to punish those responsible accordingly.

51. That conclusion is supported by the evidence of Mr. Mahon and Mr. Kelly about their first meeting on the 27th February, 2009 about Mr. Reilly's case, when Mr. Kelly said that the bank was taking a serious view of the matter which was a rising trend. That comment, when seen against the background of the events of the previous

ten days or so, suggests to me that the bank had already determined to make an example of Mr. Reilly.

Discussion

52. The bank's disciplinary procedures quoted above refer to the concept of gross misconduct which may include breach of the group email policy. Of course, every breach could not constitute gross misconduct, or perhaps misconduct at all, and it is a question of degree in each case. The evidence suggests that the bank took the view from the outset that gross misconduct was involved. Mr. Reilly was quite unaware of this and his evidence was that whilst the matters complained of might amount to misconduct, they were certainly not gross misconduct. Mr. Macken took a different view, concluding that Mr. Reilly's breach of the email policy did constitute gross misconduct of a degree which warranted dismissal. However, the first time that gross misconduct was mentioned to Mr. Reilly was in Mr. Macken's letter of the 5th of May, 2009, advising him that he would be dismissed unless he could persuade Mr. Macken otherwise at the stage two meeting. Whether the behaviour complained of was gross misconduct or simply misconduct is clearly a qualitative judgment in much the same way as is an assessment of the content of the emails. Whilst classifying the conduct as falling into a particular category may be viewed by the bank as relevant to the sanction it may impose within the framework of its own procedures, it is, in my view, of limited assistance in determining whether there were substantial grounds justifying the dismissal. In coming to a view on that issue, it is necessary to examine the factual background against which the conduct in issue arose.

53. Mr. Reilly's evidence was that the practice of circulating these inappropriate emails was widespread. The evidence put before me certainly demonstrated significant evidence of the circulation of this type of material not only within the bank

but throughout a large number of public companies and state and semi-state bodies. No evidence was led by the bank to contradict Mr. Reilly's evidence on this point, which I accept. Mr. Reilly struck me as an honest and truthful witness not given to exaggeration or hyperbole. I also believe that the bank was well aware of the practice. The bank itself relied on the IBOA circular of November, 2006 addressed to breaches of the email policy. I also accept Mr. Reilly's evidence that he was not aware of this circular although as I have said, the bank certainly was. Further Mr. Kelly's comment to Mr. Mahon that this was a rising trend indicates a degree of prior knowledge.

54. Despite this knowledge, there was no evidence of any significant attempt by the bank to address this issue. If it was a rising trend as Mr. Kelly said, it seems to me that steps could have been taken whether by way of circular notices, team briefings or whatever method to ensure that staff were left in no doubt as to the bank's attitude and the likely sanctions that might be imposed for a breach of the policy. In the absence of any such steps by the bank, its employees, whilst aware in general terms of the policy, might well have concluded that it was more honoured in the breach than in the observance. Mr. Mahon's uncontroverted evidence was that up to the time that Mr. Reilly was suspended, nobody had ever been either suspended or dismissed for breach of the email policy. Some dismissals did occur in the bank's subsidiary, the ICS and although events were unfolding at that time, the dismissals did not actually occur until post-February, 2009.

55. It seems to me that if a policy of zero tolerance was going to be adopted by the bank to breach of its email policy, its employees were entitled to some notice of this policy shift. This would not have been difficult to achieve. From Mr. Reilly's perspective, it clearly never occurred to him that in sending on chain emails, he was potentially exposing himself to dismissal. I have no doubt that had he known, he is very unlikely to have engaged in this conduct. He certainly had little reason to

anticipate what occurred. His evidence, again undisputed, was that there was a pornographic calendar hanging in the men's bathroom at the Blanchardstown branch for years without any attempt by management to remove it. This smacks somewhat of a double standard within the bank.

56. In assessing the reasonableness of the employer's conduct in relation to the dismissal herein, it seems to me that such an assessment must have regard to the surrounding circumstances, including the impact of the conduct on the employer as against the impact of the dismissal on the employee to determine the proportionality of the employer's response.

57. There is no doubting the inappropriateness of the emails and even Mr. Reilly appears to accept that sending them constituted misconduct deserving of some sanction. It is ultimately a matter of opinion as to whether some or all of the images were pornographic, obscene and so forth but certainly the bank were entitled to come to a view on this. Whether it is a view shared by the court or anyone else is not material as the authorities suggest. The same considerations apply to whether they ought to be regarded as offensive and certainly to some, perhaps most, people that would undoubtedly be the case. However, the fact remains that there is no evidence that anybody was actually offended by any of these emails. Nobody complained. The bank did not call any recipient to give his or her opinion on them. The bank say that they had the potential to reflect unfavourably on it and perhaps even for it to be sued. That may well be so but none of this actually happened over a fairly long period, perhaps because those in receipt of the emails either wanted to receive them or acquiesced in receiving them. Indeed, as the evidence makes clear, it was by mere chance that Mr. Reilly's behaviour was even detected. In short, there is no evidence that the bank suffered any loss, damage or detriment whatsoever as a result of the conduct complained of.

58. It should also be borne in mind that none of the emails in question originated with Mr. Reilly, with the sole exception of the one he accidentally sent to his bank email and forwarded only to himself. The number of emails was relatively small – 29 over a two year period out of a total outbox of 1139. I think it is also of some significance that there is at least some evidence that Mr. Reilly was not treated on a like footing to others in the bank similarly implicated. Thus, with regard to the "Anything to Declare" email, regarded as the most serious by Mr. Lonergan, despite clear evidence that this originated in Head Office and was sent on by an official subsequently promoted, no steps appear to have been taken by the bank to even investigate the other employees concerned. Furthermore, it seems that the bank went to considerable lengths to conceal the provenance of this email.

59. As against all this, the effect of the dismissal on Mr. Reilly must be considered. At the time of his dismissal, the country had just been plunged into the worst economic catastrophe in its history, brought about in no small measure it must be said, by the activities of our banks. Mr. Reilly's prospects of re-employment were extremely poor, as turned out to be the case, and as the bank well knew before it dismissed him. He had in the recent past purchased a house close to his parents in Blanchardstown with the benefit of a mortgage from the bank which he now found himself unable to repay. It is clear from his evidence that these events had a catastrophic effect on him and as he says, destroyed his life and ruined his career. Indeed, this was one of the submissions made by Mr. Mahon to Mr. Macken but unfortunately it fell on deaf ears.

60. Having regard to all of the foregoing, I am satisfied that the conduct of the bank in relation to Mr. Reilly's dismissal and the events leading up to it could not by any objective standard be described as reasonable. The evidence has driven me to the conclusion that at a very early juncture, probably on the 17th of February, 2009, a

decision was made within the hierarchy of the bank to make an example of Mr. Reilly in order to deter others from similar behaviour in the future. That decision may or may not have been made by GIR, but as a minimum was strongly influenced by it. Whilst lip service was paid to observance of procedures, it is clear that there was only ever going to be one outcome. The bank's response in this case was entirely disproportionate and could not in my view be regarded as falling within the range of reasonable responses of a reasonable employer to the conduct in issue.

61. Accordingly, I am satisfied that the bank has failed to discharge the onus of establishing that there were substantial grounds justifying the dismissal in this case.

Remedy

62. Counsel for Mr. Reilly, Mr. Banim SC, submits that the only remedy which will do justice in this case is re-instatement, as ordered by the EAT. For the bank, Mr. Connaughton SC submits that such a remedy would be wholly inappropriate because Mr. Reilly, by his conduct, must be held to have substantially contributed to his dismissal. That contribution must be considered in determining the remedy and in that regard, the bank rely on the judgment of Carroll J. in *Memorex World Trade Corporation v. Employment Appeals Tribunal* [1990] 2 I.R. 184. That was a case in which the employer sought to judicially review a decision of the EAT on the grounds that it had failed to hear all the evidence and had decided the case effectively at the end of the employer's case. The court accepted that the hearing was unsatisfactory for these reasons but declined an order of *certiorari* on the basis that the EAT had erred within jurisdiction and in any event, the appeal procedure that was available was an adequate remedy. It seems therefore that the court considered that its discretion should not be exercised in favour of granting judicial review. In the course of her

judgment, Carroll J., in commenting upon the conduct of the case before the EAT, said (at p. 188):

> "The Tribunal should hear all evidence available relating to the dismissal not only to determine whether there were substantial grounds but also because the extent to which an employee contributes to his dismissal is a matter which has to be taken into account in determining the appropriate remedy."

63. It is clear that these remarks by Carroll J. were *obiter* as they were not directed to the substantive issue in the case which she had already at that point in her judgment decided. Further, there is nothing from the Law Report to suggest that this point was argued before her in any depth or indeed at all as it did not form the basis for the arguments being advanced by either side.

64. In my view therefore, the court did not intend to lay down any rule of general application in making these remarks and in any event, for the reasons already explained, I do not believe I am bound by them.

65. It will be seen from the express wording of s. 7 that the concept of the conduct of the employee contributing to the dismissal is confined to situations where the court considers that compensation is the appropriate remedy. Thus, in *McCabe v. Lisney* (Unreported, High Court, 16th March, 1981) and *Carney v. Balkan Tours* [1997] 1 I.R. 153, the court was in each case concerned with a reduction in the award of compensation having regard to the extent of the employee's contribution to the dismissal. It would of course be unreal to suggest that the court could not have regard to the conduct of the employee in considering in a general sense whether the remedies of re-instatement or re-engagement were appropriate. However, in my view, it is equally true that the mere fact that the employee may have been guilty of some degree of misconduct, even if that were felt to have contributed to the dismissal, cannot of

itself preclude the possibility of those remedies being invoked. At the end of the day, the court has to grant the remedy which will do justice between the parties.

66. I have already concluded that the bank's conduct in this case was unreasonable and disproportionate. I would add to that by saying that the manner in which it predetermined and manipulated the entire process from the outset reflects little credit on it and visited a very grave injustice on Mr. Reilly.

67. In my view, an award of compensation would fall far short of providing adequate redress in this case and the only appropriate remedy is re-instatement.

Approved

17/4/15

THE HIGH COURT

[2013 No. 311 MCA]

BETWEEN

ANDRIUS STASAITIS

APPELLANT

AND

NOONAN SERVICES GROUP LTD

RESPONDENT

AND

THE LABOUR COURT

NOTICE PARTY

JUDGMENT of Kearns P. delivered on the 11th day of April, 2014.

INTRODUCTION

In these proceedings the appellant seeks an order pursuant to s.28 of the Organisation of Working Time Act 1997 and O.84C of the Rules of the Superior Courts 1986, as amended, declaring that the Labour Court erred in law in its written decision dated the 6th December, 2013, when it determined that the respondent had complied with the requirements of s.12 of the Organisation of Working Time Act 1997 and was entitled to rely upon the exemptions set out in the Organisation of Working Time (General Exemptions) Regulations, 1998 (S.I. No. 21 of 1998).

Should it be necessary, the appellant also seeks an order remitting his claim against the respondent to the Labour Court for reconsideration.

BACKGROUND FACTS

The appellant is a Lithuanian national who was employed by the respondents as a security officer at the premises of DHL Logistics at Airport Park in Dublin, from the 3rd September, 2009, until the 14th September, 2012. The site where the appellant worked is a warehouse facility where trucks, vans and other vehicles enter and leave the premises. The appellant's function was to monitor this traffic and for that purpose he worked from a security hut at the entrance. It is common case that he worked in eight hour shifts and that during those shifts he was not permitted to leave the security hut except for the purpose of checking vehicles entering and leaving the premises. He worked alone in performing these duties. It is also common case that his employers did not schedule any specific breaks for the appellant over the course of his shift, but rather left it to the appellant to take breaks during periods of inactivity which occurred during the shift.

The appellant was provided with kitchen facilities in the security hut and, while no specific breaks were provided for during his working shift, the respondents assert that there were significant periods of inactivity during the day during which he could take breaks. It is not in

dispute but that the appellant availed of such breaks during the time in which he worked for the respondent, but he contends that, in failing to provide for specific break periods, the respondents were in breach of their statutory obligations.

The appellant brought a case before the Rights Commissioner, which was heard on the 11th February, 2003. The Rights Commissioner having rejected the appellant's claim, the appellant brought an appeal to the Labour Court which heard his case on the 23rd August, 2013.

On the 6th September, 2013, the Labour Court determined as follows:-

> "The court notes that the claimant worked for the respondent for three years during which time he made no complaint in relation to the matter now before the court. The court is satisfied as a matter of probability that the claimant was told that he could take breaks during periods of inactivity during the course of his shift. The court is further satisfied that the presence of cooking facilities in the security hut must have made it clear to the claimant (if he was ever in any doubt) that he could avail of breaks while at work. It is not denied that the claimant did in fact take breaks.
>
> In these circumstances the court is satisfied that Regulation 5 of the Regulations was complied with in relation to the claimant. The Court is further satisfied that the Regulation 3 of the Regulations

was operative in this case and that the claimant's employment came within the exemption provided by that Regulation."

Having concluded that the appellant's complaint was "not well founded", the Labour Court disallowed the appeal and affirmed the decision of the Rights Commissioner. The matter comes before this Court by way of appeal from that decision.

RELEVANT STATUTORY PROVISIONS

The preamble to the Organisation of Working Time Act, 1997 states that it is:-

"An Act to provide for the implementation of Directive 93/104/EC of 23rd November, 1993 of the Council of the European Communities concerning certain aspects of the organisation of working time, to make provision otherwise in relation to the conditions of employment of employees and the protection of the health and safety of employees."

The word "break" is not defined in the Act, but "rest period" is defined as "any time that is not working time". In turn, "working time" means:-

"Any time that the employee is –

(a) at his or her place of work or at his or her employer's disposal, and

(b) carrying on or performing the activities or duties of his or her work,

and "work" shall be construed accordingly."

Section 12 of the Act provides:-

"(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.

(2) An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes; such a break may include the break referred to in subsection (1)

(3) The Minister may by regulations provide, as respects a specified class or classes or employee, that the minimum duration of the break to be allowed to such an employee under subsection (2) shall be more than 30 minutes (but not more than 1 hour).

(4) A break allowed to an employee at the end of the working day shall not be regarded as satisfying the requirement contained in subsection (1) or (2)."

However, it was provided by s.4 of the Act that the Minister could by regulation exempt from the application of s.12 any specified class or classes and by S.I. No. 21 of 1998 (Organisation of Working Time

(General Exemptions) Regulations, 1998) the Minister did exempt from the application of s.12:-

"An activity of a security or surveillance nature the purpose of which is to protect persons or property and which requires the continuous presence of the employee at a particular place or places, and, in particular, the activities of a security guard, caretaker or security firm."

The Regulations also provide (at Article 3) that:-

"3. The exemption shall not apply, as respects a particular employee, if and for so long as the employer does not comply with Regulation 5 of these Regulations in relation to him or her."

The Regulations goes on to provide as follows:-

"4. If an employee is not entitled, by reason of the exemption, to the rest period and break referred to in sections 11, 12 and 13 of the Act, the employer shall ensure that the employee has available to himself or herself a rest period and break that, in all the circumstances, can reasonably be regarded as equivalent to the first mentioned rest period and break.

5. (1) An employer shall not require an employee to whom the exemption applies to work during a shift or other period of work (being a shift or other such period that is of more than 6 hours

duration) without allowing him or her a break of such duration as the employer determines.

(2) In determining the duration of a break referred to in paragraph (1) of this Regulation, the employer shall have due regard to the need to protect and secure the health, safety and comfort of the employee and to the general principle concerning the prevention and avoidance of risk in the workplace."

SUBMISSIONS

On behalf of the appellant it was submitted that the time during which the appellant was required by the respondent to be present in the security hut can only be classified as "working time" both within the relevant domestic legislation and within the meaning of the Working Time Directive. "Rest periods", as defined in the legislation, are defined in opposition to working time, and an employee cannot be considered to be working and at the same time to be enjoying the benefit of a rest period.

While the present appeal was limited in its scope to a point of law, it was submitted that it was also open to the High Court to intervene if it found that the Labour Court had based its decision on an unsustainable finding of fact. In the instant case the Labour Court had erred in determining that the respondent fulfilled the requirements of Regulations

4 and 5 by awarding purported compensatory rest breaks, when at no material time was the applicant engaged in anything other than "working time" as defined by the Act. Alternatively, the findings of fact made by the Labour Court were erroneous. The periods of inactivity experienced by the appellant in the course of his duties were neither a rest period nor a break. The inferences drawn by the Labour Court from the presence of cooking equipment in the security hut were and are unsustainable having regard to the fact that the appellant was, at all times he was in the hut, required to be available to discharge work duties as they might arise. The fact that those duties may only have arisen intermittently does not alter the fact that the appellant was required to be available for the discharge of such duties and therefore could not have been on a rest period or break.

The right to a rest break during the course of work is guaranteed by Article 4 of the Working Time Directive and is an essential social right to which all workers in the EU are entitled. As such, any derogation from that right must be construed strictly. That had not happened in the instant case. The Act of 1997 and the Regulations made thereunder specifically provide that the exemption shall not apply unless the provisions of Regulation 5 are complied with. Regulation 5 had not been complied with because the employer had failed to determine the duration of any break to which the appellant was entitled and had failed also to have

regard to the additional requirement to consider the "comfort of the employee" as required also by the same article of the Regulation.

In summary, given that the appellant was clearly required to be available for work and was working within the meaning of the Act of 1997 during the entirety of his eight hour shift in the security hut, he could not therefore be said to have had any rest break, whether compensatory or otherwise, for any of that period of time. It followed therefore that the appellant was afforded no breaks pursuant to Regulation 4 or 5 of the Regulations of 1998. The respondent was therefore not entitled to rely upon the exemption set out in Regulation 3 which must be strictly construed as a derogation from a European law right.

On behalf of the respondents, it was submitted that it was not in dispute that the appellant was provided with his daily rest period of at least eleven hours between shifts and his weekly rest period. The dispute between the parties focussed exclusively on breaks at work which are set out in s.12 of the Act of 1997. While s.4 (3) of the Act provides that the Minister may by regulations exempt certain activities from the application of s.12, s.6 contains certain safeguards in respect of such exemptions and maintains the distinction between rest periods and breaks as follows:-

"6-(1) Any regulations, collective agreement, registered employment agreement or employment regulation order referred to

in section 4 that exempt any activity from the application of sections 11, 12 or 13 or provide that any of these sections shall not apply in relation to an employee shall include a provision requiring the employer concerned to ensure that the employee concerned has available to himself or herself such rest period or break as the provision specifies to be equivalent to the rest period or break as the case may be, provided for by section 11, 12 or 13.

(2) Where by reason of the operation of subsection (1) or (2) of section 4, or section 5 an employee is not entitled to the rest period or break referred to in section 11, 12, or 13 the employer concerned shall-

(a) ensure that the employee has available to himself or herself a rest period or break, as the case may be, that in all the circumstances, can reasonably be regarded as equivalent to the first mentioned rest period or break, or

(b) if for reasons that can be objectively justified, it is not possible for the employer to ensure that the employee has available to himself or herself such an equivalent rest period or break, otherwise make such arrangements as respects the employee's conditions of employment as will compensate the employee in consequence of the operation of subsection (1) or (2) of section 4, or section 5."

Regulation 4 of S.I. No. 21 of 1998 also provides as follows:-

"4. If an employee is not entitled, by reason of the exemption, to the rest period and break referred to in section 11, 12 and 13 of the Act, the employer shall ensure that the employee has available to himself or herself a rest period and break that, in all the circumstances, can reasonably be regarded as equivalent to the first mentioned rest period and break."

It was submitted there had been no error of law in circumstances where arrangements for a break for the appellant had been put in place which were, at the very least, equivalent to the breaks referred to in the Act. In fact, it was submitted, the arrangements put in place by the respondents provided for more rest for the employee than did those provided for by the Act.

It was further submitted that there was no error of law in the instant case and no unsustainable findings of fact. The Labour Court had correctly determined that the respondent was entitled to rely on the exemption contained in Regulation 3 of the Regulations of 1998, subject to compliance with Regulation 5 and there was no error of law on the part of the Labour Court. The Labour Court had found as a fact that the appellant was allowed to take breaks during periods of inactivity and was thus perfectly entitled to determine that the respondent had complied with the provisions of Regulation 5.

It was further submitted that the facts of the instant case were identical with those considered by the Employment Appeals Tribunal and the Court of Appeal in the case of *Hughes v. Corp. of Commissionaires Management Ltd.* [2011] I.R.L.R. 100 (Eat), [2011] I.R.L.R. (C.A.). In that case the Court of Appeal had stated:-

> "We would accept that if a period is properly to be described as an equivalent period of compensatory rest, it must have the characteristics of a rest in the sense of a break from work. Furthermore, it must so far as possible ensure that the period which is free from work is at least 20 minutes. If the break does not display those characteristics then we do not think it would meet the criteria of equivalence and compensation. In this case the arrangements plainly did meet those criteria, as the EAT found. Indeed, since the rest break begins again following any interruption, many would say that this was more beneficial than a Regulation 12 'Gallagher' break would be."

In *Gallagher & Ors. v. Alpha Catering Services Ltd.* [2004] EWCA Civ.1559 the court examined equivalence and compensation as regards a rest period and a rest break where the employees complained that they were not entitled to rest breaks under Regulation 12 of the Regulations of 1998. *Gallagher* can be distinguished from the instant case as in *Gallagher* the company was not entitled to rely on a derogation

and so the issue of compensatory rest did not apply. The decision in *Hughes* referred to *Gallagher* and examined what was meant by a '"Gallagher rest break" at para. 38:-

> "In a special case, such as the present one, the worker is not entitled to a 'Gallagher' rest break. The employer is, however, obliged 'wherever possible' to allow the worker to take 'an equivalent period of compensatory rest'. It is plain that this is not the same as a 'Gallagher' rest break. Certainly, the objective is to provide the worker with some break from his duties but the language of equivalence and compensation shows that it is something which is not identical to a 'Gallagher' break. It can denote something which makes up for the fact that the worker does not receive such a break, by providing a break that is as near in character, quality, and value to a 'Gallagher' rest break as possible. The precise elements of that equivalent period of compensatory rest will obviously vary according to the facts and circumstances of the individual case. In some cases, it may be possible for the employer to provide a break that very nearly meets the 'Gallagher' criteria – circumstances where the worker is technically 'on call' during the 20 minute break, but is, in practice, never called on, for example. In others, it may be that less freedom is able to be afforded to the worker during his break but he does get one or it

> may be that no break at all can possibly be given during the shift of each cycle, but that is compensated for by the worker being given a double break of 40 minutes in the second shift he works in the cycle. There are, no doubt, many other possible scenarios."

It was further submitted that Directive 93/104 must be construed in such a manner as to limit the scope of derogation to what is necessary. Exemptions under Regulation 3 of the Regulations of 1998 and the requirement to allow a break under Regulation 5 must be construed in a manner consistent with the requirement for the appellant to be continuously present in the security hut, which is the relevant exempted activity. It was submitted that having regard to the nature of the exempted activity and the health, safety and comfort of the employee, the rest breaks available to the appellant comply with the requirements of Regulation 5. The Directive in its recitals recorded:-

> "It is necessary to provide that certain provisions may be subject to derogations implemented, according to the case, by the Member States or the two sides of industry. As a general rule, in the event of a derogation, the workers concerned must be given equivalent compensatory rest periods."

The Directive thus acknowledges that it may not be possible to guarantee uninterrupted rest breaks for workers engaged in certain activities and Article 4 of the Directive sets out a pragmatic requirement

in respect of rest breaks where the working day is longer than six hours with a margin of appreciation being afforded to national legislation. The appellant in this case was undoubtedly afforded adequate rest by the respondent.

In reply counsel further stressed that the particular requirements of Irish law were such that the employer must fix the duration of any break. That had not occurred in the instant case and, for that reason, the appellant was entitled to succeed.

DISCUSSION

The Organisation of Working Time Act 1997 gave effect to Directive 93/104/EC (the "Working Time Directive") in Irish law. The Directive provides for rest periods and breaks (Articles 3-5) and, of course, it is not in dispute in this case that the appellant was provided with his daily rest period and his weekly rest period. The entire controversy between the parties herein concerns breaks at work and whether the arrangements put in hand for this appellant by his employers come within the terms of permissible derogations, both under the Directive and under the Act of 1997.

Both sides in the case before the Court were in agreement that principles of strict construction must be extended to any derogation which, as in this case, operates to exempt the employer from strict

statutory obligations. That requirement of "strict construction" can only mean in this particular context that an interpretation is adopted which most effectively secures the rights of an employee as envisaged by both the Directive and the legislation. Thus, the Court is satisfied that any arrangements put in place must satisfy the criteria of equivalence and compensation.

On a purely factual basis, it is difficult to see how it could possibly be argued that the appellant in this case is less well off by virtue of the arrangements put in place for compensatory rest in his case. It is common case that, when not required to operate the barrier or check vehicles in or out of the premises, the appellant could move to an area in the security hut where he had available to him kitchen and other facilities, although, of course, he was not at liberty to move away from the security hut. It is not in dispute but that these were the arrangements for breaks and that the appellant availed of them.

There is thus something of a paradox inherent in this case. The appellant is arguing for an interpretation of the relevant statutory provisions whereby he would be entitled to specific breaks of fixed duration during his working shift. If successful, such an outcome to the proceedings could in real terms have the effect of significantly reducing the appellant's periods of actual rest. Equally, in arguing the case for the employer, a result could occur whereby an employee could spend more

time resting – and perhaps significantly more – than the time spent in the actual discharge of his security functions. It seems to the Court that the parties to this appeal have both been driven to adopt positions which seem to be actually inimical to their own wider interests.

Both parties made detailed submissions as to the role of the Court in an appeal of this nature. The Court is satisfied that the jurisdiction of the High Court in this regard was comprehensively addressed by Hedigan J. in the case of *An Post v. Monaghan* (Unreported, High Court, Hedigan J., 26th August, 2013) [2013] IEHC 404, where he stated (at p. 14):-

> "This is an appeal on a point of law from a decision of the Labour Court. I will deal first with the role of the court in such an appeal. It is plainly a limited role. The court may only intervene where it finds that the Tribunal based its decision on an identifiable error of law or an unsustainable finding of fact. The court should be slow to interfere with the decisions of the Labour Court because it is an expert administrative tribunal. See *Henry Denny & Sons v. The Minister for Social Welfare* [1998] I.R. 539. Unless a claim of irrationality is sustained, the court cannot weigh the strengths or weaknesses of the arguments or evaluate its determination thereon. See *Wilton v. Steel Company of Ireland* [1999] E.L.R. 1 (O'Sullivan J., at p.5). The Court may, however, examine the basis upon which the Labour Court found certain facts. It can consider

whether certain matters ought or ought not to have been considered or taken into account by the Labour Court in determining the facts. See *N.U.I. Cork v. Ahern* [2005] IESC 40 (McCracken J.)."

I am quite satisfied in this case that there was no unsustainable finding of fact by the tribunal. It was perfectly entitled to hold that the arrangements put in place whereby the appellant could obtain rest during periods of inactivity at work provided a sound factual basis for its findings. The court was entitled to find that the arrangements either met the statutory requirements or satisfied a test that they complied with requirements of equivalence and compensation in lieu thereof.

The Court is therefore satisfied that the single issue which it must determine is whether the Labour Court fell into error in its interpretation and construction of the relevant statutory provisions.

DECISION

Under the requirements of the Organisation of Working Time (General Exemptions) Regulations 1998 the appellant is entitled to compensatory rest breaks and the respondent relies on Regulation 3 to claim that no breach of the appellant's rights has occurred. What falls to be determined is the classification of the terms "working time", "rest periods" and "breaks". As set out above all are defined under the Directive except for the term "break". The terminology of domestic

legislation must be determined in light of the wording and purpose of the Directive as per the European Court of Justice (E.C.J.) in *Marleasing SA v. La Comercial Internacionale de Alimentation SA* (Case C-106/89) [1990] E.C.R. I-4135. It is submitted on behalf of the appellant that the definition of the term "rest period" as referred to in *Sindicato de Medicos de Asistencia Publica (SIMAP) v. Conselleria de Sanidad y Consumo de la Generalidad Valanciana* (Case C-303/98) [2000] E.C.R. I-7997 and *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2003] E.C.R. I-8415 (cases where the issue of rest periods for doctors was considered) ought be differentiated from working time to mean that an employee cannot be both working and enjoying a break. The E.C.J. in that context held that in the case of a doctor, time "on call" was to be construed as working time. This however cannot be deemed to be analogous to the case presently before the court. The "rest period" is the time between shifts as opposed to a break which occurs within the working day. Although there is no set definition of "break" it must be interpreted in the particular circumstances of this case to mean that the employer must ensure that the employee is afforded the compensatory breaks as per the derogations under the Regulation. The Court must then move to the examination of the compensatory breaks afforded under national legislation.

In relation to s.6 of the Act of 1997 the appellant states that the employee was not provided with a compensatory or equivalent rest period

or break in circumstances where the employee was not entitled to the "ordinary" rest period or break under ss.11, 12 or 13. Under s.6 (2) (b) the employer has an obligation to make "such arrangements as respects the employee's conditions of employment as will compensate the employee". These arrangements must compensate the employee for the derogation under ss.11, 12 or 13. As per s.6 (3) the compensatory arrangements can not be monetary or of any material benefit. However the requirement under s.6 (2) may be met where the employee is provided with better physical conditions or amenities or services whilst at work as per s.6 (3) (b). In this instance the employee was provided with kitchen facilities and an area within which to take breaks during periods of inactivity. The employee in this case was permitted to take such breaks as he wanted during periods of inactivity and was provided with amenities and facilities to do so. Therefore the requirement to provide compensatory rest periods in relation to the derogation from the statutory rest periods and or breaks must be deemed to have been complied with.

Further, the decision in the Court of Appeal in the case of *Hughes v. Corp. of Commissionaires Management Ltd.* [2011] I.R.L.R. 100 (Eat), [2011] I.R.L.R. (C.A.) fortifies the view of this Court in finding that the criteria of equivalence and compensation for breaks were met by the arrangements put in place by the employer. The view of the Court of Appeal in the *Hughes* case was that, since the rest breaks in fact begin

again following any interruption, this type of break may be regarded as even more beneficial than the statutorily defined breaks.

I would dismiss the appeal.

[2009] IEHC 370

THE HIGH COURT

[2009 No. 223 J.R.]

COUNTY LOUTH VOCATIONAL EDUCATIONAL COMMITTEE

APPLICANT

AND

THE EQUALITY TRIBUNAL

RESPONDENT

AND

PEARSE BRANNIGAN

NOTICE PARTY

JUDGMENT of Mr. Justice Brian McGovern delivered on the 24th day of July 2009

1. Reliefs sought

1.1 Leave was granted by this Court (O'Neill J.) on 27th February, 2009, to the applicant to seek the following reliefs by way of judicial review proceedings:-

> 1. A declaration that the respondent has acted *ultra vires* in purporting to conduct an investigation of alleged discriminatory acts (within the meaning of the Employment Equality Acts 1998 to 2004) against the notice party which fall outside the terms of complaint made by the notice party received by the respondent on 4th August, 2006.

2. A declaration that in her investigation of alleged discriminatory acts (within the meaning of the Employment Equality Acts 1998 to 2004) against the notice party the subject of his complaint received by the respondent on 4th August, 2006, the officer of the respondent is required to confine her investigation to the two matters the subject of the said complaint.

3. A declaration that the respondent lacks jurisdiction to investigate any alleged complaint of the notice party to the provisions of the Employment Equality Acts 1998 to 2004 save the complaint received by the respondent on 4th August, 2006.

4. A declaration that the respondent is limited to investigating complaints of discrimination made by the notice party which have been lawfully referred to it and which occurred within a period of six months from 4th August, 2006.

5. An injunction by way of judicial review staying the investigation currently being conducted by the respondent into alleged discriminatory acts (within the meaning of the Employment Equality Acts 1998 to 2004) against the notice party save insofar as the said investigation is confined to the two allegations contained in the complaint received from the notice party by the respondent on 4th August, 2006.

6. A declaration that in the absence of the applicant being on notice of all the details of the allegations being pursued by the notice party before the hearing being conducted by the respondent, the respondent has acted in breach of natural justice and fair procedures in failing to permit the attendance of employees of the applicant who themselves are the subject of the allegations.

7. In the alternative a declaration that the respondent's refusal to permit the applicant's employees access to the hearing amounts to a denial of natural justice in circumstances where the notice party has been at liberty to make allegations and give evidence of matters of which the applicant has had no or sufficient prior notice.

8. In the alternative an injunction restraining the respondent from continuing its investigation until such time as the notice party is required by the respondent to provide full details of the nature of the allegations against the applicant, its servants or agents.

2. The facts

2.1 The notice party to these proceedings is a retired teacher. He was employed at two schools run by the applicant from 1981 until September 2007, when he was granted early retirement on the grounds of ill health pursuant to a scheme of the

Department of Education and Science. Between 1981 and 2003, he worked at St. Laurence's Community College, Drogheda and from 2003 until 2007, he worked at Drogheda Institute of Further Education.

2.2 On the 4th August, 2006, the respondent received a completed *"Form EE1"* from the notice party. Such a form is a standard administrative form, without any statutory basis, which is used by the respondent for dealing with complaints of discrimination relating to employment. In his form the notice party alleged that he had been discriminated against by the applicant on the grounds of his gender and on the grounds of his sexual orientation, which he indicted to be homosexual in part 3 of the form. As to the *"description of the claim"*, in part 4 of the form, the notice party indicated that he had experienced discriminatory treatment in *"promotion/re-grading"*, *"conditions of employment"*, *"harassment"* and *"victimisation"*. In part 5 of the form the notice party named Patrick Branigan & Co. Solicitors, as his *"representative"* and provided their contact details. In the section headed *"Part 8: Details of complaint"*, the notice party stated that the date of the first occurrence of the discriminatory act alleged was 16th December, 2005, and that the date of the occurrence of the most recent discriminatory act alleged was 10th March, 2006. The place at which the discriminatory acts took place was stated to be at Drogheda Institute of Further Education. In the same section a *"brief outline of complaint"* was requested. The notice party wrote as follows:-

"On Dec 16th a colleague tried to assault me with his fist to my face. Another colleague prevented actual contact by jumping between us. This was reported to the principal, who did nothing about it. On March 10 2006 another colleague placed a banana, half-peeled encased in a condom in my mail box in the staff room. I reported this to the principal whose reply was 'what do you want me to do about it'? He eventally [sic.] *said he would make an announcement to the staff about this that morning. He didn't bother to do this. I had to ask him on the following Monday why he didn't make the announcement. His reply was 'I got waylaid'. This was said in a dismissive tone. On that day (March 10) I went to my doctor and went on sick leave."*

2.3 Personal injury proceedings were instituted by the notice party in this Court against the applicant on 4th July, 2007, in which he seeks damages. The notice party claims that from 1997 onwards he was bullied, harassed, assaulted and undermined to the point where he had no option but to leave his employment. The applicant is defending these proceedings.

2.4 On 29th August, 2008, the Director of the respondent appointed Ms. Valerie Murtagh, Equality Officer, to investigate the notice party's claim in accordance with the provisions of the Employment Equality Acts 2000-2008. The respondent requested further details of the complaint from the notice party by way of written submissions, which were duly lodged with the respondent and are dated 19th

September, 2007. Reference was made by the notice party in those submissions to alleged incidents of discrimination dating back to 1997. A copy of his submissions was furnished to the applicant. The respondent requested a response to the content of those submissions by 31st January, 2008. No such response was received. The deadline for receipt of a response was extended by Ms. Murtagh to 7th November, 2008. However, the replying submissions were not made available until 21st January, 2009, the eve of the hearing date.

2.5 The hearing into the notice party's complaint commenced on 22nd January, 2009. The parties, their legal representatives and seven witnesses for the applicant, who were employees of the applicant, were present. Ms. Murtagh explained to the parties that it was practice in certain cases not to have all witnesses present at the hearing and she ruled that the applicant's witnesses be excluded from the hearing, with the exception of the Principal and Vice Principal of the school in which the applicant last worked. She indicated that she would give time to the parties for discussion prior to the hearing of evidence. The reasons for taking this course were outlined in the following terms by Ms. Murtagh at para. 17 of her affidavit sworn on 7th April, 2009:-

> *"I say that pursuant to the Employment Equality Acts I am not permitted to administer oaths during a hearing. The Acts also mandate that the hearing shall be in private. I say and have been advised that I have discretion as to how the hearing is to proceed, so long as it is conducted*

fairly. I say that I am concerned that fairness and privacy is observed in the hearing process. For that reason I do not permit all witnesses to attend the hearing in general other than witnesses that are central to the case. I say that to permit a host of witnesses may lead to overcrowding in the hearing room and create discomfort for all parties. In this case, as in others, the parties and their advisors were present in the hearing room while the other witnesses remained outside until it was their turn to present their evidence."

2.6 A joint application for an adjournment of the hearing was then made to afford each side an opportunity to consider their various positions in respect of the two sets of proceedings in being and to explore whether a settlement could be reached. An adjournment was granted to 12th February, 2009. The notice party's legal representative indicated that further submissions would be delivered on behalf of her client addressing the legal issues discussed by the applicants in their submissions of the previous day. Those further submissions are dated 9th February, 2009. They claimed that the notice party was a victim of continuing discrimination on the grounds of his sexual orientation which impacted adversely on him for many years and submit that the respondent should not be confined the terms of the complaint as set out in the notice party's Form EE1 in its investigation into the matter.

2.7 At the resumed hearing on 12th February, 2009, the applicant raised two preliminary matters. Firstly, it applied for a stay of the hearing pending the determination of the personal injury proceedings. Ms. Murtagh decided, however, that she had a statutory function to exercise and that the hearing would proceed on the basis that the two claims - the equality claim and the personal injuries claim - were separate. Secondly, the applicant requested a ruling to be made in respect of the nature of the evidence which the notice party would be permitted to rely on at the hearing. The applicant contended that the notice party should not be allowed to give evidence in respect of the events prior to 16th December 2005, the date of the first alleged discriminatory act, as per the Form EE1. The notice party made the case that the discriminatory acts were continuing acts, capable of being investigated. Ms. Murtagh concluded that she should hear all of the evidence before making any decision in fact or in law. She stated that she had yet made a decision as to the lawful ambit of her investigation and would do so at the end of hearing the evidence.

2.8 Following the rulings in these two preliminary matters the hearing commenced, with the notice party first to give evidence. At the hearing of these judicial review proceedings, the applicant pointed to new issues which emerged during the course of the applicant's testimony on 12th February, 2009, in respect of which it objects and in respect of which it claims not to have had any notice. Those issues are identified by Mr. Eugene Winters, then Acting Chief Executive Officer at County

Louth VEC at paragraphs 25 -26 of his affidavit sworn on 27th February, 2009. Those paragraphs state as follows:-

> *"25. ... Mr. Brannigan gave evidence that in early 1999 he found himself supervising students every morning and lunch time and received his first break at 2.05pm after starting work at 9.00am. Mr. Brannigan contended that this was discrimination on grounds of his sexual orientation and further when he spoke to the then Principal of the school (a Mr. O'Dowd) about this matter he was informed 'I am changing fucking nothing until I am told to." Mr. Brannigan's evidence was that this situation continued for one year.*
>
> *26. The Notice Party also informed the Respondent's Officer that Ms. Breda Nugent, a teacher in the school, had first hand experience of the discrimination which he had suffered. He gave evidence to the effect that in 1999 a rock was thrown into his class room and he complained about this incident directly to Ms. Nugent. His evidence was that he asked Ms. Nugent to go to the Principal about this matter. He further stated that he handed Ms. Nugent the rock and asked her to go and show it to the Principal and to go through the appropriate channels and tell the Principal that a rock had been thrown at him. Mr. Brannigan's evidence continued to the effect that Ms. Nugent went to the Principal and returned*

to Mr. Brannigan and indicated that she had been to see the Principal of the school, Mr. Dowd who had simply shrugged his shoulders at her."

2.9 Mr. Winters then went on to describe the nature of the applicant's difficulty with the above testimony being given, which was conveyed to Ms. Murtagh:-

"27. At this point in the hearing, when it became clear the Officer of the Respondent was prepared to let the Notice Party rely on matters which had allegedly occurred over the previous ten or twelve years and of which the Applicant had absolutely no notice, and which had not been referred to previously the Notice Party, I, and my legal advisers, became even more concerned. Counsel thereupon objected to the evidence being given by the Notice Party. It was pointed out that the evidence directly concerned members of the Applicant's staff who were not present in the room and who, in the absence of any details having been supplied prior to the hearing regarding the matters being advanced on behalf of the Notice Party, could not provide the Applicant's advisers with instructions in order to challenge the veracity of the Notice Party's account of events or the alleged import of his evidence."

2.10 The applicant applied for an adjournment. While the Equality Officer indicated she did not want any further delays in the conduct of the hearing, she made it

clear that the applicant would be given the opportunity to bring witnesses to respond to any allegations made against them.

2.11 After lunch Ms. Nugent attended the hearing but was asked to leave by Ms. Murtagh. The applicant makes the case that the exclusion of its witnesses from the hearing room is a breach of fair procedures. At the conclusion of proceedings on that day it was agreed by both sides that the matter should be adjourned for a further two hearing days. A date could not be agreed.

2.12 Correspondence was exchanged between the applicant and the respondent in respect of suitable dates. The applicant's solicitors pointed out to the respondent that the dates of 23rd and 24th February, 2009, proposed by the Equality Officer, were not suitable as it would not be possible to provide cover for teachers who would have to attend. The Equality Officer said she would defer the hearing for one week and resume the proceedings on Monday 2nd March, 2009, and continue into the following day if necessary.

2.13 These proceedings were instituted on the 27th February, 2009.

3. The law

3.1 The respondent was established under the Employment Equality Act 1998, as amended ("the Act") to hear and determine complaints of discrimination in employment on prohibited grounds of gender, marital status, family status, sexual

orientation, religion, age, disability, race and membership of the Traveller community. Section 75 of the Act establishes the position of the Director of the Equality Tribunal. Section 75(4) provides:-

> *"(4) From among the Director's staff the Director may-*
>
> *(a) appoint persons to be equality officers, and*
>
> *(b) appoint persons, including equality officers, to be equality mediation officers."*

A claim of discrimination may be delegated to an Equality Officer pursuant to s.75 (4B) of the Act which provides:-

> *"(4B) The Director may delegate to an equality officer or an equality mediation officer any function conferred on him or her under this Act or any other enactment."*

3.2 It is clear that it is a function of the Director to deal with claims in respect of discrimination or victimisation from the terms of s.77 (1) of the Act which provides:-

> *"(1) A person who claims-*
>
> *(a) to have been discriminated against or subjected to victimisation,*
>
> ...

may, subject to subsections (3) to (9), seek redress by referring the case to the Director."

The following time limit is prescribed in s.77 (5)(a):-

"(5) (a) Subject to paragraph (b), a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence.

Section 77 6(A) of the Act goes on to provide:-

"(6A) For the purposes of this section-
(a) discrimination or victimisation occurs-
(i) if the act constituting it extends over a period, at the end of the period.
...."

This provision envisages a case of continuing discrimination with the time limit referable to the point at which the discrimination ended.

3.3 The Equality Officer can deal with the complaint by way of mediation pursuant to s.78 or by way of investigation pursuant to s.79, as happened in this case. Section 79 sets out the procedure for the investigation process. It states:-

*"**79.** - (1) Where a case which has been referred to the Director under section 77-*

(a) does not fall to be dealt with by way of mediation under section 78, or

(b) falls to be dealt with under this section by virtue of section 78(7),

the Director shall investigate the case and hear all persons appearing to the Director to be interested and desiring to be heard.

(1A)(a) Claims to have been discriminated against on more than one of the discriminatory grounds shall be investigated as a single case, and

(b) claims both to have been discriminated against on one or more than one of such grounds and to have been penalised in circumstances amounting to victimisation may, in an appropriate case, be so investigated,

but a decision shall be made on each of the claims.

(2) An investigation under this section shall be in private.

...

(3A) If, in a case which is referred to the Director under section 77, a question arises relates to the entitlement of any party to bring or contest proceedings under that section, including:

(a) whether the complainant has complied with the statutory requirements relating to such referrals,

(b) whether the discrimination or victimisation concerned occurred on or after 18 October 1999,

(c) whether the complainant is an employee, or

(d) any other related question of law or fact,

the Director may direct that the question be investigated as a preliminary issue and shall proceed accordingly.

(4) Subject to subsections (2) and (3), the Minister may by regulations specify-

(a) procedures to be followed by the Director in carrying out investigations (or any description of investigations) under this section, and

(b) time limits applicable to such investigations, including procedures for extending those limits in certain circumstances,

but, before making any such regulations, the Minister shall consult the Authority and the Director.

...

(6) At the conclusion of an investigation under this section (including an investigation of a preliminary issue under subsection (3) or (3A), the Director shall make a decision and, if the decision is in favour of the complainant –

(a) it shall provide for redress in accordance with section 82, or

(b) in the case of a decision on a preliminary issue under subsection (3) it shall be followed by an investigation of the substantive issue.

..."

3.4 Section 82 provides for the redress that may be awarded on foot of a decision under s.79. In respect of an equal treatment claim a maximum of two years pay may be awarded, which in the notice party's case would amount to approximately €140,000. Section 83(1) provides that not later than 42 days after a decision of the Equality Tribunal, it may be appealed to the Labour Court. Section 90(1) provides that a decision of the Labour Court may be appealed to the High Court on a point of law.

4. The issues

4.1 Two principal issues arise for determination in these proceedings. The first is whether the respondent has jurisdiction to hear evidence at the hearing of the notice party's allegations going back over ten years which were not contained in the Form EE1? Is the jurisdiction of the respondent to investigate a complaint limited to a consideration the incidents occurring on the two dates specified in the form only? The second issue is whether the exclusion of the applicant's witnesses from the hearing room constituted a breach of fair procedures.

5. Jurisdiction of the Equality Tribunal

The applicant's submissions

5.1 Mr. McDonagh S.C. submitted that the object of these proceedings was not to stop the investigation into notice party's complaint but to seek to put parameters on the investigation into it. He contended that the allegations made by the notice party during the hearing were outside the terms of the original complaint in the

Form EE1 and introduced new issues, of which the applicant had no notice and could not be lawfully be investigated by the respondent as it was outside of its jurisdiction. He further submitted that the written submissions of the notice party dated 19th September, 2007, though put on notice to the applicant in advance of the hearing, strayed considerably outside the ambit of the terms of complaint referred by the notice party to the respondent and were lodged more than twelve months after the applicant retired. The alleged discriminatory acts of which the notice party complained of in the Form EE1 related to the period between 16th December, 2005 and 10th March, 2006. What the respondent was seeking to do, Mr. McDonagh argued, was to squeeze several allegations going back over a decade into the complaint in its original form. It was submitted that it was the Form EE1 that conferred jurisdiction on the Tribunal and was a condition precedent to the Tribunal's jurisdiction to investigate into the matters alleged.

5.2 The applicant accepted that s.77(6A) allowed for the respondent to investigate matters which allegedly occurred more than six months prior to the date upon which a particular claim was submitted to it but this was only in circumstances where a complaint was lawfully made to it in respect of such matters. It submitted that the notice party had not indicated that there was continuing discrimination against him over many years on the form and that as a result allegations pertaining to those previous years could not be investigated. In addition, it contended that as the further allegations in the written submissions were made over twelve months

after the notice party had retired, they were outside the six month time limit prescribed by s.77(5)(a).

5.3 The applicant relied on the case of *Bank of Scotland (Ireland) v. Employment Appeals Tribunal* (Unreported, High Court, Ó Caoimh J. 15th July, 2002) in support of its contention that the presentation of a potential claim to a Tribunal within the requisite time frame was a condition precedent to the jurisdiction of the Tribunal. It sought to distinguish the case of *Aer Lingus v. The Labour Court* (Unreported, High Court, 26th February, 1988, Carroll J.) (Unreported, Supreme Court, 20th March, 1990), upon which the respondent relied, on the basis that the Labour Court was concerned not with a time limit but with whether claims of unlawful discrimination could be based on events which occurred prior to the Employment Equality Act 1977.

5.4 The applicant denied that it was acting in a premature fashion by instituting judicial review proceedings at this juncture. It argued that if it was to wait until the end of an appeal to the Labour Court before bringing a judicial review that it would not be efficient or cost effective, in that the whole matter may ultimately have to be re-investigated.

The respondent's submissions

5.5 Mr. Durcan S.C., for the respondent, noted at the outset of his oral submissions the *"broad church"* of complainants who came before the respondent, some of

whom were legally represented and some of whom were not. He warned of the dangers of introducing unnecessarily formal or complex procedures in respect of such a wide group. He submitted that ss.77 (1) and 79 conferred jurisdiction on the respondent to investigate complaints. Part of the investigation process would, in his submission, be taken up with an investigation into whether there had been compliance with the statutory conditions or not. The respondent argued that there is a discretion on the part of the Director of the respondent or the Equality Officer, if carrying out an investigation, to deal with this matter by way of a preliminary issue or not. If it was decided not to deal with it by way of a preliminary issue, it formed part of the substantive hearing. Counsel for the respondent noted that no application was made for a preliminary hearing in this case. He cited *Aer Lingus v. The Labour Court* (Unreported, High Court, 26th February, 1988, Carroll J.) (Unreported, Supreme Court, 20th March, 1990) in support of his argument that the holding of a preliminary hearing was not necessary to deem a complaint receivable and that it was permissible to consider the compliance with the statutory conditions of the case as part of the substantive hearing.

5.6 The respondent contended that the Form EE1 was only intended to set out the generality of the complaint and its basic details. It submitted that to limit a complainant to the matters set out in the referral form would be to unjustly and unlawfully fetter the manner in which the Oireachtas intended the investigation to proceed as set out in the Act. The complaint form should not, it argued, be converted into a rigid pleading, which could not be developed or amended. In this

regard, counsel for the respondent drew an analogy with a High Court writ, which clearly can be amended in appropriate circumstances. It would be extraordinary, he contended, that in a tribunal setting a claim could never be expanded out, especially given that the form itself requires *"brief details"* of the complaint and where it is conceivable that a form may be filled out without legal advice. In addition, he noted that the Act provided for a situation where a continuous act of discrimination is alleged to have occurred.

5.7 The fact that the Equality Officer in this case had decided to hear all the evidence was, in his submission, in accordance with s. 79(1A). He argued that as she had not yet made a decision as to the temporal limit of the complaint that these proceedings were premature. In addition he submitted that it would be untenable for the respondent not to be permitted to inquire into historical evidence given that the Act envisages continuous acts of discrimination.

The notice party's submissions

5.8 Mr. Kenneally S.C., for the notice party, submitted that the applicant was on full notice of the allegations the notice party was making against it. The Form EE1 was, in his submission, to be read in conjunction with the detailed submission of 19th September, 1997, where the ambit of his complaint was broadened temporally. It was noteworthy, he stated, that though that submission was delivered to the applicant some one year and three months prior to the hearing,

that the applicant had not delivered its response to it until the day before the hearing commenced.

6. Conclusion

6.1 In my view, the case of *Bank of Scotland (Ireland) v. Employment Appeals Tribunal* (Unreported, High Court, Ó Caoimh J. 15th July, 2002) does not assist the applicant, as it is clear, on the facts, that the claim by the notice party was made within time and in that way it differs from this case. The *Aer Lingus Teoranta v. Labour Court* (Unreported, High Court, 26th February, 1988, Carroll J.) (Unreported, Supreme Court, 20th March, 1990) case supports the argument of counsel for the respondent who said that the holding of a preliminary hearing was not necessary to deem the complaint receivable and that it was permissible for the respondent to consider the compliance with the statutory conditions of the case as part of the substantive hearing.

6.2 I accept the submission on behalf of the respondent that the Form EE1 was only intended to set out, in broad outline, the nature of the complaint. If it is permissible in court proceedings to amend pleadings where the justice of the case requires it, then *a fortiori*, it should be permissible to amend a claim as set out in a form such as the EE1, so long as the general nature of the complaint (in this case, discrimination on the grounds of sexual orientation) remains the same. What is in issue here is the furnishing of further and better particulars, although, it must be said, in the context of an expanded period of time. But, under the legislation it is

clear that the complaints which are made within that expanded period are not time-barred. That is not to say that complaints going back over a very lengthy period would have to be considered as an issue of prejudice might arise. But this is something that would fall to be dealt with in the course of the hearing in any particular case.

6.3 Of course, it is necessary that insofar as the nature of the claim is expanded, the respondent in the claim must be given a reasonable opportunity to deal with these complaints and the procedures adopted by the Equality Officer must be fair and reasonable and in compliance with the principles of natural and constitutional justice.

6.4 It is clear that on 19th September, 2007, details of the notice party's claim were given to the applicant. These details went beyond the information contained in the EE1 form but were part of the same complaint, namely, discrimination on the grounds of sexual orientation. The replying submissions were not made available until 21st January, 2009, which was the date before the hearing. I am satisfied that the applicant had ample notice of the claim being made against his employees and should have been in a position to deal with them at the hearing before the Equality Officer. The applicant could argue that there was one matter on which it did not have notice in advance of the hearing, namely, the incident of the rock being thrown into the classroom in 1999, and the complaint made to Ms. Nugent. On the other hand, there is a reference in the statement to the Tribunal made on 19th

September, 2007, in which the notice party refers to the fact that stones were thrown at him in the classroom. It is clear, however, that Ms. Nugent attended the hearing. Indeed, one of the issues arising in this application was whether or not it was fair that she was asked to leave the room while the notice party was giving evidence. It seems to me that she would have been in a position to deal with the evidence on this point once she was informed of what the notice party had said and she could give her account of the event.

6.5 I am satisfied, therefore, that the applicant was in a position to deal with the claims made by the respondent, even if they went beyond the ambit of what is contained in the Form EE1.

6.6 Apart from the issue concerning Ms. Nugent referred to above, the applicant was concerned that its witnesses remain outside the room while the notice party gave his evidence. This forms part of the complaint in this application. The Equality Officer was entitled to run the hearing of the complaint as she saw fit, so long as it complied with the principles of natural and constitutional justice. It is quite easy to understand why an Equality Officer might regard this as a reasonable procedure because complainants, in that particular forum, might feel intimidated if the employees against whom they are complaining were all present in the same room. What is essential, however, is that the employees complained against, know the case being made against them and that they either present themselves or are represented at the hearing so that they can confront the accuser and cross-examine

him. It appears that there was a representative of the applicant present who was in a position to cross-examine the notice party on his evidence, and the relevant witnesses for the applicant were available to give their own account of events and, where necessary, to instruct the applicant as to the accuracy of the notice party's account.

6.7 It is important to emphasise that the hearing before the Equality Tribunal is not a hearing in a court of law with all the attendant formality that would exist in such a forum.

6.8 Having considered the evidence in this matter and the submissions of counsel, I have reached the conclusion that the applicant is not entitled to the reliefs sought for two reasons:

(i) the respondent had not made a final determination on the issue of the temporal limit of the complaint;

(ii) the procedures which were adopted by the respondent were not unfair or contrary to natural or constitutional justice.

Approved 26-07-09

B. A. Mc C.

7344

THE HIGH COURT

(ON CIRCUIT)

SOUTHERN EASTERN CIRCUIT

COUNTY WEXFORD

UNFAIR DISMISSALS ACT, 1977, SECTION 10(4)

BETWEEN

SAMUEL J. FRIZELLE

PLAINTIFF

AND

NEW ROSS CREDIT UNION LIMITED

DEFENDANT

Judgment of Mr. Justice Feargus M. Flood delivered the 30th day of July, 1997.

THE LEGAL PRINCIPLES

Where a question of unfair dismissal is in issue, there are certain premises which must be established to support the decision to terminate employment for misconduct.

1. The complaint must be a bona fide complaint unrelated to any other agenda of the Complainant.

2. Where the Complainant is a person or body of intermediate authority, it should state the complaint, factually, clearly and fairly without any innuendo or hidden inference or conclusion.

3. The employee should be interviewed and his version noted and furnished to the deciding authority contemporaneously with the complaint and again without comment.

4. The decision of the deciding authority should be based on the balance of probabilities flowing from the factual evidence and in the light of the explanation offered.

5. The actual decision, as to whether a dismissal should follow, should be a decision proportionate to the gravity of the complaint, and of the gravity and effect of dismissal on the employee.

Put very simply, principles of natural justice must be unequivocally applied.

RELEVANT FACTS

This is a claim for relief for unfair dismissal by the Plaintiff against the Defendant in which the said principles are germain.

In 1974 the Plaintiff was employed as a Manager of the Defendant Credit Union.

The Defendant Credit Union were a participant in a block fidelity and indemnity bond which had been negotiated by the Irish League of Credit Unions with an American Insurance Company called "Cumis". The Plaintiff as such Manager was bonded under the said policy.

The Plaintiff has held the said post since 1974 and was, inter alia, a loans officer appointed by the Defendant. As such loans officer he worked under the supervision of the Credit Committee and had delegated to him the power to approve loans that are fully secured

by shares or other adequate collateral or loans which qualify as emergency loans within the definition and limitation as to amounts and terms of repayment and security required by such loans. As such loans officer he could approve or refuse, secured loans up to the sum of £3,000 and, unsecured to the sum of £1,000. He was obliged to furnish the Credit Committee with a record of each such loan approved or not approved by him within seven days of the application therefore. The said Credit Committee was obliged to report in writing to the Board of Directors at least once in every month in relation to the functions delegated to it by the Board of Directors.

The Plaintiff remained in the Defendant's employment until his employment was terminated on August 20th, 1993, in manner hereinafter appearing.

The Plaintiff had obtained a mortgage from the Defendants to purchase his dwelling house in or about 1988. The said loan was duly secured. In 1992 the Plaintiff decided to change his house and bought another one. Again appropriate mortgage facilities were arranged with the Defendants. Unfortunately the sale of his original house failed as the purchaser withdrew from the contract. The necessity for bridging finance therefore arose and it was agreed by the Defendants on November 2nd, 1992 that such facility would be afforded to him. Repayment to be paid by weekly instalments of both capital and interest in the sum of £269 per week. It should be noted that this was in fact the first occasion on which the Defendants had granted such a facility, though arrangements for the granting of such facilities had been put in train.

In January, 1993 the Plaintiff's first house having remained unsold, he found he could not keep up the said weekly payments. On January 7th, 1993 the Plaintiff "re-phased" repayments of his account on the computer down to £165 per week. This prevented his account appearing "delinquent" on the computer. This action he took, without informing

anyone on either the Credit Committee or the Chairman or any members of the Board. The said sum of £165 paid all interest accruing due and reduced the principal sum by £70 per week. While the Plaintiff undoubtedly had certain discretionary authority in relation to the issue of secured and unsecured loans and in practice in relation to limited defaults this action by him was a non-authorised action. It did not of course in any way affect or reduce his financial liability to the Defendants. It had the effect of reducing the capital repayments which would be made before the loan was redeemed on the sale of his house.

The Credit Committee on January, 8th 1993 on a random check from the accounts on the computer found out the said re-phasing. Five of the six members of the said Committee thereupon advised the Supervisory Committee and also the Chairman of the Board and requested a meeting of the Board.

In evidence Mr. Lyons, a member of the said Committee stated that the Committee felt that it was their duty to bring this irregularity to the attention of the Irish League of Credit Unions.

In my opinion they had no such duty to acquaint the Irish League of Credit Unions. Their duty was to bring the matter before the Board and to abide the decision of the Board.

A meeting of the Board was arranged for January, 18th 1993. A written memorandum was prepared by five members of the Finance Committee dealing with three topics.

(a) The first of the said topics was in relation to the conduct of the Chairman of the Board at an earlier meeting in relation to two loan applications of Messrs. Keogh and Ryan. The Chairman's conduct was criticised as also was that of the treasurer. It is quite clear from the first paragraph of the said memorandum that the Chairman and some members of the Board were at odds with some members of the Credit Committee.

(b) The second paragraph of the said memorandum refers to being:-

"very unhappy at the current state of the Manager's bridging finance arrangements. The loan arrangements and the fact that payments were rescheduled without consultation with the Credit Committee."

(c) The final paragraph of the said memorandum is a complaint about the Plaintiff's conduct in relation to his approval of loans "not fully secured by shares or other adequate collateral".

Before the said Board Meeting the Credit Committee did not ask the Plaintiff for any explanation and at the said Board Meeting the Plaintiff was excluded from participation. The Board Meeting became manifestly acrimonious and the said five members of the Credit Committee resigned. The Board proceeded to pass a resolution of confidence in the Plaintiff as their Manager.

As a result of the said meeting, the said memorandum became part of the minutes of the meeting. At or about the same date or at the same meeting, it is not quite clear which, a representative of the Irish League of Credit Unions, a Mr. Tony Burke was making a regular inspection of the Defendants. He noted in the minutes the reference to unauthorised changes by the Plaintiff to his account. He considered that he should report this to the American Insurers, "Cumis".. As a result of that report Cumis removed bonding from the Plaintiff by endorsement of writing dated the 8th March, 1993.

In subsequent correspondence it emerges that the basis upon which the decision by "Cumis" was made was "it is clear that this is a case of pre-meditated dishonesty and Cumis are not willing to bond Mr. Frizelle".

In the hearing before me which is a full plenary hearing there was not one scintilla of evidence to justify anyone coming to the conclusion that there was any dishonest intent by the Plaintiff in rescheduling or re-phasing on his repayments. In fact the loan was repaid on or about February, 10th, 1993. And the Defendants did not suffer one penny of a loss nor was it ever the intention of the Plaintiff to cause them loss or to obtain any financial benefit whatsoever. He was undoubtedly guilty but acting ultra vires his powers in re-phasing his loan repayments. The decision of the Cumis meant that any action taken by the Plaintiff as a member of the staff of the Defendants would not be bonded and any loss resulting therefrom would not be covered. Thus the Defendants would be exposed and without indemnity of any kind.

This meant that the Plaintiff could no longer remain in the employment of the Defendants and as stated in the letter to him of June 25th, it was with regret that his employment had to be terminated.

That termination arose from the conduct of the five members of the Credit Committee. It is clear from the evidence of Mr. Lyons, who was one of the five that they considered that there was dishonesty involved and that that is were the concept of dishonesty comes from in the decision of the American Insurance Company. In my view it was not their function to make any decision or to draw any inference. Their function was to report to the Board of Directors. Further it was their function and their duty to ask the Plaintiff before they reported to the Board of Directors for his explanation and to report that explanation to the Board of Directors. This they did not do. Further in my view, their complaints to the Board of Directors about the Plaintiff was part and parcel of a much wider agenda and was tainted as a result. Finally at the point at which they were making their complaint, they were party to excluding the Plaintiff from the meeting and at the point at which their complaints

became part and parcel of the record of that meeting, the Plaintiff had had no opportunity giving his version to the Board and accordingly when the record was inspected and reported to Cumis by Mr. Burke no such explanation was present, though in fact Mr. Burke did get a verbal explanation from the Plaintiff ex post facto.

In my opinion the whole procedure is so tainted with irregularity, impropriety, and other agendas, that this dismissal must be considered an unfair dismissal. In my view, having regard to all the circumstances, there was no substantial ground to justify dismissal.

Under the provisions of the Unfair Dismissals Act, 1977, the Court has power to order the re-instatement of an employee who has been unfairly dismissed. In this case to take that action would be unreal. This Court has no means by which it can compel Cumis, the American Insurance Company, to grant bonding to the Plaintiff. Without bonding it would be inequitable to require the Defendants to reinstate the Plaintiff. Accordingly, I am compelled to turn to the alternative statutory power of awarding the Plaintiff compensation in the form of a payment equalling 104 weeks of his remuneration at the date of dismissal. I also award him the costs of the proceedings in the Circuit Court and in this Court together with such other costs before the Employment Appeals Tribunal as he may be entitled to under statute. I certify for Senior Counsel in this Court.

30th July 1997.

CSJFROSS.SAM

THE HIGH COURT

[2013 No. 334 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO

SECTION 7(4)(B) OF THE PAYMENT OF WAGES ACT 1991

BETWEEN/

HEALTH SERVICE EXECUTIVE

APPELLANT

AND

JOHN McDERMOTT

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 19th June, 2014

1. The respondent, Mr. McDermott, is a medical consultant attached to Connolly Hospital, Blanchardstown, Dublin. He is employed pursuant to the 2008 Consultant Contract, on a Type B contract. Clause 23 of the Contract provided for a particular salary scale, with certain additional payments due on particular dates from 2007 onwards. It is not in dispute but that the salary increases due from 1st June, 2009, onwards were not paid by his employer, the Health Service Executive.

2. The reasons why these payments were not sanctioned or paid are fairly clear. By June, 2009 it was plain that the State was facing a very significant financial crisis which, among many other painful things, called for an immediate reduction in the public sector pay bill.

3. By notice of complaint dated 16th June, 2011, the respondent referred a claim to the Rights Commissioner under the Payment of Wages Act 1991 ("the 1991 Act"). In that complaint the respondent maintained that his pay had been unlawfully deducted between 1st January, 2011, and 30th June, 2011. At a hearing before the Rights Commissioner the HSE argued that the complaint was time-barred because it contended that the cause of action emanated from a decision of the then Minister for Health and Children (Deputy M. Harney T.D.) in either June, 2009 or (at the very latest) August, 2009 not to sanction the increase which had been otherwise scheduled under the contract. Section 22(4) of the Health Act 2004 requires that terms of conditions of remuneration of all employees working in the health service must be approved by the Minister and, indeed, the consent of the Minister for Finance. Absent such ministerial consent the HSE could not, as a matter of public law, lawfully make the payment. Whether this failure gives an employee such as Mr. McDermott other remedies – whether a claim under the 1991 Act or an action for damages for breach of contract – is not a matter which I need presently consider.

4. The time-barring argument was rejected by the Rights Commissioner in a decision dated 7th January, 2012, who decided that he had jurisdiction to hear the complaint in respect of alleged contraventions falling within the six months period commencing 30th December, 2010, and ending on 29th June, 2011. The Commissioner then proceeded to consider the substance of the complaint and in that respect found against Mr. McDermott.

5. Mr. McDermott then appealed to the Employment Appeal Tribunal ("EAT") where the time point arose as a preliminary issue. The EAT rejected the argument that the complainant must lodge the complaint within six months from the date of the first deduction

or non-payment. It rather took the view that a cause of action arises with each and every contravention and that an employee has six months from every such contravention to make a claim against the employer.

6. The HSE now appeals to this Court on a point of law pursuant to s. 7(4)(b) of the 1991 Act against the correctness of that decision.

Background to the 1991 Act

7. The 1991 Act was a modernising item of legislation designed to replace and repeal the former Truck Acts, 1831 to 1896. The Truck Acts were themselves designed to address the social problem whereby in the 18th and 19th centuries many employers sought to pay their employees by means of benefits in kind, rather than coin or cash. These benefits in kind often took the form of credits to be exchanged for consumer staples – such as clothing and food – in the shops and premises often run by the employer. The object of the Truck Acts was to prevent this particular form of exploitation of employees, by limiting the type of deductions which might be made by employers but also by requiring certain types of employees to be paid by coin or cash.

8. The 1991 Act sought to modernise that old law and, in particular, sought to facilitate the payment of wages otherwise than in cash. Yet, in some respects at least, the spirit of the Truck Acts lives on in that s. 5 of the 1991 Act seeks to limit the type of deductions which can be made at source in respect of an employee's wages. Thus, for example, subject to some specific exceptions, s. 5(2)(b) of the 1991 Act prohibits an employer from making a deduction from the wages of an employee in respect of "goods or services supplied to or provided by the employee the supply or provision of which is necessary to the employment."

9. Section 6 of the 1991 Act creates a new mechanism whereby these rights can be enforced. Accordingly, complaints under the 1991 Act can be submitted to the Rights Commissioner at first instance, although the claim can also be pursued before the courts as an

alternative: see s. 6(3)(a) and s. 6(3)(b). Section 6(4) introduces a time limit for claims before the Rights Commissioner:

> "A Rights Commissioner shall not entertain a complaint under this section unless it is presented to him within the period of 6 months beginning on the date of the contravention to which the complaint relates or (in a case where the Rights Commissioner is satisfied that exceptional circumstances prevented the presentation of the complaint within the period aforesaid) such further period not exceeding 6 months as the Rights Commissioner considers reasonable."

10. As we shall presently see, it is the construction of these provisions – and, specifically, the meaning of the words "on the date of the contravention to which the complaint relates" - which is at issue in the present appeal.

11. Section 7 makes provision for an appeal from decisions of the Rights Commissioner to the EAT and s. 7(2) provides that such appeals must be brought within a six week period from the date it was communicated to the parties. It is accepted that such an appeal was lodged within the six week period. The EAT, however, decided the preliminary time point in a manner adverse to the HSE and it is from that decision that the present appeal is taken.

The construction of s. 6(4) of the 1991 Act

12. It is at this point that we can return to the construction of the relevant language of s. 6(4), namely, "within the period of 6 months beginning on the date of the contravention to which the complaint relates". The first thing to note is that no special meaning has been ascribed to the word "contravention" by the 1991 Act, so that it must be given its ordinary, natural meaning.

13. We may next observe that the actual language of the sub-section is clear, because it is the words "contravention to which the complaint relates" which are critical. It may be accepted that every distinct and separate breach of the 1991 Act amounts to a "contravention"

of that Act. If, for example, an employee is paid monthly and the employer makes unlawful deduction X in respect of salary for every month in a two year period it might be said in the abstract that there have been 24 separate "contraventions" of the 1991 Act during that period.

14. Yet the relevant statutory language takes us somewhat further, because the key question is the "date of the contravention to which the complaint relates." In other words, time runs for the purposes of the Act not from the date of any particular contravention or even the date of the first contravention, but rather from the date of the contravention "to which the complaint relates." As the EAT pointed out in its ruling on the matter, had the Oireachtas intended that time was to run from the date of the first contravention, it could easily have so provided.

15. For the purposes of this limitation period, everything turns, accordingly, on the manner in which the complaint is framed by the employee. If, for example, the employer has been unlawfully making deductions for a three year period, then provided that the complaint which has been presented relates to a period of six months beginning "on the date of the contravention to which the complaint relates", the complaint will nonetheless be in time.

16. It follows, therefore, that if an employer has been making deduction X from the monthly salary of the employee since January 2010, a complaint which relates to deductions made from January, 2014 onwards and which is presented to the Rights Commissioner in June, 2014 will still be in time for the purposes of s. 6(4). If, on the other hand, the complaint were to have been framed in a different manner, such that it related to the period from January, 2010 onwards, it would then have been out of time.

17. It may be that when enacting s. 6(4) the Oireachtas did not fully appreciate that everything might turn for the purposes of time on the actual manner in which the particular complaint was actually framed by the employee, but the language of the sub-section really admits of no other conclusion. Nor can it be said that such a conclusion is absurd in any way.

18. In these circumstances the Supreme Court has indicated that it is not necessary or even appropriate for a court to go further on questions of statutory interpretation. As Denham J. said in *Board of St. Malóga National School v. Minister for Education* [2010] IESC 57, [2011] 1 I.R. 363:

> "As the words of s.29 [of the Education Act 1998] are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law."

19. Counsel for the HSE, Mr. McDonald SC, urged a different approach, contending that this construction of the Act would lead to an absurd situation where there was, in effect, no time limit, depriving s. 6(4) of all meaning. For my part, I fail to see how such a construction would lead to a state of affairs which was either absurd or which would produce the results which Mr. McDonald SC feared. Depending, of course, on the manner in which the complaint is framed, only complaints which "relate" to the last six months (or, if the Rights Commissioner is satisfied that there are "exceptional circumstances" which prevented the bringing of the complaint, twelve months) prior to the presentation of the complaint to the Rights Commissioner will not be time-barred.

20. This state of affairs – with a rolling time limit - is by no means unusual in the law. If, for example, a commercial tenant is obliged to pay a monthly rent of €5,000, but has actually only paid €4,500 per month for the last eight years, then having regard to the provisions of the Statute of Limitations, in a breach of contract action the landlord will be able to claim only in respect of the underpayments for the last six years. No one would suggest in that situation that the entire action was statute-barred on the basis that the cause of action first

arose eight years ago with the first underpayment, because each separate underpayment would be regarded as a separate cause of action. A very similar analysis applies by analogy to the claim in the present case.

21. If, moreover, any different interpretation were to be adopted it itself could quickly lead to some anomalous and even absurd results, as the following series of examples show.

First example

22. Suppose, for example, an employer made deduction X from his employees monthly salary from January 2010, but no complaint was made by the employees. Possibly emboldened by their passivity, the employer then commences to make deduction Y in March, 2014. An employee thereafter presents a complaint to the Rights Commissioner in June, 2014 to the effect that unlawful deductions X and Y have been made from his salary from March 2014 onwards. Is to be said that the Rights Commissioner cannot entertain any claim in relation to deduction X from March, 2014 because the evidence is that these deductions commenced in January, 2010?

Second example

23. Suppose, for example, an employer hires a young employee with little English and who perhaps has little familiarity with Irish labour rights legislation. The employer makes a series of unlawful deductions from the employee's wages and this state of affairs continues for many years due to the employee's vulnerability and lack of awareness of his statutory entitlements. Is to be said that in those circumstances the employer should be permitted to continue to make these unlawful deductions every month, more or less in perpetuity, even though this result would be precisely the logical consequence of the argument now advanced by the HSE?

The decision in *Moran v. Employment Appeals Tribunal*

24. It remains only to consider the decision of Keane J. in *Moran v. Employment Appeals Tribunal* [2014] IEHC 154. In that case the parties also canvassed many of the arguments which featured in the present appeal, but in the event Keane J. did not find it necessary to rule on those arguments. This was because the complaint *as formulated by the claimant in that case* related to a time period of alleged contraventions which was plainly time-barred.

25. This point was clearly explained by Keane J. in the following terms:

> "I do not believe that it is necessary or appropriate for the Court to address, much less resolve, the issue of statutory construction presented by the appellant in order to dispose of this appeal. The uncontroverted evidence presented to the rights commissioner, the Tribunal and to the Court establishes that the appellant did not, as a matter of fact, present a complaint to the rights commissioner relating to a contravention of the 1991 Act alleged to have occurred on any specific date or dates within 6 months of the 17th May 2010. The appellant himself identified the contravention to which his complaint relates as an "application ... for payment of a 5% wage increase awarded by Government to [HSNs] in the [HSE] with effect from 14 September 2007."
>
> The issue of how this Court should construe the provisions of section 6(4) of the 1991 Act for the purpose of applying it to a complaint that there has been an impermissible deduction from the wages of the appellant in each of the 6 months immediately prior to the presentation by him of that complaint (specifically, a deduction in the form of a refusal to include in that payment an increase to which the complainant claims to have become entitled some years previously) is a hypothetical issue as far as the complaint actually presented by the appellant in this case is concerned.

As Carroll J. confirmed in the case of *Mhic Mhathuna v. Ireland* [1989]1 I.R. 504 (at 510), the Court cannot take into account arguments based on assumptions or hypotheses outside the facts and circumstances of the action or, in this instance, the appeal - before the Court.

If the appellant is correct in his contention concerning the proper construction of section 6(4) of the 1991 Act, then it is open to him to present a complaint to a rights commissioner relating to any alleged deduction in the wages paid to him on any specified date (or dates) within the period of 6 months beginning on the date of the first such payment. If he is incorrect in that contention, any such complaint will fail. But it would be wrong for the Court to seek to anticipate the outcome of such a complaint before the rights commissioner or the Tribunal for the purpose of the present appeal, just as it would be wrong for this Court to conduct this appeal as though the applicant had actually presented such a complaint to the rights commissioner or to the Tribunal in this case."

26. It is accordingly clear that, just as in the present case, the decision in *Moran* turned entirely on the manner in which the complaint had been formulated in that case. The claim was accordingly held to be time-barred precisely because the complaint "related" to a time period well beyond the six months statutory period. Indeed, in that final paragraph which I have just quoted, Keane J. clearly hinted that he would have arrived at a different conclusion had the complaint been formulated differently, so that it "related" to a different time period which was not statute-barred.

Conclusions

27. It follows, accordingly, that for the reasons which I have just stated, the EAT was correct in concluding that the claim in the present case was not time-barred by reason of the

operation of s. 6(4) of the 1991 Act. Critically, the complaint in the present case related to a period of time (January, 2011 to June, 2011) which was presented to the Rights Commissioner on 16th June, 2011, within the six months time limit in respect of this particular complaint.

28. Accordingly, therefore, I propose to dismiss the appeal by the HSE on the preliminary time issue and to return the matter to the Tribunal so that it can now proceed to consider the merits of the complaint.

Approved

Gerard Hogan

20th June 2014

The Minister for Agriculture and Food, Appellant, v. **John Barry, Conor O'Brien, Mary O'Connor, Michael Spratt** and **Ciaran Dolan**, Respondents [2008] IEHC 216, [2007 No. 334 SP]

High Court 7th July, 2008

Employment – Contract for services – Contract of service – Nature of work relationship – Mutuality of obligation – Enterprise test – Control – Integration – Whether employees or independent contractors – Whether tribunal erred in law – Whether tribunal applied incorrect test – Appeal from Employment Appeals Tribunal – Point of law – Jurisdiction of court to review – Principles which apply – Whether any definitive test.

The Employment Appeals Tribunal, on a preliminary application as to whether the respondents were employed under a contract of service or a contract for services, ruled that the respondents, temporary veterinary surgeons, were employed under a contract of service for the appellant and, accordingly, were entitled to payments pursuant to the Redundancy Payments Acts 1967 to 2003 and under the Minimum Notice and Terms of Employment Acts 1973 to 2001.

The appellant appealed that determination to the High Court on the basis that the Employment Appeals Tribunal misdirected itself as to the applicable law or alternatively failed to correctly apply the law to the facts before it.

The appellant argued, *inter alia*, that there was no evidence before the Employment Appeals Tribunal upon which it could conclude that any implied agreement had been reached between the appellant and the respondents to carry out inspection and certification of meat on the appellant's behalf on an ongoing basis, and that there was significant and uncontested evidence to the contrary before the tribunal to the effect that the appellant had no control over the level of work that was available for the respondents.

The appellant further argued that the Employment Appeals Tribunal applied an incorrect test to establish the existence of a contract of service grounded on a misconstruction of the judgment of Keane J. in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34.

Held by the High Court (Edwards J.), in allowing the appeal and remitting the matter to the Employment Appeals Tribunal, 1, that it was an incorrect interpretation of the *ratio decidendi* of *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 to regard it as a formulation of a single composite test either for determining the nature of the work relationship between two parties, or for determining whether a particular employment was to be regarded as governed by a contract for services or a contract of service.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34, *Tierney v. An Post* [2000] 1 I.R. 536, *Electricity Supply Board v. Minister for Social Welfare* [2006] IEHC 59, (Unreported, High Court, Gilligan J., 21st Febru-

ary, 2006), *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173 and *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612 considered.

2. That, in endeavouring to determine the nature of the contractual arrangements between parties or whether a particular employment was to be regarded as a contract for services or of service, every case had to be considered in the light of its particular facts by reference to the general principles which the courts have developed. It was simply not possible to arrive at the correct result by testing the facts of the case in a rigid formulaic way. The same question, as an aid to appreciating the facts, would not necessarily be crucial or fundamental in every case. It was for a court or tribunal to identify those aids of greatest potential assistance to them in the circumstances of the particular case.

Nethermere (St Neots) Ltd. v. Gardiner [1984] I.C.R. 612 followed. *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 considered.

3. That, in the context of trying to correctly characterise the nature of a work relationship between two parties, it was unhelpful to speak of "tests" as no one test could constitute a measure or yardstick of universal application that could be relied upon to deliver a definitive result.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34, *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173 and *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612 considered.

4. That the so called enterprise test, which involved looking at the contract as a whole and asking was the person in business on his or her own account, could not in the circumstances be determinative. Whilst in certain circumstances it could be legitimately applied as an aid to the drawing of appropriate inferences, it was incorrect to apply it in a formulaic way. It was also incorrect to assert that questions of control and integration were to be regarded merely as elements to be taken into account.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34, *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173 and *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612 considered.

5. That all potential aids to the drawing of the appropriate inferences stood in their own stead. The general principles from the case law such as enterprise, control and integration did not represent an exhaustive list. Depending on the circumstances of the particular case, some aids proved more helpful or more useful than others. There was no exhaustive list of the criteria which should be adopted or the considerations which were relevant in considering whether, a particular employment was to be regarded as a contract for services or a contract of service, nor could strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34, *Tierney v. An Post* [2000] 1 I.R. 536, *Electricity Supply Board v. Minister for Social Welfare* [2006] IEHC 59, (Unreported, High Court, Gilligan J., 21st February, 2006), *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173 and *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612 considered.

6. That the Employment Appeals Tribunal erred in formulating the preliminary question as to whether the respondents were employed under a contract of service or a contract for services. In doing so, the tribunal failed to have regard to all the possibilities in determining the nature of the work relationship between the parties. The correct approach would have been for the Employment Appeals Tribunal to ask whether the relationship between each respondent and the appellant was subject to just one contract,

or more than one contract. The second question involved the scope of each contract and the third question involved the nature of each contract.

Nethermere (St Neots) Ltd. v. Gardiner [1984] I.C.R. 612 considered.

7. That the finding of mutuality of obligation by the Employment Appeals Tribunal was made on a flawed and untenable basis as the tribunal's ruling on the issue was predicated on the finding that there was an implied agreement reached with the respondents and the applicants to carry out inspection and certification of meat on an ongoing basis. There was nothing in the evidence before the Employment Appeals Tribunal so as to justify the implication of that term on the basis of the presumed intention of the parties; neither could implication of the term be regarded as necessary to give business efficacy to the agreement.

The Moorcock (1889) 14 PD 64 and *Shirlaw v Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206 followed.

8. That the requirement of mutuality of obligation had to be satisfied if a contract of service was to exist: there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality was not present, then either there was no contract at all or whatever contract there was must be a contract for services or something else, but not a contract of service.

Nethermere (St Neots) Ltd. v. Gardiner [1984] I.C.R. 612 and *Carmichael v. National Power plc.* [1999] I.C.R. 1226 approved.

Cases mentioned in this report:-

Airfix Footwear Ltd. v. Cope [1978] I.C.R. 1210; [1978] I.R.L.R. 396.

Carmichael v. National Power plc. [1999] I.C.R. 1226; [1999] 1 W.L.R. 2042; [1999] 4 All E.R. 897.

Cassidy v. Ministry of Health [1951] 2 K.B. 343; [1951] 1 All E.R. 574.

Castleisland Cattle Breeding v. Minister for Social Welfare [2004] IESC 40, [2004] 4 I.R. 150.

Edwards v. Bairstow [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

Electricity Supply Board v. Minister for Social Welfare [2006] IEHC 59, (Unreported, High Court, Gilligan J., 21st February, 2006).

Ferguson v John Dawson & Partners (Contractors) Ltd [1976] 1 W.L.R. 1213; [1976] 3 All E.R. 817.

Graham v. Minister for Industry and Commerce and Molloy [1933] I.R. 156.

Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare [1998] 1 I.R. 34.

McAuliffe v. Minister for Social Welfare [1995] 2 I.R. 238; [1995] 1 I.L.R.M. 189.

Market Investigations v. Min. of Soc. Security [1969] 2 Q.B. 173; [1969] 2 W.L.R. 1; [1968] 3 All E.R. 732.

Montreal v. Montreal Locomotive Works Ltd [1947] 1 D.L.R. 161.
The Moorcock (1889) 14 PD 64.
National University of Ireland Cork v. Ahern [2005] IESC 50, [2005] 2 I.R. 577.
Nethermere (St Neots) Ltd. v. Gardiner [1984] I.C.R. 612.
O'Kelly v. Trusthouse Forte plc. [1983] I.C.R 728; [1984] Q.B. 90; [1983] W.L.R. 605; [1983] 3 All E.R. 456.
Queensland Stations Property Ltd. v. Federal Comissioner of Taxation [1945] 70 C.L.R. 539.
Roche v. P. Kelly & Co. Ltd. [1969] I.R. 100.
Shirlaw v Southern Foundries (1926) Ltd. [1939] 2 K.B. 206.
In re Sunday Tribune Ltd. [1984] I.R. 505.
Tierney v. An Post [2000] 1 I.R. 536; [2000] 2 I.L.R.M 214; [1999] E.L.R. 293.
Western People Newspaper v. A worker (Unreported, Labour Court, 24th May, 2004, EDA047).
Young & Woods Ltd. v. West [1980] I.R.L.R. 201.

Special summons

The facts have been summarised in the headnote and are more fully set out in the judgment of Edwards J., *infra.*

On the 12th March, 2007, the Employment Appeals Tribunal, on a preliminary application, ruled that the respondents were employed under a contract of service and, accordingly, were entitled to payments from the appellant pursuant to the Redundancy Payments Acts 1967 to 2003 and under the Minimum Notice and Terms of Employment Acts 1973 to 2001. The appellant instituted an appeal on a point of law to the High Court by way of special summons dated the 23rd April, 2007.

The appeal was heard by the High Court (Edwards J.) on the 14th and 15th February, 2008.

Anthony M. Collins S.C. (with him *Cathy Smith*) for the appellant.

Roderick Horan S.C. (with him *Lucy Walsh*) for the respondents.

Cur. adv. vult.

Edwards J. 7th July, 2008

[1] The respondents are veterinary surgeons who worked for the appellant as temporary veterinary inspectors at the Galtee Meats plant at

Mitchelstown, Co. Cork. Following the closure of that plant in October, 2004, the respondents claimed entitlement to payments from the appellant pursuant to the Redundancy Payments Acts 1967 to 2003 and under the Minimum Notice and Terms of Employment Acts 1973 to 2001. However, any entitlement to the payments claimed was contingent on them having been employees who were employed at all material times by the appellant under a contract of service. The appellant contended that they had not been employees employed under a contract of service and in each case refused to make the payments claimed. Each of the respondents respectively brought an appeal against the refusal in their case to the Employment Appeals Tribunal. The Employment Appeals Tribunal decided to consider on a conjoined basis a preliminary point in each appeal, namely whether the respondents as temporary veterinary inspectors were employed under a contract of service or a contract for services by the appellant. By a determination dated the 12th March, 2007, the Employment Appeals Tribunal ruled that the respondents were employed under a contract of service, and therefore they were employees.

[2] This appeal is brought pursuant to s. 40 of the Redundancy Payments Acts 1967 to 2003 and s. 11(2) of the Minimum Notice and Terms of Employment Acts 1973 to 2001, which each provide for an appeal on a question of law against a decision of the Employment Appeals Tribunal. The appellant contends that the Employment Appeals Tribunal misdirected itself as to the applicable law, or alternatively that it failed to correctly apply the law to the facts before it. Specifically, it is alleged that the Employment Appeals Tribunal failed to apply the correct test as to whether the respondents had been employed on a contract of service or a contract for services and/or failed to correctly apply that test to the facts before it.

The court's jurisdiction to review: appeal on a question of law

[3] In *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34, Hamilton C.J. cautioned at pp. 37 and 38:-

> "… the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

[4] This begs the question whether a determination by the Employment Appeals Tribunal of the nature of a work relationship between two parties is properly to be characterised as a matter of law, as a matter of fact or as a mixed question of law and fact. Some assistance is provided by *National University of Ireland Cork v. Ahern* [2005] IESC 40, [2005] 2 I.R. 577, cited by the appellant. In that case the Supreme Court considered what is meant by a "question of law" in the context of an appeal from the Labour Court under s. 8(3) of the Anti-Discrimination Pay Act 1974. McCracken J., with whom the other members of the court agreed, stated at p. 580:-

> "The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by the Labour Court and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law and can be considered on an appeal under s. 8(3)."

[5] I find the judgment of Sir John Donaldson M.R. in the English case of *O'Kelly v. Trusthouse Forte plc.* [1983] I.C.R 728 also provides me with considerable assistance on this question. The then Master of the Rolls stated at pp. 760 to 761:-

> "The judgment of the appeal tribunal in this case suggests that there is a difference of judicial view as to whether the question 'Is a contract a contract of employment or a contract for services?' is a mixed question of fact and law or a question of law, but I do rather doubt whether the triple categorisation of issues as 'fact', 'law' and 'mixed fact and law' is very helpful in the context of the jurisdiction of the appeal tribunal.
>
> The appeal tribunal is a court with a statutory jurisdiction. So far as is material, that jurisdiction is limited to hearing appeals on questions of law arising from any decision of, or arising in any proceedings before, an industrial tribunal: s. 136(1) of the Employment Protection (Consolidation) Act 1978. If it is to vary or reverse a decision of an industrial tribunal it has to be satisfied that the tribunal has erred on a question of law.
>
> Whilst it may be convenient for some purposes to refer to questions of 'pure' law as contrasted with 'mixed' questions of fact and law, the fact is that the appeal tribunal has no jurisdiction to consider

any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law.

The purification methods are well known. In the last analysis all courts have to direct themselves as to the law and then apply those directions in finding the facts (in relation to admissibility and relevance) and to the facts as so found. When reviewing such a decision, the only problem is to divine the direction on law which the lower court gave to itself. Sometimes it will have been expressed in its reasons, but more often it has to be inferred. This is the point of temptation for the appellate court. It may well have a shrewd suspicion, or gut reaction, that it would have reached a different decision, but it must never forget that this may be because it thinks that it would have found or weighed the facts differently. Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on an appellant. I would have thought that all this was trite law, but if it is not, it is set out with the greatest possible clarity in *Edwards v. Bairstow* [1956] A.C. 14."

[6] He further stated at p. 762:-

"There is no doubt that there are pure questions of law which throw a court back to questions of fact. The most obvious example is what length of notice is required to terminate a contract which does not expressly make provision for termination. This is a pure question of law and the answer is 'Such time as is reasonable in all the circumstances.' Applying that direction to facts whose nature, quality and degree are known with complete precision will no doubt always produce the same answer. But this is not real life. In reality every tribunal of fact will find and assess the factual circumstances in ways which differ to a greater or lesser extent and so can give rise to different conclusions, each of which is unassailable on appeal. In this sense, but in this sense alone, their conclusions are conclusions of fact. More accurately they are conclusions of law which are wholly dependent upon conclusions of fact.

The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal of fact not only to find those facts but to assess them qualitatively and within limits, which are indefinable in the abstract; those findings and that assessment will dic-

tate the correct legal answer. In the familiar phrase 'it is all a question of fact and degree'."

The primary facts

[7] The Employment Appeals Tribunal heard evidence in the matter over four days in 2006. The respondents in the present appeal were the moving parties before the tribunal. Each of them testified in their own behalf, and evidence was also adduced on behalf of all of them from the chief executive of Veterinary Ireland. The appellant in the present appeal was the respondent before the tribunal and adduced evidence from an official in its salaries section, from an assistant principal officer in its personnel division, and from a former permanent veterinary inspector at the Galtee Meats plant. The court has been provided with a transcript of the evidence and it is fair to say that it was largely uncontroversial. Though I am sure it would have been possible to produce one, the court has not been presented with an agreed summary of the evidence. Rather both sides, in their respective legal submissions, have sought independently to distil from the evidence a summary of the primary facts. While both summaries appear to the court to be fair and succinct, I propose for the purposes of this judgment to adopt the summary presented by the respondents, simply because it contains rather more detail than that presented by the appellant.

Factual background

[8] The claims have been instituted pursuant to the Redundancy Payments Acts 1967 to 2007 and pursuant to the Minimum Notice and Terms of Employment Acts 1973 to 2001. All five of the respondents are qualified veterinary surgeons and all of them worked as temporary veterinary inspectors for the appellant, in the Galtee meat processing plant, in Mitchelstown, Co. Cork, which plant closed in October, 2004 resulting in the termination of the respondents' employment with the appellant.

[9] The respondents lodged claims with the Employment Appeals Tribunal on the 21st April, 2005. It is the contention of the respondents that they worked under a "contract of service" for the appellant, and they are entitled to redundancy payments, as well as payments pursuant to the Minimum Notice and Terms of Employment Acts 1973 to 2001. The appellant entered an appearance on the 3rd June, 2005. The appellant contends that the five respondents, who worked as temporary veterinary inspectors, were engaged by the appellant at meat plants on a "contract for services" basis (*i.e.* contractors) to assist the appellant's full time veterinary

staff at the plants as an integral part of the appellant's meat inspection service.

[10] The appellant has asserted that this was reflected in the fact that the temporary veterinary inspectors were private veterinary practitioners who were also in business on their own account, and that they could and did continue in private practice alongside undertaking temporary veterinary inspector work for the appellant. It is accepted that four out of the five respondents worked as veterinary surgeons in private practices. The appellant has accepted that the remuneration which was paid to the respondents was paid on an hourly fee basis at rates which were fixed at intervals between the appellant and the respondents' union, namely Veterinary Ireland. Veterinary Ireland is a trade union affiliated to the Irish Congress of Trade Unions ("ICTU"). The appellant was the only potential employer of temporary veterinary inspectors as the appellant is the only body with the requirement of the services of temporary veterinary inspectors in Ireland.

[11] The respondents are all members of the trade union Veterinary Ireland. One of them was the union shop steward at the Mitchelstown plant. Examples of the union raising the question of the temporary veterinary inspectors' status over many years were cited to the Employment Appeals Tribunal, and evidence was given that the appellant "generally shuns it and says no".

[12] The general lack of clear legal definitions on employment status for many years led to considerable confusion. The situation, however, was regularised in 2001 with the publication of a code of practice, arising from the report of the Employment Status Group established under the Programme for Prosperity and Fairness ("PPF"). Represented on this group were the Department of Finance, IBEC, ICTU, the Department of Social and Family Affairs and the Revenue Commissioners.

[13] This report sets out an extensive check list of criteria to be used in determining whether an individual is an employee. As was presented in evidence to the Employment Appeals Tribunal, analysis of the criteria established by this key Employment Status Group indicated clearly that temporary veterinary inspectors fit into the "employee" category under each and every relevant heading.

The approval procedure

[14] The appellant and the Irish Veterinary Union (an earlier name for Veterinary Ireland) negotiated and provided the respondents, and all temporary veterinary inspectors nationwide, with written conditions in respect of the operation of temporary veterinary inspector panels in

January, 1999. On appointment by the appellant, each temporary veterinary inspector was provided with "conditions of engagement of part time temporary veterinary inspectors" (the "conditions"), which were subsequently updated at various times up to June, 2004.

[15] All of the respondents were temporary veterinary inspectors. In order to become a temporary veterinary inspector, each respondent had to apply for approval from the appellant. Once departmental approval had been granted, each respondent had to then complete a two week training course in meat inspection at his or her own expense. He/she then applied in writing to the appellant's personnel division for inclusion in a temporary veterinary inspector panel or panels at one or more of the meat factories. It was predetermined that a temporary veterinary inspector could not be listed on more than four panels at any one time, and that the temporary veterinary inspector could only hold one regular shift.

Rostering onto panels

[16] The appellant directed that the respondents could have their names placed on a maximum of four panels, (*i.e.* four meat plants), but must hold only one regular shift. They defined "regular" as attendance on more than 50% of "kill days" in the previous three months. The appellant directed that the respondents would not be allowed to work two shifts on the same day at one or more meat plants, unless it was a last resort to enable meat plants to continue when no other temporary veterinary inspector was available. The panels operated on the basis of seniority, availability and suitability.

[17] In the conditions, the appellant set out that they would make every effort to facilitate the respondents working in the meat plant of their choice, although the conditions stated that this would not always be possible.

[18] The conditions provided that the appellant's full time veterinary inspector, in consultation with the factory management, would determine the inspection points and the temporary veterinary inspector manning levels of each meat plant and would also determine in advance how the roster periods were required, based on anticipated slaughter numbers for the period in question.

Functions of temporary veterinary inspectors

[19] The conditions set out the functions of a temporary veterinary inspector as follows:-

> "The functions of the temporary veterinary inspectors are to assist the permanent veterinary staff at meat plants. The temporary veterinary

inspectors will be assigned to and perform these functions by direction of the full time veterinary inspector at the meat plant. The veterinary inspector has overall responsibility for setting the manning levels (*i.e*. the number of temporary veterinary inspectors required (1) to cover the inspection points in the slaughter hall and (2) to be engaged during the day for *ante-mortem* duties), for the control and monitoring of meat inspection operations and ensuring that temporary veterinary inspectors perform their allocated duties satisfactorily."

Reporting structure

[20] The appellant's veterinary inspector at the meat plant rostered the respondents and it was he/she who had overall responsibility for setting the manning levels required. The function of each of the respondents was to assist the veterinary inspector at the meat plant in the meat inspection service. A temporary veterinary inspector was assigned to and performed those functions at the direction of the veterinary inspector. The veterinary inspector set the inspection points on the line, and checked the temporary veterinary inspectors work on a regular basis. The veterinary inspector ensured that meat was inspected in accordance with the relevant legislation.

[21] The conditions provided that where a temporary veterinary inspector was not performing his/her duties as required by the veterinary inspector, or was persistently late in attending his/her rostered shifts, the veterinary inspector would notify him/her accordingly. After three such notifications the veterinary inspector reserved the right, in consultation with the personnel division, to remove that temporary veterinary inspector from his or her position of seniority on the panel or, as a final measure, to remove him/her from the panel altogether.

Personal protective equipment and materials – investment in the enterprise

[22] Each respondent was provided with all of the required personal protective clothing by the appellant, and all of the equipment necessary for the respondents' duties was available and was provided by the appellant at the meat plant.

[23] The conditions further provided that the respondents engaged must use/wear the personal protective equipment provided by the appellant and the veterinary inspector had to ensure compliance with this requirement.

[24] All of the knives, scabbards, wellingtons and white coats used by the respondents for their work were provided by the appellant, and were kept by the appellant at the meat plant.

Hours of work

[25] The conditions of engagement provided that in respect of remuneration it was to be the rates, negotiated from time to time by the appellant and Veterinary Ireland, which would be paid. The hours of attendance were also as agreed between the appellant and Veterinary Ireland from time to time. They further set out that "actual times of attendance and departure must be entered in the daily attendance sheets by all temporary veterinary inspectors". The veterinary inspector had an attendance book in his office, and the respondents were required to "sign in" and "sign out".

[26] The conditions of engagement further provided that the minimum roster period in the morning was determined to be either two, two and a quarter, two and a half or three hours and the minimum roster period in the afternoon was two and a quarter to a maximum of four hours, with an additional half an hour in exceptional circumstances.

[27] If a respondent was unavailable to attend a specific shift, he/she had to notify the veterinary inspector who would then appoint the next most senior temporary veterinary inspector on the panel to perform the shift.

[28] The respondents were not allowed to employ assistants to carry out their work. They had to carry out the work personally. They could not subcontract the work, and they could not supply a substitute vet from their private practice to carry out the work.

[29] The respondents were provided with flexible working conditions, in keeping with those of the full time staff employed by the appellant.

[30] The respondents had occasionally swapped shifts, which was worked out as between the respondents. The respondents asserted that this practice had ceased.

Payment and insurance

[31] The respondents were paid an hourly rate. The respondents had previously been paid a shift rate, which was then changed to a rate of pay *per* hour by agreement with the respondents' trade union, following a ballot of union members. P.A.Y.E. and P.R.S.I. was deducted by the appellant from the hourly rate of pay. The appellant deducted the employee status P.A.Y.E., and an employer's P.R.S.I. contribution of 10.75% was

paid by the appellant in respect of each respondent. The respondents were insurable for all purposes under P.R.S.I. The respondents were not obliged to maintain their own professional indemnity insurance. The appellant accepted that the Department of Finance delegated sanction to the appellant by way of letter dated the 22nd June, 1973, to link temporary veterinary inspector rates to the minimum of the full time veterinary inspector scale.

[32] Each of the respondents was issued annually with a P60 from the appellant, which named the appellant as the "employer" and each of the respondents as the "employee". The appellant deducted the respondents' union subscriptions from the respondents' salaries when asked in writing to do so by the respondents and their union.

[33] The respondents did not charge V.A.T., and were not paid V.A.T. V.A.T. was chargeable on T.B. testing, which was carried out by some of the respondents for the appellant as a separate matter in their own private practices.

Training

[34] Once a temporary veterinary inspector was approved, the appellant required that the temporary veterinary inspector would undergo a course in meat inspection at his or her own expense.

[35] The appellant provided additional training for the respondents, in respect of their role in the slaughter plants, which was carried out in 2000/2001 by a full time superintendent veterinary inspector of the appellant. The training seminars were facilitated by Veterinary Ireland.

[36] If changes in procedure arose, the veterinary inspector would inform the respondents and would distribute any new circulars from the appellant in relation to changes in legislation. The veterinary inspector held a meeting in a hotel with the respondents and other temporary veterinary inspectors in order to bring about uniformity in the meat inspection service. The legislative requirements were enforced by the veterinary inspector, who supervised and was responsible for the respondents.

Absence from panel – disciplinary action

[37] The conditions, provided that inability to attend would not give rise to disciplinary action in the following cases:-

(a) where called in under 24 hours;
(b) occasional inability to attend for practice reasons (in such cases notice must be given to the veterinary inspector at the meat plant);

(c) annual leave – five "shift" weeks *i.e.* a week in which a minimum of one shift normally falls;
(d) sick leave subject to medical certification;
(e) maternity leave (the third named respondent took two maternity leaves, and returned to the same position on the panel on both occasions);
(f) leave of absence for reasons other than private practice:-
    (i) academic studies (verification required) and
    (ii) charitable or development work outside Ireland.

[38] The conditions provided that in relation to such leave of absence, written confirmation had to be received in advance from the veterinary inspector that the temporary veterinary inspectors seniority on the panel in question would not be affected.

[39] The conditions also provided for circumstances where disciplinary action would arise. In particular, where a temporary veterinary inspector had regular shifts at a meat plant and was persistently turning down a percentage of such shifts, this would then result in a loss of seniority. The guideline as to what constituted persistent was 16% of shifts within any three month period. A record of non-availability was to be maintained by the veterinary inspector who was required to consult the appellant's personnel division in advance of any decision being taken in relation to a loss of seniority. The conditions of engagement provided veterinary inspectors had to keep a written record of the non-availability of temporary veterinary inspectors.

[40] The conditions further set out that the veterinary inspectors would have to consult with the appellant's personnel division in the department in advance of any proposed changes to temporary veterinary inspector panels, and that no change could be implemented without the written approval of the personnel division. In that regard, any such changes would have to comply with temporary veterinary inspectors' conditions of engagement and the appellant set out that temporary veterinary inspectors could not therefore be placed on, promoted, demoted or removed from panels by veterinary inspectors unless written approval was obtained in advance from the personnel division.

[41] The respondents were entitled to annual leave in the amount of five shift weeks.

The issues

[42] Clearly the work relationship between each of the respondents and the appellant was a very unusual one, and one which it is not easy to classify. The court is somewhat surprised that the Employment Appeals

Tribunal decided to deal with the matter by hearing a preliminary point as to "whether the temporary veterinary inspectors were employed under *a* contract of service or *a* contract for services by the Department of Agriculture and Food" (my emphasis), because posing the question in that way immediately limited the possibilities to just two. It is not clear why this was done. It is possible that the Employment Appeals Tribunal decided of its own motion to adopt this approach, and there was no demurral by the parties, or it may be that this approach was suggested by the parties and agreed to by the tribunal. However, even if was the case that the parties themselves were of the view that it was a straight choice between a single contract of service and a single contract for services, that would not have been decisive of the matter or binding on the tribunal. It seems to this court that there were a much wider range of possibilities, and it was unjustifiable to limit the possibilities to just two.

[43] In each instance it was incumbent on the tribunal to ask three questions. The first question was whether the relationship between each respondent and the appellant was subject to just one contract, or more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract.

[44] As I have stated, there were various possibilities. It was, of course, possible that each of the respondents, respectively, was employed under a single contract which, upon a thorough examination of the circumstances, might fall to be classified as either a contract of service or a contract for services. However, another possibility was that on each occasion that the temporary veterinary inspectors worked they entered a new contract, and these contracts, depending on the circumstances, might fall to be classified as contracts of service or contracts for services. A third possibility is that on each occasion that the temporary veterinary inspectors worked they entered a separate contract governing that particular engagement, which might be either a contract of service or a contract for service, but by virtue of a course of dealing over a lengthy period of time that course of dealing became hardened or refined into an enforceable contract, a kind of overarching master or umbrella contract, if you like, to offer and accept employment, which master or umbrella contract might conceivably be either a contract of service or a contract for services or perhaps a different type of contract altogether. This notion of an umbrella contract, though controversial, has featured in several English cases involving particular classes of workers, such as outworkers, casual workers, and piece workers: see, for example, *Airfix Footwear Ltd. v. Cope* [1978] I.C.R. 1210 and *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612.

The complaint that the Employment Appeals Tribunal misdirected itself as to the applicable law

[45] The Employment Appeals Tribunal adopted a two stage process in reaching its decision as to the nature of the relationship between the parties. In the first instance the tribunal applied a mutuality of obligation test, and thereafter it applied the so called enterprise test. The appellants have no difficulty with the fact that the mutuality of obligation test was applied but they vehemently dispute the purported finding of mutuality of obligation on the evidence that was before the tribunal. They also say that the Employment Appeals Tribunal was incorrect to apply the so called enterprise test as it is not determinative of the issue, and the Employment Appeals Tribunal's belief to the contrary is grounded in a misconstruction of Keane J.'s judgment in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34.

Mutuality of obligation

[46] Although it has been conceded by the appellants that the Employment Appeals Tribunal correctly identified that the requirement of mutuality of obligation has to be satisfied if a contract of service is to exist, I think that it is appropriate nonetheless to elaborate just a little on what this test involves, having regard to the fact that the purported finding of mutuality of obligation is disputed.

[47] The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. It was characterised in *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R. 612 at p. 632 as the "one *sine qua non* which can firmly be identified as an essential of the existence of a contract of service." Moreover, in *Carmichael v. National Power plc.* [1999] I.C.R. 1226 at p.1230 it was referred to as "that irreducible minimum of mutual obligation necessary to create a contract of service". Accordingly the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. If there is no mutuality of obligation it is not necessary to go further: whatever the relationship is, it cannot amount to a contract of service. However, if mutuality of obligation is

found to exist, the mere fact of its existence is not, of itself, determinative of the nature of the relationship and it is necessary to examine the relationship further.

[48] The Employment Appeals Tribunal's ruling on the issue of mutuality of obligation was in the following terms:-

> "… in the case herein the five temporary veterinary inspectors have an implied agreement reached with the Department of Agriculture and Food and the temporary veterinary inspectors to carry out inspection of meat and certification of same on behalf of the Department of Agriculture and Food on an ongoing basis, hence the majority finds there is mutuality of obligation."

[49] The appellant contends that there was no evidence before the Employment Appeals Tribunal upon which it could conclude that any "implied agreement" had been reached between the appellant and the respondents to carry out inspection of meat and certification of same on the appellant's behalf on an ongoing basis. Nothing in the arrangements that existed as between the parties, which had been reduced to writing, indicates that this was in fact the case. Moreover they say there was significant and uncontested evidence to the contrary before the Employment Appeals Tribunal which it inexplicably chose to overlook. This was to the effect that the appellant had no control over the level of work that was available for temporary veterinary inspectors, as this was a matter entirely within the control of the processing plants. The appellant was thus unable to give, and did not give, a commitment to the respondents at any stage as to the level of work available to them, and the respondents were at all times well aware of this. Furthermore, the uncontested evidence concerning the arrangements entered into between the appellant and the respondents was that the latter were entitled to decline to work at the very least 16% of the shifts offered to them without that refusal having any consequences for their contracts.

[50] In the court's view these points are well made. Moreover, the tribunal's belief as to the nature of the contractual arrangements between the parties is wholly unclear. The determination speaks not of the implication of a term into a clearly indentified contract (whether that contract be one of service or for services), but rather of "an implied agreement" which could either connote such a contract or, alternatively, an overarching umbrella contract. *O'Kelly v. Trusthouse Forte plc.* [1983] I.C.R. 728 provides an example of where the latter type of contract was contended for. In that case the banqueting department of a hotel company kept a list of some 100 casual catering staff who were known as "regulars" because they could be relied upon to offer their services regularly and in return were assured of preference in the allocation of available work. These workers claimed to be

entitled to unfair dismissal compensation on the basis that they had been employees employed under a contract of service, but the hotel disputed this and contended that they were independent contractors supplying services and not employees. The issue went before an industrial tribunal and the claimants lost on the basis that the important ingredient of mutuality of obligation was missing. The claimants appealed successfully to an appeals tribunal. The appeals tribunal's decision was in turn appealed to the Court of Appeal. In the course of his judgment Sir John Donaldson M.R. said at p. 763:-

> "Although I, like the appeal tribunal, am content to accept the industrial tribunal's conclusion that there was no overall or umbrella contract, I think that there is a shorter answer. It is that giving the applicants' evidence its fullest possible weight, all that could emerge was an umbrella or master contract *for*, not *of*, employment, It would be a contract to offer and accept individual contracts of employment and, as such, outside the scope of the unfair dismissal provisions."

[51] Even if the court were certain (which it is not) that the Employment Appeals Tribunal considered that a single contract existed, said to be a contract of service, and that a term was to be implied into that contract committing the appellant to offer, and the respondents to accept, work on an ongoing basis, one would have to query the basis for implying such a term. The classical situation wherein a term may be implied at common law was identified in the well known case, *The Moorcock* (1889) 14 PD 64 as being one in which a term not expressly agreed upon by the parties is to be inferred on the basis of the presumed intention of the parties. The proposition received a somewhat wider formulation in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 K.B. 206 wherein MacKinnon J. said at p. 227:-

> "*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'."

[52] The Irish courts have approved the so called "officious bystander test" many times and MacKinnon J.'s formulation has been interpreted so that a term may be implied if it is necessary to give business efficacy to the contract. However, there was nothing in the evidence before the Employment Appeals Tribunal that would have entitled it to presume an intention on the part of the parties that the appellant should be obliged to offer, and the respondents should be obliged to accept, work on an ongoing basis, so as to justify the implication of the term contended for on the basis of the

presumed intention of the parties. Neither would implication of the term be regarded as necessary to give business efficacy to the agreement. In the circumstances I cannot see how the term contended for might legitimately have been implied.

[53] Moreover, if, as is possible, the Employment Appeals Tribunal's ruling was to be interpreted as supporting the implication of an overarching umbrella agreement in a situation where individual contracts, either of service or for services, also existed, it is difficult to see how in any case the tribunal could ultimately reach a conclusion other than that arrived at by Sir John Donaldson M.R. in *O'Kelly v. Trusthouse Forte plc.* [1983] I.C.R. 728.

[54] In all the circumstances I regard the Employment Appeals Tribunal's finding that there was an implied agreement reached between the appellant and the respondents to carry out inspection of meat and certification of same on an ongoing basis to be untenable. Its finding of mutuality of obligation was predicated on the existence of this implied agreement and, accordingly, must be regarded as flawed.

The so called enterprise test

[55] Having decided that there was mutuality of obligation, the tribunal proceeded to what it characterised as "the second stage in the process" and stated:-

> "The second stage of the test in the process requires a determination as to whether the contract binding the parties is one of service or one for services. The fundamental test for determining this question was set down in the English decision of *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173. Here it was held that the court should consider if the person was performing the service as a person in business on his own account. If the answer to that question is yes, then the contract is one for services. If the answer is no, then the contract is one of service.
>
> This approach was adopted in this jurisdiction by the Supreme Court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34."

[56] At a later stage in its ruling the tribunal further stated:-

> "Following the decision of the Supreme Court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Tierney v. An Post* [2000] 1 I.R. 536, there is now a single composite test for determining if a person is engaged on a contract of service or a contract for services. It involves looking at the contract as a whole and asking, 'Is the person in business on his or her own account?'. If the

answer is yes, then the contract is one for services. If the answer is no, then the contract is one of service.

The questions of control and integration should no longer be regarded as conclusive tests in themselves but as elements to be taken into account in applying the enterprise test."

[57] It is clear from a consideration of the case law cited to the court by the parties that the summary statement of principle, as formulated in the latter quotation, did not originate with the tribunal, but rather was borrowed without attribution from an earlier determination of the Labour Court in *Western People Newspaper v. A worker* (Unreported, Labour Court, 24th May, 2004, EDA047) and reproduced *verbatim* by the Employment Appeals Tribunal.

[58] The appellant contends that the Employment Appeals Tribunal misconstrued Keane J.'s judgment in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. It is therefore necessary to scrutinise that judgment with great care with a view to identifying precisely what is the *ratio decidendi* of it. It may also be of assistance in that regard to examine how it was applied by the Supreme Court in *Tierney v. An Post* [2000] 1 I.R. 536 and in *Castleisland Cattle Breeding v. Minister for Social Welfare* [2004] IESC 40, [2004] 4 I.R. 150, and also most recently in *Electricity Supply Board v Minister for Social Welfare* [2006] IEHC 59, (Unreported, High Court, Gilligan J., 21st February, 2006).

[59] The principal judgment in the Supreme Court appeal in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 was delivered by Keane J., with whom Hamilton C.J. and Murphy J. agreed. The *ratio decidendi* of the case (about which I will say more in a moment) is to be found in the following passages from that judgment at p. 49:-

"The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as the Act of 1981, is to be regarded as a contract 'for service' or a contract 'of services' have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a 'servant' and 'independent contractor'. However, there is a consensus to be found in the authorities that each case must be considered in the light of its particular facts and of the general principles which the courts have developed: see the observations of Barr J. in *McAuliffe v. Minister for Social Welfare* [1995] 2 I.R. 238.

At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that

test does not always provide satisfactory guidance. In *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, it was pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see *Queensland Stations Property Ltd. v. Federal Comissioner of Taxation* (1945) 70 C.L.R. 539.

In the English decision of *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173, Cooke J., at p. 184 having referred to these authorities said:-

> 'The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.'

It should also be noted that the Supreme Court of the Irish Free State in *Graham v. Minister for Industry and Commerce and Molloy* [1933] I.R. 156, had also made it clear that the essential test was whether the person alleged to be a 'servant' was in fact working for himself or for another person.

It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or her-

self. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her."

[60] In the course of their written legal submissions, amplified by oral submissions in court, counsel for the appellant submitted:-

"… at what it described as the second stage of the process, the Employment Appeals Tribunal applied an incorrect test to establish the existence of a contract of service/contract for services.

Contrary to what is expressly stated in its decision, the so called enterprise test is not determinative of the issue. That conclusion appears to be grounded in a misconstruction of the passages from the judgment of Keane J. in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. Moreover it is incorrect to assert that questions of control and integration are to be regarded merely as elements to be taken into account in applying the enterprise test.

Far from relying principally upon what the Employment Appeals Tribunal describes as 'the enterprise test', that described by Keane J. contains the following four elements at least:-

- 'each case must be determined in the light of its particular facts and circumstances';
- … 'in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself';
- 'the degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive';
- 'the inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.'"

[61] In their submissions, counsel for the respondents did not engage directly with the appellant's contention that the Employment Appeals Tribunal was incorrect to apply the so called enterprise test as it is not determinative of the issue, and that the Employment Appeals Tribunal's

belief to the contrary is grounded in a misconstruction of Keane J.'s judgment in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. Rather, their written submissions are primarily addressed to the merits of the substantive issue as to whether the respondents were employed under contracts of service or contracts for services. In so far as they seek to address at all the issue as to what precisely is the state of the law *post Henry Denny & Sons (Ireland) Ltd.*, they rely on recently published views of the eminent solicitor, Dr. Mary Redmond, a renowned employment law specialist. They state:-

> "Redmond, in her book, *Dismissal Law in Ireland* (2nd ed., 2007) sets out at p. 35 that 'in Ireland the criterion traditionally applied by the civil courts to determine the relationship of employee was that of control, whereby the subordinate nature of the relationship is regarded as central to the contract of employment: *Roche v. P. Kelly & Co. Ltd.* [1969] I.R. 100'.
>
> Redmond sets out that the '*control test'* then gave way to the so called '*integration test*' which asked, 'Did the servant form part of the alleged master's organisation?'. She sets out that, likewise, this failed to provide a clear answer and a '*mixed test*' was then developed. Redmond sets out that 'This is applied in two stages. The first question to ask is whether there is control. This is a necessary but not a sufficient test. It must then be determined whether the provisions of the contract are consistent with it's being a contract of service. There may be indications, for example, that a worker is an entrepreneur rather than an employee. In this event the fundamental test to be applied is whether the person who has engaged himself to perform particular services is in business on his own account'. Having reviewed the case law, Redmond concludes at p. 40 that 'each case must depend on its own facts'."

[62] The *ratio decidendi* in any particular case consists of the general reasons given for the decision or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. I have considered with great care the judgments in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 and I consider the *ratio decidendi* of it to be encapsulated in the statement of Keane J. that in considering whether a particular employment is to be regarded as a contract "for services" or "of service" … "each case must be considered in the light of its particular facts and of the general principles which the courts have developed". I believe that the general principles referred to are those which have been identified as potentially being of assistance to a court or tribunal in the drawing of appropriate inferences.

[63] In the course of his judgment in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 Keane J. sought to elucidate some of the general principles that the courts have developed of particular relevance to the case then before him. It was in the course of him doing so that the oft quoted passage (which for identification purposes bears reiteration) appears. He said at p. 50:-

> "It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her."

[64] This particular passage was subsequently quoted, and relied upon, in the judgments in *Tierney v. An Post* [2000] 1 I.R. 536, *Castleisland Cattle Breeding v. Minister for Social Welfare* [2004] IESC 40, [2004] 4 I.R. 150 and *Electricity Supply Board v. Minister for Social Welfare* [2006] IEHC 59, (Unreported, High Court, Gilligan J., 21st February, 2006). However, although it represents an important summary of some of general principles that the courts have developed, it cannot be said to fully encapsulate the *ratio decidendi* of *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. It does not do so because it omits one very important general principle developed by the courts which assumed a significant importance in that case and also, coincidentally, in *Tierney v. An Post*, *Castleisland Cattle Breeding v. Minister for Social Welfare* and *Electricity Supply Board v. Minister for Social Welfare* respectively. A very important "particular fact" common to those cases, respectively, was that in all of those cases there existed a contractual document which purported to contain the expression of an agreed intention of the parties that their relationship should be governed by a contract for services. The existence of that particular fact brought into play the "general principle" that a characterisation or description as to the status of a party contained in a contract intended to govern a work relationship is not to be regarded as decisive or conclusive of the matter. That principle was uncontroversial in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34, having been accepted by the parties from

the outset. Although it was referred to by Keane J. elsewhere in his judgment, it is not referred to in the passage under consideration. It is in fact dealt with in greater detail in the judgment of Murphy J. who points out that the principle in question was first enunciated in the judgment of Carroll J. in *In re Sunday Tribune Ltd.* [1984] I.R. 505. Accordingly, the celebrated passage from the judgment of Keane J. contains only part of the *ratio* for the court's decision. However, the earlier statement that "each case must be considered in the light of its particular facts and of the general principles which the courts have developed" can be regarded as the true *ratio*, though admittedly it lacks specificity with respect to identification of the general principles referred to.

[65] Contrary to a misapprehension held in some quarters, I do not believe that it is a correct interpretation of the passage in question to regard it as the formulation by Keane J. of "a single composite test", either for determining the nature of the work relationship between two parties, or even for determining whether a particular employment is to be regarded as governed by a contract for services or a contract of service which is a somewhat narrower issue. To the extent that this passage from his judgment has given rise to a degree of confusion, I believe that this confusion derives primarily from misguided attempts to divine in the judgment the formulation of a definitive, "one size fits all", test in circumstances where the judge was not attempting to formulate any such test. In relation to the rush to discern a test, and to label it, it seems to this court that this is a classic example of the type of situation where a particular approach that has been advocated is subsequently labelled conveniently, but mischaracteristically, as the "such and such test", a step that is taken with the intention that it should be helpful, but which proves to be ultimately unhelpful, because the so called test turns out to be insufficiently discriminating. Put simply, such loose labelling can often create more problems than it solves. In the context of trying to correctly characterise the nature of a work relationship between two parties, I think it can sometimes be unhelpful to speak of a "control test", or of an "integration test", or of an "enterprise test", or of a "mixed test", or of a "fundamental test" or of an "essential test", or of a "single composite test" because, in truth, none of the approaches so labelled constitutes a "test", in the generally understood sense of that term, namely, that it constitutes a measure or yardstick of universal application that can be relied upon to deliver a definitive result.

[66] Although it is true that various courts, both here and in England, have from time to time characterised as "tests" a variety of approaches to be employed as aids to discerning the nature of the work relationship between two parties, there has in recent years been a move away from this. It is, I think, telling that Keane J. did not at any stage seek to characterise

any of the general principles identified by him as tests. However, the seeds of confusion may well have been sown by the reference to "the fundamental test" in the passage from the judgment of Cooke J in *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173, cited by Keane J., and then watered by his subsequent reference to the judgment of the Supreme Court of the Irish Free State in *Graham v. Minister for Industry and Commerce and Molloy* [1933] I.R. 156, wherein that court spoke of what it characterised as "the essential test".

[67] In *Market Investigations v. Min. of Soc. Security* [1969] 2 Q.B. 173, Cooke J. advocated, applying what he characterised as "the fundamental test" by posing the question, "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" He contended that if the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. (This is in fact the so called enterprise test, although Cooke J. did not use that label.) The characterisation of this approach as "the fundamental test" was subsequently criticised by Stephenson L.J in the Court of Appeal in *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R 612. In that case the Court of Appeal was involved in reviewing the decision of an appeal tribunal that had, in turn, upheld the earlier decision of an industrial tribunal that certain home workers were employed by the appellant company under contracts of service. Referring to the conclusion reached by the industrial tribunal, Stephenson L.J. said at p. 619:-

> "This conclusion is open to criticism. It adopts what Cooke J. in *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 Q.B. 173, 184G, had called 'the fundamental test'. Megaw and Browne L.JJ. had found that test 'very helpful' in *Ferguson v. John Dawson & Partners (Contractors) Ltd.* [1976] 1 W.L.R. 1213. In *Young & Woods Ltd. v. West* [1980] I.R.L.R. 210, I adopted it and Ackner L.J., at p. 208, obtained much assistance from it. But to accept it as the 'fundamental' test is I think misleading, for it is no more than a useful test. Furthermore, it can only be applicable at all where there is nothing but a choice between the two kinds of contract, of service or for services. Here the form of the preliminary issue made the test apposite, though not fundamental; but, as I have indicated, it ruled out the question whether on the evidence there was a third kind of contract or even no contract at all, which would be as effective to deprive the industrial tribunal of jurisdiction as a contract for services."

[68] Dillon L.J. agreed with Stephenson L.J. in *Nethermere (St Neots) Ltd. v. Gardiner* [1984] I.C.R 612 and had this to say in his judgment at p. 633:-

"I do, however, for my part, find the use of the word 'fundamental' somewhat misleading. In some cases, as for instance, with a jobbing gardener or a carpenter or a music teacher, who is found to be carrying on the activities in question for several customers or clients as part of his or her own business, the test may be very helpful indeed, but in many other cases the answer to the question whether the person concerned is carrying on business on his or her own account can only come as the corollary of the answer to the question whether he or she was employed under a contract of service. I note that in *Market Investigations Ltd. v. Minister of Social Security* [1969] 2 Q.B. 173, 184, Cooke J. had referred to a statement by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd* [1947] 1 D.L.R. 161, 169:

'it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.'

It is important to have in mind that each case must depend on its facts, and the same question, as an aid to appreciating the facts, will not necessarily be crucial or fundamental in every case."

[69] This court finds itself in complete agreement with the criticisms articulated by Stephenson and Dillon L.JJ. respectively. Moreover, I am satisfied that it was not Keane J.'s intention in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 to endorse Cooke J.'s approach as being "the fundamental test". That is quite clear from his statement at p. 50 that:-

"…, while each case must be determined in the light of its particular facts and circumstances, *in general* a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself" (my emphasis).

[70] The words "in general" constitute a *caveat* that the approach in question is not one of universal application. By definition they contemplate the possibility of exceptions to what is generally true, even when the issue for determination is the narrower one represented by a choice between a contract of service and a contract for services. Quite apart from that, the approach advocated cannot be treated as being of universal application where the issue for determination involves the broader question as to what is the nature of a particular work relationship between two parties, because in certain cases a work relationship is not capable of being defined in terms of a simple choice as to whether it is governed by a contract of service or a contract for services, for example in the case of a statutory office holder.

As Stephenson L.J. has correctly pointed out, the relationship may be governed by a third kind of contract or even by no contract at all.

[71] Having said all of that, once it is recognised that the approach advocated by Cooke J. in *Market Investigation v. Min. of Soc. Security* [1969] 2 Q.B. 173 does not represent a fundamental or definitive test, it may be considered apposite to use it in the circumstances of a particular case as an aid to drawing the correct inferences. In that situation a court or tribunal should not be criticised for doing so. As Stephenson L.J. said, that approach has been found helpful and useful in many cases. It is likely to be particularly helpful and useful in most cases that come down to a choice between a contract of service and a contract for services. The important thing to remember, however, is that every case must be considered in the light of its particular facts and it is for the court or tribunal considering those facts to draw the appropriate inferences from them by applying the general principles which the courts have developed. That requires the exercise of judgment and analytical skill. In my view it is simply not possible to arrive at the correct result by "testing" the facts of the case in some rigid formulaic way, and I do not believe that the Supreme Court ever envisaged, or intended to suggest, that it could be.

[72] In the circumstances, I find myself in agreement with the appellant that the tribunal misdirected itself on the law in the following respects:-

1. it was incorrect in its belief that the Supreme Court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 approved "a single composite test";
2. it was incorrect in regarding the so called enterprise test as determinative of the issue. It was not necessarily going to be determinative of the issue, and it was wrong in proceeding on the assumption that it would be. In the circumstances of the case it might legitimately have been applied as an aid to the drawing of appropriate inferences, and it was likely to be useful in that regard, but it was incorrect to apply it in a formulaic way for the purpose of determining the issue;
3. it was incorrect to assert that questions of control and integration are to be regarded merely as elements to be taken into account in applying the enterprise test. They are not. Like the question of enterprise, questions of control and integration may also provide a court or tribunal with valuable assistance in drawing the appropriate inferences. All potential aids to the drawing of the appropriate inferences from the primary facts as found stand in their own stead, and no one is subsumed by another. Moreover, those mentioned do not represent an exhaustive list. There could be other

factors that might also assist. However, depending on the circumstances of the particular case, some aids may prove more helpful or more useful than others. In the words of Dillon L.J., "the same question, as an aid to appreciating the facts, will not necessarily be crucial or fundamental in every case". It is for a court or tribunal seized of the issue to identify those aids of greatest potential assistance to them in the circumstances of the particular case and to use those aids appropriately.

Conclusion

[73] In my view the Employment Appeals Tribunal fell into error from the very outset in formulating the preliminary question in the way that it did and in failing to have regard to all possibilities in determining the nature of the work relationship between the parties. That initial error was compounded by a finding of mutuality of obligation on a flawed and untenable basis. Further, the Employment Appeals Tribunal misdirected itself in law in the manner outlined at some length above, based upon a misinterpretation of Keane J.'s judgment in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34. In all the circumstances I must allow the appeals under s. 40 of the Redundancy Payments Acts 1967 to 2003 and s. 11(2) of the Minimum Notice and Terms of Employment Act 1973 to 2001, respectively. I will hear submissions as to what orders may be appropriate in the circumstances.

Solicitor for the appellant: *The Chief State Solicitor*.

Solicitors for the defendants: *McCann Fitzgerald.*

Niamh Fennell, Barrister

[2011] IEHC 43

THE HIGH COURT

[2009 No. 1132SP]

IN THE MATTER OF THE REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 IN THE MATTER OF THE MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

AND IN THE MATTER OF AN APPEAL FROM HEARING NO. 26743 OF THE DETERMINATION OF THE EMPLOYMENT APPEALS TRIBUNAL ON THE 31ST JULY 2009

AND IN THE MATTER OF AN APPEAL BY JOHN BARRY, CONOR O'BRIEN, MARY O'CONNOR, MICHAEL SPRATT AND CIARAN DOLAN

BETWEEN

JOHN BARRY, CONOR O'BRIEN, MARY O'CONNOR, MICHAEL SPRATT AND CIARAN DOLAN

APPLICANTS

V.

THE MINISTER FOR AGRICULTURE & FOOD

RESPONDENT

JUDGMENT of Mr. Justice Hedigan delivered on the 9th day of February 2011.

1. This appeal is brought pursuant to section 39 (14) and section 40 of the Redundancy Payments Acts 1967-2003 and section 11(2) of the Minimum Notice and Terms of Employment Act 1973-2001, which each provide for an appeal on a question of law against a decision of the Employment Appeals Tribunal.

2. The appellants in these proceedings are Veterinary Surgeons who worked for the respondent as Temporary Veterinary Inspectors at the Galtee Meats Plant in Mitchelstown, Co Cork. The respondent is a Minister of the Government and has his principal offices at Agriculture House, Kildare St. Dublin 2.

3. The appellants appeal against a determination made by the Employment Appeals Tribunal dated the 31st July, 2009, in which the Tribunal held the appellants were engaged under a contract for services with the Respondent. They seek the following:-

i) An Order that that the Tribunal erred in law in reversing their previous determination of 12th March, 2007, having found that on the balance of probability, by a majority decision, that the appellants and respondent were engaged in a working relationship that carried sufficient mutuality of obligation to allow them to be classified as employees.

ii) An Order that, having considered the various other tests associated with determining whether the appellants were employed under a contract of or for services and in finding that that their Determination from March 2007 applied, the Tribunal erred in law in thereafter reversing their determination of the 12th March 2007, and then finding that all the appellants were engaged under a contract for service with the respondent.

iii) An Order that the EAT erred in law in their interpretation of the judgment of the High Court, in determining that the High Court instructed the EAT to change its original determination due to its many errors in law in reaching that original determination.

iv) An Order that the EAT erred in law in finding that the High Court directed the EAT to change its original Determination due to its many errors in law in reaching that determination, when the jurisdiction to make such a determination, is a statutory jurisdiction, exclusive to the EAT.

v) An Order that the EAT erred in law, in failing to consider, that having heard new evidence, at the renewed hearing in Cork in January 2009, to which the respondent had not objected, that they were entitled to apply the legal principles as enunciated by the High Court, and to make their own determination having regard to the totality of the evidence, and that the EAT erred in law, in finding that they were bound to reverse their decision made on the 12th of March 2007, irrespective of their new findings.

vi) An Order that the EAT erred in law in failing to consider that the additional given evidence given in January 2009, whereby the appellant gave evidence that at times they were paid for being rostered even when no work was made available, was new evidence, together with evidence as already given, upon which a finding of mutuality of obligation would be found, which thereby entitled the EAT to make a new finding such that they were not bound to reverse the determination of the 12th of March 2007.

vii) An Order that the EAT erred in law, in failing to find that it had jurisdiction to find that the appellants were employed by the respondent under a contract of services, having regard to the totality of the evidence and in particular the additional evidence heard in January 2009.

viii) An Order that the EAT erred in law, in failing to find that it had jurisdiction to, and could properly find that mutuality of obligation was present in the relationship between the appellants and the respondent.

ix) An Order that the EAT erred in law in determining that the appellants were engaged under a contract for services with the respondent.

x) An Order that the claim of the Appellants pursuant to the Redundancy Payments Acts, 1967 to 2003 and pursuant to the Minimum Notice and Terms of Employments Acts, 1973 to 2001, be returned to the EAT.

xi) In the alternative to (ix) above, an Order upholding the determination of the EAT that each of the appellants were employed under a contract of service.

4. Following the closure in October 2004 of the Galtee Meats Plant at Mitchelstown Co. Cork, the appellants claimed entitlement to payments under the Redundancy Payments Acts 1967-2003 and under the Minimum Notice and Terms of Employment Act 1973-2001. Entitlement to the payments claimed however depended on the appellants having been employees who were employed by the respondent under a contract of service. The respondent claimed they were not employed under a contract of service and refused to make the payments claimed. Arising from this the appellant's submitted claims to the Employment Appeals Tribunal on the 20th of April, 2005. The Tribunal issued its determination on the 12th of March, 2007, finding the appellants were employed under a contract of service and were therefore employees.

The respondent appealed the determination of the Employment Appeals Tribunal to the High Court on a point of law. On the 7th July, 2008, judgment was delivered by Edwards

J. who found that there was insufficient evidence before the Tribunal from which it could properly find that the appellants were employed by the respondent under a contract of service. Edwards J. found that the Tribunal erred in law in finding that there was mutuality of obligation based on an obligation on the part of the appellants alone with no obligation on the part of the respondent. The Tribunal also erred in failing to consider evidence that the respondent was not obliged to provide work for the appellants, and in failing to attach no weight to evidence that the appellants were entitled to refuse up to 16% of shifts before action would be taken by the respondent. The Tribunal was also found to have incorrectly distinguished relevant and binding authorities from the facts of the case before it.

The claim of the appellants was returned to the Tribunal who heard additional evidence from both parties. On the 31st July, 2009, the Tribunal delivered it's determination, at p.41 it held:-

> "On the balance of probability, by a majority decision that the appellants and the respondent were engaged in a working relationship that carried sufficient mutuality of obligation to allow them to be classified as possible employees. This allowed the Tribunal to consider the various other tests associated with determining whether they were employed under a contract of or for services. In that consideration their determination from March 2007 applies... However, a ruling from the High Court on this case issued in July 2008. The Judge on that case issued eight declarations concluding that the case be returned to the Tribunal. Two contrasting interpretations emerge from the totality of those declarations. One was that the Judge was in effect instructing the Tribunal to change its original determination due

to its many errors in law in reaching that determination. Another interpretation was that this ruling was silent on the Tribunal's original determination but critical of its reasoning and flawed approach in law as to how it reached that decision. Following further consultations of this division of the Tribunal and notwithstanding the majority view expressed above, and the relevant legislation, the Tribunal feels bound to accept the former interpretation. Accordingly, the Tribunal reverses its Determination of 12th March 2007, and now finds that all the appellants were engaged under a contract for services with the respondent. It therefore follows that the Tribunal finds that it has no jurisdiction to proceed with substantive hearings on these cases under the Redundancy Payments Acts, 1967-2007 and the Minimum Notice and Terms of Employments Act, 1973 to 2005".

The appellants now appeal this finding by the Employment Appeals Tribunal.

Submissions of the Appellant

5.1 In its determination made on the 31st of July, 2009, the Tribunal found at p.41 that:-

"...the judge was in effect instructing the Tribunal to change its original determination due to its many errors in law in reaching that determination...Accordingly, the Tribunal reverses its determination of 12th March 2007, and now finds that all the Appellants were engaged under a contract for services with the Respondent"

The appellants submit that the High Court remitted the proceedings simpliciter, without any direction that the Tribunal must reverse its finding. It is submitted that the Tribunal

erred in law in finding that it had no jurisdiction to make a determination as to fact, following the High Court's determination on a point of law.

5.2 The appellants referred the court to the case of *Henry Denny and Sons v Minister for Social Welfare* [1998] I I.R. 34 is very instructive to the present case. The appellant Ms Mc Mahon worked as a shop demonstrator for Denny she received a daily rate of pay and her contract described her as an independent contractor. The demonstrations were not carried out under supervision and materials were provided by the company. The question arose as to whether Ms. McMahon was employed under a contract of service or a contract for services. The Supreme Court held that in deciding whether a person is employed under a contact of service or a contract for services, each case must be determined in light of its particular facts. In general, a person will be regarded as being employed under a contract of service and not as an independent contractor (a contract for service's) where he or she is performing service for another person and not for himself or herself. In the present case the veterinary surgeons provided no equipment, they took directions as to what work to do, it is submitted that under the test laid down in Denny they are employees. It is further submitted that they have a stronger case than Ms. McMahon as she only received travelling expenses if a supermarket could not offer her work whereas the applicants were paid even if there was no work for them to do.

5.3 In his judgment Edwards J. held that there was insufficient evidence before the Employment Appeals Tribunal, on which the Tribunal could properly find that the appellants were employed under a contract of service. It was agreed between the parties

that additional evidence would be given by the first named appellant Mr Barry on behalf of all of the appellant's. Mr Barry gave evidence that he worked 52 weeks in the year 2003 and 44 weeks in 2004 and that his conditions of work complied with each of the nineteen criteria on whether an individual is an employee as set out in the "Code of Practice for Determining Employment of Self-Employment Status of Individuals" a document prepared by the Employment Status Group. Evidence was given that the appellants had to turn up for 84% of shifts within every three-month period. This was to ensure they did not miss a significant number of shifts in the busy lambing period during the spring when they would be attending to their other private clients needs. It was claimed by the appellants that failure to comply with the rule could result in loss of seniority which was important because the more senior you were the more regularly you would be offered work.

5.4 In hearing the first appeal the High Court necessarily had to address itself to the issue of its jurisdiction to hear an appeal on a point of law. The entitlement to bring an appeal is governed by Section 39 (14) and section 40 of the Redundancy Payments Acts, 1967 to 2007, and Section 11(2) of the Minimum Notice and Terms of Employment Acts, 1973 to 2001, which each provide for an appeal on a question of law against the decision of the Employment Appeals Tribunal. Edwards J. identified the issue as being whether a determination by the Employment Appeals Tribunal, of the nature of a work relationship between the two parties ought properly to be characterised as a matter of law, as a matter of fact or as a mixed question of law and fact. He drew some assistance from the case *O'Kelly & Others v Trusthouse Forte Plc.* [1983] 3 All ER 456, at 477 Sir John

Donaldson M.R. addressed the role of an appellate Court in reviewing a decision of a lower Court:-

> "When reviewing such a decision, the only problem is to divine the direction on law which the lower court gave itself. Sometimes it will have been expressed in its reasons, but more often it has to be inferred. This is the point of temptation for the appellate court. It may well have a shrewd suspicion or a gut reaction that it would have reached a different decision, but it must never forget this may be because it thinks that it would have found or weighed facts differently. Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been misdirection on a question of law before it can intervene. Unless the direction on law has been expressed it can only be satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusion under appeal. This is a heavy burden on the appellant."

If as the appellants submit there has been an error of law the court must intervene and either uphold the original finding of the Tribunal or remit the matter back to the Tribunal.

The appellants argue that when a matter is remitted the Tribunal is then obliged to make its own decision in light of the findings of the Higher Court. In the case of *National University of Ireland Cork (Appellant) v Alan Ahern & Others (Respondents)* [2005] 2 I.R. 577. The Labour Court held that there had been discrimination in relation to pay. In the Supreme Court, Mc Cracken J. allowed the appellant's appeal, and remitted the matter back to the Labour Court, finding at 548 that:-

" a determination that discrimination was not on grounds other than sex, may be a determination of fact, nevertheless, I am quite satisfied that such a finding was not based on the proper consideration of the surrounding circumstances or of the underlying facts. To this degree, I am satisfied that there was an error of law."

The matter was remitted back to the Labour Court for reconsideration in light of the findings made by the Supreme Court. The Labour Court heard additional evidence and addressed the points made by the Supreme Court. Further, the Labour Court stated that it was bound by the findings of the Supreme Court and must make its own decisions in light of those findings. It is submitted that the Tribunal in this case was obliged to make its own decisions in light of the findings made in the High Court.

5.5 Where a case is heard by way of appeal, and is then remitted to the administrative tribunal, it is for that administrative tribunal to apply the law as enunciated by the Appellate Court. The Employment Appeals Tribunal has heard additional evidence and it cannot and should not divest itself of its statutory authority to make the determination in the remitted proceedings. The finding of the High Court, that there was insufficient evidence before the Tribunal on which they could find that the appellants were employed by the respondent under a contract of service was addressed by the additional evidence given, as was the finding that mutuality of obligation was not present.

Edwards J. found that the Tribunal erred in law in failing to consider evidence that the respondent was not obliged to provide work to the appellants and that the appellants did not have an expectation of a particular level of work. It is submitted that these issues were addressed by the additional evidence that the appellants turned up for work because

they expected the work to be provided and even when there was no work available they were paid when rostered on. Edwards J. found that the Tribunal erred in law in attaching no weight to the evidence that the appellants were entitled to refuse up to 16% of the shifts before action would be taken by the respondent. It is submitted that this has been addressed by the evidence that the appellants had to accept 84% of the work proffered to them to avoid the risk of sanction i.e. demotion on the panel- an effective loss of their job.

It is submitted by the appellants that the Tribunal correctly finds the essence of "mutuality of obligation" in accordance with the judgment of Edwards J. The Tribunal then correctly directed itself as to the law, i.e. that a finding of mutuality of obligation is not of itself necessarily determinative of the nature of the relationship. The Tribunal then examined the nature of the relationship and found the appellants were employed under a contract of service. It is submitted that the Tribunal then misdirected itself as to the law, in finding that notwithstanding their majority view, they felt bound to accept the interpretation of the judgment of Edwards J. that the judge was in effect instructing the Tribunal to change the original determination. It is submitted that the Tribunal erred in law in ultimately determining that the appellants were employed under a contract for services and it is submitted that their initial finding, by a majority, that each of the appellants were employed under a contract of service should be upheld or the matter should be returned to the Tribunal.

Respondent's Submissions

6.1 The respondent submits that it is incorrect to contend that the finding on the part of the Employment Appeals Tribunal took no account of the additional evidence and

submissions that were before it on the 8th January, 2009, and there was nothing in the determination of the 31st July, 2009, to support this. The respondent claims that the High Court had invited the appellants to advance an alternative proposition as to the nature of the working relationship between the parties, and that the appellants failed to do so. Further, it is submitted that the evidence in relation to the arrangements between the appellants and the respondent in relation to declining shifts was not substantively added to by the witnesses who gave evidence before the Tribunal on the 8th January, 2009. The respondent submits that the determination of the Tribunal correctly interpreted the decision of Edwards J. and that the Tribunal was both entitled to, and required to, proceed on that basis. The Tribunal concluded that it was required to change its earlier determination of 12th of March, 2007.

6.2 The first-named appellant gave additional evidence of the specific number of hours and weeks worked. The respondents however submit that this evidence was derived from documentation that had already been submitted to the Tribunal. It cannot be described as having the character of new or additional material capable of undermining the High Courts findings. In the alternative, the respondents argue that evidence in relation to the numbers of hours or weeks worked is not in itself capable of bearing on the existence of mutuality.

6.3 The appellant has sought to rely on the 'Code of Practice for Determining Employment of Self-Employment Status of Individuals' which was prepared by the Employment Status Group. The first named appellant gave evidence that his

circumstances meet the criteria on whether an individual is an employee as set out in the code. The respondent submits that cannot be determinative of the issue, the Code is not a binding statement of law on the point. The respondent argues that the finding of the High Court contains sufficient guidance on the law so as to enable the Tribunal to perform its duties in accordance with the law. The respondent claims that, firstly, the code makes no reference to the requirement of mutuality of obligation which the High Court has held is necessary to establish the existence of a contract of service and, secondly, the relevant test is whether the person performing work, does so as a person in business on their own account. Edwards J. held that every case must be considered in light of its particular facts. In light of this, the respondent submits that the appellants reliance upon the criteria contained in the Code does not advance the issue as to the existence of mutuality of obligation or, indeed, the existence of a contract of service.

6.4 As regards the evidence given concerning the 16% Rule, Edwards J. held at 231 that:-

> "... the uncontested evidence concerning the arrangements entered into between the [respondents] and the [appellant] was that the latter were entitled to decline at the very least 16% of the shifts offered to them without that refusal having any consequences for their contracts."

The 'appellant' referred to by the High Court is the respondent in the within proceedings and the 'respondent' referred to by the High Court is the appellants in the within proceedings. The respondent submits that the "uncontested evidence" was not added to in any substantive fashion by the witness evidence before the Tribunal. At the hearing of the

8th January, 2009, a witness called by the respondent gave evidence of his view that in practice a Temporary Veterinary Inspector would not be required to work 84% of the shifts offered. The respondent argues that there was no evidence adduced which suggests that the appellants were at risk of not being hired or being put at the back of the list of regular Temporary Veterinary Inspector's if they did not turn up for 84% of their shifts.

6.5 The respondent submits that the question as to whether this appeal involves a question of law has already been answered by the High Court. The judgment of Edwards J. at 221 quoted as follows from the judgment of Donaldson MR in *O'Kelly & Others v Trusthouse Forte Plc* [1983] I.C.R 728 at 478

> "The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts."

In this regard the respondent submits that the determination by the Tribunal on 31st July, 2009, that the appellants were employed on a contract for services is a pure question of law such that this Honourable Court has jurisdiction to adjudicate upon this appeal.

6.6 The respondent relies on the following extract from the decision of Donaldson MR in *O'Kelly & Others v Trusthouse Forte Plc* [1983] I.C.R 728, as cited in the decision of the High Court at 221:-

> "Unpalatable though it may be on occasion, [the appellate court] must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction in law has been

expressed, it can only be so satisfied if in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law could have reached the conclusion under appeal. This is a heavy burden on an appellant."

It is submitted that the appellants have not discharged the "heavy burden" on them to demonstrate that no reasonable tribunal could have reached the determination that they seek to appeal here.

6.7 The appellants contend that the Tribunal confirmed that a contract of service prevailed. What the Tribunal in fact said is that the appellants and respondent were engaged in a working relationship that carried sufficient mutuality of obligation to allow them to be classified as possible employees. This is very different from confirming that a contract for service prevailed. The appellant also contends that the Tribunal erred in law in finding that it had no jurisdiction to make a determination as to fact. The respondent submits that such a finding is to be found nowhere in the Tribunal's determination.

6.8 The respondent argues that the evidence adduced before the EAT on 8th January, 2009, did not advance matters as regards any of the issues before it. It is submitted that the evidence was incapable of grounding any finding that there existed a mutuality of obligation, such as to create a contract of service, in the arrangement between the respondent and appellants. In particular, the respondent submits that there was nothing in the evidence to demonstrate that the respondent was under any obligation to give work to the appellants. It is claimed that the appellants are attempting to imply such a term into

the relationship, even though the High Court has made it clear that there is no basis on which to imply such a term.

7. Decision of the Court

7.1 The appellants have claimed entitlement to payments under the Redundancy Payments Acts 1967-2003 and under the Minimum Notice and Terms of Employment Act 1973-2001, following the closure of their place of employment in October 2004. Entitlement to the payments claimed depends on the appellants having been employees who were employed by the respondent under a contract of service. The respondent claimed they were not employed under a contract of service and refused to make the payments claimed. Arising from this, the appellant's submitted claims to the Employment Appeals Tribunal. The entitlement of the appellants to bring an appeal is governed by section 39 of the Redundancy Payments Acts 1967-2003 which provides that :-

> "The decision of the Tribunal on any question referred to it under this Section shall be final and conclusive, save that any person dissatisfied with the decision may appeal therefrom to the High Court on a question of law."

Section 11(2) of the Minimum Notice and Terms of Employment Act 1973-2001, also provides for an appeal on a question of law against a decision of the Employment Appeals Tribunal.

The question as to whether this appeal involves a question of law has already been answered in the affirmative by Edwards J. who quoted as follows from the judgment of Donaldson MR in *O'Kelly & Others v Trusthouse Forte Plc* [1983] I.C.R 728 at 478

"The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts."

The determination by the Tribunal on 31st of July, 2009 that the appellants were employed on a contract for services raises a pure question of law therefore this Court has jurisdiction to adjudicate upon this appeal.

7.2 The appellants complain that the Tribunal failed to take account of new evidence and erred in law in finding that the High Court directed it to change its original determination. The onus is on the appellant's to prove that that no reasonable tribunal would have reached the decision that is under appeal. In *O'Kelly & Others v Trusthouse Forte Plc* [1983] I.C.R 728, Donaldson MR held at 221:-

"Unpalatable though it may be on occasion, [the appellate court] must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there must have been a misdirection on a question of law before it can intervene. Unless the direction in law has been expressed, it can only be so satisfied if in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law could have reached the conclusion under appeal. This is a heavy burden on an appellant."

It is understandable that the appellants are dissatisfied with the process and reasoning adopted by the Tribunal in making the determination which they now seek to impugn. This determination might have been better phrased. However the real question here is whether in light of the additional evidence given, the appellants have discharged the

burden on them to demonstrate that no reasonable Tribunal could have found against the appellants.

7.3 Edwards J. found there was insufficient evidence before the Employment Appeals Tribunal from which it could properly find that the appellants were employed by the respondent under a contract of service. In particular Edwards J. found that the Tribunal erred in law in finding that there was mutuality of obligation as the respondent was not obliged to provide work for the applicants, and in failing to attach no weight to evidence that the appellants were entitled to refuse up to 16% of shifts before action would be taken by the respondent.

7.4 The appellant attempted to respond to these findings by adducing additional evidence before the tribunal at the hearing of the 8th of January, 2009. With regard to mutuality of obligation; additional information concerning the number of weeks worked was provided by Mr. Barry who gave evidence that he worked 52 weeks in the year 2002 and 44 weeks in 2003. However this evidence was taken from documentation that had already been submitted to the tribunal. Furthermore the fact that a person may do a lot of work is not of itself proof of the existence of mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer.

7.5 Evidence was given concerning the appellants entitlement to refuse up to 16% of shifts before action would be taken by the respondent. The appellants gave evidence that failure to accept 84% of work could result in demotion. However at the hearing of 8th

January, 2009, this evidence was contested by one Mr. Mackessy who stated at p.78/9 of the Transcript of evidence:-

> "to say that a TVI in a senior position must attend for 84% of the time in my view would be completely--- it would be an inaccurate assumption to say that... in practice on the ground it doesn't work out that way... The Department wasn't in the business of insisting that someone would attend for 84% of the time and if they didn't there would be sanctions."

While the appellants contend that if they did not turn up for at least 84% of their shifts they might no longer be hired, it is noteworthy that no evidence was produced to show that these particular appellants were at risk of not being hired or even being put at the end of the list of regular TVI's offering services to the panel. No evidence was adduced of the existence of any system of monitoring by the respondent to secure compliance with the 16% rule. Mr. Mackessy gave evidence recorded at p. 78/9 of the transcript, to the effect that a rotational policy operated at the Mitchelstown plant and the respondent did not insist that any one individual attend for 84% of shifts and there were no complaints in relation to the operation of the 16% rule at the plant.

7.6 The appellants sought to rely on the "Code of Practice for Determining Employment or Self-Employment Status of Individuals" a document prepared by the Employment Status Group. Mr Barry gave evidence that his circumstances complied with each of the nineteen criteria on whether an individual is an employee as set out in the code. The code however is not a binding statement of law therefore such compliance is not determinative

of the issue. The code does not refer to mutuality of obligation which the High Court has held is necessary to establish the existence of a contract of service.

7.7 There was nothing in the additional evidence adduced by the applicants which was of such crucial importance that having heard it no reasonable tribunal would be entitled to conclude that the applicants were employed other than under a contract for service. The heavy onus of proof which the applicants bear has not been borne. I am obliged therefore to refuse the relief sought by the appellants to have their claim returned to the Employment Appeals Tribunal. It is therefore not necessary for me to consider the issue of express directions to the Tribunal as to the correct application of the law to the facts in this case.

7.9 For all the above mentioned reasons, I must disallow the appeal under section 39 (14) and section 40 of the Redundancy Payments Acts 1967-2003 and section 11(2) of the Minimum Notice and Terms of Employment Act 1973-2001, respectively.

approved
J. L. Mc[illegible] on
9th Feb 2011.

[2010] No. 125CA

THE HIGH COURT

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

BETWEEN

JVC EUROPE LIMITED

PLAINTIFF/APPELLANT

AND

JEROME PANISI

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered on the 27th day of July 2011

1. Redundancy can be a devastating blow. Where economic conditions are difficult, or where the employee who is let go has aged or is experiencing health difficulties, finding alternative employment may be impossible. Years of devotion to an employer count for nothing where technology overtakes the workforce, rendering the labour of those displaced unnecessary; where new methods of work are demanded from those who do not have the skills to respond; or where a product is rendered obsolete. All these are examples of genuine redundancy. As ordinarily understood, redundancy means that a worker is no longer needed. The legal definition, as stated in the legislation which I quote later, mirrors common comprehension. Because redundancy is inevitable if there is no work for workers to do and the workers cease to be needed, it is also lawful. The Redundancy Payments Act 1967, as amended, establishes a floor of rights in compensation for redundancy; circumscribes the use to which dismissal by reason of redundancy can be put; and provides for minimum payments for qualified employees who are subject to this misfortune. In circumstances of insolvency those payments can be met from the public purse.

2. A contract of employment can involve both personal and impersonal interaction between employer and employee. Redundancy is not, however, a personal choice. It is, in essence, the external or internal economic or technological reorienting of an enterprise whereby the work of employees needs to be shed or to be carried out in an entirely different manner. As such, redundancy is entirely impersonal. Dismissal, on the other hand, is a decision targeted at an individual. Under the Unfair Dismissals Act 1977, as amended ("the Act of 1977"), the dismissal of an employee may only take place for substantial reasons that are fair. In effect, the contract of employment is protected in law and it may only be repudiated by the employer for reasons which do not amount to an unfair dismissal. This requires the employer to show substantial grounds which justify the dismissal. The burden of proof, in that regard, is squarely placed upon the employer. Sections 6(1) and (2) of that Act, in their amended form, provide:-

> "(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.
>
> (2) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an

unfair dismissal if it results wholly or mainly from one or more of the following:

(a) the employee's membership, or proposal that he or another person become a member, of, or his engaging in activities on behalf of, a trade union or excepted body under the Trade Union Acts, 1941 and 1971, where the times at which he engages in such activities are outside his hours of work or are times during his hours of work in which he is permitted pursuant to the contract of employment between him and his employer so to engage,

(b) the religious or political opinions of the employee,

(c) civil proceedings whether actual, threatened or proposed against the employer to which the employee is or will be a party or in which the employee was or is likely to be a witness,

(d) criminal proceedings against the employer, whether actual, threatened or proposed, in relation to which the employee has made, proposed or threatened to make a complaint or statement to the prosecuting authority or to any other authority connected with or involved in the prosecution of the proceedings or in which the employee was or is likely to be a witness,

(dd) the exercise or proposed exercise by the employee of the right to parental leave, *force majeure* leave under and in accordance with the Parental Leave Act, 1998, or carer's leave under and in accordance with the *Carer's Leave Act, 2001*,

(e) the race, colour or sexual orientation of the employee,

(ee) the age of the employee,

(eee) the employee's membership of the travelling community,

(f) the employee's pregnancy, attendance at ante-natal classes, giving birth or breastfeeding or any matters connected therewith,

(g) the exercise or proposed exercise by the employee of the right under the Maternity Protection Act 1994 to any form of protective leave or natal care absence, within the meaning of Part IV of that Act, or to time off from work to attend ante-natal classes in accordance with section 15A (inserted by *section 8* of the *Maternity Protection (Amendment) Act 2004*), or to time off from work or a reduction of working hours for breastfeeding in accordance with section 15B (inserted by *section 9* of the *Maternity Protection (Amendment) Act 2004*), of the first-mentioned Act,]

(h) the exercise or contemplated exercise by an adoptive parent of the parent's right under the *Adoptive Leave Acts 1995* and *2005* to adoptive leave or additional adoptive leave or a period of time off to attend certain pre-adoption classes or meetings."

3. To condense this and attempt a summary: a dismissal is automatically unfair under s.6 (2) of the Act of 1977 if it results from trade union activity; religious or political opinions; actual or proposed civil or criminal proceedings; bigotry; ageism; or reasons connected with maternity or parental leave due to childbirth or adoption. An employer may nonetheless dismiss an employee, but only if a reason outside of that set of proscribed reasons is the motivation and the reason for dismissal is fair.

4. A dismissal is fair, however, only if it results from a reason within the statute. The

lawful reasons for dismissal are precisely set out. Section 6(4) of the Act of 1977 provides:-

> "Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:
>
> (a) the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) the conduct of the employee,
>
> (c) the redundancy of the employee, and
>
> (d) the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statute or instrument made under statute."

5. Explanation is hardly necessary of these clear terms. Most unfair dismissal cases revolve around alleged misconduct by an employee. The issue for the tribunal deciding the matter will be whether the circumstances proven to found the dismissal were such that a reasonable employer would have concluded that there was misconduct and that such misconduct constituted substantial grounds to justify the dismissal. An employee may also be dismissed where, by reason of a change in primary or secondary legislation, it becomes unlawful for that employee to continue to work. For instance, in a pharmacy, only a qualified person may dispense controlled medication. Were legislation to provide that a large number of over-the-counter medications are to be restricted to dispensation by pharmaceutical chemists, work will disappear for unqualified assistants. An employee may be discovered not to have the capability, competence or qualifications to do the work for which he or she was employed. Such reasons for ending employment are all personal to the employee, to his or her conduct, to his or her competence or qualifications. It is made abundantly clear by that legislation that redundancy, while it is dismissal, is not unfair. A dismissal, however, can be disguised as redundancy; that is not lawful. Upon dismissal an employer can simply say that the employee was not dismissed for a reason specific to that person but that, instead, his or her services were no longer required, pointing to apparently genuine reasons for dispensing with the services of the employee. In all cases of dismissal, whether by reason of redundancy or for substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of employment came within a lawful reason. In cases of misconduct, a fair procedure must be followed whereby an employee is given an entitlement to explain what otherwise might amount to a finding of real seriousness against his or her character. In an unfair dismissal claim, where the answer is asserted to be redundancy, the employer bears the burden of establishing redundancy and of showing which kind of redundancy is apposite. Without that requirement, vagueness would replace the precision necessary to ensure the upholding of employee rights. Redundancy is impersonal. Instead, it must result from, as s.7(2) of the Redundancy Payments Act 1967, as amended, provides, "reasons not related to the employee concerned." Redundancy, cannot, therefore be used as cloak for the weeding out of those employees who are regarded as less competent than others or who appear to have health or age related issues. If that is the reason for letting an employee go, then it is not a redundancy, but a dismissal.

6. Section 7(2) of the Redundancy Payments Act 1967, as amended by s. 4 of the

Redundancy Payments Act 1971 and s.5 of the Redundancy Payments Act 2003, provides:-

> "(2) For the purposes of subsection (1), an employee who is dismissed shall be taken to be dismissed by reason of redundancy if for one or more reasons not related to the employee concerned the dismissal is attributable wholly or mainly to-
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or
>
> (c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or
>
> (d) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or
>
> (e) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained."

7. Exceptions are provided for redundancy as a defence to a claim of unfair dismissal in s.2A of the Act of 1967. These are not relevant to this case, but encompass the protections that legislation has required in the case of collective redundancies, compulsory redundancy and dismissal for the purpose of re-engagement on less advantageous conditions. The comment on the nature of redundancy made in *St. Leger v. Frontline Distributors Ireland Ltd.*, [1995] E.L.R. 160 at 161 to 162 by Dermot MacCarthy S.C., as chairman of the Employment Appeals Tribunal, is apposite:-

> "Impersonality runs throughout the five definitions in the Act. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job. It is worthy of note that the E.C. Directive on Collective Redundancies uses a shorter and simpler definition: 'one or more reasons not related to the individual workers concerned'.
>
> Change also runs through all five definitions. This means change in the workplace. The most dramatic change of all is a complete close down. Change may also mean a reduction in needs for employees, or a reduction in numbers. Definition (d) and (e) involve change in the way the work is done or some other form of change in the nature of the job. Under these two definitions change in the job must mean qualitative change. Definition (e) must involve, partly at least, work of a different kind, and that is the only meaning we can put on the words 'other work'. More work or less work of the same kind does not mean 'other work' and is only quantitative

change."

8. It may be prudent, and a mark of a genuine redundancy, that alternatives to letting an employee go should be examined. However, that does not arise for decision in this case. Similarly, a fair selection procedure may indicate an honest approach to redundancy by an employer, but I do not wish to comment on matters which are outside the competence of the decision to be made in this case: see Stewart and Dunleavy, *Compensation on Dismissal – Employment Law and Practice, (Dublin, 2007)* at paragraph. 19.8.6. As a matter of contract, where selection procedures for redundancy, or a consultation process to seek to discover alternatives to redundancy, are laid down in the conditions of employment of an employee, whether by collective agreement or individual employment contract, these should be followed. Following what is on the surface a fair procedure does not necessarily demonstrate that the decision maker is taking an honest approach to a decision. As with much else, an apparently fair procedure can be used as a cloak for deceptive conduct. It may be followed in form only so as to mask an ulterior motive or with no intention of fulfilling its purpose, even should the best of reasons for not proceeding to redundancy arise during its course.

9. The contractual entitlement to a defined procedure is declared in s. 6 of the Act of 1977. This provides at s. 6(3):-

> "Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either—
>
> (a) the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or
>
> (b) he was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union, or an excepted body under the Trade Union Acts, 1941 and 1971, representing him or has been established by the custom and practice of the employment concerned) relating to redundancy and there were no special reasons justifying a departure from that procedure."

Issues

10. The issues which arise for determination in this case depend upon the general analysis of the law set forth above. These issues are whether Jerome Panisi, as employee, was selected for apparent redundancy by his employer, JVC Europe Limited:

(i) on the basis of a dismissal disguised as a redundancy; or

(ii) pursuant to procedures which were followed in form, but not in substance.

The quantum of damages also arises for decision in the event that the answer to either question is in the affirmative.

Access to justice

11. This is the third full hearing on oral evidence of this case. Under the relevant legislation a claim for unfair dismissal may first be brought before the statutory Rights Commissioner. The determination of the Rights Commissioner may then be appealed by either

employer or employee to the Employment Appeals Tribunal. The appeal is therefore from a single individual, as decision-maker, to a panel of three: a barrister or solicitor, as chairman, and one representative nominated from each of the employer's and employee's groups. The Rights Commissioner can be bypassed in favour of an initial hearing before the Employment Appeals Tribunal. Both the Rights Commissioner and the Employment Appeals Tribunal apply fair procedures equivalent to those required in a civil trial. Witnesses are heard and there is cross-examination and opening and closing submissions. Since no transcript is kept, the written decision of the Rights Commissioner may be appealed to the Employment Appeals Tribunal and the determination at that level, in turn, may be appealed to the Circuit Court. No transcript is kept in that Court. Thence, it may be appealed, as was this case, to the High Court. All of these steps involve re-hearing all of the evidence. None of the appeals are appeals on a point of law. An employee seeking the vindication of employment rights may be required by a determined employer to proceed through four full oral hearings. The costs in terms of the engagement of legal representation may be very large. Whereas the Rights Commissioner and the Employment Appeals Tribunal may not award costs to a successful applicant, the Circuit Court and High Court are obliged to award costs in accordance with the resolution of the litigation. The entire procedure may take some years. It is also a situation where the resources of an employer may militate against fairness in the disposal of proceedings brought by an impecunious employee. After all, the point of such a case is whether the employee was unfairly dismissed; consequently he or she often has no job. The costs of legal hearings has a human rights implication: see *Campbell v. MGN Limited* [2004] UKHL 22; and in the European Court of Human Rights as *MGN Limited. v. The United Kingdom,* application number 39401/04. I am satisfied that the employee in this particular dispute was so worried about the potential costs that the sum which he received in apparent redundancy from his employer has been kept untouched by him in a bank account. The timescale involved in this case is not untypical of others. The employee filled in a T1A form seeking redress for unfair dismissal and a failure to comply with the period of notice of termination of employment required by statute on the 20th August 2008. His case was heard before the Employment Appeals Tribunal on the 8th December 2008. That tribunal issued a decision on the 24th April 2009. On the 14th July 2009, that decision was appealed by the employer. It was heard by the Circuit Court on the 2nd and 3rd June 2010, and a decision was given immediately by Judge Linnane. On the 14th June 2010 the matter was then appealed to the High Court. This Court heard the case over the 5th, 6th, 7th and 8th of July 2011. Judgment is now being given after a gap of about two weeks. The entire process has taken three years and three full oral hearings.

12. This procedure is cumbersome and redolent with the potential for unfairness. Many proposals have been mooted with a view to changing it. There are compelling reasons why change might be considered. No appeal in any court proceeding under the Constitution is ever more than a hearing and a re-hearing. Often it is less. From District Court to Circuit Court there is a full oral re-hearing in a civil or criminal case. The process is then complete. In a civil case, a Circuit Court judgment may be appealed to the High Court by a full oral re-hearing. The process is then complete. Circuit Court criminal decisions and High Court civil and criminal decisions can be appealed to the Court of Criminal Appeal or the Supreme Court on a point of law argued on the basis of a transcript. The process is then complete, barring a rare criminal appeal on a point of law of exceptional public importance from the Court of

Criminal Appeal to the Supreme Court. In criminal cases the process is usually funded at public expense.

Facts

13. Jerome Panisi was employed from the 30th September 1991 as general manager of JVC in Ireland. His functions as general manager are set out in his written contract of that date. Having analysed that contract, and having heard the evidence of Jerome Panisi, I am satisfied that 90% of his work involved sales. He was not a technical person, versed in electrical engineering, but instead maintained a strong public face in Ireland on behalf of his employer as a salesman. The results of his work were impressive. In due course the employer by whom he was engaged, JVC (U.K.) Limited, became JVC Europe Limited. Nothing turns on that and I will call the employer 'JVC'.

14. The employer argues that the Court should accept that throughout the years 2000 to 2008 JVC faced a very serious situation in terms of turnover. Apparently, the company had not invested early enough in flat screen television technology. In consequence, many of its competitors overtook it in terms of sales. Tube televisions were fast disappearing and being replaced in many homes by modern slimline televisions. The television market is, in terms of sales of consumer electronics, in or around 80% of the market. For any firm in that line of commerce, a fall in sales of televisions is very serious. That is not only because of the revenue which television sales represent, but also because the brand name thereby becomes less visible and so less established in the marketplace and in the home. Whereas there has been some variation in the figures, it seems to me to be clear that turnover in the Irish and British market for JVC fell by around 50% over that time period, and for the reasons stated. The number of people operating in Ireland in sales and administration has decreased from a high point that exceeded twelve employees down to the two that are currently employed as of the date of writing this judgment in the summer of 2011.

15. On the 4th March 2008, a meeting was arranged with Jerome Panisi in Dublin and it was attended by him, by David Diamond, the human resources manager for the company, and by Kevin Crossland, the sales director. Mr. Panisi was handed a letter which told him that there would no longer be a requirement for his position, for the post of mobile entertainment in the U.K. or for the national independent sales manager in the U.K. While these three posts were disappearing, for reasons which were not at all apparent during the hearing, three new posts were being created. These would be: sales manager of key accounts and independent firms, a London position; in Ireland, sales manager for Ireland; and lastly a post of area sales manager in the U.K. Appended to the letter were two job descriptions but, curiously, the job description for sales manager in Ireland was not forwarded until a week later. I have read the job description for that post. In terms of the actual work to be undertaken it very closely mirrors the job then being done by Jerome Panisi. It is possible to describe it in different terms but, in reality, the work to be undertaken by the individual taking that post would be virtually the same.

16. Approximately a year before this development a new key account manager had been appointed in Ireland. This individual was highly competent but lived too far away from Dublin to be effective. As a recruitment brief for this post, an outside agency prepared a document on behalf of JVC. A curious passage occurred therein:-

> "JVC are a progressive company and are looking to attract a talented individual

with potential to progress their career to General Management level as the current General Manager (Ireland) is due to retire in two years, ambition, drive and delivery focus is essential to the successful candidate."

17. Jerome Panisi was not due to retire within that timescale, and would not, in fact, have retired until October 2011, had matters taken their course without the intervention of what is claimed to be a redundancy.

18. At some point in the process of consultation before redundancy, provided for under the JVC employee-employer contract, Jerome Panisi became suspicious as to what was happening and began to record telephone conversations and meetings. While this is undesirable, I do not regard it as undermining his character or the integrity of his testimony.

19. The process for redundancy pursuant to the contract between Jerome Panisi and JVC, and as established as engaging rights under s. 6 of the Act of 1977, provided for a period of consultation within which the employee targeted for redundancy could put forward different ways in which the company might proceed without losing that worker. On the 26th March 2008, Jerome Panisi replied to the employer on the proposal to make him redundant. He pointed out that sales had yielded a high net profit in Ireland from 2000 to 2004. He further pointed out that the post of national account manager would be lost to the local organisation under the proposed arrangements. He referred to the peculiarities of the Irish market, whereby under the new structure of reporting proposed in the reorganisation, he would be reporting, were he to be selected as sales manager Ireland, directly to London. His first and primary reason, however, was that the duties of the new position of sales manager Ireland were practically the same as those currently assigned to him. In the result of the reorganisation for the apparent purpose of redundancy, the national account manager in Dublin, who used to report to Mr. Panisi as general manager in Ireland, would be lost and instead there would be a sales manager in Ireland.

20. The issue which thus comes into sharp focus is whether there was a plan, implemented through an apparent redundancy, for the new post of sales manager Ireland to be filled by the existing national account manager.

21. Thomas Dillon was then the national account manager in Ireland. He was recruited in August 2007 and reported to Jerome Panisi. He worked in that position, and then subsequently as sales manager Ireland when Jerome Panisi departed, up to the 16th April 2010. He then left in order to better himself by joining another consumer electronics firm. His evidence was that on the 10th April 2008 he was on holiday abroad when he received a telephone call from Kevin Crossland, the sales director, who was then the vice president of JVC for sales in Ireland and the U.K. He was informed by Mr. Crossland that an email had been sent to all staff advertising the position of sales manager Ireland. Mr. Dillon asked whether selection for the new post would be a long process, to which he received the reply, "I am now speaking to the sales manager Ireland". Mr. Dillon then sent in his C.V., but on the understanding that he had already been appointed as sales manager. As he understood the situation, it was possible that another person had also applied. It seemed to him, however, that the process was just for show. This incident provides a strong indication that the apparent plan of redundancy was a process of removing Jerome Panisi as general manager and replacing him with Thomas Dillon under a different designation. Prior to sending in his C.V., Mr. Dillon checked with Mr. Panisi as to whether, as a friend, he approved of his action

in applying for the job and Mr. Panisi indicated that he had no objection.

22. It has been stated in evidence that had Jerome Panisi applied for the position of sales manager Ireland, he would have been given the position. That evidence is difficult to accept at face value. Had Jerome Panisi been made redundant, then he would have been, had procedures been followed, in open competition with a younger man, and probably with others, had there been no pre-selection for that post. It is also difficult to see him accepting a diminution in status after seventeen years, and pay and conditions which were not advertised but which would be, as is often said, negotiable.

23. The crux of the issue as to whether the manner of dismissal of Jerome Panisi as general manager of JVC in Ireland was a genuine redundancy through a genuine process, or a disguised dismissal, hinges on a meeting which took place in London on the 10th March 2010. This was a weekly management meeting. Jerome Panisi would come from Ireland perhaps once a month and report to that meeting. He was not present on this occasion. In 2008 John Welbourne was general manger of sales for JVC. He was later made redundant. He said in evidence that he was not involved in the creation of the role of general manager of sales. He said that he was not involved in Thomas Dillon moving into the new role in Ireland and nor was he involved in the restructuring. He denied that he was recruiting Simon Hedges for one of the new positions. His view was that the new position in Ireland would involve simply sales, whereas Jerome Panisi had been "responsible for everything". In addition to this evidence, I have heard testimony from David Diamond, the human resources manager, and Meishi Tsuya, who held a very senior post in JVC at the time. Meishi Tsuya struck me as being a loyal person. He is also, however, a company man and highly motivated on behalf of his employer. David Diamond presented in the witness box as a clearly decent individual. It is obvious to me that he at all times did his best on behalf of employees, notwithstanding difficult and unpleasant duties. The person indicating most strongly that the dismissal of Jerome Panisi was a disguised redundancy was Dermot O'Rourke. His clear testimony stands in contrast to the infirmity in recollection and the qualified testimony of opposing witnesses. Dermot O'Rourke clearly had a much better recollection of the incident in question than the other persons present at that meeting.

24. On the 7th March 2008, Jerome Panisi had told Dermot O'Rourke about an indication in conversation over the phone which made him suspicious as to whether the process of redundancy was genuine. I am satisfied that, notwithstanding the sharing of suspicions, Mr. O'Rourke kept an open mind. At the meeting on the 10th March, approximately ten people were present, and Mr. Crossland was absent. At the very end of the meeting, one final item was announced by Mr. Welbourne which was stated not to be minuted. This was because, as was announced by him, the people concerned had not been told. A debate arose during the testimony as to whether previous management meetings had an off-the-record element to them. I am satisfied that they did. Further, I am satisfied that such discussions did not simply extend to things like the meals of employees, or the number of free beverages that were available at work, but encompassed important issues such as matters concerning employment. I am thus satisfied that Mr. Welbourne said that there was an item which was not to be minuted because people had not been told. The item, he said, was to be announced at the JVC sales conference, which takes place on an annual basis, and which was to be held in London some short time later. The announcement was to the effect that there was to be a

restructuring across sales prior to this annual conference. Mr. Welbourne said there would be a new structure at the top of sales with two new positions. A named individual was to become the area sales manager in the U.K., another named individual was to take over in the other new post and "Thomas Dillon will report to him" from Ireland.

25. Whereas other witnesses described this announcement as unlikely, I am satisfied that it was made. The accumulation of evidence proves as a probability that the dismissal of Jerome Panisi from his job as general manager of JVC in Ireland was not a genuine redundancy. Even were that evidence to be absent, the indications in the evidence in favour of a genuine process, the burden of proof being on the employer in this regard, are not strong. I do not accept that the assignment brief prepared independently for the key account manager in Ireland could so badly misdescribe the future of Jerome Panisi, given that the person to be recruited was to be directly reporting to him. Rather, it is clear that the systems were required by someone in management to be bypassed, through no fault of the human resources manager, in favour of employing Mr. Dillon, who had neither sought nor played any part in this scheme. I do not know and nor am I obliged to make a finding as to where the responsibility within management for this situation lies.

Damages

26. Redress for unfair dismissal is provided for in s. 7 of the Act of 1977, which provides:-

"(1) Where an employee is dismissed and the dismissal is an unfair dismissal, the employee shall be entitled to redress consisting of whichever of the following the rights commissioner, the Tribunal or the Circuit Court, as the case may be, considers appropriate having regard to all the circumstances:

(a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal, or

(b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or

(c)

(i) if the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) as is just and equitable having regard to all the circumstances, or

(ii) if the employee incurred no such financial loss, payment to the employee by the employer of such compensation (if any, but not exceeding in amount 4 weeks remuneration in respect of the employment from which he was dismissed calculated as aforesaid) as is just and equitable having regard to all the circumstances,

and the reference in the foregoing paragraphs to an employer shall be construed, in

a case where the ownership of the business of the employer changes after the dismissal, as references to the person who, by virtue of the change, becomes entitled to such ownership.

(2) Without prejudice to the generality of subsection (1) of this section, in determining the amount of compensation payable under that subsection regard shall be had to-

(a) the extent (if any) to which the financial loss referred to in that subsection was attributable to an act, omission or conduct by or on behalf of the employer,

(b) the extent (if any) to which the said financial loss attributable to an action, omission or conduct by or on behalf of the employee,

(c) the measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the loss aforesaid,

(d) the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the procedure referred to in subsection (1) of section 14 of this Act or with the provisions of any code of practice relating to procedures regarding dismissal approved of by the Minister,

(e) the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with the said section 14, and

(f) the extent (if any) to which the conduct of the employee (whether by act or omission) contributed to the dismissal..

(2A) In calculating financial loss for the purposes of subsection (1), payments to the employee

(a) under the Social Welfare Acts, 1981 to 1993, in respect of any period following the dismissal concerned, or

(b) under the Income Tax Acts arising by reason of the dismissal,

shall be disregarded.

(3) In this section -

"financial loss", in relation to the dismissal of an employee, includes any actual loss and any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution, attributable to the dismissal, of the rights of the employee under the Redundancy Payments Acts 1967 to 2007, or in relation to superannuation;

"remuneration" includes allowances in the nature of pay and benefits in lieu of or in addition to pay."

27. This section clarifies the consideration that is to be given to compensation for unfair dismissal. Payments under social welfare and income tax legislation are to be disregarded. In assessing compensation, the court should have regard to the implications for dismissal. My task is to assess the financial damage which the dismissal has brought about and then to place the measure of that damage against the maximum amount of compensation that is available. In the event that the compensation that is available, amounting to 104 weeks remuneration, is less than that sum, then that is the measure of damages. Where the quantum of damage is more, then the jurisdiction is limited to that maximum and the amount of damages must thus be reduced to that maximum sum. Where the measure of

damages on dismissal is more than the maximum but contributory fault is found in respect of the dismissal against the employee, the reduction is on the totality of those damages, and not on the maximum award. If the result is to reduce compensation within the maximum award, that sum is appropriate. Where the reduction in total damages for contributory fault puts the damages above the maximum award, then the maximum award is the correct measure of compensation for unfair dismissal.

28. My reasoning on this matter is that it is likely, had Jerome Panisi not been dismissed, that he would have worked within JVC for approximately the same length of time as Thomas Dillon. Redundancy in a situation where employee numbers were diminishing could not have been avoided all the way to his retirement at age 65 in October 2011. During the two years lost, however, he would have achieved full remuneration and would have been topping up his pension entitlement. This would have provided for his retirement. This has otherwise proved to be impossible. He has sought many jobs since his dismissal. Those efforts have been genuine. His actual loss and prospective loss of pension therefore exceeds the maximum of 104 weeks of remuneration. One hundred and four weeks of remuneration is €298,000. On redundancy Mr. Panisi was paid the sum of €101,000. Of this, €19,800 was a redundancy payment; €18,312 was statutory notice; €9,156 was four weeks extra notice; and €51,315 was an *ex gratia* payment. As there was no redundancy, but as there was a dismissal, Mr. Panisi has now no entitlement to the redundancy money or the *ex gratia* payment. In addition, it is highly unlikely that he would have been given an extra four weeks notice by way of wages, notwithstanding his long service to the company. After submissions of counsel as to the correct figures, it is agreed that the total award of €298,000 should be reduced. Since Mr. Panisi has already been paid the sum of €101,000, the damages due are €197,000.

Result

29. In the result, there will be a decree in the sum of €197,000 against JVC in favour of Jerome Panisi.

Approved
27 July 2011
Peter Cassidy.

in the case of applications to the Circuit Court under the provisions of the Landlord and Tenant Acts. Again in the Rules of the Superior Courts 1986 similar provisions providing for the issue of proceedings to be the commencement of the appeal are set out in Orders 105, 106 and 112. Each of these Orders which deal respectively with appeals from the Employment Appeals Tribunal, appeals from the Labour Court and appeals under the Housing (Private Rented Dwellings) (Amendment) Act 1983 provides that the summons commencing the appeal shall be issued within a specific time limit.

In my view, the essence of an appeal under section 10(4) of the Unfair Dismissals Act 1977 is not the issue or service of a notice of appeal as such, but the invoking of the jurisdiction of the Circuit Court. This is done by the issue of the originating document, usually a Civil Bill, but in the present case a notice of application to the Court in the form prescribed by Order 63 of the Circuit Court Rules 1950. In my view as with the Statute of Limitations time ceases to run when the proceedings are issued and not when they are served.

In the circumstances I am satisfied that the appropriate step to be taken within the six week time limit is the issue of the notice of application to the Court. The respodent's contention accordingly fails.

Solicitors for the applicant/appellant: *Daly and Lynch*
Solicitors for the respondent: *Hayes and Son*

Eilis Barry
Barrister

Bolger v Showerings (Ireland) Ltd: High Court (Lardner J) (*ex tempore*) 24 April 1990

Issue – Employer and Employee – Absenteeism – Ill-health of employee – Dismissal on ground of incapacity – Whether dismissal reasonable in all the circumstances

Legislation – Unfair Dismissals Act 1977 (No. 10)

Facts The appellant had employed Mr Bolger as a fork lift truck driver. He had a long history of absenteeism through ill-health since 1978 when he had suffered a back injury at work. A lengthy correspondence took place between the parties concerning his absence, in which the appellant requested that Mr Bolger supply his likely return to work date, having consulted his doctor. The appellant warned Mr Bolger that failure to comply would result in his dismissal on grounds of incapacity. Eventually a doctor

acting as locum for Mr Bolger's G.P. sent a note to the appellant stating that Mr Bolger himself felt unable to undertake his previous job at any time in the future and that Mr Bolger was due to be admitted to hospital for tests on his back injury. The appellant dismissed Mr Bolger. Surgery following the hospital tests corrected Mr Bolger's condition but the appellant refused to review its decision. Mr Bolger's claim of unfair dismissal was dismissed by the Employment Appeals Tribunal. He appealed successfully to the Circuit Court where it was held that the company had acted precipitately in not awaiting the outcome of the hospital tests. The company appealed.

Held by Lardner J in allowing the appeal:

(1) For a dismissal on grounds of incapacity to be deemed fair the onus is on the employer to show that

(i) it was the incapacity which was the reason for the dismissal;

(ii) the reason was substantial;

(iii) the employee received fair notice that the question of his dismissal for incapacity was being considered and;

(iv) the employee was afforded an opportunity of being heard.

(2) Where there is no dispute between employer and employee as to the incapacity of the employee because of ill-health it is not necessary for the employer to await the results of medical tests before deciding to dismiss the employee.

(3) In this case, the appellant had substantial grounds for the dismissal and the dismissal had been reasonable in all the circumstances.

Patrick McCarthy **for the appellant**
Frederick Morris SC and Michael Counihan **for the respondent**

LARDNER J delivered his judgment on 24 April 1990 saying: The Unfair Dismissals Act 1977 lays down the statutory right of an employee not to be unfairly dismissed by setting statutory requirements which oblige an employer to show good cause and by imposing an overall test of reasonableness. (Section 6 of the Unfair Dismissals Act and in particular subs. (1) and (4).)

Statute weight the scales in favour of the employee by providing that a dismissal shall be deemed unfair unless an employer can show substantial grounds justifying the dismissal. The onus is therefore upon the employer to show that the dismissal was not unfair. One of the grounds set out in section 6(4) is the capacity of the employee to carry out the work for which he was employed. In this case it was the ill-health of the plaintiff which the company claimed rendered him incapable of performing his duties as a forklift driver.

For the employer to show that the dismissal was fair, he must show that:

(1) It was the ill-health which was the reason for his dismissal;

(2) That this was substantial reason;

(3) That the employer received fair notices that the question of his dismissal for incapacity was being considered and

(4) That the employee was afforded an opportunity of being heard.

Having regard to the facts in this case, the question arose whether the dismissal was for a substantial reason of a kind within section 6(4) of the Unfair Dismissals Act 1977 and whether it was reasonable in all the circumstances.

The plaintiff was entitled to be told of the concerns which the company had concerning him, which could and did eventually lead to his dismissal. Mr Bolger had been clearly informed of the company's concerns in the correspondence between the parties. This is a case which must turn upon its particular facts. On three occasions, the plaintiff had been asked to provide his doctor's opinion as to his likely return to work date. In reply all that had been received by the company was a letter from Dr. O'Regan, acting as locum for Mr Bolger's G.P., setting out what was in fact Mr Bolger's own view that he would never be able to return to work and that at some time in the near future he would be admitted to Cork Regional Hospital. At no stage was a likely return to work date furnished.

The question arose whether the company was under an obligation to await the results from Cork Regional Hospital. The company was not so obliged in the circumstances of this case. If this had been the first or one of a very few instances of absence, a different view might be taken, but in the light of the case history, the company was entitled to say that Mr Bolger himself thought he was unfit to return to work. Different considerations might well apply if the company and Mr Bolger were at odds over his fitness for work. In that case, it might well have been appropriate for the company to await the results of the medical tests. However, in this case there were substantial grounds for the dismissal and the dismissal had been reasonable in all the circumstances.

An employer is entitled to expect that as part of the contract of employment, and employee would be capable of carrying out the tasks for which he had been employed.

Solicitors for the appellants: *McCann Fitzgerald*
Solicitors for the respondent: *M.M. Halley & Son*

Jeremy Maher
Barrister

89/8750P

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THE HIGH COURT

BETWEEN

DONAL O'DONNELL AND CATHERINE O'DONNELL

PLAINTIFFS

AND

CORPORATION OF DUN LAOGHAIRE

DEFENDANT

Judgment of Mr. Justice Costello delivered the 17th day of July 1990.

Mr. O'Donnell, the first named Plaintiff, is a retired Civil Servant. He lives with his wife, the second named Plaintiff, and their two daughters in their home at Blackrock which is in the administrative area of the Dun Laoghaire Corporation, the Defendant herein. Their action concerns, firstly, Mr. O'Donnell's liability to pay water charges imposed on him by the Corporation in respect of the years 1983, 1984, 1985, and 1988 and, secondly, their claim for damages arising from what is claimed to have been a wrongful disconnection of the supply of water to their home in November 1988. I decided I would determine as a preliminary point of law the validity of the County Manager's Orders made in the years 1983, 1984 and 1985 and the resolution of the Corporation's elected members which imposed water charges for the year 1988 as the Plaintiffs' claims would fail if these Orders and the resolution were valid.

The issues now to be considered are net ones. A power to raise water charges was conferred on the Corporation (and other local authorities) by Act of the Oireachtas enacted in 1962, a power subsequently amended by a further statute enacted in 1983 (see Section 7 of the Local Government (Sanitary Services) Act 1962 and Section 8 of the Local Government (Sanitary Services) Act 1983 which inserted and then amended a new section, Section 65A, in the Public Health (Ireland) Act 1878). The section, as amended, did not come into operation until the 12th of July 1983, when the amending 1983 Act came into force - a significant and important fact to which I will refer in a moment.

Section 65A (as amended), provided that a "sanitary authority" may make charges for water supplied by it. The

Corporation of Dun Laoghaire is the "sanitary authority" for the area in which the Plaintiffs reside and its Section 65A powers were exercised by Orders of the County Manager in the years 1983, 1984 and 1985, no water charges being raised for the years 1986 and 1987. But by Ministerial Order No. S.I. No. 341 of 1985 entitled "County Management (Reserved Functions) Order 1985" which came into operation on the 1st of January 1986 the power to make charges for services in respect of domestic premises became exercisable by the elected members of the Dun Laoghaire Corporation.

The important part of Section 65A for the purposes of this case is subsection (7) which reads as follows

> "A charge under this section for water supplied otherwise than by measure shall be payable in advance by equal half-yearly instalments on the 1st day of April and the 1st day of October or by such other instalments as the sanitary authority to whom the charge is payable shall determine, and, in default of being paid within two months after becoming payable shall be recoverable as a simple contract debt in any court of competent jurisdiction" (emphasis added).

The effect of this subsection is perfectly clear; when a charge is made under the section by a sanitary authority it becomes payable in advance by half yearly instalments on the dates specified, but the sanitary authority may determine that the charge it has raised be paid by instalments other than those specified in subsection (7).

The Supreme Court considered subsection (7) in Dublin Corporation .v. Ashley and anor (1986) I.R. 781. The Dublin

City Manager had made two Orders imposing water charges, one for the year 1983 and one for the year 1984. The charges for the year 1983 were made by an Order of the 25th of October 1983. The Order fixed a water charge for the period to the 31st of December of that year and specified that the charge was payable "on demand". The Chief Justice (expressing the unanimous opinion of the Court) pointed out that subsection (7) did not permit the fixing of a charge payable in one single amount and because this was the effect of the Order of the 25th of October 1983 it was outside the powers of the sanitary authority to make it. The 1984 Order was made on the 25th of May of that year. By that Order a water charge was fixed for the period to the 31st December 1984. Instead of providing that the charge was to be payable "on demand" the Order provided that the charge was "payable either in full or in two equal instalments, the first payable not later than the 1st of August and the second not later than the 1st of October". The Court held that this, too, was invalid "either on the basis that it is truly to be interpreted as being an Order for the payment in one sum only, or on the basis that it is uncertain and ambiguous and fails clearly to comply with the limits of the statutory power of Dublin Corporation as a sanitary authority" (p. 787).

I was also referred to an Order of the High Court of the 2nd of February 1988 made in an appeal by way of Case Stated in the Kilkenny County Council .v. Brennan (1987 No. 638 S.S.). In that case the Plaintiff Council had sued the Defendant in the District Court for water and sewage charges. Its claim had been dismissed but on appeal the High Court decided that the District Justice had erred in doing so. Unfortunately the Judgment of the High Court is not available. However, it is

of interest to note that the County Manager's Orders on which the proceedings had been based, having set out the rate at which water charges were to be paid, went on to provide that they were to be collected "in instalments as appropriate". It appears from paragraph 5 of the Case Stated that the District Justice was of the opinion (erroneously, as the High Court found) that the County Council had failed to determine the instalments required by subsection (7) and that this was the reason why he had dismissed the claim.

I come now to consider the three Orders of the County Manager which are impugned in these proceedings.

(1) Order of the 14th of September 1983

It will be recalled that the Amending Act of 1983 did not come into operation until the 12th of July of that year and presumably this is the reason why water charges were not raised prior to the 14th of September. The County Manager's Order of that day began by reciting Section 65A to which I have already referred and then went on to Order that

> "The following charges in respect of the supply of water to domestic dwellings are to be made for the period ending the 31st of December 1983"

and to provide a sliding scale of charges based on rateable valuation. The charge in respect of dwellings with a valuation over £35 (which is the charge applicable in this case) was fixed at £70.

It will be noted

(a) that unlike the 1983 Dublin Corporation Order in the Ashley case this Order does not provide that the charges are to be paid "on demand" and

(b) it does not specify that the charges are to be paid by instalments or the dates on which the charges are to be paid.

After the Order was made a demand was issued by the Defendant Corporation claiming payment for the whole sum of £75 and making no reference to its payment by instalments.

It was argued on the Plaintiffs' behalf that I should construe this Order as fixing a charge payable in one single amount and that I should condemn it on the authority of the Ashley case. It was submitted on the Defendant's behalf that the Order (unlike the Order in Ashley's case) makes no reference to the way the charges are to be paid - it merely sets out the amount to be paid. It was urged that the method of payment is to to be found in the statute, namely in subsection (7) of Section 65A, and that as I was concerned with the legality of the Order of the 14th of September the demand note (which apparently required payment of the full sum) could be ignored. I agree with this submission. The Order in this case did not specify that the charge was to be paid on demand and I cannot construe it as so providing. The Order provided that a sum was to be paid; the method of payment is to be found in the statute. But this does not save the Order because of the very provisions of the statute on which the Defendant

relies in suggesting that I should ignore the lump sum claimed in the 1983 Demand Note. Subsection (7) of Section 65A has the effect of providing that payment of charges fixed by a Manager's Order are to be paid on the two dates specified in the subsection (that is the 1st of April and the 1st of October) unless other dates have been fixed by him. Once the Order of the 14th of September 1983 failed to provide that the charges it fixed were to be paid by instalments they then became payable on the statutory dates. But this was a legal impossibility as the first statutory date had passed. In my opinion the statute did not empower the County Manager to make an Order which resulted in an obligation to pay charges in a manner which could not legally be performed and so I think, by failing to specify the dates on which instalment payments were to be made the Order of the 14th of September 1983 was ultra vires.

(2) Order of 10th July 1984

The County Manager made an Order on the 10th of July 1984 in respect of water charges for the year ending the 31st of December 1984 and fixed the same rate of charge which, in the Plaintiffs' case, again amounted to £70 for the year. The Order was in the same terms as those contained in the 1983 Order - that is, it did not provide that the charges were to be paid on demand and failed to specify the instalments in which the charges were to be paid. As the Order was made after the 1st of April it suffers from the same infirmity as that which invalidated the 1983 Order. There was the usual demand note

issued in respect of these charges but this differed in a significant way to that issued in 1983. Its date of issue was given as the 18th of June 1984 (that is before the County Manager in fact made his Order). It required Mr. O'Donnell to pay £70 arrears and £70 current charges. It stated that the current charge "may be paid in two equal instalments, the first forthwith and the second by the 31st of August 1984". But this demand note, in my opinion, could not have cured the defect in the Manager's Order (and indeed so to argue would be contrary to the submissions advanced in support of the 1983 Order) because subsection (7) requires the "sanitary authority" to determine the instalments in which charges are to be paid if those provided by the statute are not to operate. This provision can only be complied with by an Order of the County Manager and not by an administrative decision taken by an official of the Council before, or, indeed after the County Manager's Order had been made. The defective Order was not, therefore, cured by the demand note.

(3) Order of the 17th of June 1985

Water charges were again raised by the County Manager in 1985 by an Order made on the 17th of June. This is invalid for the same reasons which applied to the earlier two Orders. The final demand note made on Mr. O'Donnell contains no reference to payment of the 1985 charges by instalments and I have not seen the first demand note. But even assuming that the first demand made provision for the payment of charges by instalments such a provision would not have saved the Manager's Order for

the reasons which I have given in relation to the 1984 Order.

As pointed out already no water charges were raised in 1986 and 1987 and that from the 1st of January 1986 the power to raise charges became a reserved function exercisable by the elected members of the Dun Laoghaire Corporation. By a resolution adopted on the 7th of December 1987 the elected members exercised their powers under this section and fixed water charges for the year 1988. Their resolution, after reciting Section 65A went on:

> "We hereby determine that the charges for water supplied for domestic purposes for the period ending the 31st of December, 1988 shall be fixed by reference to the rateable valuation of the premises supplied in accordance with Schedule I hereunder and shall be payable in two equal instalments namely on 15th of March 1988 and the 15th day of July 1988 ..."

The Schedule provided that dwellings with a valuation of £30 and over would be liable to pay £125 so that if this resolution was valid Mr. O'Donnell was required to pay water charges by instalments on the 15th of March and the 15th of July 1988.

In my view this resolution was a valid exercise by the elected members of the powers conferred on them by Section 65A. Unlike the previous Managerial Orders the resolution made a determination of the instalments in which the charges were to be paid and so complied with subsection (7). It has been argued on behalf of the Plaintiffs that only four months separated the dates on which instalments were to be paid and

that this determination was ultra vires because, it was claimed, the section only authorized the determination of instalments which would not impose a greater burden on the houseowner than the burden imposed by six monthly instalments as set out in the subsection. I cannot agree that the subsection should be so construed. It seems to me that the subsection gives to the sanitary authority a discretion as to how instalments are to be determined and that it was well within the statutory powers of the Corporation to fix the instalments specified in its December 1987 resolution.

I should add that it had originally been urged on the Plaintiffs' behalf that the resolution was invalid because, it was suggested, it permitted the proceeds of the water charge to be dispersed for purposes other than water services. But the evidence shows that the revenue from the water charges was in fact lower than the cost of the water services provided and this point was not pursued.

It follows from the conclusions I have just announced that Mr. O'Donnell is not liable to pay the water charges for the years 1983, 1984, and 1985, amounting in all to a sum of £210 but that he is liable to pay the water charges for the year 1988, namely the sum of £125.

Subsection (9) of Section 65A empowered the Corporation to disconnect the Plaintiffs' water supply. The Corporation exercised this power in 1988 and since November of that year the Plaintiffs' home has been without water. In the light of the conclusions I have just announced it becomes necessary to consider the validity of the Defendant's actions and I will hear any evidence the parties wish to adduce on this point and Counsels' submissions on it. As I think it is desirable that all issues should be determined in these proceedings I will allow, as requested, the Defendant to amend its defence so as to plead that the Plaintiffs' delay constitutes a bar to the relief claimed and I will allow both parties to adduce evidence on this point as they think fit. I will also hear evidence on the Plaintiffs' claim for damages and I will then be in a position finally to determine all the issues in the case.

approved
JC
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THE HIGH COURT

BETWEEN

DONAL O'DONNELL AND CATHERINE O'DONNELL

PLAINTIFFS

AND

CORPORATION OF DUN LAOGHAIRE

DEFENDANT

Judgment of Mr. Justice Costello delivered the 5th day of September 1990

Having concluded, for the reasons given in my judgment of the 17th July, 1990, that the managerial orders which fixed water charges in 1983, 1984 and 1985 were ultra vires but that the resolution of the elected members fixing charges for the year 1988 was valid, I resumed the hearing of this case and heard evidence on the remaining issues. These were:-

(i) Whether the Corporation's 1988 decisions to disconnect the plaintiffs' water supply were ultra vires;

(ii) Whether the plaintiff, Mr. O'Donnell, was barred from claiming declaratory relief;

(iii) Whether the plaintiffs, or either of them, are entitled to damages.

(i) THE DECISIONS TO DISCONNECT

The Corporation's decision to introduce water charges in 1983 met with widespread, determined and organised opposition - opposition which in numerous cases took the form of a refusal to pay them. The Dun Laoghaire Corporation, like other local authorities similarily placed, had no alternative but to institute legal proceedings and in the following years many hundreds of civil processes were issued against recalcitrant householders. For a number of reasons proceedings by means of District Court action proved a slow and cumbersome process and the Corporation was faced not only with a fall in its revenue but also with the grievance of whose householders who having paid water charges watched others escape liability, apparently with impunity. As a

result when water charges were once again imposed in 1988 it decided to activate the power conferred by Section 65A of the Public Health (Ireland) Act, 1878 (inserted by Section 7 of the Local Government (Sanitary Services) Act 1962) which provided by sub-section (9) that a water authority could disconnect a supply of water "in respect of which a charge under this section remains unpaid after the expiration of two months after the charge has become payable" and further authorised the authority to impose fees to cover the cost of disconnection and subsequent re-connection.

On the 15th June 1988 the Corporation wrote to the plaintiff, Mr. O'Donnell, a letter headed "Notice re disconnection of water supply". This letter referred to the arrears of charges which it was claimed were owed by Mr. O'Donnell, namely those payable in 1983, 1984, and 1985 amounting to £210 and the first instalment for the year 1988 amounting to £62.50., and went on:-

> "Until recently this Corporation has concentrated on legal proceedings to obtain payment of arrears outstanding. However, in the last few months a number of householders have been proceeded against by disconnecting their water supply. It is now proposed to step up substantially the disconnection of supply. Accordingly, the Corporation hereby gives you notice that if the amount outstanding is not paid within the next 7 days your water supply will be disconnected without further notice."

It concluded by warning the plaintiff that disconnection and further re-connections would involve him in further substantial costs.

I draw attention to the following matters:-

(a) The decision to operate its Section 65A powers was taken by the Corporation for the purpose of enforcing payment of the sums it believed to be due for water rates. It was taken bona fide by the

Corporation for the purpose of securing compliance with the law.

(b) In the case of Mr. O'Donnell the June decision to disconnect his water supply was taken to enforce payment of the sum of £272.50 which it was claimed he then owed. In fact, because the 1983, 1984 and 1985 orders were invalid Mr. O'Donnell did not owe the sum of £210 in respect of the charges for those years. Because the 1988 charges were valid and the first instalment had fallen due on the 15th March there was at that time only a sum of £62.50 due by him to the Corporation.

The Corporation disconnected the plaintiff's water supply and wrote to him on 12 July to tell him they had done so and required payment of £60 re-connection fee along with payment of the arrears. With the knowledge and consent of Mr. O'Donnell persons who have not been named illegally re-connected his supply. The Corporation disconnected it again on 3rd August but once again it was illegally re-connected.

On the 15th July the second instalment of the 1988 charges became payable. On the 10th October the Corporation wrote again to Mr. O'Donnell. It claimed arrears amounting to £335 (that is the 1983, 1984 and 1985 charges and the whole of the 1988 charges) and warned again that unless payment was made his water supply would be cut off. This warning went unheeded and the water was cut off at the beginning of November. On 3rd November a claim was made for the arrears (£335) and disconnection and re-connection fees of £430. Again Mr. O'Donnell took the law into his own hands

and with his consent some persons without the Corporation's authority re-connected the supply. On the 9th November it was once again disconnected by the Corporation, this time using methods which effectively prevented unauthorised re-connection.

I draw attention to the following matters:

(a) The October decision to disconnect was taken to enforce payment of the sum of £335. In fact the only amount properly owing at that time was £125 (the 1988 charges).

(b) When disconnection took place in November 1988 the 1988 charges were in arrears for more than two months.

(c) Since November 1988 the Corporation has claimed payment of £430 disconnection and re-connection fees by virtue of Section 65A. But if the June decision to disconnect was invalid and if the October decision to disconnect was invalid then this claim is not sustainable because the fees are then claimed for work performed under an unauthorised decision.

It was a pre-condition of the exercise by the Corporation of its Section 65A powers of disconnection that water charges were in arrears for two months when the power was exercised. If no charges were in arrears at the time of disconnections then the Corporation would have lacked statutory authority for its decision to disconnect and it and the actions taken subsequently to implement it would have been ultra vires. In fact, when the June decision was taken the first instalment of the 1988 charges was two months in arrears and when the October decision was taken all the 1988

charges were two months in arrears. But it does not follow that these decisions were intra vires because it is open to the plaintiffs to claim, as they have done, that although the statutory power to decide to disconnect may have existed in June and again in October 1988 the excercise of that power was invalid because it was exercised ultra vires. I think this submission is correct. The power to disconnect was a discretionary one to be exercised in accordance with the statute and even though the statutory pre-condition to its exercise is shown to have existed it is still possible that its dscretionary powers were exercised in an ultra vires manner. And I think that is what happened both in June and October, 1988. The Corporation was fully entitled to operate Section 65A for the purpose of enforcing payment of water charges which were lawfully due, but, both in June and October, it decided to exercise the power to enforce payment of sums which were not lawfully due (namely, the 1983, 1984 and 1985 charges). As I think the section did not empower the Corporation to utilise the section for such a purpose it follows that these two decisions were ultra vires.

It also follows from these conclusions, and from those which were contained in my judgment of the 17th July last, that unless some legal bar exists (a subject to be considered in a moment) then Mr. O'Donnell is entitled to a declaration (a) that the 1983, 1984, and 1985 managerial orders were ultra vires and invalid, (b) that the June and October 1988 decisions to disconnect were ultra vires and invalid, (c) that he is not indebted to the Corporation for the sum of £210 (being the 1983, 1984 and 1985 charges), and (d) that he is not indebted to the Corporation in the sum of £410, being

the disconnection and re-connection fees.

(ii) BARS TO RELIEF

The main relief claimed by Mr. O'Donnell is declaratory relief by which the court is asked to make the declarations on the matters to which I have just referred. A declaratory judgment is one which declares the rights of the parties and because defendants, and in particular public bodies, respect and obey such judgments they have the same legal consequences as if the court were to make orders quashing the impugned orders and decisions. The Chancery (Ireland) Act, 1867 conferred, by Section 155, jurisdiction on the courts to make declaratory orders by providing that no action would be open to the objection that a merely declaratory decree or order was sought and rules of court have since been made with similar provision. The 1905 rules provided (by Order XXV Rule 5) that no objection could be taken to a claim merely because declaratory relief was claimed by a plaintiff and an identical provision is to be found in the current rules (Order 19, rule 29). But a declaratory judgment is a discretionary remedy and the defendants have advanced four separate grounds as to why I should refuse the relief claimed.

Firstly, it is urged that the plaintiff could have obtained relief by way of orders of certiorari and his failure to apply for this relief disentitles him to a declaratory judgment. In support of this submission reliance is placed on the judgment of Gavan Duffy, J. in O'Doherty v. The Attorney General (1941) I.R. 659. That was a case in which the plaintiff claimed entitlement to a military service

pension under the provisions of the Military Service Pensions Act, 1934. His application to the Minister was referred to a Referee who by notice informed the plaintiff that he was not a person to whom the Act applied, but that additional evidence could be submitted to him. The plaintiff instituted proceedings claiming a declaration that he was a person to whom the Act applied. The court held that although it had jurisdiction to make the declaration claimed in the exercise of its discretion it would decline to do so being of the opinion that an order of mandamus was the more convenient, beneficial and effectual remedy for the misconstruction of his statutory duty by the Referree, pointing out that it was not the practice to make a declaration where there was an appropriate remedy to which the plaintiff ought to have resorted, and that the courts have shown a strong reluctance to depart from this rule, unless, for example there was doubt as to the availibility of the alternative remedy (p 583).

But judicial attitudes have changed since 1941. By 1965 the Suprme Court had made it clear (Transport Salaried Staffs' Association v. C.I.E.) (1965) I.R. 180) that there was no requirement that an applicant should establish an inability to obtain a state-side order before the court would grant declaratory relief, holding that a declaratory order would be made if there were good reasons for making it. The use of declaratory orders has become widespread both in this country and in England as a public law remedy and such orders are made even in cases where even the court had jurisdiction to make orders of certiorari quashing impugned administrative decisions (Pyx Granite Co. Ltd v. Minister of Housing and Local Government (1960) A.C. 260, 290). Mr. O'Donnell's

failure to apply for such orders is not in itself a ground for refusing him the declaratory orders he now seeks.

The second argument advanced is that since the adoption of the 1986 rules of court it is now an abuse of process to claim declaratory relief in a plenary action when relief in an application for judicial review is available and so the relief claimed should be refused.

The 1986 procedural reforms followed closely those adopted in England. The English Law Commission considered the question of public law remedies and recommended the enactment of legislation to introduce a new remedy and new procedures for applications for what was called "judicial review" of administrative acts and decisions. Initially rules of court were adopted in 1977 and then amended in 1980 to give effect to these recommendations. Later, by the Supreme Court Act, 1981 they were enacted in legislative form. The Irish Law Reform Commission made proposals for reform on lines similar to those proposed by the Law Commission in England and it too recommended that its proposals be enacted by legislation. This has not been done. Instead they have been incorporated in the new 1986 rules, Order 84 of which following closely Order 53 of the English rules as amended in 1980.

The defendants have relied on a recent decision of the House of Lords in O'Reilly v. Mackamn (1983) 2 A.C. 237 in support of their submission. That was a case in which four plaintiffs, prisoners in Hull prison, were charged with disciplinary offences before the Board of Visitors. Three proceeded by writs issued in July 1980 in respect of adjudications made by the Visitors at the end of 1976, the

fourth by originating summons issued in September 1980 in respect of an adjudication made in May 1979. They all alleged that they were not given the opportunity to call witnesses in their defence and that the Board of Visitors had acted in breach of natural justice and each claimed declarations that the adjudications were nullities. The defendants (the members of the board and the Home Office) moved by summons in each action for orders striking out each of the four proceedings on the ground that they were an abuse of the process of the court. The application failed in the High Court. Peter Pain, J. held (a) that it was not an abuse to bring the proceedings by way of writ and originating summons instead of applying under R.S.C. Order 53 for a judicial review and (b) that it was not correct that the appropriate remedy was to apply for an order of certiorari to quash the adjudications and that it was open to the plaintiffs to apply for declaratory orders in plenary actions. The Court of Appeal held otherwise. But it is of relevance to note that there was a divergence of opinion on the issues involved. The majority (Ackner, L.J. and O'Connor, L.J.) held that the appropriate remedy (if any) was an order of certiorari and not a declaratory order and so the claims in the plenary actions should be dismissed, whilst Lord Denning, M.R. allowing the appeal for a different reason construed Section 31 of the Supreme Court Act, 1981 as meaning that it would be an abuse of process where good and appropriate remedies had been given by parliament (judicial review proceedings) to use other procedures to claim relief so as to avoid the safeguards against abuse contained in the new remedies. The plaintiffs appealed. In a unanimous

judgment (delivered by Lord Diplock) the House of Lords agreed with Lord Denning. It was pointed out that neither Order 53 nor Section 31 of the Supreme Court Act, 1981 expressly provided that procedures by way of application for judicial review were to be exclusive remedies but nonetheless it would "as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities" (p. 285).

The defendants in this action did not apply to have it dismissed as an abuse of process nor indeed did they plead that it amounted to an abuse of process. What is urged is that the new 1986 rules, like the English rules, contain provisions for judicial review which incorporate safeguards in the public interest in favour of public authorities and that, for the reasons given in O'Reilly, even if the court considers that the impugned orders and decisions are ultra vires declarations should not be made because to claim relief in a plenary action instead of by application for judicial review amounts to an abuse of process.

I am of course not bound to follow the decision of the House of Lords but judgments given by that court on rules of court or legislative provisions similar to ours rightly carry in our courts considerable weight. In that connection it is of some relevance to point out that in its journey to the House of Lords three judges disagreed with the view adopted by the Master of Rolls and the House of Lords and that

academic comment has not been unanimously supportive of their conclusions (see: Wade, "Procedures and Prerogative in Public Law", 1985 L.Q.R. 180) so that the point at issue is clearly one on which reasonable persons can reasonably hold divergent views.

I find myself siding with the minority view of the English judges. Firstly, as a matter of construction, I cannot construe the new rules as meaning that in matters of public law Order 84 provides an exclusive remedy in cases where an aggrieved person wishes to obtain a declaratory order and that such a person abuses the courts processes by applying for such an order by plenary action. Secondly, I do not think that the court is at liberty to apply policy considerations and conclude that the public interest requires that the court should construe its juridiction granted by the new rules in the restrictive way suggested, (a) because the jurisdiction it is exercising is one conferred by statute (the 1867 Act) and it is not for the courts to decide that as a matter of public policy litigants who ask the court to exercise this jurisdiction abuse the courts processes, and (b) because it is not necessary to call in aid the doctrine of public policy to avoid the mischief which would otherwise result.

I should develop this latter point a little more fully.

Order 84 contains significant safeguards in favour of public authorities. Leave to bring an application for judicial review must first be obtained (Rule 20 (1)); leave will not be granted unless the applicant can show sufficient interest (Rule 20 (4)); the application must be brought promptly and in any event within three months, subject to a power to have this time extended (Order 21 (1)).

But, as Ackner L.J. pointed out in O'Reilly (at p. 265) on a motion to try a preliminary issue in a plenary action the court could determine whether an application was so frivolous or vexatious or so devoid of merit that leave to issue it under O. 84 r. 20 (1) would never have been granted and so stay the plenary action, or it could conclude on such a motion that the plaintiff had no standing and dismiss it as it would have done under rule 20 (4) had an application for judicial review been brought.

A declaratory order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders (see Wade "Administrative Law" 5 ed. p. 523) and it is well established that a plaintiff's delay in instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in Order 84 rule 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under Order 84 time would have been extended. The rules committee considered that there were good reasons why public authorities should be protected in the manner afforded by Order 84 rule 21 when claims for declaratory relief were made in applications for judicial review and I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should not determine the relief to be

granted and this might well be the result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy. And in plenary actions the effect of delay can in many cases be determined on the trial of a preliminary issue and as speedily as if the issue fell to be determined in an application for judicial review.

For these reasons it seems to me that the apprehended use of plenary actions as a device to defeat the protections given by Order 84 is not a real danger and does not justify the court in concluding that proceedings by plenary action for declaratory relief against public authorities must be an abuse of process.

I must hold therefore that the plaintiff is not barred from obtaining the relief now claimed merely because he failed to challenge the impunged orders and decisions by applications for judicial review under O. 84.

The third ground relied on by the defendants is the plaintiffs' delay. These proceedings were not instituted until the 21st July 1989. The managerial orders challenged are dated 14th September 1983, 10th July 1984 and 17th June 1985. If the plaintiff's delay disentitles him to declaratory relief then the challenges to the later adminstrative decisions to cut off the water supply will also fail. These were made in June and October 1988. But if the court can properly declare the managerial orders to have been ultra vires the effect of delay in challenging the validity of the 1988 administrative decisions will then arise for determination.

For the reasons already given, I think I should

exercise my discretionary powers in relation to the plaintiffs' delay by applying by analogy the rules and principles contained in O. 84 r. 21. I should therefore refuse to grant the plaintiff relief unless I am satisfied that had the application been one for judicial review I would have concluded that there were good reasons for extending the time for allowing the application notwithstanding the expiration of three months' time limit contained in the rule.

The phrase "good reasons" is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84 r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plainitff may be able to establish a reasonable explanation for the delay the court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights. (The State (Cussen) v Brennan 1981 I.R. 181).

Or again, the delay may unfairly prejudice the rights and interests of the public authority which had made the ultra vires decision in which event there would not be a good

reason for extending the time, or a plaintiff may acquiesce in the situation arising from the ultra vires decision he later challenges or the delay may have amounted to a waiver of his right to challenge it and so the court could not conclude that there were good reasons for excusing the delay in instituting the proceedings.

I will turn now to consider the delay in challenging the managerial orders of 1983, 1984, and 1985.

Originally the plaintiff failed to pay the 1983, 1984 and 1985 water charges not becuse he thought that they were illegally imposed but, like many other householders in the Borough of Dun Laoghaire, and elsewhere, he thought they were unfair. It was only later and after reading in the newspapers the Supreme Court decision in the Ashley case that he considered that the orders might be invalid. He then approached a public representative and through him obtained copies of the managerial orders. Mr. O'Donnell was not a lawyer but by 1987 he had come to the conclusion that the managerial orders were invalid and this strengthened his resolve not to pay the charges they imposed. But he took no steps to challenge them. He was, however, a member of a residents' association which was actively campaigning against the charges and from his membership and from the newspaper reports he was aware that proceedings had been taken by the Corporation against many defaulting householders and he assumed that he too would be sued by the Corporation. In fact this assumption was correct. In April 1987 proceedings against him were issued but service by registered post could not be effected (and there was, I am satisfied, no effort to evade service by Mr. O'Donnell or his wife) and no further

steps to effect service were taken. I am satisfied therefore that he did not undertake the burden of instituting proceedings because he believed that the legality issue could be adjudicated upon in proceedings instituted by the Corporation either against him or against other householders who, he was aware, had raised the validity of the orders in other proceedings. Up to June 1988, therefore, there were good reasons why the plaintiff had failed to institute proceedings. Had he then applied for judicial review I am satisfied the court would have been justified in extending the time for doing so.

In June of 1988 the situation changed and for the worst as far as the plaintiffs were concerned. When the Corporation threatened to turn off the water supply it then became obvious that the legality of the managerial orders would not be determined in proceedings instituted against the plaintiff. The plaintiffs took two different actions in the new situation. When the supply was cut off they re-connected, or permitted the re-connection, of the supply. If this was the only action they had taken I do not think that they could have relied on it as a "good reason" justifying the delay in instituting proceedings because the re-connection was an illegial act which the court could not condone. But in addition Mrs. O'Donnell in June 1988 went to a public representative with a view to seeing if he could have the supply re-connected. This approach failed. When the supply was cut off finally and effectively in November Mr. O'Donnell went to another representative and through him put settlement proposals to the Corporation - he would pay the 1988 charges but not the earlier ones or the costs of

disconnecting and re-connecting the supply. This offer was turned down. He then tried to have his supply re-connected by the adoption of a motion to this effect by the elected representatives, but this approach also failed, early in December 1988.

The following February one of the householders who had refused payment suceeded on an appeal to the Circuit Court in having a decree for water charges dismissed. This case got wide publicity and Mr. O'Donnell hoped that this would strengthen his hand in negotiating a settlement with the help of his public representative. Some time after this he visited another public representative in Leinster House. As a result of advice he was given he then for the first time sought legal advice. His solicitor got counsel's opinion and he then wrote on 18th July 1989 making the claim that the managerial orders were ultra vires and that the decisions to cut off the water supply may also have been invalid. Shortly afterwards these proceedings were instituted.

The evidence, then, clearly establishes that Mr. O'Donnell was from June 1988 contesting his liability to pay water charges not through the courts but with the assistance of three different public representatives. Is the course of conduct a "good reason" within the meaning of O. 84, r. 21 which would have justified the court in extending the time for applying for a judicial review of the orders? Assistance in answering this question is to be found in The State (Furey) .v. The Minister for Defence (Supreme Court, 2nd March 1984). There the applicant had been a member of the defence forces. He was discharged on 7th August 1974. He instituted proceedings four years later for an order of

certiorari to quash his discharge. He was successful in the High Court and the Minister appealed. One of the grounds of appeal was that the application should have been refused on the grounds of delay. This was rejected by a majority decision. The evidence of the plaintiff was to the effect that he did not realise that he could pursue his complaint throught the court, that he could not afford legal advice, that over a four year period he had written many letters to the Department, to local members of parliament and to successive Ministers for Defence. On these facts it was concluded that the applicant had not disentitled himself by his delay to the remedy he sought.

The facts of this case are not identical with those in Furey. But they are close enough. Mr. O'Donnell, like Mr. Furey, tried to get redress through political pressure. When he was advised to do so, he went to a solicitor. It is true that he has not sworn that he did not get legal advice before this because he had not the means to do so but I think I am entitled to take into account the notorious fact that current levels of legal fees are perceived by most people to be very high and that this fact constitutes a powerful disincentive to legal action by persons like Mr. O'Donnell who are in receipt of a public service pension and who live in a home which could be seized and sold to pay costs should his action fail. I think therefore that his efforts to settle the dispute through the intervention of public representatives establish that there is a reasonable explanation as to why between June 1988 and July 1989 he did not institute these proceedings.

No third parties have acquired rights which it would

be unjust to injure by making the declaratory order the plaintiff seeks. Whilst it is true that declaratory order may cause the defendant administrative and perhaps financial problems I do not think that they are such as to justify the court refusing the plaintiff relief to which otherwise he would be entitled. I am fortified in this view by the fact that the Supreme Court was not inhibited in declaring water charges imposed by the Dublin Corporation for the years 1983 and 1984 to be invalid (Dublin Corporation v Ashley (1986) I.R. 781). But if the situation was sufficiently serious remedial action by retrospective legislation is quite possible. This of course would be troublesome for the authorities involved but again this is not a factor which should deprive an injured plaintiff of the relief to which otherwise he would be entitled.

I must hold therefore that the plaintiff's delay does not disentitle him to the declaratory orders he seeks relating to the managerial orders in 1983, 1984, and 1985.

The same factors which I have just outlined afford a reasonable explanation for the delay in challenging the administrative decisions of June and October 1988 by which the plaintiffs water supply was cut off. For the reasons already given I think that this explanation affords a good reason why the delay should not bar him from obtaining the relief to which he is entitled.

The fourth argument is that it would be contrary to the public interest to do so because orders declaring the water charges imposed in 1983, 1984 and 1985 to be invalid would be detrimental to the good administration of the Corporation's administrative area. In support of this

argument the defendants rely on Caswell v. Dairy Produce Quota Tribunal (1990) 2 All ER 434, case relating to an application by dairy farmers in Wales to fix a milk quota under the relevant dairy produce quota regulations. Two years after the Tribunal's decision (which was adverse to them) they applied for judicial review of the decision. The trial judge held that the Tribunal had misconstrued the 1984 Regulations and should have increased the applicants' quota but in the exercise of his discretion under the Section 31 (6) of the Supreme Court Act, 1981 he refused relief. His decision was upheld in the Court of Appeal and by the House of Lords.

It is important to note that this decision was based on statutory provisions which do not exist in this country. A somewhat confused situation has arisen in England arising from the discrepancy between rules of court and the statutory provisions of the 1981 Act which are referred to on pages 437 and 438 of the report and which I need not delay in analysing. It will be sufficient if I refer to Section 31 (6) of the 1981 Act which provides that: -

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant - (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration".

Applying these statutory provisions the House of Lords concluded (a) that there had been "undue" delay and (b) that it should refuse the plaintiff relief because it would be detrimental to good administration for relief to be granted.

We have nothing equivalent to this Section. As already indicated, in the exercise of its discretion where a plaintiff has delayed in challenging an administrative act the court may take into account the prejudice thereby suffered to a defendant public authority. But that is a different point and one I have already considered. There is, in my view, no principle of administrative law which, apart from questions of delay, would justify me in refusing relief in the public interest because of the administrative problems which a declaratory order would produce. This ground of defence, therefore, also fails.

I conclude therefore that there are no bars to the declaratory relief to which the plaintiff is entitled. Accordingly, I will

(a) make an order declaring that the orders of the County Manager of 14 September 1983, 10 July 1984 and 17 June 1985 fixing charges in respect of the supply of water to dwellings were ultra vires and invalid and that Mr. O'Donnell is not liable to pay the charges imposed on him pursuant to those orders for the years 1983, 1984 and 1985, namely, £210

(b) make an order declaring that the decisions of the Dun Laoghaire Corporation to disconnect the plaintiffs' water supply taken in June 1988 and November 1988 were ultra vires and invalid and that Mr. O'Donnell is not liable to pay the charges claimed by the defendants (namely £430) for disconnection and re-connection.

(iii) DAMAGES

The last point in the case is whether in addition to

the declaratory relief to which Mr. O'Donnell is entitled he and Mrs. O'Donnell are entitled to an award of damages. As already noted the water supply to the plaintiffs' home was cut off in June 1988 but it was shortly afterwards re-connected and damages are only claimed from November 1988, when the supply was effectively terminated. In July of this year the supply was re-connected.

There is no doubt that both the plaintiffs suffered considerable inconvenience and indeed hardship arising from the defendants' ultra vires decisions but that is not sufficient to ground an award of damages; the plaintiffs have to establish a legal basis for their claim that they are entitled to be compensated for what they have suffered.

This they cannot do. Their claim is not for damages for breach of statutory duty, or breach of a common law duty of care which the defendants might have owed to them; their claim is for damages arising from the ultra vires decision taken in October 1988 and the actions taken pursuant to it. The principles on which damages will be awarded in such circumstances have been summarised by Wade "Administrative Law" 5th Ed. p. 673, a summary approved of by the Supreme Court in Pine Valley Developments Ltd v. Minister for the Environment (1987) ILRM 747, as follows. An administrative action which is ultra vires but which is not actionable merely as a breach of duty will found an action for damages

(1) If it involves the commission of a recognised tort, such as trespass, false imprisonment or negligence,

(2) If it is actuated by malice, e.g. personal spite or a desire to injure for improper motives,

(3) If the authority making the administrative act knows that it does not possess the powers which it purports to exercise.

In this case the Dun Laoghaire Corporation committed no tort when it cut off the water supply to the plaintiffs' home; it was not actuated by malice towards the plaintiff but was carrying out its difficult responsibilities in an impartial and unbiased manner, satisfied that it possessed the statutory power to cut off defaulting householders, like the plaintiff, who failed to pay the charges which it believed had been validly imposed. The Corporation is not liable therefore to pay damages to either of the plaintiffs.

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Doc No. 0472JSG

[2013] IEHC 508

MR JUSTICE COOKE
APPROVED TEXT

THE HIGH COURT

[2013 No. 21 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 90(1) OF THE EMPLOYMENT EQUALITY ACTS 1998 – 2011

BETWEEN

ELEANOR O'HIGGINS

APPELLANT

AND

THE LABOUR COURT AND UNIVERSITY COLLEGE DUBLIN

RESPONDENTS

JUDGMENT of Mr. Justice Cooke delivered the 8th day of November, 2013

1. This is an appeal brought by Dr. O'Higgins against a Determination of the Labour Court made on 11th January, 2013, on her claim under the above Acts that a 2007 decision by her employer, the second named respondent ("the University"), not to promote her to the status of professor was unlawful in that it was vitiated by discrimination on grounds of her sex contrary to the provisions of the Employment Equality legislation. The Labour Court has been named as a respondent in the proceedings but has taken no part, the opposition having been undertaken by the University.

2. The appellant was previously the holder of a tenured post as a Senior Lecturer in what is now the School of Business and Law in the University, her duties being discharged in what was formerly the Commerce Faculty of the University College and are

thus on the business side of the now consolidated school. She has since retired from her tenured post but continues to teach under a fixed term contract.

3. It is important to underline at the outset that the issues which arise in this appeal concern an application for promotion to the grade or rank of professor within the University under a scheme which was not competitive with other applicants as might be the case under a procedure for the appointment of an single candidate to a particular professorship or for a selection of candidates to fulfil a limited number of posts. It was essentially a promotional exercise by reference to a number of defined and objective criteria and there was no limit upon the number of applicants that might receive promotion.

4. It appears that in the University there were two "pathways" to such promotions. In the one which is involved in this appeal, a scheme exists under which promotion rounds are held periodically in which senior academics can apply to be promoted to the rank of professor. That scheme is outlined in a document called "Promotion to Professor Internal Promotions Pathway 4B". The second pathway is one called "Competitive Retention Pathway" under which senior academics who are effectively threatening to move to another institution can be promoted to a professorship with a view to retaining their services.

5. The procedures and decisions under these schemes are in the hands of the University Committee for Academic Appointments, Tenure and Promotions which has been referred to by the first named respondent as the "UCAATP", but which will be described in this judgment as "the Committee". This body is comprised of members who are partly elected within the University and partly appointed by the President of the

University. The President and the Registrar are ex-officio members. For the purposes of the 2007 promotions round under the scheme in which the appellant's application was made, the Committee was comprised of twelve men and one woman.

The 2007 4B Pathway Round.

6. Although not immediately relevant to the legal issues now before this Court, the background to the hearing before the Labour Court included the fact that she had previously been an applicant for promotion to professorship in 2006 but had been refused as ineligible because at that time it was a pre-condition that an applicant had held the position of associate professor for at least five years. She had subsequently applied for associate professor status but was unsuccessful. This pre-condition had been abolished for the round of promotions held in 2007.

7. In her application for the 2007 round, the applicant was supported by the recommendation from her own School of Business and Law and her own referee. As the Labour Court's impugned Determination records, external assessors appointed by the University to review her application "also reported favourably on her eligibility for promotion". The Determination also records that, in accordance with standard practice, those assessors were asked to indicate if, in their opinion, the appellant would be eligible to the promotion to professorship grade in their own university and each had given an affirmative reply.

8. There were nineteen applicants for promotion in the 2007 round of which four were women and fifteen were men. In the result, eight promotions were granted of which two were women and six were men.

9. The conditions or criteria by reference to which the Committee conducted the promotion procedure were set out in the "Pathway 4B" document referred to above as follows:-

> "Applicants for promotion to professor are expected to have an international reputation. Professors will have achieved an internationally recognised leadership position in their disciplines from pioneering inquiry into important issues in that discipline, evidenced through sustained high-level activity. Assessment of promotion will be based primarily on the research and scholarship and academic leadership criteria. In exceptional circumstances, promotion may be based on the teaching and learning criterion reflecting internationally recognised peer-reviewed achievement in the applicant's scholarship of teaching and learning and/or pedagogical innovation within the discipline."

10. Following the refusal of her application, the appellant was given the following reasons as set out in the report of the Committee:-

- Lack of evidence of a substantial volume of publications in high-impact, high-quality referred research publications;
- Limited PhD supervision;
- Limited funding;
- Limited evidence of academic leadership within UCD;
- Limited evidence of contribution to the management or direction of the University through active engagement in internal committees or other activities that fostered the development of the University as a community.

11. The appellant requested and was given what is called a "feedback session" in which she met with two members of the Committee to answer her queries as to why her application had been unsuccessful. Not satisfied with that explanation, the Appellant initiated her claim before the Equality Tribunal.

12. The appellant's claim under the Act was first heard by an Equality Officer who dismissed the claim upon the basis that a *prima facie* case of discrimination had not been made out. It was an appeal against this decision which brought the matter before the Labour Court.

The Labour Court Determination.

13. The Determination of the Labour Court contains some thirteen pages which set out the background to the claim and appeal; summarise the arguments of the appellant and the University; provide a detailed exposé of the law which the Labour Court is required to apply; lead to the substantive analysis under the heading "Discussion" and conclude with two paragraphs headed "Determination".

14. The summary of the evidence given by the appellant to the Labour Court concludes with that court's assessment of its effect in these terms:-

> "The import of the Complainant's evidence was that in respect of each of the published criterion (*sic*) against which the application was to be considered her qualifications was (*sic*) equal to, or greater than, those of her nominated comparators who were promoted. The Complainant told the Court that, like her, comparator D had not attained the grade of Associate Professor. She acknowledged that comparator D was promoted to the Competitive Retention Pathway Scheme. She pointed out, however, that the criteria for promotion under

the scheme were the same as that (*sic*) in the main scheme. On the evidence adduced the complainant contends that the most likely reason for the impugned decision of the (Committee) was related to her gender. .... In advancing that contention the Complainant placed particular reliance on the following:-

- The absence of gender balance within the [Committee]
- That she in fact met all of the published criteria for promotion;
- That her qualification against those criteria equalled or exceeded those of her male comparators, who were promoted;
- The positive recommendations which her application received from the College Committee and her external referree and the assessors appointed by the Respondent;
- The absence of any transfer on the basis for the [Committee's] decision."

15. The Determination then sets out a summary of the evidence given on behalf of the respondent by Professor Scott, Dean of the School of Business and Law and a member of the Committee who had participated in the promotion exercise and the deliberations. He described how the Committee went about its deliberations and said that it normally "concentrates on the cumulative influence of the candidates' achievements to determine if they have reached the required standard of academic leadership in their particular field. In that process some criteria are weighted higher than others. Publications by the candidate in peer reviewed journals are considered particularly important as is the extent of the impact rate of their publications". He said that all candidates were expected to

reach the same standard of achievement but there could be what he described as "a different intensity depending on the discipline" from which an applicant came.

16. In relation to the appellant's case, Professor Scott had given evidence that the Committee had not been satisfied "that the cumulative influence of the Complainant's achievements were sufficient to enable her to progress to the level of Professor". He maintained that the decision had been reached solely on the basis of the information provided in her application and denied that gender was a consideration in the process. He accepted that the only record of the deliberations of the Committee was the written statement of the results. No record was maintained of the discussion which lasted approximately one hour for each candidate and there was no marking system in place. The appellant had been represented by counsel who cross-examined Professor Scott.

17. The Determination then contains an extensive exposé of the legal principles which the Labour Court considered to govern the analysis it was required to undertake in such a case. Having quoted extensively from case law, the court listed eight relevant principles which it derived from that jurisprudence.

The Prima Facie Case Finding.

18. The Labour Court then sets out its analysis of the issues under the section headed "Discussion". This effectively comprises two parts in which the court first asked itself whether the complainant had established a *prima facie* case. On this it reaches a conclusion in the appellant's favour. It then in a second part considers the evidence offered by the University in rebuttal of the inference raised by the *prima facie* case.

19. In taking this approach the Labour Court was clearly influenced by the fact that the Equality Officer had dismissed the claim by concluding that not even a *prima facie*

case of gender discrimination had been made out. That was therefore the first hurdle the appellant needed to overcome in the appeal.

20. In answering the question it thus posed itself, the Labour Court identified three factors. First, it noted that there was independent evidence that she did meet the required standards set by the scheme's criteria. She was recommended for promotion by her own College and the independent assessors nominated by the University supported her eligibility. It also noted that Professor Scott had said that the Committee placed considerable reliance on the report of the College Committee when making the assessment. The Determination then comments:-

> "These facts are at least suggestive of a degree of irrationality in the results of the selection process."

21. The second factor was the "gender composition" of the Committee which gave "rise to considerable disquiet". The fact that the Committee was comprised of twelve men and one woman was considered "inherently inimical to the achievement of full gender equality in access to senior appointments" within the University. The third factor was the absence of any minutes or notes of the content of the deliberations of the Committee in arriving at its decision.

22. The Determination then concludes on the question of a *prima facie* case as follows:-

> "While none of these considerations are *(sic)* determinative of the case, their cumulative effect must be sufficient to constitute facts from which discrimination can be inferred. The Equality Officer found that the Complainant had failed to

make out a *prima facie* case of discrimination. On the evidence adduced in the course of the appeal the Court must respectfully disagree with that conclusion."

Rebuttal of the Inference.

23. The court then introduced the second stage of its analysis by saying that as the complainant "has established facts from which discrimination may be inferred, in accordance with s. 85A of the Act the onus of proving the absence of discrimination shifts to the respondent. The Court must, therefore, carefully evaluate the evidence tendered by the Respondent to explain its decision not to promote the Complainant". It then asks itself the question: "Has the respondent rebutted the presumption of discrimination?"

24. Understandably, in presenting the appeal, counsel for the appellant acknowledged that there could be no quarrel with the approach adopted by the Labour Court up to this part of the Determination and submitted that the court had been entirely correct in deciding that the three factors raised an inference which had the effect of placing on the University the onus of explaining how the promotion decision had been reached without gender bias. As explained more fully below, counsel identified the point of law which constituted the basis of the present appeal as the Labour Court's acknowledgement that its role required a careful evaluation of the evidence tendered by the University to explain its decision not to promote the appellant. The Labour Court, he submitted, erred in law in failing to do exactly that.

25. Counsel for the University on the other hand relies strongly upon the fact that the present appeal is explicitly limited to one on a point of law in accordance with s. 90(1) of the Act of 1998 (as amended). She submits that the present appeal does not raise any

point of law but is, in effect, a disguised attempt to reopen issues of fact with a view to obtaining a rehearing of the matter before the Labour Court. Before addressing the legal arguments which have been made, it is necessary to set out in more detail the manner in which the Labour Court analysed the issues and then answered the question it posed for itself namely, whether the evidence given and the explanation offered by the University rebutted the inference that the decision not to promote the appellant was tainted by gender discrimination.

26. The Determination first refers to case law indicating that:-

(a) Cogent evidence of "a non-discriminatory taint" is to be required – by which this Court understands, cogent evidence of the absence of a taint of discrimination;

(b) The court must be alert to the possibility of unconscious or inadvertent discrimination so that mere denials of discrimination in the absence of corroboration must be approached with caution; and

(c) That the decision to reject the complainant's application must be shown not to have been influenced to any degree beyond the mere trivial by considerations relating to her gender.

27. The Determination then outlines its assessment of the evidence given by Professor Scott. This assessment on pp. 13 and 14 of the Determination must, in the view of this Court, be read in conjunction with the summary of the testimony he gave before the Labour Court as set out at pp. 6 and 7 of the Determination.

28. The Labour Court described Professor Scott's evidence as having been "undoubtedly honest" and explicitly accepted its veracity. It describes the evidence he

gave as being "comprehensive evidence concerning the process followed by the [Committee] and the underlying rationale for its decisions". He had explained that "in order to attain the standard required for promotion, candidates must demonstrate, to the satisfaction of the [Committee] that they have attained the highest standard of excellence and international academic leadership in their particular discipline". He said that "candidates are judged against predetermined objective criteria solely on the basis of the evidence disclosed in their application". As already stated, this assessment must, in the view of the Court, be read in conjunction with the more extended summary of the evidence as to how the deliberations were conducted. Professor Scott had said that the discussion on each application lasts for approximately one hour and is normally led by the external members. The Committee "normally concentrates on the cumulative influence of the candidate's achievements to determine if they have reached the required standard of academic leadership in their particular field".

29. On p. 13 the Labour Court then gave its assessment of the effect of the evidence:-

> "The import of that evidence was that the Complainant's application was decided upon solely by reference to the published criteria and that the members of the [Committee] came to the conclusion that she did not meet the standard necessary to warrant promotion."

30. Contrary to what might be inferred from some of the arguments on the part of the appellant, this constitutes, in the judgment of the Court, a clear finding of fact on the part of the Labour Court as to the basis upon which the Committee arrived at its decision. It must be borne in mind that the question under consideration by the Labour Court at that point was: how had the deliberations of the Committee been conducted so as to arrive at a

result which appeared, on the face of it, to be inconsistent with the *prima facie* indication that she was considered to have met the required standards by both her own college, her referee, and the external assessors? In effect, the Labour Court in finding that an inference of possible gender discrimination had been raised was concerned to know what had actually happened that enabled a group comprised of twelve men and one woman to arrive at their decision without there being element of gender discrimination given that there was no first-hand minute or note of the deliberations.

31. The Labour Court did not, however, confine itself to relying upon the veracity and honesty of Professor Scott's description of the deliberations in concluding that the inference had been rebutted. It was explicitly conscious of the inadequacy of relying solely upon a declared denial of bias on the part of the decision-maker. It takes account of the fact that of the nineteen applicants, fifteen were men and four were women; while of the eight successful applicants, six were men and two were women. "This result is inconsistent with the conclusion that the [Committee] was subconsciously disposed to appoint men in preference to women. Moreover, in examining the results of the earlier promotion round in 2006, no evidence can be found of a discriminatory disposition on gender grounds on the part of the decision-makers".

32. In the judgment of this Court, what the Labour Court is there saying is that even if, notwithstanding the honesty and truthfulness of Professor Scott's description of the deliberations, the procedure had been tainted by some subconscious or inadvertent gender-based bias, the Labour Court would expect to see it manifested in some imbalance in the outcome of the procedure. The actual result, on the other hand, it finds is inconsistent with any subconscious disposition on the part of the Committee to promote

men in preference to women; nor can such a tendency or pattern be discerned when the results are taken in conjunction with the results reached in the 2006 round.

33. It is on that basis, accordingly, that the Labour Court answers in the affirmative its question as to whether it is more probable than not that the appellant's gender had nothing to do with her failure to be promoted. The overall conclusion is then summarised and given in the final paragraph:-

> "For the reasons referred to herein the Court is satisfied that while the Complainant has made out a *prima facie* case of discrimination that the respondent discharged the onus which it bears and that it is more probable than not that the Complainant's gender was not a factor which influenced the decision not to appoint her to the post of Professor."

Grounds of Appeal.

34. As already indicated, notwithstanding the fact that, on the face of it, the Labour Court has based that final conclusion upon its assessment of the evidence of fact as to how the deliberations of the Committee were conducted and the basis upon which the rejection of the application was decided, it is submitted on behalf of the appellant that the Labour Court has erred in law. The specific grounds raised in the notice of appeal are expressed as follows:-

(a) The Labour Court erred in law in determining that having made out a *prima facie* case of discrimination that the appellant's gender was not a factor which influenced the decision not to appoint her to the post of Professor;

(b) The Labour Court failed to carry out any or any adequate probative analysis of the decision of the respondent to refuse to appoint the plaintiff to professorial status. In particular, the Labour Court failed to test the decision not to promote by reference to the evidence adduced as to the plaintiff's suitability by reference to the stipulated criteria. The Labour Court's statement that it would not substitute its decision for the UCAATP did not discharge its obligation to carry out a proper and thorough evaluation of the evidence;

(c) The Labour Court erred in law in failing to have or any proper regard to the weight of evidence adduced on behalf of the appellant;

(d) Having found that the appellant had raised a *prima facie* case of discrimination and having set out the reasons for that finding, the Labour Court failed to then examine each of the grounds to determine that there was no gender bias in the decision;

(e) Further, the Labour Court relied on limited statistical evidence in coming to its decision that there was not gender discrimination. The Labour Court failed to engage in a proper analysis of details and statistical information relevant to its determination to permit a proper evaluation as to whether there was indirect discrimination.

(f) The Labour Court misdirected itself on the limited statistical evidence adduced;

(g) The Labour Court failed to carry out any form/ any adequate form of comparative analysis as between the different candidates in respect of the contribution to academic journals and the other stipulated criteria;

(h) The Labour Court failed to have any adequate regard for the undisputed evidence of gender imbalance in the make up of the UCAATP."

35. While the basis of the appeal has been articulated in those grounds, the central thrust of the argument made by counsel for the appellant was essentially that once the Labour Court accepted that there was a *prima facie* case that discrimination had tainted the decision, it had an obligation in law to embark upon a more detailed assessment of the actual material which had been before the Committee and to make specific findings of fact by reference to that evidence. As he put it, the Labour Court was obliged to "roll up its sleeves" and "engage with" the statistical and other evidence which the appellant had put before it and against that material to test the evidence of Professor Scott. By failing to do so, the Labour Court had erred in its approach to the evaluation of evidence and thereby committed an error of law.

36. While recognising with some reluctance that the express terms of the conclusions reached in the Determination were based upon Professor Scott's factual evidence as to how the deliberations of the Committee were conducted, counsel for the appellant sought to characterise the issue as one of law by reference to a passage in the judgment of McCracken J. in the Supreme Court in *National University of Ireland Cork .v Ahern & Ors* [2005] 2 I.R. 577. The relevant passage is this:-

"The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court

must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this Court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered the labour Court or ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law and can be considered on an appeal under s. 8(3)." (This last reference is to the definition of "like work" in the Anti-Discrimination (Pay) Act 1974 since repealed and replaced by a corresponding provision in the 1998 Act.)

37. Counsel also called in aid an observation or admonition which appears in another judgment of the Supreme Court, that of Finlay C.J. in *North Western Health Board v. Martyn* [1987] I.R. 565 at 579:-

"If a party appealing the ruling or recommendations of an equality officer to the Labour Court seeks to put in issue any of the facts so found, they should unequivocally do so in their notice of appeal and, in turn, the Labour Court, upon the conclusion of its hearing, should in an unambiguous fashion state the facts which it has found and the evidence upon which it has found them."

38. Counsel for the appellant relies upon these authorities in submitting that the Labour Court in this instance has failed adequately to set out the facts upon which it relied in reaching its conclusion and has also erred in failing to take into account and to determine issues of fact that arose out of the conflict between the evidence and

submissions made by the appellant before the Labour Court on the one hand and the evidence relied upon by the University on the other.

39. As counsel for the respondent correctly pointed out, it is important to bear in mind the context in which the statement by McCracken J. in the *NUI Cork* case was made. That case concerned a number of male security service employees of UCC who claimed discrimination upon the grounds that they were performing "like work" to that of female telephone switchboard operators employed in the college but were receiving lower rates of pay. The Labour Court, having compared the work done by the two sets of employees determined that there was "like work" and that the differences in rates of pay were not justified on grounds other than sex. In allowing the appeal and remitting the matter to the Labour Court the Supreme Court held that the Labour Court had failed to take into account all of the facts relevant to the comparison made between the duties of the male security operatives and the particular group of switchboard telephonists which had been put forward as comparators in the claim. The actual rates of pay received by the group in question were the same as those received by other fulltime telephonists, but the comparator group had had their duties reduced by the introduction of job sharing arrangements without any reduction in pay rates. It was on that basis that the Supreme Court held that there had been an error of law on the part of the Labour Court in failing to take into consideration all of the elements relevant to the issue as to whether the difference in remuneration was based on grounds of sex. At p. 584 McCracken J. explains:-

> "Clearly that difference in remuneration was not based on grounds of sex but on grounds of a policy of facilitating the family obligations of the comparators. This

being so, the Labour Court ought then to have considered the question whether the difference in remuneration between the respondents and the comparators might have the same basis. The Labour Court failed to give any consideration whatever to the fact that the comparators worked shorter hours and lesser duties than their fulltime colleagues."

40. In the judgment of the Court the position in relation to the present appeal is materially different. As already pointed out above, the issue before the Labour Court in the second part of its assessment of the appeal was effectively this. Given the apparent imbalance in the composition of the Committee and the absence of any first-hand record of its deliberations, did the actual evidence given of those deliberations suffice to rebut the inference that otherwise arose? Answering that question did not, in the view of the Court, involve or require any necessary adjudication on the merits of the judgments made by the Committee on the appellant's promotion application. It was not the function of the Labour Court to decide whether the applicant's academic achievements and publications were at the level of excellence she maintained nor whether they were superior or inferior to those of other applicants. The judgments as to the degree to which the applicants met or exceeded the standard required by each of the designated criteria were qualitative judgments delegated exclusively to the specialised appraisal of the members of the Committee. Having, as it were, had its doubts raised by the apparent imbalance in the composition of the Committee and the absence of records of the deliberations, the Labour Court's concern was to be satisfied that the deliberations had not in fact been tainted by gender discrimination. It declared itself satisfied on that point by accepting as comprehensive, truthful and honest Professor Scott's account of the conduct of the

deliberations combined with the absence of any contrary indication or pattern in the outcome of the 2007 round as well as in the preceding round of 2006.

41. In her appeal submissions before the Labour Court, the appellant had submitted that the Committee had "violated the principles of equality by applying the promotion procedure in a way that was deliberately prejudicial to her". This was based upon a number of grounds identified as: Competence, Bona Fides, Composition and Balance and an alleged Arbitrary, Non-transparent Application of the Criteria.

42. Under the heading of "Competence" the appellant had argued that the Committee was unbalanced in its composition not only because it had only one woman but because it lacked the expertise to evaluate her particular achievements in the area of business ethics. Of the thirteen members, only one was a business academic while nine members were drawn from the Colleges of Life Sciences and Engineering. These colleges are, she claimed, heavily male dominated especially at the senior level so that the composition misrepresented UCD's "staff community" and this was particularly prejudiced against the School of Business which did not have a single member on the Committee. The one business academic was an extern but his role is criticised by the appellant because "he was not an expert in Business Ethics/CSR/Social Issues in Management" so that the membership of the Committee was not competent to assess her application or to properly appreciate the recommendations of the external assessors or the referee and the report of the college committee.

43. Under the heading of "Bona Fides" the appellant referred to the flawed decision of the 2006 round and maintained that the unblocking of a backlog of promotions by the removal of the five year associate professorship condition had produced a result that the

Committee was imposing an additional *de facto* condition on her application by requiring applicants for promotion to go from one level to the next without skipping a level. Thus, "previous discrimination against the complainant in promotion to associate professor prevented her from fulfilling this condition and thus constituted a discriminatory criterion". On that basis she claimed that the Committee had not approached her application with an objective and open attitude and in good faith.

44. In the judgment of the Court, the points raised under these headings did not give rise to any obligation on the part of the Labour Court to "delve into" the facts relied upon for the purpose of testing them against the evidence of Prof. Scott to any extent greater than that which appears in the text of the Determination. The arguments are, in effect, an attack upon the integrity of the individual members of the Committee and on their willingness to exercise their professional judgments objectively and in good faith. The fact that senior levels in the College of Life Sciences and Engineering may be "heavily male dominated" was not one that was in dispute but of itself it did not prove that the particular composition of this Committee was incapable of reaching an unbiased judgment upon the application. If the appellant had any justiciable grievances in respect of the academic competence of the Committee or the non-gender aspects of its composition or the alleged disguised continuation of the associate professor pre-condition, her remedy in law lay elsewhere and not in an appeal to the Equality Tribunal.

45. Under the heading of "Composition and Balance" the appellant made the more important and obvious argument based upon the fact that of the members of the particular Committee there was only one woman out of thirteen members. This, it was argued, constituted a "gross contravention of nationally prescribed guidelines designed

specifically to prevent the kind of discrimination exhibited by UCD". This, of course, is the very point which the Labour Court accepted in reversing the decision of the Equality Officer. As indicated above, the Labour Court correctly treated the fact of that imbalance not as determinative of the case as a whole but of raising an inference which the University was then required to rebut.

46. Under the heading of "Arbitrary, Non Transparent Application of the Criteria" the appellant advanced a broad challenge to the Committee's conclusion that she did not meet the required standard of the five promotion criteria (see para. 10 above). The essential submission made was this:

> "It is submitted that in each of the five alleged shortcomings, the Committee failed to accept the evidence available to it on the Complainant's achievements. It is further submitted that the failure to do so can only be explained by the fact that [the Committee] does to sufficiently understand the complainant's area of expertise and her achievements and it was biased against her because of her gender".

47. Clearly, the appellant strongly disagreed with the consensus apparently reached by the Committee as to the level and quality of her academic accomplishments and standing. On a number of grounds she impugned their ability to reach a judgment on her career inconsistent with her own assessment and with the recommendations supportive of her application. For example, she identifies one of the external assessors as coming from an institution where one of the other applicants for promotion had worked and with whom the other applicant had co-authored a chapter in a book. This gave rise she alleged to a conflict of interest and the external assessor ought not to have been used for the

assessment of that candidate's application. Whatever merit that criticism of the assessment of another candidate's application may have, it had no bearing upon the Committee's assessment of the appellant's application. The various applicants for promotion were not competing with one another and there was no limit on the number of promotions that might be granted. Even it could be said that the appellant's various criticisms of the competence of individual committee members; of their lack of appropriate academic background and of the defects alleged in the University's procedures for establishing membership of the Committee, had some merit or justification, it does not follow that the Committee so constituted was either in fact or in law incapable of determining the individual applications without gender bias. That was the issue which the Labour Court was required to determine on the appeal and not whether the appellant merited promotion in accordance with the designated criteria. In effect, the appellant assumed that because of the particular composition of the Committee and because she professed not to understand how it failed to accept her own evidence of meeting the designated criteria, that this constituted proof that the rejection of her application must necessarily be attributable to gender discrimination. The Labour Court was not concerned to determine as a matter of fact whether, for example, the Committee "did not understand sufficiently the Complainant's area of expertise". It was solely concerned to satisfy itself that the basis upon which the rejection had been decided by the Committee was untainted by gender bias.

48. Unlike the *NUI Cork* case, therefore, this is not an instance in which it has been demonstrated that the Labour Court wrongly ignored some factor or a piece of evidence relevant to the application of a statutory criterion or condition in the Act of 1998 (as

amended). On the contrary, it is clear from the exposé of the evidence and material put before it by both sides that the Labour Court took account of all material considerations. It was argued that once the Committee had found that there was a prima facie case the Court was obliged to "engage with the evidence of Professor Scot" and "identify why there was no discrimination". In the judgment of the Court that is exactly what has been done in the Court's explicit finding based on its acceptance of that evidence as comprehensive, truthful and honest that the application had been decided "solely by reference to the published criteria" and that the appellant had been found not to "meet the standard necessary to warrant promotion".

49. In the terms of the Employment Equality legislation and of the well established practice and procedures of the Authority and the Labour Court in determining claims, the Court was effectively put on enquiry as to the possible presence of gender discrimination by the imbalance in the composition of the Committee combined with the absence of minutes of its deliberations. Nevertheless, in the particular circumstances of this non-competitive promotion scheme, the Labour Court was correctly concerned only to satisfy itself that the specific decision by this particular group of 12 men and one woman had not in fact been tainted by gender discrimination whether overt or subconscious. It did so by considering and appraising the first hand evidence given to it of what had actually taken place and by excluding the possibility that there existed some inconsistency in a pattern of results which would make a conclusion as to the presence of some institutional bias inescapable and thereby render the Committee's decision unlawful.

50. In the judgment of the Court no error of law has been made out and no point of law for appeal has been identified. In reality the arguments advanced amount to an

assertion that the Labour Court should have come to a different conclusion on the factual evidence before it. In the absence of some element equivalent to that of the *NUI-Cork* case that does not constitute a point of law. That assessment is not altered by the use of a vague neologism to characterise the alleged flaw as a "failure to engage with the evidence".

51. For these reasons the appeal is rejected.

MR JUSTICE COOKE
APPROVED TEXT

In the matter of the **Employment Equality Act 1977: The Minister for Finance,** Appellant v. **The Civil and Public Service Union, The Public Service Executive Union** and **The Irish Municipal Public & Civil Trade Union,** Respondents **(No. 1)** [2006] IEHC 14, [2004 No. 336 SP]

High Court 20th January, 2006

Practice and procedure – Res judicata – Estoppel – Jurisdiction issue raised in previous related proceedings between same parties – Whether issue res judicata between parties – Whether respondents estopped from raising plea based on jurisdiction.

Employment – Labour Court – Whether decision of Labour Court on preliminary issue constituted "determination of a dispute" – Whether Labour Court decision on preliminary issue capable of being appealed to High Court – Application of principles of statutory interpretation – Intention of Oireachtas – Employment Equality Act 1977 (No. 16), ss. 19(5) and 21(4) – Interpretation Act 2005 (No. 23), s. 5.

Section 19(5) of the Employment Equality Act 1977 provides that, save only where a reasonable cause can be shown, a reference to the Labour Court is to be lodged not later than six months from the date of the first occurrence of the alleged discrimination. Section 21(4) of the Act of 1977 states that a party to a dispute determined by the Labour Court may appeal to the High Court on a point of law.

The claimants lodged a reference to the Labour Court claiming that each of them had been unlawfully discriminated against by the appellant in relation to promotion. The issue of the delay in lodging complaints was dealt with as a preliminary issue by the Labour Court.

In January, 2002 the Labour Court ruled that reasonable cause had been shown for the delay. The appellant appealed to the High Court on a point of law under s. 21(4) of the Act of 1977. The respondents unsuccessfully argued, as a preliminary issue, that the High Court did not have jurisdiction, pursuant to s. 21(4) of the Act of 1977, to hear the appeal. By consent order of the High Court (Kelly J.) of the 13th December, 2002, the appeal in those proceedings was allowed and the matter remitted to the Labour Court.

In July, 2004 the matter having been remitted by the High Court, the Labour Court again found that the respondents had shown reasonable cause for the delay. The appellant lodged a fresh appeal in separate proceedings to the High Court against that decision. At the hearing, the respondent contended that the High Court did not have jurisdiction, pursuant to s. 21(4) of the Act of 1977, to hear the appeal on the basis that the decision of the Labour Court, the subject of the appeal, did not constitute the determination of a dispute within the meaning of that section. The appellant contended that the jurisdiction issue was *res judicata* having been determined by the High Court in the earlier proceedings between the parties arising out of the same claim.

Held by the High Court (Laffoy J.), in finding that the High Court had jurisdiction to hear the appeal, 1, that, where a party had accepted a decision in earlier proceedings

on the issue of jurisdiction and had not exercised its right of appeal to the Supreme Court, it would be unfair to allow it to re-open that point in subsequent proceedings involving the same parties, in circumstances where the earlier and subsequent proceedings were to be regarded as a *continuum*. The jurisdiction issue was *res judicata* between the parties.

Kildare County Council v. Keogh [1971] I.R. 330 considered.

2. That, while technically there were two sets of proceedings, the instant proceedings and the earlier proceedings between the same parties did not in substance constitute separate litigation and were to be regarded as a *continuum*.

3. That, in any event, taking a purposive approach to the construction of s. 21(4) of the 1977 Act, as the court was now mandated to do by virtue of s. 5 of the Interpretation Act 2005, it was reasonable to assume that the Oireachtas envisaged that the Labour Court would manage its caseload in a sensible manner and that where a decision on a net issue might resolve a dispute that it would deal with that net issue as a preliminary point.

4. That it was also reasonable to assume that the Oireachtas had envisaged that where the Labour Court had dealt with such a net issue as a preliminary point, its decision would be appealable on a point of law without having to bring the reference to a final decision on the claim. Any other reading of s. 21(4) of the 1977 Act would seem to go against the clear intention of the Oireachtas that references in relation to discrimination issues should be dealt with in an expeditious and efficient manner.

Cases mentioned in this report:-

Gerster v. Freistaat Bayern (Case C-1/95) [1997] E.C.R. I-5253; [1998] 1 C.M.L.R. 303.

Kildare County Council v. Keogh [1971] I.R. 330.

Special summons

The facts have been summarised in the headnote and are more fully set out in the judgment of Laffoy J., *infra*.

By special summons dated the 18th February, 2002, (2002 No. 80 SP), the appellant appealed pursuant to s. 21(4) of the Employment Equality Act 1977 against a decision of the Labour Court dated the 14th January, 2002. By notice of motion dated the 19th November, 2002, the respondents raised a preliminary issue in those proceedings as to whether the High Court had jurisdiction to hear the appeal. By order of the High Court (Kelly J.) of the 13th December, 2002, the respondents' motion was dismissed, the appeal was allowed by consent of the parties and the matter remitted to the Labour Court.

By decision of the 29th July, 2004, the Labour Court found in favour of the respondents. By special summons dated the 18th August, 2004, the appellant appealed to the High Court against that decision.

The appeal was heard by the High Court (Laffoy J.) on the 20th and 24th January, 2006. The respondents raised a preliminary issue as to whether the High Court had jurisdiction, pursuant to s. 21(4) of the Act of 1977, to hear the appeal.

*Gerard Hogan S.C. (*with him *Niamh Hyland)* for the appellant.

Mary Honan for the respondents.

Ex tempore

Laffoy J. 20th January, 2006

1 I will rule now on the points raised before lunch. Although the special summons invokes s. 8(3) of the Anti-Discrimination (Pay) Act 1974, as I understand it, it is common case that this appeal is being prosecuted under s. 21(4) of the Employment Equality Act 1977 (the Act of 1977). That subsection provides as follows:-

> "A party to a dispute determined by the Court under subsection (2) or, in the case of such a determination in a matter referred under section 20, the Minister or a person concerned may appeal to the High Court on a point of law."

"The Court" in subs. (4) means the Labour Court. The respondents contend that this court does not have jurisdiction to hear this appeal under s. 21(4), because, it is contended, the decision of the Labour Court, the subject of these proceedings, was not the determination of a dispute within the meaning of s. 21(4).

2 The appellant contends that this court does have jurisdiction on two grounds. First, that the jurisdiction point has already been decided by Kelly J. in earlier proceedings between the parties arising out of the same claim. Those proceedings had Record No. 2002, No. 80 SP and the decision of Kelly J. was dated the 13th December, 2002.

3 That appellant contends that the jurisdiction issue is *res judicata* between the parties or, alternatively, that it would be unfair, inequitable and unjust to allow the respondents to reopen the jurisdiction issue which was decided by Kelly J. against the respondents.

4 Secondly, the appellant contends that, in any event, the decision of Kelly J. was correct and that the decision of the Labour Court of the 29th

July, 2004, the subject of these proceedings, was the determination of a dispute within the meaning of s. 21(4).

5 The decision of the Labour Court, which the appellant appeals against in these proceedings, was that the claimants, represented by the respondents, had shown reasonable cause under s. 19(5) of the Act of 1977 for not lodging their reference under s. 19 within six months from the date of the first occurrence of the act alleged to constitute discrimination.

6 The reference which relates to an allegation of discrimination by job sharers in the public service was brought following the decision of the European Court of Justice in *Gerster v. Freistaat Bayern (Case C-1/95)* [1997] E.C.R. I-5253 and has been before the Labour Court since 1998. The manner in which the reference was to be managed was the subject of a letter dated the 10th June, 1998, from the then Chairman of the Labour Court, Evelyn Owens. As I understand it, it was agreed by the parties that the issue of the time limit in s. 19(5), and, in particular, whether the clarification of the law in *Gerster v. Freistaat Bayern* constituted reasonable cause, would be dealt with as a preliminary issue by the Labour Court. This was done in a decision of the Labour Court of the 14th January, 2002.

6 That decision was the subject of the appeal which was before Kelly J. on the 13th December, 2002. On that appeal the respondents sought a preliminary ruling on a motion in terms recited in the order of Kelly J. as follows, referring to the notice of motion:-

> "… notice of motion on behalf of the respondents dated the 19th day of November, 2002, for a preliminary ruling on a point of law and for, *inter alia*, a declaration that the appellant's appeal is premature and that this court does not have jurisdiction to hear the said appeal and for the dismissal of the appeal."

That is the manner in which the issue was recited in the order.

8 Kelly J. heard the application and he dismissed the motion. When the appeal proceeded, at the suggestion of Kelly J., the parties considered whether the matter needed to be remitted to the Labour Court to establish a factual matrix for the issue as to reasonable cause. By consent, the appeal was allowed and the matter was remitted to the Labour Court. The first proceedings were then spent.

9 The matter was remitted for determination of the issue which was set out in the order of Kelly J. as follows:-

> "Whether or not in the light of the factual position as agreed or determined by the Labour Court in respect of all or any of the ten claimants, the decision of the European Court of Justice in *Gerster v. Freistaat Bayern (Case C-1/95)* [1997] E.C.R. I-5253 constituted reasonable cause to extend time within the meaning of s. 19(5) of the Employment Equality Act 1977."

It is the decision of the Labour Court on that issue which is the subject of this appeal.

10 I am of the view that the submission that the jurisdiction point is *res judicata* is well taken. This court is, of course, bound by the decision of the Supreme Court in *Kildare County Council v. Keogh* [1971] I.R. 330. The essence of the decision of the Supreme Court on the *res judicata/*estoppel issue in that case is stated as follows by Walsh J. at p. 342:-

> "If in litigation between parties in a court of competent jurisdiction a decision based upon a particular interpretation of an Act is given in favour of one of the parties, can that be the basis of an estoppel by judgment or otherwise in further and separate litigation between the same parties at a later stage in another court of competent jurisdiction so as to prevent the party who unsuccessfully contended in the first litigation for a particular construction of the Act from seeking to set up that construction again? In my view, the answer is 'No'."

I accept the submission of counsel for the appellant that this appeal and the earlier appeal should be regarded as a *continuum* and that, while technically that are two sets of proceedings, this appeal in substance is not separate litigation from the earlier appeal as being correct. In effect the respondents accepted the decision of Kelly J. They could have appealed to the Supreme Court against that decision, but they did not. They embarked on the process provided for in the order of Kelly J., which led to the decision of the 29th July, 2004 and to this appeal. It would, in my view, be unfair to allow them to re-open the jurisdiction point.

11 Apart from that, in any event, I am of the same view as Kelly J. on the issue as to whether the court has jurisdiction to hear the appeal. Section 21(4) provides for an appeal on a point of law and only on a point of law.

12 Taking a purposive approach to the construction of s. 21(4), which the court is now mandated to do by virtue of s. 5 of the Interpretation Act 2005, I think it is reasonable to assume that the Oireachtas envisaged that the Labour Court would manage its caseload in a sensible manner and that where a decision on a net issue might resolve the dispute that it would deal with the net issue as a preliminary point and decide it. I also think it is reasonable to assume that the Oireachtas envisaged that where the Labour Court adopted that approach its decision would be appealable on a point of law without having to bring the reference to a final decision on the claim. Any other reading of s. 21(4) would seem to go against the clear intention of the Oireachtas that references in relation to discrimination issues should be dealt with in an expeditious and efficient manner.

12 Therefore I rule that the court has jurisdiction.

Solicitor for the appellant: *The Chief State Solicitor.*

Solicitor for the respondents: *Darach Connolly.*

Úna Butler, Barrister

_____

[2006] IEHC 340.

THE HIGH COURT

[2006 No. 4124P]

BETWEEN

P. ELLIOTT & COMPANY LIMITED

PLAINTIFF

AND

BUILDING AND ALLIED TRADES UNION

DEFENDANT

AND BY ORDER OF THE COURT

BRENDAN O'SULLIVAN, TONY O'FARRELL, ANDY SMITH, PAUL McCLOSKEY AND TOMMY LARKIN

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered 20th October, 2006.

1. Introduction

1.1 The circumstances giving rise to an industrial dispute between the first named defendant ("BATU") and the plaintiff ("Elliott") are fully set out in a separate judgment which I have already delivered today, which judgment sets out in detail the reasons why I refused to make the interlocutory order sought by Elliott, but instead made a limited form of order.

1.2 For the reasons set out in that judgment I was not persuaded that Elliott had made out a case for an interlocutory injunction to restrain picketing generally. However, I was persuaded, again for the reasons set out in that judgment, that it was appropriate to grant a number of limited orders as to the manner of picketing. One of those orders concerns the composition of the picket. Nothing now turns on that aspect of the order.

1.3 The second order was in the following terms:-

"IT IS FURTHER ORDERED that the defendants its servants or agents and all persons to whom knowledge or notice of this order might come be restrained pending the trial of this action from picketing in a manner that is not peaceful and/or that prevents any person from having reasonable access to the premises of the plaintiff company".

1.4 It is now contended that there have been breaches of that order which amount to a contempt. In addition it is said that the actions of BATU, and indeed the individual defendants, are such as would now justify granting the order originally refused which would be to the effect of restraining picketing altogether.

2. <u>Procedural History</u>

2.1 Elliott contends that acts of contempt took place on various dates between 15th and 19th September, 2006. As a result of those allegations an application for the abridgement of time for service of this application was made on 20th September, 2006.

2.2 That application was granted and the motion was directed by this court (Abbott J.) to be returnable for 22nd September, 2006. On that occasion Abbott J. made an order joining the second to sixth named defendants ("the personal defendants") to the proceedings and adjourned the application in relation to contempt to Monday 25th September. On that occasion the defendants sought time to file affidavits in reply to those filed in support of the motion, and an arrangement was entered into between the parties that all pickets would be lifted, on a without prejudice basis, pending the hearing of the matter which was then listed to go on before me on Thursday 28th September. On that date it became clear that there were significant disputes on the facts between the parties which, at least on one view, had to be

resolved in order that the issue of contempt could be properly decided. For those reasons it was necessary to conduct an oral hearing which took place on 5th October.

2.3 This judgment is, therefore, concerned with dealing with the issues which arose on the contempt application and also with the question of whether it is now appropriate to grant a wider injunction that that originally decided on. I propose dealing with the contempt issue first as a resolution of some of the matters which arise in that contempt issue is of significance in relation to the injunction question. I turn first to the legal principles applicable to this aspect of the case.

3. Contempt/Legal Principles

3.1 Happily there is no significant dispute between counsel as to the appropriate legal principles which should be applied. Firstly it is accepted that the facts alleged to constitute contempt of the court's order must be established beyond reasonable doubt. Reference was made to *National Irish Bank v. Graham* [1994] 1 I.R. 215 where the dicta of Lord Denning MR in *Re Bramblevale Limited* [1970] 1 Ch. 128 was approved. The same principle is also clear from *Bridgewater v. Jemma Allan and Robert Walters Limited* (Unreported, High Court, Laffoy J., 12th May, 2005).

3.2 Counsel for Elliott submitted that the required intention to commit a contempt of a civil order is established where it is shown that the defendant concerned knowingly (but not necessarily wilfully) disregarded the court's order. Therefore, it is said, there will be contempt of an order where the person concerned deliberately does an act and knows of the court order even if they are not aware that the act concerned is in breach of the court order. Reliance in that regard was placed on *Director General of Fair Trading v. Smiths Concrete* [1991] 4 All E.R. 150.

3.3 In the course of debating the issue with counsel it was agreed on both sides, and I agree, that there is one refinement to that position that needs to be noted. Courts

strive to ensure that orders made are clear in their terms. It is particularly important in cases where a party may be exposed to the risk of severe sanction for breach of an order that it be clear to that party what they can, cannot or must do. However despite the best efforts of all concerned it does remain the case that on certain occasions it may not be absolutely clear as to what is or is not within the scope of a binding order of the court. In those circumstances I am satisfied that, having regard to the penal nature of the contempt jurisdiction, a party could not be said to be in contempt of a court order where, objectively speaking, there was reasonable doubt as to whether the actions complained of came within or without the scope of the order concerned. I should emphasise that, in my view, the relevant test is an objective one. Would a reasonable and informed person, having had sight of the court order, come to the view that the acts complained of were legitimate having regard to that order.

3.4 On the facts of this case there is no dispute but that BATU, as a party represented at the hearing which gave rise to the order, was aware of the contents of the order. Furthermore none of the personal defendants allege that they were unaware of the terms of the order. Therefore on the facts of this case, the contempt issue must be approached on the basis that each of the defendants were aware of the terms of the order.

3.5 Elliott also alleges, relying on *Howitt Transport Limited and Another v. Transport and General Workers Union* (1973) IRLR 25 (a decision of the then United Kingdom, National Industrial Relations Court), that a trade union is under an obligation to ensure compliance by its members with the terms of an order made against it. In general terms I accept that that proposition represents the law in this jurisdiction. It should, of course, be subject to a reasonableness test. It is not open to the officers and managing bodies of a trade union (anymore than other body) to

guarantee that each and every member of an organisation will act in a particular way. Trade unions should not, therefore, be seen as a guarantor of its members actions. However it does seem to me that a trade union which is subject to a court order, is bound to take all reasonable steps to ensure that not only it and its officers but also its members, where possible, comply with the terms of the order.

Against those legal principles it is necessary to turn to the specific issues of contempt alleged in this case.

4. The Alleged Contempt

4.1 In general terms Elliott puts forward two contentions which, it says, establish a breach of the order. They are:-

(a) it is said that persons have been prevented from having reasonable access to Elliott's premises at its site at Clare Hall, Malahide, Co. Dublin; and

(b) it is said that in certain respects the conduct of each of the defendants has been such that it amounts to intimidation and, therefore, that the picketing is not peaceful.

4.2 By way of background to a consideration of those allegations it should be noted that it appears to be common case that a decision was taken by BATU to confine picketing to the Clare Hall site. The stated reason, given in evidence by the second named defendant ("Mr. O'Sullivan"), who is assistant General Secretary of BATU, was that it was considered desirable to confine picketing to one site so that there would, at all times, be at least one senior official of the union present so as to ensure that the picketing was carried out in a proper fashion. I accept Mr. O'Sullivan's evidence in that regard.

4.3 It should also be noted that the allegations relate to both the general method of picketing employed and to certain specific occasions. There is a material conflict in

the evidence concerning both those general and specific allegations. However a certain amount of the facts are not in dispute. It would appear that in the early days of the strike action (and extending for a number of days after the court order was made) quite significant numbers appeared on the picket lines. In general terms the method adopted was that the picketers moved in a circle in or around the entrance to Elliott's premises. When persons or vehicles were stopped, they were spoken to (normally by a paid official of the union) and if the person concerned indicated a desire to go on to the premises they were not, ultimately, prevented from so doing. It also appears to be the case that on most occasions the person concerned was also spoken to by a representative of Elliott who sought to persuade them to pass the picket.

4.4 The areas of factual dispute which arise relate to the extent to which the picketing, in effect, prevented persons from going on to the premises without having to stop and be spoken to by BATU officials. In addition, it is said that, while no person who indicated a willingness was, ultimately, prevented from so doing, there was considerable delay in facilitating entry to those who indicated such a desire. Those issues are the subject of dispute to which I will have to return.

4.5 The specific instances which I have mentioned concern an incident involving a vehicle owned by Limestone Construction and a number of separate incidents involving vehicles owned by Goode Concrete. I will return to the question of the Goode Concrete allegations in due course as additional issues arise in respect of that company. However, on the preponderance of the evidence, I am satisfied that what occurred in respect of the Limestone Construction vehicle was that it stopped at the picket line at which stage the driver (who was a non-national with at least some difficulty with English) was invited not to pass the picket. There is nothing in the evidence to suggest that the driver was spoken to in anything other than a normal and

peaceful manner. The driver sought an opportunity to consult with his superiors and made a phone call in that regard. It would appear that, as a result of that phone call, the driver was instructed not to pass the picket and departed. There is nothing in the evidence which, in my view, would lead to the view that the manner in which the Limestone Construction vehicle was stopped was any different from the normal practice adopted at the picket line. That general issue falls, in my view, therefore, to be considered along with the rest of the evidence concerning the manner in which the picket was conducted.

4.6 In relation to that general evidence I have paid particular regard to the testimony of Darren Kelly who is employed by Elliott as a foreman at the site. Mr. Kelly impressed me as a competent and fair witness. While it is true to state that Mr. Kelly was not present in the early days of the strike (and indeed for a couple of days immediately after the court order) the account which he gave of the manner in which picketing was conducted leads me to the conclusion that while the picketers were moving at most times the way in which the picket was organised was such that vehicles approaching the site did not really have any option but to stop and converse with union officials prior to entering the site. I also accept Mr. Kelly's evidence concerning what typically happened after the driver of a vehicle had indicated an intention to enter onto the site. I am satisfied that there was a slow retreat by those involved on the pickets so as to permit vehicles concerned to enter onto the site.

4.7 I am not satisfied that this latter aspect of the case amounts to a breach of the order. While it would, undoubtedly, be preferable if the entrance was clear or if there was a relatively speedy clearing of the entrance as soon as any person gave an indication that he or she wished to enter, I am not satisfied (and most certainly not satisfied beyond reasonable doubt) that anything occurred which amounted to a

significant impairment of the ability of persons to enter the site very soon after they had indicated a wish so to do. The fact remains that no person who gave such an indication, actually failed to get onto the site. Insofar as it is possible to tell from the evidence it would not seem that anyone was delayed by much more than a minute to 90 seconds. I could not, in those circumstances, conclude that that aspect of the procedure adopted amounted to a breach of the order.

4.8 Before leaving that aspect of the case I should note (and this is an issue to which I will return) that a new method of mounting the picket was adopted, when pickets were re-imposed after the brief removal of pickets while a replying affidavit was being filed. There can be little doubt but that that new method is far preferable to that which was being adopted in the past. In that context I should note that the evidence made clear that BATU did not have any guidelines or recommendations in place to govern the method of picketing either generally or in this case. Given the obligation to use best endeavours to ensure compliance with a court order it would be desirable if such a document were produced. While the decision to confine picketing to one location where there would always be a union official present was sensible, and is to be commended, it would be a useful additional safeguard if those having control on the ground of a picket had clear instructions as to the manner in which the picket should be conducted in accordance with law. In that regard those advising on the contents of such guidance might usefully refer to *Broome v. DPP* [1974] AC 587.

4.9 That leads to the question of the way in which vehicles were stopped so as to enable representations to be made to the driver concerned. I have come to the view that that method, as it generally operated, and as given in evidence by Mr. Kelly, does amount to a breach of the order. Persons on a picket line are obviously entitled to seek to communicate with those who might wish to enter the site for the purposes of

attempting to persuade them not to pass the picket. Equally those persons, whether they arrive on foot or in a vehicle, are entitled to pass the picket and are equally entitled not to listen any representations if they do not wish to do so. I am satisfied that the way in which the picket was organised created a situation where those arriving by vehicle were effectively stopped from entering until such time as union officials had an opportunity to speak to them.

4.10 It was accepted by counsel for BATU that such a practice was not permissible. *Broome* is, indeed, ~~indeed~~ authority for such a proposition. That concession was, of course, made in the context of their being evidence presented on behalf of BATU which suggested that no such obstruction had taken place.

4.11 In addition to that evidence there was also testimony tendered on behalf of Elliott by Mr. Michael O'Dwyer which would have suggested that the level of obstruction went beyond that described by Mr. Kelly. I am not satisfied beyond reasonable doubt that any obstruction went as far as Mr. O'Dwyer contended. I am, however, satisfied beyond reasonable doubt that the method of picketing was generally as described by Mr. Kelly. On that basis I am satisfied that there was a breach of the order. I am also satisfied that a reasonable, informed, and objective interpretation of the order makes clear that any form of obstruction which would prevent persons, who did not wish to be addressed by union officials, from entering the premises until they had being subject of an attempt to persuade them not to enter, is in breach of the "reasonable access" requirement in the order. I am therefore satisfied that the necessary ingredients for a contempt of the order have been made out in that limited respect.

4.12 Before going on to the other aspects of contempt contended for, I should say that it seems to me that the contempt which I have found under this heading is at the

lower end of the scale. In that context I have also had regard to evidence to the effect that on a number of occasions the Gardaí were called, but that no issue seems to have been taken by the Gardaí with the manner in which the picket was being conducted other than to request the moving of some vehicles. While it is, of course, the case that the Gardaí are concerned with the implementation of the public law rather than the precise parameters of a court order, it is clear, on the evidence, that the Gardaí read the court order and had no concerns. It would be surprising if it were the case that the picket was being conducted in a manner which could be described as intimidatory, abusive, or significantly obstructive, that some Garda action might not have been at least contemplated.

4.13 Under the second heading it is alleged that the picketing was not peaceful in two respects. The first allegation concerns issues which arose in the context of Goode Concrete to which I have already referred. It would appear that the first vehicle which arrived from Goode Concrete was also driven by a non-national who had limited English. That person was stopped in the ordinary way and it does not seem to me that the circumstances surrounding him being stopped differ from the general circumstances which I have already concluded amounted to a contempt. A similar situation applies to the later arrivals of Goode Concrete vehicles. However the driver of the first vehicle contacted his employers for instructions. What is different about this instance is that it would appear that a series of phone calls were made both by Mr. O'Sullivan and by the fourth named defendant ("Mr. Smith") (who is also a full-time union official) to Goode Concrete which, at a minimum, suggested that Goode Concrete employees should not pass the picket. There is, however, a serious conflict of evidence as to whether threats were issued in the course of those phone calls to the effect that an attempt would be made to black Goode Concrete on any other sites

where BATU members were employed, if Goode Concrete instructed its drivers to pass the picket.

4.14 I am not satisfied that, even if true, the matters contended for could, objectively speaking, be regarded as a breach of the court order. It may well be that the phone calls concerned happened to be made from the vicinity of the picket line. The calls may also have related to the question of whether the picket should be passed. However the calls were not part of the picketing itself. Even if I am wrong in that view it seems to me that the order is not sufficiently clear as to prohibiting inappropriate third party contact as could reasonably lead me to conclude that there was a contempt by breach of the order in respect of these issues even if the factual allegation made by Elliott were found to be true. In the circumstances it seems to me that it would be inappropriate to reach a conclusion (which would have to be reached beyond reasonable doubt) on these factual issues which may, on one view, arise on another occasion and may require to be dealt with on the balance of probabilities. I, therefore, express no view as to the competing factual accounts. However the plaintiff's evidence in respect of these matters is a factor that I should properly take into account while considering whether to extend the nature of the injunction in place.

4.15 The second aspect of the allegation that picketing was other than peaceful concerns an incident which, on the evidence, involved a car being driven by a person who was not associated with BATU or the strike. In the circumstances it does not seem to me that those facts could amount to a contempt on any view. There was a conflict of evidence as to whether, after the car concerned had gone close to injuring Mr. O'Dwyer, Mr. O'Sullivan may have made an unfortunate comment. Even if he made such a comment it would not, it seems to me, amount to a contempt of the court

order and it is, therefore, unnecessary to determine whether he made the comment concerned.

5. Conclusions on Contempt

For those reasons I am satisfied that a contempt of my previous order has been made out but only in the limited respect identified relating to the way in which vehicles were prevented from gaining access without first speaking to union officials. For the reasons which I have also set out above, it seems to me that the contempt concerned is on the lesser end of the scale. I had indicated, at the close of the hearing, that in any event I had come to the view that committal for contempt would not be warranted on foot of any aspects of the case where I regarded it as possible that I might reach a conclusion, after consideration, that a contempt had occurred. I will, however, hear counsel and, in particular counsel for BATU and the personal defendants, further as to the precise course of action I should take in the light of the above finding.

6. The Injunction

6.1 It was accepted by counsel for Elliott that in considering whether a wider injunction (including a complete prohibition on picketing) should now be put in place, I should have regard, not just to the views which I formed as to the events which gave rise to the contempt hearing, but that I must also have regard to whether there was a reasonable fear that further breaches would occur which necessitated the court adopting a different view in relation to the order which should be in place. While, in the ordinary way, a court should not restrain picketing where that picketing is legally justified, simply because there have been instances of an abuse of the right to picket – in those cases the court should lean towards restraining only the unlawful activity while permitting the lawful picketing to continue – there may be cases where the

manner in which picketing is conducted is so far from that which can be said to come within legal bounds that the only reasonable remedy which the court could impose would be to prohibit the picketing altogether.

6.2 Looked at another way if, notwithstanding that there is a right to picket on an occasion in question, those who have that right so abuse it by the manner in which picketing is conducted, it may be that it is open to the court to prohibit picketing completely, as the only effective means by which compliance with the law can be insured. It is clear, however, that counsel for Elliott is correct when he conceded that, in order for a court to come to such a view, it would be necessary that the court would be satisfied that there were reasonable grounds for fearing that significant breaches of the manner in which picketing should properly be conducted would be likely to occur into the future. An injunction is not a punishment for past wrong - it is designed to prevent future illegality.

6.3 For two reasons I am not satisfied that it is not the case here that there is an established risk of future general illegal picketing. Firstly the level of breach which I have found is, for the reasons indicated, on the lower end of the scale. Secondly, as I pointed out, the picketing which is currently occurring seems to be entirely unobjectionable. Provided picketing continues in that way, and there is no evidence from which I could reasonably conclude that it will not, it would not be unlawful. Imposing a complete prohibition on picketing would, therefore, in my view, be a disproportionate response to the breach which I have found.

6.4 However, in one respect it does seem to me that there are at least arguable grounds for suggesting that there have been wider breaches of BATU's obligations than were apparent at the time of the interlocutory hearing. If the evidence given by witnesses tendered on behalf of BATU in respect of the Goode Concrete incident had

been before me on the occasion when the interlocutory injunction was heard (and of course the relevant incidents had not occurred at that time) I would have been persuaded to extend the injunction to one which limited BATU, or any one having notice of the order, from communicating with third party employers in relation to the industrial action. I am therefore prepared to grant a further limited injunction in that regard. However I have not, as yet, had the opportunity of hearing the views of counsel as to the precise form of any such injunction and I will hear counsel further as to an appropriate formulation.

Approved
JH CH.
20.X.06

[2008] IEHC 445.

THE HIGH COURT

DUBLIN

Case No. 2008 10211 P

TOM DOYLE

PLAINTIFF

and

ASILO COMMERCIAL LIMITED

TRADING AS ELY HQ

DEFENDANT

JUDGMENT DELIVERED BY MR. JUSTICE MC GOVERN

ON FRIDAY, 5TH DECEMBER 2008

JUDGMENT WAS DELIVERED AS FOLLOWS ON FRIDAY, 5TH DECEMBER 2008

REGISTRAR: Tom Doyle V. Asilo Commercial Limited. 10:41

MR. JUSTICE McGOVERN: This is an application for an Interlocutory Injunction in which the Plaintiff claims the following reliefs:

1. An injunction restraining the Defendant, its servants or agents from dismissing the Plaintiff from his employment with the Defendant pending the trial of this action or until further order. 10:41

2. ~~Two~~ An injunction restraining the Defendant, its servants or agents from the giving effect to the purported dismissal of the Plaintiff and from stopping the payment of his salary and benefits. 10:41

3. An injunction restraining the Defendant, its servants or agents from taking any steps to fill the position in which the Plaintiff has been employed, namely that of Head Chef in Ely HQ, Hanover Quay in Dublin 2. 10:41

10:42

4. An injunction restraining the Defendant, its servants or agents from announcing or publishing in any way the purported termination of the employment of the Plaintiff

5. An injunction restraining the Defendant, its servants or agents from treating the Plaintiff other than as continuing to be employed by the Defendant pending the trial of this action or until further order. 10:42

6. An injunction directing the Defendant to pay to the Plaintiff his salary, expenses, bonuses, perquisites and all emoluments connected with his employment. And then further or other relief. 10:42

The Defendant company operates a restaurant premises know as "Ely HQ" at Hanover Quay in Dublin. The Defendant has some related companies which own other restaurants under the brand name of "Ely" elsewhere in the City. The Plaintiff was employed by the Defendant in September 2006 as Head Chef. He was initially employed at a salary of €40,000 on a one year contract. When that contract expired he was then retained on a salary of €55,000 per annum. A contract was drawn up but the Plaintiff never signed it. The Plaintiff does not dispute the fact that the contract exhibited by the Defendant in an affidavit is in the same terms as that which was offered to him after his initial one year contract had expired. He says, however, that he did not accept that contract and that he continued to work under the original contract. The Defendant disputes this. 10:42 10:43 10:43

In the summer of 2007, all the chefs employed by the Defendant and their related companies in other restaurants were asked to submit recipes for a cookery book contemplated by the Defendant. The Plaintiff submitted between 25 and 30 recipes for that book and says that approximately 5 had already appeared on the Ely HQ menu. The Plaintiff says that on several occasions he made informal inquiries concerning royalties and copyright entitlement but never received an answer. The Defendants say that he never raised such an issue, other than in an e-mail of 27th November 2008, in the course of which he said: 10:43 10:44 10:44

> "I genuinely presumed that there would be an appropriate acknowledgment for my input in the book, both in terms of accreditation and financial."

I should point out that in the commencement of the book, which was ultimately published, the Plaintiff and other chefs who had contributed were given mention. 10:44

The parties agree that the second contract was offered to the Plaintiff in or around September 2007. While the Plaintiff does not accept that he was bound by that agreement because he never signed it he did continue to work for the Defendant at an increased salary of €55,000 per annum. He says that he refused to sign the second contract because it included a clause which sought to remove his entitlement to any copyright in 10:45

menus composed by him and used outside his employment. It can be inferred from this that he had read the second contract.

Page 12 of the contract contains the following clause: 10:45

> "Copyright: All written material, whether held on paper, electronically or magnetically, which is made or acquired by you during the course of your employment with us is our property and our copyright. At the time of termination of your employment with us or at any other time upon demand you 10:46 shall return to us any such material in your possession."

The Plaintiff's affidavit clearly states that he refused to sign the contract, but it is not clear whether he made his objections known to the Defendant. 10:46 He says that he did and the Defendant denies this.

In connection with the publication of the cook book, the Defendant furnished chefs in their employment with an employee release form, which was intended to protect 10:46 the Defendant from any future claims made by any of their chefs in connection with recipes that were published in the book or photographs of them in the book. Each form contained the name of the employee and other details and then contained the clause: 10:46

> "I hereby give authorisation and grant my consent to the use of content and recipes written by myself, along with photographs featuring myself for inclusion in the above named for the usage/time period and media specified above by Ely and its agents or

representatives."

And then there was some other material which isn't relevant and then it went on to say:

> "I understand that I have no interest in the copyright nor any moral rights in the photograph. I am over 18 years of age."

The Plaintiff was requested on a number of occasions to sign this document but refused to do so. Having refused to do so after a number of requests he was dismissed. 10:47

The exhibits to the affidavits indicate that there were other issues which also gave rise to his dismissal, such as an unwillingness to follow the Defendant's policy on the direction that the menu needed to be taken in order for the business to survive and issues concerning his lack of attendance at key times of business and an allegation of a general lack of interest and his failure to fulfil his role as Head Chef. 10:47 10:48

What emerges from the minutes of meetings held in November 2008 is that strains were developing between the Plaintiff and the Defendant over these various issues and this was taking place against a background of difficult trading conditions for the Defendant. 10:48

The Defendant accepts that it dismissed the Plaintiff for gross misconduct. It says that the gross misconduct was the continuing refusal to carry out legitimate instructions.

10:48

The Defendant has produced a number of authorities which suggest that where a work is made by an employee in the course of employment, the employer is the first owner of any copyright in the work, subject to an agreement to the contrary. The Plaintiff has not produced any authority which satisfies me that he had a legal right to copyright in the recipes produced by him for the cookery book.

10:49

The principles applicable to the granting of an interlocutory injunction have been crystallised in a number of decisions, namely the American Cyanamid Company V. Ethicon Limited case, 1975 Appeal Cases 396, and in this jurisdiction in Campus Oil Limited V. Minister For Industry and Energy (No. 2) [1983] IR 88. I have been referred to the case of Mahalingam V. Health Service Executive, the unreported Supreme Court judgment of 4th October, 2005, in which Fennelly J. dealt with the issue of injunctions of the type sought by the Plaintiff in this case. In this case the Plaintiff claims that the dismissal was null and void and that he should have been reinstated. He has already been dismissed and in substance what he is seeking here is a mandatory injunction reinstating him

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pending the determination of the dispute. A letter of dismissal for gross misconduct was a furnished to the Defendant. Now, it is not clear when this was furnished and the evidence suggests that it may only actually have come to his attention in the course of hearing in this Court over the past two days. But it does refer to the fact that the Plaintiff has a right of appeal against the decision if he wishes to appeal it and that he should write to Mr. Eric Robinson and Ms. Michelle Robinson within five days, giving full reasons as to why he believes the disciplinary action was either inappropriate or too severe. 10:50 10:51

For all practical purposes, the Plaintiff has appealed by bringing these proceedings to the Court so the issue of any right of appeal which exists in that letter is somewhat moot in view of the fact that he has brought this application where he is challenging in the courts his dismissal. 10:51

In the Mahalingam case Fennelly J. stated: 10:51

> "The implication of an application of the present sort is that in substance what the Plaintiff appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case, it is necessary for the applicant to show, at least, that he has a strong case that he is likely to succeed at the hearing of the action. So, it is not 10:51

> sufficient for him simply to show a prima facie case and, in particular, the courts have been slow to grant interlocutory injunctions to enforce Contracts of Employment. None of this is to deny that there have been developments in the law in recent years."

10:52

I should point out that in the case before me the Plaintiff is effectively seeking a mandatory injunction because he has already been dismissed.

In the case of Bergin V. Galway Clinic, a judgment of Mr. Justice Clarke delivered on 2nd November, 2007, the Judge said: 10:52

> "There have been a significant number of decisions over the last number of years, both of this court and to a lesser extent of the Supreme Court, in relation to what might loosely be called employment injunctions. I think it is fair to state that this area of jurisprudence of the courts is in a state of evolution and the precise current state of that jurisprudence is far from clear." 10:53

He went on to state that the reason for the lack of clarity is because so many cases settle before the hearing of the substantive issues. But I accept that the law relating to the enforcement of Contracts of Employment has broadened somewhat in recent years and that in cases of summary dismissal the employer has to apply fair procedures and the old regime, where the courts were very slow to entertain injunction applications relating to Contracts of Employment, has certainly broadened and moved on. 10:53 10:53

I have to stress that in dealing with this application I am not dealing with the substantive issues raised in the case but I am only dealing with the motion for an interlocutory injunction. 10:54

It seems to me that when some of the meetings took place in November of this year that by that time the Plaintiff had the benefit of legal advice because he did say that he would attend a disciplinary meeting under protest even though he was told he could not have his solicitor present, although he was entitled to have a fellow employee with him. 10:54

The Plaintiff has not produced authority at this interlocutory hearing that he was entitled to copyright in the recipes which he prepared and allowed to be used in the book. In my view, if he is not entitled to copyright then prima facie the employer was acting reasonably in requiring him to sign the employee release form. 10:54 10:55

On the Plaintiff's own case, he had taken a position of opposition to doing so for many months prior to the commencement of these proceedings. It is the Plaintiff who asserted the legal right of copyright, or at least raised the issue in a manner which the suggested he was doing so, and the burden of proving that he had copyright rests with him. There is a dispute between 10:55

the Plaintiff and the Defendant as to when he first raised this issue. What is clear and beyond dispute is that around the time of the publication of the book he was making the case that he was entitled to refuse to sign the release form and was also maintaining that he was entitled to some financial reward for his input. The Defendant says that the Plaintiff had ample time to make this case and assert a legal entitlement before he took these proceedings but that he failed to do so until the last minute before publication of the book. It seems to me that this is a reasonable point. 10:55 10:56

The evidence suggests that there has been an irretrievable break down in the relationship between the Plaintiff and the Defendant and, in those circumstances, the courts should be slow to impose a Contract of Employment on the Defendant. Since these proceedings commenced the Defendant has offered the Plaintiff the statutory period of two weeks notice, in an open letter which was designed to resolve this matter and to save costs. The Plaintiff has repudiated that offer, and he was entitled to do so. In my view, this is something which will go to the issue of costs when the matter is finally determined. 10:56 10:56

10:57

The Defendant argues that the Plaintiff is in reality trying to run a case in the High Court which is more appropriate to the Employment Appeals Tribunal and that what he is claiming is that his dismissal was unfair.

There is ample authority for the proposition that under employment law a Contract of Employment may be terminated by an employer on the giving of reasonable notice to the employee. The employer is entitled to give that notice so long as he complies with the contractual obligation of reasonable notice, whatever his reasons for giving the notice. It is not the function of the courts to substitute itself for the employer and to make its own decision on the merits of employer's decision to dismiss. As Mummery LJ stated in Foley V. The Post Office [2000] ICR 1283 at page 1295:

10:57

10:57

> "The employer, not the Tribunal is the proper person to conduct the investigation into alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, is a reasonable response."

10:58

In this case, it seems to me that damages are an adequate remedy for the Plaintiff. On the issue of balance of convenience and balance of hardship, I cannot ignore the fact that there has been an irretrievable breakdown of trust between the Plaintiff and the Defendant and that it would impose an undue burden on the Defendant if it was obliged to reinstate the Plaintiff pending the determination of this dispute. I emphasise again that I am not determining the dispute between the parties at that stage.

10:58

10:58

However, for the reasons set out above I refuse the application for interlocutory relief.

END OF JUDGMENT

10:58

MR. DOWLING: I apply for my costs.

MR. QUINN: Judge, i would ask you to reserve the costs of the trial. Obviously, as the Court has indicated, there are issues that can only be fully determined at the 10:59 plenary hearing and in those circumstances, I think, in the particular circumstances of this interlocutory application it would be appropriate to reserve the costs.

MR. JUSTICE McGOVERN: Yes, I will reserve the 10:59 costs in this case. I am going to hand back the papers in the matter, including the cook book.

MR. QUINN: I am tempted to keep that. I wonder would it be 10:59 appropriate to seek directions in relation to an early trial? Obviously, there is an urgency now for the Plaintiff that he paid his salary.

MR. JUSTICE McGOVERN: Yes. I think there should be an early trial, 10:59 obviously.

MR. DOWLING: I think that is sensible. So, if my friend wants to deliver a Statement of Claim.

MR. JUSTICE McGOVERN: I don't know when the next chancery list of fixed dates is. Does anybody know that?

MR. QUINN: I think it may be next week, Judge. Next Wednesday, Judge. 11:00

MR. JUSTICE McGOVERN: What I will do is I will direct that the matter be listed with priority in the next chancery list of fixed dates, with a view to getting an early trial. 11:00

MR. QUINN: I would certainly deliver my Statement of Claim within a week.

MR. DOWLING: Well, if it going to be in the chancery list to fix dates without completely rushing things. There has been a fairly substantive expedition of these issues. If Mr. Quinn delivers his Statement of Claim by Monday I will have mine, my Defence, to him by close of business on Tuesday. I think the judge will be very slow to list it next Wednesday. 11:00

MR. JUSTICE McGOVERN: I think so, yes. If you have your Statement of Claim delivered by close of business on Monday. And you say you can have your defence delivered by close of business on Tuesday? 11:00

MR. DOWLING: Close of business on Tuesday.

MR. JUSTICE McGOVERN: And any notices for

particulars arising out of those pleadings can take place then in due course.

MR. DOWLING: I think that can be done by Wednesday.

MR. JUSTICE McGOVERN: Very good. 11:00

THE HEARING THEN CONCLUDED

Approved 8-12-08
J. J. McG.

[2008] IEHC 467

THE HIGH COURT

2008
Record No.3521 P

BETWEEN

MARTIN DONNELLAN

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE COMMISSIONER OF AN GARDA SÍOCHÁNA,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 25th day of July 2008

Background:

1. This case raises an important point for the management and senior ranks of An Garda Síochána. On the 7th June 2008, the plaintiff, who then held the commission rank of Assistant Commissioner in An Garda Síochána, was retired from the force by reason of having reached his 60th birthday. In these proceedings he challenges the underlying statutory basis, which makes provision for this compulsory retirement, on age grounds. He does so by asserting, firstly, that the governing statutory instrument, namely the Garda Síochána (Retirement) Regulations 1996 (S.I. No. 16/1996), is *ultra vires* the Police Forces Amalgamation Act 1925, which is the parent Act, and secondly, that its provisions are incompatible with Council Directive 2000/78/EC, of 27th November 2000, 'establishing a general framework for equal treatment in employment and occupation'.

2. The plaintiff is a married man with a family and up to the date last mentioned had spent 40 years with the force. His ultimate superior was the Commissioner who is the second named defendant herein. The Minster for Justice, Equality and Law Reform ("The Minister") is sued as being the person ultimately responsible for An Garda Síochána and also as the "corporation sole" who made the relevant statutory provisions specifying the retirement age for members of the force. Ireland and the Attorney General are joined as being vicariously liable for any "wrongs" that may have been committed by the other defendants named herein.

3. In these proceedings, which were commenced by way of a Plenary Summons, the plaintiff seeks a variety of declarations to the effect (i) that S.I. No. 16/1996 ("the 1996 Regulations") firstly is *ultra vires* the powers contained in s. 14 of the Police Forces Amalgamation Act 1925 ("the 1925 Act" or "the Act of 1925") (see paras. 6 and 19 *infra.*), and secondly is incompatible with Council Directive 2000/78/EC, ("the Directive") and (ii) that if successful he is entitled to serve as an Assistant Commissioner until age 65 as originally provided for by S.I. No. 335/1951. In this regard, although included in the Statement of Claim, he does not now formally seek either injunctive relief or damages.

4. Accordingly there are two issues in this case, namely the *ultra vires* or administrative law issue and the directive issue. In this context and before I deal with the grounds of challenge, it is worth noting that no relief is sought on the basis of any alleged breach of employment contract or on the basis of legitimate expectation. Moreover, whilst the plaintiff has lodged a claim with the Equality Tribunal under the Employment Equality Act 1998, as amended by the Equality Act 2004, that in itself

has no direct bearing on this case. Furthermore no question turns on *locus standi* or on the issue of acquiescence by the plaintiff.

5. The defendants in their defence assert that the 1996 Regulations are *intra vires* s. 14 of the 1925 Act, that the plaintiff's terms of employment, provided, *inter alia*, that his retirement age could be changed by Statutory Instrument and that when appointed Assistant Commissioner, he knew that 60 years of age was the appropriate retirement age for that rank. In addition they plead that as a matter of administrative law and also for the purposes of the framework Directive, the making of the 1996 Regulations was objectively and reasonably justified by a legitimate legislative aim, namely the maintenance of an effective and efficient police force, with the means being proportionate to that aim. In the premise, they say that the plaintiff is not entitled to the relief claimed or any relief.

Domestic Legislative Provisions:

6. As the challenge in this case is focused exclusively on the validity of the 1996 Regulations it would be useful at the outset to outline the relevant provisions thereof to include the provisions dealing with other members of the force. As this will show, the Minister, from time to time, has exercised the powers contained in s. 14(1)(b) of the Act of 1925, allowing him/her to make regulations relating to *"the promotion, retirement, degradation, dismissal and punishment of members of the amalgamated forces"*. The following such Regulations are of relevance to this case:-

(1) Garda Síochána (Retirement)(No.2) Regulations 1951 – S.I. No. 335/1951 ("The 1951 Regulations"):

Regulation 6

"The following provisions shall apply to future members of An Garda Síochána in lieu of the existing provisions:

(a) subject to subparagraph (b) of this para., every such member shall retire from the Garda Síochána on attaining the age which is applicable to the rank in the Garda Síochána for the time being held by such member, that is to say:

(i) in the case of a member holding any rank higher than the rank of Chief Superintendent – on attaining the age of sixty-five years, and

(ii) in the case of a member holding the rank of Chief Superintendent or of Superintendent – on attaining the age of sixty years, and

(iii) in the case of a member below the rank of Superintendent – on attaining the age of fifty-seven years.

(b) Notwithstanding subparagraph (a) of this paragraph, if, but only if, the Commissioner is satisfied that it is in the interests of the efficiency of the Garda Síochána that the age at which any such member would retire under the said subparagraph should be extended because of the possession by that member of some special qualification or experience, the Commissioner may, with the consent of the Minister, extend that age in the case of that member by such period, not exceeding five years, as the Commissioner shall determine."

(2) Garda Síochána (Retirement) Regulations 1990 – S.I. No. 318/1990 ("The 1990 Regulation"):

Regulation 3

"Notwithstanding anything in the Garda Síochána (Retirement) Regulations..., as amended, a member of the Garda Síochána appointed to the rank of Commissioner after the commencement of these regulations shall retire-

(a) on completion of 7 years service in that rank, or

(b) on attaining the age of 60 years,

whichever is the earlier:

Provided however that if the member is aged 55 years or more on such commencement, he shall retire –

(a) on completion of 5 years service in that rank, or

(b) on attaining the age of 65 years,

whichever is the earlier"

(3) Garda Síochána (Retirement) Regulations 1996 – S.I. No. 16/1996 ("The 1996 Regulation"):

Regulation 3

"Notwithstanding anything in the Garda Síochána (Retirement) Regulations..., as amended... a member of the Garda Síochána appointed to the rank of Assistant Commissioner or Deputy Commissioner after the commencement of these regulations shall retire on attaining the age of 60.

Regulation 4

These regulations shall not apply to a member of the Garda Síochána appointed to the rank of Deputy Commissioner who at the time of coming into operation of these Regulations holds the rank of Assistant Commissioner."

(4) An Garda Síochána (Retirement) (No.2) Regulations 2006 – S.I. No. 686/2006 ("The 2006 (No. 2) Regulations"):

Regulation 2

"Paragraph 6(a)(iii) of the Garda Síochána (Retirement) (No.2) Regulations 1951... is amended by the substitution of 'sixty years' for 'fifty seven years'"

(5) An Garda Síochána (Reserve Members) Regulations 2006 – S.I. No. 413/2006 – ("The 2006 (Reserve Members) Regulations"):

Regulation 10

"(1) A reserve member's service shall end when he or she reaches the age of 65."

In addition to these general regulations the Minister has occasionally also made comparable regulations relative to particular persons or their circumstances or classes of persons or their circumstances. However, as these were particular in application they are not relevant to this case.

7. As can therefore be seen, the retiring position of members of the force can be summarised as follows:-

(1) Re: Commissioner: By virtue of the 1951 Regulations the retiring age of an appointee to this rank was sixty five. That was changed in 1990,

when the Commissioner was obliged to retire, on completing a period of seven years in that rank, or on attaining the age of sixty whichever was the earlier. An exception was made for those who were aged 55 in 1990, but that has no application to the facts of this case. This remains the current situation.

(2) Re: Deputy Commissioners/Assistant Commissioners: The retiring age of sixty five, specified in the 1951 Regulations for the holders of these ranks, was reduced to sixty by the 1996 Regulations, the subject matter of these proceedings. This remains the current situation.

(3) Re: Chief Superintendents/Superintendents: The 1951 Regulations continue to apply with the relevant retiring age being sixty.

(4) Re: All ranks below that of Superintendent: The retiring age of fifty seven, which had been set by the 1951 Regulations, was increased for such members to age sixty, by the 2006 (No. 2) Regulations.

(5) Re: Garda Reserve: The retiring age of such members was fixed, in the 2006 Garda Reserve Regulations, at sixty-five.

The above summary represents the immediate statutory position in which the following events and circumstances should be viewed.

The Plaintiff's Case:

8. Since joining the force in March 1968, the plaintiff has held the following ranks and posts within the service:-

(a) Between July 1968 and December 1973, he was stationed at Chapelizod/Ballyfermot Garda Station.

(b) In December 1973, he was appointed to the Detective Branch Crime Ordinary, Central Detective Unit, Dublin Castle.

(c) In June 1981, he was promoted to Detective Sergeant assigned to the Bridewell Garda Station.

(d) In April 1990, he was promoted to Inspector and appointed as Detective Inspector to Donnybrook Garda Station.

(e) In 1996, he was promoted to Detective Superintendent and assigned to Letterkenny Garda Station.

(f) In May 2000, he was promoted to Detective Chief Superintendent in charge of the Garda National Immigration Bureau.

(g) In April 2004, he was transferred, with that rank, to the National Bureau of Criminal Investigation.

(h) On the 31st August 2005, he was promoted to Assistant Commissioner.

(i) In May 2007, with that rank, he was transferred to the National Support Services and from that date to his retirement he was in charge of the following eight national garda units:-

(i) National Drugs Units,

(ii) National Bureau of Fraud Investigation,

(iii) National Bureau of Criminal Investigation,

(iv) Garda National Immigration Bureau,

(v) Criminal Assets Bureau,

(vi) Garda Technical Bureau and Forensic Science Department including Fingerprints, Ballistics and Handwriting sections,

(vii) Garda Reserve Unit,

(viii) Operational Support Unit including Helicopter, Water and Horse Units.

9. As can therefore be seen, by June of this year the plaintiff had completed 40 years service in An Garda Síochána and during that time he was awarded the Scott Medal for valour, he received special commendations for outstanding bravery and professionalism and at no stage was he ever the subject of any disciplinary inquiry or proceedings. His professionalism and level of commitment have always been of the highest level. None of these facts have been put in issue by the defendants. His general health, both physical and mental, is good and he is both anxious and capable of continuing in his present post. To that end, by letter dated the 28th February 2008 he requested an extension of his tenure under Regulation 6(b) of the 1951 Regulations. The Commissioner declined to invoke this provision, and accordingly his request was refused. He was therefore compulsorily retired, by operation of law, on the 7th June 2008, with an entitlement to a tax free lump sum of €210,332 (being 1½ times his retiring salary) and an annual pension of €70,110, which is linked to salary scales of serving members into the future.

Composition/Structure of An Garda Síochána:

10. The force of which the plaintiff was a member has an unusual structure to it, in that the number of members within the Commissioner ranks equal 15 to include one vacancy which has yet to be filled. At Chief Superintendent and Superintendent level there are 239 posts, all out of a total force of 13,874. This funnel or narrowing effect at the top and its consequences are matters relied upon by the defendants in their justification of the 1996 Regulations. Whilst no breakdown is available for that year, the following would appear to be the current position:

Rank	Number	Proportion %
Commissioner	**1**	**<0.01**

Deputy Commissioner	**1***	**<0.01**
Assistant Commissioner	**12**	**0.09**
Chief Superintendent	**52**	**0.38**
Superintendent	**187**	**1.35**
Inspector	**317**	**2.28**
Sergeant	**2,164**	**15.6**
Garda	**11,140**	**80.29**
Total	**13,874**	**100**

*A Recent retirement has resulted in a vacancy for one Deputy Commissioner

4.1% of membership is above the rank of Sergeant

1.83% of membership is above the rank of Inspector

11. As of March/April 2008, the following additional information is available about the force:-

(1) The age-profile of the Force

Figures as of the 15th March 2008

			Years Service					
Age	**Total**	%	under 5	5 to 10	10 to 15	15 to 20	20 to 30	Over 30
Under 25	**1,312**	9.6	1,312					
25 to 30	**2,931**	21.4	2,058	873				
30 to 35	**2,137**	15.6	377	1,760				
35 to 40	**967**	7.1	53	357	216	341		
40 to 45	**2,215**	16.2		7	1068	523	617	
45 to 50	**2,352**	17.1		2	211	127	2,012	

Over 50	**1,778**	13			4	4	896	874
		100%	27.80%	21.90%	10.90%	7.30%	25.70%	6.40%
Total	**13,692**		**3,800**	**2,999**	**1,499**	**995**	**3,525**	**874**

53.7% of sworn members are under the age of 40

(2) The Average Retirement Age of Members of Commissioner Rank

Figures as of end of April 2008

Number of Voluntary and Compulsory Retirements - **Commissioner Ranks**							
Retirement Status	2003	2004	2005	2006	2007	End April 2008	Total
Compulsory Retirements	2	0	5	1	2	0	10
Voluntary Retirements*	0	0	0	0	0	1	1
Total	2	0	5	1	2	1	11
***Breakdown of Age on Voluntary Retirement**							
64 years of Age	0	0	0	0	0	1	1

(3) The Average Retirement Age of Members of Chief Superintendent Rank

Number of Voluntary and Compulsory Retirements - **Chief Superintendent Rank**							
Retirement Status	2003	2004	2005	2006	2007	End April 2008	Total
Compulsory Retirements	4	5	6	4	3	1	23
Voluntary Retirements*	0	2	2	3	0	0	7
Total	4	7	8	7	3	1	30
*Breakdown of Age on Voluntary Retirement							
59 years of age		1	1	2			4
58 years of age			1				1

57 years of age				1			1
56 years of age							
55 years of age							
54 years of age							
53 years of age							
52 years of age							
51 years of age		1					1
50 years of age							
Total		2	2	3			7

(4) The Average Retirement Age of Members of Superintendent Rank

Number of Voluntary and Compulsory Retirements - **Superintendent Rank**							
Retirement Status	2003	2004	2005	2006	2007	End April 2008	
Compulsory Retirements	7	9	13	7	2	5	43
Voluntary Retirements*	1	4	8	8	7	2	30
Total	8	13	21	15	9	7	73
*Breakdown of Age on Voluntary Retirement							
59 years of age	1	3	2		3	1	10
58 years of age			1		1		2
57 years of age			2	3			5
56 years of age		1					1
55 years of age			1				1
54 years of age				2			2
53 years of age			1	1	3	1	6

52 years of age			1	1			2
51 years of age							
50 years of age				1			1
Total	1	4	8	8	7	2	30

12. In a memo dated the 18th of April 2007, Assistant Commissioner Clancy, gives some statistics regarding Chief Superintendents:

- Average age on promotion to that rank: 51.9, with the youngest being 42 and the oldest 58 years of age.
- Average length of service before reaching that rank: 30.51 years, with the shortest being 22 and the longest 38 years.
- Average length of service at that rank: 8.81 years, with the shortest being 2 and the longest 18 years.

13. With regards to Assistant and Deputy Commissioners, it would appear that under the 1996 Regulations there have been 19 appointments to these ranks, to date. Within this period the youngest age of appointment was 47 years and 10 months with the oldest being 57 years and 8 months. The average age of appointment was 53.26 and the average duration of service 6.74 years. These figures do not take into account the three appointments of Noreen O'Sullivan (at age 47), Derek Byrne (at age 47) and Louis Harkins (at age 56). In the last five years (2003-2007) 10 have retired at age 60, with no early retirements in this category. In the next 5 years, 2 will have reached retiring age in 2008, 3 in 2009, 2 in 2010, with none in 2011 or in 2012. Over the 12 year period since 1996 there have been 22 appointments (including the three named in this paragraph), with no increase in the number of posts. Thus, assuming all

incumbents would stay until retirement age, a further 7 would be appointed over the next 4 years.

14. Had the retiring age been 65 instead of 60 for the Commissioner ranks, the average length of service since 1996 would have been 12.58 years. The number of persons who would have retired in the last five years would have been 1. In the next five years; there would be no retirements in 2008 or 2009, there would be 5 in 2010, 1 in 2011 and none in 2012. Over the 12 year period since 1996 there would have been 14 appointments and with no increase in posts, but assuming all incumbents would have stayed until retirement, a further 6 would be appointed over the next 4 years.

15. The information, outlined and tabulated above, is not seriously in dispute between the parties, but some controversy exists about an observation in a report produced by the Organisational Development Unit (ODU) of An Garda Síochána, headed "Review of Retirement Age for Officers in An Garda Síochána" (February 2007). On p. 10 it is stated that for the six year period up to September 2006, 72% of Chief Superintendents and 68% of Superintendents served until their mandatory retirement age of 60. This means that on average 30% of those holding such ranks left the force before the due date. Whether these figures are entirely accurate is not quite clear, but in any event, they are not as critical as those within the Commissioner ranks. This is partly because of the numbers involved (52 Chief Superintendents and 187 Superintendents) and partly because of the importance of having a competitive pool of Assistant/Deputy Commissioners who might ordinarily be first considered for the post of Commissioner. In addition, in the context of early retirement, what is of particular relevance is the age at which such members leave the force. In the Chief Superintendent rank, it can be seen (para. 11(3) *supra.*) that out of the 7 who retired

early, 5 served until at least age 58, with only one retiring much earlier at age 51. At Superintendent level (para 11(4) *supra.*) the figures are more mixed, but out of 30 early retirees in this category, 17 served at least until aged 57.

16. There is one other observation in the ODU report which should be referred to, and it is one which the plaintiff takes strong issue with. It is that if the retirement age of all officers (from Superintendent to Assistant Commissioner level) should be increased from 60 to 63, and assuming that all such persons would serve until reaching that age, such an adjustment would result in 49 officers remaining in the organisation in the period 2007 and 2009, who otherwise would not so remain if the existing *status quo* was maintained.

17. Finally, for the sake of completeness I should mention the representative structures of the Gardaí which are provided for by statute and regulated by statutory instrument; these are as follows:-

(1) The Police Forces Amalgamation Act 1925 provided for the establishment of representative bodies for all or any one of the ranks of the Garda Síochána.

(2) The Garda Síochána (Representative Bodies) Regulations 1927 (Unnumbered, 29th December 1927) established the Representative Body for Gardaí (RBG), the Representative Body for Inspectors, Station Sergeants and Sergeants (RBISS) and the Representative Body for Chief Superintendents and Superintendents (RBCSS).

(3) The Garda Síochána (Associations) Regulations 1978, S.I. No. 135/1978, provided for the establishment of the Garda Representative

Association (GRA) and the Association of Garda Sergeants and Inspectors (AGSI).

(4) The Garda Síochána (Associations) (Superintendents and Chief Superintendent) Regulations 1987, S.I. No. 200 of 1987, provided for the establishment of the Association of Garda Superintendents and the Association of Chief Superintendents.

Issue No. 1 – The *Ultra Vires* / Administrative Law Issue:

18. It is submitted on behalf of the plaintiff that the 1996 Regulations (S.I. No. 16/1996) are *ultra vires* s. 14 of the Police Forces Amalgamation Act 1925, as being irrational, unreasonable, unjustified and, almost as a discreet point, that the same were made without engaging in any due consultative process. This ground of challenge is made by reference to the time period at which the Regulations were made. It is also claimed that in light of the changed circumstances which have occurred in the intervening period, a similar evaluation should be made as of today's date. These circumstances relate to life expectancy, changes in An Garda Síochána, changes in legislation and the emerging trends across some European States, wherein retirement at a specific age is not applied. or if it is, the specified age is much later than 60. Therefore the Court is invited to examine the legality of these Regulations both as of 1996 and as of 2008.

19. At the outset, it should be understood that the phrase "*ultra vires*" is not used in its narrow, traditional or historic sense as indicating that the maker of the statutory instrument exceeded express powers conferred by the parent legislation. It is conceded, as it had to be, that by the plain and unambiguous wording of s. 14(1)(b) of the 1925 Act, (see para. 6 *supra.*) the Minister had the statutory power to make such

Regulations. Therefore the "principles and policies" line of authority (*Cityview Press v. An Chomhairle Oilúna* [1980] IR 381), has no reference to this case. Rather the term is used to found a submission that the Minister, when making the S.I. exceeded her implied obligation or duty to act both reasonably and rationally. It is in this sense that the phrase *ultra vires* is relied upon.

20. There is no dispute about the general principles of law which govern challenges of this nature. These have been set down by the Supreme Court in *Cassidy v. Minister for Industry and Commerce* [1978] IR 297. Henchy J., at pp. 310 – 311, said:-

> *"The general rule of law is that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being ultra vires. And it is a necessary implication in such a statutory delegation that the power to issue subordinate legislation should be exercised reasonably. Diplock L.J. has stated in Mixnam's Properties Limited v. Chertsey Urban District Council, at p. 237 of the report:-*
>
> > *'Thus, the kind of unreasonableness which invalids a bye-law [or, I would add, any other form of subordinate legislation] [sic.] is not the antonym of 'reasonableness' in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say 'Parliament never intended to give authority to make such rules'; they are unreasonable and ultra vires'.*
>
> *I consider that this to be the correct test."* (Emphasis added)

Cassidy was a case where a maximum prices order made no distinction between prices charged in public bars and lounge bars (notwithstanding obvious differences in costs *etc.*), with the result that, by reference to the legal principles outlined, the court was compelled to conclude:

> *"...that Parliament could not have intended that licences of lounge bars should be treated so oppressively and unfairly by the maximum-price orders."* (Henchy J. at 311).

21. Nothing of substance has been added to these principles by cases such as *State (Kenny) v. Minister for Social Welfare* [1986] 1 IR 693, *Philips v. The Medical Council* [1991] 2 IR 115, and *Purcell v. A.G.* [1995] 3 IR 287. There is however a brief observation from the judgment of McCarthy J. in *McHugh v. Minister for Social Welfare* [1994] 2 IR 139 which I wish to quote, where the learned judge at 156 said:-

> *"...If a regulation is demonstrably lacking in logic and unfair it cannot be sustainable within the framework of the scheme; it cannot be a proper application of the statutory power to make regulations."*

From the above I would therefore summarise the position as follows:-

(a) Delegated legislation must be made within and for the purposes authorised by the parent Act.

(b) This means (i) that the legislation must strictly comply with the express and implied limitations of the conferring provision and (ii) that the exerciser of the power must act reasonably.

(c) This requirement can be tested by asking whether the instrument made suffers from arbitrariness, injustice, unfairness or whether it is manifestly illogical: because if it is,

(d) The affected legislation is tainted and therefore unlawful, as the Oireachtas could never have intended such results.

Accordingly, it can be said that the test is one of manifest arbitrariness, or demonstrable illogicality, or gross unfairness or injustice.

22. Quite frequently one finds that when a challenge is based on unreasonableness, submissions are made which inextricably link what was said in *Cassidy* to what the Supreme Court decided in *the State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] 1 IR 642, a case involving a judicial review challenge to an administrative decision. Having considered the "Wednesbury" principles (from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223), and having rejected the logic or moral standing test as propounded by Lord Diplock in *Council of Civil Service Union v. Minister for the Civil Service* [1985] AC 374 at 410, Henchy J. said at 658:

> *"I would myself consider the test of unreasonableness or irrationality in judicial review lies in considering whether or not the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense."*

In other passages contained in the judgment the learned judge used slightly different language in describing when a court could intervene. He gave examples, including, when the decision was:

(a) fundamentally at variance with reason and common sense,

(b) indefensible for being in the teeth of plain reason and common sense, and

(c) made in flagrant disregard of fundamental reason or common sense.

It has long been accepted that these different methods of expression have like meaning and all are conveniently captured in the direct quote from his judgment. It is also interesting to note that even though he had given the judgment in *Cassidy*, Henchy J. made no reference to that case in *the State (Keegan)*; neither did O'Higgins C.J.

23. In deciding that the issue under review in *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39, fell *"to be decided in accordance with the principles laid down"* in the *State (Keegan)* (*ibid.* at 70). Finlay C.J., having quoted extensively from the judgment of Henchy J. in that case, and having rejected court intervention (i) simply because different inferences or conclusions could be reached, or (ii) because the case against the decision was stronger than the case for it, continued:

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant materials which would support its decision."* (*ibid.* at 72)

In *Aer Rianta v. Commission for Aviation Regulation* (Unreported, High Court, 16th January 2003), O'Sullivan J., on first reading, appears to set an even higher threshold and an even more restrictive test, than the Chief Justice did in *O'Keeffe*. However, when viewed as a whole, his judgment, which was heavily influenced by court deference to specialised bodies, is less daunting than at first sight. Furthermore, at a time when *O'Keeffe* was under active, if not intense, scrutiny it is unlikely that the learned judge intended to raise the threshold even higher than the one propounded in

that case. In any event, there has been a tendency for some time towards the virtual free interchange of the *Cassidy* principles with the *Keegan* principles.

24. In my view unless a high level of awareness accompanies such an approach, confusion is bound to follow. There are obvious and significant differences between the court's jurisdiction when testing the validity of delegated legislation and when determining a judicial review application. Evidently judicial review is not concerned with the decision, but rather with the process of decision making. Secondly, in cases such as *the State (Keegan)*, *O'Keeffe*, and indeed others to include *Aer Rianta*, the decisions under review were administrative ones which by their nature are quite dissimilar from the exercise of legislative function. Thirdly the circumstances in which a court can intervene in judicial review are "limited and rare" (*O'Keeffe*). Fourthly, the principle of "curial deference" applies; so that courts afford considerable respect and latitude to the skill. competence and experience which underlay the establishment and functioning of specialised bodies; this concept has no standing with secondary legislation. Fifthly, there can be no question of the court's power, when dealing with the validity of secondary legislation, being in any way bound by the principle established in *O'Keeffe*. namely, that no intervention will occur unless there is "no relevant material" before the decision making body. Other points of distinction also exist. I can therefore see a very clear distinction between unreasonableness in the context of this case and unreasonableness as a ground for judicial review.

The Factual Basis of Challenge: The Evidence:

25. The evidence tendered on the administrative law point was based partly on affidavit, partly on oral evidence and partly on a number of documents, which I will firstly refer to. Perhaps almost unique to a challenge at this time remove, there are

available three documents created by the Minister for Justice, or her Department, which outline the reasons for the making of the 1996 Regulations. These were obtained by the plaintiff through voluntary discovery and, without objection, have been produced and used by both parties in this case.

26. The documents consist of a "Note for Minister's Information", the author of which was a Mr. Folan, secondly, a document headed "Memorandum for The Government" dated the 15th January 1996, and thirdly a note by the then Minister for Justice, Ms. Nora Owens T.D., to the then Taoiseach, Mr. John Bruton T.D., dated the 17th January 1996. All of these documents dealt in a contextual way with the reasons for the then proposal to make the 1996 Regulations and can be summarised as follows:-

(i) In 1990 the Government took a decision to place the Commissioner's tenure of office on the same footing as a Secretary to a Government department which had been changed in 1987. It was essential to retain this new retiring age (60) so as to keep parity with these office holders, and also because it was "imperative to the maintenance of motivation within the senior ranks of the force". To revert to a retiring age of 65 would mean that potential incumbents could be *in situ* for 10 or 15 years. This could de-motivate the lower Commissioner ranks and could also negatively impact on the dynamism required to lead the force.

(ii) That being so, if one had a situation of Deputy/Assistant Commissioners retiring at age 65, whilst the Commissioner retired at age 60, this would render a great number from within the Deputy/Assistant Commissioner ranks ineligible for appointment to

lead the force on the grounds of age; this would heavily impact on the following two appointments.

(iii) The most effective solution therefore would be to reduce the retiring age from 65 to 60 for all Commissioner ranks and thus bring them in line with Superintendents and Chief Superintendents. This would have the effect of creating a competitive pool of candidates who would be available for Government consideration in the appointment of any future Commissioner. It would also avoid potential blockage at the lower Commissioner rank levels; whereas, with a retiring age of 65, persons could serve for ten or more years. Such a change would have a positive motivating effect on relevant members who could then have more realistic prospects of promotion. Otherwise, if the *status quo* was retained, motivation and dynamism within the force would be seriously affected.

(iv) The implementation of a new regional command structure would see a switch to greater operational focus in terms of garda leadership. Once again, to make this significant change effective, a high degree of dynamism and motivation was required.

(v) Therefore, accordingly, the Regulation should be made.

27. This summary is taken from Mr. Folan's note but it is also largely reflective of the Memorandum for Government as well as the Minister's note to An Taoiseach. There were, however, three further points raised in the latter documents which should be mentioned. In the Memorandum, it is stated, at para. 3, that:

"[T]he Garda Commissioner has recently raised a concern that a situation could develop where all members of the Assistant and Deputy Commissioner

ranks could be aged 60 and above when the post of Garda Commissioner fell to be filled. In such a situation all of the Assistant and Deputy Commissioners would be precluded on age grounds from being appointed Commissioner of An Garda Síochána."

Secondly, the memo also pointed out that members who had 30 years service and reached age 50 could retire on full pension. And thirdly, in the briefing document to An Taoiseach, the Minister, having noted that the age profile of Chief Superintendents who were then being considered for appointment to Assistant Commissioner rank, *"presents a serious problem"*, stated:-

"The most serious aspect of the matter, however, is that the people promoted this time could 'block' Assistant Commissioner posts for ten years of more (instead of 5 years) which would mean that no younger members of the force, however suitable for the top job, could become an Assistant Commissioner (and gain experience at that level), thus restricting considerably the Government's option, later on, when it comes to appointments to the top job."

The Minister concluded by recording, that the Department of Finance did not have any objections and that she did not "expect garda opposition either".

28. The plaintiff in his oral evidence complained about the irrationality of the 1996 Regulations, on several grounds; these included:-

(i) Given the depth of skill, knowledge and experience which he had acquired in over 40 years of service, it makes no sense for this to be lost to the force and forever wasted.

(ii) The role of Assistant Commissioner involves almost exclusively managerial and executive tasks, rather than any front line involvement

in operational matters. Accordingly, the physical demands involved are minimal.

(iii) Given the ever-increasing sophisticated methods of dealing with crime, it seems strange, that whereas in 1951 a member of the commission ranks could hold office for eight years longer than an ordinary member, the current position is that all members must now retire at age 60.

(iv) Given advancements in medical care and treatment, the life expectancy of persons has increased dramatically over the years.

(v) Apart from eye testing for the purposes of being a patrol driver, no member of An Garda Síochána is compulsorily obliged to undergo any regular or routine health checks.

(vi) Throughout his 40 years in the force, he had never considered promotional prospects to be a motivating factor: from his perspective the most effective motivation for any member, stemmed from having a force well organised, skilfully prepared and driven by committed leadership.

(vii) It would be quite wrong to believe that the Assistant Commissioner rank exists only for the purpose of creating a pool from which a future Commissioner could be appointed; Assistant Commissioners have vital tasks to perform in their own right.

(viii) The blockage concerns are overstated and indeed are inconsistently viewed by Garda management. Within the rank of Superintendent and Chief Superintendent there is high natural wastage through early retirement. Moreover the authorities are inconsistent in their views on blockage. Quite frequently Sergeants and Inspectors hold their

respective ranks for periods well in excess of 10 to 15 years, and yet this practice seems to attract no Garda agitation; and finally

(xi) It should be noted that there is nothing preventing the Government from appointing a Commissioner from a rank lower than that of Assistant Commissioner.

29. The reference to life expectancy was expanded upon by reference to the following information extracted from the C.S.I. Office in its Irish Life Tables No 14:

	1950	**2006**	**Percentage Increase**
Life expectancy of Male	64.5	76.1	18%
Life expectancy of Female	67.1	81.1	21%
Life expectancy of male aged 60	5.49	20.9	29.80%
Life expectancy of female	16.8	23.6	40.70%

30. Evidence was also given on behalf of the plaintiff by Mr. Thomas Monaghan, who retired in May 2005, after being a Chief Superintendent for twelve years. During this time he became Chairman of the Chief Superintendent's Association, whose function was to raise with management matters of welfare and efficiency on behalf of its members. This facility was provided for by the Garda Síochána Conciliation and Arbitration Scheme. In October 1990, a joint claim by this Association and a similar Association representing Superintendents, was placed before the negotiating forum at which an increase in the mandatory retiring age from 60 to 63 was sought. That claim was still in being when, in December 1995, the then Commissioner invited applications for the post of Assistant Commissioner, four of which were then available. This circular made no mention of the impending 1996 Regulations which

only became public knowledge when the Commissioner re-advertised these posts in January 1996. According to the witness there had been no consultation with his organisation, either in the lead up to, or at the time of, the making of these Regulations.

31. This claim for an increase in the retirement age was re-agitated in 2004, when the Associations made a further submission to the then Minister on the issue. At that time the Associations also disputed the proffered "justification" underlying the 1996 Regulations. Despite presenting its case forcibly, the Minister was not receptive to making the changes sought, or any such change. Finally, Mr. Monaghan explained the inactivity of the Associations between 1996 and 2004 as being referable to the ongoing review of An Garda Síochána as ordered by the then Taoiseach. That review did not finalise until 2004.

32. The defendants called a number of witnesses, including Mr. Pat Folan (see paras. 26 – 27 *supra.*), who joined the Department of Justice in 1981. In September 1994 he moved to the Garda Division, as Principal Officer, where he remained until July 1997. That division was responsible for the garda budget, garda resources and garda policy, *inter alia*, in relation to promotion, retirement, resources *etc.* In July 1997 he moved to a new posting and since then has held a variety of other positions, mostly at Deputy Secretary level in the latter years. As a result of these postings, and in particular that occupied by him from 1994 to 1997, he was very familiar with the background circumstances leading up to the 1996 Regulations.

33. According to his evidence, the context in which these Regulations were conceived arose from two interconnected set of circumstances, namely the retirement

of the first Commissioner appointed under the 1990 regime, and secondly the approval by the Government of the regionalisation of the force. In 1995 or early 1996, when the appointment of a successor to that Commissioner was being looked at, it became clear that significant numbers of those holding the rank of Assistant Commissioner, would be aged 60 or over when the next and follow-on appointments fell to be made. These individuals would be ineligible on age grounds, even for consideration. Side by side with this, the Government in late 1995 had approved a plan for the creation of a regional structure for An Garda Síochána, and as part of this move had also approved the appointment of three further Assistant Commissioners. In fact, coincidentally, a further such post became free at that time and accordingly there were four vacancies. In considering the potential candidates to fill these positions it became clear that if the retiring age of Assistant Commissioners remained at 65, this would significantly diminish the competitive pool available to the Government in its consideration of the new Commissioner. Secondly, those so appointed to the Assistant rank could hold their posts for anywhere between 10 to 15 years. Accordingly, to provide a choice for the Government and to avoid entrenchment through blockage for long periods, as well as facilitating a sense of renewal, dynamism and refreshment of thought, it was considered that the retirement age for Assistant/Deputy Commissioners should be reduced from 65 to 60. In addition, this change would impact positively on motivation within the force, and would facilitate greater movement and turnover at the highest level; those in the lower ranks would thus have a more realistic possibility of promotion. This was particularly critical given the very narrow pyramid or funnel effect at the top of the organisation. The other major consideration stemmed from the consequences of the regionalisation programme which was designed to have in place a strong operational focus within the regional

structure. Once more that required a serious level of dynamism and motivation within the senior ranks. It was therefore essential that the change take place.

34. Deputy Commissioner Martin Callinan, who was appointed to his post in 2007, outlined some of the significant changes which have taken place within An Garda Síochána in the past number of years. In particular, there has been an ongoing process of efficiency review and modernisation which was formally recognised in the 2007 Policing Plan (see s. 22 of the Garda Síochána Act 2005). This plan was drawn up by reference to internal reviews; it was also influenced by external bodies such as the Garda Inspectorate (which was set up under the 2005 Act), which reported in August 2007, and an advisory group, which made a final report headed "Final Report to the Garda Commissioner: From the Advisory Group on Garda Management and Leadership Development" in May 2007 (the Hayes Report). In this plan there are six strategic imperatives set out, all of which are designed to modernise the force by way of training, development and motivation. This witness also described An Garda Síochána as a *"very flat organisation"* with about 1.35% of its members being Superintendents, 0.38% being Chief Superintendents and only 0.09% at the level of Assistant Commissioner. At Deputy Commissioner level it is less than 0.01%. Given these figures it was his opinion that if the age of retirement for Assistant Commissioner was increased to 65, this opportunity would benefit eight Assistant Commissioners who could potentially remain on in the force for another five years. That of course would have the effect of either depriving or deferring a similar number of Chief Superintendents of promotion, and likewise with Superintendents and so on. This because any increase in age would have a domino effect within the organisation. As of now, the average age of appointment to Superintendent is 46 and on average three and a half years are served at that level. In his opinion any such alteration would

create a serious potential for "exodus" amongst officers who otherwise might expect promotion in the near future. Moreover, if the plaintiff was successful in this case, it would most likely be that the Association of Superintendents and the Association of Chief Superintendents would also benefit from such judgment. This could have serious complications. At present almost 2,400 Gardaí have passed the Sergeant's promotion exams and almost 650 Sergeants have passed the Inspector's promotion exams. There are ten Inspectors and six Superintendents on their respective promotion lists, who have yet to be appointed. In summary, a return to the retiring age of 65 would have a serious detrimental effect on the force including the 2,000 odd members with third level qualifications who have joined An Garda Síochána since 2003.

Submissions:

35. In both their opening and closing submissions, counsel on behalf of the plaintiff advanced the *ultra vires* point on a number of grounds. At the commencement it was said, by way of general observation, that the identification of 60 as a compulsory retiring age was illogical and had no rational connection to any fixed or determinate event or circumstance. Secondly, it was emphasised that this case was not about raising the retirement age, to whatever that might be; rather it was based on the principled objection to any age being assigned for compulsory retirement. It was said that some other threshold or test must be found for this purpose, such as, for example, competency. Moving to the particular, counsel submitted that the effect of the 1996 Regulations was to create the wholly irrational situation whereby, as of the 7th June 2008, the acknowledged skill, expertise, professionalism and competence which the plaintiff has accumulated in over 40 years of service must be entirely disregarded. Such a wasteful consequence could easily be remedied at virtually no financial cost; the net difference of allowing the Plaintiff to

remain on, instead of getting his lump sum and pension entitlements, being only about €41,000 per year.

36. It was further claimed by the plaintiff that:-

(a) It is inappropriate to link the retiring age of an Assistant Commissioner to that of the Commissioner, as the latter, who is comparable to the Secretary General of a Government department, holds office for a fixed tenure;

(b) The long standing difference between the ranks of Chief Superintendent/Superintendent and Commissioner, should be maintained; and,

(c) The equally long standing practice of retiring senior management later than those of the more junior ranks (including the Garda Reserve), such likewise be retained.

37. Reference was made to the documentation summarised above (see paras. 26 – 27 *supra.*). As well as criticising its content, it was also claimed that no reports or surveys, external or internal, were commissioned in order to independently verify its contents. For example, in the Minister's note to An Taoiseach, it is recited that the age profile of Chief Superintendents, currently available for promotion, *"presents a serious problem"*. There is no evidence to support such a view. Likewise in the Memorandum for Government it is claimed that the Garda Commissioner had raised concerns about the matters which the memorandum speaks of. Once again there is no record of any such communications by him. Likewise there is no mention of the joint claim lodged in 1990 by the Associations of Superintendents and Chief Superintendents seeking an increase in their members retiring age to 63. The

documentation is thus critically incomplete in several respects. Insofar as one can identify some rationale for the then proposed change, it can be observed that if motivation and morale within the organisation were of concern to the Government, then surely some consultative process with those directly affected should have been engaged in. Furthermore, the true motivating force within An Garda Síochána was leadership, in a structured and expert way, and it was never common practice to seek dynamism or drive commitment, through affording opportunity for promotion. In addition there were several ways of dealing with any concerns about blockage, including expanding the pool from which a Commissioner could be appointed and by offering fixed term contracts to the occupants of certain posts. So, taken either individually or cumulatively, the underlying justification for this statutory instrument, as outlined in the documentation as well as in the evidence of Mr. Folan, falls foul of the test enunciated in *the State (Keegan)* (see para. 22 *et seq. supra.*).

38. The submissions made on behalf of the defendants were detailed in nature and traversed all of the points raised on behalf of Mr. Donnellan. Many of the more central ones are evident from what next appears in this judgment.

Decision: The *Ultra Vires* Issue:

39. As set out previously in this judgment, the test which I must apply is to decide whether the statutory instrument is manifestly arbitrary or unjust, or whether it demonstrably lacks logic; so that the Oireachtas could never have intended the consequences which now result from this S.I.; so that such an exercise of vested power could never have been envisaged. Thus, I must ask, was the decision of the Minister in 1996, to change the age of retirement for Assistant and Deputy Commissioners, irrational in the sense indicated? If the decision was rational, was it

arrived at in a reasoned and logical way, having regard to the factors taken account of.

40. As stated above, (para. 19 *supra.*), Section 14(1)(b) of the 1925 Act, empowers the Minister, by its express wording, to make Regulations, *inter alia,* dealing with the promotion, retirement, degradation, dismissal, and punishment of members of the amalgamated forces. It is therefore beyond argument that under this section the Minister could regulate the retirement of members. This he did not once, but repeatedly so throughout the years. It was entirely within his competence to so do.

41. In meeting this, which is the first challenge to the Regulations, the Defendants deny that the same lack reason or logic and plead justification. Although set out in an earlier part of this judgment, the justification so offered was, firstly, to create a pool of suitable candidates at the Assistant / Deputy Commissioner level, from which follow-on Commissioners would be predominantly chosen; secondly, that people would serve within the higher ranks for shorter periods than previously, thus allowing appointment at an earlier age; this would facilitate a greater turnover of people, thereby preventing "blockage"; thirdly, that such changes would increase motivation and dynamism within all ranks of the force; fourthly, that the same would preserve the alignment previously established between the Commissioner and the Assistant/Deputy Commissioner rank and finally, that such would assist in the implementation and success of the new regional command structure.

42. As above outlined, three documents were presented to the Court, in which the Minister advanced reasons for her decision, namely the "Note for Minister's Information", the "Memorandum for The Government" dated the 15th January 1996, and the note by the Minister to the Taoiseach, dated the 17th January 1996 (paras. 26

and 27 *supra.*). From these, as well as from the evidence (paras. 32 – 34 *supra.*), a number of concerns were identified, which have been previously mentioned and which are further dealt with herein.

43. After 1990, the Commissioner's tenure was changed and aligned to that of a Secretary General of a Government Department. Thereafter, he held office for seven years or until he reached the age of 60, whichever first occurred. A particular exception was made relative to special circumstances, but that has no application to this case. Whilst it is a matter for Government as to whom it may appoint as a Commissioner, it seems that, as a matter of policy, it wanted to create and have in place, a pool of viable candidates, who predominantly would be the contenders for the next appointment. Such candidates would be expected to have some experience in the most senior ranks and, therefore, subject to limited disruption, would seamlessly fill the top spot. In any hierarchical structure it would be normal firstly to consider those closest in rank or service to the post requiring an appointee; without of course disregarding or ignoring 'outstanding candidates' at other levels. Moreover, those next in rank, to include Assistant/Deputy Commissioners, would have a real expectation of being in the frame for consideration. Some, even most, but perhaps not all at this rank, would feel that such a position is not in itself an end destination. That being so, it would be seriously debilitating, for both Government and such candidates if, as a result of some structural defect, this group was ineligible for the highest position at next appointment. This applies also to 'outstanding candidates', in the sense that I have mentioned; who would or should have been identified earlier via the promotional process. Therefore the Government should have a choice and such persons should, at least, have the prospect of promotion. To seek this objective must surely be legitimate.

44. With a retirement age of 65, there was, after the 1990 change, a very real risk that many of the Assistant Commissioners would be too old for appointment to the post of Commissioner. This problem first arose when a successor for the second seven year period was being considered. Therefore some remedial steps were necessary if a pool of younger Assistant Commissioners was to be established. It seems, according to the Memorandum for Government (see para. 27 *supra.*) that the Commissioner himself raised concerns about the limited nature of the pool of Assistant/Deputy Commissioners who might be available for future promotion. That the Commissioner held this view has been questioned: it being said that if he did, it is, therefore, surprising that in his letter of invitation to the Chief Superintendent rank, issued in December 1995, he made no mention of his concerns in this regard. Whatever may be the explanation for this, the evidence so given verifies the position as asserted. In addition to the memorandum, this Court was given oral evidence outlining the regular discussions had between the Commissioner and the Minister and the almost daily contact between the former and the Secretary General of the department. Whilst it was not suggested that all of these communications dealt solely with the issue at hand, nevertheless I am satisfied that the problem was the subject of discussion, comment and even debate between the office holders herein mentioned.

45. In any event, if the Minister was within her power in refusing to alter the Commissioner's retiring age from the 1990 position of 60, as I believe she was, I cannot see how the above aim of establishing a competitive pool could be satisfied without affecting some change at Commissioner rank level: this simply because those supposedly within the pool would be ineligible because of age. Whilst perhaps some more innovative changes may have been considered, and I confess I cannot think what

these might be, nevertheless I believe that the aim, indeed necessity of making this most significant post as meaningful as possible, *inter alia*, by having access to the most senior quota of people available, was a legitimate one for the Minister to have, and to pursue by way of regulation change.

46. Issue was taken with the suggestion that the change in retirement age would prevent blockage at the Assistant Commissioner level: such assertions are not entirely determinative. Reducing the retirement age alone would not permanently increase the movement, since it would have the effect of temporarily decapitating the organisation, allowing people to be brought up sooner than they would have been. However, after this initial movement, the situation would merely, or largely, revert to the previous situation. The change in retirement age would not, therefore have lasting effect. However it would have short/medium term effect which could not entirely be discounted. In 1996, with a retirement age of 65, some incumbents at the Commissioner Rank, could have held office for ten or fifteen years. As of now if a court declaration issued from this case, the default age would return to 65. Eight Assistant Commissioners could benefit. These are significant numbers out of such a small pool. Therefore an age change would inevitably have consequences, and would affect all ranks, but in particular those with limited numbers.

47. In the Note refereed to (para. 26 *supra.*), it was said that "it is imperative to the maintenance of motivation within the senior ranks" to have the changes effected. Criticism was made of such conclusion, it being pointed out that those with first hand knowledge, namely the Associations of Superintends/Chief Superintends were never consulted. It is thus said that the problem as identified was not borne out by the facts. Whilst it is true to say that no dialogue was exchanged between these parties, and in

that way the opportunity for information gathering was missed, nonetheless it cannot be disputed or even challenged that motivation, energy, vigour and focus renewal, are all essential efficiency drivers for any organisation and also for those who both lead and serve that organisation. This is particularly so for a body of such societal importance as An Garda Siochána. In this respect I cannot agree with what the plaintiff has said. Whilst not all persons are motivated by the prospect of promotion, many are and critically many of those, previously promoted several times, might well be suitable for the ultimate position .

48. Perhaps the real complaint is the lack of hard objective evidence to underpin this particular matter. In my view it was well within the competence of the Minister to have regard to such an obvious point, which incidentally would have a ripple downward effect within the entire organisation. Moreover it is to be doubted if engaging with those directly involved would have progressed matters further. Furthermore it is impossible to entirely separate this point from the 'pool' point. Therefore it could not be said that the motivation/dynamic driver point, was devoid of support or denuded of purpose at the relevant time. In addition it should noted that these objectives, do not relate solely to candidates who aspire to a No. 1 position; these are also critically important to those who held other positions, within the force. Consequently such matters are both relevant and valid.

49. Another step, taken by the Government at the time, was the significant structural change in having a strong operational force at regional level. This lead to three Assistant Commissioner posts being created, and with a further one vacant, four new appointments were required. As part of this innovative re-organisation, not just at personal level but also at operational level, it was imperative, for its initial success

and thereafter for its continuation, to incentivise those within the senior ranks. A sense of renewal, of expectation, of ambition, all to a greater or lesser extent, was required. Of course other factors were also in play, but the importance of making this chance a major success cannot be underestimated.

50. Furthermore, critically looking at the structure of the force it becomes clear that it is indeed quite a "flat" organisation. As previously outlined, there are almost 13,900 members. The Commissioner himself represents 0.01% of that total, whereas at Garda rank the numbers represent 80.29%. There are two Deputy Commissioners, although one position is currently vacant, and there are 12 Assistant Commissioners. Thus when taken as a whole, the Commissioner ranks, in total 15 people, account for little more than 0.1% of the Force. If one adds those at Chief Superintendent level, being additional 52 persons, this increases the percentage by 0.38%. In total, even including those all those at Superintendent and Commissioner rank, the total is only about 1.8% of the total Force. As can therefore be seen, there is an extremely narrow funnel at the top of the organisation; with those in managerial roles constituting an extremely small percentage and being very confined in numbers. There is no suggestion that this structure is or will likely be changed in the future. Therefore it is obvious that those performing management roles in what has been described as a "flat organisation" are critical to the well being and efficiency of the Force. This is therefore a unique situation. This fact also weighs heavily when considering the justification required under Article 6.

51. A good deal of debate took place in this case towards identifying infirmities that might have existed in the documentation prepared in contemplation of the passing of the S.I. under consideration. For example, as previously indicated, it was asserted

that no external reports from consultants were obtained and that no internal investigation, of any quality, was undertaken which would justify the impugned change. Moreover, it was said that there was no empirical evidence to justify concerns regarding the reference to age profile. Changes in the police force were ignored as were the increase in live expectancy and the proposal made by the Joint Association of Superintendents and Chief Superintendents to increase the retiring age of their members from 60 to 63. In essence, the 1996 proposal to change was *ad hoc* and ill thought out, with its consequences either not appreciated or ignored. In my opinion this type of forensic, historical examination is of little value. It is not necessary, although fortuitous as it is to have the material available, that such documentation should be thoroughly discursive, or shaped in the form of a reasoned opinion or supported by international data or practice. Its content does not have to pass the judgment bar of anxious scrutiny or forensic audit. It seems to me that if, on analysis, there are set forth the broad reasons which prompted the Minister into making an S.I., as I am satisfied there are here, that in my opinion is sufficient to prevent a plaintiff being successful in challenging the instrument on the grounds of reasonableness or unreasonableness, as the case may be, unless patently irrational or illogical.

52. A number of reports were also handed up during the course of the hearing. The Hayes Report, from May 2007, noted that a systematic approach is needed to *"succession planning"* to prevent too many senior officers retiring at the same time, and in order to ensure that, through training and development, there is a sufficient pool of able and experienced officers to provide continuity in management and direction, and competition for promotion. Succession did not simply involve the identification of a person for a particular post, but rather it should be structured; related to training and development. A Garda Inspectorate report, *"Policing in*

Ireland: Looking Forward", dated August 2007 similarly reviewed the operational structure of the Force, noting and agreeing with the conclusions of the Hayes report.

53. Regardless of the justifications put forward by the Defendants, there are still questions as to the way in which the decision was reached, in the sense that it followed fair procedures (*e.g.* as enunciated in *Burke v. Minister for Labour* [1979] IR 354). The Plaintiff argued that the Minister, as a matter of law, was obliged to consult with those directly affected at the time, namely the Associations of Superintendents and Chief Superintendents, but had failed to do so. Whilst it may have been preferable or even desirable or, in the context of industrial relations, even helpful to so do, nonetheless, I cannot see anything in the 1925 Act, or in the Regulations providing for the establishment of the Associations, (para. 17 *supra.*), and I am not aware of any provision of general law, which obliges the maker of an S.I. to consult with members of the organisation which may be affected thereby or even with a certain cohort of those members. Accordingly there cannot be any invalidity resulting from a partial or even total lack of communication in this regard.

54. As noted by Carney J. in *Gorman v. Minister for the Environment* [2001] 2 IR 414 at 436 – 437:

> *"Whilst there can be no doubt as to the existence of a constitutionally protected right under Article 40.3 to fair procedures in decision-making, it has been recognised in the case-law that the principles of constitutional justice do not apply with equal force in every situation and indeed in some circumstances where decisions are taken by public bodies, such as a decision to enact a particular piece of legislation by the Oireachtas, the audi alteram partem rule or the duty to consult and hear submissions does not arise at all".*

Whether and to what extend, if at all, this is or is not an absolute position, in the absence of express provision does not arise in this case. See also *Cassidy v. Minister for Industry* [1978] IR 297 at 304 where the Court found that there was no duty to consult with the Vintner's Association before bringing into effect a statutory instrument fixing maximum process for the sale of intoxicating liquor. It is therefore clear that in the enactment of secondary or delegated legislation, there is no general requirement for consultation with the affected class. Such is necessary, for example under the Waste Management Acts / Regulations, where there is a requirement for consultation by the Council where, *inter alia*, there is a proposed change to a Waste Management Plan; that situation is entirely different: the duty is explicitly provided by law, which is not the situation here.

55. If any one or more of the above aims could be said to constitute the dominant or principal motive in the passing of these Regulations, then I would hold that the plaintiff's challenge to them must fall. As Henchy J. pointed out in *Cassidy*, if there is a legitimate aim for the making of an S.I., it being a dominant and purposeful aim, then even though there may also be secondary aims which may not be justified by the parent legislation, nonetheless once the former exists, the S.I. in question will not be declared invalid.

56. In any event, I do not think it is necessary to rely on that passage from his judgment: this in light of the justifying aims identified above, supported as they were by way of evidence, not only the documentary evidence which was current at the time, but also the evidence of Mr. Gavin who was, in fact, directly involved. I am satisfied that these were justifiable concerns which the Minister could have and were the influencing factors in her decision to change the retiring age which was then

applicable to the rank of Assistant Commissioner in 1996. I, therefore, believe that the plaintiff's challenge on the *ultra vires* or the administrative law point fails.

57. Consequently, I am satisfied that the aims as specified and the justifications as offered by the Minister through the evidence adduced in this case, were such as could not possibly attract to the 1996 S.I., the invalidity principles as identified in *Cassidy* through the judgment of Henchy J. It could not be said that the actual decision on its face was necessarily unreasonable. Nor could the decision be said to be one which the Oireachtas could not have ever intended or foreseen under the 1925 Act. I thus feel that this justification passes the general test.

58. Another submission suggested that the S.I. should be reviewed as of today's date; in this context, not by reference to the Council Directive, but by reference to purely domestic law. In my opinion even if this were possible, the net question would be whether or not by applying the appropriate administrative law principles, the S.I. was or was not valid in 1996. In my view, there was no principle of law in existence, at that time, like that as later contained in the Directive, which means that the 1996 Regulations could not be measured against the principle to test for discrimination in employment and occupation on age grounds. The change in this regard was the most significant feature which has occurred in the previous twelve years but, it would be quite wrong to try and retrospectively apply that Directive or its provisions in a theoretical sense to the validity of the S.I. at the appropriate date, which is 1996. I, therefore, reject this submission of the plaintiff.

59. Finally, in this regard. I do not believe that the passage of either the Directive or the enactment of the 2004 Act, could in any way reflect unreasonableness in the

thinking of the Minister at the time of the 1996 S.I.. Therefore, the challenge on the *ultra vires* point fails.

Issue No. 2: The Directive Challenge:

60. The second major issue in this case arises from Council Directive 2000/78/EC of the 27th November 2000, 'establishing a general framework for equal treatment in employment and occupation'. This Directive was incorporated into domestic law by the Equality Act 2004. In short, it is submitted on behalf of the plaintiff that the 1996 Regulations are inherently incompatible with the Directive, a form of *"per se"* inconsistency, and accordingly cannot be relied upon to terminate his employment on his 60th birthday. In this context, though in precisely what way remains unclear, reference has also been made to the said Act of 2004 as being in itself an Act against which the Regulation should be measured. I will return to the point later in this judgment.

61. This Directive, adopted on the basis of Article 13 of the EC Treaty, contains the following recitals which should be outlined:-

> *"(4) The right of all persons to equality before the law and protection against discrimination constitutes a [recognised] universal right ...*
>
> *(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination...*
>
> *(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential. ...*
>
> *(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty,*

in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community...

(14) This Directive shall be without prejudice to national provisions laying down retirement ages. ...

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

...

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate...

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and

vocational training objectives, and discrimination which must be prohibited."

(Emphasis added)

62. The following Articles of the Directive must also be referred to:

i) Article 1 of the Directive states that its purpose is "*to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*"

ii) Article 2, headed "Concept of Discrimination", provides:

"1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless... that provision, criterion or practice is objectively justified by a legitimate aim and the

means of achieving that aim are appropriate and necessary..." (Emphasis added)

iii) Article 3, delineating the scope of the Directive, states that it "*shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to... (c) employment and working conditions, including dismissals and pay...*"

iv) Article 6, which is headed "Justification of differences of treatment on grounds of age", at sub-article (1), reads:

> "*Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.*" (Emphasis added)

63. The Directive, by virtue of Article 20, became directly applicable in this jurisdiction on 2nd December 2003.

64. Before dealing substantively with the instrument, a preliminary issue which arises thereunder, must be resolved. As will be considered more thoroughly in the next part of the judgment, Recital 14 of the Directive reads "*this Directive shall be without prejudice to national provisions laying down retirement ages*". It is the plaintiff's case that, notwithstanding this recital, any relevant provision of national law must still be compatible with the Directive. On the other hand the defendants

argue that by its plain meaning, once there is in existence such a national measure, it is immune from Directive compatibility.

65. In *Félix Palacios de la Villa v. Cortefiel Servicios SA*, (Case C-411/05) [2007] ECR I-08531 (16th October 2007), the European Court of Justice expressed a view on this Recital. In that case Spanish law, under certain conditions, permitted freely negotiated collective agreements between workers and employers to contain provisos dealing with compulsory retiring ages. On a challenge to the provisions contained within one such agreement, the Court at para. 44 of its judgment had this to say on Recital 14:

> *"It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that Recital merely states that the Directive does not affect the competence of the member states to determine retiring age and does not in any way preclude the application of that Directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached."*

66. The defendants seek to distinguish that decision by pointing out that the retirement age was not "laid down" by any domestic law, and therefore there was no direct establishment on the part of the national authority. In addition, a lengthy passage from the opinion of Advocate General Mazak, delivered on 15th February 2007, was opened in which, at paras. 64 and 65, he opines that Recital 14 should be read in a manner which immunised from Directive scrutiny national measures containing retirement ages. It was thus urged upon this Court that effect should be given to the primacy of the plain and unambiguous language of Recital 14.

67. I am afraid that I cannot agree with this submission; even, if uninfluenced by case law, I would hold, relying upon first principles, that such a construction would be inherently incompatible with the whole purpose, thrust and tenor of the Directive. Given the significance of furthering the principle of equality and noting the steps taken at community level to implement this, it would seem almost self-defeating, to allow member states to disregard the Directive, by such simple means as fixing compulsory retiring ages. It would matter not at what particular age the threshold was set, or whether there was any or any legitimate justification therefor. Once on the statute books the effect would be to bypass the Directive. I could not hold that this was either the intention of the Directive or indeed its effect.

68. In addition, I entirely disagree that the *Palacios* decision can be distinguished in such a manner so as to neutralise the effect of para. 44 of the Court's judgment. In my view the real challenge in the case was to a compulsory retiring age which was both recognised and enforceable in the domestic laws of that state. The fact that its foundation lay directly within the collective agreement does not in any way take from the primacy of the point. I therefore believe that *Palacios* is a direct authority on Recital 14 and, since it accords with my own interpretation as to the placement of that Recital, I would respectfully follow it. Therefore, having regard also to the next succeeding paragraph, I am satisfied that the Directive applies to the Regulations under review in this action.

69. There can be no doubt in my view but that members of An Garda Síochána serving within that force are covered by the Directive (and the 2004 Act). That the Directive applies is, in my opinion, self-evident from the Employment Equality Act

1998, as amended by the 2004 Act; this because of the definitions given to "employee", and "contract of service", and because of the express provisions of s. 2(3) which specifically deem a member of An Garda Síochána to be an employee of the State under a contract of service. In addition it is significant to note that in its original form s. 37(4) of the 1998 Act applied its provisions to members of the Defence Forces, An Garda Síochána and the Prison Service. In its amended form, by virtue of s. 25 thereof, application of the Act is continued only in respect of members of the Defence Forces. These circumstances, as well as the provisions of s. 37(3) and (4), as amended, make it inescapably clear that the provisions of the Directive apply to the plaintiff in this case.

70. That being so, it inevitably must follow that the provision of the 1996 Regulations, which had the effect of terminating the plaintiff's employment at age 60, constitutes direct discrimination within the meaning of Article 2 of the Directive; in that the plaintiff is treated less favourably than another Assistant Commissioner who has not reached the age of 60. Therefore it falls squarely within the prohibition on direct discrimination. This conclusion of course equally applies to the Equality Act 2004. Consequently it is incumbent upon the member state to justify this difference of treatment on the grounds of age. It can do so under the provisions of Article 6 if it can establish that, within the context of national law, the differences in such treatment are *"objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour, market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary"* (see paras. 61 – 62 *supra.* for the relevant Directive provisions).

71. The effect of the Directive, in these circumstances, can thus be summarised:-

i) In pursuit of its purpose to implement the principle of equal treatment in employment and occupation, it prohibits direct and indirect discrimination on any of the discriminatory grounds which include age.

ii) "Direct discrimination" for this purpose occurs where by reason of age one person is treated less favourably than another in a comparable situation (Article 2).

iii) If a national law provides for differences in treatment between comparable persons on the grounds of age, such inequality will not necessarily be prohibited if the differences are objectively and reasonably justified, by reference to a legitimate aim such as legitimate employment policy, labour markets and vocational training objectives, and if the means used are appropriate and necessary (article 6).

iv) Member States have a broad discretion in their choice of identifying the aim(s) to be pursued and the means or measures to implement such (Recital 25). These can be identified by reference to political, economic, social, demographic and budgetary considerations, provided overall the effect of the Directive is not put in peril: *Mangold* [2005] ECR I-9981.

v) Member States shall, without prejudice to the Directive, have the power to fix retiring ages (Recital 14).

vi) Member States are not obliged under the provisions of the Directive to recruit, or maintain in employment, persons in the police, prison or emergency services who lack the capacity to perform the required service: this derogation supports the legitimate objective which a

Member State may have in preserving the operational capacity of these services (Recital 18).

72. Having come to the conclusion that the Directive is applicable to the current situation, it must still be determined if and how the national laws relating to the compulsory retirement of Assistant Commissioners at age 60, fall foul of the Directive.

73. It is settled in the case law that in order to avail of the Directive's protection the complainant must show that he is being treated differently to someone who is in the same position as him, or that someone who is in a different position is being treated the same as him (see Article 2(2)(a)). This person, hypothetical or otherwise, is referred to as the "comparator".

74. In the context of age, it has been recognised that this comparator requirement may be difficult to define with specificity. Unlike other areas such as sex discrimination, where it can be readily apparent that two comparable people are being treated differently on that basis (as in *Lindorfer v. Council of the European Union* Case C-277/04: re: Community pension regulations, where in calculating pension amounts, account was taken of a person's sex on the basis that women lived longer: this was illegally discriminatory), age presents a particular problem. The European Commission paper on Employment & Social Affairs entitled "Age Discrimination and European Law", (Colm O'Cinneide, 2005), (hereinafter "the Commission paper") notes that the fluid nature of a person's age, and the uncertain and shifting nature of "age groups", as well as the changing expectations which accompany changes in age,

even between persons of similar ages, made the application of the comparator test difficult in this context.

75. Reference was made to the decision of the Irish Equality Tribunal in *Perry v. Garda Commissioner* DEC-E2001-029. In that case the Equality Officer found that provisions governing voluntary retirement were discriminatory, since if the retirement scheme was considered by reference to two hypothetical employees, one aged 60 plus 1 day old, and another aged 60 minus 1 day, the result leads to a disparity between the resulting gratuity payments. This could not be explained with reference to *"clear actuarial or other evidence ... presented by the respondent which would make such discrimination permissible in the context of the [Employment Equality Act 1998]."* However, the applicant ultimately lost because of transitional measures allowing for age-related pay to continue for three years after the entry into force of the Employment Equality Act 1998.

76. The difficulty of finding a suitable comparator in relation to age discrimination was also highlighted in the Opinion of the Advocate General in *Palacios*, where Advocate General Mazák felt that:

> *"So far as non-discrimination on grounds of age, especially, is concerned, it should be borne in mind that that prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. It is therefore a much more difficult task to determine the existence of discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators are more clearly defined."*

77. Once a difference in treatment is shown to exist with a relevant comparator, it is then necessary to show that such is due to age; or put another way, that age is a "material factor". Such discrimination may be obvious on its face, as was seemingly the case in *Perry*, or else it may be more covert; referring to factors that are essentially "age proxies", for example if an employee was dismissed for "being around too long" or was denied a promotion for being "overqualified", when the decision was essentially based on age. As the Commission paper states, such "age proxies" constitute direct discrimination *"as age will actually be a 'material factor' in the decision-making process."*

78. It is worth noting that under Article 10(1) of the Directive, if a claimant can establish a *prima facie* case that age was a material causal factor in the decision, then the burden of proof shifts to the respondent to show that age was not such a factor, or else that it was justified. The fact that one candidate is preferred over another of a different age will clearly not be enough to shift the burden. However, if, for example, a job was granted to a younger person who was less qualified than an older applicant then this could indicate the presence of age bias. The Commission Paper, p. 24, refers to a Slovakian District Court case (2003 No. 7C 190/02-309) where the court found discrimination on the basis that a research worker with more than 20 years experience, had been excluded from the position of coordinator (even though she had been involved in developing, and had been mentioned in, an initial project proposal), in favour of a younger less qualified researcher, where no justification could be established.

79. Nonetheless, as I have previously said, it is clear that the imposition of mandatory retirement age is discriminatory, *per se*, under the Directive, in that it

places one person at a disadvantage to another, who would otherwise be in the same situation, on the grounds of age alone.

80. It must thus be determined whether such discrimination is saved by one or more of the justifications under the Directive. As enunciated, these justifications include:

i) That the measure is a *"genuine and determining occupational requirement"* ("GOR");

ii) That the measure is aimed at *"preserving the operational capacity"* of the Gardaí;

iii) That the measure is justified by a legitimate aim, in this case employment policy; or,

iv) That the measure is *"objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"* – the proportionality requirement.

81. Turning to the first potential justification, namely that of a GOR. Article 4 permits discrimination where age is *"a genuine and determining occupational requirement for the position in question, and it is proportionate to apply this requirement in the particular circumstances."* This Article only applies where the characteristic of age itself, goes towards an applicant's ability to perform a particular job. The Commission paper states that *"it is difficult to see many circumstances where such a blunt characteristic such as age would be required as a 'genuine occupational requirement'"* and notes that the UK government's consultation paper on implementation of the Directive suggests that there will be *"very few cases where age is genuinely a requirement."* But there will be some, however few, such as acting, or

modelling clothes aimed at a particular age group. As stated earlier, there may be cases where characteristics acting as proxies to age might be employed in relation to a genuine occupational requirement. The Commission however has serious reservations about the practical application of the saver, noting that age should not be used as a proxy for characteristics such as incapacity, ill-health or immaturity, since:

> *"[A]ge is not a sufficiently precise indicator for any of these characteristics for it to be possible to normally use it as a substitute for a 'real' GOR..."*

This would be so even if age could be statistically linked to trends in those characteristics. Nonetheless there may be circumstances where the assessment of individual work is impossible or excessively onerous, and where age can in some way be linked to the possession of a GOR. In those circumstances age discrimination may be a *"necessary shorthand"* to differentiate between different groups of works. However, in the opinion of the Commission:

> *"[T]he use of such age limits will have to be shown clearly necessary: even a pressing legitimate aim such as public safety cannot justify the sweeping use of age limits where individual assessment is possible."*

82. From the Canadian case of *Law v. Canada (Minister of Employment and Immigration)* [1989] 1 SCR 143 and the Australian case of *Qantas v. Christie* (1998) 152 ALR 1295 two questions can generally be asked in this context:

> *"a) are the characteristics that are cited to justify the act of discrimination legitimate and justifiable grounds for distinguishing between two people, b) is age an effective and reliable proxy for the relevant characteristics or a necessary differentiating tool for determining whether an individual possesses those characteristics."*

83. This test, which was applied in another Canadian case of *MacDonald v. Regional Administrative School Unit No. 1* (1992) 16 CHRR D/409, lead to the conclusion that a state-wide mandatory retirement age of 65 for school bus drivers was justifiable, given the number of drivers involved. In relation to protecting public safety, the Commission paper cites *"the US Supreme Court case decision in Western Airlines v. Criswell No.83-1545, where the Court emphasised that employers would have to demonstrate that the use of an age limit was 'necessary' and individual assessment was not possible, even where public safety was an issue."*

84. Recital 18 of the Directive which allows, in relation to the armed forces and the police, prison or emergency services, discrimination *"with regard to the legitimate objective of preserving the operational capacity of that service"* should be read in light of the exemption for genuine occupational requirements. Age in the context of such services would seem to be a form of genuine occupational requirement, since it is obvious that such services require a great degree of physicality and that the age of the people "on the ground", so to speak, would indeed inhibit their efficiency. However, where such a restriction is in place in relation to the armed forces or police services, there would still be a requirement that such is for the purpose of preserving the operational capacity of the force, and/or, as a genuine occupational requirement; any such measure should also be proportionate. Although in this regard the perils of using age as a proxy for other characteristics should of course be borne in mind.

85. What constitutes *"preserving the operational capacity"* of the Gardaí? One can readily understand why such a saver was placed in the Directive. Were this provision not in place, it would be open to a member of a police force, army or other such service, to claim that it was an illegitimate discrimination to have different

retirement ages as between what one might call the "troops on the ground", or "bobbies on the beat", and those members of a force who have a more administrative, managerial or operational role. In the case of the Gardaí this was the situation until the most recent regulations which now bring in line the retirement ages of all members (excluding the Garda Reserves), irrespective of rank to aged 60. Prior to this there was a difference as between the lower ranks, who could be seen to be doing the more physical work, and the higher ranks, including the Commissioner ranks, who had a more operational role. That such a distinction should be allowed may well be justified, since it is obvious that a Garda on the beat will need to be more physically able than one behind a desk. Nevertheless, were the aforementioned saver not included, such discrimination might be open to challenge given that the correlation between age and physical fitness for duty is not a given, and will inevitably vary as between individual members.

86. In any event I am satisfied that the Regulations under consideration herein, could not be said to be aimed at *"preserving the operational capacity"* of the force. Nor could it be said that the age of the Assistant Commissioner formed part of the *"occupational requirement"*, of that position as it could be of a job like child modelling. There is nothing inherent about the age used in the Regulations which would mean that a person of a certain age was required for the job.

87. The above two potential justifications thus seem aimed at very specific circumstances which would otherwise be discriminatory. The following two are wider in their potential application and seek to regulate the use of age discrimination where it is required for broader social purposes and where it is proportionate.

88. An issue which arose during the trial was the question of whether, in looking at the reasons and justification offered, one should do so by reference to the context in which the Regulation was made, or in the context of changed circumstances since that time. Given my conclusions on this particular matter, it should be noted that the following comments strictly speaking are *obiter*. If I was deciding this matter solely on administrative law grounds I would feel bound, in general, only to consider the justification question in light of the situation at that time. It is at this time when the "reasonableness" of a decision should be tested. To otherwise review such matters would be to look towards the merits of the decision in light of changing circumstances; in the presenting situation this is not the purpose of judicial review. The question in judicial review is whether there was an error in the way in which a decision was arrived at. This question is fixed in time; either the matter was properly decided at the time, or it was not. Changing circumstances do not render a prior decision improper merely because, under new conditions, the legitimate justifications of the decision-maker no longer hold true.

89. However, in circumstances where the Court is reviewing a matter not purely as to the "reasonableness" of a decision, but in relation to whether its continued existence is in compliance with a Directive (especially in circumstances where the Directive post-dates the Regulation), I am satisfied that the Court may also inquire as to whether at the current date the Regulations in questions can be justified. This makes sense given that some measures may be temporally or circumstantially justified, but once the reason for their original inception has passed, they would clearly no longer be so. For example if movement restrictions were put in place to curb the spread of an infectious disease which had long since ceased, or if restrictions were placed on certain organisations because of their composition or aims, which had

long since changed. In both situations the justifying purpose no longer exists and so the once legitimate aims were now moot, thereby no longer justifying their purported compliance with the Directive.

90. Much evidence was led by the Defendants in attempting to justify the 1996 Regulations. Such justifications, as outlined herein, it was contended, were as relevant today as when the Regulations were introduced. I would agree with this proposition, insofar as I agree that the particular justifications advanced by the Defendants, if they were legitimate at all, would be so regardless of whether they were judged at the time of the making of the 1996 Regulations or today. It is therefore unnecessary, and I do not propose, to distinguish between whether the justifications were or still are relevant. That is not to say that justifications may not cease to be legitimate with the passage of time, but in the present circumstances I can see no real difference as between then and now with regards to their legitimacy.

91. The next proposition to deal with is thus whether the justifications advanced by the Defendants relate to a *"legitimate aim"*, in particular a *"legitimate employment policy"* or like aim; the list of examples given in the Directive is not an exhaustive one, given the use of the word "including"; nor should it be taken that where a justification falls under one of the headings in Article 6(1) that it will not be scrutinised as to whether the distinction in question is objectively justified. Such an interpretation is supported by the Opinion of Advocate General Sharpton in *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (delivered on 22nd May 2008), para. 110. She states at para. 112 of her Opinion that:

> *"The only logical conclusion to be drawn is that Directive 2000/78 expressly permits particular kinds of differential treatment based directly on grounds of*

age, provided that they are 'objectively and reasonably justified by a legitimate aim ... and if the means of achieving that aim are appropriate and necessary'. This analysis of the text is borne out by the Court's judgment in Palacios de la Villa..."

92. In *Palacios* the ECJ considered whether the national law in that case had a "legitimate aim". The Court held, at para. 62, that:

"[P]laced in its context, the ... provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment."

The respondents argued in the circumstances that the legislation, which allowed for compulsory retirement ages in accordance with collective agreements, had the legitimate aim of *"regulating the national labour market, in particular, for the purposes of checking unemployment"*. The court accepted this as a legitimate aim, stating that:

"64. The legitimacy of such an aim of public interest cannot reasonably be called into question, since unemployment policy and labour market trends are among the objectives expressly laid down in the first subparagraph of Article 6(1) of Directive 2000/78 and, in accordance with the first indent of the first paragraph of Article 2 EU and Article 2 EC, the promotion of a high level of employment is one of the ends pursued both by the European Union and the European Community.

65. Furthermore, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy (see, in particular, Case C-208/05 [2007] ECR I-181, paragraph 39) and that assessment must evidently apply to instruments of national employment policy

designed to improve opportunities for entering the labour market for certain categories of workers."

93. The Commission paper, in considering what constitute legitimate aims, noted that concern had been expressed by Eurolink Age and other NGOs that the very broad and vague wording of the examples might encourage a loose approach. However, the Commission paper states that the examples should only be seen as broad guidelines; it then cites examples of legitimate aims considered in a UK Department of Trade and Industry Consultation Paper, "*Equality and Diversity: Age Matters*" (London: DTI, 2003). These included:

"*a. health, welfare and safety – for example, for the protection of younger workers;*

b. facilitation of employment planning – for example, where a business has a number of people approaching retirement age at the same time;

c. the particular training requirements of the post in question – for example, air traffic controllers...

d. encouraging and rewarding loyalty;

e. the need for a reasonable period of employment before retirement – for example, an employer who has exceptionally justified a retirement age of 65 might decline to employ someone a few months short of 65 if ... the applicant would not be sufficiently productive in that time."

94. In the context of considering the legitimate aims advanced, the paper further notes that it is obviously necessary for the person advancing that aim to have a subjective belief as to its validity. Furthermore:

> *"[T]he less pressing and immediate the legitimate aim concerned, the greater may be the degree of scrutiny of the objective justification of an age distinction: a discriminatory scheme justified on public safety grounds will generally require less clear-cut justification than one based on economic reasons."*

95. In this case the relevant justifications would be that the alteration in the retirement ages was required to:

i) maintain motivation within the force and senior ranks, by preventing the blocking of the Commissioner ranks;

ii) bring the retirement age of the Assistant / Deputy Commissioners in line with that of the Commissioner and the Superintendents ranks;

iii) create a competitive pool of candidates from which the Commissioner might be chosen;

iv) implement the new regional command structure, with a greater operational focus.

96. Before continuing I would note that it is firmly established that where justification is sought, and multiple reasons are given, it will be enough that one or more of the justifications advanced. amount to a legitimate aim.

97. The efficient and effective running of the Gardaí is certainly an *"aim of public interest"*, as put in *Palacios*. It is likely that such an aim would fall under the heading

of "employment policy". However the required extent that such a policy would need to become one of the inclusive examples under Article 6(1) is unclear. Nonetheless, I am content to conclude that the justifications advanced in this case constitute a *prima facie* legitimate aim, namely "employment policy" within the Gardaí.

98. As noted above, even where a measure is shown to have been enacted with a legitimate aim it must still show itself to be appropriate and necessary. This is the test of proportionality; the measure must go no further than is required to reach the legitimate aim and must do so in the least restrictive way.

99. The ECJ considered Article 6(1) in *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981. That case concerned a German law which permitted employers to conclude, without restriction, fixed-term contracts of employment with workers over the age of 52. The Court noted the purpose of the legislation as being to promote the vocational integration of unemployed older workers, insofar as they encounter considerable difficulty in finding work. Such public interest objectives could not be doubted; it was an objective and reasonable justification for different treatment on the ground of age. Nonetheless, it still fell to be considered whether the means to achieve that legitimate objective were appropriate and necessary, noting that Member States enjoy a broad discretion in this regard. The Court, taking a pragmatic view, stated that in reality the provision had lead to a situation in which all workers who had reached the age of 52, *"without distinction, whether they were employed before the contract concluded and whatever the duration of any period of unemployment"* would be offered fixed-term contracts, which could be renewed indefinitely. This meant that a significant body of workers, determined solely on the basis of age, were in danger of being excluded from the benefit of stable employment. The Court thus concluded that:

"In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective ... it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued (see, to that effect, Case C-476/99 Lommers [2002] ECR I-2891, paragraph 39). Such national legislation cannot, therefore, be justified under Article 6(1) of Directive 2000/78."

100. The question of whether a measure which was objectively justified was nevertheless implemented by means which were appropriate and necessary, that is proportionate, under Article 6(1), was also considered in a decision of the U.K. Employment Tribunal: *Hampton v. Lord Chancellor and Ministry of Justice* (Case No.: 2300835/2007). It that case the claimant held the judicial office of Recorder. Service as a Recorder is generally regarded as a prerequisite for appointment to a salaried position on the Circuit or High Court bench. In 1998 the retirement age for Recorders was reduced from 70 to 65. In 2000 a standard retirement age was introduced for all new judicial appointments, however in 2002 this was reversed and the age was increased back to 70 for all fee paid judicial office holders, except for Recorders and Deputy District and High Court Judges, since the lower retirement age had affected the operational viability of certain Tribunals. The applicant complained

that the different retirement ages between Recorders and other judicial office holders was discriminatory, although he accepted that some retirement age needed to be set so as to ensure judicial independence. The Ministry having conceded that the applicant had been subjected to less favourable treatment on the ground of age, the sole issue was thus whether the policy of retiring all Recorders at 65 could be objectively justified.

101. The Ministry argued that the retention of Recorders from age 65 to 70, who would not be in the pool for appointment to full-time judicial office, prevented the recruitment of younger recorder who would be in such a pool. Furthermore it argued that the presence of Recorders over the age of 65 would reduce the availability of more challenging cases, and thus necessary experience, for those who would be in the pool for next appointment. The Tribunal, however, rejected these arguments. It found that there was no evidence to support the assumption that all Recorders over the age of 65 would remain in the post until 70. Nor did it consider that the reduction in the number of younger Recorders, which would result from increasing the retirement age to 70, would have any effect on the production of suitable candidates for judicial appointment. It also felt that, contrary to the submissions of the Ministry, a reduction in the number of vacancies would increase competition and in fact lead to an increase in the quality of those appointed. Further, it noted that steps could be taken to ensure that those who had the potential to be promoted to a judicial post were allocated the right types of cases so as to gain the appropriate experience. For these reasons, the Tribunal did not accept that the policy of retiring Records at 65 was a proportionate means of achieving the admittedly legitimate aim of ensuring a reasonable flow of new appointments into the judiciary.

102. Both *Mangold* and *Hampton* in my view are clearly distinguishable from the present case. In *Mangold* the provisions in question had a wide ranging reach, affecting every person over the age of 52. It was clear that in practice this was causing indirect discrimination against this age group. In contrast the provisions here are of a specific and defined character. *Hampton*, similarly, is distinguishable. It was clear in *Hampton* that there was a very large pool of Recorders, well over a thousand, from whom Judges could be appointed. The Tribunal thus felt that there was no real evidence that keeping the age at 65 could be justified on this ground. Nor could it be proportionate where, in the circumstances, all of the problems identified by the State could have been overcome by much less invasive methods than having a compulsory retirement age. Again in the instant case there are but a dozen persons in the Assistant and Deputy Commissioner ranks from whom a Commissioner might be chosen. Even if it was to be accepted, as was advanced by the Plaintiff, that a Commissioner could be appointed from the Chief Superintendent ranks, the pool would still not be anywhere near the size of the one considered in *Hampton*. These two cases are therefore readily distinguishable from the present situation. Finally I should say that the possibility of an appointment from the Chief Superintendent rank does not in any way diminish the importance of having a quota available at the higher rank. It is having a choice from the most senior group that is the point.

103. The means in this case were the introduction of a Regulation which reduced the age of retirement for Assistant Commissioners from 65 to 60. However this reduction is still subject to regulation 6(b) of the 1951 Regulations which allows the extension of a member's service for a period of up to five years where the Commissioner is satisfied that, because of some special qualification or experience, it is in the interests of the efficiency of An Garda Síochána to do so. Mr. Donnellan did

in fact make such a request to the Commissioner for such an extension, but this in fact was refused.

104. The fact that individual assessment is possible is an important consideration. Where there are a large number of people involved and it would be impractical to test every person then it may be proportional to use some form of age-proxy. Conversely, where there are few people to assess and such could be done relatively easily it would not be proportionate to use blanket proxies so as to determine personal characteristics. As stated in the Commission paper:

> *"A person's health, maturity, ability to learn, experience, skill, willingness to work may often be ascertained by normal vetting procedures, individual assessments and good job specifications. A 50-year old secretary, for example, could be assumed to have certain types of experience not held by a 20-year old, but this alone should not justify automatic selection for the older applicant without an assessment of the merit of the 20-year old. The use of maximum entry ages for the police in many member states may for example be very questionable. In a Dutch case, a number of referees successfully challenged the age limits of 47 and 49 used by the Royal Dutch Football Association (KNVB) on the basis that individual assessment of each referee's capability for the job of referee was entirely possible, and it was a breach of proportionality to set a fixed age limit.*
>
> *[Further,] [a]ge limits may be necessary in particular industries to ensure a 'turnover' of workers and to encourage recruits into a profession: the Dutch Supreme Court has upheld the imposition of a compulsory retirement age upon airline pilots for this reason... [H]owever, the use of age limits that intended to simply shift the age profile of the company or which unreasonably*

narrow the age spread of new recruits may face great difficulties in showing objective justification."

105. The Dutch Supreme Court case referred to as *16 pilots v. Martinaur Holland NV and the Association of Dutch Pilots*, Hoge Raad [Dutch Supreme Court] (8th October 2004 – Nr. C03/077HR) should be noted. That case was taken by 16 pilots against Martinair Holland NV and the VNV (Dutch Airlines Association). A compulsory retirement age of 56 had been set for pilots. The court noted that in the 1970s the original justification for this would have related to traffic safety and health, since in the past flying could take a high physical toll on pilots. However, nowadays the primary purpose of the measure was to facilitate and to enhance a regular and predictable flow of pilots within the corps. Both the Cantonal and Supreme Court ruled that this rationale formed an objective justification. It should be observed that this conclusion was influenced by the fact that a pilot's career was structured in such a manner that it was possible to reach the highest seniority before retirement.

International Jurisprudence:

106. Some flavour of the international jurisprudence relative to the special position of age as a ground for discrimination was also offered.

107. Attention was drawn by the Supreme Court of the U.S. in *Massachusetts Board of Retirement et al. v. Murgia* 427 U.S. 307 (1975) to the fact that:

"While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of unequal treatment' or been subjected to

unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."

Thus the U.S. Supreme Court felt that the aged did not constitute a "suspect class" for the purposes of equal protection. Nor did they constitute a:

"'discrete and insular' group... in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span."

108. The court, in that case, went on to consider the rational-basis of a mandatory retirement age of 50 for uniformed state police officers, whose functions were to protect persons and property and to maintain law and order. They were in effect the operational face of the force. The court felt that the mandatory retirement of officers rationally sought to protect the public by assuring *"physical preparedness"* of its uniformed officers. However, Marshall J. dissented from this position strongly criticising the "two-tier" test for equal protection which looked at law with *"strict scrutiny and mere rationality"* since it did not realistically represent the way the court did or should go about the consideration of equal protection. He contended that the use of "strict scrutiny" in relation to "suspect classes" results in almost all statutes subject to such scrutiny being struck down, and thus leads to a great reluctance on the part of the court to extend the categories of "suspect classes". However, he says, this results in too much legislation being dropped to the bottom tier and being measured by mere rationality, which leads to the opposite result of almost all legislation being upheld. He strongly dissented to the court's conclusion in the above case stating:

"There is simply no reason why a statute that tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession merely because they are 50 years old should be

judged on the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests."

109. The U.S. jurisprudence on issues of equality is, I feel, of limited persuasiveness. The courts in the U.S. are very slow to interfere with legislative intent. Further, their considerations are based on far broader, amorphous considerations of a general right to equality before the law, whereas in this case we are looking at a positive piece of law, Directive 2000/78/EC, which lays out specifically what is required of legislation which purports to treat specific groups of people in different ways; it must be objectively justified and proportionate. Such a proportionality argument is peculiarly European; no such consideration is given to the idea that legislation might achieve a similar objective in a different and less restrictive way in the U.S. case law.

110. In the more recent case of *Kimel et al. v. Florida Board of Regents et al.* 528 U.S. 62 (2000) the court held that:

"States may discriminate on the basis of age without offending the Federal Constitution's Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest; the rationality commanded by the Amendment's equal protection clause does not require states to match age distinctions and the legitimate interests they serve with razorlike precision; under the Amendment, a state may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the state's legitimate interest, as (1) the Constitution does not preclude reliance on such generalisations, and (2) that age proves to be an inaccurate proxy in

any individual case is irrelevant..."

111. As discussed above, this is wholly inconsistent with the line taken by the ECJ. Reliance on age-proxies must be proportionate, and even where there are legitimate aims for differences in treatment, such aims must still be necessary and appropriate.

112. The U.S. treatment of legitimate aims would also not be sufficient under the Directive. The Court in *Kimel* also held that:

> *"When conducting rational basis review under the equal protection clause the Federal Constitution's Fourteenth Amendment, the United States Supreme Court will not overturn government actions unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the actions were irrational; in contrast, when a state discriminates on the basis of race or gender, the court requires a tighter fit between the discriminatory means and the legitimate ends they serve; because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker."*

113. Under the Directive, the burden of proof, once a *prima facie* case of direct discrimination is made out, is borne by the respondent who must justify the distinction. This burden equally applies to age discrimination as it does to race, gender and disability. Although there is a difference between different types of discrimination, such will go towards the justifiability of the discrimination; where it

will be easier to justify differences in treatment on grounds of age, since these are inherently more likely to have a rational basis, compared, for example, to race. The Directive in no way states that discrimination on the ground of age is presumptively rational.

114. Although not as extreme as the U.S. case law, the jurisprudence from Canada and Australia are equally distinguishable on the ground that they are considering constitutional rights, rather than specific legislative protection, and thus the question of discrimination on the grounds of age is considered in a more generalised way.

115. Notwithstanding this however, it is worth noting in the Canadian context that s. 32(1) of the Canadian Charter of Rights and Freedoms confines the Charter's operation to government actions. The Canadian Supreme Court in *McKinney v. University of Guelph* [1990] 3 SCR 229 found that it is deliberately so confined, and its purpose is as a check against government powers over the individual, and not as a tool to be used against private individuals. This is not the case with equal treatment under the Directive; the private sector is specifically included under Article 3(1).

116. There are two decisions from the U.K. which should also be mentioned: *R (Carson) v. Work and Pensions Secretary* and *R (Reynolds) v. Work and Pensions Secretary*, both reported at [2006] 1 AC 173. The facts of *Carson* were that the applicant was a pensioner living in South Africa. She had paid all the necessary contributions, continuing to make voluntary payments after emigration. When she turned sixty, she started to receive the same pension she would have received if she had been living in the United Kingdom. On 9th April 2001 the basic pension for United Kingdom pensioners was increased to reflect the rise in the United Kingdom

cost of living. However pensioners ordinarily resident abroad are not entitled to these annual increases. The applicant thus continued to receive the basic pension. Nonetheless, despite acknowledging that she was being treated in a different way to those ordinarily resident, the Court found that she was in a *"materially and relevantly"* different position to a person resident in the UK. Once such a difference was apparent Parliament were entitled to treat such a person differently; indeed the Court noted it could have legitimately refused to pay her any pension at all. This particular case is, however, of limited relevance. It is clear that Ms. Carson was not being discriminated against on the ground of age, rather because of her status as a non-resident, or expatriate.

117. The Second case is more on point. The applicant, Ms. Reynolds, complained that because she was under the age of 25, she was paid jobseeker's allowance and then income support at the reduced rate of £41.35 a week instead of the full rate of £52.20. She argued that Article 14 of the ECHR entitles her to be treated equally with people over the age of 25. Once again the Court found that since there were material differences between older and younger persons, in particular the expenses of older people were necessarily higher, that was sufficient to justify the difference in treatment.

118. In any event, the cases in *Carson* and *Reynolds* were not considered under the Directive, but under the UK Human Rights Act 1998. They are thus of limited persuasiveness. Before leaving them, however, I would like to comment on the following passages from the speech of Lord Walker. At p. 193 of the report he said:

> *"Age is a personal characteristic, but it is different in kind from other personal characteristics. Every human being starts life as a tiny infant, and*

none of us can do anything to stop the passage of the years. As the High Court of Australia said (in a different context) in Stingel v. The Queen (1990) 171 CLR 312, 330: 'the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness.'"

This continues;

"There is nothing intrinsically demeaning about age. It may be disheartening for a man to be told that he cannot continue in his chosen job after 50 and it is certainly demeaning for a woman, air hostess, to be told that she cannot continue as a cabin crew member after the age of 40."

119. There is no doubt but that age has been treated in a way different from other discriminatory grounds. This has been acknowledged in several Commission papers, as it has been in many judicial decisions. However I would be hesitant to come to the view that age, as a matter of policy or common acceptability, should be relegated to a form of doubtful importance within the overall family of discriminatory grounds. Whilst I acknowledge that the contrary view has strong support, nonetheless I think that context is critical when evaluating this issue. By context I mean the type of discrimination involved, the broad and historical societal background in which it takes place, the cultural and ethnic history of the relevant area, the protective provisions of, and access to, the legal system *etc.* As appears from para. 7 of the *Massachusetts* case, the reasons why certain discriminatory ground have been elevated into a suspect class are because they were:

"Saddled with such disabilities or subjected to such a history of purposeful, unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the political process."

If one was asked to provide a comparable context in this jurisdiction, I firmly believe

that in respect of most if not all of the recognised discriminatory grounds, the resulting product in its composition would be very different to that which I have just quoted. So for my part, I would not be an enthusiast of compartmentalising grounds of discrimination, some of which may attract greater scrutiny than others. For all individuals who suffer discrimination, a thorough evaluation and, if necessary, a clear vindication, by appropriate measures is required.

120. Thus, for the above reasons, the international case law on age discrimination is of limited persuasiveness or application in the context of age discrimination in employment under the Directive.

Conclusions: The Directive:

121. With regards to compliance with Directive 2000/78/EC, firstly although the Regulation, by setting up a system of mandatory retirement, is *prima facie* direct discrimination, it can be said that the overall aim of the scheme is a legitimate one. In particular, given the peculiar structure of An Garda Síochána (paras. 34, 50 and others *supra.*), the aims of ensuring motivation and dynamism through increased prospect of promotion, the creation of the most useful pool of candidates possible for appointment to the position of Commissioner, are both rational and legitimate. These rationales were considered and outlined in more detail in relation to reasonableness, but my comments in relation thereto apply equally to this aspect of the challenge, being whether or not they are rational and legitimate in the context of the Directive. I thus note that the justifications advanced are sufficient to overcome the rationality challenge.

122. Secondly, nonetheless, in the context of the Directive these aims must be proportionate. As stated an important consideration in considering whether a measure will be proportionate is whether individual assessment would be possible in a given case, such that using an age-proxy would not be legitimate. In this regard I would place particular emphasis on the ability of, *inter alia*, the Assistant Commissioner to request an extension of his tenure in office. Such a request under Regulation 6(b) of the 1951 Regulations must I feel be viewed as a form of individual assessment. It must be presumed that when considering such a request the Minister will take into account the individual circumstances of the petitioner, for example his/her service record and skill set, as well as the needs of the force as a whole. The retirement age of 60, set by the 1996 Regulations, may therefore be seen as an activator for such a request, and consequently this type of individual assessment; at age 60, a person may apply to the Commissioner for a continuance, and the Commissioner should consider each application on an individual and case-by-case basis. In effect, despite the Plaintiff's accumulated skill, his desire to continue and his grievance at the force losing his 40 years experience, the Commissioner did not consider these to be sufficient to ground an extension. Although a continuation was refused in this case, the procedure under Regulation 6(b) of the 1951 regulation serves to temper the severity of what would otherwise be an absolute retirement age; thereby rendering it, in my opinion, proportionate. It cannot therefore be entirely equated with a blanket policy type position.

123. Furthermore the structure of a Garda's career is such that he can attain the highest office within his term of service and hold that position for a reasonable period. Moreover, and I know of no other employment position where this is possible, a member can retire after 30 years of service with a full pension at age 50. Thus, in

addition to the financial package, which in this case is significant (see para. 9 *supra.*), a member's age of retirement is such that the prospect of a second career is very much open.

124. Counsel for the Plaintiff put forward the suggestion that a fixed term contract might serve better for the rank of Assistant Commissioner, and that this would alleviate the problem of "blocking", caused by Assistant Commissioners holding their position for upwards of ten years. Although this might be a more preferable option it is not for this Court to determine the employment policy of the Government in this regard, and as such it is a matter for the Minister and An Garda Síochána to decide. I thus do not propose to otherwise comment in this regard. I have thus come to the conclusion that the 1996 Regulations are proportionate.

125. I should also say that although much reference was made to the position of the Equality Act 2004 and it was suggested, albeit somewhat indirectly or even opaquely, that that Act in itself should be a yardstick against which the Regulation should be measured, this point was never fully explored and its correct place in contextual terms was never finalised. I therefore do not intend to deal with this matter individually. Instead I would merely note that any conclusions in relation to the Directive apply *mutatis mutandis* to any question of whether the 1996 Regulations are also compatible with the 2004 Act.

126. Before finishing, I must say that comments as to the legitimacy of the measures utilised in this case, as is usual, turn wholly on the specific facts of the case and such comments should not be taken as supporting the general legitimacy of all mandatory retirement or appointment ages. As noted, national measures relating to

compulsory retirement ages are not excluded from consideration under Directive 2000/78/EC. Any discrimination with regards to age must, as put by that Directive, serve a legitimate aim or purpose, and the means taken to achieve that purpose must be appropriate and should go no further than is necessary, *i.e.* they should be proportionate.

127. For the above-cited reasons I therefore dismiss the Plaintiff's case.

[2017] IEHC 272

Approved Judgment

No Redaction Needed

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 708 J.R.]

BETWEEN

MICHAEL LYONS

APPLICANT

AND

LONGFORD WESMEATH EDUCATION AND TRAINING BOARD

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 5th day of May, 2017

1. On the 9th September, 2016 Baker J. gave leave to the applicant to apply for judicial review and granted an order that the proceedings be stayed until the determination of the application for judicial review.

Facts

2. In May, 2015 the applicant was notified that a complaint of bullying had been made against him by his colleague, a teacher called Ms. Michelle Spence. This complaint cited a number of alleged incidents, some of which dated back to 2008. Notwithstanding the fact that the applicant's principal had been aware of the 2008 allegations for some years, the applicant first learned of their existence in 2015.

3. An investigation into the complaint was launched in accordance with the "Bullying Prevention Policy – Complaint Procedure for Education Training Board Staff". This procedure is specifically described as an industrial relations procedure and is not a legal procedure.

4. The respondent engaged a private limited company called Graphite Recruitment HRM Limited to carry out the investigation. The applicant was asked by the two investigators to submit his written response, to attend various meetings and interviews, with which he duly complied. On or about the 4th April, 2016 the applicant was furnished with a copy of the report of Graphite Recruitment HRM dated 24th March, 2016. As was apparent from the report, the two investigators of Graphite Recruitment HRM Ltd. had "upheld" the allegations of bullying against the applicant insofar as it related to four specific instances (only) alleged to have occurred between January and April 2015 as follows:

(i) the applicant's alleged failure to include Ms. Spence's in the transition year Art Plan in January, 2015;

(ii) the applicant's failure to "acknowledge" Ms. Spence at a staff meeting in April, 2015;

(iii) the applicant's alleged failure to include Ms. Spence in a community arts project in April/May 2015; and

(iv) a dispute between the applicant and the respondent in relation to the use of a camera for school photographs from September 2014 to June 2015.

None of the other allegations were upheld. At no stage was the applicant permitted to cross-examine his accuser.

5. On the 21st April, 2016 the applicant received a letter from the respondent dated the 20th April, 2016 advising that the report of Graphite Recruitment HRM Ltd. was to be adopted by the respondent. The applicant was advised that he had fifteen working days to make a limited appeal to the decision. He appealed but his appeal was rejected.

6. By letter dated 30th August, 2016 written by the Chief Executive of Longford Westmeath Education and Training Board, Christy Duffy, the applicant was advised that as his appeal had not been upheld that the investigation report "stands" together with the "findings" against him. The applicant was advised as follows: -

> "Bullying behaviour in an ETB workplace is unacceptable misconduct which properly falls to be addressed under the appropriate provisions of Circular Letter 71/2014 Disciplinary Procedures for Teachers Employed in Education and Training Boards. (herein "ETB")
>
> In the light of findings/conclusions of the investigation report (copy enclosed) you are required to attend a Stage 4 Disciplinary Meeting to be convened for the purpose of determining the disciplinary action if any, which may arise from the finding of the investigation referred to above."

The applicant was further advised that the meeting was scheduled to take place at 11:00am on Thursday the 15th September, 2016.

7. It was within this context that the applicant applied *ex parte* by way of application seeking a number of reliefs as set out below, to be presented before Baker J. on the 9th September, 2016.

Submissions on behalf of the Applicant

8. Counsel for the applicant indicated that the applicant was the Deputy Principal at Lanesboro Community College and that in or about May 2015 the applicant was notified that a complaint of bullying had been made against him by his colleague, a teacher called Michelle Spence. This complaint cited a number of alleged instances, some of which dated back to 2008. The applicant first learned of their existence in

2015. Notwithstanding this, the applicant's principal had been aware of the 2008 allegations for some years.

9. An investigation into the complaint was launched in accordance with the 'Bullying Prevention Policy – Complaint Procedure for ETB Staff' dated the 1st September, 2013. This procedure does not have any status under the Education Act 1998 (as amended by section 6 of the Education (Amendment) Act 2012) as it is not a disciplinary procedure and does not afford the subject of any investigation the safeguards provided for in Circular 71/2014. It is specifically described as an 'Industrial Relations Procedure' and not a legal procedure. Section 1.1 states:-

> "Agreed procedure is an industrial relations procedure and not a legal procedure. It will be conducted within the norms of industrial relations custom, practice and procedure and as such is not a judicial process. In circumstances where legal action is evoked, the policy will be suspended and the operation of law will take precedence." (this Court's emphasis).

10. The respondent engaged a private limited company called Graphite Recruitment HRM Ltd. to carry out the "investigation".

11. The applicant was asked by members of staff of Graphite Recruitment HRM Ltd. to submit his written response by the 21st May, 2015. He complied with this request. He was also requested to attend various meetings and interviews and he duly complied. The procedures designed and adopted by Graphite Recruitment HRM Ltd. did not permit the applicant to confront his accuser or challenge by way of cross examination the allegations against him. According to the agreed policy document it was expected that this investigation would take five to six weeks. The process eventually concluded on the 4th March, 2016 having been in existence for forty-three weeks (this Court's emphasis).

12. On or about 4th April, 2016 the applicant was furnished with a copy of the report of Graphite Recruitment HRM Ltd. dated 24th March, 2016. As was apparent from the report, the two employees of Graphite Recruitment HRM Ltd. had "upheld" the allegations of bullying against the applicant insofar as it related to four specific instances alleged to have occurred between January and April 2015. None of the other allegations were upheld. On the 21st April, 2016 the applicant received a letter from the respondent dated 20th April, 2016 advising that the report of Graphite Recruitment HRM Ltd. was to be adopted by the respondent. Such "adoption" has no and can have no legal implications for the processes provided in Circular 71 of 2014. The applicant was advised that he had fifteen working days to take a limited procedural appeal to the decision and his appeal was rejected.

13. By letter dated 30th August, 2016 from the Chief Executive of Longford Westmeath Education and Training Board, Mr. Christy Duffy, the applicant was advised that as his appeal had not been upheld and that the investigation report "stands" together with the "findings" against him. As set out above, the applicant was required to attend a "Stage 4 Disciplinary meeting".

This was the first indication of any disciplinary process.

14. By letter dated 31st August, 2016 the applicant's solicitors wrote objecting to the course of action proposed and followed this letter with a further letter of the 2nd September, 2016 outlining the detailed basis for the applicant's objections to the respondents proposed course of action. The applicant requested assurances that any steps that the respondent proposed to take in respect of the as yet unspecified allegations against him would be taken entirely in accordance with Circular 71/2014 and by letter dated the 6th September, 2016 the respondent solicitor responded that the applicant concerns were unfounded and that the disciplinary meeting would proceed.

Legislation

15. By virtue of the provisions of the Vocational Educational Act 1930, the respondents' predecessor in title was established to perform the functions conferred on it by the Act.

16. By virtue of the Education and Training Boards Act 2013 the existing Vocational Educational Committees were dissolved and replaced by a number of ETB's including the respondent.

17. Section 24 of the Education Act 1998 as amended by s. 6 of the Education (Amendment) Act 2012 provided:-

> (11) The board of a recognised school may, in accordance with procedures determined from time to time by the Minister following consultation with bodies representative of patrons, recognised school management organisations and with recognised trade unions and staff associations representing teachers or other staff as appropriate, appoint, suspend or dismiss any or all of the principal, teachers and other staff of a school, who are remunerated or who are to be remunerated out of monies provided by the Oireachtas."
>
> (12) Where the employer of the principal, teachers and other staff of a recognised school is a person other than the board of the school concerned, a reference in this section to a board shall be construed and have effect as if the said person were substituted for the said reference wherever it occurs.
>
> (13) In applying subsection (11) to the principal, a teacher or other member of staff of a recognised school which is established or maintained by a

vocational education committee, the board of the recognised school concerned shall comply with the provisions of the Vocational Education Committee Acts 1930 to 2006 in relation to suspension and dismissal."

18. Counsel submitted that the respondent is required to carry out its functions in accordance with the provisions of Education Act 1998 as amended that "procedures determined from time to time by the Minister" and the requirements of natural and constitutional justice and fair procedures. In particular, the respondent is bound to invoke any disciplinary process against a teacher strictly in accordance with the procedures set out in Circular 71 of 2014, which has been issued by the Minister in accordance with the above provisions of the Education Act 1998 as amended. The applicant submitted that separately, outside the scope of s. 24 of the Education Act 1998 as amended and without departmental approval or sanction, the respondent has adopted a "non-legal" industrial relations procedure – a bullying prevention policy or complaint procedure for ETB staff. The document in question or the processes outlined therein do not constitute substitution for the procedures contained in Circular 71 of 2014 issued by the Minister pursuant to s. 24 of the Act of 1998.

The Essential Aspects of Fair Procedure

19. Counsel for the applicant stated that it was one thing for a preliminary investigation to ascertain the background to an allegation, or to assemble competing contentions in respect of disputed issues of fact. Such a process can facilitate a disciplinary process being conducted in an efficient and manageable way, still observing fair procedures. It is quite another thing for an investigation not in compliance with mandated procedure, or on a more basic level, not in compliance

with fair procedures, to form the factual basis of an investigation on which disciplinary sanctions can be imposed. He quoted *Millick v. Irish Casing Co. Ltd.* [2007] 18 ELR 229 where Clarke J. discussed the difference between investigations that do not involve any findings of fact (to which all rules and natural justice need not apply) and inquiries which can make formal findings (to which rules of justice do apply). He also quoted *Marie Fuller v. the Minister for Justice* [2005] 1 I.R. 529 in which McGuinness J. commented *obiter dictum* in relation to the differences between statutory powers applicable when disciplining civil servants and industrial relations procedures of the State:

> *"in my view ss. 13 to 16 of the Act of 1956 were intended by the Oireachtas to deal with matters of discipline concerning individual civil servants. The Oireachtas has two other legislations provided a framework for the resolution of industrial disputes and has established bodies such as the Labour Relations Commission, the Labour Court and other specialist negotiation and arbitration bodies to this end. These means are available to the applicants and respondents as the means of resolving their dispute."*

The Bullying Prevention Policy

20. While this document is described as "nationally agreed", it is evident from the terms of the document itself that it is in no sense a "national agreement". It is simply an agreement between the relevant Trade Unions and the ETBs. It covers both teachers and non-teaching staff. The document has no capacity in law to impact upon the terms of Circular 71/2014. The two documents are entirely different and distinguishable. At page 14 of the bullying prevention policy, it is indicated that breaches of the policy "will be regarded as misconduct and maybe subject to

disciplinary action under the disciplinary procedure relevant for the staff member concerned". This merely indicates that an alleged breach of the policy may form a disciplinary charge under the disciplinary procedures and no more. Where a complaint of bullying is "upheld, it is clear that disciplinary action will be taken in accordance with the appropriate stage of the ETB Disciplinary Policy for Staff". It is clear as a matter of law that if the disciplinary proceedings are indeed to be taken, these must be under, and have as their legal basis, Circular 71 of 2014. The Bullying Prevention Policy cannot affect or render *otiose* any provision of Circular 71/2014.

21. The bullying prevention policy outlines an informal process. Under the heading "Failure by a Staff Member to attend Meetings under the Formal Stages of the Procedure", it is clear that the only sanction for a staff member who fails to cooperate with the procedures is that the procedure continues in their absence.

22. There is mention of the ETB nominating two investigators from a panel of "approved investigators".

23. Counsel on behalf of the applicant submitted that the "investigation" which is to be subcontracted is to be conducted in accordance with the terms of reference and protocol provided for in Appendix II. It is evident from a consideration of the protocol that the requirements of natural justice have not been incorporated into the protocol. It would be essential for natural justice to be complied with, if reliance were to be placed on "findings" for the purposes of dismissing an employee.

24. The following is provided by Counsel for the applicant by way of example of how the protocol lacks compliance with fair procedures. Individual witnesses are invited to a "meeting". A draft minute of the interview conducted will then be prepared and provided to the witness. The witness can apparently can review the draft minute and suggest changes, this even in respect of matters on which they have

given evidence. The investigator then makes a "determination" on the amendments suggested.

25. The witness is entitled to attend at an interview accompanied by a work colleague or trade union representative (but not a legal representative). The following is set out in the protocol:

> "conflicting witness accounts - where the investigators are presented with conflicting accounts of an incident and where no additional witnesses are available or where evidence is not persuasive, the case rests upon which version of the events the investigator considers the more credible, but a rationale must be provided".

26. Counsel for the applicant submitted that it was far from clear where this understanding of 'fair procedures' had come from - it does not obtain any support from principle nor from the case law of the High Court to Supreme Court in the past half century. Counsel further submitted that the final investigation report must include "an assessment of credibility for each party in witness" along with the investigators "findings of fact". He said that the subject of an allegation, such as the applicant would not be entitled to challenge including by way of cross-examination the evidence against him.

Case Law relating to Fair Procedures

27. Counsel for the applicant submitted that the law in respect of fair procedures was clear, particularly where an individual is liable to be dismissed from his or her employment. When a Stage 4 process under Circular 71 to 2014 is invoked, it follows that a teacher may be dismissed.

28. He submitted that cross-examination is clearly necessary in bodies which are administering justice. The entitlement to cross-examine allegations is not confined to a court body administering justice. In *Borges v. Fitness to Practice Committee* [2004] 1 I.R. 103 Keane C.J. stated:-

> *"It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this court In re Haughey [1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practising as a doctor, either for a specified period or indefinitely."*

Keane C.J. continues:-

> *"The applicant cannot be deprived of his right to fair procedures, which necessitates the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person."*

29. Counsel also cited the comments of Hardiman J. *Maguire v. Ardagh* [2002] 1 I.R. 385 who also quoted from Ó Dálaigh C.J. in *Re Haughey* [1971] I.R. 217 wherein Ó Dálaigh C.J. said:-

> *"In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights and in compliance with the Constitution the State,*

either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."

30. He also quoted a recent case of *E.E. v. Child and Family Agency* [2016] IEHC 777 a decision of the 14th November, 2016 where Humphreys J. summarised the matter as follows:-

"To require, as a matter of mandatory constitutional law, a right to cross-examine politicians and businesspeople in a tribunal or mere inquiry whose findings are 'legally sterile', but to refuse to accept such a right at the suit of a 'man of no property' such as this applicant, where there are huge and fundamental issues of human, natural, constitutional and ECHR family rights at issue, would be an egregious form of judicial doublethink and an abdication of the judicial function to vindicate the rights of the individual."

31. Counsel for the applicant submitted that it was evident therefore that where a deputy principal of a school in the management of the ETB is notified that he is to be subjected to a disciplinary procedure under Circular 71/2014, whether at Stage 4 or at any of the formal stages, fair procedures manifestly indicate that he will have the right to confront and cross-examine the individual who has made the allegations against him.

32. He said that Circular 71 of 2014 expressly provides for the entitlement of a person in the position of the applicant to challenge any evidence which is to be relied upon at a Stage 4 hearing - this is a mandatory requirement of Circular 71/2014. He submitted that it was clear as a matter of law and as a matter of fair procedures, an individual whose job was at stake and against whom allegations were to be made would be entitled to challenge and cross-examine the evidence to be relied upon in the

case against him. He then quoted Circular 71 which this Court will deal with in more detail.

33. He submitted in particular in relation to Stage 4, the following appears to be the essential aspects:

(1) If the conduct is of a "serious nature", a comprehensive report on the facts of the case will be prepared by the principal and forwarded to the chief executive. A copy will be given to the teacher.

(i) It does not appear that any such report is being prepared, and no such report has been given to the applicant in this case.

(ii) Following the provisions of the comprehensive report prepared by the principal there are a number of essential procedural steps that must be taken.

(iii) If the chief executive decides to proceed to a disciplinary process, the teacher will be provided with an opportunity to attend at a meeting with the chief executive accompanied by his or her trade union representatives or a colleague subjected to an overall maximum of two. It is clear at this stage that there is no question of the chief executive proceeding to a disciplinary sanction but rather to a disciplinary process as provided for in Circular 71/2014.

(iv) It is entirely possible that upon receipt of a comprehensive report and the practice of the case which will have been forwarded in the interim to the teacher, the chief executive will decide not to proceed to a disciplinary process.

However, the chief executive in his affidavit states:

> "I say that the fact of the matter is that a sufficient number of allegations against him where upheld as led to the investigation concluding that there had been repeated inappropriate behaviour."

Following the hearing, the chief executive formulates "his/her judgment". The chief executive will take into account the report from the principal, any other evidence and the teacher's representation if any thereon.

Counsel made the submission that there was no report from the principal.

34. Counsel for the applicant also said that from an analysis of the correspondence and the documentation generated by the respondent, it would appear to be the case that the chief executive has formed the view that the process conducted by Graphite Recruitment HRM Ltd. had made findings of fact, upon which he could rely. The fact that this process itself did not allow for the applicant to challenge evidence by way of cross-examination and to confront his accuser appears to have been regarded by the chief executive as irrelevant.

Bias

35. The issue which counsel for the applicant brought to the court's attention was the issue of objective bias resulting from the chief executive having already "adopted" findings, flowing from the process conducted by Graphite Recruitment HRM Ltd.

Irrationality – Proportionality

36. Counsel for the applicant stated that no consideration was given to invoking the disciplinary process at the informal stages of Stages 1, 2 and 3. Linked to this is the failure to consider what is factually accurate within the allegations already made. Whatever about process and findings lacking in fair procedure, looked at objectively,

counsel for the applicant submits that the allegations made are manifestly insufficient in severity or in frequency to constitute "bullying. He cited a decision of Kearns P. in *Glynn v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2014] IEHC 133, where the President dismissed the plaintiff's claim, holding that for an allegation of bullying to be actionable, the first question the court must answer is whether the behaviour complained of, by reference to an objective test, imports that degree of calibrated inappropriateness and repetition (this Court's emphasis) which differentiates bullying from workplace stress or occupational stress.

37. In conclusion, counsel for the applicant reiterated the following points:

(1) The respondent had displayed objective bias towards the applicant;

(2) Circular 71/2014 envisages that if the disciplinary procedures provided for therein are to be implemented this will involve a number of stages moving from informal stages to formal stages, and that the respondent in its letter of the 30th August, 2016 and the chief executive's letter of the 30th August, 2013 failed to indicate upon what basis such significant stages are apparently not to be adopted.

38. No rational basis or reason had been advanced for the decision not to avail of Stage 1, Stage 2 or Stage 3 of the procedures and the respondent has not acted in accordance with the procedural safeguards contained in Circular 71/2014.

Submissions on behalf of the Respondent

39. Counsel for the respondent set out the legal framework, and stated that section 24 of the Education Act 1998 was replaced by the substitution of a new section inserted by s. 6 of the Education (Amendment) Act 2012 (the Act of 2012). At that time, the Vocational Educational Committees were still in existence and special

provision was made in ss. (13) for the Application of the Provision of the EEC Acts. In addition, ss. (12) provided that the phrase "Board" would in certain circumstances mean the employer. Section 65 of the Education Training Boards Act 2013 contains a provision deleting the aforementioned subs. 13, therefore with the establishment of the ETBs, ss. 12 came to apply to them.

40. The ETBs maintain schools through the provision by it of teaching staff and a host of other services. As the employer of staff, it then performs all the staff functions provided for by section 24 of the Act of 1998 as replaced, that is an ETB can appoint, suspend and dismiss staff. The performance of these functions of appointments, suspension and removal are not reserved functions but are executive functions that fall to be performed by the chief executive.

41. Counsel for the respondent accepted that Circular 71 of 2014 refers to procedures approved by the Department of Education and Skills, the interpretation application of this Circular.

42. The Bullying Prevention Policy exists because of the legal obligation on the ETB to address its obligations under section 60 of the Safety, Health and Welfare at Work Act 2005.

43. He submitted that in 2006 the Vocational Education Committees in consultation with the trade unions adopted policies and procedures for this educational section to prevent workplace bullying, harassment and sexual harassment. Over time these policies were amended to take account of legislative and other changes within the sector, culminating for the present purposes with a version of the bullying prevention policy which issued for implementation on the 1st of September, 2013 following the enactment of the Education and Training Boards Act 2013. The policy was later amended from the 1st of March, 2015 and again in 2016 and he said

that in part what is before the court is the interplay between the two lawfully adopted policies.

44. Counsel for the respondent submitted that there was only one decision that was the subject of the judicial review and that is the decision of the chief executive to summon the applicant to a meeting. He submitted that what was not the subject of challenge was the following:

(a) the decision to invoke the bullying policy on the foot of a complaint of the 1st of May, 2013;

(b) any issue of compliance with the bullying policy;

(c) the procedures adopted during the investigation;

(d) the report of the investigation that issued on the 20th of March, 2016;

(e) the adoption by the chief executive of the findings of the report on the 28th of April, 2016;

(f) the rejection of the applicant's procedural appeal against the chief executive's adoption of the report by the Workplace Relations Commission;

He also said that it was important to note that the chief executive in adopting the report, adopted it in total, including those findings favourable to the applicant.

45. He suggested that the applicant now wants to urge the court that:-

(a) he can now retrospectively seek to undermine the Investigation Report that is being adopted by including the fairness of the procedures of the investigation on foot of which was prepared;

(b) the applicant seeks to stop the holding of a preliminary meeting on the basis that notwithstanding the conclusion of the bullying investigation

that a Stage 4 disciplinary process cannot proceed on two discrete grounds:

(i) That the decision of the stage to invoke s. 4 is disproportionate and irrational;

(ii) It is a precondition of Stage 4 that the process should be grounded on a report prepared by the principal of the school. On the basis that there is no such report, the applicant seeks to exclude the chief executive from any involvement in the disciplinary processes on the basis of alleged objective bias.

46. Counsel for the respondent submitted that Circular 71 of 2014 contains two sections. One section deals with competency issues and the other deals generally disciplinary measures. Further separate routes are set out for dealing with teachers and principals. He also submitted that Circular 0071 of 2014 is in part commentary, in part advisory in tone, and in part formal. Section 1 headed "background" and s. 2 "general principles" apply to all sections of the circular. Section 3 concerns professional competence and what appears to be s. 4 (the sections are not numbered) relates to work and conduct issues. The introduction to the relevant section states:-

> "Although disciplinary action will normally follow the progressive stages the procedure may be commenced by the school at any stage of the process if the alleged misconduct warrants such approach."

Circular 71 however does not address the manner in which complaints that are not dealt with by the principal of the school enter the process as set out.

47. He submitted that this is a classic case where the policy does not address precisely the circumstances in this case, in that for good and fair reasons: the policy covers circumstances where (a) the complaint is not investigated by the principal and

(b) the comprehensive report on the facts of the case is not prepared by the principal. He said that it could not be the case that the employer is left in a *lacuna*, where no disciplinary procedure can be invoked. He said that if the applicant's logic is followed - the only process allowing a bullying investigation was one in which the chief executive had to note a report made by the school principal. Otherwise, the chief executive would have to deal with the investigation informally with no sanction.

48. The Bullying Prevention Policy provides that:

(1) Every employee has a right to make a formal complaint pursuant to the policy and there is no requirement to commence a complaint at the informal stage.

(2) Where a formal complaint is made, not to the school principal but to the Head of Human Resources in the ETB head office, this removes the matter from the realm of the local school entirely.

(3) A formal investigation is then carried out by approved persons unassociated with the employer and such investigation must conclude in findings being made.

(4) Once such findings are made the matter is then passed to the chief executive who must, in the first instance, determine to either adopt or reject the report. No other option is available to the chief executive.

(5) The aforementioned determination of the chief executive may be appealed by the complainant or the person subject of the complaint to the Workplace Relation Commission by way of procedural challenge.

(6) There is a provision for invoking the disciplinary proceeding at an appropriate stage.

Right to Cross-Examine

49. Counsel for the respondent submitted that the applicant's rights to natural justice were respected and this is clear from the material before the court and in particular from the full exchanges, statements and invitations to reply. He said that the applicant now raises a question of an entitlement to cross-examine witnesses. Neither before entering upon the investigation or at any stage during the investigation did the applicant request a facility to cross-examine any witness. At no stage was the applicant denied that facility and in his procedural appeal to the Workplace Relations Commission he did not identify this as a matter of concern.

50. He submitted that the investigation dealt fairly and evenly with both the applicant and the complainant and in doing so meet the requirements of natural justice as set out by Henchy J. in *Kiely v. the Minister for Social Welfare* [1977] I.R. 267:-

> *"It would be contrary to natural justice if one side were allowed to shelter behind his controverted documentary evidence while the other side had to bring his witnesses to the hearing, where they might be required to give their evidence on oath and to be subject to cross-examination. The lack of mutuality and the potential for an unjust determination inherent in such a procedure would put it in conflict with the rule of audi alteram partem."*

He said further:-

> *"This Court has held, in cases such as In re Haughey that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally — to receive unsworn evidence, to act on hearsay, to depart from*

the rules of evidence, to ignore courtroom procedures, and the like — but they may not act in such a way as to imperil a fair hearing or a fair result."

51. In relation to the report of the bullying investigation counsel submitted that the applicant does not identify in respect of any of the adverse findings made against him any factual evidence with which he disagrees to which the case might be made that a failure to allow for cross-examination was material.

52. He submitted that the chief executive is entitled to continue with the disciplinary process, with the bullying report and the background materials properly before him as evidence. The principles of natural justice do not require that matters which have independently been investigated in a fair and balanced process be heard "*de novo*" in a further stage of a disciplinary process. In this instance, at all times it was known that the bullying policy was not purely an 'evidence gathering exercise' but also the policy implies that the investigators required to make findings. What has to be considered is how the principles of natural justice have applied in section 4 in that the Circular refers to a teacher's right to challenge the evidence that is being relied upon. In that regard, it is open at all times to the applicant to take issue with the characterisation of his conduct as bullying, to highlight any conclusions that are not supported by evidence, and the applicant can seek to introduce additional evidence.

The Absence of a Report from the Principal

53. Counsel for the respondent submitted that it was self-evident that the matter proceeded without a report from the school principal, and in that respect it does not accord with its specified procedure. He raises the question: is the absence of the report from the principal fatal? He said the court may take the view that the lack of formal compliance does not justify relief by way of judicial review. He referred to

administrative law in Ireland by Hogan 4th Ed. and the judicial remedies in public law by Lewis 3rd Ed. and he quoted from Laffoy J. in *McGlinchey v. Ryan* [2010] IEHC 536:-

> *"It is well settled, as a matter of constitutional law and of contract law, that an employee who is involved in a disciplinary process in the course of his employment is entitled to be afforded fair procedures, although what constitutes fair procedures may vary from case to case. In this case, the inquiry was to be governed in accordance with the agreement between the plaintiff and the defendant embodied in the Terms of Settlement and in accordance with Annex 1 thereto. The conduct of the inquiry was subject to the express terms agreed between the parties and the ruling of the adjudicator falls to be considered against those terms."*

54. Counsel for the respondent submitted that it was clear in this case that all the parties concerned knew well from the outset that the process was going to be conducted within the framework of the Bullying Prevention Policy which, in turn, contains explicit and specific provisions for referral to the circular letter and the disciplinary procedure. It is immediately clear from a perusal of the extensive account given by the investigators of the manner in which they conducted their work that they paid close attention to all matter and procedural fairness and natural justice.

55. The underlining fact is that the applicant participated fully in that process without even once raising the issue of either where or to whom the report of the investigation was going to be sent. He did not raise the possibility of cross-examining throughout the process. In such a circumstances he submitted that an estoppel arises, as to his right to cross-examine presently. The applicant's participation in the process throughout highlights the lack of importance the applicant attached to the absence of

the principal's report. The absence of the principal's report may therefore be considered by the Court as not fatal to the process.

Objective Bias

56. Counsel for the respondent states that objective bias is complained of solely on the basis that the chief executive has adopted the investigation report which follows the disciplinary report. Whereas it is apparent that the chief executive had no hand, act or part in the findings of the investigation report, and that his role in adopting the investigation report was administrative, his role in determining to proceed to Stage 4 hearing was equally consistent with what would happen if it had been the case that a report on this or any other matter was to come to him from a school principal.

The Statutory Framework

57. The Vocational Education Act 1930 provided for vocational education committees. By virtue of the Education and Training Boards Act 2013 the existing vocational educational committees were dissolved and were replaced by a number of ETBs. Section 15 of the 2013 Act provides the following:

> 15(1) A chief executive of an education and training board shall perform the executive functions of the board.

58. Sections 23 and 24 of the Education Act 1998 were substituted by s. 6 of the Education Act (Amendment) Act 2012. Section 23 provides:

> "In addition to the functions conferred on a Principal by section 22, the Principal of a recognised school shall—
>
> (a) be responsible for the day-to-day management of the school, including guidance and direction of the teachers and other staff of

the school, and be accountable to the board of the school for that management,

(b) provide leadership to the teachers and other staff and the students of the school,

(c) be responsible, together with the board, parents of students and the teachers, for the creation in the school of an environment which is supportive of learning among the students and which promotes the professional development of the teachers,

(d) under the direction of the board, and in consultation with the teachers, the parents and, to the extent appropriate to their age and experience, the students, set objectives for the school and monitor the achievement of those objectives, and

(e) encourage the involvement of parents of students in the school in the education of those students and in the achievement of the objectives of the school.

(2) For the purpose of carrying out his or her functions under this Act, a Principal of a recognised school shall have all such powers as are necessary or expedient in that regard, and shall carry out his or her functions in accordance with—

(a) such policies as may be determined from time to time by the board of the school, and

(b) regulations made under section 33.

(3) The Principal of a recognised school shall be entitled to be a member of any and every committee appointed by the board of the school.

(4) Wherever practicable, the Principal of a recognised school shall, in exercising his or her functions under this section, consult with teachers and other staff of the school.

(5) Where the employer of the Principal, teachers and other staff of a recognised school is a person other than the board of the school concerned, a reference in this section to a board shall be construed and have effect as if the said person were substituted for the said reference wherever it occurs."

59. Section 24 states:

"(1) Subject to this section, the board of a recognised school—

(a) shall, if not already appointed, appoint a person to be Principal of the school, and

(b) may appoint such and so many persons as teachers and other staff of the school as the board from time to time considers necessary for the performance of its powers and functions under this Act.

...

(12) Where the employer of the Principal, teachers and other staff of a recognised school is a person other than the board of the school concerned, a reference in this section to a board shall be construed and have effect as if the said person were substituted for the said reference wherever it occurs.

(13) In applying subsection (11) to the Principal, a teacher or other member of staff of a recognised school which is established or maintained by a

vocational education committee, the board of the recognised school concerned shall comply with the provisions of the Vocational Education Committee Acts 1930 to 2006 in relation to suspension and dismissal."

Circular 0071 of 2014

60. Circular 0071 of 2014 was sent to Chief Executives of ETBs and provided for the revised procedures on the suspension and dismissal of teachers and principals. Previous circulars were superseded by Circular 0071 of 2014.

61. The background to the revised procedures provided:

"(1) Background

Under the terms of *Towards 2016* the parties undertook to review and revise existing procedures for the suspension and dismissal of teachers comprehended by Section 24(3) of the Education Act 1998. Since the parties noted that the provisions of Section 24 of the Education Act 1998 did not apply to teachers in schools operated by vocational education committees (VECs) further discussions ensued involving the Department of Education and Science, the IVEA, the TUI and the ASTI in order to adapt the provisions agreed in relation to other teachers to accommodate the specific management structures and processes operating in VEC schools. These discussions concluded in procedures for the suspension and dismissal of teachers in VEC schools being agreed between the parties.

The following procedures have now been issued in that context.

ETBs and Principals have a responsibility for the quality and effectiveness of education and the management of staff in a school as set out in the Education Act 1998.

While no procedures can be definitive about the range of circumstances which might give rise to the initiation of disciplinary procedures in general these are likely to be related to misconduct, a threat to the health and safety of students and/or sustained failure to perform adequately the professional duties and responsibilities expected of a teacher.

(2) General Principles underpinning these procedures

Apart from considerations of equity and justice (this Court's emphasis), the maintenance of a good industrial relations atmosphere at workplace level requires that acceptable procedures be in place and be observed. Disciplinary procedures are necessary to ensure both that discipline is maintained in the workplace and that disciplinary measures can be applied in a fair and consistent manner.

Such procedures serve a dual purpose in that they provide a framework which enables management to maintain satisfactory standards and employees to have access to procedures whereby alleged failures to comply with these standards may be fairly and sensitively addressed.

The essential elements of any procedures for dealing with disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be

imposed is well-defined and that an internal appeal mechanism is available."

The general principles continue as follows:

"These procedures are intended to comply with the general principles of natural justice (this Court's emphasis) and provide:

- that there will be a presumption of innocence. No decision regarding disciplinary action can be made until a formal disciplinary meeting has been convened and the employee has been afforded the opportunity to respond to the allegations raised (this Court's emphasis)
- that the employee will be advised in writing in advance of a disciplinary meeting of the precise nature of the matters concerned and will be given copies of all relevant documentation. In the case of a complaint, this detail will include the source and text of the complaint as received. A complaint should be in writing.
- that details of the allegations, complaints or issues of professional competence be put to the teacher concerned
- that the right of a teacher concerned to have access to and to view his/her personnel file (to include all records in relation to the teacher in hardcopy or electronic format, held by the school/ETB) will be fully respected
- that the teacher concerned is given the opportunity to avail of representation by a work colleague or trade union representative/s
- that the teacher concerned be given the opportunity to respond fully to any such allegations, complaints or issues of professional competence (this Court's emphasis)

- that the teacher concerned has the right to examine and challenge all evidence available and to call witnesses or persons providing such evidence for questioning (this Courts emphasis)
- that the teacher concerned has the right to a fair and impartial examination of the issues being investigated, taking into account the allegations or complaints themselves, the response of the teacher concerned to them, any representations made by or on behalf of the teacher concerned and any other relevant or appropriate evidence, factors or circumstances
- that the ETB, as employer, has a duty to act reasonably and fairly in all interactions with staff and to deal with issues relating to conduct or professional competence in a confidential manner which protects the dignity of the teacher
- that all matters relating to the disciplinary procedure are strictly confidential to the parties and their representatives
- that it will be considered a disciplinary offence for any person to intimidate or exert inappropriate pressure on any person who may be required to attend as a witness
- that where a decision is taken to impose a disciplinary sanction, the sanction imposed will be in proportion to the nature of the conduct/behaviour/performance that has resulted in the sanction being imposed
- that these procedures are without prejudice to the right of a teacher to have recourse to the law to protect his/her employment."

62. Circular 0071 of 2014 provides for the disciplinary procedures for teachers employed in ETBs. The procedure was developed following the discussions between the Department of Education and Skills, School Managerial Bodies and recognised Teacher Unions. It takes account of employment legislation and the Labour Relations Commission's Code of Practice on Disciplinary Procedures. This procedure superseded all existing local and national disciplinary procedures.

63. The document states:-

> "This procedure relates to work and conduct issues and matters other than professional competence and applies to all teachers other than those serving in a probationary capacity."

64. The Court notes that allegations in respect of child abuse as defined in Child Protection Guidelines for Primary and Post-Primary schools are dealt with in the first instance under these guidelines.

65. It appears to this Court that allegations of bullying should also be dealt with in the first instance under these guidelines. However, the Court will revert to this in due course.

> "Informal Stage
>
> It is intended that problems relating to work and conduct are resolved, where possible, through informal means (this Court's emphasis). To this end the Principal will discuss any unsatisfactory conduct with the teacher concerned and inform him/her of the required improvements. The teacher will be given an opportunity to offer explanation and comment. Where an improvement might be effected without recourse to disciplinary action, guidance will be provided as appropriate and due attention will be given to whether the shortcoming is due to personal,

health or domestic circumstances. In such cases help and advice will be given where possible. The teacher will also be informed that unless the necessary improvement is made the matter may proceed to the formal disciplinary procedure.

Stage 1: Verbal Warning

A formal disciplinary meeting with the teacher will be convened by the Principal. The teacher will be given at least five school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative or a work colleague."

66. The Court notes that there is no entitlement for a teacher to have a legal representative with him and the Court will revert to this in due course.

"At the meeting the teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision. Having considered the response, the Principal will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the Principal will inform the teacher that he/she is being given a verbal warning. Where a verbal warning is given it should state clearly the improvement required and the timescale for improvement. The warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process."

67. The court notes that the processes at Stages 1 to 3 were not taken by the defendant in this matter.

> "Stage 2: Written Warning
>
> If, having received a verbal warning, the teacher's conduct is perceived by the Principal to be less than satisfactory in relation to that required at Stage 1 a meeting will be arranged between the teacher and the Principal and another officer delegated by the Chief Executive. The teacher will be given at least seven school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative/s or a colleague/s subject to an overall maximum of two."

68. Again the Court notes that the procedures for the suspension and dismissal of teachers and principals exclude the possibility of a teacher being represented by a legal representative.

> "At the meeting the teacher should be given a clear statement of the area/s where his or her conduct is perceived as unsatisfactory. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response, the Principal and the other officer delegated by the Chief Executive, will decide on the appropriate action to be taken. Where it is decided that no action is warranted the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted the teacher will be informed that he/she is being given a written warning. Where a written warning is given

it should state clearly the improvement required and the timescale for improvement. The written warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process.

Stage 3: Final Written Warning

If having received a written warning, the Principal perceives that the teacher's conduct remains less than satisfactory or there is an occurrence of a more serious offence, a meeting will be arranged between the teacher, the Principal and another officer delegated by the Chief Executive. The teacher should be given at least seven school days' written notice of the meeting. The notice should state the purpose of the meeting and the specific nature of the complaint together with any supporting documentation. The teacher concerned may be accompanied at any such meeting by his/her trade union representative/s or a colleague/s subject to a maximum of two.

At the meeting the teacher should be given a clear statement of the area/s where his or her conduct is perceived as unsatisfactory. The teacher will be given an opportunity to respond and state his/her case fully and to challenge any evidence that is being relied upon for a decision and be given an opportunity to respond. Having considered the response, the Principal and the other officer delegated by the Chief Executive will decide on the appropriate action to be taken. Where it is decided that no action is warranted, the teacher will be so informed in writing within five school days. Where it is decided that disciplinary action at this stage is warranted, the teacher will be informed

that he/she is being given a final written warning. Where a final written warning is given it should state clearly the improvement required and the timescale for improvement. The final written warning should inform the teacher that further disciplinary action may be considered if there is no sustained satisfactory improvement. The teacher will be advised of his/her right to appeal against the disciplinary action being taken and the appeal process.

The final written warning will be active for a period not exceeding 12 months and subject to satisfactory service will cease to have effect following the expiry of the 12 month period.

Stage 4:

If it is perceived that the work or conduct has continued after the final written warning has issued or the work or conduct issue is of a serious nature a comprehensive report on the facts of the case will be prepared by the Principal and forwarded to the Chief Executive. A copy will be given to the teacher.

In accordance with the provisions of the Education and Training Boards Act, 2013, employment matters including the suspension and dismissal of staff are executive functions. Consequently, the following procedures will apply.

4.1 If the Chief Executive decides to proceed to a disciplinary process, the teacher will be provided with an opportunity to attend at a meeting with the Chief Executive accompanied by his/her trade union representative/s or a colleague subject to an overall maximum of two. (The court notes again that there is no

provision for a legal representative even though issues relating to suspension and dismissal of staff are at issue).

The teacher will be given at least 7 school days' notice of the meeting. The notice should state the purpose of the hearing and the fact that disciplinary action may be considered.

At the meeting the teacher will be given an opportunity to make his/her case in full and to challenge any evidence that is being relied upon for a decision.

Following the hearing the Chief Executive shall make his/her judgement on the matter. In formulating his/her judgement the Chief Executive will take account of the report from the Principal, any other evidence and the teacher's representation (if any) thereon.

The Chief Executive shall notify the teacher of his/her decision and any intended disciplinary action if that be the outcome of his/her deliberations. If it is decided to take disciplinary action, the Chief Executive may avail of any of the following range of sanctions.

(a) Final written censure

(b) Deferral of an increment

(c) Withdrawal of an increment or increments

(d) Demotion (loss of post of responsibility)

(e) Other disciplinary action short of suspension or dismissal

(f) Suspension (for a limited period and/or specific purpose) with pay

(g) Suspension (for a limited period and/or specific purpose) without pay

(h) Dismissal

Where disciplinary action short of dismissal is proposed, the case will be reviewed by the Chief Executive within a specified time period to consider whether further disciplinary action, if any, is required.

The Chief Executive will act reasonably in all cases when deciding on the appropriate disciplinary action. The nature of the disciplinary action should be proportionate to the work or conduct issue that has resulted in the sanction being imposed."

69. The next section is headed "Gross Misconduct":-

"In cases of serious misconduct at work or a threat to health and safety to children or other personnel in the school the stages outlined above do not normally apply and a teacher may be dismissed without recourse to the previous stages.

The following are some examples of gross misconduct for which any or each of Stages 1 to 3 of the disciplinary procedure may not apply depending on the gravity of the alleged offence:

- Theft
- Deliberate damage to school property
- Fraud or deliberate falsification of documents
- Gross negligence or dereliction of duties
- Refusal to comply with legitimate instructions resulting in serious consequences

- Serious or persistent incapacity to perform duties due to being under the influence of alcohol, unprescribed drugs or misuse of prescribed medication
- Serious breach of health & safety rules
- Serious abuse/misuse of the school property/equipment
- Serious breaches of confidentiality
- Serious bullying, inappropriate behaviour, sexual harassment or harassment against an employee or customer, including students
- Violent/disruptive behaviour
- Downloading/disseminating pornographic material from the internet
- Circulation of offensive, obscene or indecent e-mails or text messages.

The above list is not exhaustive.

If there is an allegation of serious misconduct the teacher may be suspended on full pay pending an investigation and the conclusion of any appeal process.

In the course of investigation, the teacher concerned has the right to have the allegations brought to his/her attention and he/she has the right to respond to all allegations. If the investigation upholds a case of serious misconduct the normal consequence will be dismissal.

Stage 5: Appeals

It will be open to the teacher to appeal against the proposed disciplinary action. In the case of sanctions being imposed at Stages 1, 2 and 3 the appeal will be to an officer delegated by the Chief Executive who has not had a previous involvement with the matter and who is of an equal or higher grade

to the officer who imposed the sanction for example, the Principal, APO, PO, EO or CE. In the case of serious misconduct being imposed under stage 4 of the procedure an appeal will be to a disciplinary appeal panel appointed by the Chief Executive as set out in Appendix A. The procedures for appealing are as set out in Appendix A.

Appendix A: Appeal Process

A teacher may seek a review of disciplinary proceedings by the panel on one or more of the following grounds:

(1) the provisions of the procedures were not adhered to

(2) all the relevant facts were not ascertained

(3) all the relevant facts were not considered or not considered in a reasonable manner

(4) the teacher concerned was not afforded a reasonable opportunity to answer the allegation

(5) the teacher concerned could not be reasonably be expected to have understood that the behaviour alleged would attract disciplinary action

(6) the sanction recommended is disproportionate to the underperformance or misconduct alleged."

70. The applicant was informed by letter dated 7th May, 2015 that Rose McCormack, the HR Section, Longford Office was in receipt of a formal complaint of alleged bullying from Ms. Michelle Spence. The applicant was requested to respond, giving complete details. The letter continued "the complaint will be investigated in accordance with the provisions of the formal procedure documented in Bullying

Prevention Policy and Complaint Procedure for ETB staff" and the letter continues that "the applicant had a right to be accompanied" and he was referred to:

(1) the Bullying Prevention Policy and Complaint Procedures for ETB staff;

(2) that he had the right to avail of employee assistance service at any point during the investigation;

(3) that the agreed procedure is an industrial relation procedure and not a legal procedure (this Courts emphasis).

71. It was stated that the procedure will be conducted within the norms of industrial relations custom, practice and procedure and as such is not a judicial process. In circumstances where a legal action is involved the policy will be suspended and the operation of law will take precedent. A series of documentation was enclosed. Finally, the letter states that the Head of HR will appoint an investigation team comprising two persons, a panel of approved organisations which can be drawn upon to undertake the investigation (under a contract for service) as approved in Appendix 1 of the Bullying Prevention Policy and Complaint Procedure for ETB staff. There was no provision for either party to a complaint, to reject a nominated investigator save in very exceptional circumstances where an investigator so nominated is related to, or a personal friend of either the complainant or alleged respondent in the complaint.

Bullying Prevention Policy

72. This Court now turns to the Bullying Prevention Policy.Therein it is stated that the new policy and procedure complies with the recommendations of the Government Task Force Report on bullying in the workplace and the following codes:

(1) Health and Safety Authorities Code of Practice on the prevention of workplace bullying

(2) The Labour Relations Commission Code of Practice detailing procedures for addressing bullying in the workplace.

Under the General Principles attaching to the Bullying Policy provides:

"All persons invoking or engaging in, the formal procedural stages of the policy are advised that

(1.1) The agreed procedures in industrial relations procedure and not a legal procedure (this Court's emphasis). It would be conducted within the norms of industrial relations custom, practice and procedure and as such is not a judicial process. In circumstances where legal action is invoked the policy will be suspended and the operation of law will take precedent.

(1.2) Any individual invoking the policy to a procedure at the Formal stage must provide written agreement to proceeding through the formal procedural stages in accordance with 1.1.

(2) The right to be accompanied at all stages of this procedure is recognised. Reference in the policy to representative includes

(i) a work colleague of the staff member's choice or

(ii) representation by an authorised trade union but not any other person or body unconnected with the particular ETB

The nature of the meetings is such that legal representation is **not** required."

The Court notes this legal representation is not excluded, it is just not required – however this is a matter of some considerable debate in this case.

"The following principles shall apply:

- All formal complaints shall be in writing
- Details of any complaints shall be put to the respondent staff member concerned
- Both parties to the complaint shall be given the opportunity to avail of representation during the procedure by a work colleague or by an authorised trade union but not any other person or body unconnected with the particular ETB.
- Parties to the complaint have the right to a fair and impartial determination of the issues concerned taking into account any representations made by or on behalf of the staff member and any other relevant or appropriate evidence, factors or circumstances.
- No allegations which have previously been investigated can be entered as part of the current investigation.
- Access to personal information held by an ETB shall be facilitated in accordance with the ETBs Data Protection Policy (specifically with respect to the ETBs Access Procedure) and with the principles and requirements of the Data Protection Acts 1998 – 2003. When the proceedings have been completed the Investigation Board and all associated documentation concerned to the Board will be filed, on a strictly confidential basis with the Head of HR in the ETB.
- That all matters relating to the complaint are strictly confidential to the parties and their representatives."

73. There then proceeds a definition of bullying at work:

"Repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of behaviour in this definition may be an affront to dignity but as a once off incident it is not considered to be bullying".

74. This Court notes that complaints of bullying can often be resolved on an informal basis and no further action may be required. Mediation is a process where an independent and neutral mediator assists the parties to come to agreement through a collaborative process. However, it is a decision for the complainant in the first instance which approach to adopt. In most cases, adopting an informal approach or engaging in mediation is the preferred approach of the ETB and unions representing staff in the sector. The engagement of a mediator is a matter for the Head of HR to decide, upon receiving a request from a staff member who believes s/he is being bullied or a staff member who is a respondent to a complaint of bullying.

75. The next procedure detailed in the bullying prevention policy is the formal procedure. This is for when "attempts to resolve the alleged complaint through informal means have not succeeded or where the complainant elects to invoke the formal procedure as a matter of first instance." It continues: "an investigation will be carried out by the ETB. All complaints will be treated seriously and in confidence". (this Court's emphasis).

"Stage 1 investigation:

1. The complainant writes in confidence to the Head of Human Resources to request that an investigation under the Formal Procedure be undertaken. This letter shall include the written statement of complaint which must be signed

and dated by the complainant. A formal complaint should *inter alia* contain: clear specific allegations against named individual(s), dates and times of incident(s), a list of witnesses if any, direct quotes if they can be recalled, a brief description of the context of each incidence, a brief description of the impact/effect each incidence had on the complainant, any other relevant documentary evidence except for mediation details of previous approaches made to the respondent (if any) and the outcome of same.

2. Upon receipt of a written complaint the Head of HR or his/her nominee will formally acknowledge within 5 working days' receipt the complaint and advise of the right to be accompanied.

3. The respondent to the complaint will be furnished with a copy of the complaint and all accompanying documentation within the same 5 working days' and informed of his/her right to be accompanied.

4. The respondent to the complaint shall be given an additional 10 working days from the date of issue by the ETB of the complaint details and documentation to respond in writing to the complaint details. The response should be sent to the Head of HR. Any counter complaint if raised by the respondent will be processed as part of the respondent's response to the complaint under the remit of the same investigation [...]

5. The Head of HR will contact Education and Training Boards Ireland to have an investigation team nominated comprising two persons from the panel of approved investigators. The panel of improved investigators can be drawn upon to undertake the investigation (under a contract for service) [...]"

The policy document suggests that the investigation should commence no later than the expiration of 30 working days from the date of receipt by HR of the written complaint, and the official Investigation Board must issue to the Head of HR no later than 40 working days from the date of receipt by the Investigators of the complaint the documentation originally supplied by the Head of HR.

Lastly, the Court notes that the policy sets out that the final investigation report will be referred to the CE of the ETB for consideration and a determination.

This Court quotes further from the policy:

> "Stage 2:Decision by the ETB as employer takes circular to reject the findings of the Investigation Report.
>
> 2.1 The Chief Executive having undertaken evaluation of the report will decide as to whether or not the Investigation Report should be adopted. The decision of the Chief Executive will be communicated to the parties to the complaint within a total of 15 days of the date of issue by the Head of HR of the final investigation report to the parties to the complaint. Such covering correspondence will advise a right of appeal to an independent third party [...]
>
> 2.2 Importantly in arriving at a decision the Chief Executive:
>
> (a) Is not to be regarded as making any assessment as to the merits or otherwise of the complaints made by the complainant against the respondent
>
> (b) Shall meet with the Investigation Team by way of informing/satisfying his/her self that the terms of reference for the investigation have been adhered to
>
> 2.3 In circumstances where the Chief Executive decides to adopt the findings of the investigation report s/he shall have due regard to the procedures

undertaken over the course of the investigation and the discharge of the terms of reference by the Investigation Team. Where the Chief Executive elects to adopt the Report particular regard should be had to be able to respond to the potential for a procedural appeal under the specified appeal grounds. [...]"

Section 3 of the policy sets out the following under the heading "provision for appeal" - "it is open to either party to complaint of bullying to appeal the decision of the Chief Executive of the ETB to the agreed Appeal Officer nominated by the LRC and nationally agreed between ETB and unions consultative forum."

76. The next section of the policy document deals with the following:

"Disciplinary Action Arising

Breaches of the Bullying Prevention Policy will not be tolerated by the ETB. Breaches of the Policy shall be regarded as misconduct (but not gross misconduct) and may be subject to disciplinary action under the Disciplinary Procedure relevant for the staff member concerned. Repeated policy breaches will be taken into consideration in determining the appropriate disciplinary sanction to be applied to the staff member concerned.

Where a complaint of bullying is upheld or a complaint is found to be vexatious/malicious, disciplinary action will be taken in accordance with the appropriate stage of the ETB Disciplinary Policy for staff [...]"

Discussion

77. There are a number of matters for the Court to consider in this case:

(1) The issues of fair procedures in the course of the investigation

(2) whether there was bias as a result of the respondent acting on foot of the investigation process conducted by the company retained by the respondent; and finally

(3) What is the relationship between Circular 71/2014 and the bullying policy.

Counsel for the respondent makes the point that the subject matter of the judicial review is an order of *certiorari* quashing the decision of the respondent dated the 30th of August, 2015, insofar as the respondent has purported to uphold or rely upon a finding of bullying against the applicant for the purpose of summoning the applicant to a Stage 4 disciplinary meeting on Thursday the 15th of September, 2016 as provided for in the Department of Education and Skills Circular letter 71/2014 entitled "Revised Procedures for Suspension and Dismissal of Teachers and Principals". It is a matter for the court to decide whether or not *inter alia* the procedures adopted during the investigation are contained in the grounds of the judicial review.

78. In May 2015, the applicant was notified that a complaint of bullying had been made against him by his colleague, a teacher called Ms. Michelle Spence. The complaint cited a number of incidents, some of which dated back to 2008. Ms. Spence had requested the head of human resources of the respondent to conduct a formal investigation into the alleged bullying. The allegation of bullying detailed over one hundred pages in respect of her complaint.

79. An investigation into the complaint was launched in accordance with the Bullying Prevention Policy – Complaint Procedure for ETB Staff. The respondent engaged a private limited company called Graphite Recruitment HRM Ltd. to carry out the said investigation. The applicant was asked by the investigation to submit his

written response to various meetings and interviews and he duly complied. On the 4th of April, 2016 nearly one year after the complaint from Ms. Spence and the applicant was furnished with a copy of the report of Graphite Recruitment HRM Ltd. which was dated the 24th of March, 2016.

80. The two investigators of Graphite Recruitment HRM Ltd. were Ms. Louise McGonigle and Mr. Gordon Nolan. The Court has the statement of Michelle Spence which was taken by the defendant's investigator on the 4th of August, 2015. An interview with Mr. Michael Lyons held on the 22nd of September, 2015 at which he was accompanied by Brian Hyland from the Teachers Union of Ireland. A further interview was held with Ms. Michelle Spence on the 11th of January, 2016. A further interview was held with the applicant held on the 16th of February, 2016.

81. Emails were sent to Graphite Recruitment HRM Ltd. from Deirdre O'Brien. Further, a statement of Antoinette Higgins, Margaret Mullooney, and AnnMarie Keenan were taken by Graphite Recruitment HRM Ltd. A number of letters were also received by Graphite Recruitment HRM Ltd.

82. By letter dated the 4th of March, 2016 Louise McGonagall, the senior HR consultant of Graphite Recruitment HRM Ltd. indicated that they would now proceed to consider the information provided by Graphite Recruitment HRM Ltd. to date and will issue a report of their findings to the HR manager of the respondent.

83. Graphite Recruitment HRM Ltd.'s final report issued on the 24th of March, 2016 and among the findings were that:

> "The investigation concludes that Mr. Lyons has withheld information in relation to Ms. Spence on two occasions. Specifically, in relation to failing to inform her about a Community Arts Project and the non-inclusion of her TY plan at the Board of Management meeting. The investigation also finds that

> Mr. Lyons undermined Ms. Spencer on two occasions. Specifically, in relation to failing to acknowledge her contribution at a staff meeting in addition to keeping possession of the school Arts camera".

The report also noted that the behaviour of Ms. Spence towards Mr. Lyons wife has been a contributory factor in this finding against Mr. Lyons. In addition, both parties have strong opinions on certain matters, which has lead to tensions between them. However as there has been repeated inappropriate behaviour directed towards Ms. Spence by Mr. Lyons during the course of his employment, this can be reasonably regarded as undermining her right to dignity at work as per the definition outlined in the ETB bullying policy.

84. The report does not deal with the complaints Ms Spence alleges took place from 2008, and the finding of the report is unhelpful in this light. It appears to the Court that an investigation which took a year, comprising of four interviews (two interviews with Ms. Spence and two interviews with Mr. Lyons) and a number of statements and letters from witnesses did not adequately deal with issues that predated the complaints. The report does not set out sufficiently the basis upon which the investigators concluded that Ms. Spence's right to dignity at work had been undermined.

85. On the 21st of April, 2016 the applicant received a letter from the respondent dated the 20th of April, 2016 advising that the report of Graphite Recruitment HRM was to be adopted by the respondent. The applicant was advised that he had fifteen working days to appeal the decision. The applicant duly appealed to the appeals officer whereupon his appeal was rejected. By letter dated the 30th of August, 2016 the applicant was advised that in circumstances where his appeal had not been upheld,

the investigation report would be upheld, together with the findings against him as set out therein. The applicant is advised of the following:

> "Bullying behaviour in an ETB workplace is unacceptable misconduct which promptly falls to be addressed under the appropriate provisions of Circular 0071 of 2014 Disciplinary Procedures for Teachers Employed in Education and Training Boards. In the light of the findings/conclusions of the investigation report (copy enclosed) you are required to attend a Stage 4 disciplinary meeting to be convened for the purposes of determining the disciplinary action if any which may arise from the finding of the investigation report referred to above."

The applicant was further advised that the meeting was scheduled to take place at 11 am on Thursday the 15th of September, 2016.

86. In correspondence, Brian Carolan, solicitor on behalf of the applicant in his first letter to the Chief Executive of Longford Westmeath Education and Training Board Dr. Christy Duffy, sought certain assurances in relation to the applicant's right to fair procedures. He also submits in his letter dated 1st August, 2016:

> "Clearly any findings of the previous investigation report cannot be relied upon in any subsequent disciplinary process in circumstances where the applicable ETB policies and procedures do not permit this.
>
> Our client is anxious to have all of his rights to fair procedures including the right to challenge the evidence against him and in particular the right to cross-examine his accuser, his right to the presumption of innocence and his right to be advised in advanced in writing of the specific allegations against him that are proposed to be the subject matter of any disciplinary procedure."

87. Further in a letter dated the 2nd of September, 2016 to Dr. Duffy he stated:

> "The disciplinary process provided for Circular 71 of 2014 does not refer to or in any way impact upon the investigation you refer to and accordingly we are surprised of the suggestion in your recent letter that in some way the results of that investigation could have any relevance to the detailed procedures provided for in Circular 71 of 2014."

He relied upon the presumption of his client's innocence and the right of Mr. Lyons to challenge including by way of cross-examination all evidence which would be called at such a hearing. He further stated that his client is entitled to call witnesses. He also suggested that Mr. Lyons is entitled to a fair and impartial examination of the issues being investigated and that it did not appear to him that the Chief Executive was in a position to provide such a fair and impartial examination given his involvement in the procedures to date and most particularly in the light of his apparent acceptance of findings made against Mr. Lyons.

88. By letter dated the 6th of September, 2016 William Egan & Associates solicitors wrote to the applicant's solicitor stating the following:

> "A reading of these documents (the Bullying Prevention Policy and Circular letter 71 of 2014) makes it abundantly clear that there an inextricable and intended link between them. It is repeatedly stated there were employees found to have behaved in an inappropriate manner towards another employee. The defending conduct may be referred to the disciplinary procedures at an appropriate stage."

It further stated:

> "In the circumstances our client is now quite entitled to refer the matter to the disciplinary procedure at an appropriate stage to consider the appropriate

conduct of your client and what disciplinary action, if any, may be appropriate to the circumstances.

Your client has participated in the process to date and has had access to representation and all the relevant documentation throughout that process. The now related suggestion that he is in some way a stranger to the details of the matter, that all the work to date should now be set aside to commence a *de novo* process is entirely intangible and without foundation."

89. The Court is satisfied that a finding of bullying in contravention of the Bullying Prevention Policy does amount to conduct of a serious nature. Such a finding of course, could lead in certain cases to dismissal. It is not for the Court to make any decisions in this regard as it is clearly a matter for the Chief Executive to make a determination.

Fair Procedures in Relation to the Investigation by Graphite Recruitment HRM

90. The process set out in Bullying Prevention Policy and Circular 71/2014 excludes a legal representative from acting on behalf of a teacher against whom accusations are levelled. This is the case, even though the complaints may lead to dismissal. Investigative bodies, like Graphite Recruitment HRM are utilised by employers both in the public sector and in the private sector. Generally, the processes adopted by such bodies exclude:

(1) legal representatives from attending on behalf of their client;

(2) cross-examination.

91. Where investigative processes can lead to dismissal, cross-examination is a vital safeguard to ensure fair procedure. In *Borges v. the Fitness to Practice Committee* [2004] 1 I.R. 103, Keane C.J. states:

"It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedure requires that he or she should be allowed to cross-examine, by counsel, his accuser or accusers. That has been the law since the decision of this Court in In re Haughey [1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal's finding may not simply reflect on his reputation but may also prevent him from practicing as a doctor, either for a specified period or indefinitely."

92. Keane C.J. discusses conduct which reflects on a person's good name or reputation:-

"The applicant cannot be deprived of his right to fair procedures, which necessitate the giving of evidence by his accusers and their being cross-examined, by the extension of the exceptions to the rule against hearsay to a case in which they are unwilling to testify in person."

93. In *Maguire v. Ardagh* [2002] 1 I.R. 385 Hardiman J. stated:-

"where a person is accused on the basis of false statements of fact, or denied his civil or constitutional rights on the same basis, cross-examination of the perpetrators of these falsehoods is the great weapon available to him for his own vindication. Falsehoods may arise through deliberate calculated perjury."

94. Hardiman J. continued:-

"In re Haughey [1971] I.R. 217, it was said by Ó Dálaigh C.J. at p. 264:

"... in proceedings before any tribunal (this Courts emphasis) where a party to the proceedings is on risk of having his good name, or his

person or property, or any of his personal rights jeopardized, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."

Applying that general principle to the facts of that case, this Court found at p. 263 that a person against whom damaging allegations were made was entitled to the following "minimum protection":-

(a) that he should be furnished with a copy of the evidence which reflected on his good name;

(b) that he should be allowed to cross-examine, by counsel, his accuser or accusers;

(c) that he should be allowed to give rebutting evidence; and

(d) that he should be permitted to address, again by counsel, the Committee in his own defence.

Without these rights:-

"no accused - and I speak within the context of the terms of the inquiry - could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of clocha ceangailte agus madraí scaoilte. Article 40, s. 3 of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the court to underline that the words of Article 40, s. 3 are not political shibboleths but provide a positive protection for the citizen and his good name."

Accordingly, the right to cross-examine one's accusers is a constitutional right and not a concession. It applies, as In re Haughey [1971] I.R. 217 affirmatively demonstrates, in an Oireachtas committee or sub-committee as well as in any other forum in which a citizen may be accused. It is an essential, constitutionally guaranteed, aspect of fair procedures."

95. It is quite clear to this Court that the proceedings adopted by Graphite Recruitment HRM Ltd. is in breach of Article 40(3)(1) and (2) of the Constitution of Ireland by the refusal to allow legal representatives to appear on behalf of the applicant. The processes adopted by Graphite Recruitment HRM Ltd. failed to vindicate the good name of the applicant, in their refusal to hold an appropriate hearing, whereby the applicant through solicitor or counsel may have cross-examined the complainant..Equally, the complainant ought be entitled to then cross-examine the applicant.

96. Fair procedures manifestly indicate that the applicant has the right to confront and cross-examine the individual who has made allegations against him. It is unclear whether Stage 4 of the Disciplinary Procedure under Circular 71/2014 entitles the applicant to be accompanied by a solicitor. However, this Court finds that it is the it is the actual investigation that requires the rights to cross-examination and representation, that takes prior to the initiation of the disciplinary procedure under Circular 71/2014.

97. It appears to this Court that the Department of Education and Skills must be aware of the importance of fair procedures, and how fair procedures must be adopted under its Bullying Protection Policy, or its 'Disciplinary Procedures' under Circular 71/2014. It is clear that as a matter of law and as a matter of fair procedures an individual whose job is at stake and against whom allegations are made would be

entitled to challenge and cross-examine evidence. The Court finds that the investigation carried out by Graphite Recruitment HRM Ltd. failed to adopt fair procedures, in contradiction of the dicta of Supreme Court in the above cited decisions.

98. It is noted by the Court that this is the process adopted by many companies when dealing with complaints against employees. It is quite clear that the exclusion of solicitors and counsel, and the refusal to allow cross-examination under such policies is a breach of the Constitutional right to fair procedures.

99. It is clear to the Court that if there is a finding of bullying under an investigation that adopts constitutional fair procedures, this may amount to conduct of a serious nature. In a case such as this, such a finding would allow an employer to invoke Stage 4 of the procedures - but only if the investigation leading to such a finding had been conducted in line with fair procedure.

100. Such a finding could lead to dismissal, but it is not for the Court to make any decisions in this regard. This is a matter for the Chief Executive to determine, and the Court repeats, this is provided that the finding of bullying followed from a constitutionally sound investigative process.

101. The Court is clear that in circumstances where a complaint is made which could result in an individual's dismissal, or where it impinges on the individual's right to a good name, the individual is entitled to fair procedures, as outlined by the Supreme Court in the case law quoted above.

102. Counsel for the respondent makes the point that the order following from a judicial review case such as this is an order of *certiorari.* This would quash the decision of the respondent dated the 30th of August, 2015, insofar as the respondent upheld a finding of bullying against the applicant, for the purpose of summoning the

applicant to a Stage 4 disciplinary meeting as provided for in the Department of Education and Skills Circular 71/2014.

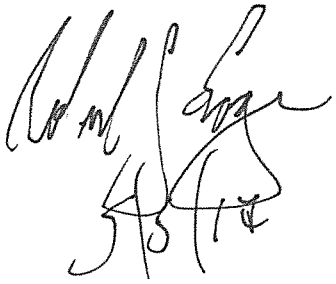
103. However, the Chief Executive is relying on a flawed and constitutionally impermissible finding of bullying. In the Court's view, the investigative process comes foursquare within the remit and ambit of the judicial review sought by the applicant.

104. In summary, the Court holds as follows:

(1) The investigation by Graphite Recruitment HRM Ltd. was in breach of the constitutional right to fair procedures.

(2) If a constitutionally sound finding of bulling had been made, this could amount to conduct of a serious nature, and as such could be the subject matter of a disciplinary process at Stage 4 of the proceedings set out above. This would not necessitate the investigation being carried out under Stages 1 to 3 beforehand.

105. Finally, the Court will set aside the summoning of the applicant to a Stage 4 disciplinary meeting, on the basis that the findings of Graphite Recruitment HRM Ltd. are in breach of the fair procedures. The Chief Executive has no constitutionally sound basis to hold a disciplinary hearing in accordance with Circular 71/2014.



Dunnes Stores (Cornelscourt) Limited trading as **Dunnes Stores**, Appellant v. **Margaret Lacey** and **Nuala O'Brien**, Respondents [2005] IEHC 417, [2004 No. 362 SP]

High Court 9th December, 2005

Employment – Appeal from Employment Appeals Tribunal – Point of law – Deduction of wages – Remuneration properly payable – Whether Employment Appeals Tribunal erred in law – Payment of Wages Act 1991 (No 25), s. 5(6).

Section 5 of the Payment of Wages Act 1991 prohibits an employer from making a deduction from the wages of an employee unless the deduction is authorised to be made by virtue of any statute or any instrument made under statute or is required or authorised to be made under the employee's contract of employment or the employee has consented to same.

Giving effect to a Labour Court recommendation, the appellant agreed to implement a long service increment for members MANDATE trade union with more than ten years service. In doing so the appellant replaced the previous system of weekly service pay payable to staff with more than ten years service with the long service increment. The respondents who were members of MANDATE trade union made a complaint to the rights commissioner pursuant to s. 6 of the Act of 1991 that, in failing to pay the long service increment and the weekly service pay, the appellant was in breach of s. 5 of the Act of 1991 in that it amounted to an unlawful deduction of wages. The rights commissioner made a recommendation in favour of the respondents. The appellant appealed to the Employment Appeals Tribunal where the recommendation of the rights commissioner was upheld. The appellant appealed the determination of the Employment Appeals Tribunal to the High Court on a point of law. The appellant argued that the Employment Appeals Tribunal had erred in law in failing to address the question of what was the remuneration properly payable to the respondents. The respondents argued that there was evidence of an agreement on the part of the appellant to pay both the service pay and the long service increment to the respondents.

Held by the High Court (Finnegan P.), in allowing the appeal, that, the question of the remuneration properly payable to the respondents was essential to the making of a determination by the Employment Appeals Tribunal and accordingly, where there was no evidence of an agreement to make both payments, the tribunal erred in law in failing to address the remuneration properly payable.

There are no cases mentioned in this report.

Special summons

The facts have been summarised in the headnote and are more fully set out in the judgment of Finnegan P., *infra.*

On the 10th August, 2004, the Employment Appeals Tribunal upheld a recommendation of the rights commissioner dated the 1st December, 2003, holding that the appellants had made an unlawful deduction from the respondents' wages in breach of s. 5 of the Payment of Wages Act 1991. The appellants instituted an appeal by way of special summons dated the 2nd September, 2004. The appeal was heard by the High Court (Finnegan P.) on the 2nd December, 2005.

Mark Connaughton S.C. (with him *Marcus Dowling*) for the appellant.

Frank Callanan S.C. (with him *Alex White*) for the respondents.

Cur. adv. vult.

Finnegan P. 9th December, 2005

[1] This is an appeal from a determination of the Employment Appeals Tribunal pursuant to s. 7(4)(b) of the Payment of Wages Act 1991.

[2] Section 5 of the Act of 1991 prohibits an employer from making a deduction from the wages of an employee unless the deduction is authorised to be made by virtue of any statute or any instrument made under statute or is required or authorised to be made under the employee's contract of employment or the employee has consented to the same. Section 6 of the Act of 1991 provides that an employee may present a complaint in relation to a breach of the Act to a rights commissioner who shall hold a hearing. Section 7 provides for an appeal from a decision of the rights commissioner under s. 6 to the Employment Appeals Tribunal and in s. 7(4)(b) for an appeal from a determination of the Employment Appeals Tribunal to the High Court on a point of law.

[3] Historically service pay has been a feature of wage scales for the appellant's employees. The first respondent at the time of the application to the rights commissioner was entitled to service pay of €3.81 *per* week and the second respondent to €3.17 *per* week. Relevant employees with over five years service were entitled to receive between 50 cent and €3.50 *per* week payment, being by way of staged increases up to 30 years service. In relation to Dublin based employees the payment was made pursuant to a Registered Employment Agreement but similar terms were applied to

employees outside Dublin. In 1999 MANDATE the respondent's trade union sought the introduction of a long service increment for its members. The appellant refused and the matter was referred to the Labour Relations Commission but no agreement was reached there. The dispute was then referred to the Labour Court pursuant to s. 26(1) of the Industrial Relations Act 1990. In its recommendation dated the 26th October, 2001, the Labour Court recommended that a long service increment of £7.83 *per* hour (*sic)* effective from the date of the recommendation be introduced at ten years service. I assume that this should correctly refer to €7.83 *per* week but that is irrelevant to the issue I have to decide. Such a recommendation is not of binding effect. The appellant issued a memorandum dated the 18th September, 2002, designed to give effect to the Labour Court recommendation as understood by the appellant. This provides as follows:-

> "*Long service increment to existing staff with more than ten years service*
>
> In addition, long service increment of 0.23c per hour will be paid to all sales assistants with more than ten years service. This payment will not apply to canteen, cleaning, security or timepiece. This payment will be backdated to the 26th October, 2001. Therefore sales assistants with more than ten years service will actually be paid €10.47 *per* hour.
>
> The old system of weekly service pay for fulltimers is now being abolished for all staff with more than ten years service as of the 26th October, 2001. Any service pay received by fulltimers in the interim will be set against the back pay for the new service rates by the wages department. Again this payment will be made directly into staff bank accounts this Friday.
>
> However fulltimers with between five and ten years service will continue to receive their weekly service pay until they reach ten years service when this will be replaced by the hourly payment. Therefore on an ongoing basis staff who have over five years service will continue to receive weekly service pay until they have reached ten years service when their weekly pay will be replaced by hourly service pay."

[4] The effect of the memo is that staff with less than ten years service continue to receive service pay. Staff with ten years service no longer receive service pay but receive a higher sum described as a long service increment.

[5] MANDATE responded to the memorandum by letter dated the 23rd September, 2002, the relevant part of that letter reading as follows:-

> "Service Pay
>
> There is no agreement with MANDATE trade union or its members to abolish service pay after ten years. Dunnes Stores sought clari-

fication from the court on this matter and was advised that the issue of service pay was not before the court. Therefore we are seeking the full restoration of service pay."

[6] The respondents complained to a rights commissioner pursuant to s. 6(1) of the Act of 1991, the complaint being that in discontinuing service pay for employees with ten years service but in substituting a higher payment by way of long service increment the appellant was in breach of s. 5 of the Act of 1991: in short the complaint was that such employees are entitled to both service pay and the long service increment. On the 1st December, 2003, the rights commissioner found in favour of the respondents holding that the cessation of service pay amounted to an unlawful deduction. The appellant appealed to the Employment Appeals Tribunal pursuant to s. 7 of the Act of 1991. On the 10th August, 2004, in its determination the Employment Appeals Tribunal upheld the recommendation of the rights commissioner.

[7] The appellant's case is this. Section 5(6) of the Act of 1991 provides as follows:-

> "Where –
>
> (a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or
>
> (b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee,
>
> then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."

[8] For the appellant it was argued that regard must be had to the phrase "properly payable". The recommendation of the Labour Court is not binding upon the appellant. This is so whether remuneration is determined under the Registered Employment Agreement or an agreement *simpliciter*. Accordingly the appellant was not obliged to implement payment of a long service increment but nonetheless decided to do so and thereby increased the remuneration of the relevant employees. The Employment Appeals Tribunal in order to make a determination ought first properly to have had regard to the remuneration "properly payable" to the employee. In the case of the respondents the remuneration properly payable was their remuneration at the appropriate hourly rate together with service pay but increased in accordance with the memorandum of the 18th September, 2002. The

terms "service pay" and "long service increment" are not terms of art but each refer to additional remuneration to employees with long service. The Employment Appeals Tribunal erred in law in failing to address the question of the remuneration properly payable to the respondents or in the alternative erred in implicitly finding that the remuneration properly payable as a result of an agreement reached between the appellant and MANDATE was the appropriate hourly rate, the service pay and the long service increment, there having been no agreement on the part of the appellant to make such payment.

[9] For the respondents it was argued that on construing the memorandum of the 18th September, 2002, the letter dated the 23rd September, 2002, from MANDATE to the appellant and the reply of the 21st October, 2002, from the appellant to MANDATE, together with the submissions by the appellant to the rights commissioner and the Employment Appeals Tribunal, there is evidence of agreement on the part of the appellant to pay both service pay and long service increment to the respondents. These documents should be considered as containing no denial by the appellant of an obligation to make such payment and so evidencing an agreement to make such payments: accordingly such payments are properly payable for the purposes of the Act of 1991.

Conclusion

[10] I am satisfied upon careful perusal of the documents relied upon by the respondents that the same cannot represent the agreement or an acknowledgement of the agreement contended for but rather contain a clear denial of the existence of any such agreement. No other evidence of an agreement was proffered. In these circumstances I am satisfied that the Employment Appeals Tribunal erred in law in failing to address the question of the remuneration properly payable to the respondents, such a determination being essential to the making by it of a determination. Insofar as a finding is implicit in the determination of the Employment Appeals Tribunal that the appellant agreed to pay to the respondents service pay and a long service increment, then such finding was made without evidence and indeed in the face of the evidence: I am satisfied that there has been no deduction of pay from the respondents within the terms of the Act of 1991 but rather their remuneration has been unilaterally increased by the appellant making a payment which recognises their long service in excess of that which was payable prior to the 18th September, 2002. In either case there has been an error or law. Accordingly I allow the appeal.

Solicitors for the appellant: *BCM Hamby Wallace.*

Solicitors for the respondents: *John J. McDonald & Co.*

Cliodna McAleer, Barrister

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against forfeiture has been sought is because the court might enquire about the time when the lessee would be able to pay the arrears of rent and service charges.

In my opinion, the defendant lessors have validly exercised their right of peaceable re-entry. Therefore, I refuse to grant an interlocutory injunction. Since the plaintiffs have been allowed back into possession on foot of the interim injunction, I will also make an order for possession in favour of the defendants.

Solicitors for the plaintiff: *Arthur Cox & Co.*

Solicitors for the defendant: *Timothy J. Hegarty & Son.*

M.D.

In the matter of **The Sunday Tribune Limited** (in Liquidation)
[1982 No. 10,390P]

High Court 26th September, 1984

Company – Winding up – Creditors – Classification – Preferential payments – Test applicable – Unpaid wages or salary of servants or employees – Whether employee engaged under a contract of service or a contract for services – Claimants in first category entitled to be paid as preferential creditors – Companies Act, 1963 (No. 33), s. 285.

On the 15th November, 1982, the High Court made an order directing that The Sunday Tribune Ltd. be wound up by the court, and appointing an official liquidator. During the winding up of the company, the official liquidator applied to the court for the determination of the proper classification of the debts proved by three creditors of the company in respect of wages or salary owed to each of them by the company for services rendered to the company by each of those creditors. The three creditors claimed that the sums so due to them were debts payable in the winding up in accordance with the priority specified in s. 285, sub-s. 2, of the Act of 1963. It is provided by sub-s. 2(b) of that section that, in the winding up of a company, there shall be paid in priority to all other debts all wages or salary (whether or not earned wholly or in part by way of

commission) of "any clerk or servant" in respect of services rendered to the company during the four months before the relevant date.

The first claimant had been employed by the company on a shift basis as sub-editor of the newspaper published by the company. He was required to attend at the company's premises at a specified time and he had worked under the guidance of the chief sub-editor and to his instructions. The second claimant had been paid a fixed sum each week as a journalist for writing the material for a weekly column published in the company's newspaper; she was required to attend and participate at the company's editorial conferences. The third claimant had furnished regularly articles for the company's newspaper but each article had been commissioned separately by the company. The official liquidator had refused to enter the names of the three claimants in the list of preferential creditors because of the independent nature of their work and because income tax had not been deducted by the company from their remuneration in accordance with the PAYE system. At the hearing of the official liquidator's application it was

Held by Carroll J., in determining the issues, 1, that the proper test to apply was to ascertain whether or not the services rendered to the company by each claimant had been rendered pursuant to a contract of service.

2. That the evidence established that the services so rendered to the company by each of the first two claimants had been rendered pursuant to contracts of service and that, accordingly, the debts proved by those two claimants qualified for the priority specified in s. 285, sub-s. 2, of the Act of 1963.

Beloff v. *Pressdram Ltd.* [1973] 1 All E.R. 241 and *Stevenson, Jordan & Harrison Ltd.* v. *Macdonald* [1952] 1 T.L.R. 101 considered.

3. That the services rendered to the company by the third claimant had not been rendered pursuant to a contract of service and, accordingly, the debt proved by that claimant did not qualify for such priority.

Cases mentioned in this report—

[1]*Ferguson* v. *John Dawson & Partners* [1976] 1 W.L.R. 1213.
[2]*Beloff* v. *Pressdram Ltd.* [1973] 1 All E.R. 241.
[3]*Simmons* v. *Heath Laundry Company* [1910] 1 K.B. 543.
[4]*Stevenson Jordan & Harrison Ltd.* v. *Macdonald* [1952] 1 T.L.R. 101.
[5]*Market Investigations* v. *Minister of Social Security* [1969] 2 Q.B. 173.
[6]*Jones* v. *Scullard* [1898] 2 Q.B. 565.

Motion on Notice.

On the 27th October, 1982 the High Court (Keane J.) appointed John McStay to be provisional liquidator of The Sunday Tribune Ltd. On the 15th November, 1982 the High Court (Carroll J.) appointed him to be official liquidator of the company, and directed that the company be wound up by the court. During the liquidation, the official liquidator applied to the High Court pursuant to order 55, r. 48, of the Rules of the Superior Courts, 1962, for the determination of certain issues specified in the Examiner's memorandum dated the 9th September, 1983, and described in the judgment of Carroll J., *infra*. Section 285, sub-s 2(b), of the Companies Act, 1963, provides— "In a winding up there shall be paid in priority to all other debts . . . (b)all wages or salary (whether or not earned wholly or in part by way of commission) of any clerk or servant in respect of services rendered to the company during the 4 months next before the relevant date."

The liquidator's application was heard by Carroll J. on the 14th and 21st November 1983 and the 28th May, and 5th July, 1984.

E.G. Stewart S.C. (with him *I. Finlay*) for the official liquidator.

B.M. McCracken S.C. (with him *J. McMenamin*) for the claimants.

Cur. adv. vult.

Carroll J. 26th September, 1984

The liquidator of The Sunday Tribune Ltd. has applied to the Court to determine if certain people who did work for the paper published by that company were employees of the company and were entitled, therefore, to claim priority in the winding up as preferential creditors. The liquidator was not prepared to enter them in the class of preferential creditors on the grounds that income tax had not been deducted from their remuneration in accordance with the PAYE system.

The Examiner's memorandum identifies the first claimant as "Patrick Woodworth, of a class for convenience described as 'shift workers', whose claim is as a part-time worker working under the same conditions, control and supervision as full-time employees, paid by the shift under a contract based on the house agreement applicable to all employees. This claimant worked two shifts per week." In a separate affidavit Patrick Woodworth said that he was employed on a shift basis and that, in the beginning, he did one shift per week as sub-editor. He was required to attend at a specified time and then worked under the guidance of the chief sub-editor and to his instructions until the shift was over. The period of the shift was fixed in advance. If any work had to be done beyond the end of the shift, overtime was paid. From March, 1983, he worked two shifts per week. He worked under the same general terms and conditions (of a house agreement between the company and the National Union of Journalists) as full-time employees.

The next claimant is described in the Examiner's memorandum as "Mary Holland, of a small class described as 'regular columnist.' Her contract agrees a fixed fee of £— per week as a journalist in relation to her weekly column, her attendance and participation in editorial conferences and whatever additional small news items came her way. For two weeks of the year, payment was to be honoured without having to supply copy. For two additional weeks, advance copy was to be accepted by the newspaper. The salary was separately negotiated and was not a minimum fixed by a trade union agreement." In her affidavit Mary Holland says she was paid that sum per week to include a regular weekly column, attendance and participation at editorial conferences, with

such further news items or items of interest as she might be able to contribute. Six times a year the column was to be a major piece.

The next claimant is identified in the Examiner's memorandum as "Ronit Lentin, of a class described as 'regular contributors' who were paid for commissioned work not necessarily appearing weekly on a rate-per-word-basis. No reference was made to editorial control or attendance at the office." In her affidavit Ronit Lentin said that she had been a regular contributor. She visited the office of *The Sunday Tribune* approximately once each week and she would either suggest a topic for an article or be asked to contribute an article of a certain length on a specific topic. She was then commissioned and paid on the basis of the house agreement between the company and the National Union of Journalists. She said that in no case was the work embarked on without a firm commission from the editor.

Each of the three claimants filed an affidavit to say that he or she was registered with the Revenue Commissioners under Schedule D and, accordingly, paid tax on his or her aggregate annual income from journalism.

I am satisfied that the fact that income tax was not deducted in accordance with the PAYE system is not the determining factor in this case. The profession of journalism is such that a journalist may have an income from more than one source under a contract of service or a contract for services or both. It appears to have been a matter of convenience, permitted by the Revenue authorities at the time, to allow payments to be made without deduction of PAYE, notwithstanding the status of the worker. At the time she was working for *The Sunday Tribune,* Mary Holland was also working part-time for London Weekend Television and also for *The New Statesman.* Patrick Woodworth, who worked part-time on shift for *The Sunday Tribune,* also worked for *The Irish Times,* the Irish Press Group and the Irish Independent Group. He said that there was no difference in practice between the way in which those with certificates of exclusion (i.e., those from whose pay income tax was not deducted under the PAYE system) worked and the way in which those without such certificates worked.

The determining factor is whether the work which was done by each claimant was done on foot of a contract of service which created the relationship of employer and employee or whether it was done on foot of a contract for services which did not create that relationship. The Court must look at the realities of the situation in order to determine whether the relationship of employer and employee in fact exists, and it must do so regardless of how the parties describe themselves: see *Ferguson* v. *John Dawson & Partners.*[1] The simple test is whether the employer possessed the right not only to control what work the employee was to do but also the manner in which the work was to be done. However, that test is no longer of universal application. In the present day, when senior staff with professional qualifications are employed, the nature of their employment cannot be determined in such a simplistic way.

The question is dealt with extensively in *Beloff* v. *Pressdram Ltd.*[2] One of the issues to be determined in that case was whether copyright in a certain memorandum belonged to the journalist who wrote it or the newspaper which published it. If the work was written in the course of the author's employment by the newspaper under a contract of service, the newspaper was entitled to copyright in the work under s. 4, sub-s. 4, of the Copyright Act, 1956. It was not in issue that the memorandum was made in the course of employment but the court had to decide whether the employment was under a contract of service or a contract for services. Ungoed-Thomas J. reviewed the earlier law and quoted from pp. 549-50 of the judgment of Fletcher Moulton L.J. in *Simmons* v. *Heath Laundry Company*[3] as follows:–

> "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service. The place where the services are rendered, i.e., whether at the residence of the person rendering the services or not, will also be an element in deciding the case, but is not in my opinion decisive . . . "

Ungoed-Thomas J. goes on (at p. 248 of the report of the *Beloff Case*[2]) to say that nowadays professional and similarly skilled persons are widely engaged under what are recognised as contracts of service, and he reviews recent authorities in relation to particular cases which have been held to be (or not to be) contracts of service.

The test that Denning L.J. applied in *Stevenson, Jordan & Harrison Ltd.* v. *Macdonald*[4] is there stated (at p. 111) as follows:–

> "One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

At the same page Denning L.J. also said:–

> "It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services."

Ungoed-Thomas J., having reviewed other cases as well, said at p. 250 of the report of the *Beloff Case*[2]:–

> "It thus appears, and rightly in my respectful view, that, the greater the skill required for an employee's work, the less significant is control in determining whether the employee is under a contract of service. Control is just one of many factors whose influence varies

according to circumstances. In such highly skilled work as that of the plaintiff it seems of no substantial significance. The test which emerges from the authorities seems to me, as Denning L.J. said, whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether his work is not integrated into the business but is only accessory to it, or, as Cooke J. expressed it, the work is done by him in business on his own account."

The court went on to hold that the plaintiff, who was political and lobby correspondent of *The Observer*, was employed under a contract of service. The job of political and lobby correspondent was essential for and woven into its political coverage. The court held that the plaintiff's job was an integral part of the business of *The Observer*.

In Patrick Woodworth's case, his employment satisfies the simple test of control by the employer. He worked at specified times under the guidance of the chief sub-editor and to his instructions. The fact that he worked part-time does not change the nature of his employment. A person may be an employee even though employed part-time: *Market Investigations* v. *Minister of Social Security*.[5] In addition, a person may be employed by different employers: *Jones* v. *Scullard*.[6] Therefore, I am satisfied that Mr. Woodworth was employed by *The Sunday Tribune* under a contract of service.

In Mary Holland's case, I am of opinion that her employment was an integral part of the business of the newspaper. The column was to run for 50 of the 52 weeks of the year. She took part in editorial conferences. There was provision for the equivalent of holiday pay. Her case is not dissimilar to that of the plaintiff in *Beloff* v. *Pressdram Ltd*.[2] Therefore, I am satisfied that she was employed under a contract of service.

In Ronit Lentin's case, I am of opinion that her employment was not an integral part of the business of the newspaper. In my opinion, she was a freelance contributor who secured commissions in advance. She was under no obligation to contribute on a regular basis. Presumably, if she did not negotiate a commissioned article, the company's editor would get articles from some other source. Therefore, I am satisfied that she was not employed under a contract of service but was an independent contractor in respect of the articles she did provide.

Accordingly, Patrick Woodworth and Mary Holland were employees of the company for the purposes of s. 285 of the Companies Act, 1963, while Ronit Lentin was not such an employee.

Solicitors for the official liquidator: *Eugene F. Collins & Son.*

Solicitors for the claimants: *Hickey, Beauchamp, Kirwan & O'Reilly.*

D.B.C.

In the matter of an appeal pursuant to **s. 7(4)(b)** of the **Payment of Wages Act 1991**. **Sandra Cleary**, **Ellen Bradley**, **Joyce Donovan**, **Angela Carmody**, **Joan Thomson**, **Anita Malone**, **Yvonne Masters**, **Maureen Andrews**, **Brian McCarthy** and **James Dowdall**, Appellants v. **B & Q Ireland Limited**, Respondent [2016] IEHC 119, [2014 No. 304 MCA]

High Court 8 January 2016

Employment – Contract – Payment of wages – Non-payment of bonus payments – Discretion to discontinue bonus scheme – Date of accrual of entitlement to bonus – Location allowance – Interpretation of contract of employment – Whether bonus scheme could be discontinued after accrual of entitlement – Whether location allowance expense or wages – Payment of Wages Act 1991 (No. 25), ss. 1 and 5.

Section 1 of the Payment of Wages Act 1991 provides, *inter alia*, as follows:-

"'wages', in relation to an employee, means any sums payable to the employee by the employer in connection with his employment, including—

(a) any fee, bonus or commission, or any holiday, sick or maternity pay, or any other emolument, referable to his employment, whether payable under his contract of employment or otherwise, and

[…]

Provided however that the following payments shall not be regarded as wages for the purposes of this definition:

(i) any payment in respect of expenses incurred by the employee in carrying out his employment …"

Section 5(1) of the 1991 Act provides as follows:-

"An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—

(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or

(c) in the case of a deduction, the employee has given his prior consent in writing to it."

The appellants were employees of the respondent company. The respondent operated a bonus scheme, payable twice annually, in June and November, for work carried out from August to January and from February to July, respectively. The respondent discontinued the bonus scheme in January 2012 and did not make the payments

allegedly due in July 2012. The respondent also previously operated a so-called zone allowance whereby employees in Dublin stores received an additional hourly allowance in consideration of the higher cost of living there. The respondent removed that allowance as it contended that there was no longer a reason to pay it.

The appellants applied to the rights commissioner who found in their favour. The respondent appealed to the Employment Appeals Tribunal, which determined that the bonus scheme was discretionary and could be withdrawn at any time. The tribunal also determined that the zone allowance was separate and distinct from salary and that it was not paid as compensation for work carried out but was a form of compensation for working in a certain area, and thus was not wages under s. 1(1) of the 1991 Act. The appellants appealed to the High Court under s. 7(4)(b) of the 1991 Act against the finding of the tribunal.

Held by the High Court (McDermott J.), in allowing the appeal in respect of the bonus payment issue but refusing it in respect of the zone allowance issue, 1, that the payment of a bonus crystallised as a contractual obligation once it was earned in accordance with the terms of the bonus scheme under a contract of employment. Where such a bonus scheme was thereafter unilaterally withdrawn, the fact employees worked the relevant period pursuant to the scheme meant they accrued a bonus entitlement under the scheme despite the existence of a clause that all bonus schemes were discretionary and could be withdrawn at any time.

2. That the discretionary nature of a bonus scheme did not extend to a withholding of a bonus due. A bonus so accrued was a bonus properly payable as wages under s. 5(1) of the 1991 Act. The discretion to withdraw a bonus scheme at any time was intended to apply *in futuro* and attached to the conferring of bonuses, as yet unaccrued, under the terms of the scheme.

Finnegan v. J & E Davy [2007] IEHC 18, [2007] E.L.R. 234 considered. *Small v. Boots Co. plc* [2009] I.R.L.R. 328 followed.

3. That the tribunal erred in regarding the use of the word "discretionary" in relation to the bonus scheme as being determinative. The use of the word "discretionary" was not always determinative of whether a contractual entitlement arose under a bonus scheme.

Small v. Boots Co. plc [2009] I.R.L.R. 328 considered.

4. That a discretion to withdraw a bonus scheme had to be exercised reasonably. A discretion exercised unreasonably would render the employer in breach of contract if no reasonable employer would have exercised the discretion in such a way. A high onus was imposed on an employee who claimed that such a discretion had been unreasonably exercised.

Lichters and Hass v. DEPFA Bank plc [2012] IEHC 10, [2012] E.L.R. 258 followed.

5. That an expense could be withdrawn or reduced in accordance with the terms of the contract of employment dealing with expenses, and was not properly the subject of a claim for relief under the 1991 Act as a deduction from wages. The 1991 Act had no application to issues arising from a reduction of an allowance properly classified as an expense because it was clearly not a deduction from wages.

London Borough of Southwark v. O'Brien [1996] I.R.L.R. 420 followed. *McKenzie v. Minister for Finance* [2010] IEHC 461, [2011] E.L.R. 109 considered.

6. That although findings of fact had to be accepted by the High Court on appeal, the court could still examine the basis upon which those facts were found. The relevance or admissibility of the matters relied on by the tribunal in determining the facts in the manner that it did might give rise to a matter of law.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34 and *National University of Ireland Cork v. Ahern* [2005] IESC 40, [2005] 2 I.R. 577 applied.

Cases mentioned in this report:-

Blackrock College v. Browne [2013] IEHC 607, (Unreported, High Court, Hedigan J., 20 December 2013).

Finnegan v. J & E Davy [2007] IEHC 18, [2007] E.L.R. 234.

Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare [1998] 1 I.R. 34; [1998] E.L.R. 36.

Horkulak v. Cantor Fitzgerald International [2004] EWCA Civ 1287, [2004] I.R.L.R. 942; [2005] I.C.R. 402.

Lichters and Hass v. DEPFA Bank plc [2012] IEHC 10, [2012] E.L.R. 258.

London Borough of Southwark v. O'Brien [1996] I.R.L.R. 420.

McKenzie v. Minister for Finance [2010] IEHC 461, [2011] E.L.R. 109.

Mears Ltd. v. Salt (Unreported, United Kingdom Employment Appeals Tribunal, 1 June 2012).

National University of Ireland Cork v. Ahern [2005] IESC 40, [2005] 2 I.R. 577; [2005] 2 I.L.R.M. 437; [2005] E.L.R. 297.

Small v. Boots Co. plc [2009] I.R.L.R. 328.

Originating notice of motion

The facts have been summarised in the headnote and are more fully set out in the judgment of McDermott J., *infra*.

On 25 June 2014, the appellants issued an originating notice of motion pursuant to s. 7(4)(b) of the Payment of Wages Act 1991, appealing findings of the Employment Appeals Tribunal of 14 May 2014.

The appeal was heard by the High Court (McDermott J.) on 29 and 30 January and 4 February 2015.

Peter Ward S.C. (with him *Claire Bruton*) for the appellants.

Maurice G. Collins S.C. (with him *Marcus Dowling*) for the respondent.

Cur. adv. vult.

McDermott J. 8 January 2016

Introduction/background

[1] The appellants are ten employees of the respondent who commenced their employment on different dates between the years 2001 and 2008 respectively in different retail premises operated by the respondent. The first, second, third, fourth, fifth, sixth and tenth appellants claim an entitlement to be paid a winter/summer bonus under their respective contracts of employment. The bonus was normally paid twice annually and amounted to 6% *per* annum of gross salary: the first payment, amounting to 3% of gross salary, was paid in June of each year ("the summer bonus") for the work period August to January and the second, a further 3%, was payable in November for the work period of February to July ("the winter bonus"). Those commencing employment in 2009 did not benefit from this bonus scheme. The employer discontinued the bonus scheme applicable to the appellants in January 2012 but later indicated that it would take effect from 1 April 2012. The appellants claim that the summer bonus, payable in 2012, should nevertheless have been paid since it was earned and/or accrued during the previous August to January. It was also claimed that the withdrawal of the bonus was in itself unlawful and in breach of the provisions of the Payment of Wages Act 1991 ("the 1991 Act").

[2] The second element of the claim concerned the withdrawal of a "zone allowance" payable to staff at three Dublin outlets owned by the respondent at Liffey Valley, Tallaght and Swords, which is also said to be a breach of the appellants' entitlements under the 1991 Act.

[3] The appeal is pursuant to s. 7(4)(b) of the 1991 Act from a number of determinations made by the Employment Appeals Tribunal ("the Tribunal") on 14 May 2014 in respect of appeals against decisions of the rights commissioner ("the Commissioner") dated 5 and 20 November 2013 following complaints brought by the appellants. It is made by way of notice of motion dated 25 June 2014 grounded upon affidavits sworn by Mr. Jonathan Hogan, an industrial officer with the Mandate trade union. A

replying affidavit of Louise Harrison, solicitor, verifying the statement of opposition was submitted on behalf of the respondent.

Reliefs sought

[4] The appellants seek orders pursuant to O. 84C of the Rules of the Superior Courts 1986 and s. 7(4)(b) of the 1991 Act:-

a. that the Tribunal erred in law in determining that the removal of a winter/summer bonus by the respondent was not in breach of s. 5 of the 1991 Act;
b. that the Tribunal erred in law in determining that the removal of a "zone allowance" by the respondent was not in breach of s. 5 of the 1991 Act;
c. that the Tribunal had erred in law in failing to award compensation to the appellants pursuant to s. 6 of the 1991 Act;
d. that the Tribunal erred in law in determining that the removal of the winter/summer bonus constituted a deduction in compliance with s. 5(1)(b) of the 1991 Act;
e. that the Tribunal erred in law in determining that the zone allowance was paid as an expense/compensation for working in a particular geographic area as defined and contemplated by s. 1(1)(i) of the 1991 Act;
f. that the Tribunal erred in law in classifying the non-payment of the zone allowance as a "reduction" rather than a deduction for the purposes of s. 5of the 1991 Act, and, if required;
g. an order remitting the matter back to the Tribunal for hearing.

[5] Three related declarations are also sought by the appellants that:-

a. the respondent made unlawful deductions from the appellant's wages contrary to s. 5 of the 1991 Act;
b. the winter/summer bonus and/or zone allowance are properly payable to the appellants within the meaning of the 1991 Act; and
c. the appellants are entitled to compensation pursuant to s. 6 of the 1991 Act for the unlawful deductions.

Procedural background

[6] The appellants challenged the decisions of the respondent not to pay the zone allowance (where applicable) and the winter/summer bonus payment as unlawful deductions of wages properly payable to them under the appropriate provisions of the 1991 Act. The claims were first brought to

the Commissioner and were heard over four days in June, July and October 2013. The claims were upheld.

[7] The Commissioner's decisions were subsequently appealed by the respondent to the Tribunal. By determinations dated 14 May 2014, the Tribunal overturned the decisions reached by the Commissioner in respect of both points.

Preliminary points of objection

[8] The respondent submits that the originating notice of motion dated 25 June 2014 does not, as required under O. 84C, r. 2(3), set out the "point of law on which the appeal is made".

[9] It is also claimed that the appellants have failed to exhibit the transcript of the hearing as contemplated by O. 84C, r. 3(1)(e).

[10] These issues were raised as preliminary points of objection in the statement of opposition dated 21 July 2014. During the course of the hearing both sides sought to rely upon elements of the transcript in support of their respective arguments and I do not consider that this challenge to the admissibility of the transcript in evidence was seriously pursued.

[11] I am also satisfied that the grounds upon which the appeal is brought as set out in the notice of motion are sufficient to raise a number of points of law, as required under the Rules of the Superior Courts 1986 and s. 7 of the 1991 Act, which clearly arise from the pleadings, the affidavits submitted and the substance of the claims brought by the appellants under the relevant legislation.

The Tribunal's determination

[12] The Tribunal's decisions of 14 May 2014 dealt separately with the winter/summer bonus and the zone allowance payments.

Winter/summer bonus

[13] With regard to the winter/summer bonus payment, the Tribunal found that although the terms of the appellants' contracts of employment differed in a number of respects, each contained a common clause which was set out in the employee's handbook and provided that "all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time".

[14] The Tribunal found as follows:-

> "On 1 April 2012 the [appellants] were notified that 'with effect from 1 April 2012 you will no longer receive the summer/winter bonus traditionally paid in June and November of each year'. Each employee was asked to sign a letter 'to confirm receipt of the notification of the amendment'. It is clear from the letter that it is not a letter seeking consent to the amendment as was argued by the appellants. It merely seeks acknowledgement of receipt of the amendment to the terms and conditions of employment. From the evidence adduced it would seem that the contracts of employment differed slightly in relation to the point at issue. One set of contracts stated ' … may amend or vary your terms of employment from time to time and these variations or amendments will be posted on the staff notice board if the change is minor or in writing if the change is more substantial'. The other set of contracts stated '[d]etails of the other terms and conditions of employment are given in the employee handbook. Any changes to the above details will be notified to you directly'. There is one consistency between those two contracts and it is set out in the employee handbook, wherein it states in bold 'all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time'. That clause is clear, unequivocal and incapable of any other interpretation".

The Tribunal concluded that the non-payment of the winter/summer bonus complied with the provisions of s. 5(1)(b) of the 1991 Act and reversed the Commissioner's decision. It stated that:-

> "If [the employees] were not content with [the employer] retaining the power unilaterally to review or withdraw the allowance, they should not have entered into such a contract."

Winter/summer bonus payment – factual background

[15] All employees of the respondent who had served for at least six months with the respondent company received a winter/summer bonus payment on the basis of pay earned during certain periods of trade. The winter bonus was based on the basic pay earned in the previous February - July period of trade, with the summer bonus payment being derived from the basic pay earned in the previous August - January trading period. The employee handbook, provided by the respondent to its employees, states that the "scheme guarantees 6% of your basic pay earned salary (excluding commission and overtime) *per annum* subject to qualifying and accrual times being satisfied." In January 2012 the respondent announced the withdrawal of these two seasonal bonus payments with effect from 1 April

2012. In a letter dated 29 February 2012 the respondent informed its employees that even though they had an expectation that the summer bonus would be paid, this would not be forthcoming due to cost cutting measures by the respondent. It was accepted by the respondent, in meetings held in January 2012 between the respondent and employees, that the latter were eligible to receive a summer bonus, but that there was no prospect of payment due to the implementation of cost reducing policies. The decision was taken in the context of rapidly deteriorating trading conditions for the employer.

Winter/summer bonus payment – appellants' submissions

[16] The appellants' submit that the Tribunal's finding that the withdrawal of the winter/summer bonus was not contrary to the provisions of s. 5(1)(b) of the 1991 Act was wrong in law. They claim that s. 5(1)(b) only allows a financial deduction to be made when authorised by the contract of employment. The appellants argue that the Tribunal failed to consider the fact that their summer bonus – which was payable in June 2012 – was referable to a period which the appellants had already worked, *i.e.* August 2011 to January 2012 and could not be the subject of a retrospective withdrawal under the "bonus" clause. It failed to consider the fact that the respondent had accepted that the appellants had accrued the summer bonus payable in June 2012 at the time when the decision was made by the respondent to withdraw it. The employees had already provided consideration by their work over that period and had therefore earned the bonus which could not be retrospectively and unilaterally withdrawn.

[17] The appellants also submit that the Tribunal failed to examine whether their contracts of employment contained an express provision which permitted the withdrawal of the winter/summer bonus and, if so, whether their consent was required before the bonus could be withdrawn.

[18] In addition, the appellants contend that the withdrawal of a "declared" bonus could not occur on the exercise of the employer's discretion.

Winter/summer bonus payment – respondent's submissions

[19] The respondent submits that the bonus was not "declared" by the respondent to the appellants for the period commencing August 2011 and ending in January 2012 or any other period. The Tribunal reached the same conclusion on the evidence before it.

[20] The respondent pleads in its statement of opposition that it was open to the Tribunal, on the evidence, to make the findings set out in its determination dated 14 May 2014 in relation to the winter/summer bonus payment and that there is no basis for impugning such findings.

[21] The respondent submits that none of the material put before the court provides any basis for overturning Tribunal's findings. The contracts of employment were clear and unambiguous in respect of the discretionary nature of the bonus payment. In arguing that these terms ought to be construed within the context of their factual background, the appellants fail to provide an adequate rebuttal to the clear meaning of the words used in the clause that "all bonus schemes are discretionary and … may be reviewed or withdrawn at any time".

[22] Further, the respondent argues that the appellants' submission that the power to withdraw the winter/summer bonus should be subject to specific limitations has no legal or factual basis and is unfounded, as the Tribunal's determination of 14 May 2014 clearly states that it considered the evidence proffered in relation to the terms of the contract. The Tribunal found that there was a clear and unambiguous term in the contracts that gave the employer the right to review or withdraw the bonus scheme. Furthermore, such a review or withdrawal could be undertaken "at any time". This clause also clearly states that the bonus scheme is discretionary in nature.

[23] The respondent rejects the appellants' contention that the employer's discretion to withdraw the bonus is qualified in any respect. In that regard, the appellants contend that the discretionary nature of the bonus payment was removed because the period of time to which the bonus was referable had passed. Secondly, it is argued by the appellants that the contract falls to be interpreted in light of the "factual matrix" under which it was made and intended to operate. The respondent highlights that neither of these points were made before the Tribunal, and that being so, the court would be acting *ultra vires* if these arguments were allowed to be advanced on this appeal.

[24] The respondent claims that it is not clear what the appellants mean by describing the bonus as "declared", that there is no provision for the declaration of a bonus under the contract and that no announcement or process was identified by which the bonus was ever "declared" to its employees. On the contrary, it is submitted that the evidence before the Tribunal clearly stated that the bonus was under review as of January 2012.

[25] The respondent further argues that the Tribunal did not consider that the existence of the bonus scheme coupled with the passing of time

was sufficient to give rise to the conclusion that the bonus was payable. Furthermore, the respondent contends that there is no legal precedent for such a finding.

[26] The respondent contends that the notice of motion, dated 25 June 2014 discloses no error of law by the Tribunal in reaching its determination on this issue.

Zone allowance

[27] With respect to the zone allowance, the Tribunal considered the definition of wages and expenses under s. 1(1)(i) of the 1991 Act that payments will not be regarded as wages for the purposes of the Act if they include "any payment in respect of expenses incurred by the employee in carrying out his employment".

[28] The Tribunal's determination further states:-

> "There can be no doubt that the allowance paid was a separate and distinct payment from that of the salary and had a separate and distinct purpose. Wages are paid in consideration of work carried out. Zone allowances were paid as a form of compensation for working in a particular area and therefore come under the umbrella of s. 1(1)(i) [of the 1991 Act]."

[29] The Tribunal also considered a letter of 29 January 2003 concerning the allowance which indicated that employees would receive "a 5% increase [in their] hourly earnings in the form of a zone allowance (41 cent per hour)". It concluded that this letter must have been amended and that there was no evidence that the 5% increase was ever maintained. The Tribunal was satisfied that the content of the letter did not form part of the contract of employment.

[30] The Tribunal also noted in its determination of 14 May 2014 that the removal of the zone allowance payment was made in good faith by the respondent in an attempt to save money. The Tribunal further highlighted that the respondent company was experiencing severe financial losses and that an examiner had been appointed in May 2013.

[31] It concluded that the case bore striking similarities to the facts of *McKenzie v. Minister for Finance* [2010] IEHC 461, [2011] E.L.R. 109. It found that the provisions of the 1991 Act had no application to the circumstances of this case. It held that "[the] removal of the allowance amounts to a reduction in the allowance, albeit a 100% reduction, and is not a deduction from the wages payable".

Zone allowance payment – factual background

[32] Prior to April 2012, those appellants who worked at the respondent's stores based in the "Dublin region" (*i.e.* stores at Swords, Tallaght and Liffey Valley) received a "zone allowance" of €0.41 per hour which was payable to those appellants who were eligible for such an allowance. The respondent introduced this zone allowance payment in January 2003. The zone allowance was conceived as a compensatory payment to those who worked in the Dublin stores, because the cost of living in Dublin was deemed to be higher than other regions of the country. The allowance was clearly calculated to attract candidates for employment and to offer terms of employment whereby they would be paid the allowance in consideration of their working for the employer in a "zone" in which it was recognised additional living expenses would be incurred.

[33] By letter dated 29 January 2003 the respondent informed its employees that the said zone allowance would "be reviewed but not removed or reduced". Nine years later, in January 2012, the respondent announced that the zone allowance would be removed from 1 April 2012 onwards. The affected employees consulted with the Mandate trade union expressing their concerns with the respondent's decision in relation to the removal of the allowance.

[34] At the time of the announcement in relation to the zone allowance payment, the respondent company was in a poor financial situation. These difficulties necessitated cost saving measures which, as argued by the respondent, were required to safeguard the future of the business and to protect jobs. It was accepted by the Tribunal that this factor does not alter the employer's contractual obligations to its employees.

[35] On 31 January 2013 the respondent was forced to petition the High Court for the appointment of an examiner under the provisions of the Companies (Amendment) Act 1990. That application was successful and on 23 May 2013 the High Court approved the scheme of arrangement proposed by the examiner.

[36] Though it engaged in correspondence with the Mandate trade union, the respondent reaffirmed its decision by letter dated 29 February 2012 to remove the zone allowance payment. In this letter the respondent offered an explanation for the decision to remove the said allowance as "there is no longer a valid reason to pay a higher rate of pay in the three Dublin stores".

[37] The respondent offered to "buy-out" the zone allowance. The appellants refused to accept this offer and the proposed "cushion payment"

offered by the respondent. The zone allowance payment has not been paid to the appellants since 1 April 2012.

Zone allowance payment – appellants' submissions

[38] The appellants submit that the Tribunal failed to have proper regard to the contents of the letter of 29 January 2003, erred in law in concluding that the allowance did not fall within the meaning of "wages", and failed to engage in any appropriate analysis of the term "expenses" for the purposes of s. 1(1)(i) of the 1991 Act. The appellant submits in this regard that there was no evidence before the Tribunal from which it could be inferred that the zone allowance was an expense under s. 1(1)(i) of the 1991 Act. However, it is not submitted that an expense under the subsection only applies to vouched or vouchable items; rather, it is submitted that in these cases the zone allowance was an intrinsic part of the wages payable to employees contracted to work at the Dublin outlets.

[39] It is also argued that the Tribunal erred in law in holding that the contents of the letter dated 29 January 2003 did not form part of the contractual terms on which the appellants could rely.

[40] The appellants allege that the Tribunal's finding that the appellants' case mirrored that of the decision reached by Edwards J. in *McKenzie v. Minister for Finance* [2010] IEHC 461, [2011] E.L.R. 109 was a misinterpretation of that case, upon which the finding that the 1991 Act did not apply to the circumstances of the appellants' case was incorrectly based.

Zone allowance payment – respondent's submissions

[41] The respondent submits that the appellants must show that they had a contractual entitlement to be paid the zone allowance.

[42] The respondent states that it is accepted between the parties that the Tribunal's finding that the zone allowance was an "expense" within the meaning of s. 1(1)(i) of the 1991 Act cannot be disturbed unless there was an absence of evidence before the Tribunal upon which such a finding could reasonably be made.

[43] The respondent notes that the grounds of appeal identified in the originating notice of motion do not identify any error of law in the definition of an expense. The respondent submits that this argument is new and that the appellants should not be permitted to advance it in this appeal for the first time. The respondent argues that the appellants seek a fresh

determination of fact on evidence adduced before the Tribunal which it was for the Tribunal to assess and is not a proper basis for an appeal on a point of law.

[44] The respondent also notes that the submission that the Tribunal erred in law in its interpretation of the decision of Edwards J. in *McKenzie v. Minister for Finance* [2010] IEHC 461, [2011] E.L.R. 109 was not relevant to the issues on this appeal because the appellants implicitly accept that if there was evidence before the Tribunal that the zone allowance was a payment in respect of expenses, then it automatically fell outside the scope of the 1991 Act.

The law

[45] The relevant statutory provisions are set out in the 1991 Act and the Payment of Wages (Appeals) Regulations 1991 (S.I. No. 351) (hereinafter "the 1991 Regulations"), and the provisions of O. 84C of the Rules of the Superior Courts 1986.

[46] Section 1 of the 1991 Act provides, *inter alia*, the definition of wages:-

> "'wages', in relation to an employee, means any sums payable to the employee by the employer in connection with his employment, including—
>
> (a) any fee, bonus or commission, or any holiday, sick or maternity pay, or any other emolument, referable to his employment, whether payable under his contract of employment or otherwise, and
>
> (b) any sum payable to the employee upon the termination by the employer of his contract of employment without his having given to the employee the appropriate prior notice of the termination, being a sum paid in lieu of the giving of such notice:
>
> Provided however that the following payments shall not be regarded as wages for the purposes of this definition:
>
> (i) any payment in respect of expenses incurred by the employee in carrying out his employment,
>
> (ii) any payment by way of a pension, allowance or gratuity in connection with the death, or the retirement or resignation from his employment, of the employee or as compensation for loss of office,
>
> (iii) any payment referable to the employee's redundancy,
>
> (iv) any payment to the employee otherwise than in his capacity as an employee,

(v) any payment in kind or benefit in kind."

[47] Section 5 is entitled the "Regulation of certain deductions made and payments received by employers". Subsection (1) of s. 5 is most relevant, and states:-

"An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—

(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or

(c) in the case of a deduction, the employee has given his prior consent in writing to it."

Subsection (5) of s. 5 provides, *inter alia*:-

"Nothing in this section applies to-

[…]

(d) a deduction made by an employer from the wages of an employee in pursuance of any arrangements—

(i) which are in accordance with a term of a contract made between the employer and the employee to whose inclusion in the contract the employee has given his prior consent in writing, or

(ii) to which the employee has otherwise given his prior consent in writing,

and under which the employer deducts and pays to a third person amounts, being amounts in relation to which he has received a notice in writing from that person stating that they are amounts due to him from the employee, if the deduction is made in accordance with the notice and the amount thereof is paid to the third person not later than the date on which it is required by the notice to be so paid …"

[48] Section 5(6) of the 1991 Act provides that:-

"Where-

(a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that

occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or

(b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee,

then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."

[49] This appeal is brought by way of s. 7(4)(b) of the 1991 Act which states that:-

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

[50] In *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 the Supreme Court dealt with the circumstances in which the High Court will overturn a decision of a specialist tribunal such as the Employment Appeals Tribunal. Hamilton C.J. commented, at pp. 37 and 38, that:-

"… I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

[51] As was noted in the appellants' submissions, the High Court, in considering whether to overturn the Tribunal's determination, must first scrutinise whether the Tribunal based its determination upon an identifiable error of law or upon an unsustainable finding of fact. The Supreme Court in *National University of Ireland Cork v. Ahern* [2005] IESC 40, [2005] 2 I.R. 577 held that although findings of fact must be accepted by the High Court on appeal, that court could still examine the basis upon which those facts were found. The relevance or admissibility of the matters relied on by

the Tribunal in determining the facts in the manner that it did may give rise to a matter of law.

The format of the appeal

[52] Regulation 3 of the 1991 Regulations, upon which the respondent relies in respect of the format and grounds of this appeal, states that:-

> "A notice under section 7(2) in relation to an appeal shall contain—
> (a) the names, addresses and descriptions of the parties to the proceedings to which the appeal relates,
> (b) the date of the decision to which the appeal relates and the name of the rights commissioner who made the decision, and
> (c) a brief outline of the grounds of the appeal."

Rules of court

[53] Order 84C, r. 2(3) of the Rules of the Superior Courts 1986 as inserted by r. 1 of the Rules of the Superior Courts (Statutory Applications and Appeals) 2007 (S.I. No. 14) states:-

> "Where the relevant enactment provides only for appeal to the High Court on a point of law, the notice of motion shall state concisely the point of law on which the appeal is made."

[54] The correct format of an appeal on a point of law was considered by Hedigan J. in *Blackrock College v. Browne* [2013] IEHC 607, (Unreported, High Court, Hedigan J., 20 December 2013) in which the Labour Court made a determination which, the appellant argued, was based on an error of law. Section 17(6) of the Protection of Employees (Part-Time Work) Act 2001 provided specifically for an appeal on a point of law. It was held that where the Oireachtas provides for a particular and limited form of statutory appeal, the appellant was obliged to proceed in accordance with those provisions and adhere to the rules prescribed therein.

Decision on the winter/summer bonus

[55] The court is satisfied that the bonus at issue in this case was not declared by the employer at any stage and the Tribunal was not invited to and did not make any finding that a bonus had been declared. There was no announcement that a particular bonus was payable. The bonus scheme clearly operated on a basis that did not require such an announcement. It

was payable at the rate of 3% in June 2012 for the period worked between August 2011 and January 2012. The attempt to categorise the bonus payable in respect of the period from August 2011 to January 2012 as a form of declared bonus is therefore misconceived.

[56] There is no doubt that the relevant appellants provided their labour during this period and had an expectation, having done so, that the 3% bonus would be paid. That expectation was based upon the terms of the bonus scheme which provided that an employee was entitled to the payment of the 3% if he/she had the requisite period of service to enable him/her to benefit from the scheme and had worked the relevant accrual period *i.e.* the six months to which it applied. It was unilaterally withdrawn from them. However, the employer contends that this was in accordance with the terms of the contract of employment and bonus scheme which provides that the bonus "may be reviewed or withdrawn at any time". The employer accepts that its employees' expectations were understandable, if not legally warranted, but submit that whether post or pre the summer or winter period covered in any particular year, it is entitled to withdraw the bonus. In the case of a period of the relevant year not yet worked, the withdrawal of the bonus simply means that the balance of the 3% cannot be earned because it cannot accrue. Therefore, it is not payable. Similarly, it is said that the bonus scheme, once withdrawn, means that it is no longer applicable to the first part of the year which has been worked and in respect of which the 3% bonus would otherwise have accrued: it simply need not and will not be paid. It is submitted that the clear and unambiguous terms of the bonus clause and scheme allow for this result and that the Tribunal was correct in so finding. I respectfully disagree.

[57] I am satisfied that the terms of the contract and bonus scheme must be interpreted in the overall context of the contract. The bonus scheme applied to each eligible employee during the course of his/her employment. To be eligible for the bonus payment employees had to have at least six months' service. The bonus was calculated at the rate of 6% *per annum* of the gross basic pay of the employee and was payable twice annually. The scheme provided that an eligible employee was to be paid a 3% bonus on the completion of the six month winter or summer period regardless of whether he/she remained in employment for the full year. The bonus was not contingent at that stage upon a satisfactory performance by the employee or upon any other specified conditions. It was not specifically linked to the profitability of the company. The withdrawal of the bonus was announced in January 2012, after the relevant six month period, to take effect from 1 April 2012. The worked six month period bonus was payable

in June 2012. The respondent submits that notwithstanding these important elements of the contract and bonus scheme, the employer retained an absolute discretion to withdraw payment at any time.

[58] The financial reality with which the employer was faced led to a review of the bonus scheme. I accept that the employer had a wide discretion under the terms of the contract and scheme to withdraw the scheme which must be exercised reasonably. If the discretion is exercised unreasonably the employer will be in breach of contract if no reasonable employer would have exercised the discretion in that way. This imposes a very high onus on an employee who claims that the discretion was unreasonably exercised (*per* Hedigan J., in *Lichters and Hass v. DEPFA Bank plc* [2012] IEHC 10, [2012] E.L.R. 258). Having regard to the fact that the respondent was obliged to seek examinership and that it was clearly in a very difficult financial situation, the decision to withdraw the bonus could not be regarded as unreasonable. The respondent submits that this ground was not advanced to, or considered by, the Tribunal and should not be entertained. I am satisfied that this is so, but even if it had been advanced, it is clear that it could not have succeeded.

[59] If the employer had grounds upon which to exercise its discretion to withdraw the scheme, a further question arises: under the terms of the bonus scheme, was the employer, on a proper construction of the contract and scheme, entitled to withdraw it both prospectively and retrospectively? It seems to me that the employer was entitled to withdraw the bonus scheme prospectively. However, it is claimed that though the contract states it may be withdrawn "at any time" this should not be interpreted literally and applied retrospectively in the circumstances of this case. The phrase must be understood in the context of the other terms of the scheme as operated by the employer as set out above. In that regard, the Tribunal noted that a letter from the employer to each of the appellants on 1 April 2012 sought an acknowledgement of receipt of notice of its intention to discontinue the bonus as of that date, as an amendment to the terms and conditions of employment. The Tribunal's decision is rooted in the finding that the employee's handbook provides a consistent clause common to each contract to the effect that "all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time".

[60] *Finnegan v. J & E Davy* [2007] IEHC 18, [2007] E.L.R. 234 concerned the deferral of a quantified bonus for a period of two years which involved a change in the terms of employment unilaterally imposed upon the plaintiff by his employer. Smyth J. held that the plaintiff had a legitimate and reasonable expectation that if the firm thrived and his efforts

were fruitful he would be awarded a bonus. This was discretionary in respect of each year's trading and dependent upon an annual personal assessment by the employer. Smyth J. was satisfied at p. 240 that:-

> "[The] plaintiff could reasonably expect as a matter of principle built up from a number of years of consistent conduct in the payment of bonuses and the matter of discretion never having been mentioned to him at any stage that some bonus would be payable – the amount only dependent on the trading activities of the firm and his own performance."

The parties did not have the benefit of a written contract. The case was decided on a consideration of the substance and effect of the deferral of the payment of the bonus. The court determined that the unilateral imposition of the deferral constituted a particularly onerous and unusual condition which was not made known to the plaintiff for a period of six years and operated as a restraint of trade (because the bonus would not be paid if the plaintiff took up employment with a rival). This is materially different from the more extensive discretion exercised under the contract in this case, the terms of which are said to be set out in the employee's handbook. In this case the amount of the bonus and the periods for which it would be payable to the appellants were clearly set out in advance and completely unrelated to performance by the employee, however, the bonus scheme could be withdrawn at any time. This case is therefore of little assistance in the interpretation of the terms of this bonus scheme save insofar as it acknowledges that a legitimate expectation of payment of a bonus may arise under a contract where it has been promised and quantified in respect of a defined work period.

[61] The literal interpretation adopted by the Tribunal suggests that if the employees were not content with the terms of the contract and the bonus scheme "they should not have entered into such a contract" and that the discretion retained by the employer to withdraw the scheme was absolute. However, the use of the word "discretionary" is not always determinative of whether a contractual entitlement arises under a bonus scheme.

[62] In *Small v. Boots Co. plc* [2009] I.R.L.R. 328 a number of warehousemen were in receipt of performance-related bonuses which were not given over a three year period. The employees brought an action for unlawful deduction of wages, claiming a contractual entitlement to the bonuses. Slade J. (delivering the judgment of the United Kingdom Employment Appeals Tribunal) considered the interpretation of the word

"discretionary" in bonus schemes as follows in a way which I regard as helpful and persuasive at p. 332:-

> "18. In my judgment, the extent of an employer's discretion in relation to a bonus scheme is relevant to the determination of the question of whether and, if so, to what extent the scheme has contractual content. The employment judge erred in failing to determine the meaning of the term 'discretionary' in the documentation on which he relied.
>
> 19. As is illustrated by the observation of Potter LJ in *Horkulak* [*v. Cantor Fitzgerald International* [2004] EWCA Civ 1287; [2004] I.R.L.R. 942 at p. 949], the use of the term discretionary in a bonus scheme may be attached to the decision whether to pay a bonus at all, its calculation or its amount. No doubt there are other factors to which discretion may be attached. In determining whether the reference to a discretionary bonus conferred any contractual entitlement, the employment judge should have decided to what aspect of the scheme the term discretionary was attached. In the context of this case, the possible interpretations include discretion attached to the provision of an overarching bonus scheme, to a decision each year to operate a bonus scheme, to the method of calculation of bonus or to the threshold which triggers a bonus or to whether and if so what percentage of salary will be paid."

Slade J. concluded that the employment judge had not engaged with the question of whether the employer's discretion had any contractual content, and if so what it was, and by regarding the use of the word "discretionary" in relation to the bonus scheme as determinative, I consider that the Tribunal in this case made a similar error.

[63] The employees worked the relevant period pursuant to the terms of the contract and scheme, thereby accruing a bonus entitlement under the scheme. I am not satisfied that the terms of the bonus scheme, properly interpreted, allow for the unilateral withholding of a bonus payment in respect of a period worked by the employee during which the workers had a legitimate expectation that the bonus was accruing and would be paid. I am satisfied that the bonus for August 2011 to January 2012 was properly payable in June 2012 notwithstanding the withdrawal of the scheme in January 2012. I am satisfied that in the circumstances of this case the overall discretionary nature of the bonus scheme does not extend to a withholding of the bonus due in respect of that period, in respect of which the bonus was quantified and payable under the scheme subject to compliance with the eligibility provisions. I am satisfied that the contract of

employment and bonus scheme must be interpreted reasonably. The discretion to withdraw the bonus scheme at any time, in my view, was always intended to apply *in futuro* and attached to the conferring of bonuses, as yet unaccrued, under the terms of the scheme. The payment of the bonus crystallised as a contractual obligation once it was "earned" in accordance with the terms of the scheme as operated. I am satisfied that the Tribunal erred in law in interpreting the discretion vested in the employer to withdraw the bonus scheme at any time as being applicable or attaching to this period.

[64] I am therefore satisfied that notwithstanding the employer's difficult financial circumstances in this case, it bore a contractual obligation to pay the 3% bonus accrued to each employee during the relevant six month period and that this was a bonus properly payable as "wages" under s. 5(1) of the 1991 Act.

Decision on zone allowance

[65] Section 1(1)(i) provides that any payment "in respect of expenses incurred by the employee in carrying out his employment" is not to be regarded as "wages" under the 1991 Act. The zone allowance in this case is clearly not a payment in respect of expenditure by an employee in carrying out the duties of his or her employment which is then to be recouped from the employer nor did the employer ever claim that it was. It is claimed by the employer, and was so found by the Tribunal, that the zone allowance was paid separately from the amount paid for basic salary for the purpose of "compensation for working in a particular area" and is properly to be regarded as an expense based upon a wider definition than that of the more familiar "vouched" expense.

[66] In *London Borough of Southwark v. O'Brien* [1996] I.R.L.R. 420 Mummery J. considered the equivalent provision of English law contained in s. 7(2)(b) of the Wages Act 1986. At issue was the withdrawal of a mileage allowance payable to an employee which, he claimed, was an unlawful deduction of wages under the 1986 Act. The Industrial Tribunal determined that the allowance constituted wages because it provided benefit over and above an expense actually incurred. Mummery J., delivering the judgment of the United Kingdom Employment Appeal Tribunal overturning the decision, stated at p. 422:-

> "22 … when asking, 'Is the payment *in respect of* expenses incurred by the employee?', it is not necessary for the payer to show that what he has paid is precisely a reimbursement of the sum expended by

the worker. 'In respect of' means 'referring to' or 'relating to' or concerning in a general way, whereas the expression used by the chairman in his decision, 'payment of expenses', would appear (wrongly, in our view) to equate the statutory provision with reimbursement of a precise amount."

The United Kingdom Employment Appeals Tribunal concluded that the mileage allowance was an expense under s. 7(2)(b) of the Wages Act 1986. I am satisfied to adopt the same approach to the interpretation of s. 1(1)(i) of the 1991 Act.

[67] There may be cases in which a payment designated by an employer as an expense may be properly regarded as part of the wage payable to an employee. For example in *Mears Ltd. v. Salt* (Unreported, United Kingdom Employment Appeals Tribunal, 1 June 2012) the United Kingdom Employment Appeals Tribunal held that a travel allowance paid as a daily allowance to employees, irrespective of whether travel expenses had been incurred, constituted wages rather than expenses because in fact no expense was incurred. It was accepted, at para. 15, that at first instance it was open to a decision-maker "as a matter of fact and degree, to conclude that, neither in its original form, for its original purpose, nor in the modern form, could it sensibly be said … to be a payment in respect of expenses". However, on this appeal, it is not open to the court to enter upon a hearing *de novo* of the facts of the case. I am satisfied that there was a sufficient evidential basis upon which the Tribunal was entitled to make its findings of fact in respect of whether the payment was an expense or not and it has not been established that these findings are unsustainable. The Tribunal heard extensive evidence on the matter. It adopted the correct interpretation of the nature and extent of expenses covered by s. 1(1)(i) of the 1991 Act which is similar to that applied by Mummery J. in *London Borough of Southwark v. O'Brien* [1996] I.R.L.R. 420. I do not consider that the Tribunal erred in law by so doing. I acknowledge that the nature and extent of the types of payment made to employees vary widely and the decision in this case, on this issue, has very limited value as a precedent: each case will be decided on its own facts. However, disputes of fact which arise in the course of determining whether any particular payment designated by an employer as an expense is in fact part of "wages" payable under the 1991 Act will undoubtedly fall to be considered in the future by the Commissioner and the Tribunal who have the expert knowledge in this area, with which the court will be slow to interfere.

[68] The court has also been referred to *McKenzie v. Minister for Finance* [2010] IEHC 461, [2011] E.L.R. 109 in which Edwards J. held, *inter*

alia, at paras. 5.3 and 5.4, p. 135, that a cabinet decision to reduce the rates of expense allowances for motor travel and subsistence payable to public servants was taken in the public and urgent national interest, and that in the exceptional circumstances of the banking crisis, the government was entitled to act as it did. I am not satisfied that this decision is relevant to the issue in this case. If the zone allowance was payable as part of the appellants' wages pursuant to contract, the withdrawal of the allowance would clearly be an unlawful deduction under the 1991 Act. If it is an expense it may be withdrawn or reduced in accordance with the terms of the contract dealing with expenses, but is not properly the subject of a claim for relief under the 1991 Act as a deduction from wages.

[69] Edwards J. also indicated in *McKenzie v. Minister for Finance* [2010] IEHC 461, [2011] E.L.R. 109, *obiter dictum*, at para 5.8, p. 136, that the reduction of the motor travel allowances and subsistence payments in that case were not a "deduction" from wages for the purposes of the 1991 Act, which had no application to those reductions. I am satisfied that the 1991 Act has no application to issues arising from a reduction of an allowance properly classified as an expense because it is clearly not a deduction from "wages" and I do not consider that conclusion to be in conflict with that part of the judgment.

[70] I am not satisfied that the appellants are entitled to the relief claimed in respect of the zone allowance.

Conclusion

[71] I am satisfied that the Tribunal erred in law in holding that the withholding of the bonus payment for the period August 2011 to January 2012 was lawful and did not constitute a deduction from the wages of the relevant appellants. The bonus is payable to the employees up to the conclusion of that period. I am satisfied that the employer was entitled to terminate the bonus scheme from January 2012 and that it was lawfully withdrawn and was no longer payable from the six month work period commencing in February 2012.

[72] I am satisfied that in the circumstances of this case the Tribunal did not err in law in treating the zone allowance paid to the appellants as an expense under s. 1(1)(i) of the 1991 Act. Its withdrawal was therefore not a deduction from wages under the 1991 Act.

[*Reporter's note*: 1. Section 7 of the Payment of Wages Act 1991 was replaced by s. 52 and Schedule 7 of the Workplace Relations Act 2015 on 1 October 2015.

2. The respondent was ordered to pay one third of the appellants' costs. No order was made in respect of the respondent's costs.]

Solicitors for the appellants: *CC Solicitors*.

Solicitors for the respondent: *William Fry*.

Eoin Byrne, Barrister

[2007] IEHC 324

THE HIGH COURT

Record Number: 2006/406[illegible]Sp

Between/

Sunday Newspapers Limited — Plaintiff/Appellant

And

Stephen Kinsella and Luke Bradley — Defendents/Respondents

JUDGMENT OF MR JUSTICE T.C. SMYTH

DELIVERED THE 3RD DAY OF OCTOBER 2007

Appearances

For the Appellant:	Mr. Mark Connaughton SC Mr. Oisin Quinn BL
Instructed by:	Fanning & Kelly 2 Hatch Lane Hatch Street Dublin 2
For the Respondent:	Mr. Anthony Kerr BL
Instructed by:	James A. Connolly & Co. 13 St. Andrews Street Dublin 2

MR. JUSTICE T.C. SMYTH DELIVERED HIS JUDGMENT AS FOLLOWS

This appeal comes before the Court pursuant to Section 15(6) of the Protection of Employees (Fixed-Term Work) Act, 2003 ("the 2003 Act"), which provides:

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

The background to the litigation is that on 25th October 2005 a Rights Commissioner heard complaints under the 2003 Act brought by the two Defendants ("the claimants"), both of whom are members of the Technical, Engineering and Electrical Union (T.E.E.U) ("the Union"). The Plaintiff company ("the company") submitted that both claimants had signed a severance agreement which, inter alia, stated as follows:-

"Lump Sum
This is in full and final settlement of any and all outstanding entitlements whether statutory or otherwise, e.g. Notice Pay, Collective Agreement Notice, Holidays, Statutory Redundancy, and any other discretionary payments/allowances. This is subject to the Parting Terms document."

"Acknowledgement
This agreement is based on any/all claims in relation to my employment with Sunday Newspapers Limited and/or Terenure Printers Limited, stated or as yet un-stated, being fully resolved (including, but not limited to all claims under the Unfair Dismissals Acts, the Minimum Notice and Terms of Employment Acts, the Protection of Employment Acts and the Redundancy Payments Acts and all or any employment legislation). I have read and understand the above agreement and by my signature below acknowledge and accept the terms in full and final settlement."

The Rights Commissioner having considered the submissions of the parties found that the claimants voluntarily, and with the benefit of the representation of their Union, accepted a severance package and signed a waiver that confirmed their acceptance of the terms "in full and final settlement" and accordingly, found against the claimants. That decision was appealed to the Labour Court pursuant to S.15 of the Act of 2003. The appeal was successful and it was determined that the complaints were well founded and that the claimants who had received €20,541.36 and €30,103.03 respectively on the signing in July 2006 "in full and final settlement of all claims and entitlements" were entitled to further monies of €27,752.08 and €40,483.85 respectively.

The decision of the Supreme Court in **Bates v- Medel Bakery Ltd** [1993]/IIR 359 in the context of an appeal from the Employment Appeals Tribunal under the Redundancy Payments Act, 1967 and of the High Court in Ashford Castle Ltd. V- Services Industrial Professional Technical Union [2006]/ ELR 201 in the context of an appeal from the Labour Court under the Industrial Relations (Amendment) Act 2001 point to the desirability of the court expressly confining itself in its enquiries in an appeal on a point of law. These cases and **C & D Food Ltd. V- Cunnion** [1997] I.I.R, 147 and **O'Leary v- Minister for Transport** [1998] I.I.R, 558 and **Costal Line Container Terminal Ltd. V- Siptu** [2000] I.I.R 549 make it clear that it is not open to the High Court in its appelate function in the context of a determination on a point of law to seek to try anew or take into account facts put before the Court (in whatever procedural guise) which were not before the expert tribunal. However, the jurisdiction given to the Court by statute has been interpreted as including an entitlement to review the mixed questions of law and fact and in addition whether there was evidence to support any findings of fact made by the statutory body whose decision was under appeal (see **Mara (Inspector of Taxes) v- Hummingbird Ltd** [1982] 2 I.L.R.M 421 and **Henry Denny & Sons (Ireland) Ltd v- Minister for Social Welfare** [1998] 1/1.R.34). In the course of his judgment in Denny's case Hamilton, C.J. said (at p.37/8) as follows:-

> "…the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based on an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected.".

More recently Gilligan, J, in **Electricity Supply Board v- Minister for Social, Community and Family Affairs** (The High Court: Unreported 26th February, 2006) observed:

> "Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the court is satisfied that the conclusion arrived at adopts the wrong view of the law, then this conclusion should be set aside."

Much learned argument was put before the Court by counsel for the parties under S. 6 and 12 of the 2003 Act. It is unnecessary to seek to resolve all the differences of interpretation of **nice** points of statute law. In the instant case there is as an undisputed fact, a written agreement signed by the parties on 13th July 2005. Section 12 of the 2003 Act provides:-

> "Save as expressly provided otherwise in this Act, a provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of the provision concerned of this Act) shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act."

The Labour Court noted that this provision is in similar terms in other employment rights statutes (e.g. S.13 of the Unfair Dismissals Act, 1977, S.11 of the Payment of Wages Act, 1991 and S.14 of the Protection of Employment (Part-time Work) Act, 2001. In **Hurley v- Royal Yacht Club** [1997] E.L.R. 225 Judge Buckley in the Circuit Court considered "under what circumstances can claims be legitimately compromised"? In the context of S.13 of the Unfair Dismissals Act, 1997, and stated:

> "In several areas of the law the Supreme Court has held that any consent by a person to waive a legal right which that person has, must be an informed consent. This doctrine must surely apply to contracting out provisions and to section 13 in particular.".

(the judge then having reviewed various determinations of the Employment Appeals Tribunal) continued as follows:-

> "I am satisfied that the applicant was entitled to be advised of his entitlements under the employment protection legislation and that any agreement or compromise should have listed the various Acts which were applicable, or at least made it clear that this had been taken into account by the employee. I am also satisfied that the applicant should have been advised in writing that he should take appropriate advice as to his rights, which presumably in his case, would have been legal advice. In the absence of such advice I find the agreement to be void."

Mr Kerr, B.L, for the claimants accepted that the important aspect of advice was that it be, as stated by the Circuit Judge "appropriate advice". It is not imperative that it be professional legal advice in writing. In the instant case it is undisputed that at all material times prior to 13th July 2005 an issue existed between the parties as to whether the claimants (fixed term employees or workers) were being treated in a less favourable manner than comparable permanent employees of the company. While the status and skill of the relevant trade union officials representing the claimants differed such was not an issue of moment in the Labour Court determination.

Even if, as determined by the Labour Court, the form of agreement was of a stereotype and even if as determined

> "The claimants were called into the office and presented with the waiver and asked to sign it so as to obtain the payment which they had been offered. As a result of the advice which the claimants had obtained from the Department of Enterprise Trade and Employment, and the subsequent advice from their Union, they believed that they could not contract out of their rights and that any document which they signed would not prevent them from pursuing a claim under the Protection of Employees (Fixed-Term Work) Act, 2003."

altogether from any question of an absence of good faith and straight dealing, if such was the belief of the claimants, there is in point of law the difficulty that the Labour Court in an earlier part of its

determination held (referring to the Defendants) "They were advised as to the provisions of the Protection of Employees (Fixed-Term Work) Act, 2003". If the claimants believed as determined by the Labour Court they could not credibly or at all sign "in full and final settlement". If the claimants or either of them signed the Severance Agreement in the form in which they did with the intention of taking further action in the matter - they so deceived the company (Appellant employer), that makes a sham and a mockery of seeking to conclusively resolve an employment dispute. In my judgment the Labour Court erred in law in allowing the claimants to consider as void the Severance Agreement because they mistakenly believed they had been advised that S.12 of the 2003 Act meant that the severance agreements would not preclude them from bringing claims pursuant to the 2003 Act. The section does not preclude severance agreements, settlement agreements or other compromises of claims or potential claims pursuant to employment legislation (Talbot v- The Minister for Labour (The High Court, Barron, J. Unreported 12th December, 1984); **PMPA Insurance Company Limited v- Keenan & Others** [1985] ILRM 173; **Minister for Labour v- O'Connor and Irish Dunlop Ltd.** (The High Court, Kenny, J. Unreported 6th March 1973).

It was submitted on behalf of the Claimants that the Court should follow the decision of the Supreme Court

in **PMPA v- Keenan** [1985] ILRM 173, but in my judgment that case is clearly distinguishable from the instant case. In **Keenan's** case there was no evidence that the Defendant's claim was included in the settlement which covered their claims. In the instant case the very claim made subsequent to the Severance Agreement was in fact made before the Severance Agreement was arrived at and signed and its all claims provision clearly states such to be in the context of severally enumerated Acts and "all or any employment legislation".

I accept the submissions of Mr Connaughton, S.C., on behalf of the company that the decided cases indicate that a party may enter into an agreement in relation to his or her statutory rights and the question of whether or not such rights have been compromised is a matter for the proper construction of the agreement itself. In the instant case the agreement is expressly stated to be in full and final settlement and that means what it says. It says so in express terms referable to enumerated Acts and all or any employment legislation in respect of any and all outstanding entitlements whether statutory or otherwise stated or as yet unstated.

In the instant case there was some meaningful discussion and negotiation (which is not to be equated with interminable talks, documents and meetings) and professional advice of an appropriate character before

the agreement was signed. The fact that the written document proffered for signature was prepared by one party for signature by another after discussion and negotiation however one might view such "negotiation" - which is "to confer for the purposes of an arrangement or some matter by mutual agreement or to discuss a matter with a view to a settlement or compromise" per the Shorter Oxford English Dictionary) does not make the agreement void. In my judgment the instant case is clearly distinguishable from that of **Fitzgerald v- Pat the Baker** [1999] E.L.R 227 cited by Mr Kerr in support of his arguments under S.12 of the 2003 Act.

The submissions referable to S.6 of the 2003 Act may be summarised as follows:-

1. For the claimants

(a) They had been in full time employment with the company from about March 2003. The company acknowledged that the claimants had two years permanent service (in the document setting out the details of the company's severance package). The package made to permanent employees provides for a minimum payment of one year's salary.

(b) The 2003 Act provides that a fixed term employee should not, in respect of his conditions of employment, be treated in a less favourable manner to a comparable

permanent employee.

(c) The severance agreement signed in July 2005 was signed under duress and without the benefit of legal advice and the claimants were denied natural justice.

2. For the company

(a) The claimants freely and voluntarily entered into the Severance agreement with appropriate advice after discussion or negotiation of the very issue subsequently raised before the Rights Commissioner, the Labour Court and this Court and no intimation was either conveyed to the Company or contained in the Severance Agreement of reservation of their position or without prejudice acceptance to bringing a further claim. The 'all claims' were clearly referable to the claimants claim made before (now pursued) post signature of the Severance Agreement and no other and the facts are wholly distinguishable from those adverted to by Carroll, J. In the case of **PMPA V- Keenan**. Mr Oisin Quinn, B.L., in making the final reply for the company correctly drew the Court's attention to the fact that the Labour Court expressed no concluded view on a number of points (including adequacy of consideration) and made no finding as to duress.

(b) The payments made to the claimants did not constitute remuneration within the meaning of the 2003 Act. The payments that were made (including the enhanced amount of €5,000) were made in consideration of both claimants entering into severance agreements. They were made separate from and in complete distinction from the severance packages given to permanent employees. The company took the view that the totality of the loss that would be claimed by either claimant was their earnings until the expiration of their fixed term contracts. In response to the claim being made by reference to the 2003 Act in the discussions or negotiations, it is not **ad rem** from whom the suggestion of the figure may have come.

(c) If there is a difference in the treatment between the claimants and the permanent employees not due to retire within a year, such is permissible pursuant to S.6 (2) of the 2003 Act. It is clear that before the Labour Court the ground relied upon by the company was not simply that the claimants were fixed term employees (although they were such) but rather that their entitlement to work with the company was due to expire in a period of less than a year from the date of the closure of the plant. It was on that basis that the argument rested that it would be manifestly unreasonable for the claimants to be paid a lump sum for a period in excess of that.

(d) There was no legal basis for the Labour Court concluding that if the claimants made a claim (that in fact was never made because the circumstance never arose) that on the conclusion of the fixed term contract upon which they were engaged it was "satisfied that there is a high probability that whether by operation of Section 9 of the Act or otherwise, the claimants **could** have become entitled to a contract if indefinite duration".

Determination:

1. In my judgment in law the "Parting Terms" document (being Appendix 1 in the Trade Union Submissions to the Labour Court) is not an acknowledgement that the claimants had two years permanent service. It is the whole or part of a stereotype document which was circulated to persons: The claimants did receive a copy of this document at some time. There is no sustainable credible evidence that those terms were offered to the claimants: What was offered to the claimants was that they would be retained in employment for the balance of their fixed-term contracts. The Parting Terms document contains a separate formula for permanent staff and another for casual staff. Each formula concludes as follows:-

> "In all cases, where the above formula, i.e. 1.1, 1.2 & 1.3 combined, does not amount to one year's gross basic salary only, a minimum all inclusive amount

equivalent to one year's gross basic salary only will apply."

[Note the word "only" does not occur in the formula conclusion referable to casual staff].

The conditions attached to the Parting Terms document provided (inter alia) the following:-

"2.5 The combined gross amounts of clauses 1.1, 1.2 & 1.3 may not exceed, in any circumstances, the normal expected gross amount that otherwise may have been earned to age 65.

2.6 The company reserves the right to decide in all circumstances who may avail of parting terms, and at what time, regardless of offers, whether written or oral, being made to any individual.

2.7 The company reserves the right to withdraw or amend the parting terms without notice being given to any party."

As a matter of legal construction clause 2.5 is clearly designed to ensure ("in any circumstances") that a permanent employee who was due to retire in less than a year from the date of the announcement, would not 'earn' more as a result of the closure of the plant and the severance package being offered to permanent employees, than they would have earned had they simply

continued to work in the plant until their normal retirement date.

It is this very approach that was taken by the company in its original separate and specific offers made to both claimants, i.e. that they would be offered an equivalent to pay that they would have earned had they continued until the expiry of their fixed term contracts.

In the decision of the Labour Court it is stated (in reference to clause 2.5) "manifestly this clause can have no application". "It is true that the clause is contained in the General Conditions and does not seek to address any specific category of employee it is a clause of general application and in my judgment as a matter of law includes all employees. There is no exclusion of any category of employee and therefore as a matter of law it does apply to the claimants. The provision limits the amount payable. It is not at all manifest to me on a true construction of the conditions that they can have no application to the claimants. The Labour Court was correct in stating "Patently the claimants are not seeking an amount in excess of their potential up to age 65". Sixty five was clearly the age at which permanent staff would cease to work with the company: for those on a fixed-term contract their ceasing to work with the company would occur by effluxion of time irrespective of their age at or

before 65. The argument in decision by the Labour Court under S.6 (2) and 7 (1) of the 2003 Act is logical, on a point of law decision it is irrelevant as to whether factually I agree on what is stated. Regretfully on a mixed point of law and fact I am unable to agree with the conclusion drawn from the argument as correct. In my judgment there is "an unsustainable finding of fact" (as identified by Hamilton CJ in Denny's case) as to the requirements of the claimants.

2. In my judgment the claimants as fixed term employees were treated differently but in no less favourable a manner to a comparable employee. It was open to both the claimants and the company to put before the Labour Court such "comparables/comparators" as each wished that Court to consider it was then for that Court to consider and decide in the specific circumstances of the case which was the relevant genuine comparable. The Labour Court determined that -

"The claimants are entitled to the same minimum payments under the Respondent's parting terms as were guaranteed to comparable employees."

As the entitlement found is related to the company's Parting Terms which are referable to comparable employees of the company then the appropriate

comparable is such person or persons as were doing the same or like work as permanent employees, in the absence of such person or persons then the appropriate comparable is the person or persons who were doing the same or like work who were not employees of the company.

In the specific circumstances of this case I hold that as a matter of law there is an error in the decision of the Labour Court, not that they considered the prime consideration was the nature of the work, but rather than the person or persons to be first considered as the appropriate comparable was to be first sought amongst the permanent employees failing such person, then only does one look elsewhere.

3. On the question of remuneration it was in my judgment open to the Labour Court as a matter of fact to construe the additional payment of €5,000 as remuneration relying on the judgment in **Barber v- Guardian Exchange Assurance** [1990] ECR [1889] paragraph 13, as a payment [not as contended for by the Company as enhanced consideration … on the claimants entering into severance agreements…]. By citing and relying on Barber's case the Labour Court accepted that the sum/sums…

> "… which is paid to him upon termination of the employment relationship, which makes it possible to facilitate his adjustment to the new

> circumstances resulting from the loss of his employment and which provides him with a source of income during the period in which he is seeking new employment."

Yet, the court notwithstanding having doubts as to whether the claimants would have willingly compromised such rights as they, post signing the Severance Agreements, alleged under the 2003 Act which they did not reserve from the Severance Agreement would do so for €5,000, failed to reach any concluded view on the point.

4. In reaching its decision on the question of the waiver there is no evidence in the decision of the Labour Court that it had examined the course of negotiations between the parties so as to ascertain what was intended, yet concluded they were fully satisfied that the claimants did not enter into a binding and enforceable agreement to settle their claim under the 2003 Act. This is not a supportable position in point of law.

In its submission to the Labour Court the claimant's Union stated:

> "This Union made representations to the company at the highest level and expressed the view that these members in question [the claimants] had the protection of the Protection of Employees (Fixed-Term Work) Act, 2003 and therefore were entitled to a minimum of one years gross salary, as

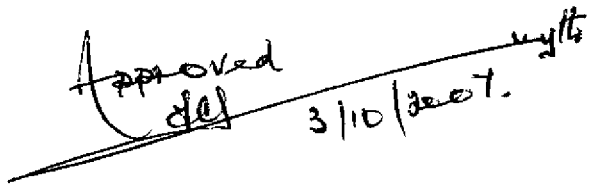
> contained in the Company's document entitled "Parting Terms" (Appendix 1). The company rebuked the Union on each occasion and stated that if we were unhappy with their decision we could take it elsewhere.
>
> In mid July 2005, each individual was asked to sign a document accepting what the company were offering, the alternative to signing was that they would not receive anything. Under duress, and without the benefit of legal advice, both members individually signed a severance agreement (Appendix 2 is a copy of one). This document, especially the section titled "acknowledgement" literally asks the individual to sign away all their rights under any employment legislation".

The inference drawn from primary facts but not the finding of facts themselves, may be, in point of law, disturbed on appeal. The issue that stalled the conclusion of the discussions was solely referable to their having fixed-term contracts and the rights they contended for under the 2003 Act. I accept as correct Mr. Connaughton's submission that the **PMPA v Keenan** case is wholly distinguishable and inapplicable to the instant case. The Severance Agreement was in respect of all claims "stated and unstated" if as appears to have been inferentially accepted by the Labour Court the claimants "signed the form with the intention of taking further action in the matter" the conflict between what is signed up to in the Severance Agreement and the details of the claimant's case as set out in the letters of 1st October 2005 (which goes to the credibility of the witnesses and the integrity of

reliable fact) was not analysed or determined.

One can have considerable sympathy with the Labour Court who clearly went to very considerable research and trouble in their finding but I am nonetheless unable to accept as sustainable their conclusion for the reasons hereinbefore referred to. Accordingly I uphold the appeal of the company.

END OF JUDGMENT



[2006] IEHC 292.

THE HIGH COURT

[2005 No. 198S]

BETWEEN/

SENAN HISTON

PLAINTIFF

AND

SHANNON FOYNES PORT COMPANY

DEFENDANT

Judgment of Ms. Justice Finlay Geoghegan delivered the 3rd day of October, 2006.

Present Application

This is an application by the plaintiff for liberty to enter final judgment in the sum of €376,458.57 as a debt due and owing by the defendant to the plaintiff in respect of salary period 22nd September, 2001, to the 16th December, 2004 and interest pursuant to the Courts Act, 1981.

The motion seeking liberty to enter final judgment was issued on the 19th April, 2005 and came on for hearing before MacMenamin J. in the High Court on the 17th February, 2006. It appears that on such application, counsel for the defendant characterised the defence sought to be made as one of contributory negligence and an issue arose as to whether a matter of law contributory negligence was capable of being a defence to the plaintiff's claim in the summary proceedings. MacMenamin J. directed the trial of that question as a preliminary issue. No formal order was drawn pursuant to the directions of MacMenamin J. on the 17th February, 2006. However a

motion was then issued seeking a determination of the issues pursuant to the direction of MacMenamin J. which came on for hearing before me and I delivered a judgment on the preliminary issue on the 15th June, 2006. On the preliminary issue I determined:

> "Contributory negligence, as alleged in paragraphs 1 to 16 of the defendant's particulars dated the 26th April, 2006, is not, as a matter of law capable of being a defence to the plaintiff's claim."

A further motion was then issued by the plaintiff on the 22nd June, 2006, seeking directions regarding the further hearing of the plaintiff's motion for liberty to enter final judgment. On consent I made an order re-entering the motion seeking liberty to enter final judgment and on consent of the parties agreed to hear that motion on the 25th July, 2006. A further affidavit was filed on behalf of the defendant in the application for liberty to enter final judgment. The defendant now seeks to have the matter remitted to plenary hearing. It contends on the facts set out in the additional affidavit of Mr. Inverarity that it has a bona fide defence based on the following:

1. That the plaintiff did not work for the defendant during the period for which salary is claimed (22nd September, 2001 to 16th December, 2004), and that the plaintiff is not entitled to receive his salary in circumstances where he did not work.
2. That the plaintiff did not find alternative employment during the period in question and by not doing so failed to mitigate his alleged loss and therefore is not entitled to judgment for the debt alleged to be due and owing.

No objection is made on behalf of the plaintiff seeking to raise the above defences subsequent to the hearing of the motion before MacMenamin J. and the

determination of the preliminary issue as directed by him. Rather, it is submitted on the plaintiff's behalf that neither potential defence is such as entitles the defendant to have the matter remitted to plenary hearing.

There is no dispute between the parties as to the principles to be applied by the court in determining whether or not the plaintiff is entitled to summary judgment or whether the matter should be remitted for plenary hearing. This court must determine that issue in accordance with the decision of the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607. In that case both McGuinness J. and Hardiman J. gave judgments with which Denham J. concurred. Both McGuinness J. and Hardiman J. approved of the earlier formulation of Murphy J. in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 where he cited with approval the test laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyds Rep. 21 in the following terms:-

> "The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendant's having a real or *bona fide* defence."

In the same decision, Hardiman J. considered that the above formulation was similar to a number of earlier formulations on applications for summary judgment. He referred amongst others to *Sheppards, Crawford v. Gillmor* (1891) L.R. Ir. 238 where Sir Peter O'Brien C.J. said at p. 245:-

> "I think, however, that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises."

There are no relevant facts in dispute in this application. The background is more fully set out in the judgment I delivered on the preliminary application on the 15th June, 2006. The plaintiff is the former Harbour Master of the Foynes Port Company. He became the holder of an office in the employment of the defendant following the amalgamation of the former Harbours of Foynes Port Company and Shannon Estuary Port Company pursuant to the Harbours (Amendment) Act 2000. A dispute then ensued between the plaintiff and the Chief Executive of the defendant which culminated in the defendant purporting to dismiss the plaintiff on the 21st September, 2001. The plaintiff then commenced plenary proceedings against the defendant essentially challenging the validity of that purported dismissal and seeking declarations, injunctions and other consequential relief. In the High Court he was substantially unsuccessful and appealed that decision to the Supreme Court. In the Supreme Court, (Unreported, Supreme Court, 17th December, 2004) the appeal was allowed and so much of the judgment and order of the High Court as dismissed part of the plaintiff's claim was set aside and in lieu thereof the Supreme Court made a declaration:

> "That the plaintiff has not been validly removed from office in the employment of the defendant."

The basis of that decision as appears from the judgment of Geoghegan J. at p. 8 was that having regard to the interpretation of s. 39 of the Harbours Act 1996 by the Court, the plaintiff continued to have officer status in the employment of the defendant and could not be dismissed without the sanction of the Minister for Marine. That sanction was not obtained prior to the purported dismissal and accordingly Geoghegan J. stated at p.8:-

"It seems clear, therefore, that he had never been validly removed and is still in office."

On the present hearing before me it was common case that until the date of the purported dismissal on the 21st September, 2001, the plaintiff was paid a salary by the defendant in accordance with the amount claimed. Further it was common case that the defendant recommenced paying the plaintiff the said salary from the date of the Supreme Court judgment, the 17th December, 2004, and that in the subsequent period the plaintiff was not required to turn up for work with the defendant. There is no dispute between the parties that if the plaintiff is entitled to be paid a salary for the period between the 22nd September, 2001 and 16th December, 2004, that the salary due is in the amount claimed. Further, it is not disputed by the defendant that prior to the purported dismissal on the 21st September, 2001, the plaintiff was the holder of an office in the employment of the defendant in respect of which he was entitled to be paid a salary in the amount claimed.

The defendant in its approach to the payment of salary to the plaintiff subsequent to the Supreme Court decision has sought to distinguish the plaintiff's position prior to and subsequent to the judgment of the Court. Notwithstanding, no submission was made on behalf of the defendant, correctly in my view, that the decision of the Supreme Court in any way altered the legal relationship between the plaintiff and the defendant. The judgment and order of the Supreme Court of December, 2004, is simply declaratory of the plaintiff's position. The Supreme Court declared that the plaintiff had not been validly removed from office in the employment of the defendant. Accordingly at all material times between the 21st September, 2004 and the 16th December, 2004 and prior to and subsequent to the said

period the plaintiff was in office in the employment of the defendant. Whilst it is relevant to note this position, it does not necessarily determine the present application.

Potential Defences

The first defence sought to be made is that as the claim made by the plaintiff is for a debt due in respect of arrears of unpaid salary, and whilst the defendant accepts that the plaintiff was at all material times the holder of an office to which the salary claimed was attributable, it is contended that the payment of salary connotes a reward for services rendered and that the corollary is that if full services are not rendered, then full payment is not due. Reliance was placed in particular upon the analysis of the House of Lords in *Myles v. Wakefield Metropolitan District Council* [1987] A.C. 539.

The plaintiff asserts that this potential defence is unstateable in law by reason of s. 5 of the Payment of Wages Act, 1991 which governs the obligations of the defendant in relation to the payment of salary to the plaintiff. Section 5 of the Payment of Wages Act, 1991 provides that "an employer shall not make a deduction from the wages of an employee" unless certain conditions set out in s. 5 are fulfilled. Counsel for the defendant did not submit that on the facts herein any of the conditions which would potentially justify a deduction under s. 5 applied. Rather it was submitted that s. 5 of the Act of 1991 did not apply to the present situation as the defendant was not making a deduction from salary but was rather failing to pay 100% of the salary.

The plaintiff is an employee as defined in s. 1 of the Act of 1991. The defendant is an employer as defined in the same section and the salary claimed are wages as defined in the same section. The purpose of s. 5 is to preclude an employer

from making deductions from the wages of an employee unless certain specified conditions are met. Section 5(2) is expressly directed to a prohibition against an employer making any deduction from wages in respect of "any act or omission of the employee" unless certain specified conditions are met. As already indicated it is not suggested that any of such conditions were met by the defendant herein. It does not appear to me arguable that a failure to pay to the plaintiff any part of his salary is not a deduction from his salary within the meaning of s. 5 of the Act of 1991. It is a deduction of 100%. Further the 100% deduction is being made in respect of an alleged omission by the employee i.e. the failure to turn up for work. Such a deduction is expressly prohibited by s. 5(2) of the Act of 1991.

Insofar as the defendant sought to rely on the decision in *Myles v. Wakefield Metropolitan District Council* it appears to me that the reasoning in that case which applies to the common law position is not applicable by reason of the express statutory prohibition in s. 5 of the Act of 1991which applies to the obligations of the defendant to the plaintiff herein.

The second defence sought to be made is that notwithstanding the decision on the preliminary issue, there exists a duty on the plaintiff to mitigate the loss which the plaintiff alleges he suffered in his claim in these proceedings. The plaintiff in response asserts that the obligation on a plaintiff to mitigate his loss does not apply to a claim for a debt due regardless of whether the claim is a debt due pursuant to contract or a payment due under statute. If this is properly a payment due under statute (which is disputed by the defendant) then the plaintiff relies upon the statement in McGregor on *Damages,* 17th Ed. (2003) at p.216 (para 7-002):-

> "[t]he principal meaning of the term 'mitigation' ... concerns the avoiding of the consequence of a wrong, whether tort or breach of contract, and forms probably the only exact use of the term."

Those authors add at p.7 (para 1-010):-

> "Actions claiming money under statutes, where the claim is made independently of a wrong which is a tort or breach of contract, are not actions for damages. Actions in respect of benefits under the Social Security Acts provide an excellent illustration; further examples are provided in the sphere of employment by claims for unfair dismissal and claims for redundancy payments, both of which are now provided for under the Employment Rights Act, 1996"

The plaintiff also relies upon a further statement in the same edition of McGregor at para 1-005 in relation to the distinction between actions for a debt, such as the present claim and actions for damages:-

> "(1) Actions claiming money payable by the terms of a contract are for money which the defendant has promised by the contract to pay and therefore are not actions for damages. Illustrations are provided by actions for the price of goods sold and delivered, actions for salary or wages for services rendered, actions for rent, actions for freight and actions to recover moneys are payable under insurance policies. In tradition terminology the contrast is between actions of debt and actions for damages. Actions of debt are to be distinguished from actions for damages for breach of a contract and are outside the scope of this textbook."

I accept the distinction made by the plaintiff. It does not appear to me arguable that the principles applicable to a plaintiff's obligation to mitigate his or her loss are relevant to a claim for a debt due pursuant to contract or pursuant to statute. Those principles apply to claims for loss and damage suffered by reason of an alleged wrong (whether in contract or tort).

Accordingly I have concluded that the defendant has not satisfied the court that there is a fair or reasonable probability of the defendant having a real or *bona fide* defence to the plaintiff's claim herein. Accordingly I have concluded that the plaintiff is entitled to summary judgment as claimed in the summary summons herein.

Approved

M. Finlay Flood

[2019] IEHC 654

THE HIGH COURT

[2017/ 81 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS COMMISSION ACT, 2015

BETWEEN

TRINITY LEISURE HOLDINGS LIMITED TRADING AS TRINITY CITY HOTEL

APPELLANT

AND

SOFIA KOLESNIK AND NATALIA ALFIMOVA

RESPONDENTS

JUDGMENT of Mr. Justice Binchy delivered on the 7th day of October, 2019

1. This is a judgment on an appeal brought by the appellant against a decision of the Labour Court of 17th January 2017. As prescribed by O. 84 (C) of the rules of the Superior Courts, the appeal is brought by way of an originating notice of motion, grounded on an affidavit sworn on behalf of the appellant by a Mr. Ronnie Neville, solicitor, of Mason Hayes and Curran, solicitors for the appellant. Provision for such appeals is made by s. 46 of the Workplace Relations Act 2015, on a point of law only.

2. The respondents advanced identical claims against the appellant alleging various breaches of employment law legislation, only one of which is relevant to this appeal, and that is the claim that the claimants were not paid a premium for working on Sundays. That claim is advanced pursuant to s. 14(1) of the Organisation of Working Time Act 1997 ("the Act of 1997"). The appellant seeks, *inter alia*, the following orders: -

(i) An order declaring that the Labour Court erred in law in assuming jurisdiction under s. 14(1) of the Act of 1997, or in applying that section to the respondents in granting them relief pursuant to the same;

(ii) An order allowing the appeal on the ground that the Labour Court erred in law in awarding Sunday premium to the respondents;

(iii) A declaration that the Labour Court erred in law in determining that the appellant had to tender evidence in relation to what element of the respondent's hourly rate of pay was specifically referable to them having to work on Sundays;

(iv) A declaration that the Labour Court erred in law in failing to find the fact of the respondents having to work on Sundays had been taken into account in the determination of their pay.

3. A statement of opposition was delivered on behalf of the respondents in which they fu deny each ground of appeal relied upon by the appellant in its appeal/notice of motion. In summary, the repsondents plead that the decision of the Labour Court involves unappealable findings of fact, and that the appellant has failed to identify any errors of law on the part of the Labour Court in arriving at its decision.

4. The first named respondent originally entered into her contract of employment on 10th September 2007, and the second named respondent entered into her contract of employment on 11th September 2006. The respondents were not initially employed by the appellant and their respective employment contracts transferred to the appellant in September 2013 pursuant to the EC (Protection of Employment on Transfer of Undertakings) Regulations 2003, S.I. 131 of 2003. Their contracts made provision for payment of salary at an hourly rate, which, on the date on which their claims were made, was in each case €9.53 per hour. In each case, the contract having stated the hourly rate of pay, goes on to state: -

"This includes your Sunday premium based on you getting every third Sunday off (i.e. you work two Sundays out of three). Payment will be made weekly with one week in arrears and will be paid directly into your bank account [...]"

5. It was the respondent's contention before both the Labour Court and the Rights Commissioner that where a Sunday premium is included in an employee's rate of pay, then some element of the employees pay must be specifically referable to the obligation to work on Sundays. Since in this case the contract did not identify any element of the claimants' pay as being a premium for working on Sundays, then it follows that the fact of the employees having to work on Sundays has not been taken into account, and the employees are therefore entitled to be compensated in accordance with those provisions of s. 14(1) of the Act of 1997 that apply where the fact of an employee having to work on a Sunday has not been taken into account in the determination of his or her pay.

6. In response to this, it is the appellants' case that the determination of the employee's pay does take account of the fact that they are required to work on Sundays, because this is expressly stated to be so in the contracts, and there is no requirement that the contract should identify how much of the hourly rate of pay is specifically referable to Sunday work.

7. The Labour Court held against the appellant, in each case in identical terms, on the grounds that: -

"[...] the respondent failed to tender any evidence to the court in relation to what, if any, element of the complainant's hourly rate of pay was specifically referable to her contractual obligation to work on Sundays. It follows that the respondent's cross appeal in this regard fails. At first instance, the adjudication officer directed the respondent to pay the complainant 'a premium of 30% of the basic rate for all hours worked on Sundays falling within the period 25th September 2013 to 24th March 2014'. The court affirms that decision".

8. Section 14(1) of the Act of 1997 provides as follows: -

"14. — (1) An employee who is required to work on a Sunday (and the fact of his or her having to work on that day has not otherwise been taken account of in the determination of his or her pay) shall be compensated by his or her employer for being required so to work by the following means, namely—

(a) by the payment to the employee of an allowance of such an amount as is reasonable having regard to all the circumstances, or

(b) by otherwise increasing the employee's rate of pay by such an amount as is reasonable having regard to all the circumstances, or

(c) by granting the employee such paid time off from work as is reasonable having regard to all the circumstances, or

(d) by a combination of two or more of the means referred to in the preceding paragraphs."

9. In the event of a claim being advanced by an employee to a rights commissioner (now , since the Workplace Relations Act, 2015 , an adjudication officer) or the Labour Court, pursuant to the Act of 1997, subsections 14(3) – (6) provide a mechanism for determining reasonable compensation to employees in respect of Sunday work, by reference to collective agreements for comparable employees.

10. On this appeal, it is the respondents' case that the decision of the Labour Court is to the effect (although it is not actually stated in the decision) that the fact of the employees having to work on Sundays has not been taken into account in the determination of their pay. As is apparent from the extract from the decision of the Labour Court quoted above, the precise conclusion that that it arrived at, and the reason that it affirmed the decision of the Adjudication Officer, was that it found that the appellant had not tendered any evidence as to

what, if any, element of the respondents' pay related to their obligation to work on Sundays. It is the respondents' case that this is a decision on a matter of fact, and not on a matter of law, and is not therefore amenable to appeal. This, it is submitted, is well established by a long line of authorities (to which I refer below). Furthermore, it is argued that if a Sunday premium is included in an employee's rate of pay, then some element of that rate of pay must be specifically referable to the obligation to work on Sundays, and it was a matter for the appellant to give evidence in this regard, and it failed to do so. It is submitted on behalf of the respondents that for this reason the Labour Court was correct to reject the appellant's appeal. The Labour Court made its decision based upon the evidence before it and it is unclear how it can be argued that it made an error of law in doing so. The respondents suggest that these proceedings are being used as yet another appeal on the same points, rather than on a meritorious point of law.

11. It is submitted that the Labour Court properly applied the express terms of the contract and, in accordance with the parole evidence rule, found that the appellant had failed to tender evidence in relation to what, if any, element of the hourly rate of pay was specifically referable to the contractual obligation to work on Sundays. Since the written contracts set out the hourly rate of pay without any ambiguity, they are not amenable to variation by parole evidence, even had such evidence been presented, which it was not. Specifically, the respondents argue that since the employment contracts make no reference to the minimum wage, this Court should not have any regard to whatever the minimum wage may have been at any point in time in considering whether or not the employment contracts of the respondents take into account the requirement to work on Sundays. This point is made in response to arguments made on behalf of the appellant both at the hearing of this appeal and before the Labour Court.

12. It is submitted on behalf of the appellant that the decision of the Labour Court is based on three clearly identifiable errors of law as follows: -

(1) The Labour Court incorrectly assumed jurisdiction to consider the respondents' claim to Sunday premium in circumstances where the employment contracts state that the requirement to work on Sundays had been taken into account in the determination of the respondents' pay.

(2) The Labour Court failed to give any consideration as to whether or not it had any jurisdiction to examine a claim for Sunday premium in circumstances where the first limb of s.14(1) of the Act of 1997 has been complied with i.e., where the contract states that the requirement to work on Sundays has been taken into account. Instead, the Labour Court proceeded directly to consider the claim of the respondents.

(3) Thirdly, if the Labour Court was entitled to find that the respondents were entitled to an additional Sunday premium (which is denied), it failed to consider afresh the appropriate premium to be awarded to the respondents, but rather simply endorsed the amounts awarded by the adjudication officer, without due consideration, including inviting submissions from the appellant, and having regard to the wording of s.14(2) of the Act of 1997.

13. Both parties made comprehensive submissions on the jurisdiction of this Court in appeals from the Labour Court. Both parties referred to the same passage from the decision of Hamilton C.J. in the case of *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 IR 34, where he stated, at pp. 37-38: -

> "That the Court should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected.

Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them, it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

14. Both parties also referred to the decision of the Supreme Court in the case of *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] ILRM 421, in which case Kenny J., in considering the approach to be taken where mixed questions of fact and law arise held: -

"If they are based on the interpretation of documents, the courts should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the Commissioner. If the conclusions drawn from the primary facts are ones which no reasonable Commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he had adopted a wrong view of the law, they should be set aside."

15. Both parties also referred to and relied upon the decision of Baker J. in *Health Services Executive v. Sallam* [2014] IEHC 298, a case which also considered an appeal from the determination of the Labour Court. In that case, Baker J. stated: -

"The power of the High Court in an appeal from a determination of the Labour Court was explained by McCracken J. in the Supreme Court in National University of Ireland Cork v. Ahern & Ors. [2005] IESC 40, [2005] 2 IR 577, where he stated as follows: - at para. 9: -

'The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As

a statement of principle, this is certainly correct. However, this is not to say that the High Court or this Court cannot examine the basis upon which the labour court found certain facts. The relevance, or indeed admissibility, of the matters relied upon by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered or taken into account by it in determining the facts.'

This Court, then, may on appeal consider whether the Labour Court wrongly took into account or ignored a fact or piece of evidence, incorrectly applied a legal test in coming to a conclusion, or erred in law in its interpretation of the law."

16. Counsel for the respondents in this case argue that cases such as *Health Services Executive v. Sallam* and *National University of Ireland Cork v. Ahearn* make it clear that in considering appeals from the Labour Court, this Court is obliged to afford the decision of the Labour Court a curial deference. In this regard the respondents also rely upon the decision of Gilligan J. in *Electricity Supply Board v. The Minister for Social Community and Family Affairs [2016] IEHC 59* in which he stated in his conclusion: -

"I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the

appeals officer to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision."

17. The respondents submit that no error of law on the part of the Labour Court has been identified by the appellant. The employment contracts are clear and give rise to no ambiguity. They provide for an hourly rate of pay to the claimants. While that hourly rate of pay is stated to take account of the fact that the claimants are required to work on Sundays the contracts do not explain how this is so, and nor did the claimant present any evidence before the Labour Court to explain how the rate of pay takes into account the requirement of the claimants to work on Sundays. Moreover, the Labour Court would not have been entitled to hear such evidence, had it been tendered, if the effect of such evidence would be to vary the unambiguous contractual terms as set out in the written contracts of employment.

18. Counsel for the appellant also relies on the decision of *Earagail Eisc Teoranta v. Doherty & Ors.* [2015] IEHC 347, a case in which the appellant employer submitted that the Employment Appeals Tribunal had erroneously interpreted s. 5(1) of the Payment of Wages Act, 1991 (the "Act of 1991") and had incorrectly proceeded on the basis that the provisions at subs. (a)-(c) of that section were to be taken conjunctively. The court was satisfied that this argument concerned a point of law and concluded that there was a manifest error in the tribunals' interpretation of s. 5 of the 1991 Act. Kearns P. held at p. 26: -

"I have carefully considered the submissions of both sides and am satisfied that there is a manifest error of law in the tribunals' interpretation of s. 5 of the 1991 Act. The determination of the tribunal clearly indicates the tribunals' view that, pursuant to s. 5(1)(c) of the 1991 Act, the written consent of the employees was required before the appellant company could bring about any changes to salary levels. However, these exceptions listed at (a),(b) and (c) of s. 5(1) are clearly not to be taken conjunctively. The word "or" is expressly used in the provision and it is clear that each subsection

concerns separate instances which might give rise to an exception to the rule that an employer shall not make a deduction from the wages of an employee. Sub-section (b) states that deductions are allowable where they are authorised by virtue of an employees' contract of employment, which is something the tribunal should have considered independently of sub-section (c). However, in treating ss. (a) – (c) as conjunctive, the tribunal erred in law."

19. Counsel for the appellant also referred me to a number of decisions of the Labour Court itself in which it considered claims advanced under s. 14 of the Act of 1997. In the case of *Group 4 Securitas v. SIPTU* [DWT 996] the Labour Court held that s. 14 of the Act of 1997 did not allow for a claim of enhancement of the premium paid to employees in the security industry in respect of Sunday working, the premium for which was IR£5, and had been set some thirteen years previously. The Labour Court in its decision stated: -

"Section 14(1) Of the Organisation of Working Time Act, 1997, clearly states that where an employee's pay has not taken account of the requirement to work on Sunday, he/she shall be compensated. In this case the employee is paid an allowance for working on Sunday and, therefore, does not have a case under the Act. The court does not consider that section 14, under which this claim has been brought, allows for a claim for enhancement of the rate."

20. In the case of *Duesbury Limited, T/A Old Ground Hotel v. Mary Frost* [DWT 1032], the claimant gave evidence that she had become employed by the respondent in that case in 1996, when it took over ownership of the hotel. She claimed that while employed by the previous owner, she was paid double time in respect of working on Sunday, but this was discontinued by the respondent when it took over the hotel. She claimed that the obligation to work on Sunday was not taken into account in her personal rate of pay.

21. The witness for the respondent gave evidence as to her belief that the claimant's rate of pay included consideration for working on Sundays, but she was not employed by the respondent when the claimant's rate of pay was fixed and had no involvement in fixing the same. Crucially, the evidence given on behalf of the respondent was unsupported by any documentary records or other corroborative evidence of any kind. In those circumstances, the Labour Court stated that it could not accept the evidence of the respondent as going far enough to rebut the direct evidence of the claimant. The court also stated in its decision that: -

> "It is clear from subsection (1)(b) of this section [i.e. s.14(1) of the Act of 1997] that the right to compensation for Sunday working can be satisfied where the requirement is taken into account in determining the employee's rate of pay. This suggests that some element of the employee's pay must be specifically referable to the obligation to work on Sundays."

22. The case of *Duesbury* was referred to in the decision of the Labour Court in this case, arising out of the fact that before the Labour Court , counsel for the appellant had referred to that decision for the purpose of distinguishing the facts in *Duesbury* from the facts in this case. The Labour Court thought that the appellant was relying on *Duesbury* in support of its arguments in this case, whereas on this appeal it was submitted that counsel for the appellant was referring to *Duesbury* to the intent of distinguishing the facts in that case from the facts in this case. In its decision the Labour Court stated: -

> "However, notwithstanding the respondent's purported reliance on the determination in *Duesbury*, the respondent failed to tender any evidence to the Court in relation to what, if any, element of the Complainant's hourly rate of pay was specifically referable to her contractual obligation to work on Sundays."

This gave rise to an additional ground of appeal on the part of the appellant in this appeal.

23. In the case of *Matthew Scally and Aoife Lynch and Michelle Kelly*, [DWT 13102] the Labour Court found in favour of the claimants in circumstances where the respondent was unable to say how the rate of pay of the claimants was computed. Moreover, the hourly rate paid to the claimants was directly in line with that prescribed by the then applicable employment regulation order, which rate was exclusive of Sunday premium. For this reason, the court was satisfied that the rate paid to the claimants did not contain any element of compensation for the purposes of s. 14 of the Act of 1997.

24. Finally, I was referred to the case of *Paul Fitzpatrick, t/a The Morgan Hotel and Jarmila Riecka* [DWT 1523] which is probably the most relevant of these cases because the claimant's contract of employment expressly provided that her salary took account of the obligation to work on Sundays. Unfortunately, the precise wording of the contract of employment of the claimant in that case is not recorded in the decision of the Labour Court. However, the court held: -

> "On its plain and ordinary meaning, paras (a)-(d) of this subsection take effect only where the fact of the employee being required to work on Sunday is not otherwise taken into account in determining his or her pay. The court has reviewed the claimant's written contract of employment and it is satisfied that the fact of her having to work on Sundays was taken into account in determining her salary. It follows that the respondent did not contravene s. 14 of the Act in relation to the claimant."

Discussion and Decision

25. It is not in dispute that the claimants were required to work two out of three Sundays. The Labour Court found as a fact that this requirement had not been taken into account in the determination of the claimants' pay. The Labour Court arrived at this finding of fact on the basis that the appellant did not adduce any evidence at the hearing before the Labour Court to

satisfy the Labour Court that the respondents' pay took into account their obligation to work on Sundays.

26. While submissions appear to have been made to the Labour Court to the effect that the minimum wage was at all relevant times less than the hourly rate paid to the respondents, and that this was how the pay of the respondents took into account their contractual obligation to work on Sundays, no oral evidence was given to the Labour Court to this effect, and nor is this stated in the contracts of employment of the respondents. There was therefore no evidence of any kind presented to the labour Court relating to this issue, to the intent of proving that the excess of the rate of pay over the minimum wage was the means by which the rate of pay took account of the obligation to work on Sundays.

27. However, it is not correct to say that there was no evidence at all before the Labour Court as regards the question as to whether or not the rate of pay of the respondents takes account of the requirement to work on Sundays. The Labour Court had before it written evidence, in the form of the contracts of employment of the respondents. The language used in the contracts is plain English and could not be more clear. The contracts state that the hourly rate of pay "includes your Sunday premium based on you getting every third Sunday off". The wording is not buried in small print somewhere in the middle of the contract, but appears on the front page thereof, in the third clause of the contract.

28. Section 14(1) of the Act of 1997 imposes an obligation on employers to pay a reasonable remuneration to employees in respect of Sunday work by reference to stated criteria set out in ss.14(1)(a)-(d), unless the requirement to work on Sundays is otherwise taken into account in the rate of pay of the employee. Here , in stating that the hourly rate of pay "includes your Sunday Premium" the contracts make it clear that the requirement to work on Sundays is included in the rate of pay of the respondents,or, in the words of the Act of

1997, is "taken into account in the rate of pay of the employee", and in executing the contracts, the respondents accept that to be the case.

29. Neither of the decisions of the adjudication officer or the Labour Court record any evidence having been given either by the appellant or the respondents in either forum on this question, although it is clear that submissions on the question were made. However, it hardly needs to be said that submissions are not evidence. The only evidence presented to either forum on the question was the contract of employment in each case, which contained a clear and unambiguous statement,i.e., that the rate of pay included the Sunday Premium, based upon the repondents having every third Sunday off.

30. It is the respondents' contention that the court ought to take account of the vulnerable position that employees such as the respondents are in when presented by an employer with such contracts, and that it is the duty of the employer to ensure that the contract clearly identifies the portion of the hourly rate of pay that relates to Sunday work. Having failed to so provide in the contract, or to give any evidence on the issue, the appellant, it is submitted, has failed to establish that the rate of pay of the respondents takes account of the requirement to work on a Sunday for the purposes of s.14(1) of the Act of 1997.

31. The difficulty with this line of argument is that it ignores not just the clear and unambiguous language of the contracts of employment, but also the fact that the respondents do not appear to have given any evidence on the question. If they did, it is not recorded either in the decision of the adjudication officer or the Labour Court, and nor were any submissions made to me as regards the evidence that they gave on the question.

32. While a statement in a contract that the rate of pay takes account of the requirement to work on Sundays may not always be conclusive , if an employee wishes to assert that the rate of pay does not do so then in my opinion he or she must advance some credible evidence to rebut the express provision of the employment contract, or at least so as to shift the onus of

proof in the matter to the employer,although he or she will still have to overcome the parole evidence rule. However, it may be possible to do so. For example it might be that events have overtaken the contract, and that surrounding circumstances no longer reflect that which was originally agreed. For example, if the rate of pay provided for in the contract ,was at the time the contract was completed, greater than the statutory minimum wage, but is no longer so at the time the complaint is advanced , it is difficult to see how that rate of pay could still be said to reflect the requirement to work on a Sunday, since that is the minimum rate of pay which the employer must in any event pay. Whatever the reason, faced with written evidence of his or her own agreement that his/her hourly rate of pay takes into account an obligation to work on Sundays, an employee advancing a claim under s. 14(1) of the Act of 1997 must lead some evidence to explain why he/she claims that what is stated in the contract is not correct. In failing to do so, the employee leaves the contract unchallenged, and the employer is under no obligation to go into evidence on the issue

33. Upon receiving a complaint from an employee that his or her rate of pay does not take account of the requirement of Sunday work, it is obvious that the Labour Court must undertake an investigation as to whether or not this is so. Its conclusion on the issue constitutes a finding of fact, which, in the ordinary course, in accordance with the authorities referred to above, will not be disturbed by this Court. In this case however that finding of fact was arrived at by the Labour Court on the basis that the appellant "failed to tender any evidence to the court in relation to what, if any, element of the complainants' hourly rate of pay was specifically referable to [their] contractual obligation to work on Sundays". In the circumstances of the case, this was a conclusion on a matter of law, because in so deciding the Labour Court decided that a clear statement made in a contract of employment signed by both parties may not be relied upon ,and instead must be proven in a particular way. In drawing this conclusion the Labour Court in my view made an error of law.It did so firstly by

ignoring the express statement in the contracts of employment of the respondents, that their hourly rate of pay includes their Sunday premium. Secondly it did so by interpreting the Act of 1997 in such a manner as to impose an obligation on an employer either to ensure that a contract of employment is drawn up in a particular way i.e., to explain by way of a breakdown any statement to the effect that an hourly rate takes into account the obligation to work on a Sunday, or, alternatively, to adduce oral testimony at the hearing of a complaint pursuant to s. 14 of the Act of 1997 in order to prove a statement agreed expressly to by an employee in his/her contract of employment.

34. Finally, I should address one other argument advanced on behalf of the respondents. It was argued that, pursuant to s. 3(1)(g) of the Terms of Employment (Information) Act, 1994 (the "Act of 1994"), there is an obligation on the employer to show the method of calculation of the employees' remuneration, and that it cannot be said that the appellant has done so in this case. The failure to comply with the provisions of the Act of 1994 is of course a separate complaint, and one which the respondents made in this case also, together with other complaints under the Act of 1994. The Labour Court determined those complaints in favour of the respondents, but considered that the breaches of the 1994 Act were technical and did not cause the respondent any detriment. However, the decision of the court does not record any specific breach of s. 3(g) of the Act of 1994. In the context of this appeal however, the respondents point to s. 3(1)(g) of the Act of 1994 to bolster their argument that there is an obligation on an employer to identify the element of the rate of pay of the respondents that is specifically referable to the contractual obligation to work on Sundays. However, this argument must also be rejected because it is clear that in providing simply that the

respondents are to be paid a specific rate per hour worked, the appellant has met its statutory obligation to the respondents under s. 3(1)(g) of the Act of 1994.

35. For these reasons the appeal must be allowed, and the claim of the respondents under s. 14(1) of the Act of 1997 dismissed.

Approved Judgment

7/10/19

Donald Binchy

No Redaction Needed

THE HIGH COURT

[2009 No. 8510 P ~~85HP~~]

BETWEEN

MARIE CUNNINGHAM

PLAINTIFF

AND

INTEL IRELAND LIMITED

DEFENDANT

Judgment of Mr. Justice Hedigan delivered on 15th day of May, 2013.

1. The defendant has issued this motion seeking to strike out the plaintiff's personal injury summons dated the 22nd September, 2009 as an abuse of process and/or a duplication of the plaintiff's equality claim against the defendant and/or for want of prosecution. The defendant relies upon s. 101(2)(a) of the Employment Equality Act 1998 – 2008 and upon the rule in *Henderson v. Henderson* (1843) 3 Hare 100, both of which are designed to prevent the duplication of proceedings.

2. The plaintiff was employed by the defendant as a senior manager. Having returned to work on the 11th August, 2008 following maternity leave, the plaintiff on the 3rd December, 2008 instituted a claim for discrimination against the defendant in relation to access to employment, promotion/regrading, conditions of employment and harassment.

3. The plaintiff's equality claim was heard in July and September 2011 but was rejected by the Equality Tribunal in a decision dated the 22nd February, 2012. The plaintiff appealed that decision to the Labour Court and the appeal is ongoing.

4. The plaintiff was a Grade 9 GER Workforce Mobility Manager. She was on a combination of maternity leave and sick leave from late June 2007 to the 11th August, 2008. The plaintiff's equality complaint as set out in her Form EE1 dated 3rd December, 2008 was that she had been discriminated against on the grounds of gender. The plaintiff's primary allegation was that the defendant failed to allow her to return to her original job following her maternity leave and/or failed to provide her with a job to match her grade level.

5. In her "brief outline of complaints" attached to Form EE1, the plaintiff claimed that the alleged discrimination significantly affected her "health and wellbeing". Her personal injury claim herein appears to relate to the same alleged damage to the plaintiff's "health and wellbeing".

6. The defendant claims that the same events caused the alleged personal injury claimed in the personal injury summons herein and objects to being required to meet the same claim in High Court proceedings and in the statutory proceedings. They claim that according to submissions filed in her claim to the Employment Equality Tribunal, the plaintiff alleged that she was discriminated against on grounds of her gender on the following basis:

(a) refusal of Intel to permit her to return to her position;

(b) the retention of her leave replacement in her position after her return from maternity leave;

(c) the failure of Intel to keep her informed of all changes within Intel during her maternity leave;

(d) the failure or refusal to deal with her complaints after her return;

(e) the failure of Intel to conform to the provisions of its own maternity leave policy.

In submissions dated 31st July, 2009 filed with the Equality Tribunal, the plaintiff claimed that the defendant caused her considerable health difficulties including stress, anxiety, depression and panic attacks. The submissions complained that from the time she announced she was pregnant, she was micro-managed. She claimed that she was treated aggressively, causing her considerable upset. The submissions and her oral evidence to the Equality Tribunal dealt with the entire period referred to in the personal injury summons. There appears to be no part of the claim in the personal injury summons that was not made to the Equality Tribunal.

7.Decision

Section 101 of the Employment Equality Act 1998 – 2008 at (2)(a) provides;

> "Where an individual has referred a case to the Director under section 77(1) and either a settlement has been reached by mediation or the Director has begun an investigation under section 79, the individual –
>
> (a) shall not be entitled to recover damages at common law in respect of the case, and . . .."

The rule in *Henderson v. Henderson* has been described by Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1;

> "*Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court

> is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

Further, in *Woodhouse v. Consignia Plc* [2002] 1 WLR 2558, Brooke L.J. referred to the public interest in the efficient conduct of litigation and stated (at p. 2575):

> "But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in *Henderson v Henderson* (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided

(subject to appeal) once and for all, is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits when one would do."

8. Thus all matters and issues arising from the same set of facts or circumstances must be litigated in the one set of proceedings save for special circumstances. This is a rule that is of benefit to both plaintiffs and defendants, to the courts themselves and thus to the public interest. Is this the case with the proceedings referred to herein ? Initially, Ms. Cunningham raised her complaints in her application to the Employment Equality Tribunal. Her complaint Form EE1 dated the 3rd December, 2008 states that the first act of discrimination of which she complains was on the 11th August, 2008. At page 1 of the form the grounds on which discrimination is claimed are specified as gender discrimination. On page 2 under description of claim, she included conditions of employment, other and harassment. In paragraph 2 of her submissions to the Equality Tribunal dated 31st July, 2009, she dates her complaints from when she announced she was expecting a baby. From that time, she stated, that her work was micro-managed, she was, she claims, harassed by her then manager. In the conclusions of these submissions, the plaintiff states again that she was bullied and harassed from March 2007 on. She sums up the effects of all her complaints as distress and humiliation, causing her considerable health difficulties, including stress, anxiety, depression and panic attacks. She stated she was then undergoing hypnotic and anti-depressant medication and psychotherapy.

9. When the particulars of bullying, harassment and psychological abuse set out in her personal injury summons are examined at paragraphs 7 – 15, it is clear that the claims set out there start with the announcement of her pregnancy and concerns the

same conduct described in Form EE1 and submissions supporting the same. In the particulars of negligence at u, v and w, the claim in this personal injury summons goes on to deal with her post-return to work period, *i.e.* August 2008.

10. Thus, it is clear from her own pleadings and submissions in the two sets of proceedings that both her employment claim and her personal injury claim arise out of the same matters, *i.e.* alleged mistreatment in her working environment. This she alleges commenced on the announcement of her pregnancy, continued through her commencement of maternity leave, through that leave and culminated in her disatisfaction with the way she was treated on her return to work. The plaintiff in issuing these personal injury proceedings after her employment equality complaints, in my view, drew an artificial distinction which does not stand up to analysis.

11. In terms of the reliefs sought, the claim in the personal injury proceedings is for compensation for the stress and the health problems arising therefrom. It is clear that such a remedy may be awarded by the Labour Court in the employment equality proceedings. See *Ntoko v. City Bank* [2004] ELR 116. In doing this, the Labour Court may chose to consider a complainant's medical reports in assessing the compensation to be awarded. See *McGinn v. Daughters of Charity* EDA9/2003.

12. Thus the plaintiff is not precluded from recovering compensation in the Labour Court in respect of the personal injury she alleges she has suffered. Moreover, the defendant herein has stated unequivocally in open court in this application that they will not oppose the plaintiff bringing into her claim before the Labour Court her complaints dating from her announcement of her pregnancy.

13. When she chose to create this artificial distinction in the one essential complaint to pre and post-August 2008 by issuing these personal injury proceedings, the plaintiff, in my view, breached the provisions of s. 101(2)(a) of the Employment

Equality Act 1998 – 2008 and breached the rule in *Henderson v. Henderson*. By confining her complaints in one set of proceedings these statutory and common law requirements do not in any way limit the plaintiff's right to a remedy for those complaints. The Labour Court had and still has at its disposal ample jurisdiction to do so. In particular, as a lay litigant, the plaintiff is far better off having all of her complaints dealt with in the one set of proceedings. Thus the application of the defendant to dismiss these proceedings must be allowed.

14. I would note finally that the practice here readily admitted of issuing proceedings and then leaving them lie for years until other proceedings are concluded is inconsistent with contemporary jurisprudence concerning the obligation of the courts to ensure the expeditious conduct of proceedings.

15th May 2013

Gerard Morgan, Plaintiff v. **The Provost and Fellows of Trinity College Dublin, Cyril Smith** and **John Gerard Buchanan**, Defendants [2002 No. 15820P]

High Court 9th July, 2003

Employment – Discipline – Suspension – Fair procedures – Terms of suspension – Accusation of misconduct – Whether disciplinary procedures employed fairly – Whether right to challenge accusers – Whether suspension constitutes disciplinary sanction.

Injunction – Interlocutory – Employee – Suspension – Prejudice – Whether damages adequate remedy – Where balance of convenience lies.

The plaintiff was employed as a senior lecturer in the English Department of the first defendant. On the 7th October, 2002, he was suspended with pay with immediate effect on foot of a complaint made by a female colleague who alleged physical intimidation and harassment. The plaintiff applied, *inter alia*, for an interlocutory injunction restraining the defendants from removing him from office and restraining them from embarking on a disciplinary inquiry.

The plaintiff contended that (a) there was a failure to comply with natural justice in that he did not have an opportunity to challenge his accusers during the investigation by the second defendant; (b) there was a failure on the part of the second defendant to comply with the time limits for referring the matter to the disciplinary panel; (c) his suspension was invalid, as it constituted a second suspension and should in any event be lifted at this stage by reason of its duration; and (d) the reference of additional complaints to the disciplinary panel was otherwise than in accordance with the disciplinary procedures.

The defendants submitted that the complaints made by the plaintiff were premature and should first have been referred to the disciplinary panel of the first defendant. Insofar as where the balance of convenience lay, the defendants contended that the first defendant, as an employer, had duties not only to a staff member accused of misconduct but to other staff who may be affected by such behaviour.

Held by the High Court (Kearns J.), in refusing the relief sought, 1, that, whether a suspension amounted to a sanction such as would invoke concepts of natural justice or give rise to an inference that the person concerned had been found guilty of significant misconduct, was, in every case, a question of fact and degree.

2. That, where a suspension constituted a disciplinary sanction, the person affected should have been afforded natural justice and fair procedures before the decision to suspend was taken. However, where a person was suspended so that an inquiry could be undertaken as to whether disciplinary action should be taken, the rules of natural justice might not apply.

Quirke v. Bord Luthchleas na hÉireann [1988] I.R. 83; *Deegan v. The Minister for Finance* [2000] E.L.R. 190 followed.

3. That the inevitable consequence of any suggestion that an employee who had been suspended was thereby, and without more, irredeemably prejudiced, and *ipso facto* could not then get of a fair hearing, would mean that there could never be a holding suspension as one of the steps in a disciplinary process.

Cases mentioned in this report:-

Deegan v. Minister for Finance [2000] E.L.R. 190.

Flynn v. An Post [1987] I.R. 68.

Furnell v. Whangarei High Schools Board [1973] A.C. 660; [1973] 2 W.L.R. 92; [1973] 1 All E.R. 400.

In re Haughey [1971] I.R. 217.

John v. Rees [1970] Ch. 345; [1969] 2 W.L.R. 1294; [1969] 2 All E.R. 274.

Lewis v. Heffer [1978] 1 W.L.R. 1061; [1978] 3 All E.R. 354.

McNamara v. South Western Area Health Board [2001] E.L.R. 317.

Murtagh v. St. Emer's National School [1991] 1 I.R. 482; [1991] I.L.R.M. 549.

Quirke v. Bord Luthchleas na hÉireann [1988] I.R. 83; [1989] I.L.R.M. 129.

Wiseman v. Borneman [1971] A.C. 297.

Motion on notice.

The facts of the case have been summarised in the headnote and are more fully set out in the judgment of Kearns J., *infra*.

The action was commenced by plenary summons dated the 11th December, 2002. By notice of motion dated the 12th December, 2002, the plaintiff sought an interlocutory injunction restraining the defendants from removing him from office or embarking on disciplinary action against him. The matter came on for hearing before the High Court (Kearns J.) on the 13th May and the 5th June, 2003.

John MacMenamin S.C. (with him *Roddy Horan*) for the plaintiff.

Tom Mallon for the first and third defendants.

Senan Allen S.C. (with him *Lyndon McCann S.C.*) for the second defendant.

Cur. adv. vult.

Kearns J. 9th July, 2003

The plaintiff in these proceedings is a senior lecturer in old and medieval English in Trinity College Dublin. He joined the Department of English in 1968 as a junior lecturer, was subsequently appointed as senior lecturer and was elected a fellow of the college in 1993. He carries on his research and teaching on the campus of the college and is entitled to reside in rooms within the college itself and enjoy various other rights ancillary thereto.

On the 7th October, 2002, the plaintiff was suspended with pay with immediate effect on foot of a complaint made by Dr. Stephanie Newell, a member of staff and colleague in the Department of English, alleging physical intimidation and harassment. On Sunday, 6th October, 2002, the plaintiff had entered the Arts Building and there had entered the office of Dr. Newell in the English Department. He spent some ten minutes in that office in the presence of Dr. Newell during which time he engaged in invective against English people and the English middle classes. Dr. Newell is English and felt very intimidated and frightened by his behaviour which became increasingly angry. She moved to the departmental office to do some photocopying, but was followed by the plaintiff who became more and more angry. According to Dr. Newell, the harangue continued for some further time, at the conclusion of which the plaintiff grasped her hand, kissed her on the cheek and then left. Dr. Newell found this experience frightening and threatening and made a formal complaint in writing to the second defendant who is a senior dean of Trinity College. On the following day the second defendant wrote to the plaintiff advising that a formal complaint had been made against him which required to be investigated in accordance with procedures set out in sch. (iii), ch. (xii) of the college statutes. Also enclosed with the second defendant's letter was the letter of complaint from Dr. Newell and the formal record of an interview about the incident held on the 7th October, 2002, between the second defendant, the staff secretary and Dr. Newell. The plaintiff was advised by the said letter to attend an interview regarding the matter on Friday the 11th October, 2002, at which he could be accompanied by a colleague or other representative of his choice. This offer of interview was declined by the plaintiff.

In his letter dated the 7th October, 2002, the second defendant wrote as follows to the plaintiff:-

> "I have today received a complaint from Dr. Stephanie Newell concerning your behaviour towards her in the department of English on Sunday morning, the 6th October, 2002, between approx. 10.50 and 11.20 a.m.
>
> The college's policy document on preventing sexual harassment and bullying in the workplace states:-

> 'Any act or conduct by a perpetrator is considered to be harassment if it is unwelcome to the recipient and could reasonably be seen as offensive, humiliating or intimidating to the recipient.'
>
> The college's disciplinary procedures cite as examples of misconduct by a member of the academic staff (para. 12 sch. (iii), ch. (xii) of the statutes):-
>
> 'violence or threats of violence towards other members of the college community or persons having legitimate business with the college' and 'harassment on the college premises or in the course of employment'.
>
> On the basis of the verbal and written evidence presented to me by Dr. Newell, I deem the matter to be of such seriousness that I am invoking powers given to the senior dean under para. 12 of the aforementioned statutes that you be suspended with pay to take effect immediately. I shall be formally recommending this course of action in accordance with the statutes to the board of the college. This means that you should not be physically present in any part of the Arts Building of the college until further notice.
>
> I shall be taking steps to conduct a full and formal investigation of the complaint made by Dr. Stephanie Newell in accordance with the college's disciplinary procedures applicable to academic staff.
>
> Yours sincerely."

This event occurred in the aftermath of an investigation by the second defendant into other complaints made against the plaintiff by Professor John Scattergood, also from the Department of English, and by Professor Nicholas Grene, head of the Department of English, in respect of which a report dated the 30th September, 2002, had been made available to the plaintiff on the 4th October, 2002. That report had recommended to the board of the college that the plaintiff be suspended from his post as senior lecturer in the department of English for a period of three months without pay and further recommended that the plaintiff receive a formal warning that if the conduct, the subject matter of the reports, was to be repeated, the plaintiff might be subject to further disciplinary action including dismissal as a possible outcome.

This investigation and report arose out of complaints made against the plaintiff by Professor John Scattergood and Professor Nicholas Grene dated the 21st February, 2002.

These complaints arose out of letters written by the plaintiff on the 17th February, 2002 and the 19th February, 2002, to Professor Nicholas Grene and other named parties and a further letter of the 22nd February, 2002, written by the plaintiff to all members of the Department of English in the college.

Essentially, the plaintiff had complained in these letters that he had not been consulted in February, 2002, in connection with the appointment of a permanent lecturer in medieval English in the English Department, nor included in the nominating committee for selection. The plaintiff felt that, given his seniority and years of experience in old and medieval English in the college, he was being wrongfully excluded from the process.

In his letter dated the 17th February, 2002, the plaintiff made various specific allegations against Professor Scattergood and called into question his suitability to be on the nominating committee for the lectureship post. In particular, the plaintiff suggested that Professor Scattergood had no reputation as an old English scholar and no credibility as a defender of old English interests in the department. He further suggested that Professor Scattergood's judgment in the making of appointments in the Department of English had been consistently unsound.

In his letter dated the 19th February, 2002, the plaintiff further contended that Professor Scattergood had "blocked" the careers of Trinity-trained medievalists and claimed that in the course of an interview in 1999 for a position in the English Department, a candidate, Dr. Michelle Sweeney, had been "undermined by Professor Scattergood's open rudeness" in the course of her interview. These letters were circulated to all members of the English Department and to the other persons named at the foot or end of each letter. These letters further suggested that Professor Scattergood had undermined the autonomy of medieval and renaissance English in the department.

By his letter dated the 22nd February, 2002, which was also circulated to all members of the Department of English, the plaintiff again protested at his exclusion from the process of appointment of the permanent lecturer in medieval English. In his letter he complained of Professor Grene's attitude towards him, which he had found "high handed and patronising, but also (which is much worse) lacking in candour and straightforwardness. It has been so for many years". The letter went on to complain that the plaintiff was obliged to express publicly his present lack of confidence both in Professor Grene and in Professor Scattergood whom, he alleged, had not acted "in good faith either towards me or in the interests of old English".

For the purpose of preparing his report, which runs to some 37 pages, the second defendant held meetings with the plaintiff on the 14th March, 2002 and the 4th April, 2002. He also held meetings with other members of the English Department, including Professor Grene, Professor Scattergood, Professor Ní Chuilleanáin, Dr. Piesse and Professor Ross. Having regard to the breadth and scope of allegations raised by the plaintiff, the second defendant obtained and reviewed a large amount of documentation

pertaining to the history of the Department of English over many years, consisting of correspondence, minutes of school meetings, committee reports and faculty plans. Further correspondence from the plaintiff to the senior lecturer, the senior dean and members of staff in the Department of English written between February, 2002 and April, 2002, which repeated or contained material relevant to the allegations raised by the plaintiff were also reviewed for the purposes of the report.

At the conclusion of his investigation and report, the second defendant found as follows:-

> "I find that the contents of the correspondence referred to in this report constitute malicious and false accusations on the academic integrity, character, reputation and impartiality of Professor John Scattergood. The college has an obligation to protect the complainant against such behaviour. The college also has a duty of care and protection towards all staff within the department and in college who are parties to receipt of copies of correspondence containing such accusations for the distress this may cause. Colleagues must not be expected to tolerate such abuse when the person's actions go beyond the bounds of acceptable academic behaviour. Such disruptive behaviour constitutes a form of bullying to undermine colleagues and cannot be allowed or excused."

Under the procedures pertaining to such matters, to which I shall presently refer, the second defendant then recommended the sanctions already outlined to the board of the college.

As far as the plaintiff is concerned, an academic dispute between members of the English Department had thereby been elevated into a disciplinary matter. He believes he is entitled to, but has been denied, fair procedures in and about the manner in which the disciplinary process has taken place. In his grounding affidavit sworn on the 11th December, 2002, he deposes to his belief that the referral by the second defendant of complaints to the third defendant has been embarked upon for the sole purpose of securing the termination of his tenure in the college.

The plaintiff further complains that in respect of the proposed hearing by the disciplinary panel, he was served with a book of evidence containing some 150 pages of documents as late as the 5th December, 2002, some three working days before the scheduled hearing. He further complains that the book of evidence contains a number of new allegations and complaints additional to those investigated by the second defendant in February, 2002. He complains that these new complaints have been referred *simpliciter* to the disciplinary panel although the statutes envisage a preliminary inquiry by the senior dean or the relevant head of department before any invocation of the college's disciplinary procedures.

The plaintiff secured an order on the 11th December, 2002, in the High Court (Smyth J.) restraining the third defendant until further order from convening or proceeding with the disciplinary inquiry.

The application now before the court seeks an interlocutory injunction restraining the third defendant from holding the disciplinary hearing, which was intended to be heard by a disciplinary panel to be chaired by the third defendant and which was originally scheduled to take place on the 11th December, 2002. The motion on notice also seeks to set aside the plaintiff's suspension and to restrain the defendants from taking any disciplinary steps against the plaintiff until the trial of the action.

The first defendant's disciplinary procedures

The first defendant's disciplinary procedures for academic staff are set out in sch. III of ch. XII of the Consolidated Statutes of Trinity College Dublin and of the University of Dublin.

Paragraph 2 of sch. III sets out examples of misconduct governed by the procedures and makes it clear that misconduct is not limited to the matters actually listed in para. 2. Amongst the examples of misconduct cited are "violence or threats of violence towards other members of the college community or persons having legitimate business with the college" and "abuse of the disciplinary code, including the making under it of a false and malicious accusation against a member of staff".

The regulations provide that where misconduct has been reported, the head of department shall make preliminary inquiries and attempt to deal with the matter on an informal basis. Where the allegations are serious, however, the matter may be referred to the senior dean. Paragraph 11 provides that the senior dean shall, where a case has been referred to him by a head of department or otherwise, carry out such inquiries as he deems appropriate. Unless he decides that no further action is justified, the senior dean must formally interview the member of staff giving him an outline of the allegations made against him and furnishing a copy of the college's disciplinary code and procedures.

Paragraph 12 provides that the senior dean may recommend to the board of the college that, pending investigation, the member of staff concerned should be suspended on pay from all or any part of his duties, together with any conditions that should apply to such suspension. It further provides that the senior dean may, in exceptional circumstances, order that the suspension should take effect immediately, pending the decision of the board.

In the instant case, the latter portion of para. 12 was relied upon by the second defendant to suspend the plaintiff on the 7th October, 2002 and the suspension was confirmed by the board on the 24th October, 2002.

Paragraph 13 provides:-

> "After completing his/her investigation, the Senior Dean may –
>
> (a) decide not to proceed where he determines that there is insufficient evidence or that the case is otherwise unfounded, or
>
> (b) with the prior written consent of the member of staff concerned, recommend to the Board of College an appropriate penalty/disposition, or
>
> (c) in every case in which dismissal is a possible outcome or where otherwise in the opinion of the Senior Dean the nature of the case justifies such action, refer the case for a hearing to the Disciplinary Panel.
>
> The Senior Dean shall make such determination as soon as possible and subject to the provisions of para. 16."

Paragraph 14 provides that where there has been a refusal or a failure by the member of staff to give consent under para. 13(b), the senior dean may refer the case to the disciplinary panel in accordance with para. 13(c).

This is the situation in the present case insofar as the dean's report in to the February matters is concerned. In these circumstances, the disciplinary panel "shall not be informed of the senior dean's recommendation and the case will be heard *de novo*".

Paragraph 15 minutes the penalties which may be recommended by the senior dean. The senior dean cannot recommend dismissal.

Paragraph 16 is in the following terms:-

> "A reference to a disciplinary panel by the senior dean under para. 13(c) shall be made by written notice to the Registrar, containing a brief specification of each charge against the member of the academic staff. Such notice must normally be received by the Registrar within 30 working days from the date on which the senior dean received original notification of the offence. In exceptional circumstances the senior dean may serve such notice after the expiry of this time limit. The decision of the senior dean to serve such notice after expiry of the normal time limit shall be reviewable by the disciplinary panel."

Paragraph 19 imposes a requirement on the senior dean to serve, at least three working days in advance of the hearing, on the member of the academic staff and on the chairperson of the disciplinary panel a statement of the charges, a list of witnesses whom the senior dean proposes to call, a summary in writing of the evidence that is purposed to be given and a list of exhibits if any.

Paragraph 23 provides that the disciplinary panel shall consist of the chairperson (who must be legally qualified) and four members of the academic staff drawn from a standing list of 30 persons on a random basis. The standing list is drawn up by the board with the agreement of the Academic Staff Association.

While the disciplinary panel is obliged to meet within 21 working days of the referral to it of a case by the senior dean in accordance with para. 13(c), the chairperson has a discretion to grant to a member of the academic staff a further period to prepare the case, if so requested.

There are detailed provisions for the conduct of such hearings. Paragraphs 33 to 35 provide:-

"33. The Chairperson shall conduct the hearing in accordance with the principles of natural justice and fair procedures. Having opened the proceedings, the Chairperson shall invite the senior dean and/or the representative of the senior dean to make the case to the panel, which case has to be established beyond all reasonable doubt. The member of academic staff and/or the representative of the member of academic staff shall then be heard. Where witnesses are called, they may be examined, cross-examined or re-examined by the parties and by members of the panel. When the presentation of evidence is complete, the chairperson shall invite the parties or their representatives to address concluding remarks to the panel. The chairperson shall then, in the presence of the parties, address the other members of the panel, summarising the evidence presented, giving directions as to the proper approach to evidence adduced and instructing them as to their functions.

34. Following the chairperson's address, the ordinary members of the panel shall retire to consider their decision in private and in the absence of the chairperson and the parties. A decision that the charges have been proved shall not be made unless at least three of the ordinary members are in agreement with such verdict. The ordinary members shall nominate from amongst themselves a spokesperson. When a decision has been reached the spokesperson shall, in the presence of the full panel and the parties announce the decision. Where the panel decides that the charges have been proven, the chairperson shall, following submissions from the parties, address the panel on factors relevant to the determination of an appropriate penalty. The ordinary members shall then again retire to consider an appropriate penalty. Their spokesperson shall, in the presence of the full panel and the parties, announce their decision. The chairperson may, if of the opinion that the proposed penalty is *ultra vires* or unreasonable ask the ordinary members to

reconsider the matter. Where the four panellists are unable to decide (which decision may be made by simple majority) upon an appropriate penalty, the penalty shall be determined by the chairperson.

35. The chairperson shall, following announcement of the penalty, inform the member of academic staff of the right to appeal to the visitors in the event of the panel's decision being confirmed by the board."

It will be seen from the foregoing that the disciplinary process in the college is multi-tiered. Firstly, certain complaints may go no further than the head of department. Secondly, where a matter is, because of its seriousness, referred to the second defendant, he may decide, following inquiries and after completing his investigation, not to proceed further on the basis of insufficient evidence. Alternatively, he may, with the prior written consent of the member of staff concerned, recommend to the board of college an appropriate penalty. Where there is a refusal to give consent to the imposition of penalty by the member of staff, as in the instant case, the matter is then referred to the disciplinary panel for a complete *de novo* hearing. That hearing requires proof to the criminal standard of proof before an adverse finding can be made. Witnesses may be examined and cross-examined and the member of staff has the right to legal representation. He also has the further safeguard that the panel's decision must be confirmed by the board. Even then, there still remains a right of appeal to the college visitors.

It is difficult to imagine a more comprehensive set of procedures for the protection of academic staff. The essential question, however, is whether those procedures were fairly employed by the first and second defendants. No allegation of any sort is made against the third defendant, whose qualifications for the position of chairman are impeccable. By virtue of the injunction application brought by the plaintiff, the complement of lay personnel for the disciplinary panel has not yet been assigned.

Contentions of the parties

The arguments advanced on behalf of the plaintiff in support of his application for interlocutory relief may be summarised as follows:-

(a) there was a failure to comply with natural justice in that the plaintiff did not have an opportunity to challenge his "accusers" during the investigation by the second defendant;

(b) there was a failure on the part of the second defendant to comply with the time limits for referring the matter to the disciplinary panel;
(c) the suspension of the plaintiff was invalid, constituted a second suspension and should in any event be lifted at this stage by reason of its duration; and
(d) the reference of additional complaints to the disciplinary panel was otherwise than in accordance with the procedure.

It is further submitted that the plaintiff will suffer irreparable damage if the suspension is not lifted. Counsel for the plaintiff contends that damages could never be an adequate remedy in the particular context. Within the confines of an academic institution, a suspension to which was added the restriction that the plaintiff could not enter the Arts Building, was incredibly damaging to the plaintiff's reputation and standing within the college community, counsel argued. The plaintiff's whole way of life and professional standing was at stake in the context of the present application. The balance of convenience lay in favour of granting an interlocutory injunction.

The defendants submit that all of the complaints made by the plaintiff in these proceedings are premature. Any complaints of procedural defect could be made by the plaintiff to the disciplinary panel. The disciplinary panel is strictly governed and subject to the principles of natural justice and fair procedure. The defendants submit that all of the complaints now advanced by the plaintiff at this hearing could and indeed should have been advanced by him at first instance to the disciplinary panel. In the event of the disciplinary panel failing in its duties in respect of any complaint, it would at that stage have been open to the plaintiff either to appeal the decision of the panel to the visitors or apply to this court. It is submitted that there is not one *iota* of evidence that the panel has acted improperly or is likely to act improperly.

The early stage of the investigation was, it is argued, just that, investigatory. There was no right during that process to challenge "accusers" because there were none. While the second defendant does have a duty to investigate and a power to impose a penalty, that power is at all times subject to being exercised only with the prior written consent of the staff member which in the instant case had never been forthcoming. The mere forwarding of a complaint by the second defendant to the panel does not render the complainant an "accuser" until such time as the first defendant puts the staff member at risk of the imposition of a sanction in a hearing before the disciplinary panel.

On the allegation of delay, it is accepted that the second defendant did not refer the matter to the disciplinary panel within 30 working days.

However, it was submitted that the period of time taken by the second defendant to investigate this entire matter and ultimately refer to the disciplinary panel was reasonable. That issue is also reviewable by the disciplinary panel and can be resolved at that hearing. It had been necessary for the second defendant to examine a considerable volume of documentation relating to the department of English over many years. Furthermore, the plaintiff had in correspondence with the second defendant indicated his understanding of the delay and was making no complaint about it prior to the delivery of the report in October.

The defendants argue that there is no second suspension, nor was the single suspension imposed as a sanction. It was purely a holding operation, pending the hearing by the disciplinary panel. Furthermore, the suspension was one with pay and clearly was not open-ended in that it clearly would only last until the disciplinary panel convened and dealt with the entire matter of the complaints. The period from the 7th October until the 11th December, 2002, could not be regarded as excessive, not least because additional charges and complaints had arisen in respect of certain behaviour by the plaintiff following delivery to him of the second defendant's report on the 4th October, 2002.

Further, in circumstances where the disciplinary issue had already been referred to the disciplinary panel, there could be no complaint about the addition of further charges. The reference to the disciplinary panel was clearly in contemplation or in train at the time these additional acts of alleged misbehaviour had occurred and were thus properly within the purview and remit of the disciplinary panel to be determined by the panel in accordance with its own rules. It would be a nonsense for the senior dean to conduct further investigations in such circumstances.

Insofar as the balance of convenience went, it was submitted that the first defendant as an employer has duties not only to a staff member accused of misconduct but to other staff who may be affected by that behaviour. It had such a duty of care, not least because the plaintiff's complaints were being disseminated by the plaintiff to a wide audience within the first defendant, as his correspondence demonstrated.

Suspension: legal considerations

The power of suspension is expressly provided for in the first defendant's disciplinary procedures and the entitlement to suspend *per se* is thus not in issue. Whether, however, a suspension amounts to a sanction such as would invoke concepts of natural justice or give rise to an inference that

the person concerned had been found guilty of significant misconduct is, in every case, a question of fact and degree.

A suspension may have different consequences and implications by reference to the particular occupation of the person affected. For example, a professional footballer might not regard a suspension, even a lengthy one, as being particularly detrimental or damaging to career or reputation. On the other hand, an allegation of misconduct against a senior medical consultant, or, as in the instant case, a senior academic and lecturer, may well be a more serious matter. It is a simple fact of life that suspension for a person in one of the latter categories may be seen as altogether more damaging. At the opposite end of the spectrum, the Supreme Court found in *Murtagh v. Board of Management of St. Emer's National School* [1991] 1 I.R. 482 that the three day suspension of a pupil either by the principal or by the board of management of a school did not amount to an adjudication on or determination of any rights, or the imposition of any liability.

Equally, the court will have to consider the manner and nature of the suspension. If the suspension is without pay and open-ended, it obviously has far more detrimental effects from the point of view of the person suspended and may more readily be seen as a punishment. Disciplinary procedures may also be found wanting if the person who is about to be suspended has not been fully informed as to the complaint against him and given an opportunity to respond to any proposed suspension. In the case of a second suspension, which is the situation contended for on behalf of the plaintiff in the instant case, the detrimental effects can only be seen as more marked, because such a suspension is more often than not likely to lead inexorably to the possibility of termination of employment, a factor I deemed to be of some importance in *McNamara v. South Western Area Health Board* [2001] E.L.R. 317.

In *Quirke v. Bord Luthchleas na hÉireann* [1988] I.R. 83, Barr J. emphasised the distinction between two types of suspension, punitive and holding, when stating as follows at p. 87:-

> "… the suspension of a member by a body such as B.L.E. or a trade union or professional association may take two different forms. On the one hand, it may be imposed as a holding operation pending the investigation of a complaint. Such a suspension does not imply that there has been a finding of any misbehaviour or breach of rules by the suspended person, but merely that an allegation of some such impropriety or misconduct has been made against the member in question. On the other hand, a suspension may be imposed not as a holding operation pending the outcome of an inquiry, but as a penalty by way of punishment of a member who has been found guilty of misconduct or breach of rules. The importance of the distinction is that where a sus-

pension is imposed by way of punishment, it follows that the body in question has found its member guilty of significant misconduct or breach of rules."

It follows, obviously, that where suspension constitutes a disciplinary sanction, the person affected should be afforded natural justice and fair procedures before the decision to suspend him or her is taken. However, where a person is suspended so that an inquiry can be undertaken as to whether disciplinary action should be taken against the person concerned, the rules of natural justice may not apply.

These were the findings of the Supreme Court in *Deegan v. The Minister for Finance* [2000] E.L.R. 190, in which Keane C.J. stated as follows at pp. 198 to 199:-

"It is clear that the suspension of a person from their employment for a specified period because of irregularities or misconduct on his or her part can constitute a form of disciplinary action which would entitle the person affected to be afforded natural justice or fair procedures before the decision to suspend him or her is taken. The consequences of such suspension can be extremely serious for the person concerned, involving not merely their right to earn a livelihood but also their right to have their good name protected. In *John v. Rees* [1969] 2 All E.R. 274 at p. 305, McGarry J., in a passage cited by the learned High Court judge, said:-

'… in essence suspension is merely expulsion *pro tanto*. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office. Accordingly, in my judgment the rules of natural justice *prima facie* apply to any process of suspension in the same way that they apply to expulsion.'

However, that was not a case in which the suspension was being imposed so that an inquiry could be undertaken as to whether disciplinary action should be taken against the person concerned and, if so, the nature of such a sanction.

That distinction was emphasised by Lord Denning M.R. in *Lewis v. Heffer* [1978] 3 All E.R. 354 a decision to which the attention of the learned High Court Judge does not appear to have been drawn. Having cited the passage from the judgment of Megarry J., Lord Denning went on at p. 364:-

'These words apply, no doubt, to suspensions which are inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspensions which are made, as a holding operation, pending enquiries.

> Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply: see *Furnell v. Whangarei High Schools Board* [1973] 1 All E.R. 400'."

Obviously a person who is being suspended must be informed of the reason for his suspension (*Flynn v. An Post* [1987] 1 I.R. 68). *Flynn v. An Post* is also an authority for the proposition that a power of suspension must be construed as permitting a suspension to continue only for the period of time during which it would not be reasonably practicable to hold a full hearing into the matter. An open-ended suspension, particularly one without pay, can only be seen as a form of punishment and a severe one at that. In contrast, a short period of suspension with pay against a clearly defined backdrop of consecutive steps to resolve the disciplinary issue is less likely to warrant the court's intervention on the basis that the procedures, or their application, are unfair to the person concerned.

The plaintiff in the instant case complains that his suspension is both unfair and prejudicial. In this context, "prejudicial" may be taken to include the plaintiff's reputation and standing in the college community and also, and perhaps more importantly from the point of view of this application, his right to a fair hearing. It is an inescapable fact that the plaintiff coming before the disciplinary panel will carry with him the taint or degree of prejudice which inevitably arises from the fact that he has been charged and that the second defendant believes that the procedure is justified. However, it seems to me that the inevitable consequence of any suggestion that an employee who has been suspended is thereby, and without more, irredeemably prejudiced, and *ipso facto* cannot then get of a fair hearing, would mean that there could never be a holding suspension as one of the steps in a disciplinary process. That in turn would mean that an employer, possibly faced with a situation where work colleagues are the complainants in a given case, would have to suffer the prejudice instead. There could then be no action the employer could take, short of ignoring complaints of

a serious nature or proceeding at once to the termination stage with all the risks and liabilities that might attach thereto.

In *Furnell v. Whangarei High School Board* [1973] A.C. 660, Lord Morris of Borth-y-Gest stated at p. 679:-

> "It has often being pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules: see the speeches in *Wiseman v. Borneman* [1971] A.C. 297. Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions."

Bearing in mind, therefore, that fairness in action is the court's guiding principle, the essential questions seem to me to be as follows:-

Were the defendants' disciplinary procedures applied fairly having regard to:-

(i) the suspension and the manner of its imposition?
(ii) the delay, either in the preparation of the second defendant's report, or between its delivery in October, 2002 and the scheduled hearing by the disciplinary panel in December, 2002?
(iii) the possibility of prejudice to the plaintiff in any hearing before the disciplinary panel arising from the investigation or findings of the second defendant in his report?

Decision
The suspension

While counsel for the plaintiff has urged the court to find as a fact that there were two suspensions of the plaintiff, I am quite satisfied that the only suspension which was imposed was that of the 7th October, 2002, in respect of the incident involving Dr. Newell.

It is of course true to say that the second defendant had recommended suspension of the plaintiff in respect of the February complaints for a period of three months without pay, together with a warning as to future behaviour, to the board. However this was a sanction which could never have been imposed without the plaintiff's consent. The effective suspension, in the "exceptional circumstances" found to exist by the second defendant, was imposed on the 7th October and was confirmed and adopted by the board on the 24th October, 2002. What the board did on that occasion was effectively to endorse the steps taken by the second

defendant under para. 12, sch. III, ch. XII of the college statutes on the 7th October, 2002.

It seems to me that the second defendant could reasonably form the view that the gravity of the behaviour complained of by Dr. Newell constituted "exceptional circumstances" within the meaning of para. 12, such as would justify immediate suspension. The plaintiff was well aware of the reason for the suspension, although it is true to say he was not provided with an opportunity of responding thereto because of the immediate nature of the suspension. However, within a very short period of time, the plaintiff declined to be interviewed about the incident and published for all to see within the college precincts a handwritten statement dated the 8th October, 2002, which further inflamed matters but wherein he did not dispute the essential facts giving rise to the complaint by Dr. Newell. If there was therefore any want of due process, it was a shortcoming of no real importance on the facts of this particular case.

The second defendant's letter of the 7th October, 2002, to the plaintiff made it clear that he thereafter intended taking steps to conduct a full and formal investigation of the complaint made by Dr. Newell in accordance with the college's disciplinary procedures applicable to academic staff. It was made clear, therefore, that the suspension was not an end in itself but rather a stage in a process. A parallel or converging process was also inevitable arising from the investigation and report into the February complaints and the plaintiff's refusal to accept or consent to the second defendant's recommendation as to sanction. From my review of the papers I find no evidence of malice or ill-will in any of the second defendant's behaviour towards the plaintiff. On the contrary he had clear duties and obligations under the college statutes. In referring the complaints to the disciplinary panel he at all times, in my view, behaved with total propriety.

Delay

The plaintiff's complaints in respect of delay are twofold. Firstly, he complains of the length of time the second defendant took to complete his report, which was only delivered to him on the 4th October, 2002.

A huge range of issues had been raised by the plaintiff in his complaints which essentially related to the administration of the English Department over a period of 25 years. I accept entirely the assertion by the second defendant that a huge amount of work was involved both in the investigation itself and thereafter in the preparation of a report. At the same time as performing these functions, the second defendant had his other duties within the Department of Microbiology to attend to, including the

setting and marking of examinations in May, 2002. It was thus the end of July before he could complete his investigation and prepare a report. He was approached by the plaintiff in late July who asked when he could expect the report. The second defendant deposes at para. 19 of his original affidavit that he explained to the plaintiff that he hoped to have it finished shortly but that the draft would have to be read by the staff secretary before it could be finalised. The staff secretary was on holidays at the time and accordingly the draft was only completed in late August, following which the second defendant went on scheduled annual holiday. He returned in early September and went through the draft report with the staff secretary, making some necessary corrections and cross-referencing to appendices. On the 23rd September, 2002, the plaintiff wrote asking when the report would be ready. There followed an exchange of e-mails between the second defendant and the plaintiff. The plaintiff's e-mail stated:-

> "I well understand the claims on your time and also the work you have put into this report. I apologise if I have inadvertently caused more difficulty for you, but I had simply understood from our conversation in July that the report had already been submitted."

I accept the account furnished by the second defendant in his second affidavit that the plaintiff was in no way complaining about the length of time which the report took to complete, because he apparently believed he would be vindicated in it. It was only when he discovered that the report concluded that a case had indeed been made out against him that he began to dispute the procedures and timetables involved.

In any event, as has been pointed out by counsel on behalf of the defendants, there is a provision in the college statutes whereby the decision of the senior dean to serve notice of a reference to a disciplinary panel may be extended after the expiration of the 30 working days from the date on which the senior dean received original notification of the offence. The decision of the senior dean to serve such notice after the expiry of the normal time limit is also reviewable by the disciplinary panel. It seems to me that the plaintiff's position could not be better protected in respect of any complaints of delay under this heading.

Nor could the plaintiff have been under any illusion or belief that he was being subjected to an open-ended suspension. On the contrary, he had been made aware that the disciplinary process was being set in motion and that a hearing by a disciplinary panel would follow. Also, he was being suspended on full pay.

The hearing was scheduled to take place on the 11th December, 2002. While the book of evidence, which contained material relevant to the additional charges, was only served on the plaintiff some three days before the date of the proposed hearing, it is quite clear that the plaintiff would

have secured an adjournment of the hearing had he so requested it. Instead of doing so, however, the plaintiff elected to bring injunction proceedings in the this court.

Having regard to the additional offences with which the plaintiff is charged arising out of his behaviour following his suspension, and having regard to the requirement to investigate these matters so as to provide a detailed book of evidence, it does not seem to me that the period of suspension between October and December, effectively two months, was excessive in the particular circumstances of this case, particularly when the plaintiff was and is on full pay throughout.

The second defendant's report

It is beyond dispute that the second defendant undertook a wide ranging investigation, both into complaints raised against the plaintiff and into complaints which the plaintiff himself raised about events going back over many years.

During the course of that investigation, the plaintiff was interviewed on two separate occasions, once while attended by a representative. He was fully aware of the matters under investigation and had every opportunity of presenting his account to the second defendant. Crucially, he retained the right of veto over any possible sanction which the second defendant might regard as appropriate. Nothing in his conclusion or recommendations therefore amounts to a sanction and I am satisfied that the panoply of rights identified in *In re Haughey* [1971] I.R. 217 do not arise in those particular circumstances.

Secondly, in respect of the plaintiff's complaint that the possibility of a fair hearing by the disciplinary panel has been prejudiced or prejudged is one which I completely reject.

When this matter goes before the disciplinary panel it will be a completely *de novo* hearing. Not merely will it be a *de novo* hearing, but the burden or onus of proving guilt beyond reasonable doubt will fall on the second defendant. One of the functions of the third defendant will be to instruct the panel that they must act only on the evidence before them. If any member of the panel who survives the plaintiff's seven peremptory challenges and unlimited challenges for cause has heard anything of the plaintiff around the college, he will be instructed to put it out of his mind. A separate book of evidence constitutes the material which will form the basis of the case presented to the disciplinary panel. The disciplinary panel does not have regard to the report and findings of the second defendant. In the course of the hearing before the disciplinary panel, the plaintiff can,

through counsel if he so desires, cross-examine witnesses, make submissions, give evidence himself and enjoy each and every right which the concept of natural justice requires in the context of any adjudication leading to possible sanction, particularly where proof beyond reasonable doubt is necessary.

I am therefore satisfied that all of the plaintiff's complaints of unfairness are unwarranted and without substance.

That being so, I am not satisfied that the plaintiff has made out an arguable case on the hearing of this application. I should also perhaps say something about where in my view the balance of convenience lies.

I believe that on this test the balance is firmly against granting an interlocutory injunction. The rights of the college in maintaining good order and the need of the college to protect the interests of the other staff members of the English Department must be placed in the balance along with the plaintiff's interests when considering this issue. The court has to take into account the fact that the plaintiff himself has widely disseminated his allegations against the head of the English Department and his colleague Professor Scattergood, in such a way and to such a degree as to arouse considerable indignation from working colleagues in the English Department, as is apparent from the material put before the court. It seems to me that a quite unsatisfactory working atmosphere could be created in the English Department, possibly leading to other difficulties, if this suspension were to be lifted prior to the completion of the investigation and disciplinary process. I would, accordingly, also refuse relief on consideration of the balance of convenience test.

I accept the defendants' case that the plaintiff's complaints in this instance are premature. It seems to me that all matters can be dealt with fully and adequately by the disciplinary panel who will come to this matter unfettered by the prior history with which this judgment is largely concerned. The college statutes and procedures are particularly well framed to ensure fairness at every stage.

Finally, and for the sake of completeness I should state that I do not believe that the defendants have caused the plaintiff "irreparable damage" as alleged. He has been suspended on full pay pending the completion of the disciplinary process. The plaintiff appears to contemplate as damage that which might be suffered by him in the event of the disciplinary panel giving him an unfair hearing. However, there is absolutely nothing in his affidavit to suggest there is any basis whatsoever for believing that such an unfair hearing would arise, and the plaintiff himself expressly eschews any criticism of the third defendant.

For all of these reasons I refuse to grant the interlocutory injunction sought in this case.

Solicitors for the plaintiff: *Fawsitt & Company.*

Solicitors for the first and third defendants: *Arthur Cox.*

Solicitors for the second defendant: *Maxwell Weldon & Darley.*

Tessa Robinson, Barrister

E.P. Ó Coindealbhain (Inspector of Taxes), Appellant, v. **Thomas B. Mooney**, Respondent [1988 No. 83R]

High Court 21st April, 1988

Revenue - Income tax - Employed person - Branch manager of employment office - Whether a contract of service or for services - Whether assessable for tax under Schedule D or Schedule E of the Income Tax Act, 1967 - Tests to be applied - Income Tax Act, 1967 (No. 6).

Schedule D of the Income Tax Act, 1967, provides at s. 52 that tax under that Schedule shall be charged in respect of the annual profits or gains arising or occurring, *inter alia* "to any person residing in the State from any trade, profession or employment whether carried on in the State or elsewhere." Schedule E of the said Act provides at s. 109 that tax under that Schedule shall be charged *inter alia,* in respect of the profits or gains arising or occurring to any person by virtue of "any office, employment or pension".

The respondent taxpayer was engaged by the Minister for Social Welfare as the manager of an employment office. The terms and conditions of his engagement were set out in a letter from the department dated the 20th March, 1978, which provided *inter alia* that the respondent would be responsible for the work of the employment office; that his remuneration would be made up of allowances and other payments related to the value of the work done; that he should provide and furnish office facilities and that he should employ a competent deputy and such clerical assistants as might be necessary. Both the accommodation and the assistants procured by the respondent were to be subject to the approval of the department. The respondent could not serve on any public body while holding office. His appointment was subject to three months notice of termination on either side.

The respondent was assessed to tax under Schedule E of the Income Tax Act, 1967, as an employed person and he appealed against this assessment to the Circuit Court, on the ground that he should be assessed to tax under Schedule D as a self-employed person. The Circuit Court allowed the appeal and, at the request of the appellant, stated a case for the opinion of the High Court to determine whether it was "correct in law in holding that the respondent is engaged under a contract for services and therefore self-employed and assessable under Schedule D."

Held by Blayney J., in answering the case stated in the affirmative, 1, that only the terms of the written contract between the parties could be considered in deciding what the terms and conditions of the respondent's employment were.

Narich Property Ltd. v. Commissioner of Pay Roll Tax [1984] I.C.R. 286 applied.

2. That in determining whether a contract was one of service or for services the extent and degree of control exercised by the employer and whether the employed person was in business on his own account were factors to be considered.

Roche v. P. Kelly & Co. [1969] I.R. 100, 108 and *Market Investigations Ltd. v. Minister for Social Security* [1969] 2 Q.B. 173 considered. *McDermott v. Loy* (Unreported, High Court, Barron J., 29th July, 1982) applied.

3. That for the contract to be one of service the contracting party must have agreed to provide his own work or skill in the performance of some service.

Ready Mixed Concrete v. Minister for Pensions [1968] 2 Q.B. 497 approved.

4. That the right of the employer to terminate the employee's contract upon notice was not inconsistent with the contract being one for services.

Graham v. Minister for Industry & Commerce [1933] I.R. 156 approved.

5. That in the circumstances the respondent's contract was a contract for services and accordingly assessable to income tax under Schedule D of the Income Tax Acts.

Cases mentioned in this report:-

Graham v. Minister for Industry & Commerce [1933] I.R. 156.

Hitchcock v. Post Office [1980] I.C.R. 100.

Market Investigations Ltd. v. Minister for Social Security [1969] 2 Q.B. 173; [1969] 2 W.L.R. 1; [1968] 3 All E.R. 732.

McDermott v. Loy (Unreported, High Court, Barron J., 29th July, 1982).

Narich Property Ltd. v. Commissioner of Pay Roll Tax [1984] I.C.R. 286.

Ready Mixed Concrete v. Minister of Pensions [1968] 2 Q.B. 497; [1968] 2 W.L.R. 775; [1968] 1 All E.R. 433.

Roche v. P. Kelly Ltd. [1969] I.R. 100.

Case stated.

The respondent was assessed for income tax under Schedule E of the Income Tax Act, 1967, for the years 1978/79 to 1981/82 inclusive. He appealed against these assessments contending that he was employed under a contract for services; that accordingly he was an independent contractor and not an employee and should have been assessed under Schedule D, Case 1 as a self-employed person. The appeal was heard by the Circuit Court (His Honour Judge O'Malley) on the 2nd November, 1984, and the 26th April, 1985. The appeal was allowed and at the request of the appellant Judge O'Malley on the 9th January, 1988, stated a case pursuant to ss. 428 and 430 of the Income Tax Act, 1967, for the opinion of the High Court. The question in the case stated is set out in the headnote *supra* and the relevant facts stated are set out in the judgment of Blayney J., *post.*

The case stated was heard by the High Court (Blayney J.) on the 4th and 7th April, 1988.

Ercus Stewart S.C. (with him *Carroll Moran*) for the appellant.

Daniel O'Keeffe S.C. (with him *Patrick Quinn*) for the respondent.

Cur. adv. vult.

Blayney J. 21st April, 1988

This is a case stated for the opinion of the High Court by His Honour Judge Peter O'Malley pursuant to ss. 428 and 430 of the Income Tax Act, 1967. It raises a net issue which has frequently had to be considered by the courts, namely, whether a particular contract is a contract of service or a contract for services.

The contract in question is one entered into between the Minister for Social Welfare (to whom I shall refer as the Minister) and the respondent under which the respondent was appointed branch manager of the employment office,

Tullamore, from the 24th April, 1978, upon the terms and conditions set out in a letter from the Department of Social Welfare dated the 20th March, 1978.

The appellant treated the contract as making the respondent a servant of the Minister and assessed him for income tax under Schedule E, and the department deducted tax under P.A.Y.E. from all emoluments paid to the respondent in the years 1978/79 to 1981/82 inclusive.

The respondent appealed against the assessments contending that his contract with the Minister was a contract for services; that accordingly he was an independent contractor and not an employee and should have been assessed under Schedule D, Case 1 as a self-employed person. The learned Circuit Court judge accepted this contention and at the request of the appellant he has stated this case for the opinion of the High Court. The question of law for the opinion of the court is whether the learned Circuit Court judge was correct in law in holding that "the respondent is engaged under a contract for services and therefore self-employed and assessable under Schedule D."

The contract between the respondent and the Minister is a written contract. It is contained in the letter of the 20th March, 1978, from the Department, to which I have already referred, and the form of acceptance dated the 28th March, 1978, signed by the respondent. In view of its being a written contract, it is not necessary to set out the case stated in full, as the court, in arriving at its decision, is confined to considering the terms of the contract. In *Narich Property Ltd. v. Commissioner of Pay Roll Tax* [1984] I.C.R. 286 (a decision of the Privy Council), where the issue was whether lecturers employed by the appellant were employed under a contract of service or were independent contractors, Lord Brandon of Oakbrook, delivering the judgment of the court said at page 291:-

> "The judgment of the Judicial Committee in the A.M.P. case was delivered by Lord Fraser of Tullybelton and is authority for three principles of law applicable to a case of the present kind. The first principle is that, subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract. The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have amounted to an agreed addition to, or modification of, the original written contract, such conduct may be considered an taken into account by the court."

In my opinion that is a correct statement of the law. Where the agreement creating the relationship between the parties is expressed in writing, apart from circumstances giving rise to the exception referred to in the quotation (which are not present in this case), the entire agreement between the parties is to be found in the writing, so it is the unique source of their relationship; it follows that it is from its terms alone that the nature of the relationship can be determined.

The Department's letter of the 20th March, 1978, and the form of acceptance signed by the respondent are as follows:-

"20ú Marta 1978
Mr. Thomas B. Mooney
Ross Road,
Screggan,
Tullamore,
Co. Offaly

A Chara,
With reference to your application of 6th March, 1978, I am directed by the Minister for Social Welfare to offer you appointment as Branch Manager of the Employment Office, Tullamore from 24th April, 1978, upon the following terms and conditions:

(1) You will be paid:
  (a) a fixed allowance as Branch Manager of £3,055 a year in return for which you will be responsible for the work of the office while the numbers on the live register do not exceed an average of 100 per week in a four weekly period;
  (b) where the live register exceeds this figure an allowance for assistance by way of additional remuneration consisting of 14.4p per registrant for the first one thousand registrants in excess of the Branch Manager's quota of 400 in a four weekly period and 16.7p per registrant thereafter;
  (c) a premises allowance of £500 a year;
  (d) an annual leave allowance of £105 payable yearly in respect of a full year's service and pro rata in respect of shorter periods;
  (e) four pence for each unemployment benefit claim on the live register each week in respect of pay related benefit scheme;
  (f) five pence for each insurance card exchanged in excess of the first 200 cards each year.

  The remuneration attaching to the appointment is subject to review from time to time.

(2) The remuneration and allowances set out in preceding paragraphs will cover the provision by you of the following facilities and services which must be approved by the Department: *viz.*
  (a) Suitably furnished office accommodation of adequate size which must be fitted with counters and shelving and which forms no part of premises licensed for betting or for sale of intoxicants, the premises to be maintained in good order and condition both internally and externally;
  (b) the services of a competent deputy to be in regular attendance during the normal office hours as occasion may require, and
  (c) the provision of any clerical assistance which may be considered necessary for the efficient performance of the work of the Department.

(3) The appointment will be subject to three months written notice of termination given on either side without cause assigned, but in the event of your resignation without such notice or ceasing to perform your duties after such notice and before the expiration thereof, you will be liable for any expenses incurred by the Department in making alternative arrangements for the performance of your duties and without prejudice to any other remedy in respect of such expenses any sum due to you from the Department may be withheld towards meeting such expenses.

The Minister, however, reserves to himself the power to terminate without cause assigned the appointment either summarily or by such notice as he may think fit in any circumstances whatsoever which in his opinion, render this course expedient either by reason of the requirements or exigencies of the Public Service or otherwise in the public interest.

The Minister also reserves to himself the right to suspend from duty and pay without cause assigned the holder of the appointment in any circumstances whatsoever which, in his opinion, render this course expedient either by reason of the requirements or exigencies of the Public Service or otherwise in the public interest.

(4) Notwithstanding anything contained in the foregoing paragraphs, the Minister reserves to himself the power to reduce or vary at any time after due notice, the amount of remuneration payable.

(5) The duties will be as set out in the accompanying schedule subject to such variations as may be made by the Department from time to time and must be performed in accordance with the instructions of the Department.

(6) The office must be open from 10 a.m. to 12 noon and 2 p.m. to 4 p.m. on Mondays to Fridays inclusive. These hours are, however, liable to modification by the Department. The office must be available during the ordinary office hours as occasion may require for the use of an officer or officers of the Department in connection with any of his or their official duties.

(7) It is a condition of your appointment that:

(a) you will be responsible for the safe custody of any public monies with which you are entrusted and you must account for all such monies received and paid on behalf of the Department of Social Welfare and the Department of Labour in such manner as may from time to time be prescribed;

(b) you shall make arrangements for the lodgment with the Department of a fidelity guarantee bond in the sum of two hundred pounds (£200) effected with a company approved for this purpose. A specimen form of guarantee is attached;

(c) you shall not serve on or accept membership of any public body while holding office under this Department.

If you are willing to accept appointment on these terms as from the date mentioned you should complete the enclosed Form of Acceptance and send it to this section by return. Arrangements for your installation as Branch Manager on 24th April, 1978, at the premises provided by you will then be made.
Mise le meas,

Schedule of duties of branch managers

The Branch Manager will be required to act generally as the agent of the Department of Social Welfare in the District served by the Employment Office.
The duties of the office will be as follows:

(1) To issue insurance cards to persons insurable under the Social Welfare Acts and wet-time books to persons insurable under the Insurance (Intermittent Unemployment) Act, 1942, and to exchange insurance cards and wet-time books as required.
(2) To receive applications for qualification certificates under the Unemployment Assistance Acts.
(3) To receive claims for unemployment benefit, redundancy payments, applications for unemployment assistance and to take all necessary action thereon in accordance with instructions. To receive claims for pay related benefit and to take all necessary action thereon in accordance with instructions.
(4) To receive in the prescribed manner evidence of unemployment.
(5) To make payment of unemployment benefit, pay-related benefit, redundancy payments, and unemployment assistance in accordance with instructions.
(6) To register the requirements of employers desiring work people and work people desiring employment, to place the one in touch with the other, to exhibit particulars of vacancies and to keep such records as may be required by the Department.
(7) To account for all monies received and paid on behalf of the Department of Social Welfare and the Department of Labour in such manner as may from time to time be prescribed.
(8) To make all necessary arrangements for the safe custody of any public monies wherewith entrusted *e.g.*, by securely locking up such monies in a safe or otherwise.
(9) To complete statistical returns, conduct correspondence, exhibit and distribute forms and notices and generally to perform such duties as may be required by the Department.

Form of Acceptance P. 2990

An Runai,
Roinn Leasa Shoisialaigh,
Brainse Pearsanra (P.3.),
157/164 Sraid Chnoc Na Lobhar,
Baile Atha Cliath 2.

I accept appointment as Branch Manager of the Employment Office, Tullamore, upon the terms and conditions contained in your letter of 20th March, 1978. I am prepared to commence duty on 24th April, 1978, in premises in Distillery Lane, Tullamore, County Offaly.
My age is 31 years my date of birth being 20th/8th/1946 and I give here under a complete list of occupations at present followed by me.

Signed:	Tom Mooney Ross Road, Screggan, Tullamore.
Date:	28th March 1978
Other occupations:	Clerk McDonald Engineering Limited Church Road Tullamore."

As the contract has to be considered in the light of the circumstances surrounding the making of it, it is relevant also to set out the following paragraph from the case stated which figured among the facts proved or admitted:

"2. (j) Branch Managers were first introduced to this country in or about 1911 under the 1909 Labour Exchange Act. They were appointed to pay out social insurance and after the 1933 Unemployment Assistance Act, to pay out unemployment assistance. There has been no major change in their functions since their introduction and to this day they carry out this function on behalf of the Minister. Various different schemes have been introduced down through the years, including fuel vouchers, butter vouchers, pay related benefit *etc.* but their basic function has remained unaltered *viz.* to pay out monies on behalf of either the Minister for Labour or the Minister for Social Welfare. The number of Branch Managers has remained remarkably constant except in 1933 when the numbers were increased because of the introduction of unemployment assistance. They were set up, in the main, in rural areas where it would have been too costly to set up a District Office of the parent Department staffed by Civil Servants."

What is the test or tests to be applied in determining whether a contract is one of service or for services? There was no real disagreement between counsel as to

this. The dispute centred rather on the application of the law to the respondent's contract.

The first test is the extent and degree of control exercised by the employer. In *Roche v. P. Kelly Limited* [1969] I.R. 100 Walsh J. said in his judgment at page 108:-

> "While many ingredients may be present in the relationship of master and servant, it is undoubtedly true that the principal one, and almost invariably the determining one, is the fact of the master's right to direct the servant not merely as to what is to be done but as to how it is to be done. The fact that the master does not exercise that right, as distinct from possessing it, is of no weight if he has the right."

In *Market Investigations Ltd. v. Minister for Social Security* [1969] 2 Q.B. 173, a decision of the High Court in England, which was heavily relied upon by the appellant, Cooke J. said in his judgment at pp. 184 and 185:-

> "The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court [in the U.S.A.] suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.
>
> The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

In *McDermott v. Loy* (Unreported, High Court, Barron J., 29th July, 1982) this passage was cited to Barron J. and it was submitted that he should apply the test referred to in it. He commented on it as follows:-

> "It seems to me that the test really has not changed. When the question was asked, who decides what the work is to be and when and where it is to be done, it seems to me that the purpose was to determine whether the employee was working for someone else or for himself. This is the basis upon which *Graham v. Minister for Industry and Commerce* [1933] I.R. 156 was decided. The

Court was satisfied with the evidence that the plaintiff had been working for himself as a building contractor."

I respectfully agree with Barron J.'s comments. It seems to me that to ask the question whether the person is engaged in business on his own account is to approach the issue from a different angle rather than to lay down a wholly new test.

A further test, which was referred to by the respondent, is also relevant on the facts of this case. It arises from the nature of a contract of service. In *Ready Mixed Concrete v. Minister of Pensions* [1968] 2 Q.B. 497, MacKenna J. at page 515 defined a contract of service as follows:-

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

It is to the first of these three conditions that I wish to draw attention. For the contract to be one of service, the contracting party must agree to provide his own work and skill in the performance of some service.

The next step is to apply these tests to the contract entered into between the respondent and the Minister but, before doing so, it is necessary to summarise its provisions and to see if, independently of these tests, any inferences can be drawn from them. In summarising the contract I will adhere closely to the terminology used in it as it seems to me to be of considerable importance in determining its effect.

Under the contract the respondent is appointed branch manager of the employment office, Tullamore, on the 24th April, 1978. His remuneration consists of certain allowances and certain fixed fees related to the volume of work to be performed and it may be reduced or varied from time to time by the Minister. He must provide and furnish his own premises and employ a competent deputy and such clerical assistance as may be necessary, both the premises and any employees having to be approved by the Department. His appointment is subject to three months' notice of termination on either side. His duties, which are subject to variation, are clearly defined. The days and hours during which the office must be open are stipulated. The manager is responsible for the safe custody of public monies and has to take out a fidelity guarantee bond in the sum of £200. He may not serve or accept membership of any public body while holding office.

In the context of the relationship it creates between the parties, the following appear to me to be the most important features of the contract:

1. The respondent is not obliged to perform any of the work personally.
2. He is required to provide and furnish the office premises and employ a competent deputy and any clerical assistance which may be necessary.

3. His remuneration is not described as wages or salary; it is made up of allowances together with other payments related to the volume of work to be done.
4. The remuneration may be varied without the agreement of the respondent.
5. Clause 2 of the terms and conditions refer expressly to the remuneration and allowances covering the "provision" by the respondent of certain "facilities and services", so part of the contract requires the provision of services by the respondent.

In my opinion these features are inconsistent with the contract being one of service - they all point rather to its being one for services, in particular the absence of any requirement to perform the work personally and the obligation to provide and furnish the premises in which the work is to be performed. Both these features suggest that the respondent is an independent contractor. So even before the accepted tests are applied it seems to me that a conclusion can be reached on a consideration of the terms of the contract alone.

And when the tests are applied, in my opinion this conclusion is confirmed. Firstly, the test as to the degree and extent of the control exercised by the Minister. While he clearly lays down in the contract what is to be done, he does not direct how it is to be done except in certain instances when things are to be done in accordance with instructions, nor does he direct when the work is to be done except that the office is to be open during specified hours from Monday to Friday inclusive. For example, one of the duties of the respondent is

> "To register the requirements of employers desiring work people and work people desiring employment, to place the one in touch with the other, to exhibit particulars of vacancies and to keep such records as may be required by the Department."

But it is nowhere stated how employers desiring work people and work people desiring employment are to be put in touch with one another - whether it is to be done by letter, by telephone, by personal introduction etc. This is left to the discretion of the respondent. Also the manner in which particulars of vacancies are to be exhibited. Another duty of the respondent is to keep certain records and prepare certain accounts, but there is no requirement as to when this work is to be done.

It was submitted on behalf of the appellant that the Minister exercised the necessary control by reason of the fact that the deputy employed by the respondent and any clerical assistance have to be approved by the Department. But the control given by the requirement to have the Department's approval is minimal. Once a deputy or a clerk has been approved, he is then in the employment of the respondent and under his control. It is he who decides what hours are to be worked in addition to the hours during which the office has to be kept open, and how any work is to be done in respect of which there are no express instructions from the Department. So the fact that the Department has to approve of their appointment is of little significance in regard to how or when they do their work.

It was also submitted by the appellant that the fact that the Minister can terminate the contract on three months' notice is inconsistant with its being a contract for services. I reject that submission. In *Graham v. Minister for Industry and Commerce* [1933] I.R. 156, Fitzgibbon J. rejected a similar submission. He said in his judgment at page 162:

"Now, it is true that the power of dismissal is inherent in the relationship of master and servant, but it is equally true that in many cases the person who has engaged a contractor to carry out a particular piece of work has power to determine the contract if the contractor is inefficient or negligent, and I cannot see that this power to determine the contract necessarily makes the contractor the servant of the person with whom he had made the contract."

The second test to be applied is whether the respondent is in business on his own account. In my opinion he is. I have no doubt that he is running a business, the nature of the business being to provide a particular service for the Minister. His profit is the amount by which his remuneration exceeds his expenses; the lower he can keep his expenses the greater his profit. If he employs no one other than a deputy, and does a substantial amount of the work himself, his profit will be much greater than if he does little of the work himself and employs another person to do it instead. Similarly, the amount of his profit will also depend on how much rent he has to pay for his premises, and how well he succeeds in keeping down his other expenses. All these matters require management decisions and in making them the respondent is working for himself and not for the Minister. So it seems to me that he is clearly in business on his own account as the profit he makes from the contract depends on how he decides to perform the work which has to be done.

Finally, there is the test from the definition of a contract of service, that one of the conditions to be satisfied is that the contracting party agrees to provide his own work and skill. In my opinion it is clear that the contract here does not satisfy that condition. There is no obligation on the respondent to carry out any of the work personally. It was submitted on behalf of the appellant that the respondent's job was a supervising regulatory one; that the responsibility for getting the work done was the job itself, and that the respondent undertook this personally. In my opinion this submission does not accord with the facts and in order to see this it is only necessary to refer to the schedule entitled "Schedule of Duties of Branch Manager" attached to the letter of the 20th March, 1978. It sets out in detail the "duties of the office", and it is clear that what it imposed on the respondent is the obligation to do these specific things, not simply the responsibility of seeing that they are done. In my opinion he has a contractual obligation to carry out these duties but he is not obliged to carry them out personally so the element of the respondent providing his own work and skill is absent and because of this the contract is not one of service.

I was referred by the respondent to *Hitchcock v. Post Office* [1980] I.C.R. 100 a decision of the Employment Appeal Tribunal in England, in which it was decided that a sub postmaster was an independent contractor and not a servant. One of the features to which the Tribunal considered that great importance should be attached was that "the applicant provided the premises and a certain amount

of the equipment at his own expense" (p. 108). This is also an important feature in the present case. The respondent is required to provide "suitable furnished office accommodation", which means that not only must he provide the premises, but he must also furnish them, and since what is being furnished is an office, the furniture would obviously include any typewriters, calculators, safes or other office equipment which might be necessary. The provision of the premises and of such equipment is in my opinion inconsistent with the contract being one of service.

In my opinion a consideration of the terms of the contract leads to a preliminary conclusion that it is a contract for services, and this conclusion is confirmed when its terms are considered in the light of the accepted tests. I am satisfied accordingly that the learned Circuit Court judge was correct in holding that "the respondent is engaged under a contract for services and therefore self-employed and assessable under Schedule D."

Solicitor for the appellant: *Revenue Solicitor.*

Solicitors for the respondent: *Patrick C. Donaghy & Co.*

Paul Gardiner, B.L.

In the matter of the **Equal Status Acts 2000 to 2011** and in the matter of **G.**, Appellant v. **The Department of Social Protection**, Respondent [2015] IEHC 419, [2012 No. 150 CA]

High Court 7th July, 2015

Equality – Equal status – Discrimination – Social welfare payments – Entitlement – Surrogacy – Definition of mother – Refusal to allow mother of surrogate child non-statutory payment following birth of child – Gender discrimination – Less favourable treatment on one or more of statutory grounds – Statute – Interpretation – Remedial social statutes – Whether open to court to make finding of unlawfulness in one statute on basis of policy of another – Whether payment of allowance service within meaning of Act – Whether making non-statutory payments to women in appellant's position ultra vires – Whether Equal Status Act capable of filling lacuna in law regarding surrogacy – Equal Status Act 2000 (No. 8), ss. 2, 3, 4, 5, 14 and 28.

The appellant suffered from a disability as a result of which she was unable to support a pregnancy. She and her husband made an arrangement in a foreign jurisdiction with a surrogate mother, who carried the gametes of both, and subsequently gave birth. In accordance with the law of that state on surrogacy, the appellant and her husband were registered as parents of the child on the birth certificate. They did not seek to adopt the child in Ireland.

The respondent administered a range of social insurance and social assistance income support schemes. Following inquiries the respondent advised the appellant that she would have no entitlement to either maternity leave or maternity benefit under current legislation. The respondent refused to grant a discretionary payment comparable to that of a working adoptive mother, saying that to make a payment outside the statutory framework would have been *ultra vires*.

The appellant brought a claim of discrimination under the Equal Status Act 2000 to the Equality Tribunal. While accepting that she could not comply with the statutory regulations for maternity or adoptive benefit, she submitted that she was comparable to both a working natural mother and a working adoptive mother. The claim was dismissed by the Equality Tribunal and that decision was affirmed on appeal by the Circuit Court (Her Honour Judge Lindsay), which found that the appellant had not been treated less favourably within the meaning of the Act of 2000, and that any special provision made by the respondent would have been *ultra vires* its statutory powers.

On appeal on a point of law to the High Court the appellant argued that the trial judge erred in drawing the following conclusions: that her complaint fell outside the scope of the Act of 2000 because there was no legislative regulation of surrogacy in Ireland and because surrogacy had not been envisaged when the Act of 2000 became law; that she had not been less favourably treated within the meaning of the Act of

2000; and that making any special provision would be *ultra vires* the powers of the respondent.

Held by the High Court (O'Malley J.), in dismissing the appeal, 1, that two categories of mother were recognised under Irish law, mothers who had given birth and mothers who had adopted a child. Both categories were entitled to social welfare payments under qualification conditions that related directly to the legal status of motherhood. The appellant could not claim the status of mother under Irish law and could not, for the purposes of a claim of discrimination, choose to compare herself directly with those two categories.

M.R. and D.R. (minors) v. An tArd Chláraitheoir [2014] IESC 60, [2014] 3 I.R. 533 applied.

2. That where a woman did not meet the statutory qualification conditions for maternity or adoptive benefit, a claim to be legally entitled to compensation for the refusal to grant an equivalent non-statutory payment necessarily involved a claim that she had been subjected to a legal wrong. In the particular circumstances, a legal wrong could only be established on the assumption that one statute was held to be legally deficient by reference to another.

3. That since social welfare legislation and the Act of 2000 both embodied policy choices made by the legislature, it was not open to a court to make a finding of unlawfulness in one on the basis of the policy of the other. Pending the introduction of legislation dealing with surrogacy, it was not for the courts to attempt to resolve the complex questions that needed to be addressed, nor could the Act of 2000 be used to fill the gap.

4. That the respondent provided a service within the meaning of the Act of 2000 comprised of the administration or operation of the statutory code of benefits and allowances provided for under the Social Welfare Acts, and other non-statutory payment schemes.

5. That as the Social Welfare Acts did not prohibit the making of non-statutory payments, a scheme to make provision for women in the appellant's position would not have been *ultra vires* the powers of the respondent, so long as such a scheme was consistent with appropriate public policy objectives and assessments.

6. That for a complainant to show, by reference to one or more of the statutory grounds upon which discrimination was prohibited under the Act of 2000, that he or she was treated less favourably than a person to whom those grounds did not apply, it was not necessary to prove actual intent to discriminate on that ground.

7. That the Act of 2000 was intended to cover a broad range of human life and activity; that its overall purpose was to reduce the social wrong of discrimination based on improper considerations. As a remedial statute, it had to be liberally construed and could have been relied upon in relation to novel factual situations, such as surrogacy arrangements, not familiar to the legislature at the time of enactment.

Bank of Ireland v Purcell [1989] I.R. 327 and *Gooden v St. Otteran's Hospital (2001)* [2005] 3 I.R. 617 applied.

Obiter dictum: That since no man could qualify for either maternity leave or adoptive leave payments in any circumstances, a claim of gender discrimination by the appellant was not tenable.

Z. v A. (Case C-363/12) [2014] 3 C.M.L.R. 407 considered.

Cases mentioned in this report:-

Aylott v. Stockton on Tees Borough Council [2010] EWCA (Civ.) 910, [2010] I.R.L.R. 994; [2010] I.C.R. 1278.

Bank of Ireland v. Purcell [1989] I.R. 327; [1990] I.L.R.M. 106.

Clark v. TDG Ltd. [1999] 2 All E.R. 977; [1999] I.R.L.R. 318; [1999] I.C.R. 951.

Complainant v. Department of Social Protection DEC-S2011-053, (Unreported, Equality Tribunal, 18th November, 2011).

Gooden v. St. Otteran's Hospital (2001) [2005] 3 I.R. 617.

Lewisham LBC v. Malcolm [2008] UKHL 43, [2008] 1 A.C 1399; [2008] 3 W.L.R. 194; [2008] 4 All E.R. 525.

Murphy v. Slough Borough Council [2004] I.C.R. 1163.

National Asset Management Agency v. Commissioner for Environmental Information [2015] IESC 51, [2015] 2 I.L.R.M. 165.

M.R. and D.R. v. An tArd Chláraitheoir [2013] IEHC 91, [2013] 1 I.L.R.M. 449.

M.R. and D.R. (minors) v. An tArd Chláraitheoir [2014] IESC 60, [2014] 3 I.R. 533.

Vavasour v. Northside Centre for the Unemployed Ltd. [1995] 1 I.R. 450.

Z. v. A. (Case C-363/12) [2014] 3 C.M.L.R. 407; [2014] I.R.L.R. 563.

Appeal from the Circuit Court

The facts have been summarised in the headnote and are more fully set out in the judgment of O'Malley J., *infra*.

The appellant appealed to the High Court on a point of law pursuant to s. 28 of the Act of 2000 from a decision of the Circuit Court made by Her Honour Judge Lindsay on the 5th July, 2012. The matter had come to the Circuit Court by way of appeal from a decision of the Equality Tribunal of the 18th November, 2011 (see DEC-S2011-0530).

The appeal was heard by the High Court (O'Malley J.) on the 5th and 6th December, 2013, and the 1st April, 2014.

Nuala Butler S.C. (with her *Patrick Dillon-Malone S.C.*) for the appellant.

Gerard Durcan S.C. (with him *Cathy Smith*) for the respondent.

Cur. adv. vult.

O'Malley J. 7th July, 2015

Introduction

[1] This appeal concerns a claim of discrimination, on grounds of disability, gender and family status, in the context of the birth of a child by a surrogacy arrangement. The appellant in the case says that she is the genetic mother and primary carer of a child born as the result of a surrogacy arrangement necessitated by her medical condition. She did not qualify for either maternity benefit (not having been pregnant and given birth) or adoptive benefit (since, being the registered mother of the child on its birth certificate, she has not sought to adopt it). Her claim is that she has been discriminated against by virtue of the respondent's refusal to grant her a payment equivalent to those benefits. The case turns on the correct interpretation of the relevant anti-discrimination legislation.

[2] The appeal is against the order of the Circuit Court (Her Honour Judge Lindsay) made on the 5th July, 2012, upholding a decision of the Equality Tribunal that the complaint of the appellant fell outside the scope of the Equal Status Act 2000 as amended ("the Act of 2000").

Background facts

[3] In 2006, the appellant was diagnosed with cervical cancer while pregnant. She had to undergo a hysterectomy, as a result of which she is unable to support a pregnancy. It is common case that her condition is a disability within the meaning of s. 2 of the Act of 2000, which includes in the definition of disability "the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body". The appellant is otherwise fertile as is her husband.

[4] The appellant and her husband subsequently entered into a surrogacy arrangement in a foreign jurisdiction. The arrangement complied with the law of that state, which provides for detailed regulation of surrogate pregnancies and births. The gametes of both the appellant and her husband were carried by the surrogate mother, who gave birth to a baby in January, 2011. The appellant and her husband are the registered parents of the child under the law of the state in question, while the surrogate mother is not identified on the child's birth certificate.

[5] Some months before the birth, the appellant made inquiries of the respondent as to the availability of maternity leave. She was informed that,

under current legislation, she would have no statutory entitlement to maternity leave and, as a result, no entitlement to maternity benefit.

[6] An application to the appellant's employer for special leave from her employment (equivalent to that available for adoptive leave) after the birth of the child was successful insofar as the employer was happy to grant the leave, but it could not offer paid maternity leave and told her that she would have to seek payment for such leave from the respondent directly.

[7] On the 6th January, 2011, the Equality Authority wrote, on the appellant's behalf, to the respondent, requesting it to use its discretion to give a payment for leave comparable to that of a working adoptive mother. It was acknowledged that the type of leave being granted by the employer had no statutory basis such as that set out in either adoption or maternity protection legislation. The case made was that the appellant was entitled not to be discriminated against by virtue of the Employment Equality Act 1998 (in particular ss. 2, 6 and 8) and the Act of 2000. The payment was sought on the basis that it was available to every other working mother who had a child either naturally or by adoption.

[8] On the 20th January, 2011, the respondent replied, setting out the qualification conditions for adoptive benefit and maternity benefit. Adoptive benefit required, *inter alia*, proof of adoption by way of a certificate of placement or a declaration of suitability issued by An Bord Uchtála. Eligibility for maternity benefit required certification by a medical practitioner as to the confinement of the mother. In the circumstances, neither benefit was payable, and to make a payment outside the statutory framework would, according to the respondent, be *ultra vires*.

[9] On the 15th March, 2011, a notification was sent to the respondent, in the form prescribed by the Act of 2000, setting out the basis on which the appellant considered herself to be treated less favourably than others contrary to the Act of 2000. The appellant said that, as she had neither given birth to nor adopted her child, she could not comply with the statutory regulations for maternity or adoptive benefit. She was, however, a mother with a newborn child to care for and she submitted that she was comparable to both a working natural mother and a working adoptive mother.

[10] The notification invoked the rights of the appellant under Article 41 of the Constitution (the obligation of the State to protect the family, the importance of the life of women within the home and the obligation of the State to ensure that mothers are not obliged by economic necessity to work outside the home).

[11] On the 22nd March, 2011, the respondent replied, stating that its earlier correspondence did not constitute a formal disqualification for benefit, as no formal application had been received from the appellant for either maternity benefit or adoptive benefit. It was suggested that it was open to the appellant to lodge a late claim for these benefits. The letter also suggested that the appellant could contact her local community welfare officer and apply for supplementary welfare allowance.

[12] In response, it was pointed out that any application for either benefit would have to fail. The appellant had not been pregnant and did not give birth, and so could not obtain the requisite certificates from her employer and a medical practitioner. She and her husband had not adopted their child but were registered as its birth parents in accordance with the law of the state where the child was born. Nor was she eligible for supplementary welfare, since she was on leave from her employment. What she was seeking was a payment *equivalent* to the statutory benefits provided to natural and adoptive mothers.

[13] The respondent replied by letter dated the 11th May, 2011, reiterating that it could not act outside the legislation, and that a decision could not be made in the absence of any claim for a benefit or other payment.

[14] Separately, the appellant's employer informed the respondent on the 8th June, 2011, that it considered the application for maternity benefit to be the appropriate application and filled in this form without completing the section in relation to certification.

[15] On the 23rd June, 2011, the Equality Authority, on behalf of the appellant, filed a complaint before the Equality Tribunal.

The statutory context

[16] Section 2(1) of the Act of 2000 defines the concept of a "service" as follows:-

> "In this Act, unless the context otherwise requires –
>
> … 'service' means a service or facility of any nature which is available to the public generally or a section of the public, and without prejudice to the generality of the foregoing, includes –
>
> (a) access to and use of any place,
>
> (b) facilities for –
>
> i. banking, insurance, grants, loans, credit or financing,
>
> ii. entertainment, recreation or refreshment,
>
> iii. cultural activities, or

iv. transport or travel.

(c) a service or facility provided by a club …

(d) a professional or trade service,

but does not include pension rights (within the meaning of the Employment Equality Act, 1998) or a service or facility in relation to which that Act applies."

[17] Section 3 (as amended by the Equality Act 2004) provides in relevant part as follows:-

"(1) For the purpose of this Act discrimination shall be taken to occur –

(a) where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the 'discriminatory grounds') which –

(i) exists,

(ii) existed but no longer exists,

(iii) may exist in the future, or

(iv) is imputed to the person concerned …

(c) where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

[18] Discrimination under s. 3(1)(a) is generally referred to as "direct discrimination", while s. 3(1)(c) is regarded as "indirect discrimination".

[19] "Provision" is defined in s. 2 (as amended) as meaning:-

"a term in a contract or a requirement, criterion, practice, regime, policy or condition affecting a person."

[20] The discriminatory grounds relied on in this case are set out in s. 3(2) and arise, as between any two persons, on the basis:-

(a) that one is male and the other is female (the "gender" ground), […]

(c) that one has family status and the other does not or has a different family status … (the "family status" ground) [and]

(g) that one is a person with a disability and the other either is not or is a person with a different disability (the "disability" ground).

[21] "Family status", for the purposes of this case, means being pregnant or having responsibility, as a parent or as a person *in loco parentis*, in relation to a person who has not attained the age of 18 years.

[22] Section 4(1) deals with the requirement to provide "reasonable accommodation" in the context of disability as follows:-

> "For the purposes of this Act discrimination includes a refusal or failure by the provider of a service to do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service."

[23] "Refusal" includes a deliberate omission. A refusal or a failure to provide the special treatment or facilities in question will not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost.

[24] Section 5(1) of the Act of 2000 prohibits discrimination in the following terms:-

> "A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public."

[25] Section 14(1) provides that nothing in the Act of 2000 is to be construed as prohibiting, *inter alia*, the taking of any action required by or under any enactment (including measures under European Union law).

The complaint to the Equality Tribunal

[26] The appellant's complaint alleged unlawful discrimination on the grounds of disability (including a failure to provide reasonable accommodation), family status and gender, contrary to s. 5(1) of the Act of 2000.

[27] The case in relation to the appellant's disability was based on the fact that, by reason of her medical condition, she could not have a family by natural means. In relation to family status, she argued (without prejudice to her contention that, as a matter of law, she was the mother of the child) that she was at least in the position of being *in loco parentis*, but was being treated differently from other women responsible for newborn children. On the gender issue, it was submitted that her situation was such as could only arise in respect of a woman.

[28] It was submitted that because of the manner of the child's birth, the appellant was unable to fulfil the strict conditions of the statutory regime. In respect of the maternity benefit, the appellant was unable to

obtain a medical certificate of pregnancy because she was not, and could not become, pregnant. In respect of adoptive leave, the appellant could not obtain evidence of adoption because she did not adopt her child. It was stressed that:-

a. she was the biological and genetic mother of the child and, like natural and adoptive mothers, she was primarily responsible for the care and nurture of the baby during the post-natal period;
b. her employer granted her leave in connection with the birth of her child; and
c. she fulfilled the relevant PRSI contribution conditions under the statutory scheme.

[29] The appellant therefore argued that she had been treated less favourably than mothers in a comparable position who are deemed eligible to benefit under the Maternity Protection Acts and the Adoptive Leave Acts. It was submitted that this had caused financial strain and distress to her and her family.

[30] It was also contended that the respondent had failed to provide her with reasonable accommodation in accordance with s. 4(1) of the Act of 2000 insofar as there had been a failure or refusal to do all that was reasonable to accommodate the appellant's needs, by providing special treatment or facilities, in circumstance where without such special treatment or facilities it was impossible for her to avail of the service provided by the respondent.

[31] The appellant argued that the primary consideration underlying the statutory regime was the facilitation of full-time care of the child by his or her primary carer during the critical period of time following his or her introduction to the family. This was said to be a reflection of the importance attached by the State to the special bond created between the child and the primary carer at this time.

[32] The respondent submitted that statutory schemes such as maternity and adoptive leave were not "services" within the meaning of the Act of 2000. It was therefore argued that the service sought by the appellant did not exist, and that she was expressly seeking a benefit to be extended to her on a discretionary basis, thereby asking the Tribunal to create a new statutory entitlement. It was submitted that it was not within the respondent's power to offer a discretionary payment.

[33] The respondent also contended that the complaint raised issues of constitutional law relating to the definition of motherhood, which lay outside the jurisdiction of the Tribunal.

Decision of the Equality Officer

[34] In a decision issued on the 18th November, 2011, the Equality Officer dismissed the appellant's complaint [see decision number DEC-S2011-053].

[35] Referring to the burden of proof under the Act of 2000, the officer noted that it was for the complainant to set up, in the first instance, a *prima facie* case by establishing facts upon which she could rely in asserting that she had suffered discriminatory treatment.

[36] The Equality Officer did not accept the respondent's submission that the statutory schemes administered by it were not services, ruling that s. 2(1) of the Act of 2000 did not set out an exhaustive list of services and that financial services or facilities were clearly contemplated. However, she went on:-

> "5.2 … I do accept that the language used in 'available to the public or a section of the public' is clear using everyday language and therefore, in the context of statutory entitlements, applies to actual schemes that are in place. It is clear that the service that the complainant is seeking – maternity leave for a mother who has not carried her own child or adoptive leave for a person who has not adopted her child – does not exist in the statutory scheme and therefore this Tribunal has to find that the complainant has not been refused such a service within the meaning of these Acts.
>
> 5.3 I accept that the facts of this case do present a compelling complaint. However, I find that the Irish legal system operates a default legal assumption that the person giving birth to a child is the child's legal mother. There is no legal recognition of surrogacy in this jurisdiction and it is clear that this is a matter that will raise a number of complex issues for the legislature to consider in due course. These considerations are not, however, a matter for this Tribunal with its limited jurisdiction. I find that almost all legislation addressed to the regulation of society resorts to some form of classification and such can be used as a classification of inclusion or exclusion for various legislative purposes. There is nothing, in accordance with section 14(1) of these Acts that entitles this Tribunal to find such classification as invidious, unfair or discriminatory. In deciding, as a matter of policy, to establish a special scheme for Maternity and Adoptive Leave, the Oireachtas necessarily had to define the scope and limits of its application. I am satisfied that the definitions currently contained in the statutes do not recognise the situation that the complainant finds herself in and in such

circumstances the respondent had no option but to turn down her application."

[37] On the issue of reasonable accommodation, the Equality Officer found that to offer to the appellant special treatment by way of making a payment to her would have been *ultra vires* the powers conferred upon the respondent by statute.

Decision of the Circuit Court

[38] The hearing before the Circuit Court appears to have been conducted on the basis of the same arguments as those put before the Equality Officer. The decision of Her Honour Judge Lindsay, delivered on the 5th July, 2012, affirmed the finding of that officer.

[39] The judge approached the matter on the basis that she had firstly to decide whether the appellant had a disability. Finding that she had, the next issue was whether there had been discrimination. The test was formulated as follows:-

> "Has the appellant been treated less favourably than a natural mother or an adoptive mother on the grounds that she is not able to have a child and yet she is now responsible for a child which has been born to a surrogate mother and to whom she is the biological mother?"

[40] In relation to the issue of reasonable accommodation she asked whether it was open to the Minister to make special arrangements, and whether not doing so was an act of discrimination:-

> "Therefore there are two matters that I must decide firstly was the appellant treated less favourably than another person is or would be treated in a comparable situation and secondly is it open to the Minister to make a special arrangement.
>
> The Minister in his defence has stated that he is administering a scheme, in other words a specific benefit for specific persons as is prescribed for him in the [Social Welfare Act 2005]."

[41] Having considered the long title of the Act of 2000, the judge found that the purpose of the legislation was to promote equality and prohibit discrimination:-

> "However, there is no legislative provision for surrogacy in Ireland. The appellant's situation was not envisaged when the Act [of 2000] became law. The Act is quite specific it covers situations where there is discrimination of those within the scope of the Act and not those outside it. Although there may be discrimination in the ordinary meaning of the word and the Minister's decision may seem unfair and

unjust he is confined by the terms of the Act and any benefit given to the appellant would be *ultra vires*. He does have discretion to make a special provision … but to exercise this discretion would be beyond the defined scope of the Act."

[42] She therefore answered the questions posed by finding that the appellant had not been treated less favourably within the meaning of the Act of 2000 and that any action by the respondent by way of special provision would be outside the scope of the Act of 2000 and, accordingly, would be *ultra vires.*

Appeal to the High Court

[43] Under s. 28(3) of the Act of 2000, the appeal to this court is on a point of law only. There was, in any event, no dispute between the parties on any factual matter.

[44] The points of law raised on behalf of the appellant are pleaded as follows:-

a. that the trial judge erred in law in concluding that, because there is no legislative regulation of surrogacy in Ireland, the appellant's complaint did not come within the scope of the Act of 2000;
b. that the trial judge erred in law in concluding that, because surrogacy had not been envisaged when the Act of 2000 became law, the appellant's complaint did not come within the scope of the Act of 2000;
c. that the trial judge erred in law in the manner in which she concluded that the appellant had not been less favourably treated within the meaning of the Equal Status Acts 2000 to 2011; and
d. that the trial judge erred in law in the manner in which she concluded that the taking of any action by the respondent by way of special provision would be beyond the defined scope of the Act of 2000 and, consequently, *ultra vires* the powers of the respondents.

[45] The grounds pleaded in support of these propositions included a contention that the Circuit Court Judge had erred in identifying the issues as she did. It is argued that the correct approach is to ask, firstly, whether the appellant has been treated less favourably on a discriminatory ground; secondly, whether (in the case of disability) the appellant has been discriminated against by reason of the failure to make reasonable accommodation including the provision of special treatment or facilities; and thirdly, whether, in the event of a finding that discrimination has occurred, relief

can be ordered against the Minister having regard, *inter alia,* to s. 14(1) of the Act of 2000.

[46] The suggestion is made that the Circuit Court Judge failed to engage with the central argument in the case:-

> "… namely that a discriminatory exclusion from the scope of [the Social Welfare Acts] may itself constitute discrimination within the meaning of the Equal Status Acts 2000 to 2011."

[47] In written submissions for the court, the parties adopted much the same arguments as they had at the earlier hearings. However, it became apparent during the hearing that the respondent had shifted position somewhat. It was now accepted that the respondent does provide a service, with the service in question being described as the operation of the statutory code for the provision of benefits and allowances. The focus of the respondent's case on this aspect moved to an argument that there had been, as a matter of law, no discrimination against the appellant. Reliance was placed on a number of United Kingdom authorities not previously referred to in submissions.

[48] As a matter of fairness, the court adjourned the hearing to give an opportunity to the appellant to consider and respond to this new line of argument. Further oral and written submissions were accordingly made. The appellant maintains an objection to permitting the respondent to put forward a wholly new argument not made at the previous hearings. She says that it was not seriously in dispute, before either the Equality Tribunal or the Circuit Court, that she had been treated less favourably and that the respondent should not be permitted to argue, in this the third stage of the process, that there was no discrimination.

[49] However, the appellant's supplemental submissions do engage with the merits of the respondent's arguments.

[50] The appellant also puts forward an alternative basis for her own case based on the concept of indirect discrimination. She says that at all times her case was that she had been discriminated against within the meaning of s. 3 of the Act of 2000 and that she is therefore entitled to make an argument based on s. 3(1)(c).

[51] The respondent, in turn, has objected to what is perceived as being a new argument, where the complaint at the earlier hearings had been based on a claim of direct discrimination.

[52] After the conclusion of the adjourned hearing, the Supreme Court delivered judgment in *M.R. and D.R. (minors) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533 and this court afforded the parties an opportunity to file written submissions in relation thereto.

[53] This being an appeal on a point of law, the court has no jurisdiction to determine an issue of law not argued in the court below – see *Vavasour v. Northside Centre for the Unemployed Ltd.* [1995] 1 I.R. 450, recently approved by the Supreme Court in *National Asset Management Agency v. Commissioner for Environmental Information* [2015] IESC 51, [2015] 2 I.L.R.M. 165. However, as the latter judgment makes clear, the application of this principle may depend on the formulation of the issue by the parties.

Submissions on behalf of the appellant

[54] Counsel for the appellant says that the scheme as drawn up and as operated by the respondent is discriminatory. If that is so, then it is not an answer to her claim to say that she is not eligible under the scheme. There is no factor bringing the issue within the terms of s. 14 of the Act of 2000, since there is no statutory provision prohibiting the making of a payment to her.

[55] It is submitted that the burden on the appellant is to show that she has been discriminated against by reference to a person in a comparable – not identical – situation.

[56] The appellant compares herself with a mother who has given birth naturally and submits that if she did not suffer a disability and was able to support a pregnancy in the ordinary way, then, having regard to the fact that she fulfils all of the other relevant statutory conditions, there is no question but that she would be entitled to payment for maternity leave in accordance with the Maternity Protection Acts.

[57] It should be noted that in submissions it was maintained by the appellant (on the basis of the High Court decision in *M.R. and D.R. v. An tArd Chláraitheoir* [2013] IEHC 91, [2013] 1 I.L.R.M. 449, and before the delivery of the Supreme Court judgments in that case) that she was the child's mother as a matter of law. However it is a core part of her case that she does not need to establish that status, since she is, in any event, *in loco parentis*.

[58] A comparison is also made with an adopting mother prevented through disability from producing gametes for gestational surrogacy. Like such an adopting mother, the appellant has not undergone pregnancy but she has responsibility for care of the child following its birth and on a permanent basis into the future. If the appellant's disability was that she was infertile, and her only possibility of becoming a mother was through

the process of adoption, she would be entitled to payment for leave from employment under the Adoptive Leave Acts.

[59] The appellant relies on *Murphy v. Slough Borough Council* [2004] I.C.R. 1163 (also a case involving surrogacy, where the applicant had been refused paid leave by her employer) and the reasoning at p. 1173 therein of Silber J. in the Employment Appeal Tribunal:-

> "39 … the applicant has been treated less favourably than others who gave birth in the conventional way to their own children; 'the reason' for the treatment accorded to the applicant related to her disability, namely her inability to have children. For those reasons we consider that … the decision not to give the applicant paid leave was 'for a reason which relates to the disabled person's disability'".

[60] It is submitted that the court should adopt the line of reasoning followed in this case, which involves stepping back from the "immediate" (or "intermediate") reason (non-eligibility under the statutory criteria) and looking for the "ultimate" reason for the treatment of the complainant (the inability to meet the statutory criteria by reason of disability). However, it is also submitted that the court should treat other United Kingdom authorities on the issue with caution, noting that the legislation is not framed in the same terms.

[61] The appellant alleges that, contrary to s. 4 of the Act of 2000, the respondent has discriminated against her on the ground of disability insofar as it has refused or failed to do all that is reasonable to accommodate her needs by providing special treatment or facilities in circumstances where, without such special treatment or facilities, it is impossible for the appellant to avail of the service in question. The appellant's case is that the service provided by the respondent is payment for leave from employment upon becoming a mother.

[62] The appellant acknowledges the need for evidence of motherhood. In cases of natural birth or adoption this is provided, respectively, through medical certification of pregnancy or a certificate of placement. She submits that the refusal of the respondent to consider or accept alternative evidence of the condition of motherhood results in discrimination against her on account of her disability. In relation to the issue of reasonable accommodation, the appellant points to the fact of her insurance contributions and submits that to accommodate her within the payment regime would not impose any financial burden on the respondent additional to that which would apply if she were capable of pregnancy or had adopted a child. She says that by failing or refusing to find a suitable administrative arrangement which could accommodate her, the respondent

has failed to give effect to the spirit of the statutory regime and to ensure full compliance with it.

[63] The fact that the respondent administers a large number of payment schemes without any statutory foundation is highlighted for the purpose of demonstrating that discretionary payments are not necessarily *ultra vires* the respondent. The schemes referred to deal with a disparate range of areas but, by way of example, the appellant points in particular to the Back to Education allowance. Eligibility for this scheme requires the applicant to be in receipt of jobseekers' benefit or allowance – but these are, under the statutory criteria, available only to persons seeking work. The terms of the scheme permit recipients to retain their benefit while in full-time education. It is, therefore, open to the respondent to put in place a non-statutory payment for a person who does not meet the criteria for the parallel statutory payment.

[64] The appellant emphasises in argument that her challenge does not have the consequence, as contended for by the respondent, of setting aside or invalidating an existing legislative choice. She submits that she is not seeking any broader finding than one to the effect that she has been discriminated against within the meaning of the Act of 2000.

[65] It is also contended that, contrary to the analysis and conclusion of the Circuit Court Judge in this case, the consideration that surrogacy arrangements of this kind may not have been contemplated when the Act of 2000 became law is an irrelevant and incorrect basis for holding that it could not be applicable. It is said that the Act of 2000 is intended to apply across a broad range of human activity, and that it does not matter whether a particular field has or has not already been made the subject of regulation.

[66] It is submitted that the issues giving rise to the situation under consideration affect the appellant only because she is a woman and that therefore she is discriminated against on the ground of gender.

[67] In relation to the "family status" aspect, the appellant submits that she is a person with responsibility for a person under 18 years of age and she is being treated less favourably than other persons with a different family status, in particular those who are or were pregnant and who are thus capable of carrying and giving birth to their children. Such persons are entitled to maternity benefit, but the appellant has no entitlement to that or any similar benefit such as adoptive benefit.

[68] In submissions relating to the applicability of s. (3)(1)(c), the appellant says that a condition (the requirement of certification of pregnancy or adoption) has been applied to her, by virtue of "an apparently neutral

provision", with which, because of her disability, it is not possible to comply. She is therefore placed at "a particular disadvantage". On this argument, the consideration that other women who suffer from no disability might choose to avail of surrogacy has no relevance. Such women would be able, if they wished, to comply with the condition but she has no choice.

[69] Counsel for the appellant stresses that she does not seek to attack the validity of the social welfare provisions in question, or to interfere with the rights thereby accorded to other women, or to use the Act of 2000 as if it had the status of the Constitution. Nor does she ask the court to engage in a *quasi* legislative exercise. Even if the court finds that the respondent had no power to make a payment to the appellant, that does not mean that she is not entitled to redress for having been discriminated against. The Act of 2000 envisages an award of compensation where that has occurred.

Submissions on behalf of the respondent

[70] Counsel for the respondent started with the proposition that under Irish law the mother of a child is the woman who gave birth to it. The fact that the law of the state in which the child was born considers the appellant to be the mother does not alter that position.

[71] It is submitted that, as a government department, the respondent is bound by the Social Welfare Acts as enacted. The Minister must act within the four corners of the Acts, and there is no payment under them to which the applicant is entitled. Section 14 is applicable in this context.

[72] As already noted, the respondent, in this court, altered its previous position somewhat. It was accepted that a service is provided. However, where the appellant characterises the service in question as being the provision of payments for leave for mothers of newly born and newly adopted children, the respondent submits that the proper analysis is this: the respondent provides statutory benefits and allowances, in accordance with a statutory code. The "service" it provides is the operation of that code. The respondent says that the definition of the service is crucial, to avoid the risk that a court might end up ordering the provision of a new service. It is contended that that is, in reality, what the appellant is seeking.

[73] It is submitted that Irish law, as reflected in the legislation, supports mothers and adoptive mothers in particular circumstances. However there would be a policy choice involved in deciding to subvent persons who go through a surrogacy process. There are distinctions between the adoption and surrogacy processes – the former is subject to a clear statuto-

ry regime nationally and internationally, while the Oireachtas has made a choice not to make provision in relation to surrogacy.

[74] In answer to the suggestion that the Minister could set up a non-statutory scheme, counsel for the respondent said that there would have to be "considerable doubt" as to whether that would be lawful having regard to the choices already embodied in the legislation. Secondly, he pointed to the fact that the payments in question are benefits (as opposed to allowances), with entitlement being based on contributions. He suggested that it would be unfair to other contributors if any payments were made other than in accordance with statutory conditions.

[75] Counsel for the respondent then went on to deal with the submissions made by the appellant as to the proper approach to analysing a claim of discrimination. It is now submitted that the court should not adopt the reasoning in *Murphy v. Slough Borough Council* [2004] I.C.R. 1163. This is on the basis that the United Kingdom Employment Appeal Tribunal in that case was following the decision of the Court of Appeal of England and Wales in *Clark v. TDG Ltd* [1999] 2 All E.R. 977, which was subsequently criticised by the House of Lords in *Lewisham LBC v. Malcolm* [2008] UKHL 43, [2008] 1 A.C 1399, and is no longer good authority.

[76] In any event, it is submitted that the English authorities deal with "disability-related" discrimination, while the statutory definitions are different in this jurisdiction. When considering whether a person has been discriminated against within the meaning of s. 3 of the Act of 2000, the question is whether there was discrimination "on the ground of" disability, and that requires intent. The "reason" for the treatment must be the "fundamental reason" and must be discriminatory in itself. Here, the fundamental reason has nothing to do with disability, which is irrelevant to the decision that a woman with a child born through surrogacy is not eligible for a benefit. There is, therefore, no discrimination. The result can only be different if the *Murphy v Slough Borough Council* [2004] I.C.R. 1163 or *Clark v. TDG Ltd.* [1999] 2 All E.R. 977 line of analysis is followed, as opposed to *Lewisham LBC v. Malcolm* [2008] UKHL 43, [2008] 1 A.C 1399.

[77] The respondent contends that the appellant is not in a situation comparable in law with that of a woman who gives birth by way of pregnancy and confinement. This is because the latter is given special protection by both Irish and European Union law. Similarly, Irish law gives special protection to adoptive mothers, in circumstances where adoption is closely controlled by law. No such protection is afforded in surrogacy cases.

[78] It is not accepted that any question of discrimination on grounds of gender arises. It is possible for men to have children by surrogacy also, but in no circumstances would a man qualify for the statutory benefit.

[79] The argument in relation to family status is also rejected on the basis, again, that it was not the reason why the appellant could not obtain benefit. Any person exercising parental responsibility would be refused if the child came into his or her care on foot of a surrogacy process. The payment in all cases (for maternity benefit) is conditional on pregnancy and birth. There is no equivalent payment available to persons *in loco parentis*.

[80] Again, it is not accepted that the reason for refusal was the disability of the appellant, since any parent who has a child by surrogacy will be refused whether disabled or not. Therefore, the fundamental reason for the treatment was not the prohibited ground.

[81] On the question of "reasonable accommodation", the respondent says that the obligation is to take measures that will allow a disabled person access to existing benefits and that it cannot apply so as to require the provision of new ones. It is also inapplicable to a situation where the respondent is obliged to pay benefit to persons who meet the statutory criteria, and does not pay it to those who do not. This course of action is prescribed by statute, and the Act of 2000 cannot be relied upon to invalidate other legislation.

[82] The respondent says that the word "provision" as used in s. (3)(1)(c) cannot be interpreted to include a statutory provision which the Minister is obliged to implement, with the effect that it would be ignored or rendered inoperative if found to be discriminatory. The concept of indirect discrimination therefore has no application. To hold otherwise would be to breach the separation of powers, in that the court would in effect be legislating for rights which the Oireachtas has chosen not to create.

The Supreme Court decision in M.R. and D.R. (minors) v. An tArd Chláraitheoir [2014] IESC 60

[83] The parties filed written submissions in relation to the Supreme Court judgments in *M.R. and D.R. (minors) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533. This case concerned a claim that the genetic mother of two children born through a surrogacy arrangement should be officially registered, under the provisions of the Civil Registration Act 2004, as their mother. She succeeded in the High Court but the Supreme Court unanimously allowed the appeal, holding that

the law as it stands does not permit of an interpretation of the word "mother" as meaning other than the woman who gave birth.

Submissions on M.R. and D.R. (minors) v. An tArd Chláraitheoir [2014] IESC 60 on behalf of the respondent

[84] It is noted throughout the judgments that the Oireachtas has not to date legislated for surrogacy. The respondent submits that the same situation pertains in relation to any issue arising from a surrogate birth, including the payment of maternity benefit. It is submitted that the remedies sought before this court would result in the High Court "legislating" for such rights where the Oireachtas has not chosen to do so, and would involve a breach of the separation of powers. It is also submitted that the judgments make it clear that the courts must respect and implement the legislature's policy choices in this area.

[85] The respondent refers to the following extracts from the judgments.

[86] At pp. 567 and 568 Denham C.J. said:-

> "[111] There have been statutory developments in other jurisdictions to address issues which arise where there has been assisted human reproduction. Legislatures have recognised the need to address issues that now arise as a result of scientific and medical developments enabling children to be born in circumstances such as surrogacy.
>
> [112] Neither the Status of Children Act 1987 nor the Civil Registration Act 2004, nor any legislation in Ireland currently addresses the issues arising on surrogacy birth of children.
>
> [113] Any law on surrogacy affects the status and rights of persons, especially those of the children; it creates complex relationships and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas."

[87] Clarke J. said at pp. 674 and 675:-

> "[406] … [T]he sole and exclusive executive power to make legislation under the Constitution is conferred on the Oireachtas (Article 15.2.1º). In that context there are limits to the extent to which it is constitutionally appropriate for the courts to engage in a reinterpretation of the common law where such interpretation might cross the line into legislation and, thus, infringe the constitutionally protected role of the Oireachtas. The application of underlying existing common law principles to new circumstances is one thing. The development of substantially new principles or policies is another.

[407] Thus, the way in which law can change is by means either of a legitimate and permissible evolution of existing common law principles to meet new circumstances and conditions as part of the inherent evolution of the common law, by express legislation, or by means of constitutionally mandated changes resulting from the role of the courts as interpreters of the Constitution..."

He continued at p. 675:-

"[408] … Short of the existing law being found to be in breach of the Constitution, the only proper role of the courts is to play their appropriate part in the evolution of the common law in its application to new conditions and circumstances or to interpret legislation. Even where it is clear that the existing law is no longer fit for purpose it may well be that the only solution lies in legislation. This will particularly be so where any solution to identified problems requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the courts."

[88] MacMenamin J. said at pp. 720 and 721:-

"[543] Even at a time after the possibility of *in vitro* fertilization was thought of, the same implied understanding of 'mother' is to be found in statutory form. To take further examples s. 28(2) of the Social Welfare (Consolidation) Act 1981 (as amended by s. 19 of the Social Welfare Act 1992) provides:-

'(2) In deciding whether or not to make an order under section 21A of the Family Law (Maintenance of Spouses and Children) Act, 1976 (inserted by the Status of Children Act, 1987) in so far as any such order relates to the payment of expenses *incidental to the birth of a child*, the Circuit Court or the District Court, as the case may be, shall not take into consideration the fact that the *mother of the child is entitled to maternity allowance*" (emphasis added).

[544]While it might be said that this provision does not actually preclude another interpretation, it is not easy to ignore the statutory juxtapositions of the terms 'mother of the child' and 'birth of the child'.

[545] The link between motherhood and birth is also to be found in the Maternity Protection Acts 1994 to 2004, designed and intended to protect the rights of both pregnant employees, and employees who have given birth. Section 16 of the Act of 1994 (as amended by s. 10 of the Act of 2004) defines the 'mother' as a person 'who has been delivered of a living child'. The protection extended by the legislation again

links or connects pregnancy, birth and motherhood (see also s. 6 of the Act of 2004). These close associations are difficult to ignore."

[89] The respondent concludes in written submissions that:-

"The decision in this case to grant maternity benefit to a woman who has given birth to a child but not to a woman who has a child by way of a surrogacy arrangement reflects and gives effect to the legislative choice and policy in this area. It follows a fundamental principle that the person who gives birth is in law the mother of the child and only she is entitled to benefits which accrue to a mother."

[90] The respondent submits that in light of these judgments it is not open to this court to interpret the relevant legislative provisions in a manner which gives rights to persons who have a child on foot of a surrogacy arrangement, when the Oireachtas has not to date chosen to confer such rights. To do so would be to legislate by interpretation and would infringe the constitutionally protected power of the Oireachtas.

Submissions on M.R. and D.R (minors) v. An tArd Chláraitheoir [2014] IESC 60 on behalf of the appellant

[91] The appellant submits that none of the passages relied upon by the respondent from the decision of the Supreme Court in *M.R. and D.R. (minors) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533 have the effect contended for by the respondent. The consideration that it is a matter for the Oireachtas to legislate for the complex questions of family and other legal relations that arise from surrogacy arrangements, and that to date the Oireachtas, despite the importance of these matters to society and to the constitutional interests of those affected has not done so, does not have the consequence that the appellant is left outside the legislative scheme of the Act of 2000.

[92] It is submitted that the judgments were given in a context where no provision has been made for surrogacy in this jurisdiction at all, including in respect of benefits equivalent to maternity protection benefits. The general provisions of the Act of 2000 have not been qualified or contradicted or restricted in the manner contended for by the respondent.

[93] The appellant submits that *M.R. and D.R. (minors) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533 does not advance or in any way support the respondent's argument that this court would be legislating if it were to find in favour of the appellant in this case. That argument, it is contended, remains affected by the same error of law as the Circuit Court Judge fell into in these proceedings, which is the removal

from scrutiny of a matter that is *prima facie* prohibited by the general provisions of equality legislation. The appellant would thereby be deprived of a remedy – which is a limited remedy under and within the Act of 2000 and has no wider legislative effect – on the sole ground that the matter is novel and unregulated or, as found by the Supreme Court, on the grounds that it is no longer novel and ought to be regulated by legislation, but to date has not been.

[94] By making provision for the payment of benefit in particular circumstances, the Social Welfare Acts do not require that persons in comparable situations, but not meeting the precise statutory criteria, be excluded from the possibility of payment either of the benefit in question or of an equivalent payment. The appellant submits that s. 14 does not create a charter to allow the State to discriminate by legislation. Specifically, it does not prohibit the taking of action, not itself prohibited by an enactment, but not falling within the express scope of the governing legislative scheme.

[95] The appellant submits that if a failure to regulate the substantive subject matter underlying an equality claim is adjudged to afford a full defence to such a claim, this would serve only to reward legislative and administrative inaction in a manner which is contrary to the purpose and intent of the Act of 2000.

[96] It is argued that all of the judgments in *M.R. and D.R. (minors) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533 recognise that the intimate ties between a genetic mother who is bringing up her child born to a surrogate, and that child, are constitutionally underpinned and require legal protection. From this perspective, far from undermining the present claim, the appellant's case that the discrimination that has occurred here falls within the widely defined "family status" ground has become all the more compelling as a result of the Supreme Court judgments.

The United Kingdom authorities

[97] In considering these authorities, which I propose to do chronologically, it is important to bear in mind the fact that the statutory provisions being construed are not identical to those under consideration here and have themselves been amended.

[98] Section 5(1) of the Disability Discrimination Act 1995 ("the United Kingdom Act") defined discrimination by an employer against an employee as occurring where, for reasons which *related* to the employee's disability, the employer treated him less favourably than he treated or would treat others to whom "that reason" did not or would not apply, and

could not show that the treatment in question was justified (emphasis added). The distinction drawn in earlier anti-discrimination legislation between direct and indirect discrimination did not feature.

[99] The United Kingdom Act also provided that an employer was under a duty to take such steps as were reasonable to prevent a disabled employee being placed at a substantial disadvantage by reason of any work related "arrangements" made by the employer, or any physical features of the employer's premises. Failure to comply with this duty, without justification, amounted to discrimination under s. 5(2).

[100] Sections 19 and 20 dealt with discrimination in the provision of services. Again, the definition provided that it was discrimination if, for a reason related to a disability, the disabled person was treated less favourably than the service provider treated or would treat others to whom that reason did not or would not apply, and it could not be shown that the treatment was justified.

[101] "Justification" under the United Kingdom Act required showing that there was a reason which was both material to the circumstances of the particular case and substantial.

[102] *Clark v. TDG Ltd*. [1999] 2 All E.R. 977 was the first decision of the Court of Appeal dealing with this legislation. It concerned an employee whose job involved manual labour and who suffered a work related injury. His employer came to the view that he would not be fit to return to work within a reasonable time and therefore terminated his employment on the basis that he was no longer capable of performing the main functions of his job.

[103] An industrial tribunal held that the employee had a disability and was dismissed for a reason relating to it. However, he had not been subjected to discrimination, in that he was not treated less favourably than the employer would have treated others absent from work, without a foreseeable date of return, for reasons other than disability. This decision was reversed on appeal, and the matter ended up in the Court of Appeal.

[104] The employer's case was that a person to whom "that reason" would not apply would be someone else incapable of performing the main functions of his job for a reason which did not relate to disability.

[105] Giving the judgment of the court, Mummery L.J. said at p. 987 that the phrase "that reason" referred only to the facts constituting the reason for the treatment, and did not include within that reason the added requirement of a causal link with disability – that was more properly to be regarded as "the cause of the reason for the treatment" rather than as in itself a reason for the treatment.

[106] On the issue of the correct comparator, Mummery L.J. referred at pp. 988 and 989 to the example, given during a Parliamentary debate on the issue, of a café refusing to allow dogs, including guide dogs accompanying blind people (it appears that it was intended by Parliament that this would be seen as a *prima facie* case of discrimination):-

> "It could only be a case of less favourable treatment and therefore a *prima facie* case of discrimination, if the comparators are 'others' *without dogs*: 'that reason' for refusing access to refreshment in the café would not apply to 'others' without dogs."

[107] Mummery L.J. also stated at p. 988:-

> "If no dogs are admitted to a café, the reason for denying access to refreshment in it by a blind person with his guide dog would be the fact that no dogs are admitted. That reason 'relates to' his disability. His guide dog is with him because of his disability."

[108] The court therefore considered that the appropriate comparators were employees who were able to perform the main functions of their jobs. The reason for the applicant's dismissal would not apply to them, so he had been treated less favourably than them. They would not be dismissed for "that reason":-

> "However, that does not necessarily mean that [the employee] has been discriminated against. It is open to [the employers] to show that the dismissal is justified, just as it would be open to the café proprietor to justify the exclusion of dogs, including guide dogs with their blind owners."

[109] The matter was remitted for consideration of the issue of justification.

[110] *Murphy v Slough Borough Council* [2004] I.C.R. 1163 was a decision of the United Kingdom Employment Appeal Tribunal ("EAT"). It concerned a teacher who suffered from a medical condition which meant that a pregnancy would endanger her life. She had a child by a surrogate mother and applied to take paid post-natal leave. Her employer took the view that her situation was comparable to that of an adoptive mother, rather than that of a mother who had given birth – the difference being that paid leave for the former was only a matter of discretion, as opposed to entitlement. Her application was refused because of the school's difficult budgetary situation.

[111] The EAT held that the applicant had been treated less favourably than women who gave birth to their own children; that the reason for that treatment was her inability to have children; and that this "related" to her disability within the meaning of the United Kingdom Act.

[112] In its determination, *Clark v. TDG Ltd.* [1999] 2 All E.R. 977 was relied upon for a number of aspects. Referring to the example of the guide dog, it was said at p. 1172 that:-

> "38. The task therefore is to isolate the ultimate reason for the conduct complained of (*i.e.* the disability) and to ignore the immediate cause (*i.e.* the guide dog)."

[113] Applying this analysis, the EAT found at p. 1173 that:-

> "39. … the applicant has been treated less favourably than others who have given birth in the conventional way to their own children; 'the reason' for the treatment accorded to the applicant related to her disability, namely her inability to have children. For those reasons, we consider … that the decision not to give the applicant paid leave was 'for a reason which relates to the disabled person's disability.'"

[114] However, it went on to find that the financial position of the school was such as to validate the finding of the employment tribunal that the treatment of the applicant, and the decision by the school not to adjust its arrangements, had been justified.

[115] In 2008, the House of Lords considered the issue in *Lewisham LBC v. Malcolm* [2008] UKHL 43, [2008] 1 A.C 1399. There, a local authority tenant who suffered from schizophrenia sublet his flat in breach of the tenancy agreement. To do so was clearly not in his interest – he thereby lost his security of tenure. The landlord (which had been unaware of the tenant's illness) commenced a process to gain possession on the basis that he had moved out, which was resisted by the tenant on the basis of his disability. The Court of Appeal had held that the landlord's treatment of the tenant was for a reason which related to his disability, and that the fact that the landlord did not know of the disability did not preclude a finding of discrimination.

[116] In allowing the appeal the House of Lords doubted the correctness of *Clark v. TDG Ltd.* [1999] 2 All E.R. 977 and took a different approach.

[117] Lord Bingham held that the tenant would probably not have behaved so irresponsibly were it not for his illness, but the illness had nothing to do with the landlord's reason for seeking possession. On the question of who the "others" were for the purpose of appropriate comparison, he identified three possible categories: (a) tenants without a mental disability who had sublet a flat and moved out, (b) tenants who had not sublet or moved out, and (c) "some other comparator group". The *Clark v. TDG Ltd.* [1999] 2 All E.R. 977 analysis would lead to the choice of group (b), but Lord Bingham considered that group (a) was the more natural choice

and that *Clark v. TDG Ltd.* was incorrect. It was clear that the landlord would have claimed possession against any non-disabled tenant who sublet and moved out, so the tenant had not been discriminated against.

[118] Lord Scott of Foscote said at para. 32, p. 1414, that the *Clark v. TDG Ltd.* [1999] 2 All E.R. 977 analysis "emasculates" the point of the statutory comparison:-

> "32 … What is the point of asking whether a person has been treated 'less favourably than others' if the 'others' are those to whom the reason why the disabled person was subjected to the complained of treatment cannot apply? If a person has been dismissed because he is incapable of doing his job, what is the point of making the lawfulness of his dismissal depend on whether those who are capable of doing their job would have been dismissed?"

[119] He referred to the hypothetical case of the blind man and the guide dog and analysed it as follows at pp. 1415 and 1416:-

> "35 … Would the blind man without his dog have been refused entry? Almost certainly not. The problem was the dog. The dog was the reason for the refusal of entry. That reason was causally connected to the disability, but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog. The problem, I repeat, was the dog … If he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside. Anyone, whether sighted or blind, who was accompanied by a dog would have been treated in the same way. The reason for the treatment would not have related to the blindness; it would have related to the dog."

[120] It was accepted by at least some of their lordships that the effect of this judgment was to reduce the protection afforded by the United Kingdom Act, and some misgivings were expressed on this score.

[121] In *Aylott v. Stockton on Tees Borough Council* [2010] EWCA (Civ.) 910, [2010] I.R.L.R. 994, the issue came before the Court of Appeal again. Mummery L.J. rejected a submission that his judgment in *Clark v. TDG Ltd.* [1999] 2 All E.R. 977 was still good law, holding at para. 68, p. 1002, that it was overruled by *Lewisham LBC v. Malcolm* [2008] UKHL 43, [2008] 1 A.C 1399 and was "deceased as a case". However, it is worth noting two observations made at p. 1002 in his judgment.

[122] The first was that Parliament had legislated to, in effect, nullify *Lewisham LBC v. Malcolm* [2008] UKHL 43, [2008] 1 A.C 1399, by providing in s. 15 of the Equality Act 2010 that:-

> "67 …

'(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.'"

[123] The second observation was that, after *Lewisham LBC v. Malcolm* [2008] UKHL 43, [2008] 1 A.C 1399, claimants and their advisers had shifted their focus to the duty to make reasonable adjustments. Mummery L.J. commented that this was, perhaps, what they should have been doing all along, since it was a concept central to the United Kingdom Act. It entailed a measure of "positive discrimination", requiring adjustments to be made for disabled persons that would not be required for others.

European Union law

[124] The parties are agreed that this is not a European Union law case, turning as it does on domestic statutory law. However, the respondent places some reliance on the decision of the Court of Justice of the European Union ("CJEU") in *Z. v. A. (Case C-363/12)* [2014] 3 C.M.L.R. 407 delivered on the 18th March, 2014. In that case a school teacher who, like the appellant in the instant case, was fertile but could not support a pregnancy, had a child born through surrogacy. She sought paid leave equivalent to maternity or adoptive leave and was refused.

[125] Ruling on a reference from the Equality Tribunal, the CJEU held at p. 445 that she had not been discriminated against under the relevant European Union legislation. The refusal of leave would, it considered, have been discrimination:-

"51 … if the fundamental reason for that refusal applies exclusively to workers of one sex."

[126] However, a commissioning father in a surrogacy arrangement would have been treated in the same way.

[127] Indirect discrimination was not established since it had not been shown that a refusal to grant leave put female workers at a particular disadvantage compared with male workers.

Interpretation of the Act of 2000

[128] Having regard to the objectives of the Act of 2000, it must be acknowledged to be a remedial statute. It follows that it must be liberally

construed. As described in Dodd, *Statutory Interpretation in Ireland* (Tottel, 2008) at p. 179:-

> "[6.52] 'Remedial social statutes' and legislation of a paternal character favour a purposive interpretation and are said to be construed as widely and liberally as can fairly be done within the constitutional limits of the courts' interpretive role. This formula has been repeated in a number of cases [citations at fn. 82 p. 179] … Remedial social statutes are enactments which seek to put right a social wrong and provide some means to achieve a particular social result."

[129] Dodd refers to *Bank of Ireland v Purcell* [1989] I.R. 327, where Walsh J. referred to the Family Home Protection Act 1976 as a remedial social statute and said at p. 333:-

> "This statute is not to be construed as if it were a conveyancing statute. As has been frequently pointed out remedial statutes are to be construed as widely and as liberally as can fairly be done. The first consideration in construing s. 3 is to ascertain the purpose of the section."

[130] In *Gooden v St. Otteran's Hospital (2001)* [2005] 3 I.R. 617, Hardiman J. said of the Mental Treatment Acts of 1945 and 1953 at p. 639:-

> "I believe however that in construing the statutory provisions applicable in this case in the way that we have, the court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of powers. I do not know that I would have been prepared to go as far as we have in this direction were it not for the essentially paternal character of the legislation in question here…"

Discussion and conclusions

[131] It seems to me that the first question to be addressed is whether or not the provisions of the Act of 2000 are capable of being applied to surrogacy related issues. In this respect I agree with the appellant (and do not understand the respondent to expressly disagree) that the Act of 2000 is intended to cover a broad range of human life and activity, and that its overall purpose is to reduce the social wrong of discrimination based on improper considerations. Having regard to the principles applicable to remedial statutes, it should be construed widely and liberally. I consider that the Circuit Court Judge fell into error in holding that it could not be

relied upon in relation to novel factual situations not familiar to the legislature at the time of enactment.

[132] Since it is now accepted that the respondent does provide a service within the meaning of the Act of 2000, the question arises as to the proper definition of that service.

[133] The respondent says that it is the operation of the statutory code of benefits and allowances. I consider this definition to be too restrictive, since it takes no account of the fact that the respondent also administers a large number of non-statutory payment schemes. There is insufficient material before the court to determine the legal basis for each of these schemes, but such case law as there is makes it clear that they must be administered according to generally applicable principles of public law. In my view they would have to be regarded as services to the public within the meaning of the Act of 2000.

[134] However, the proposition that the service in issue in this case is the making of payments to the mothers of newly-born or newly-adopted children is also too restrictive, since it leaves the statutory context for those payments out of account.

[135] I consider that the service provided by the respondent is the administration or operation of the statutory code and of other non-statutory payment schemes.

[136] The statutory provisions at issue in this case relate solely to mothers, whether natural or adoptive. It is clear, in the light of the judgments of the Supreme Court in *M.R. and D.R. (minors) v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533, that the appellant cannot claim the status of mother under Irish law. This situation is no doubt a source of great distress to her but, pending the introduction by the Oireachtas of legislation dealing with this field, it is equally clear from the Supreme Court judgments that it is not for the courts to attempt to resolve the complex questions that need to be addressed.

[137] It follows that the appellant cannot, for the purposes of a claim of discrimination, choose to compare herself directly with the two categories of mother recognised under Irish law – that is, mothers who have given birth and mothers who have adopted. Both of these categories are entitled to social welfare payments that, in the applicable qualification conditions, relate directly to the legal status of motherhood. The appellant does not have that status. If she did, it seems likely that she would have a strong case based on constitutional grounds but that is not what the court is dealing with here.

[138] The appellant has maintained throughout, however, that her case does not depend on the status of motherhood. She says, primarily, that she is a person who is *in loco parentis* of a child and that she is discriminated against because she has not been pregnant. She also says that she is discriminated against on grounds of disability and gender.

[139] Dealing with the last matter first, I do not think that the claim of gender discrimination would in any event be tenable. It is true that the appellant's medical condition is one that can only affect a woman. However, since no man can qualify for either maternity leave or adoptive leave payments in any circumstances, she has not been treated less favourably than any man is or would be, if he had a child through a surrogacy arrangement or otherwise.

[140] The disability and family status arguments are more complex. Having regard to the purposes of the Act of 2000, and to the observations above, I would be prepared to agree with much of the appellant's submissions. If a complainant can show, by reference to one or more of the statutory grounds upon which discrimination is prohibited, that he or she was treated less favourably than a person to whom those grounds do not apply, it is not in my view necessary to prove actual intent to discriminate on that ground. Thus, in the context of disability, it is not necessary to show that the café proprietor has a hostility to blind people if he or she refuses, without justification, to admit blind people accompanied by guide dogs. The point of the legislation is to ensure that blind people can, as far as practicable, avail of services in the same way as sighted people. The problem as I see it, is not the dog – it is whether a blind person with a guide dog may be refused service without justification. However, I would prefer not to give a definitive view on the issue of the correct interpretation of the section in this case, since I do not consider that it can determine the case.

[141] On the face of it, the appellant has, certainly, been discriminated against because she did not bear her child. As noted above, less favourable treatment on the basis that the complainant had not been pregnant would satisfy one of the statutory grounds. She says that this is a discriminatory exclusion from the social welfare legislation, within the terms of the equal status legislation, and that the refusal of the respondent to grant her an equivalent non-statutory payment is a matter entitling her to compensation.

[142] The difficulty that I have with the appellant's case lies in the fact that the payment, from which she says she has been excluded for discriminatory reasons, is one created by statute. A claim to be legally entitled to compensation necessarily involves a claim that one has been subjected to a legal wrong, but in this particular instance such a wrong can only be

established on the assumption that one statute can be held to be legally deficient by reference to another – that is, by reference to the Act of 2000. Despite the submission that she is not to be taken either as attacking the validity of the social welfare legislation, or as attempting to measure those provisions against the Act of 2000 as if it were the Constitution, I cannot see how the appellant can maintain a claim of unlawful discrimination without saying, in effect, that the Social Welfare Act 2005 discriminates unlawfully. In the proceedings as constituted before this court, the only legal standard by which she can make that claim is the standard set by the Act of 2000. Since both are Acts of the Oireachtas, embodying policy choices made by the legislature, it is not open to a court to make a finding of unlawfulness in one on the basis of the policy of the other. There has been no assessment of the constitutionality of the choices made in the social welfare code, which would be the only legitimate basis for such a finding.

[143] For the same reasons I find that the word "provision" in s. 3(1)(c) cannot be interpreted as including a statutory provision. That too would have the effect of elevating the Act of 2000 to all but constitutional level, permitting the legitimacy of all other legislation to be assessed by reference to it.

[144] I should perhaps say that I am not persuaded by the argument made by the respondent that a non-statutory scheme to make provision for women in the appellant's position would be *ultra vires*. The existence of a broad range of non-statutory schemes demonstrates that the respondent frequently uses such schemes as a flexible alternative, or supplement, to primary legislation, presumably on the basis of appropriate public policy objectives and assessments. I do not think that s. 14 of the Act of 2000 is relevant here. The Social Welfare Acts do not "prohibit" the making of payments other than in accordance with statutory criteria – if they did, all of the non-statutory schemes would be at risk of being found to be *ultra vires*. I consider that the main difference in relation to a non-statutory scheme would be that it would probably be open to challenge if the Act of 2000 prohibitions on discrimination were contravened.

[145] However, it is not open to a court to hold that the respondent is derelict, either in not legislating or in not creating a scheme in this instance, without holding that the policy choices embodied in the primary legislation are legally deficient. The appellant has argued that the Act of 2000 envisages an order of compensation if discrimination is established, even if the respondent has no legal power to remove or ameliorate the discrimination complained of by way of making a non-statutory payment. Again, that

raises the problem of whether the Act of 2000 can be relied upon in this fashion to find that there is discrimination contrary to that Act embodied in another Act. In my view it cannot, whether by this court, or by the Equality Tribunal acting as the body primarily charged with dealing with complaints under the Act of 2000.

[146] It is easy to understand why the appellant feels that she has been treated badly, why the Equality Officer referred to the case as raising "compelling" considerations and why the Circuit Court Judge accepted that the respondent's decision might seem unfair or unjust. However, there is as yet no legislation governing the complex issues that arise in the context of surrogate births. My view is that the Act of 2000 cannot be used to fill the gap.

[147] I therefore propose to dismiss this appeal.

Solicitor for the applicant: *Sinéad Lucey.*

Solicitor for the respondent: *The Chief State Solicitor.*

Desmond McDermott, Barrister

THE HIGH COURT

[2015 No. 76 MCA]

IN THE MATTER OF THE PAYMENT OF WAGES ACT 1991

BETWEEN

DEVIDAS PETKUS, ROMAS PUSVASKIS, ZYDRUNAS ZUKAS, SALUIUS MATULEVICIUS, TADIS DERKANTIS, RAMUNAS NARBUTAS, LAIMONAS SEMETULSKIS, DRAGOS AIONITAOEI, ROLANDAS KAZDAILIS, DARIUS MARTANKUS, ARTUAS GRUNDAI, MINDAUGHAS MILASIUS, SERGIU NOHAI, DUMITRU VATAMANU, MAZVYDAS CEPLIAUSKAS, NERIGUS RAGUCKAS, DEIVIS BALAKAUSKAS, VILIUS CLAUAS, EVALDAS SEAVZEVICIUS, MACIEJ STEGILINSKI AND DARIUS PETKUS

APPELLANTS

AND

COMPLETE HIGHWAY CARE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 20th of January, 2017

1. This is a statutory appeal pursuant to the provisions of the Payment of Wages Act 1991, and O. 84C of the Rules of the Superior Courts.

2. By order of this Court of 19th October, 2015, time was extended to allow the applicants to appeal by way of statutory appeal.

3. A motion was issued on 27th October, 2015, originally returnable for 23rd November, 2015. The motion was grounded on the affidavit of Kieran O'Brien, Solicitor, together with exhibits. A director of the respondent company, Barry Ennis, swore an affidavit on 12th January, 2016, together with exhibits and Mr. O'Brien

swore a further affidavit on 5th July, 2016. The matter was heard before this Court on 6th July, 2016, in Kilkenny and judgment was reserved.

4. The applicants seek to set aside the determination of the Employment Appeals Tribunal of 13th January, 2015, on the following legal grounds:-

(a) the Employment Appeals Tribunal fell into an error of law in its analysis and application of the evidence to the relevant law;

(b) that the Employment Appeals Tribunal fell into an error of law in making unsustainable findings of fact and/or findings of fact for which there was no supporting evidence;

(c) that the Employment Appeals Tribunal fell into an error of law in failing to appropriate differentiate between a reduction and a deduction;

(d) that the Employment Appeals Tribunal fell into an error of law in finding that the respondent's 10% adjustment to the appellants' pay was a reduction;

(e) that the Employment Appeals Tribunal fell into an error of law in finding that the respondent's 10% adjustment to the appellants' pay was a reduction and that the Act does not apply to a reduction;

(f) that the Employment Appeals Tribunal fell into an error of law in failing to find that the respondent's 10% adjustment to the appellants' pay was not a deduction;

(g) that the Employment Appeals Tribunal fell into an error of law in failing to find that the respondent's 10% adjustment to the appellants' pay was not a deduction and consequently finding that the Act did not apply;

(h) that the Employment Appeals Tribunal fell into an error of law in failing to consider the entirety of the circumstances of the matter and failed to properly consider or apply the correct interpretation and intention of legislation protecting the payment of wages of workers under the Act and the Constitution; and

(i) that the Employment Appeals Tribunal fell into an error in law in setting aside that decisions of the Rights Commissioners and each of the appellants' cases.

History of the Dispute

5. The appellants were all employees of the respondent at the relevant time. The employees allege that the respondent unlawfully deducted 10% from their wages and withdrew a bonus. The employer claimed that due to very difficult economic trading conditions for the respondent that a reduction in wages took place. This commenced in 2009 and that the bonuses were dispensed with in 2010. The appellants made a claim to the Rights Commissioner Service of the Labour Relations Commission covering a period from March 2011 to September 2011.

6. The Rights Commissioner by decision of 30th April, 2013, decided that there was a breach of s. 5 of the Payment of Wages Act 1991, in that the 10% deduction in their pay was illegal.

7. The Rights Commissioner found that there was no illegal deduction with regard to the bonus and this portion of the claim failed.

8. The respondent appealed to the Employment Appeals Tribunal and the Tribunal in its decision of 13th January, 2005, stated:-

"The Tribunal recognises the inherent difficulty in differentiating a reduction from a deduction. A deduction or reduction of 10%, as in this case, has

different implication on the respondent's statutory liabilities. A deduction of 10% would not alter the respondent's statutory liabilities i.e. PRSI, USC, PAYE. However, a reduction does alter their statutory liabilities. It is clear from the payslips exhibited, the respondent's statutory liabilities were altered and, therefore, the Tribunal can only conclude that the 10% adjustment was a reduction. The Act does not apply to a reduction. On that basis, the Tribunal upsets the decisions of the Rights Commissioner under the Payment of Wages Act 1991, cancel the awards made to the respondents."

9. The High Court judgment in *McKenzie & Anor v. Minister for Finance & Ors* (Edwards J., 30th November, 2010) [2010] IEHC 461, was relied on by the respondent at the Rights Commissioner hearing. The Rights Commissioner, in his decision, took the view that this case concerned expenses and, therefore, it did not refer to wages properly payable as defined in the Payment of Wages Act and thus, did not rely on that judgment.

10. In the relevant contract of employment governing the relationship between the appellants and the respondent, there is no specific reference to the right to deduct wages except at para. 20 where it states "changes to terms of employment, the company reserves the right to make reasonable changes to any of your terms and conditions of employment set out in this contract description and should this occur you will be notified in advance in writing of the nature and date of the change subject to consultation."

The Law

11. Section 5 of the Payment of Wages Act 1991, states:-

"(1) An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—

(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or

(c) in the case of a deduction, the employee has given his prior consent in writing to it.

(2) An employer shall not make a deduction from the wages of an employee in respect of—

(a) any act or omission of the employee, or

(b) any goods or services supplied to or provided for the employee by the employer the supply or provision of which is necessary to the employment,

unless—

(i) the deduction is required or authorised to be made by virtue of a term (whether express or implied and, if express, whether oral or in writing) of the contract of employment made between the employer and the employee, and

(ii) the deduction is of an amount that is fair and reasonable having regard to all the circumstances (including the amount of the wages of the employee), and

(iii) before the time of the act or omission or the provision of the goods or services, the employee has been furnished with—

(I) in case the term referred to in subparagraph (i) is in writing, a copy thereof,

(II) In any other case, notice in writing of the existence and effect of the term,

and

(iv) in case the deduction is in respect of an act or omission of the employee, the employee has been furnished, at least one week before the making of the deduction, with particulars in writing of the act or omission and the amount of the deduction, and

(v) in case the deduction is in respect of compensation for loss or damage sustained by the employer as a result of an act or omission of the employee, the deduction is of an amount not exceeding the amount of the loss or the cost of the damage, and

(vi) in case the deduction is in respect of goods or services supplied or provided as aforesaid, the deduction is of an amount not exceeding the cost to the employer of the goods or services, and

(vii) the deduction or, if the total amount payable to the employer by the employee in respect of the act or omission or the goods or services is to be so paid by

means of more than one deduction from the wages of the employee, the first such deduction is made not later than 6 months after the act or omission becomes known to the employer or, as the case may be, after the provision of the goods or services.

(3)

(a) An employer shall not receive a payment from an employee in respect of a matter referred to in subsection (2) unless, if the payment were a deduction, it would comply with that subsection.

(b) Where an employer receives a payment in accordance with paragraph (a) he shall forthwith give a receipt for the payment to the employee.

(4) A term of a contract of employment or other agreement whereby goods or services are supplied to or provided for an employee by an employer in consideration of the making of a deduction by the employer from the wages of the employee or the making of a payment to the employer by the employee shall not be enforceable by the employer unless the supply or provision and the deduction or payment complies with subsection (2).

(5) Nothing in this section applies to—

(a) a deduction made by an employer from the wages of an employee, or any payment received from an employee by an employer, where—

(i) the purpose of the deduction or payment is the reimbursement of the employer in respect of—

(I) any overpayment of wages, or

(II) any overpayment in respect of expenses incurred by the employee in carrying out his employment,

made (for any reason) by the employer to the employee, and

(ii) the amount of the deduction or payment does not exceed the amount of the overpayment,

or

(b) a deduction made by an employer from the wages of an employee, or any payment received from an employee by an employer, in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision, or

(c) a deduction made by an employer from the wages of an employee in pursuance of a requirement imposed on the employer by virtue of any statutory provision to deduct and pay to a public authority, being a Minister of the Government, the Revenue Commissioners or a local authority for the purposes of the Local Government Act, 1941 , amounts determined by that authority as being due to it from the employee, if the deduction is made in accordance with the relevant determination of that authority, or

(d) a deduction made by an employer from the wages of an employee in pursuance of any arrangements—

(i) which are in accordance with a term of a contract made between the employer and the employee to whose inclusion in the contract the employee has given his prior consent in writing, or

(ii) to which the employee has otherwise given his prior consent in writing,

and under which the employer deducts and pays to a third person amounts, being amounts in relation to which he has received a notice in writing from that person stating that they are amounts due to him from the employee, if the deduction is made in accordance with the notice and the amount thereof is paid to the third person not later than the date on which it is required by the notice to be so paid, or

(e) a deduction made by an employer from the wages of an employee, or any payment received from an employee by his employer, where the employee has taken part in a strike or other industrial action and the deduction is made or the payment has been required by the employer on account of the employee's having taken part in that strike or other industrial action, or

(f) a deduction made by an employer from the wages of an employee with his prior consent in writing, or any payment received from an employee by an employer, where the purpose

of the deduction or payment is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of any amount by the employee to the employer, or

(g) a deduction made by an employer from the wages of an employee where the purpose of the deduction is the satisfaction (whether wholly or in part) of an order of a court or tribunal requiring the payment of any amount by the employer to the court or tribunal or a third party out of the wages of the employee.

(6) Where—

(a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or

(b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee,

then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."

12. The court accepts the well established principle in relation to an appeal on a point of law that the Superior Courts have repeatedly applied a consistent significant

curial deference which is summarised by Hamilton C.J. in *Henry Denning & Sons Ireland Limited v. Minister for Social Welfare* [1998] 1 I.R. 34, stating:-

> "That the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

13. In the same case, Keane J. citing with approval the comments of Carroll J. in the High Court, stated:-

> "In an appeal on a question of law the court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law) the court should confine itself to considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law."

14. In the same judgment, Keane J. cited the decision of Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] 2 ILRM 421, when he stated:-

> "If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or

made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside."

15. There seems to have been some confusion about the relevance of the *McKenzie* judgment. At para. 5.8, of his judgment Edwards J. stated:-

"Finally, the Court agrees with the respondents' submission that the Payment of Wages Act, 1991 has no application in the circumstances of this case. First, as has been pointed out, correctly in the Court's view, the reduction in the PDF allowance is not a 'deduction' from wages payable. It is a reduction of the allowance payable. The Act has no application to reductions as distinct from 'deductions'. Secondly, even if that were not so, any alleged breach of the Payment of Wages Act, 1991 is not a justiciable controversy before the High Court in circumstances where that Act sets up a specific enforcement mechanism to be availed of elsewhere in such circumstances."

16. This judgment was considered in a further judgment of the President of the High Court in *Earagail Eisc Teoranta v. Doherty & Ors* [2015] IEHC 347, the then Kearns P. stated:-

"The Court is also satisfied that the decision in *McKenzie* is distinguishable from the facts of the present case in a number of respects. The Court accepts the submissions of the respondents that the remarks of Edwards J. in relation to 'reduction v. deduction' issue were obiter. Furthermore, *McKenzie* related to the reduction in an allowance payable in respect of motor travel and subsistence. The definition of 'wages' in the 1991 Act expressly excludes any payment in respect of expenses incurred by the employee in carrying out his

employment and so the finding by Edwards J. that the 'RDF Allowance' did not come within the scope of a deduction under the Act relates to an entirely different situation to that the present case where employees salaries were reduced. I am satisfied therefore that the Tribunal was entitled to proceed to consider the complaints on the basis that the reduction to the employees wages in the present case may have constituted a deduction in breach of the 1991 Act."

17. At the hearing before the Employment Appeals Tribunal, the appellants' representatives SIPTU made a detailed supplementary submission on the effect of the *McKenzie* case and submitted that Case No. PW86-W87/211, *Bessborough Centre Limited v. Long & Ors* decision of 13th April, 2013, had been wrongly decided because of an incorrect interpretation of the *McKenzie* case.

18. This Court can see no reference in the papers placed before the Employment Appeals Tribunal of any argument in relation to statutory liabilities of PRSI, USC and PAYE which was a reason for the Tribunal's differentiation between deduction and reduction.

19. The determination of the EAT is silent on the McKenzie case although the supplementary submissions of the appellants specifically address same. The decision of the Rights Commissioner's was detailed and rejected it as a precedent.

20. The determination did not summarise the evidence adduced by the appellants and the respondent, and did not comprehensively and concisely deal with any issues as to fact, nor did not summarise the legal materials put forward by either party.

21. The entire decision of the Rights Commissioner was under appeal including the failure of the Rights Commissioner to find in favour of the appellants that a bonus

was improperly withheld and came within the parameters of Section 5 of the Payment of Wages Act 1991. This was not addressed in the Tribunal decision.

22. The Tribunal did explain this differentiation between a reduction and a deduction. It seems to have followed the obiter comment of Edwards J in *McKenzie*, but did not set out any of the legal arguments on how it came to differentiate the legal arguments and make its decision.

23. Unfortunately, the McKenzie case has caused particular confusion to the determinations of Employment Appeals Tribunal and Rights Commissioners on the issue of Section 5 of the Payment of Wages Act 1991. This is clear from a number of decisions which have been furnished to the court as follows:-

(i) *Bessborough Centre Limited v. Long*, Case No. PW86-W87/2011, a decision of the Employment Appeals Tribunal on appeal from the Rights Commissioner decision. The Employment Appeals Tribunal determination is dated 11th April, 2013;

(ii) Santry Sports Injury Clinic and Padden and Ors Pw 251/255/2011 EAT 16th July 2013.

(iii) *Hog Heaven Limited v. O'Gorman*, Case No. PW774/2012, a determination of the EAT on 3rd March, 2014, on appeal from the Rights Commissioner;

(iv) *Hamilton v. Earagail Eisc Teoranta*, a decision a Rights Commissioner of 17th May, 2016. (r-15937-pw-15/SR.)

(v) *InisBofin Community Services Programme Company Limited v. Burke*, Case No. PWD1614, which is an appeal of an adjudication officer's decision. This determination was issued on 18th May, 2016.

24. The EAT determination the subject of this statutory appeal in the opinion of this Court, falls a long way short of the standard this Court would expect in detailing the arguments that have been made and giving reasons, and explaining its decision.

25. I do not accept that the determination of the tribunal, that there was a reduction of wages as distinct from a deduction, is a pure question of fact. It is a mixed question of law and fact. The basis of the conclusion was that a reduction as distinct from a deduction altered the Respondents statutory liabilities. Because an Employer arbitrarily reduces the wages of an employee, without the consent of the employee, and alters the amount of PAYE, PRSI, and USC accordingly does not necessarily remove the reduction from the jurisdiction of the Payment of Wages act 1991, entitling the Employer to ignore it's provisions.

26. It is not a matter for this Court to decide the substantive issue, but for the relevant decision making body set up under the Payment of Wages Act 1991 if a reduction is allowed at all pursuant to the provisions of s. 5 of the Payment of Wages Act 1991, without the consent of an employee. It is unfortunate that an obiter sentence in a judgment of this Court which did not relate to the payment of wages at all and which was put into practice by way of statutory instrument has caused such confusion.

27. The judgment of Kearns P. in *Earagail Eisc Teoranta v. Doherty* of 5th June, 2015, has clarified that issue. The *McKenzie* case is not precedent to allow a reduction of wages which does not offend s. 5 of the Payment of Wages Act 1991.

28. The court is satisfied that the appellants are entitled to succeed in relation to para. (h) of their notice of motion, that is that the Employment Appeals Tribunal fell into an error of law in failing to consider the entirety of the circumstances of the matter and failed to properly consider or apply the correct interpretation and intention

of that legislation protecting the payment of wages of workers under the Act and the Constitution.

29. It is, therefore, appropriate to allow the appeal and remit the matter back to the Employment Appeals Tribunal for further determination.

approved 20th January 2017.

Michael White.

No Redaction Needed

The Board of Management of Malahide Community School, Appellant v. **Dawn Marie Conaty**, Respondent
[2019] IEHC 486, [2018 No. 301 MCA]

High Court 5 July 2019

Employment – Unfair dismissals – Fixed-term contracts – Waiver of rights – Employment of existing employee with entitlement to statutory protection on fixed-term contract – Agreement purporting to exclude or limit application of Unfair Dismissals Acts – Entitlement to contract out of statutory protections – Whether contract for fixed term – Whether Unfair Dismissals Act 1977 applicable – Unfair Dismissals Act 1977 (No. 10), ss. 2(2)(b) and 13.

Section 2(2)(b) of the Unfair Dismissals Act 1977 provides, *inter alia*:

"(2) Subject to subsection (2A), this Act shall not apply in relation to—

…

(b) dismissal where the employment was under a contract of employment for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of the expiry of the term without its being renewed under the said contract or the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that this Act shall not apply to a dismissal consisting only of the expiry or cesser aforesaid."

Section 13 of the 1977 Act provides:

"A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of this Act) shall be void in so far as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act."

The respondent was employed as a teacher by the appellant. For two years prior to October 2015, the respondent had been employed by the appellant (without a written employment contract in place) and thus was entitled to the protections afforded to employees under the 1977 Act.

On 22 October 2015 the respondent was required to sign a contract of employment that was stated to cover the term from 8 October 2015 until 30 August 2016. The contract further provided that it might be renewed if the allocated hours specified in the contract continued to be allocated and demand remained for the subjects taught by the respondent.

On the expiration of the contract in August 2016, the appellant purported to dismiss the respondent. The respondent challenged the dismissal and was successful in her claim for unfair dismissal before the Labour Court. The Labour Court rejected the appellant's claim that the respondent had been employed under a fixed-term contract of employment

and that, as a result of s. 2(2)(b), the 1977 Act did not apply to her. The appellant appealed on a point of law to the High Court concerning the Labour Court's interpretation and application of s. 2(2)(b).

Held by the High Court (Simons J.), in dismissing the appeal, 1, that a contractual provision that purported to deprive an employee of rights that they had already acquired under the 1977 Act could only be characterised as an agreement that purported to "exclude" or "limit" the application of the Act and was therefore void pursuant to s. 13 of the Act.

2. That s. 2(2)(b) of the 1977 Act allowed for the possibility of an employee, at the commencement of their employment, making an informed decision to waive their statutory rights. It carved out an exception to the general rights under the 1977 Act and fell to be interpreted strictly.

3. That s. 2(2)(b) of the 1977 Act applied only where the "employment" was under a contract of employment for a fixed term, which required an assessment of the contractual arrangements between the parties in the round. Where an employee's initial employment was on the basis of a permanent contract, s. 2(2)(b) could not be relied on by his or her employer.

4. That in order for a contract of employment to come within the exception for fixed-term contracts pursuant to s. 2(2)(b), the language used with respect to identifying the end of the term needed to be unequivocal.

5. That, as a matter of contract law, an employer who requested an employee to agree to inferior terms and conditions, which involved the loss of statutory rights, was required to explain the precise legal effect of those changes to the employee. This was an implied term that was part of the implied obligation of mutual trust and confidence between an employer and employee and was also necessary to reflect the unequal bargaining power between an employer and employee.

Obiter dicta: 1. Notwithstanding that s. 13 of the 1977 Act appeared, on a literal interpretation, to preclude the possibility of an employee ever waiving their rights under the Act, the case law indicated that it was permissible for an employee to make an informed waiver of his or her statutory rights.

Hurley v. Royal Yacht Club [1997] 8 E.L.R. 225 and *Sunday Newspapers Ltd. v. Kinsella* [2007] IEHC 324, [2008] 19 E.L.R. 53 considered.

2. Whereas a clause confirming that an agreement was in full and final settlement of all claims under the 1977 Act appeared to offend against the literal wording of s. 13 of the Act, on a purposive interpretation, it was open to an employee to waive their right to pursue further proceedings under the Act if that waiver was given on the basis of informed consent. The public interest in ensuring that parties were able to resolve disputes without having to pursue legal proceedings to a conclusion was best advanced by such an interpretation. Furthermore, an agreement to accept a particular amount in full and final settlement of a claim for unfair dismissal, on the basis of informed consent, represented a vindication of the employee's rights under the legislation.

Hurley v. Royal Yacht Club [1997] 8 E.L.R. 225 and *Sunday Newspapers Ltd. v. Kinsella* [2007] IEHC 324, [2008] 19 E.L.R. 53 approved.

Cases mentioned in this report:

Board of Management of Malahide Community School v. Conaty [2018] IEHC 144, (Unreported, High Court, O'Regan J., 21 March 2018).

Health Service Executive v. Doherty [2015] IEHC 611, (Unreported, High Court, Noonan J., 9 October 2015).

Hurley v. Royal Yacht Club [1997] 8 E.L.R. 225.

National University of Ireland Cork v. Ahern [2005] IESC 40, [2005] 2 I.R. 577; [2005] 2 I.L.R.M. 437.

Sunday Newspapers Ltd. v. Kinsella [2007] IEHC 324, [2008] 19 E.L.R. 53.

Appeal from the Labour Court

The facts have been summarised in the headnote and are more fully set out in the judgment of Simons J., *infra.*

By originating notice of motion dated 25 July 2018, the appellant appealed against the determination of the Labour Court dated 29 June 2018.

The appeal was heard on 9 May 2019.

Mark Connaughton S.C. (with him *Tom Mallon*) for the appellant.

Marguerite Bolger S.C. (with her *Padraic Lyons*) for the respondent.

Cur. adv. vult.

Simons J. 5 July 2019

Summary

[1] This matter comes before the High Court by way of a statutory appeal from the Labour Court. The appeal presents a short point of law as to the entitlement, if any, of an employer and employee to contract out of the statutory protections otherwise provided for under the Unfair Dismissals Act 1977 (as amended) ("the 1977 Act").

[2] The point arises in the following circumstances. The employee ("the teacher") had acquired rights under the 1977 Act by dint of her having had more than one year's continuous service as a teacher at Malahide Community School ("the school"). In October 2015 the school required the teacher

to sign a written contract for the balance of the academic year 2015/2016. The written contract presented to the teacher purported to take the form of a "fixed-term" contract for a period of approximately 11 months. The school contends that, by signing this contract, the teacher relinquished the statutory rights she had previously acquired under the 1977 Act. On the expiration of the term of the contract on 31 August 2016, the school purported to dismiss the teacher.

[3] The teacher successfully challenged her dismissal before the Labour Court and has been reinstated. The school has since appealed the Labour Court's determination to the High Court.

[4] The school's grounds of appeal are beguiling in their simplicity. It is said that "fixed-term" contracts are expressly excluded from the application of the 1977 Act by s. 2(2)(b) thereof. This is subject only to the procedural requirements under that section having been satisfied. The procedural requirements are as follows: the contract must be in writing; must be signed by or on behalf of the employer and by the employee; and must provide that the 1977 Act shall not apply to a dismissal consisting only of the expiry of the fixed term. These requirements are said to have been met. It is further submitted that there is no question of the parties having contracted out of the 1977 Act in circumstances where the legislation simply does not apply to "fixed-term" contracts.

[5] In truth, the protection afforded to employees under the 1977 Act is more robust than the school's submission appears to suggest. Freedom of contract is severely restricted by s. 13 of the Act. Any provision in an agreement which purports to exclude or limit the application of, or is inconsistent with, any provision of the 1977 Act is void. The contract of October 2015 falls foul of this section. A contractual provision which purports to deprive an employee of rights which they have already acquired under the 1977 Act can only be characterised as an agreement which purports to "exclude" or "limit" the application of the 1977 Act. But for the offending provision of the contract of October 2015, the teacher would have retained her status as a permanent employee entitled to the full protections of the 1977 Act. Therefore, the relevant provisions of the contract of October 2015 are void.

[6] On its literal meaning, s. 13 precludes an employee from *ever* contracting out of their rights. However, there is case law which suggests that — at least in the context of settlement agreements — an employee may be entitled to waive their rights on the basis of informed consent. The school cannot avail of this in its appeal. This is because it is common case that the teacher had *not* been informed that the contract of October 2015 would entail the loss of her acquired rights. Indeed, it appears that both the school and the

teacher were labouring under the mistaken belief that the teacher did not have any acquired rights.

[7] (The school principal had explained to the Labour Court that she had mistakenly thought that the teacher's employment for the school years 2013/2014 and 2014/2015 had been on the basis of "fixed-term" contracts. In fact, there was no written contract in place for either year).

[8] The reliance which the school seeks to place on the exception for fixed-term contracts under s. 2(2)(b) is misplaced. This exception requires a consideration of an employee's employment in the round, and the exception cannot apply where the employment had been on a permanent basis. Moreover, for the reasons explained at para. 60 *et seq*. below, the other requirements of s. 2(2)(b) were not, in any event, satisfied by the contract of October 2015.

[9] The school's appeal will, therefore, be dismissed.

Procedural history

[10] Before turning to consider the substance of the statutory appeal, it is necessary first to say something about the procedural history whereby this appeal came on for hearing before the High Court. In particular, it is necessary to explain that this is, in fact, the second appeal to come before the High Court.

[11] The contract of October 2015, the subject matter of these proceedings, had a purported end date of 31 August 2016. The school did not renew the contract, and the teacher's employment terminated on 31 August 2016.

[12] The teacher then submitted a complaint to the Workplace Relations Commission ("the WRC"). The WRC adjudication officer rejected the complaint on the basis that the dismissal was excluded from the 1977 Act under s. 2(2)(b). The teacher appealed this decision to the Labour Court. The Labour Court made a determination in favour of the teacher, and made an order directing the school to re-engage her in a teaching role from the commencement of the 2018/2019 school year. This determination is dated 22 November 2017. I will refer to this as "the first determination".

[13] The school brought an appeal against the Labour Court's first determination to the High Court. The matter was duly heard by the High Court (O'Regan J.), and, by reserved judgment dated 21 March 2018, the appeal was allowed. See *Board of Management of Malahide Community School v. Conaty* [2018] IEHC 144.

[14] It seems from the judgment that the High Court took the view that the Labour Court's rationale was not evident from its determination. In particular, the High Court appears to have been concerned that there had been no express reference to s. 13 of the 1977 Act in the operative part of the first determination, and that the rationale for extending the case law in respect of "informed consent" from the context of settlement agreements to fixed-term contracts had not been explained.

[15] Rather than determine the points of law itself, the High Court instead remitted the matter to the Labour Court for reconsideration:

> "30. For the reasons above, I cannot be satisfied that the correct principles of law were applied in the absence of:
>
> 1. an engagement with or consideration of the impact of s. 2(2)(b) on the circumstances before the Labour Court;
> 2. some weighing in the balance of the provisions of s. 2(2)(b); and
> 3. an explanation of the perceived difference between exclusion and waiver identified by the Labour Court in its decision (see paras. 19 and 20(3) hereof) and why notwithstanding such difference the jurisprudence in respect of waiver was sufficient to address the critical/central issue between the parties.
>
> In these circumstances, I am satisfied that it is appropriate to remit the matter to the Labour Court for reconsideration."

[16] The Labour Court heard further submissions on the remitted appeal (but did not hear any further oral evidence) at a hearing on 12 June 2018. The Labour Court then issued its determination on 29 June 2018. The Labour Court again ruled in favour of the teacher. I will refer to this as "the second determination".

[17] The (second) appeal to the High Court was instituted by way of an originating notice of motion dated 25 July 2018. On the same date, the school issued a separate motion seeking a stay on the implementation of the Labour Court's order directing the re-engagement of the teacher. That application was refused by the High Court (Binchy J.) by order dated 30 July 2018. The substantive appeal subsequently came on for hearing on 9 May 2019.

[18] There was some discussion at the hearing before me as to the implications of the High Court judgment on the first appeal. Counsel on behalf of the teacher submitted that certain issues had been determined conclusively by the High Court in its judgment of 21 March 2018 and that it was inappropriate for the school to seek to re-agitate these issues. It was said that these matters were *res judicata*. In particular, it was submitted that the High Court

had made a finding that the Labour Court, in considering the previous employment history of the teacher as part of its first determination, had acted properly. Reliance was placed in this regard on paras. 22–23 of the High Court judgment, and the reference to there having been "no error of law".

[19] With respect, I think that this might be to read too much into the first High Court judgment. As noted above, the approach adopted by the High Court in March 2018 had been to remit the points of law to the Labour Court for further consideration in circumstances where O'Regan J. was not satisfied that the Labour Court's rationale was evident from its first determination. It does not appear to me that the judgment was intended to determine any of the points of law conclusively.

Labour Court's findings of fact

[20] The originating notice of motion in these proceedings is headed up "In the matter of Section 46 of the Workplace Relations Commission Act 2015". Strictly speaking, however, it appears that the appeal is under s. 10A of the 1977 Act. Nothing turns on this distinction in that the form of appeal under the two sections is identical, i.e. an appeal on a point of law.

[21] The parties to an appeal on a point of law will, generally, be bound by the findings of fact of the Labour Court. The High Court, on an appeal on a point of law, only has a very limited jurisdiction to look behind those findings of fact. See, for example, the judgment of the High Court in *Health Service Executive v. Doherty* [2015] IEHC 611:

> "29. It is well settled that as a general rule, this court on appeal cannot revisit findings of fact made by the Labour Court, unless they can be shown to have been unsupported by any evidence or are irrational or unreasonable in the light of the evidence before the Labour Court."

[22] See also the judgment of the Supreme Court in *National University of Ireland Cork v. Ahern* [2005] IESC 40, [2005] 2 I.R. 577 at p. 580:

> "[9] The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been

considered by the Labour Court and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law and can be considered on an appeal under s. 8(3)."

[23] The first determination of the Labour Court contains a number of findings of fact which are at least potentially relevant to the application of the provisions of the 1977 Act to the circumstances of the case. In particular, the Labour Court made findings of fact in respect of: (i) the employment history of the teacher with the school prior to her signing the contract in October 2015; (ii) the school principal's understanding of the employment status of the teacher; and (iii) whether the teacher had been advised that, by entering into the contract, she would be relinquishing her acquired rights under the 1977 Act. The Labour Court subsequently relied upon these findings of fact for the purposes of reaching its second determination, i.e. the determination the subject matter of this appeal.

[24] One might have thought that the parties would accept that the appeal before the High Court must be determined by reference to these findings of fact. The parties would, of course, be entitled to make legal submissions to the High Court as to the interpretation and application of the statutory provisions to the factual circumstances as found by the Labour Court. For example, the school maintains that, as a matter of law, the previous employment history is largely irrelevant to the application of s. 2(2)(b).

[25] As it happens, however, the *status* of the findings of fact is in dispute. The school is sharply critical of the Labour Court for relying on the findings of fact from the first determination for the purposes of its second determination. The gravamen of the criticism seems to be that once the matter had been remitted to the Labour Court pursuant to the High Court order of 23 March 2018, the Labour Court should have conducted a *de novo* hearing before a differently constituted division of the Labour Court. This, presumably, would have entailed the hearing of oral evidence — again — from the teacher and the school principal. (Both had given evidence at the first hearing.)

[26] With respect, there is nothing in the High Court order of 23 March 2018 which necessitated such an approach on the part of the Labour Court. Had the High Court intended to be prescriptive as to the form of remittal, then this would have been specified in the order. Indeed, it appears from the written legal submissions filed on behalf of the teacher that the school may have canvassed the possibility of including in the order a direction that the remitted appeal should be heard by a different division of the Labour Court, but that the High Court had refused to make such an order, saying that this

should instead be left to the discretion of the Labour Court. This narrative has not been challenged by the school.

[27] In the absence of a particular procedure having been prescribed by the order of 23 March 2018, the Labour Court had some flexibility as to the procedure which it adopted, subject always to the overarching obligation that the procedure be fair. There is nothing in the approach adopted by the Labour Court on the resumed hearing which could be characterised as failing to comply with fair procedures. The parties were entitled to make detailed oral and written submissions on the legal issues which had been identified in the High Court judgment.

[28] If and insofar as the criticism is predicated on an argument that the findings of fact in the first determination of the Labour Court had been implicitly set aside by the High Court in its first judgment, such an argument is untenable. It is clear from the judgment of 21 March 2018 that the decision of the High Court was to the effect that the Labour Court had not as yet properly engaged with the legal issues arising. There is nothing in the High Court judgment which suggests that the findings of fact were incorrect. Indeed, the only express reference in the judgment to findings of fact is to the effect that the Labour Court had not erred in its consideration of the prior employment history of the teacher.

[29] At all events, it is clear from the case law cited by the High Court earlier in its judgment that the court was fully aware that findings of fact are not generally amenable to being set aside on a statutory appeal limited to points of law.

[30] One of the curious features of the school's objection is that none of the facts are actually in dispute. The school had conceded at the first hearing before the Labour Court that the teacher had acquired rights under the 1977 Act. This concession was, entirely properly, repeated at the second hearing before the Labour Court. Further, there is no suggestion that the evidence which the school principal had given at the first hearing was incorrect or mistaken. It seems to be accepted, therefore, that the teacher was not advised at the time of entry into the contract in October 2015 that she was relinquishing rights under the 1977 Act. Rather, the position adopted by the school is that there was no legal obligation to provide such advice.

[31] In summary, therefore, the objection to the Labour Court having had regard to the findings of fact from its first determination is untenable.

[32] I have set out the relevant extract of the Labour Court's first determination which records its findings of fact as an appendix to this judgment.

Approach of the Labour Court

[33] The approach adopted by the Labour Court in its second determination was to address the interpretation and application of s. 2(2)(b) first, before turning to a consideration of s. 13.

[34] The Labour Court interpreted s. 2(2)(b) as involving an implicit requirement that a "fixed-term" contract must clearly stipulate in writing what is being waived. On this interpretation, it was not sufficient on the facts of the present case for the contract simply to record that the 1977 Act did not apply. Rather, the written terms of the contract should, it is said, have reflected the fact that the teacher was waiving her acquired rights to permanent employment. See p. 8 of the second determination as follows:

> "Section 2(2)(b) essentially allows an employee who wishes to accept a temporary employment arrangement from an employer to waive his or her rights to protection under the 1977 Act. In a situation where an employee is giving up what would otherwise be very valuable employment protection rights, it is essential that the agreement clearly stipulates in writing what is being waived and that the parties indicate, through their signature, express agreement to it. These conditions must therefore be fully and completely satisfied.
>
> It is clear on the evidence adduced that at the time the complainant signed the fixed-term contract in issue she was already employed by the respondent on a permanent contract of employment and she enjoyed the full protection of the 1977 Act against unfair dismissal. The purported effect of the impugned contract was to alter her tenure in employment from permanency to a fixed term and to extinguish her acquired entitlement to avail of the protection that the 1977 Act provides."

[35] The Labour Court went on then to conclude that the first decision had made a finding that the teacher had not been aware that she was signing away her rights as a permanent employee:

> "Furthermore, for the reasons outlined in determination UDD1752, the court is satisfied that the complainant was not aware that she was signing away her protection rights under the 1977 Act in October 2015. Nor was she cognisant that her employment status was changing from that of a permanent employee to that of a temporary fixed-term employee. Consequently, it was clear to the court that the conditions necessary to render s. 2(2)(b) of the 1977 Act effective were not satisfied. On that basis the exclusion which permits the non-application of the 1977 Act did not apply to the termination of the complainant's employment."

[36] In summary, the Labour Court determined that s. 2(2)(b) was inapplicable for the following three reasons: (i) there was an absence of informed consent on the part of the teacher; (ii) the reference to the possibility of the contract being renewed meant that the requirement that the termination date be capable of being ascertained was not met; and (iii) the Labour Court was not satisfied that the contract was a bona fide contract as the date of commencement had already passed at the time the contract was signed.

[37] The analysis in the second determination of s. 13 is brief. The Labour Court found that in seeking agreement from the teacher to exclude or limit the application of the 1977 Act, the contract of October 2015 was in breach of s. 13 and therefore void.

[38] The Labour Court concluded that the teacher had been unfairly dismissed when her contract was not renewed on 1 September 2016 and ordered the school to re-engage the teacher from the commencement of the 2018/2019 school year.

Position of the school

[39] The originating notice of motion sets out some 30 grounds of appeal. However, at the opening of the appeal, counsel for the school very helpfully summarised the school's appeal under three broad headings as follows:

(i) The Labour Court erred in its interpretation of s. 2(2)(b) of the 1977 Act. If a contract satisfies the conditions set forth under the section, then the contract is excluded from 1977 Act. The Labour Court erred in introducing an *additional* condition, namely a requirement for "informed consent".

(ii) The Labour Court erred in relying on s. 13. Section 13 is concerned only with waivers and has no relevance to the exclusionary provisions under s. 2.

(iii) The purported finding that the contract of October 2015 was not a bona fide fixed-term contract is incorrect. The fact that the employment had commenced prior to the contract being signed did not affect its validity. The reference to the possibility of the contract being renewed was merely aspirational, and did not mean that the contract was not for a fixed term.

Position of the teacher

[40] Counsel for the teacher commenced her submission by putting the 1977 Act into its proper context, making reference to principles of Irish

constitutional law and of EU law. Counsel cited the Protection of Employees (Fixed-Term Work) Act 2003 (which gives effect to Directive 1999/70/EC), and the principle of EU law that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and employees.

[41] Counsel then conducted a careful analysis of the 1977 Act. Section 13 applies where an employee has *existing* rights under the 1977 Act. Every attempt to exclude or limit *existing* rights under the 1977 Act falls to be considered under s. 13. This is subject to waiver on the basis of "informed consent".

[42] It was submitted that the approach adopted by the Labour Court is consistent with the case law in relation to waivers. Whereas this case law is concerned primarily with settlement agreements on the termination of employment, it is said that the same principles apply to a waiver of rights arising as a result of the entering into of a "fixed-term" contract. Counsel placed particular reliance on the judgment of the Circuit Court in *Hurley v. Royal Yacht Club* [1997] 8 E.L.R. 225; and the judgment of the High Court in *Sunday Newspapers Ltd v. Kinsella* [2007] IEHC 324, [2008] 19 E.L.R. 53.

Discussion

Section 13

[43] The starting point for the analysis of this appeal must be s. 13 of the 1977 Act. The section reads as follows:

> "13.—A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of this Act) shall be void in so far as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act."

[44] The section imposes a significant restraint on the principle of freedom of contract in the context of employment contracts. The general rule, i.e. that parties of full capacity are free to agree such contractual terms as they wish, is displaced. The restraint is drafted in very broad terms: any purported *exclusion or limitation* of the application of the 1977 Act is void. The focus is on the "agreement" and its purported effect. The section has *retrospective* effect, i.e. its application extends even to contracts which had been entered into *prior to* the commencement of the 1977 Act. All of this reflects the importance which the Oireachtas has attached to the statutory protections against unfair dismissal.

[45] The relevant provisions of the contract of October 2015 read as follows:

> "The temporary contract will commence on ~~30 August 201~~[*] 8 October 2015 and will terminate on 31 August 2016 subject to satisfactory service during the probationary period. The temporary contract may be renewed for a continued period in the event that the allocated hours as specified above continue to be available and the demand for these subjects continues. A contract of indefinite duration will not arise (see Circular 34/2009), if this post is not viable within a reasonable period.
>
> The provisions of the Unfair Dismissals Acts 1977–1993 or any amendment thereto shall not apply to a dismissal consisting only of the expiry of the said term without it being renewed."
>
> [*]*The date of 30 August 2015 has been scored through in the original, and the date of 8 October 2015 inserted in manuscript.*

[46] It may assist in understanding the effect of s. 13 on the contract of October 2015 to take a step back, and to consider briefly what the legal position would have been had the contract of October 2015 baldly stated that the 1977 Act would not apply to the continued employment of the teacher. It is obvious that such a contractual clause would have been void. This is because the teacher had already acquired rights under the 1977 Act by dint of her having had more than one year's continuous service as a teacher at the school. A contractual clause which purported to extinguish those rights would fall foul of s. 13. It would self-evidently purport to "exclude" or "limit" the application of the 1977 Act.

[47] The fact that the actual wording of the contract of October 2015 uses language which appears to echo the waiver for "fixed-term" contracts under s. 2(2)(b) tends to obscure the purported effect of the contract. It is less immediately apparent that acquired statutory rights are being extinguished. Yet this is precisely the purported effect of the contract of October 2015: the teacher is being switched from a permanent contract to a fixed-term contract, with the attendant loss of the protection against unfair dismissal. But for the offending provision of the contract of October 2015, the teacher would have retained her status as a permanent employee entitled to the full protections of the 1977 Act. Therefore, the relevant provisions of the contract of October 2015 are void. An agreement which purports to deprive an employee of rights which they have already acquired under the 1977 Act can only be characterised as an agreement which purports to "exclude" or "limit" the application of the 1977 Act.

[48] The proposition can be tested this way. Suppose that instead of echoing the language of the waiver under s. 2(2)(b), the contract had stated as follows:

"The Unfair Dismissals Acts shall not apply to the dismissal of the employee if, at the date of her dismissal, the employee has less than one year's continuous service with the school under this contract of employment. This is subject to s. 2(4) of the Act."

[49] This form of wording broadly reflects one of the exceptions provided for under s. 2(1). It could not, however, be effective against the teacher precisely because she had already achieved more than one year's continuous service before the contract was entered into. If the school sought to argue that the period of employment should be reckoned from 22 October 2015, such an argument would be rejected on the basis that it ignores the overall employment history. It would be unreal to treat the employment under the contract of October 2015 as a new employment. Put otherwise, the mere fact that the wording of a contractual provision appears to echo a statutory exception or waiver under s. 2 is not proof against that contractual provision being voided under s. 13. The contractual clause will be invalid if it does not reflect the true employment history.

Is waiver of statutory rights possible?

[50] On a literal interpretation, s. 13 of the 1977 Act would appear to preclude the possibility of an employee ever waiving their rights under the legislation. Such an inflexible rule could present difficulties in practice. This is especially so in the context of the settlement of claims for alleged unfair dismissal. An employer who is making a financial payment in accordance with a settlement agreement will wish to ensure that the agreement is in full and final settlement of all claims which the former employee may have arising out of the termination of their employment. A "full and final settlement" clause is standard in most types of settlement agreement, not just those in respect of employment law disputes. If the correct interpretation of s. 13 is that a settlement agreement would be ineffective because it would involve the former employee waiving his or her statutory rights, then this would impact on the ability of parties to compromise claims for unfair dismissal. Rather than settle or compromise claims, the parties would have to pursue legal proceedings to conclusion. This would be so even in circumstances where the employee had the benefit of independent legal advice. This would be contrary to the public interest in that it might overwhelm the Labour Court, and would result in the incurring of unnecessary legal fees.

[51] Precisely because of this practical difficulty, the courts have taken a pragmatic approach to the interpretation of s. 13. Notwithstanding what appears to be the literal interpretation of s. 13, the case law indicates that it

is permissible for an employee to make an informed waiver of his or her statutory rights.

[52] The Circuit Court addressed the issue as follows in *Hurley v. Royal Yacht Club* [1997] 8 E.L.R. 225. On the facts of that case, an employee had entered into an agreement with his former employer accepting certain payments in full discharge of all claims against it. It seems that subsequently the employee sought to pursue proceedings before the Employment Appeals Tribunal. The issue before the Circuit Court was whether the agreement was void by reference to s. 13 of the 1977 Act.

[53] The Circuit Court accepted that, notwithstanding the literal meaning of s. 13, it cannot have been the intention of the legislature to prevent employers and employees from compromising claims under the 1977 Act. The Circuit Court went on to hold that, as with any consent by a person to waive a legal right, the consent must be an informed consent. The judgment goes on to suggest that in order for an agreement to be valid: (i) the agreement must identify the employment protection legislation which is being waived and (ii) the employee should have been advised in writing that he should take appropriate advice as to his rights stating at p. 227:

> "I am satisfied that the applicant was entitled to be advised of his entitlements under the employment protection legislation and that any agreement or compromise should have listed the various Acts which were applicable, or at least made it clear that they had been taken into account by the applicant. I am also satisfied that the applicant should have been advised in writing that he should take appropriate advice as to his rights, which presumably in his case would have been legal advice. In the absence of such advice I find the agreement to be void. My finding that the agreement was void, should not be taken as an indication that the officers of the club behaved improperly, or that they unfairly pressurised the applicant. I am satisfied that they genuinely believed it was in the interests of the club, once a decision to dismiss the applicant had been taken, to ensure a speedy agreed settlement with the applicant."

[54] The principles set out by the Circuit Court in *Hurley v. Royal Yacht Club* [1997] 8 E.L.R. 225 appear to have been endorsed subsequently by the High Court in *Sunday Newspapers Ltd v. Kinsella* [2007] IEHC 324, [2008] 19 E.L.R. 53.

[55] It appears that, as a matter of practice, these principles are applied on a regular basis by parties to employment law disputes. It also seems that the approach in both *Hurley v. Royal Yacht Club* [1997] 8 E.L.R. 225 and *Sunday Newspapers Ltd. v. Kinsella* [2007] IEHC 324, [2008] 19 E.L.R. 53 is followed by the Labour Court.

[56] The approach had also been endorsed in the leading textbook on dismissal law, Ryan, *Redmond on Dismissal Law* (3rd ed., Bloomsbury Professional, 2017) at pp. 588–589:

> "[25.54] Section 13 of the 1977 Act renders void any provision in an agreement, whether a contract of employment or not, and whether made before or after the commencement of the Act, to the extent that it purports to exclude or limit the application of, or is inconsistent with, any provision of the Act. This may be relevant where a settlement has been negotiated between an employer and employee. It will not apply, however, where the complainant has had independent advice. An agreement should be regarded as valid where it is entered into by a complainant with full knowledge of the legal position, where statutory entitlements are discussed in the negotiations leading up to the making of the agreement and the compromised settlement can be objectively described as adequate. Apart from a s 13 argument, a settlement arrived at on termination of employment may be the result of duress. If an employee feels that he or she has been forced to sign an agreement, he or she should make a contemporaneous note recording all relevant details." (Footnotes omitted.)

[57] The principle underlying this case law, namely that a person cannot be taken to have waived a statutory right unless they make an informed decision to do so, would appear to apply equally to the advance waiver of rights under s. 2(2)(b).

[58] It is not, strictly speaking, necessary for the purposes of determining this appeal for this court to make a finding as to whether this line of case law is correct or not. This is because even if one accepts that it is, in principle, open to an employee, such as the teacher in this case, to waive her rights, it could only be done on the basis of informed consent. There was no informed consent on the part of the teacher. It is common case that the teacher in this case was not put on notice by the school that she was relinquishing her statutory rights. Indeed, it appears that at the time the contract was entered into in October 2015, both the school and the teacher were labouring under the misapprehension that she had not acquired a right to permanent employment under the 1977 Act.

[59] However, given the importance attached to this line of case law in the practice of the Labour Court, it would be remiss of this court not to raise any concerns which it might have as to correctness of same. Happily, I am in broad agreement with the approach taken in the case law. In particular, I agree that it is open in principle to an employee in the context of the settlement of proceedings for unfair dismissal to confirm that the agreement is in

full and final settlement of all claims under the 1977 Act. This is subject always to compliance with the requirements identified in *Hurley v. Royal Yacht Club* [1997] 8 E.L.R. 225. Whereas a "full and final settlement" clause would appear to offend against the literal wording of s. 13, I am satisfied that, on a purposive interpretation, it is open to employees to waive their right to pursue further proceedings under the 1977 Act if this waiver is given on the basis of "informed consent". I say this for two reasons. First, the public interest in ensuring that parties are able to resolve disputes without having to pursue legal proceedings to a conclusion is best advanced by this interpretation. Secondly, an agreement to accept a particular amount in full and final settlement of a claim for unfair dismissal, on the basis of informed consent, in a sense represents a vindication of the employee's rights under the legislation. The purpose of the legislation is to provide redress in the case of unfair dismissal. If an employee can obtain proper redress without having to pursue legal proceedings to their conclusion, such an outcome is not necessarily inconsistent with the purpose of the legislation.

Section 2(2)(b)

[60] Section 2(2)(b) of the 1977 Act provides as follows:

"(2) Subject to subsection (2A), this Act shall not apply in relation to—

…

(b) dismissal where the employment was under a contract of employment for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of the expiry of the term without its being renewed under the said contract or the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that this Act shall not apply to a dismissal consisting only of the expiry or cesser aforesaid."

[61] Section 2(2)(b) allows for the possibility of an employee, *at the commencement of their employment*, making an informed decision to waive their statutory rights. This waiver must be confirmed by the employee signing a written contract which states that the 1977 Act shall not apply to a dismissal consisting only of the expiry of the fixed term. The provisions of s. 2(2)(b) carve out an exception to the general rights under the 1977 Act. As such, same fall to be interpreted strictly.

[62] There seems to have been much debate between the parties both before the Labour Court and before the High Court on the first statutory appeal as to whether s. 2(2)(b) should be characterised as involving an "exclusion" from the provisions of the 1977 Act, or, alternatively, as involving a form of "waiver". I am satisfied that it should be characterised as a "waiver". This is because in order for the exception — to use a neutral term — to be effective, the contract must record the disapplication of the 1977 Act, and the employee's agreement to same must be confirmed by their signing the written agreement. The exception is not, therefore, automatic, but rather necessitates an informed decision by the employee. Thus, the position can be distinguished from that in respect of the exclusions provided for under s. 2(1) of the Act. These exclusions are triggered by the nature of the identity of the employee, e.g. a person in employment as a member of the Defence Forces, or a person who is employed by a close relative. The exclusions are thus automatic and are not contingent on some step on the part of the employee.

[63] The relationship between s. 2(2)(b) and s. 13 can be summarised as follows. The former allows for the waiver, in advance of the commencement of employment, of rights which would otherwise have accrued under the 1977 Act. The latter, by contrast, protects rights which have already been acquired.

[64] The contract of October 2015 did not satisfy the requirements of s. 2(2)(b) for the following reasons.

(i) Term of contract not certain

[65] The first and most obvious respect in which the contract of October 2015 fails to satisfy the requirements of s. 2(2)(b) is that the requirement that the contract be for a "fixed term" is not met. Leaving aside the provision made separately for a contract for a "specified purpose", which has not been relied upon in this case, the exception under s. 2(2)(b) is only available where a contract of employment is for a "fixed term". This necessitates that the termination date of the contract must be ascertainable from the outset.

[66] Whereas the contract of October 2015 has a nominal termination date of 31 August 2016, this is contingent on future events:

> "The temporary contract will commence on ~~30 August 2015~~* 8 October 2015 and will terminate on 31 August 2016 subject to satisfactory service during the probationary period. The temporary contract may be renewed for a continued period in the event that the allocated hours as specified above continue to be available and the demand for these subjects continues."

[*]The date of 30 August 2015 has been scored through in the original, and the date of 8 October 2015 inserted in manuscript.

[67] As appears, the contract may be renewed if certain objective conditions are met, i.e. the allocated hours continue to be available, and the demand for the two relevant subjects, namely English and religion, continues. The fact that it could not be known at the time that the contract was entered into whether these contingencies would occur has the legal consequence that the contract cannot be regarded as being for a "fixed term".

[68] The submission on behalf of the school that this clause of the contract is "aspirational" only, and should be disregarded for the purposes of determining whether the contract qualifies as a fixed-term contract, cannot be accepted. The statutory requirements that the contract be in writing and signed by the employee emphasise the importance which the Oireachtas attaches to ensuring that an employee must be on notice of the legal effect of the contract. The language of a contract must be unequivocal in order to come within the exemption. The reference to the contingency of the contract being renewed is not something which a reasonable person would discount as merely "aspirational", and, accordingly, of no legal effect.

[69] There is a further difficulty with the contract. The contract was not signed until *after* the nominated commencement date of 8 October 2015. (The teacher did not sign the contract until 22 October 2015.) Section 2(2)(b) only allows for the possibility of an employee, *at the commencement of their employment*, making an informed decision to waive their statutory rights. This timing point is of crucial importance. A procedure whereby an employee might be requested to waive their rights during the course of employment would be open to the risk of abuse.

(ii) "Employment" not under fixed-term contract

[70] The exception under s. 2(2)(b) only applies where the "employment" had been under a contract of employment for a fixed term. This requires an assessment of the contractual arrangements between the parties in the round. This approach to interpretation is consistent with the provisions in respect of consecutive fixed-term contracts set out at s. 2(2A). For example, where there has been a temporary break in employment (of less than three months), then it is the totality of the employment arrangements that are looked at.

[71] Where, as in this case, there is a history of employment, regard must be had to same in order to determine whether the "employment" is pursuant to a fixed-term contract. On the facts of this case, the teacher's initial employment had been on the basis of a permanent contract. It cannot be

said therefore that her "employment" was under a contract of employment for a fixed term. Rather, the "employment" is properly characterised as one under a permanent contract. Section 2(2)(b) is only available in the case of a first-time employment, or, perhaps, employment pursuant to series of fixed-term contracts.

[72] The school appears to say that it is only legitimate to have regard to the future employment of the employee. If this future employment is to be under a fixed-term contract, then the employer is entitled to avail of the exception. On this interpretation, an employee who had been employed on a permanent basis for a number of years could be moved onto a fixed-term contract with an immediate loss of their acquired rights. Such an interpretation would, self-evidently, be open to potential abuse. The approach contended for by the school is artificial, and would undermine the effectiveness of the legislation.

(iii) No informed consent

[73] It is an express requirement of s. 2(2)(b) that the contract be signed by the employee, and that the contract provide that the 1977 Act shall not apply to a dismissal consisting only of the expiry of the fixed term. The purpose of these procedural requirements is, self-evidently, to ensure (i) that the employee is on notice that protections which would otherwise arise under the 1977 Act are being waived, (ii) that the employee's consent is confirmed by their signature. The principle of "informed consent" as set out in the judgements in *Hurley v. Royal Yacht Club* [1997] 8 E.L.R. 225 and *Sunday Newspapers Ltd. v. Kinsella* [2007] IEHC 324, [2008] 19 E.L.R. 53 (discussed above) apply by analogy. A person can only be said to have waived a statutory right if they do so on an informed basis. If one assumes for the moment that — contrary to my finding under the previous headings — it is competent for an employee to waive their right of permanent employment by entering into a fixed-term contract under s. 2(2)(b), it is nevertheless necessary that that waiver be given on the basis of informed consent. There is an implicit obligation on an employer to put an employee on notice that the entering into of a particular contract will entail the loss of statutory rights previously acquired by the employee. A bald statement in the contract to the effect that the 1977 Act does not apply to dismissal consisting only of the expiry of the fixed term would not be sufficient. Rather, the contract would have to include an express acknowledgement to the effect that the employee was relinquishing their acquired right to the protection of the 1977 Act. The formula of words used in the contract of October 2015 is deficient in this regard. It did not put the teacher on notice of the loss of her statutory rights.

[74] Further, it is common case that the teacher was not informed verbally of the loss of her statutory rights. Indeed, both the teacher and the school appear to have been labouring under the misapprehension that the teacher had not acquired rights under the 1977 Act. The school principal had explained to the Labour Court that she had mistakenly thought that the teacher's employment for the school years 2013/2014 and 2014/2015 had been on the basis of "fixed-term" contracts. In fact, there was *no written contract* in place for either year, and thus reliance could be placed on s. 2(2)(b).

[75] The signing by the teacher of the contract in October 2015 was not sufficient to waive her statutory rights in the absence of informed consent.

[76] Alternatively, lest I be incorrect in my interpretation of s. 2(2)(b), I am satisfied that, as a matter of contract law, an employer who requests an employee to agree to inferior terms and conditions, *which involve the loss of statutory rights*, is required to explain the precise legal effect of those changes to the employee. This implied term is part of the implied obligation of mutual trust and confidence between an employer and employee. It is also necessary to reflect the unequal bargaining power between an employer and employee.

Summary

[77] In summary, a reasonable person reading the contract of October 2015 would not understand same as entailing the loss of statutory rights, nor, indeed, as being for a fixed term only.

Proposed order

[78] The appeal by the appellant, the board of management of Malahide Community School, is dismissed. The determination of the Labour Court dated 29 June 2018 bearing the reference "UDD1837", is affirmed.

APPENDIX:
Extract from Labour Court's first determination

"Court's findings

On the evidence it is clear that the complainant's prior employment with the respondent was under a permanent contract of employment. That was admitted on behalf of the respondent in the course of the hearing of this appeal. Moreover, it is clear that the complainant resumed working for the respondent in August 2015. At that point her employment was not pursuant to

a fixed-term contract and it was undoubtably permanent in nature. What is now contended for by the respondent is that on or about 22 October 2015, at which point the complainant was employed on a permanent contract, she freely and knowingly entered into a contract to retrospectively alter the fundamental nature of her employment from that of permanence to fixed term. It is further contended that, at a point at which she had the full protection of the 1977 Act, she intentionally agreed to forgo that protection.

Having considered the submissions of both parties, the court is of the view that as the complainant was on a permanent contract prior to signing the fixed-term contract, and indeed had already commenced a new school year on that basis at the end of August 2015, the change in employment status in October of that year is very significant and needs to be examined.

The court must examine whether there was any discussion or consideration given to the complainant relinquishing her employment status as a permanent employee and returning on less favourable terms in respect to tenure, thereby placing her outside the protection of the 1977 Act.

It is not disputed that this change in status was ever brought to her attention, indeed the respondent itself was not even aware of her employment status at the time and therefore was not in a position to ensure the complainant gave informed consent. The court is of the view that it is particularly significant that the position as advertised in September 2015 made no reference whatsoever to its fixed term status and the complainant's letter of application similarly makes no such reference, (both were presented to the court at the hearing).

The court cannot accept the respondent's contention that she fully understood the nature of the contract or that she freely entered into it, knowing that it may not be renewed. In any event the contract states that 'the temporary nature may be renewed for a continued period in the event that the allocated hours as specified above continue to be available and the demand for these subjects continues'. The subjects she was teaching were English and religion, it was within the bounds of possibility that the demand for such subjects was likely to continue. However, she was not successful and another teacher with shorter service was successful.

The complainant told the court that she did not have an opportunity to examine the contract and was simply presented with it and asked to sign it. On that basis it is difficult to see how the complainant could have freely entered into such a contract having had full knowledge of its implications. Had she not signed the contract at the time her employment may have been in jeopardy. The court accepts that evidence."

Solicitors for the appellant: *Mason Hayes & Curran.*

Solicitors for the respondent: *ByrneWallace.*

Alan V. Meehan, Barrister

THE HIGH COURT [2020] IEHC 55

IN THE MATTER OF A STATUTORY APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS ACT 2015

[2019 No. 83 MCA]

BETWEEN

MAREK BALANS

APPELLANT

AND

TESCO IRELAND LIMITED

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of January, 2020.

1. This is an appeal on a point of law pursuant to the provisions of s. 46 of the Workplace Relations Act 2015 against a decision of the Labour Court made on 21st January, 2019. The appellant, Mr. Balans, is a night worker employed by the respondent in a distribution centre. Mr. Balans made a number of complaints to an adjudication officer of the Workplace Relations Commission in respect of his employment. The first related to an alleged impermissible deduction from his wages and the operation and application of the Payment of Wages Act, 1991 ("*the Act of 1991*"), s. 5(6). The second related to his alleged entitlement to be paid a premium for hours worked *between Saturday and Sunday* and the meaning of that time period under the contract. The third relates to the grievance procedure operated by the respondent. He also made application for extension of time, from six to twelve months, within which to make a claim for compensation.

2. On the 23rd August, 2018, the adjudication officer upheld the appellant's complaint that there had been a breach of the Act. He also recommended that the respondent pay the

applicant redress of €1,000 for the manner in which its grievance process was operated. He rejected the application for extension of time and also the contention of the appellant that hours worked between Saturday and Sunday included the hours from midnight on Friday/Saturday until 6 a.m. on Saturday morning. His decision and recommendation were appealed to the Labour Court by both parties.

3. The Labour Court in its principal finding overturned the decision of the adjudication officer and found that no unlawful deduction had been made from the appellant's wages. It held that the rate of pay specified in the plaintiff's contract arose as a result of a computational error. The court also disagreed with the recommendation to pay redress, but the decision of the adjudication officer on all other issues was upheld.

4. A number of grounds of appeal have been advanced on behalf of Mr. Balans:-

i. The Labour Court fell into error in its interpretation of the contract of employment. By interpreting the contract as it has, it is argued that the Labour Court has purported to rectify the contract and thereby exercise a jurisdiction which it does not enjoy.

ii. The Labour Court misinterpreted the meaning of "*hours worked between Saturday and Sunday*" and held, in error, that the contract precluded Mr. Balans from receiving a 20% premium for hours worked between midnight on Friday/Saturday and 6 a.m. on Saturday mornings.

iii. The Labour Court erred in holding that there was no reasonable cause to justify an extension of the six-month period for the purposes of lodging a claim with the Workplace Relations Commission, and in doing so that it failed to provide adequate reasons for its finding. It is to be observed, that insofar as the latter part of this challenge is concerned (i.e. inadequate reasons), the respondent

maintains that the court ought not to entertain such ground as it is not advanced in the notice of motion.

Background

5. In view of the issues raised on this appeal it is relevant to consider the background to the dispute. This is addressed in the affidavit sworn by the appellant on the 27th February, 2019 in support of this appeal and by Mr. Alan Jones, sworn in response on the 9th May, 2019.

6. In 2012 the appellant was employed by the respondent as a night warehouse operative on a part time/short hours contract. He was employed on the night shift, three days a week. In November, 2013 the parties entered into a contract ("*the 2013 contract*") which in turn was replaced on the 16th June, 2015 by a further contract, the terms of which are the subject matter of this dispute ("*the 2015 contract*"). This provided for employment on a full time basis. It is suggested by the respondent that the 2015 contract has been superseded by a further contract issued by the respondent on the 11th May, 2017 but which the appellant has refused to sign.

7. The rate of pay as recorded in the 2013 contract was as follows:-

"*Payment rates break down as follows:-*

- *Basic rate - €9.69.*
- *Hours worked between 22:00 and 06:00 attract a consolidated rate of pay that includes a 20% premium for unsocial hours.*
- *Hours worked between Saturday and Sunday attract a 20% premium if part of rostered working week.*"

It was also provided that the rate of pay would be subject to the usual taxation deductions. Thus, under the 2013 contract the appellant was entitled to a basic hourly rate of pay of €9.69 together with a bonus of 20% in respect of unsocial hours and a further premium of 20% in respect of hours worked "*between Saturday and Sunday*", if part of the rostered working week. In the 2015 contract, the basic rate of pay is stated to be €11.87 per hour. The contract was

signed by the parties. The respondent maintains that an error was made in the 2015 contract in that the basic rate was calculated in a manner which incorrectly incorporated the 20% premium for unsocial hours which he had received under the 2013 contract. The applicant maintains entitlement to this rate of pay and 20% premium for unsocial hours based on this figure. He also claims entitlement to further premia based on this figure. Since June, 2015 he has been paid €10.29 per hour, rather than €11.87 as expressly stipulated in the contract.

8. On the 6th October, 2016, Mr. Balans made a complaint under the respondent's internal grievance procedure. On the 24th March, 2017 this was determined not to be well – founded. An internal appeal was dismissed on the 5th May, 2017. On the 14th August, 2017 he made a complaint to the Workplace Relations Commission.

9. The adjudication officer found that the stated €11.87 per hour in the 2015 contract arose as a result of a mistake on the part of the respondent. He continued:-

> "*Nevertheless, it is difficult to see grounds why this should be set aside because of such a unilateral mistake. There is nothing unconscionable about a rate of pay of €11.87. I accept the evidence that this was not a prevailing rate of pay in the respondent, but it was the rate of pay inserted into the contract. The complainant did not contribute to the respondent's mistake. Applying the doctrine of mistake, there is no basis to set aside the binding nature of the basic rate of pay as €11.87 per hour.*"

He found that the rate of €11.87 was *properly payable* and that the underpayment to the appellant amounted to a deduction within the ambit of s. 5 of the Act.

10. Section 5 of the Act of 1991 prohibits an employer from making deductions except in accordance with the provisions of that section. These include:-

> "*(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,*

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or

(c) in the case of a deduction, the employee has given his prior consent in writing to it."

The appellant maintains that none of these considerations arise.

11. Section 5(6) provides:-

"*(6) Where—*

(a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or

(b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee,

then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."

12. Wages is defined in s. 1 of the Act of 1991 as:-

"*...any sums payable to the employee by the employer in connection with his employment, including—*

(a) any fee, bonus or commission, or any holiday, sick or maternity pay, or any other emolument, referable to his employment, whether payable under his contract of employment or otherwise..."

The Decision of the Labour Court

13. The Labour Court found that the enforcement of contract under common law is not a matter for the Labour Court. To ground a claim under the Act of 1991, the wages concerned must be properly payable. It noted that it had found in a previous decision *Department of Public Expenditure v. Brian Collins* (PW/18/14), as had the Employment Appeals Tribunal in *Aer Lingus v. Matchett* (PW/18/18), that an error in the contract does not mean that the rate of pay set out in the contract was properly payable. The Labour Court concluded:-

> "*Having regard to the submissions of both parties and the oral submissions made on the day, the court is clear in this case also that the rate of pay set out in the complainant's contract arose due to a computational error and was not properly payable.*"

14. The Labour court concurred with the adjudication officer on the extension of time issue. It overturned his Recommendation to award compensation under the Industrial Relations Act, 1969 because of the finding that the company's grievance process was procedurally sound. With regard to the hours worked between Saturday and Sunday, the Court concurred with the Decision of the adjudication officer that:-

> "*... an additional premium payable for 'Hours worked between Saturday and Sunday', while the wording could be expressed more clearly, does not mean that a premium is payable for hours worked on Saturday mornings.*"

Submissions made to the Labour Court

15. The occurrence of the stated mistake in the contract is explained at para. 4 of the employer's submissions to the Labour Court which are exhibited to the appellant's affidavit in support of his application to this court. When the respondent's HR administration team drafted the contract of employment for the complainant, they inserted his employee number and the rate of €11.87 per hour which was the consolidated figure of the then basic hourly rate payable

of €9.89 together with the 20% premium for unsocial hours. It was submitted to the Labour Court that this was a clear error of an administrative or clerical nature. Reliance was placed by the respondent on the decision in *Aer Lingus v. Matchett*, where the court had concluded:-

> "*...it is clear to the Court that the salary set out in the letter of appointment ... was not the appropriate salary point to pay the Complainant ... and consequently must have been an error on the Respondent's part, therefore, it was not unlawful for the Respondent to deduct the monies.*"

16. This was relied on as authority for the proposition that an administrative error in a contract of employment should not result in the error being compounded and being applied in practice. It was submitted that the respondent should not be bound by the error especially as it went outside the collective agreement on site and could have far reaching implications for the respondent. The respondent also submitted that the appellant was seeking to be paid 40% higher than other colleague, which would have significant implications for equality in pay in the distribution centre. It was contended that the adjudication officer misinterpreted the provisions of the Act and that the respondent had clearly demonstrated that this was a clerical mistake within the meaning of the section. The correct rate of pay as per the established agreed rates was properly payable and this is what the appellant received. There was therefore no illegal deduction. The amount/rate properly payable under the contract within the meaning of the Act was €9.89 and that it was this amount that the 20% premium applied in the event of the working of unsocial hours. Further submissions were made in respect of the Saturday/Sunday issue and the period of time in respect of which the claim might be made.

17. The essence of the submission made on behalf of Mr. Balans was that he was entitled to be paid his contractual salary subject to any lawful deductions. The contractual hourly rate specified in the contract was €11.87. This was undisputed. Any error which may have been made by the respondent should not entitle it to unilaterally reduce his salary. The subsequent

attempt by the respondent to request the employee to sign a new contract illustrated that the employer also believed that it had made an error which had legal effect. Submissions were also made in respect of other two issues.

Submissions to this Court

18. Mr. Kirwan S.C. on behalf of the appellant submits that the Labour Court fell into error as a matter of law in its analysis of the contract and the provisions of the Act of 1991. The Labour Court has no jurisdiction to correct or amend errors or disregard the clear terms of the written contract. If such jurisdiction had been intended to be conferred by the Oireachtas, it would have so provided. Under s. 5(6) of the Act of 1991 the wage properly payable to Mr. Balans was his basic hourly rate of €11.87 together with such further premia to which he may be entitled. Counsel relied on a decision of the EAT in *Sullivan v. Department of Education* [1998] ELR 217, which addressed the meaning of "*deductions*" in s. 5. The EAT held that while there was no specific definition of deduction in the Act, guidance could be taken form the definition of "*wages*" in s. 1 and emphasis should be placed on the word "*payable*". The Tribunal stated:-

> "... *if an employee does not receive what is properly payable to him or her from the outset then this can amount to a deduction within the meaning of the 1991 Act. We take payable to mean properly payable. The definition of wages goes on to give examples of types of payments which can amount to wages and states that the payments can amount to wages whether payable under his contract of employment or otherwise ... although in our view it is not simply a matter of what may have been agreed or arranged or indeed paid from the outset but, in the view of the Tribunal, all sums to which an employee is properly entitled.*"

19. Reliance is also placed on *Ministry of Defence v. Country and Metropolitan Homes (Risington) Limited* [2002] EWHC 2113. Rectification is a discretionary equitable remedy.

Counsel argued that *Matchett* is distinguishable. Mr. Matchett had been promoted but his letter of appointment provided for an incorrect pay scale. The case did not concern the plaintiff's contract of employment, rather his letter of appointment, and further, having realised the error, his employer deducted the amount of the overpayment. It is emphasised by counsel that, on the facts, the contract authorised Aer Lingus to make such a deduction. Counsel also argues that the reliance of the Labour Court on its decision in *Department of Public Expenditure v. Collins* was misplaced and that, in any event, such decision is contrary to the approach adopted by Hunt J. in *Babinskas v. First Glass Limited* [2016] IEHC 598. It is contended that the Labour Court erred in a manner similar to that which occurred in *Babinskas*, discussed below, by disregarding Mr. Balans' entitlement to be paid the wage as set out in the contract. It is argued that the respondent has attempted to vary the contract and to require Mr. Balans to enter into a new agreement precisely because the July, 2015 contract of employment is binding on them. There is no error within the meaning of s. 5(6) of the Act. There is nothing computational about deliberately paying someone less than is specified in their contract of employment. This was not a computational error, and to so hold amounts to an error of law. Reliance is placed on *Morgan v. Glamorgan County Council* [1995] IRLR 68, where Mummery P., in addressing the equivalent legislation in that jurisdiction discussed the meaning of the words "*err*" and "*computation*" as follows:-

> "*Although the error may be one of 'any description' within the meaning of s.8(4), it must be a) an 'error' on the part of the employer and b) it must be an error which affects 'the computation' of the gross wages. As neither the word 'error' nor the word 'computation' are defined by statute, they must be given their ordinary meaning. In its ordinary and natural meaning an error is a mistake something incorrectly done through ignorance or inadvertence. 'Computation' of wages is a matter of reckoning the amount, of ascertaining the total amount due by a process of counting and calculation.*"

The court concluded that no error of computation had occurred because the deduction from the applicant's wages arose from a deliberate decision.

20. On the second issue it is submitted that the expression "*hours worked between Saturday and Sunday*" includes the period between midnight on Friday/Saturday and midnight on Sunday/Monday and that if it was the intention of the respondent to limit the premium payable to specific portions of the weekend, it should have expressly so stated. As there is ambiguity in the wording of the contract, the *contra proferentum* principle ought to apply and the contract construed against the employer.

21. With regard to the extension of time, it is submitted that the Labour Court was incorrect as a matter of law in holding there was no reasonable cause for extending the time for lodging his complaint to the Workplace Relations Commission. The appellant engaged with the respondent's grievance procedure, including internal appeal procedures, which as a matter of law amounts to reasonable cause. It is further submitted that no reason for this conclusion had been proffered by the Labour Court contrary to requirement for the stating of reasons as held by Kearns P. in *Earagail Eisc Teoranta v. Doherty and Ors* [2015] IEHC 347. As previously stated, the respondent objects to the court embarking on any consideration of this ground.

22. Mr. Dunne S.C., counsel for the respondent, stresses the limited role of this Court on this appeal. He submits that it is fundamentally misconceived to suggest there is or has been an attempt made to rectify the contract. The Labour Court applied the provisions of the Act, which is a self – contained statutory code. The focus of the inquiry is to establish what wages are properly payable. The applicant could have brought a claim for breach of contract or for specific performance, but he failed to do so. There was no deduction. Counsel submits that when the Act of 1991 is construed as a whole, it is clear that the Oireachtas was aware that mistakes might occur in contractual documentation. This is evident from the provisions of s. 4 which specifically refers to errors or omissions. Section 4(3) of the Act of 1991 provides:-

"(3) Where a statement under this section contains an error or omission, the statement shall be regarded as complying with the provisions of this section if it is shown that the error or omission was made by way of a clerical mistake or was otherwise made accidentally and in good faith."

By virtue of the provisions of ss. 4(1) and 4(2), an employer is obliged to give an employee a statement in writing specifying clearly the gross amount of the wages payable to the employee and the nature and amount of any deduction therefrom. He is also obliged to take such reasonable steps as are necessary to ensure that both the matter to which the statement relates, and the statement are treated confidentially by the employer and his agents and by any other employees. Section 4(2) provides:-

"(2) A statement under this section shall be given to the employee concerned—

(a) if the relevant payment is made by a mode specified in section 2 (1) (f), as soon as may be thereafter,

(b) if the payment is made by a mode of payment specified in regulations under section 2 (1) (h), at such time as may be specified in the regulations,

(c) if the payment is made by any other mode of payment, at the time of the payment."

Section 4(4) provides that an employer who contravenes subs. (1) or (2), shall be guilty of an offence and shall be liable on summary conviction to a fine.

23. Counsel also submits that the term "*wages*" within the meaning of the Act is not necessarily to be defined exclusively by reference to the contract of employment. The first step is to determine what wages are properly payable, an exercise which was carried out by the Labour Court. It made a finding of fact that there was an error in the figure set out in the contract, a conclusion to which it was entitled to arrive. This is not an error of law.

24. Mr. Dunne S.C. points out that the appellant was originally employed to work 22.5 hours per week but in 2015 his contract of employment was renewed as his working hour

commitment changed significantly. His rate of pay did not alter at that time and it is argued that there is no averment in the appellant's affidavit to the effect that he understood that his rate of pay would have increased or that there was any agreement to that effect. There was no such agreement. The appellant does not contradict the assertion of Mr. Jones that a clerical mistake was made nor was this contradicted before the Labour Court. It is therefore submitted that it was permissible for the court to rely on the provisions of s. 5(6) of the Act. There was a clerical computational error in the calculation of his hourly rate, and this was evident from the material which was opened to the Labour Court. Further, the respondent points to the fact that no complaint was made concerning what he was paid in the period from June, 2015 to the 6th October, 2016. In exercise of its statutory function the Labour Court was entitled to look beyond the terms of the contract as executed by the parties to determine what constitutes wages properly payable. The Act of 1991 confers considerable discretion on the court in the determination of such issues.

25. Counsel thus emphasises the statutory framework of the Act and submits:-

i. The rationale of the Act, as evident from its long title, is to provide further protection to employees in relation to the payment of wages.

ii. The investigation which is required to be carried out, must be viewed in the context of the redress available which is limited to a complaint that the employee's wages had been subjected to unlawful deduction.

iii. Section 5(5) of the Act permits the deduction of overpayment of wages, where such overpayment may have been made for any reason and this clearly includes an error in computation or, it is submitted, an error in the stated wages payable. Thus, the jurisdiction conferred on the Labour Court is an extensive one.

26. Reliance is placed on the decision of the EAT in *Sullivan v. Department of Education* [1998] ELR 217 and *Dunnes Stores (Cornelscourt) Limited v. Lacey* [2007] 1 I.R. 478. In

Sullivan it was held that emphasis ought to be placed on the expression "*properly payable*" within the meaning of the Act.

27. With regard to the second issue, the respondent submits that it was within the courts' jurisdiction to make such finding on the evidence. The Labour Court had correctly adopted the reasoning of the adjudication officer on this point. The adjudication officer stated:-

> "*Giving these words their ordinary meaning, the premium is paid for hours between Saturday and Sunday, not between Friday and Saturday. The fact of the complainant working the early hours of Saturday morning does not enable him to recover this additional premium pursuant to this provision. This element of the claim is therefore, not well founded.*"

28. Finally, with regard to the refusal to extend time, it is submitted that the finding of the Labour Court who concurred with the adjudication officer, is unassailable and that no error of law arises. In *O'Donnell v. Dun Laoghaire Corporation* [1991] I.R.L.M. 301, Costello J., when addressing whether there were good reasons for extending time, stated:-

> "*The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time, I think it is clear that the test must be an objective one and that the court should not extend the time merely because an aggrieved plaintiff believes that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay...*"

29. Thus, it is submitted that the appellant has not discharged the onus of establishing reasonable cause for extending the time. Further, in the context of statutory appeals such as s. 46 of the Workplace Relations Act 2015, O. 84C of the Rules of the Superior Courts provides

for procedures where provision is not made either by the enactment concerned or by another order of the Rules.

30. With regard to s. 4 of the Act of 1991, the adjudication officer considered this section and concluded that it concerned statements of wages paid to employees *i.e.* payslips. He also expressed the opinion that the section was not justiciable before an adjudication officer and that s. 4(3) offered a good faith defence to employers facing prosecution arising from an error in a payslip or other similar document. He continued:-

> *"Section 4(3) cannot be extended to apply to errors relating to wages and statements issued pursuant to s. 3 of the Terms of Employment (Information) Act or in the contract of employment. There is no statutory provision which enables the employer to set aside a contractual term even where there is an error made in good faith."*

31. The Labour Court, although noting the argument made by the respondent that the adjudication officer had erred in his interpretation of s. 4(3) of the Act did not address this further in its determination and it does not appear to have formed a basis for any part of its reasoning.

Decision

32. This is an appeal on a point of law pursuant to s. 46 of the Workplace Relations Act 2015. It is not necessary to provide a detailed analysis of the court's role on this appeal as has been discussed in *Fitzgibbon v. Law Society* [2015] 1 I.R. 156, *An Post v. Monaghan* [2013] IEHC 404, *Dunnes Stores v. Doyle* [2014] 25 E.L.R. 184, and *Health Services Executive v. Abdel Raouf Sallam* [2014] IEHC 298, where Baker J. observed that the High Court must show appropriate curial deference to the Labour Court, but that such deference arises when the Labour Court deploys its particular expertise on industrial relations issues.

33. Thus, the court has a limited role on this statutory appeal which is confined to a point, or points, of law. It must respect the specialist role of the Labour Court. Nevertheless, it may intervene where an error of law has been demonstrated or where a finding of fact has been made which is unsupported by the evidence. To this end, the process by which findings of fact are made may be a question of law. The court's role in the determination of an appeal on a point of law under s. 46 of the Workplace Relations Act, 2015, however, is broader than that which it enjoys on an application for judicial review.

34. Section 5 of the Act of 1991 prohibits the making of deductions from wages save in certain circumstances. Section 5(6) provides that where the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee, then, except insofar as the deficiency or non – payment is attributable to an error of computation, the amount of the deficiency or non – payment should be treated as a deduction made by the employer from the wages of the employee on the occasion.

35. Central to the court's analysis must be the concepts of *wages properly payable* and the circumstances in which, if there is a deficiency in respect of those such payments, it arose as a result of an *error of computation.*

36. The provisions of s. 5(6) of the Act of 1991 were considered by Finnegan P. in *Dunnes Stores (Cornelscourt) Limited v. Lacey* [2007] 1 I.R. 478. A Rights Commissioner had found in favour of the respondents holding that the cessation of service pay amounted to an unlawful deduction, which was upheld by the EAT. It was argued that the EAT should address the question of remuneration properly payable to an employee before considering the question of a deduction or whether a deduction was unlawful. Finnegan P. concluded at p. 482:-

> *"I am satisfied upon careful perusal of the documents relied upon by the respondents that the same cannot represent the agreement or an acknowledgement of the agreement*

contended for but rather contain a clear denial of the existence of any such agreement. No other evidence of an agreement was proffered. In these circumstances I am satisfied that the Employment Appeals Tribunal erred in law in failing to address the question of the remuneration properly payable to the respondents, such a determination being essential to the making by it of a determination. Insofar as a finding is implicit in the determination of the Employment Appeals Tribunal that the appellant agreed to pay to the respondents service pay and a long service increment, then such finding was made without evidence and indeed in the face of the evidence: I am satisfied that there has been no deduction of pay from the respondents within the terms of the Act of 1991 but rather their remuneration has been unilaterally increased by the appellant making a payment which recognises their long service in excess of that which was payable prior to the 18th September, 2002. In either case there has been an error or law. Accordingly I allow the appeal."

37. This decision supports the proposition that the first matter which should be addressed by the Labour Court is to determine what wages are properly payable under the contract.

38. Both parties rely on the decision of Hunt J. in *Babianskas v. First Glass Ltd* [2016] IEHC 598, in support of their respective positions. It is appropriate therefore to consider this decision. There, the plaintiff was employed as a lorry driver who made a claim under the Organisation of Working Time Act 1997 in respect of annual leave and public holidays. His written contract of employment stipulated that he was entitled to be paid €34,384 per annum, which converted to a weekly wage of €668.75. He was in fact paid €554.48 per week. Hunt J. found that the Labour Court had correctly summarised the substance of the appellant's case as follows:-

"*The rate specified in his contract of employment is the rate that is liable to be paid to him in respect of time worked, within the meaning of Regulation 2 and should, on that*

account, be deemed to be his normal weekly or daily rate for the purpose of calculating his holiday pay."

39. The Labour Court noted that the purpose of the Regulations was to ensure that for annual leave or public holidays an employee received no less or no more than he or she would have received if he or she was working during the period in question. Finding against the appellant in respect of the holiday and annual leave claims, it found that the appropriate reference point for such claims was the lower amount actually received by the employee rather than the higher rate specified in the contract of employment. Hunt J. stated that the Labour Court was required to determine whether the amount liable to be paid was that specified in the contract, or that actually paid to the appellant over a protracted period after the date of the written contract. He continued:-

"*In my view, having correctly identified that Regulation 2 was the relevant applicable provision in the case, it did not proceed to provide a clear analysis of the legal basis upon which it considered that the amount liable to be paid was the amount actually paid rather than the higher amount specified in the written contract between the parties.*"

The starting point is that the appellant was initially liable to be paid the amount stipulated in the written contract, and only became liable to be paid a lesser amount if there was some enforceable variation of that contract, whether by waiver, estoppel or agreement. He continued:-

"*The Labour Court simply referred to his apparent acceptance of the lower sum over a long period of time. The protracted acceptance of the lower sum is an undoubted fact, but in my view it was insufficient on its own to permit the Labour Court to decide that the appellant was liable to be paid the lower amount on the basis of a simple*

extrapolation that the level of liability was fixed solely by the fact that a lower sum was subsequently accepted by him."

40. The learned judge held that the obligation of the Labour Court to ascertain the sum that the appellant was liable to be paid for the purposes of Regulation 2 implied that it had carried out an inquiry and an analysis of the meaning and application of that provision in the context of the facts before it. He continued:-

"*The assumption that the relevant sum was the actual amount paid, coupled with a reference to the issue of potential unlawful deductions being determined elsewhere, did not in my view amount to a full consideration of the meaning and application of the term 'liable' in the context of the instant case. There is certainly a serious issue as to whether the term 'sums liable to be paid' is necessarily synonymous with payments actually made.*"

He found the Labour Court had erred in law by assuming or inferring that the apparent acceptance by the appellant of the lesser sum than that to which he was initially contractually entitled, automatically meant that this was the sum which he was liable to be paid. He considered that the proper and full resolution of this issue required more extensive factual and legal analysis by the Labour Court, not that the final result must necessarily be different. He therefore remitted the matter to the Labour Court for further consideration.

41. Mr. Dunne S.C. submits that *Babianskas* does not assist Mr. Balans because the court was there concerned with a failure on the part of the Labour Court to properly assess the correct wages paid to the appellant and that the point of law appeal focused on the failure on the part of the Labour Court to properly hear the parties on the significant questions of law at issue and to allow for an adequate challenge of evidence. It is submitted that the Labour Court, in this case, carried out its obligation to conduct an analysis of the wages which were properly due to the appellant. To this end, they engaged with the evidence and concluded that the wages as

contained in the contract were incorrectly computed by reference to an error. It is also submitted that there is no criticism that the Labour Court had failed to properly consider the evidence. It had determined that there was no unlawful deduction of wages in circumstances where any such alleged deficiency was due to a computational error. There was adequate material before the Labour Court to come to this conclusion. On the other hand, counsel for the appellant relies on this case as authority for the proposition that the Labour Court had erred in law by disregarding Mr. Balans' contractual entitlement to be paid wages. He calls in aid *dicta* of Hunt J. that the starting point of legal analysis is that the appellant was initially liable to be paid the amount stipulated in the written contract which could be reduced only if there was some enforceable variation of the contract.

42. I have considered the reasoning of Hunt J. and in my view, there is nothing in this judgment which detracts from what was stated by Finnegan J. in *Lacey* or inconsistent with the approach which the Labour Court stated it was taking in this case, namely that to ground the claim under the Act of 1991 wages must be properly payable. Thus, in my view, there is nothing incorrect in this *approach*. It seems to me, however, that where the difficulty arises is that the Labour Court, rather than *making* the *necessary assessment* of wages properly payable under the Act of 1991 proceeded to perhaps unwittingly conflate that issue with the separate issue of whether there had been a deduction and whether that deduction came within the exception governed by s. 5(6). In so doing, in the opinion of this court, the Labour Court fell into error in failing to appropriately assess the wages properly payable to the appellant within the meaning of the Act of 1991.

43. Further, I accept counsel for the appellant's submission that in the circumstances of this case any error made in the drafting of the contract is not to be equated with a deficiency or non-payment attributable to a computational error within the meaning of s. 5(6). It does not appear

to me that s. 5(6) of the Act was designed to permit the effective rectification of a contract which, on the submission of one of the parties, contains an error.

44. In arriving at its conclusion, the Labour Court relied on *Collins* and *Matchett*. In *Collins*, it was held that to ground the claim in respect of an unlawful deduction under the Act, the wages concerned must be properly payable. The claimant did not dispute that there were agreed General Council Reports setting out how workers in his position should be treated when promoted through an external competition. The Labour Court concluded from the submissions of the parties and the oral submissions made on the day that the rate of pay set out in the contract was not properly payable to the complainant. The decision does not record any further reason for this conclusion and it is unclear whether the arguments raised before this court were aired before the Labour Court in that case. In *Matchett*, it appears, as submitted by counsel for the appellant, that the contract authorised the deduction.

45. With regard to the second ground of appeal it seems to me that there was adequate material before the Labour Court to determine, as it did, that the phrase "*hours worked between Saturday and Sunday*" did not mean that the premium was payable for hours worked between midnight on Friday/Saturday and 6 am on Saturday mornings. In my view, on analysis of the documentation before the court, it was entitled to come to this conclusion and no error of law has been identified. Insofar as its contended that adequate reasons were not provided, and in so far as the court is entitled to consider the grounds of appeal being advanced on such ground, given the clear and stated reasons of the adjudication officer, the Labour Court, in my view was entitled to state its agreement with his approach and to concur with his view. It goes without saying, however, that it may not always be sufficient to simply concur with others' reasoning. Much would be dependent on the facts and circumstances of each case.

46. Similar considerations apply to the third ground of the appeal, namely the extension of time. No case is made by the appellant that he was lulled into a false sense of security by

engaging in the internal grievance procedure, nor does the appellant claim that he relied on a representation that the respondent would not rely on the time limits specified in s. 41(8) of the Workplace Relations Act 2015. It is clear from the wording of that subsection that the adjudication officer enjoys a discretion to extend the time to entertain a complaint. It provides:-

> "*An adjudication officer may entertain a complaint or dispute to which this section applies presented or referred to the Director General after the expiration of the period referred to in subsection (6) or (7) (but not later than 6 months after such expiration), as the case may be, if he or she is satisfied that the failure to present the complaint or refer the dispute within that period was due to reasonable cause.*"

47. The Labour Court concurred with the decision of the adjudication officer that there was no reasonable cause to justify an extension of the six-month time limit. The adjudication officer also concluded that whatever the shortcomings of the grievance process, they did not prevent the referral of the complaint. Even if this Court were to take a different view to the Labour Court, which adopted the adjudication officer's view, I am not satisfied that any difference of view in this regard could be said to amount to an error of law. In my view there was adequate available material to enable the Labour Court to conclude as it did and to adopt the reasoning of the adjudication officer in this regard. The parties were fully aware of the reasons advanced by the adjudication officer for his decision and in the particular circumstances of this case, the Labour Court is not, in my view, to be criticised for the manner in which it explained its decision by expressing its concurrence with the decision of the adjudication officer. Further, it is matter for the appellant to discharge the onus of proof in this regard and I have seen nothing in this case that might fall foul of the principles outlined by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.R.L.M. 301, referred to above, or of Laffoy J. in *Minister for Finance v. Civil and Public Service Union and Ors* [2007] ELR 36, to which the court was also referred.

48. In the circumstances, I allow the appeal on the first ground of appeal and reject the second and third grounds of appeal. The matter ought to be remitted back to the Labour Court for determination.

49. On the evidence presented by the respondent it may be that the stance adopted by the appellant is ultimately found to be without substantive merit, but that is not a matter for the determination by this court and the court is not to be taken as expressing any view on such merits. The court has found that an error of law arises. On reconsideration of the appeal in accordance with the principles outlined in this judgment, it is open to the Labour Court to arrive, or not arrive, at the same conclusion. Further, nothing in this judgment should be taken as affecting the rights and remedies which the parties may have in any other forum.

Approved Miriam MacGrath
Feb 10th 2020

APPROVED **[2021] IEHC 667**

THE HIGH COURT
JUDICIAL REVIEW

2021 No. 671 JR

BETWEEN

AMMI BURKE

APPLICANT

AND

AN ADJUDICATION OFFICER
THE WORKPLACE RELATIONS COMMISSION

RESPONDENTS

ARTHUR COX LLP

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 November 2021

INTRODUCTION

1. These judicial review proceedings seek to challenge the manner in which a claim for unfair dismissal has been dealt with. The claim for unfair dismissal had been submitted initially to the Director General of the Workplace Relations Commission, who duly referred it to an independent adjudication officer for determination.

2. The claim for unfair dismissal had been part heard, but not yet determined, when the Supreme Court delivered its landmark decision in *Zalewski v. An*

Adjudication Officer [2021] IESC 24; [2021] 32 E.L.R. 213. This decision has significant implications for the hearing and determination of claims under the auspices of the Workplace Relations Commission. Relevantly, the Supreme Court held that, in the case of a claim for unfair dismissal, the absence from the Unfair Dismissals Act 1977 of any provision for the administration of an oath, or any possibility of punishment for giving false evidence, was inconsistent with the Constitution of Ireland.

3. The legislation regulating the procedure for unfair dismissal claims has since been amended in an attempt to give effect to the decision of the Supreme Court. Prior to the introduction of this amending legislation, the adjudication officer, who had been assigned to determine the claim the subject-matter of these judicial review proceedings, had notified the parties that the hearing of the claim would have to commence afresh before a different adjudication officer once the (then anticipated) amending legislation had been enacted.

4. The claimant in the unfair dismissal proceedings seeks to challenge the legality of this approach. It is said, variously, that the decision in *Zalewski* does not apply to claims which were already part heard, and that, in any event, there is no requirement for an oath to be administered in the context of this particular claim for unfair dismissal.

5. The principal reliefs sought in these judicial review proceedings include, *inter alia*, an order directing the (original) adjudication officer to resume the hearing of the claim, and an order compelling the adjudication officer to direct the disclosure of certain documentation. In oral submission, it was said that this court has a duty to put the adjudication officer back in "*her judging box*" to hear out the rest of the claim for unfair dismissal.

PROCEDURAL HISTORY

6. The applicant for judicial review is a qualified solicitor and had been employed by the notice party, Arthur Cox Solicitors ("***the law firm***" where convenient). The applicant's employment was terminated summarily in November 2019. The applicant has since brought a claim for unfair dismissal pursuant to the provisions of the Unfair Dismissals Act 1977.

7. The procedure governing unfair dismissal claims is prescribed principally under the Unfair Dismissals Act 1977, and partly under the Workplace Relations Act 2015.

8. The claim for unfair dismissal had been made to the Workplace Relations Commission on 31 January 2020. In accordance with the statutory procedure prescribed, the claim was referred by the Director General of the Workplace Relations Commission to an independent adjudication officer for determination. The claim has been part heard, having been before the adjudication officer on five separate occasions between September 2020 and May 2021. It should be explained that on a number of these days the hearing was limited to a matter of hours in compliance with the then applicable covid-related public health measures.

9. This judgment is not concerned with the underlying merits of the claim for unfair dismissal. However, to allow the reader to understand certain of the grounds of judicial review advanced, it is necessary to rehearse one aspect of the claim as follows.

10. It appears that the applicant's former employer, Arthur Cox Solicitors, is seeking to defend the claim for unfair dismissal on the basis of the law firm's

dissatisfaction with the applicant's (alleged) conduct and behaviour in the office and her relationship with her colleagues. It further appears that the law firm has sought to place particular reliance on an incident said to have taken place on Monday, 1 April 2019. There had been a conversation on that date between the applicant and a partner at the law firm, Mr. Kevin Lynch. This conversation related to events on the preceding Friday and Saturday. The applicant and Mr. Lynch had been acting on opposite sides of a so-called "*Chinese Wall*" in respect of a commercial transaction. The applicant maintains that there had been delays on the part of Mr. Lynch's team in progressing the transaction, and that these delays were as a result of Mr. Lynch and members of his team having attended a social event that evening marking the departure of a senior associate from the law firm.

11. The applicant, in her grounding affidavit, has described the conversation on Monday, 1 April 2019 as involving her "*respectfully*" mentioning to Mr. Lynch that she did not think it acceptable that she had been left in the office until 2 am as a result of his team's delays due to socialising. The applicant has explained, in submission to this court, that Mr. Lynch has described the conversation in very different terms, having told the adjudication officer that she (the applicant) had "*shouted*" at him on 1 April 2019 and had accused him of delays. Mr. Lynch is also said to have told the adjudication officer that he had never been treated like that in all of his years at the law firm.

12. The parties had given (unsworn) evidence on this issue at a hearing before the adjudication officer on 20 October 2020. It seems that there was a significant dispute at the hearing as to whether the relevant commercial transaction had been completed at 2 am or at 10.30 pm. Mr. Lynch had, seemingly, maintained the

position at the hearing that the transaction had been completed at the earlier time. The applicant insisted that the transaction had not closed until 2 am.

13. It has subsequently been conceded on behalf of the law firm that the applicant had been correct in her recollection. This concession is stated as follows in a letter dated 25 March 2021 to the adjudication officer from the solicitors acting on behalf of the law firm:

> "Since the matter was last heard our client has checked their records in respect of the transaction referenced in Ms Burke's letter, and we are happy to confirm that Ms Burke's position is correct, that the particular deal that Ms Burke worked on over 29/30 March 2019 closed at approximately 2 am, and that Mr Lynch was in his evidence confusing this with another matter that also closed on 30 March 2019.
>
> It was the intention of our client that Mr Geoff Moore, Managing Partner would clarify this matter at the outset of the forthcoming hearing prior to his giving evidence, but as Ms Burke has sought clarity on this matter at this juncture, we are happy to correct the record in this regard."

14. Prior to receipt of this letter, the applicant had made both an oral and a written request to the adjudication officer that relevant emails over a six-hour period on the night of 29 March 2019 be produced. The adjudication officer had declined this request, stating that she did not deem it necessary that these emails be produced to her at this time. The adjudication officer's letter went on to say that if, during the course of the (unfair dismissal) proceedings, it became apparent that she needed sight of these emails, then she would review the matter accordingly.

15. As discussed at paragraph 86 *et seq*. below, the applicant remains aggrieved at the manner in which the adjudication officer dealt with her request for the disclosure of the emails. It is now said that the content of these emails would have confirmed, first, the time at which the commercial transaction closed; and

secondly, that the delay in completing the transaction occurred because Mr. Lynch had been out at a social event marking the departure of a senior associate from the law firm.

16. The hearing of the claim for unfair dismissal had been fixed to resume on 31 March 2021, but had been rescheduled, at the request of the law firm, to 12 May 2021.

17. The Supreme Court delivered its judgments in *Zalewski v. An Adjudication Officer* on 6 April 2021. Shortly thereafter, on 16 April 2021, the Workplace Relations Commission published a notice on its website outlining certain procedural changes consequent upon the decision of the Supreme Court. Relevantly, the approach to be taken in claims where an adjudication officer determines that there is a serious and direct conflict of evidence between the parties is stated as follows:

> "Cases where there is a serious and direct conflict of Evidence
>
> Save where the investigation or hearing does not amount to the administration of justice (ie in industrial relations disputes), where an Adjudication Officer determines that there is a serious and direct conflict of evidence between the parties to a complaint before him/her, or one emerges in the course of the hearing, the Adjudication Officer will adjourn the hearing to await the amendment of the Workplace Relations Act 2015 and related enactments to grant to Adjudication Officers the power to administer an oath or affirmation, and provide for a punishment for the giving of false evidence.
>
> However, in order to minimise delay to the parties, unless a postponement is granted in advance, all scheduled hearings will commence in the normal manner and proceed to conclusion subject to the requirement that it will be necessary to adjourn where an adjudication officer concludes that it is necessary that an oath or affirmation be administered, as outlined above. Following the judgment, the fact that the parties indicate a view that there is no requirement for an oath to be administered is not

> determinative of the question. Adjudication Officers will determine whether they consider the oath to be necessary."

18. Approximately one month later, on 21 May 2021, a revised version of the notice was published on the Workplace Relations Commission's website. Relevantly, this version indicated that the following procedures would apply in respect of part-heard cases:

> "6. Cases part-heard as of 7 April 2021
>
> Where a case commenced prior to 7 April 2021 which has not concluded, and where, inevitably, evidence was heard without an oath or affirmation being administered, the Adjudication Officer will now have to consider whether a serious and direct conflict of evidence arises in the case.
>
> If the Adjudication Officer decides that there is such serious and direct conflict of evidence, then the case will* have to commence afresh before a different Adjudication Officer who will administer the oath or affirmation once the legislation is in place.
>
> Parties will have the opportunity to make submissions before any determination is made on this question. It is intended that part-heard cases will be scheduled for hearing to determine whether there is a serious and direct conflict of evidence. This will be done by the Adjudication Officer who already part-heard the matter and they will decide whether the case can be completed without an oath or affirmation or whether it must start afresh."
>
> *The word "*will*" has since been amended to "*may*".

19. The applicant's claim for unfair dismissal had been scheduled to resume on 12 May 2021. There is no transcript of the hearing on that date, but it seems that, having heard submissions from both sides on the implications of the Supreme Court's decision, the adjudication officer had indicated to the parties that there would have to be a fresh hearing of the claim for unfair dismissal by a different adjudication officer.

20. Some two weeks later, on 26 May 2021, the (original) adjudication officer wrote to the parties in the following terms:

> "You will recall that, at the adjudication hearing on 12th May 2021, I drew your attention to the Supreme Court judgment in *Zalewski v. Adjudication Officer and WRC, Ireland and the Attorney General [2021] IESC 24* where the Supreme Court found that, where there was a serious and direct conflict of evidence in a case before a WRC Adjudication Officer, evidence must be taken under oath. The Supreme Court found that to do otherwise would be unconstitutional.
>
> The judgment of the Supreme Court is reflected in the WRC web-notice Supreme Court judgment: Impact on WRC Adjudications, the Workplace Relations Act 2015 and related statutes - Workplace Relations Commission which contains information in relation to part-heard cases and cases where there is a direct and serious conflict of evidence.
>
> I would draw your attention to the section of the web-notice concerning part-heard cases which provides that, where a case commenced prior to 7 April 2021 and has not concluded, and where, inevitably, evidence was heard without an oath or affirmation being administered, the Adjudication Officer will now have to consider whether a serious and direct conflict of evidence arises in the case.
>
> I have noted the submissions you made in this regard at the hearing on 12th May 2021 and I have determined that there is a serious and direct conflict of evidence in this case. Accordingly, I am of the view that this case will have to commence afresh before a different Adjudication Officer who will administer the oath or affirmation once the enabling legislation is in place.
>
> I will now inform the Adjudication Services administration section that, in light of the unique circumstances which pertain, I am recusing myself from this case and requesting that will it be scheduled to recommence before a different Adjudication Officer. I am firmly of the view that, in light of the Supreme Court judgment, this is the safest and most prudent course of action.
>
> I sincerely regret any difficulty that this may cause to the parties, but it is outside our control. However, I wish to reassure you that, once the necessary legislation has been enacted, this case will be scheduled as a priority."

21. It should be explained that the applicant attaches great weight to the fact that the version of the public notice referenced in the above letter is the *revised* version which had been published a number of days after the hearing on 12 May 2021. The applicant had initially alleged, in her oral submission to this court, that the amended public notice represented an "*after the fact clean-up*" or a "*whitewashing*" of the adjudication officer's decision made at the hearing on 12 May 2021.

22. The applicant engaged thereafter in correspondence with the adjudication officer and with other officials of the Workplace Relations Commission. Given the emphasis that the applicant places on it, it is necessary to set out the content of one particular letter *verbatim*. This is a letter dated 14 July 2021 sent to the applicant by the Director General of the Workplace Relations Commission. The operative part of the letter reads as follows:

> "As you will be aware, once a case is assigned to an Adjudication Officer and she or he has seisin of the case: section 40 (8) of the Workplace Relations Act 2015 applies viz. *An adjudication officer shall be independent in the performance of his or her functions*.
>
> My understanding is that the Adjudication Officer concerned has indicated to the parties that it would best serve the interests of those concerned that she recuses herself and indeed advised both parties of her decision by letter dated 26 May 2021.
>
> Again, I understand that the Adjudication Officer has indicated that evidence was heard without an oath or affirmation being administered and has come to the view that there is a serious and direct conflict of evidence in this case. In light of the Supreme Court judgment in *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24, an oath or affirmation is required in such circumstances and, given the Adjudication Officer's decision to recuse herself, this matter must commence afresh before a different Adjudication Officer who will administer the oath or affirmation if she or he is of the opinion that such an oath is indeed required.

> The assigning of the complaint to a different Adjudication Officer is in train and the scheduling of the hearing will be done expeditiously once the enabling legislation is in place."

23. I return to discuss this letter at paragraph 75 below.

24. The within proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review on 19 July 2021. The High Court (Barr J.) granted leave on that date. A number of days thereafter, the applicant applied to the High Court (Simons J.) for a priority hearing of the proceedings. That application for priority had been made *ex parte*, and the court directed that the application be made on notice to the respondent and notice party on 30 August 2021. On that date, the hearing of the substantive application for judicial review was fixed for a one-day hearing on 20 October 2021. Prior to the hearing date, there was a further application for directions on 15 October 2021.

25. The substantive hearing of the application for judicial review commenced on 20 October 2021, but did not finish on that date. The hearing was adjourned for a number of days to allow the applicant time to review the transcript of the first day's hearing and to finalise her rebuttal points. The applicant completed her reply at a short hearing on 26 October 2021. Judgment was reserved until today's date.

26. It should be noted that the Workplace Relations Commission and the adjudication officer ("***the respondents***") have chosen to participate in these judicial review proceedings on a limited basis only. The submissions made on behalf of the respondents were directed principally to standing over the correctness of the guidance published on the Commission's website. The respondents largely left it to the notice party, i.e. the applicant's former employer, to respond to the other grounds of challenge.

27. The respondents' approach in this regard is informed by their view that the position of an adjudication officer is analogous to that of a judge of the District Court or the Circuit Court in respect of whose decisions judicial review proceedings have been taken. The respondents rely in this regard on, *inter alia*, the judgments of the Supreme Court in *Noonan Services Ltd v. Labour Court*, unreported, 14 May 2004, and *Miley v. Employment Appeals Tribunal* [2016] IESC 20; [2018] 1 I.R. 787.

WORKPLACE RELATIONS (MISCELLANEOUS PROVISIONS) ACT 2021

28. The procedures governing a claim for unfair dismissal have now been amended so as to confer an express statutory power to administer an oath and to prescribe penalties for false evidence. These amendments were introduced under the Workplace Relations (Miscellaneous Provisions) Act 2021.

29. Section 8 of the Unfair Dismissals Act 1977 now includes a new subsection, subsection (14), as follows:

> "(a) An adjudication officer may require a person giving evidence in proceedings under this section to give such evidence on oath or affirmation and, for that purpose, cause to be administered an oath or affirmation to such person.
>
> (b) A person who, in or for the purpose of proceedings under this section, gives a statement material in the proceedings while lawfully sworn as a witness that is false and that he or she knows to be false shall be guilty of an offence and shall be liable—
>
> (i) on summary conviction, to a class B fine or to imprisonment for a term not exceeding 12 months, or both, or
>
> (ii) on conviction on indictment, to a fine not exceeding €100,000 or imprisonment for a term not exceeding 10 years, or both.".

30. This amendment was commenced with effect from 29 July 2021.

DETAILED DISCUSSION

TEMPORAL LIMITS OF SUPREME COURT'S DECISION IN *ZALEWSKI*

31. The Supreme Court in *Zalewski* held, by a majority, that the determination of a claim for unfair dismissal involves the administration of justice and that the carrying out of this function by a non-judicial body is permissible under Article 37 of the Constitution of Ireland. The Supreme Court emphasised that the standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34.

32. Relevantly, the Supreme Court held that, in the case of a claim for unfair dismissal, the absence of any provision under the then legislation for the administration of an oath, or of any possibility of punishment for giving false evidence, was inconsistent with the Constitution of Ireland.

33. The applicant submits that the finding of unconstitutionality made in *Zalewski* should not apply to part-heard claims for unfair dismissal in respect of which evidence had been tendered prior to the date of the Supreme Court's decision on 6 April 2021. It is also submitted that the amendments made to the Unfair Dismissals Act 1977 by the Workplace Relations (Miscellaneous Provisions) Act 2021 do not have retrospective effect, i.e. in the sense of applying to extant claims.

34. The applicant advances three principal arguments in support of the proposition that the finding of unconstitutionality should not apply to part-heard claims, as follows. First, it is sought to distinguish a line of case law, running from *A. v. Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 I.R. 88 to *Wansboro v. Director of Public Prosecutions* [2018] IESC 63;

[2019] 1 I.L.R.M. 305, on the basis that the claim here is a civil matter not a criminal matter. The point is made that a claim for unfair dismissal does not engage the right to personal liberty.

35. Secondly, it is said that the finding of unconstitutionality has caused a *disadvantage* to the applicant in that the procedural law has changed halfway through her claim for unfair dismissal. This is contrasted with the position of the litigants in the earlier case law, who are said to have been seeking to rely on a finding of unconstitutionality to their benefit.

36. Thirdly, it is sought to draw a distinction between a finding of unconstitutionality based on *omission*, i.e. the absence of a legislative provision deemed to be constitutionally required, and a finding based on the inclusion of an offending provision.

37. For the reasons which follow, I have concluded that none of these arguments are well founded.

38. The submission that a finding that legislation is unconstitutional operates differently as between civil and criminal proceedings is not borne out by the case law. The Supreme Court held in *A. v. Governor of Arbour Hill Prison* that, when an Act is declared unconstitutional, a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society. Thus, whereas the default position is that a legislative provision which is held to be invalid should be regarded as void *ab initio*, this is subject to an exception in circumstances where the rights of the

parties have already been finally and conclusively determined in legal proceedings.

39. The Supreme Court considered that this exception applies to both civil and criminal proceedings. See, for example, the following passage from the judgment of Murray C.J. in *A. v. Governor of Arbour Hill Prison* (at paragraph 85 of the reported judgment):

> "Absolute retroactivity based solely on the notion of an Act being void *ab initio* so as to render any previous final judicial decisions null would lead the Constitution to have dysfunctional effects in the administration of justice. In the area of civil law it would cause injustice to those who had accepted and acted upon the finality of judicial decisions. Rights which had become vested in third parties as a consequence of such decisions would be put in jeopardy. […]".

40. Murray C.J. set out his conclusions on this issue as follows (at paragraphs 114 to 117 of the reported judgment):

> "It follows from the principles and considerations set out in the cases, which I have cited, that final decisions in judicial proceedings, civil or criminal, which have been decided on foot of an Act of the Oireachtas which has been relied upon by parties because of its status as a law considered or presumed to be constitutional, should not be set aside by reason solely of a subsequent decision declaring the Act constitutionally invalid.
>
> The parties have been before the courts, They have, in accordance with due process, had their opportunity to rely on the law and the Constitution and the matter has been decided. Once finality has been reached and the parties have in the context of each case exhausted their actual or potential remedies the judicial decision must be deemed valid and lawful.
>
> Save in exceptional circumstances, any other approach would render the Constitution dysfunctional and ignore that it contains a complete set of rules and principles designed to ensure 'an ordered society under the rule of law' in the words of O'Flaherty J.

> I am quite satisfied that the Constitution never intended to visit on that ordered society the potential unravelling of judicial decisions over many decades when a particular Act is found unconstitutional solely on the consideration of the *ab initio* principle to the exclusion of all others."

41. As appears, the exception to the void *ab initio* principle is expressly stated to apply to both civil and criminal proceedings which have reached finality.

42. In the present case, the applicant's claim for unfair dismissal had not concluded even at first-instance as of the date of the Supreme Court's decision in *Zalewski*. Even if it had been concluded at first-instance, there would have been a statutory right of appeal against the adjudication officer's determination to the Labour Court. It follows, therefore, that the applicant's claim for unfair dismissal does not come within the exception to the general rule.

43. By contrast, the logic of the applicant's argument is that the adjudication officer should now determine the outstanding claim for unfair dismissal by reference to the *unamended* version of the legislation, and pursuant to the very procedure which has been found to be unconstitutional. With respect, for the adjudication officer to have adopted this approach, in the particular circumstances of this case, would have resulted in an administration of justice being carried out and concluded in a manner which has been identified as insufficient to ensure that justice is done in cases where there is a serious and direct conflict of fact. (See further paragraph 63 *et seq*. below).

44. The second argument advanced by the applicant for distinguishing the *A. v. Governor of Arbour Hill Prison* line of case law seeks to characterise the finding of unconstitutional invalidity as a disadvantage to her. The disadvantage is described principally in terms of delay in the determination of the claim for

unfair dismissal, but it is also implied that a fresh hearing would confer some unarticulated advantage on her former employer.

45. The applicant's conception of the rights protected by the finding of constitutional invalidity is too narrow. As is apparent from the discussion at paragraphs 134 to 147 of the majority judgment in *Zalewski*, the procedural safeguards are intended to ensure that, in the case of a claim for unfair dismissal, the standard of justice administered under Article 37 of the Constitution of Ireland is not lower or less demanding than the justice administered in courts under Article 34. These procedural safeguards are necessary to permit a fair hearing and a proper application of the law. As such, the procedural safeguards are for the benefit of all parties to a claim for unfair dismissal: they are not the exclusive preserve of a claimant.

46. The finding that the previous procedure was deficient, and the subsequent introduction of amending legislation, is undoubtedly to the advantage of all sides, including the applicant. For the reasons explained at paragraph 63 *et seq*. below, it is essential that evidence in the applicant's unfair dismissal claim be given on oath and that both parties be entitled to defend their position by way of cross-examination on oath. It is inaccurate, therefore, to suggest that the applicant has been disadvantaged by the correction of the deficient procedure or that she is in a materially different position than the litigants in the earlier case law.

47. The third argument advanced by the applicant was that the decision in *Zalewski* did not apply to pending claims because the finding of unconstitutionality had been based on an *omission*, i.e. the absence of a legislative provision deemed to

be constitutionally required. Other than to assert the proposition, the applicant made no attempt to substantiate this argument.

48. There is no support to be found for this proposition in the case law, as is apparent from the detailed discussion of constitutional lacuna in legislation in the leading textbook on constitutional law, *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny, and Walsh editors, 5th edition, Bloomsbury Professional, 2018). The learned authors explain, at §§6.2.334 to 6.2.351, by particular reference to *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71; [2010] 1 I.R. 635, the approach that is taken to vindicate constitutional rights in the case of an omission of a procedural requirement from legislation. It is incorrect, therefore, to suggest that it is permissible to continue to rely on an unconstitutional procedure simply because a legislative amendment is required to correct it.

49. It is sufficient to dispose of the applicant's argument to observe that the Supreme Court in *Zalewski* has ensured the effectiveness of its finding, i.e. that the absence from the Unfair Dismissals Act 1977 of any provision for the administration of an oath is unconstitutional, by indicating that proceedings in certain types of claim are precluded pending legislative amendment. See the following passage from the majority judgment of O'Donnell J. (at paragraph 149):

> "These conclusions do not, moreover, appear to have any consequence for decisions already made in other cases under the 2015 Act, nor do they necessarily preclude current proceedings under the Act, even without amendment of the Act. The effect of this decision is that proceedings may be heard in public, and *it would appear that it is only in those cases where an adjudication officer concludes that it is necessary that an oath be administered that the flaw in the Act would preclude proceedings pending any considered amendment of the Act*.* However, I would hear the parties

> further on the question of the precise remedy, and the order to be made."
>
> *Emphasis (italics) added.

50. This approach is broadly analogous to the approach in *Carmody* as discussed in the passages from *Kelly: The Irish Constitution* cited above. Thus, the peculiarity that the unconstitutionality arose as a result of an *omission* from the legislation—far from telling against the judgment applying to pending claims for unfair dismissal—has precisely the opposite result.

51. The applicant submits that the phrase "*preclude proceedings pending any considered amendment of the Act*" should be interpreted as meaning that part-heard claims, which involve a serious and direct conflict of evidence, should merely be adjourned until the enactment of amending legislation. Now that the amending legislation has been enacted, it is submitted that such claims should proceed, with the (original) adjudication officers administering oaths as they deem necessary to any witnesses. It is further submitted that if the "*abortion*" of proceedings, i.e. the recommencement of hearings under a different adjudication officer, had been the judicial intention, then the reference to "*preclude ... pending*" makes no sense for there would be nothing to await in the amending legislation to affect the part-heard proceedings.

52. With respect, these submissions seek to read too much into this passage of the judgment. As is apparent from the passage itself, and more particularly from the subsequent ruling of the Supreme Court on 15 April 2021, *Zalewski v. An Adjudication Officer* [2021] IESC 29, the Supreme Court were careful to confine the remedy to the particular circumstances of that case. On the facts of *Zalewski*, the claim for unfair dismissal had been determined by the adjudication officer and an order of *certiorari* was sought setting aside that determination. The case

was not concerned with a part-heard claim, and the Supreme Court were not, therefore, required to address this specific contingency.

53. The passage at paragraph 149 of the majority judgment in *Zalewski* simply states that, in those cases where an adjudication officer concludes that it is necessary that an oath be administered, proceedings are precluded pending legislative amendment. This reflects the earlier finding that the structure created by a statutory requirement to give evidence on oath, and the possibility of prosecution for false evidence, is an important part of ensuring that justice is done in cases where there is a serious and direct conflict of evidence. The absence of such a provision from the Unfair Dismissals Act 1977 rendered it unconstitutional.

54. The passage does no more than to highlight the potential consequences of the finding of unconstitutionality for current proceedings then pending before the Workplace Relations Commission. The passage does not attempt to anticipate what form a legislative amendment might take: that is a matter for the Oireachtas alone (*N.V.H. v. Minister for Justice and Equality (No. 2)* [2017] IESC 82). Still less does the passage seek to prescribe what should happen in circumstances where an adjudication officer has already heard unsworn evidence which discloses a serious and direct conflict. Indeed, the passage makes no specific reference to part-heard claims at all.

55. In summary, the fact that the applicant's claim for unfair dismissal had not been subject to a final and conclusive determination prior to the delivery of the Supreme Court's decision in *Zalewski* has the consequence that the determination of the claim must now be made in accordance with the principles identified by the Supreme Court.

NO LEGITIMATE EXPECTATION OR IMPERMISSIBLE RETROSPECTIVITY

56. The correct interpretation of the amendments introduced under the Workplace Relations (Miscellaneous Provisions) Act 2021 is that they apply to cases, such as the applicant's part-heard claim for unfair dismissal, which had not been finally and conclusively determined. This does not entail the amending legislation having an impermissible retrospective effect; rather the amendments apply prospectively to cases which have not yet been completed and in respect of which the rights of the parties have not yet been determined.

57. The applicant cannot be said to have any legitimate expectation that her claim for unfair dismissal would be completed under the unamended, invalid version of the legislation. It is long since established that there can be no *legitimate* expectation that a public authority will act contrary to law (*Wiley v. Revenue Commissioners* [1994] 2 I.R. 160).

DECISION TO DIRECT THAT HEARING RECOMMENCE

The applicant's position

58. Without prejudice to her principal argument that the judgment in *Zalewski* does not apply to part-heard claims, the applicant submitted, in the alternative, that the decision to direct that the hearing commence afresh under a different adjudication officer is unlawful. There are a number of related strands to this submission. I address these in sequence below.

59. The first argument is that there is no "*serious and direct*" conflict of fact such as would justify the taking of evidence on oath. The applicant submitted that there is only one major conflict of evidence, and that is in relation to Mr. Lynch's evidence. It was further submitted that the dispute as to the circumstances

surrounding the completion of the commercial transaction on the night of 29 March 2019 is one which will be resolved by requiring Arthur Cox Solicitors to disclose emails for a six-hour period.

60. The applicant appeared to moderate this position somewhat during the course of her reply. In answer to a direct question from the court, the applicant accepted that the content of the emails (if disclosed) would have to be put formally to Mr. Lynch, and he would have to be afforded an opportunity to respond to same. The applicant then submitted that the appropriate course would be for the adjudication officer to serve a statutory notice directing Mr. Lynch to give evidence in the proceedings and to produce the emails sought by the applicant. (The power to serve such a statutory notice is provided for under section 8(13) of the Unfair Dismissals Act 1977). The applicant also accepted that an oath might be required in relation to the *other* witnesses on behalf of the law firm.

61. The second and third arguments advanced by the applicant overlap. It is submitted that—even if certain evidence must now be given on oath—there is no requirement for the entire hearing of the claim for unfair dismissal to recommence, still less that such a fresh hearing be before a different adjudication officer.

Findings of the court

62. This court is being invited to set aside a number of procedural decisions made by an adjudication officer in the course of the determination of a claim for unfair dismissal. It should be emphasised that it would be most unusual for this court, in the exercise of its judicial review jurisdiction, to intervene in the proceedings of any tribunal exercising a judicial function *prior* to the conclusion of those proceedings. I will return to discuss the rationale for this approach, and the

appropriate standard of review, at paragraph 109 *et seq*. below. For present purposes, it is sufficient to note that one practical reason for this approach is that this court, on an application for judicial review, will only have a limited appreciation of what precisely has occurred in the proceedings before that tribunal.

63. There has been scant evidence adduced before this court regarding the proceedings before the adjudication officer. What is apparent, however, from what little has been put before this court is that the claim for unfair dismissal has given rise to significant disputes of fact. It is the applicant's case that one of the principal witnesses on behalf of the law firm has deliberately given false evidence to the adjudication officer. The applicant put the allegation as follows in her oral submissions to this court:

> "Mr. Lynch gave false evidence. He sprung a story. I remember I was sitting in my seat and I was shocked in Lansdowne House on Lansdowne Road. He gave a complete mischaracterisation and false account of events and that account, Arthur Cox [had not] submitted a precis of his evidence, Arthur Cox submitted a legal submission of many pages and there was nothing in there warning me that Mr. Lynch had prepared a story and was going to tell lies in relation to the events of that day."

64. The applicant reiterated this allegation on a number of occasions, referring variously to the "*falsification of*" and the "*fabrication of*" Mr. Lynch's evidence. This is, obviously, a very serious allegation to level against any witness, but is especially grave when made against a practising solicitor.

65. This factual controversy can only be properly and fairly resolved by requiring both sides in the unfair dismissal claim to give evidence on oath and to submit to cross-examination on oath. As explained by O'Donnell J. in the majority judgment in *Zalewski* (at paragraph 144), the significance of evidence on oath is

not because of any importance attached to the procedure itself, but because it triggers the power to punish for false evidence and thus provides an incentive to truthful testimony. The judgment also reiterates (at paragraph 145) that the right to cross-examine the opposing party is fundamental to fair procedures, and is one of the rights without which no party could hope to make any adequate defence of their good name.

66. The suggestion that the factual controversy between the applicant and Mr. Lynch can be resolved simply by directing the disclosure of copies of emails exchanged over a six-hour period on the night of 29 March 2019 is incorrect. In the event that the production of the emails sought by the applicant were to be directed, the imperatives of fair procedures dictate that Mr. Lynch would then have to be given an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to the credibility or reliability of his evidence. (See, by analogy, *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63 (at paragraphs 90 to 93)). It is inevitable, therefore, that sworn evidence will be required.

67. It is also incorrect to suggest that there is only one major conflict of evidence and that is in relation to Mr. Lynch's evidence. The applicant herself has asserted that were it to be established that Mr. Lynch had given false evidence, then this would "*severely discount*" the authenticity and the reliability of the evidence of two other partners of the law firm.

68. Moreover, it is apparent that not only is there a factual dispute as to what occurred on the night of 29 March 2019, there is also a significant factual dispute as to what occurred in its aftermath. As explained at paragraph 11 above, two radically different versions of the conversation on Monday, 1 April 2019 have

been given to the adjudication officer, with one side describing it as respectful and the other saying that it involved shouting. It should also be noted that only part of the evidence intended to be called has been heard.

69. Having regard to the serious and direct conflicts of evidence which had emerged at the hearings before the adjudication officer to date, and having regard to the allegation that one witness has deliberately given false evidence to the adjudication officer, there can be no doubt but that the decision to discontinue the hearings, and to direct that this claim for unfair dismissal be heard and determined by a different adjudication officer is legally correct. The determination of the claim for unfair dismissal has potentially grave implications for both parties. It is essential that evidence be given on oath, and that both parties be entitled to defend their positions by way of cross-examination on oath.

70. Any suggestion that the rights of the respective parties would be vindicated by some sort of hybrid hearing, whereby the balance of the evidence would be given on oath, but the unsworn evidence received to date would remain on the record, is misplaced. The same standard—and the same potential penalties—must apply to all of the evidence to be given. It would place a decision-maker in an invidious position if he or she were invited to prefer unsworn evidence to sworn evidence.

71. In order to ensure confidence in the process, it was entirely reasonable to direct that the fresh hearing be conducted by a different adjudication officer. As correctly observed by the Workplace Relations Commission in its submissions to this court, it can readily be anticipated that the hypothetical "*reasonable man*" would have concerns that an adjudication officer, who has previously heard *unsworn* evidence in relation to a serious and direct conflict of fact, could already

have reached a view on the basis of that unsworn evidence, which view would not necessarily be displaced upon a hearing of the evidence on a sworn basis.

72. It will be a question of fact and degree in any particular case as to whether the nature and extent of the unsworn evidence heard by an adjudication officer is such as to mandate that a claim be heard by a different adjudication officer. The present case, however, lies at the far end of the spectrum in that the allegation is that one of the parties deliberately gave false evidence. It was eminently sensible for the (original) adjudication officer to take the precaution of ensuring that the fresh hearing be before a different adjudication officer who had not had any prior involvement. Even were this decision to be characterised as conservative, it certainly cannot be condemned as unreasonable or irrational. Indeed, there would be much stronger grounds for judicial review had, counterfactually, the (original) adjudication officer decided to retain seisin of such a contentious part-heard claim for unfair dismissal rather than recuse herself.

73. The fact that the hearing will have to recommence will inevitably result in some delay and this is, understandably, a cause of frustration to both sides. It is crucial, however, that justice is not only done, but that it is seen to be done. The determination of a claim for unfair dismissal involves the administration of justice. The Supreme Court emphasised in *Zalewski* that the standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34.

74. As reiterated by the Court of Appeal in *Commissioner of an Garda Síochána v. Penfield Enterprises Ltd* [2016] IECA 141, considerations such as administrative convenience, efficiency or delay cannot trump the requirement that justice is not only done, but is seen to be done. The decision that the claim

for unfair dismissal be heard by a different adjudication officer ensures that there cannot be any question mark over the integrity of the process. Any delay caused is proportionate to this overarching objective. The benefit to the parties in terms of the elimination of any possible perception of predetermination by prior participation significantly outweighs any disbenefit in terms of delay. The Workplace Relations Commission has already indicated that priority will be given to the applicant's claim and the scheduling of the fresh hearing will be done expeditiously.

75. Finally, it should be recorded that there is no basis whatsoever for the applicant's attempted criticisms of the adjudication officer personally. The applicant had alleged that the decision to recuse herself from the fresh hearing of the claim for unfair dismissal was a unilateral decision made by the adjudication officer, separate from any *Zalewski* considerations, and is "*proof*" that the adjudication officer was more concerned about the other party and the interests of the other party. The applicant sought to rely in this regard on a selective and misleading reading of the letter of 14 July 2021 from the Director General of the Workplace Relations Commission. The operative part of this letter has been set out in full at paragraph 22 above. As appears therefrom, the recusal and the direction of a fresh hearing are clearly referable to the judgment of the Supreme Court.

76. The applicant had also alleged, in her initial oral submissions to this court, that the adjudication officer, in deciding to recuse herself, had been acting in the interests of a major law firm. This reflects a plea in the statement of grounds that the "*only possible explanation*" for the abortion of the proceedings and the refusal to direct disclosure is "*a desire to protect the interests of*" Arthur Cox Solicitors. It has also been pleaded that a reasonable observer would question

whether the adjudication officer is recusing herself "*for personal reasons, e.g. because she does not wish to direct Arthur Cox to disclose critical evidence or to make a finding of unfair dismissal against a major law firm*".

77. It is entirely improper that these allegations should have been made: the adjudication officer's decisions are objectively justified and there is no basis for attributing any ulterior motive to her. The applicant subsequently withdrew the allegations on the second day of the hearing before me, stating that she wished to correct the record and to make it "*crystal clear*" that she is not alleging bias against either the adjudication officer or the Workplace Relations Commission.

CRITICISM OF THE COMMISSION'S PUBLISHED NOTICES

78. The applicant has sought to criticise the content of the various iterations of the notices published on the Workplace Relations Commission's website following the decision in *Zalewski*. The criticism, as pleaded in the statement of grounds, had been to the effect that the Workplace Relations Commission had applied an incorrect interpretation of the Supreme Court's decision.

79. In the course of oral submission, however, the applicant sought to advance an additional argument as follows. It was alleged that the notice published on the website was amended on 21 May 2021 to give foundation retrospectively to the adjudicator's decision to direct that the applicant's claim for unfair dismissal be heard afresh by a different adjudication officer. The applicant characterised this as a "*whitewash*" by the Workplace Relations Commission of an unlawful decision by the adjudication officer, and as a deliberate change of policy intended to affect and frustrate her proceedings.

80. With respect, there is no evidential basis for these allegations. The registrar of the Workplace Relations Commission, in her affidavit of 15 September 2021, has explained the genesis of the revised version of the guidance notice published on the Commission's website as follows:

> "13. I also emphasise to this Honourable Court that the WRC is an organisation driven by a commitment to excellence and in so doing the WRC strives to deliver a service which is fair and effective; in deliberating the implementation of the Supreme Court's judgment, the WRC was acutely cognisant of the impact on parties. I also say and believe that the Guidance arrived at to deal with part-heard cases was the product of a good faith and faithful interpretation of the judgments of the Supreme Court.
>
> 14. Consequently, on 16 April 2021, the day after the Supreme Court's ruling, the WRC published the first version of the Guidance online, updating parties on the outcome of the Supreme Court judgments and the immediate practical implications for parties. The WRC reflected on the judgments and considered its practical implications, which warranted a more detailed version of the Guidance and an updating of the Guidance insofar as related to part-heard matters in a version published on 21 May 2021.
>
> 15. I note that the Applicant seems to imply at Ground (E)(35) of the Statement of Grounds that the amendment to the Guidance published on 21 May 2021 arose as a result of the oral arguments made by the Applicant on 12 May 2021 and pleads that it appears that the WRC's interpretation of *Zaleswski* changed after the Applicant's oral arguments on 12 May 2021. This suggestion is incorrect. The initial version of the Guidance was published the day after the ruling to update parties at that time, but that version necessitated further particulars once the WRC had an opportunity to consider all of the logistical implications of the judgments. I also confirm that I had already envisaged the amendments for part-heard hearings that were introduced in the version of the Guidance published on 21 May 2021 prior to oral arguments being made by the Applicant in her case on 12 May 2021."

81. As appears, the registrar refutes any suggestion that the Workplace Relations Commission's interpretation of *Zalewski* changed after the applicant's oral arguments on 12 May 2021. The applicant has not sought to cross-examine the registrar on her affidavit.

82. More generally, it should be explained that an adjudication officer is independent in the exercise of his or her functions. Whereas the Workplace Relations Commission provides logistical support and training to adjudication officers, the notices published on the Commission's website in May 2021 did not have any statutory force and were not binding on the adjudication officers. The determination of any particular claim for unfair dismissal—and the making of procedural rulings in respect of such claim—is ultimately a matter for the adjudication officer alone. The adjudication officer to whom the applicant's claim for unfair dismissal had been referred had full jurisdiction to make the decisions that she did, and this jurisdiction was not contingent on the existence of any published policy by the Workplace Relations Commission.

83. The statement of grounds does not seek an order setting aside the published guidance. Indeed, given that the published guidance does not have statutory force, there might well be a question mark as to whether the guidance is amenable to judicial review. At all events, I am satisfied that the version of the guidance as revised on 30 July 2021 correctly identifies the implications of the decision in *Zalewski* for part-heard claims of unfair dismissal. This version of the guidance differs slightly from that published on 21 May 2021 in that it emphasises an adjudication officer's discretion to direct a fresh hearing, by changing the word "*will*" to "*may*" in the sentence "*If the Adjudication Officer*

decides that there is such serious and direct conflict of evidence, then the case will have to commence afresh before a different Adjudication Officer […]".

84. The fact that this additional change was introduced subsequently does not affect the validity of the decision made by the adjudicator on 12 May 2021 and confirmed in her letter of 26 May 2021. This is because, as explained above, the jurisdiction to direct a fresh hearing was not contingent on the existence of any published policy. For the reasons set out at paragraph 63 *et seq*. above, the decision to discontinue the hearing, and to direct that this claim for unfair dismissal be heard and determined by a different adjudication officer, is legally correct.

85. Finally, the applicant sought to make something of the supposed failure of the Workplace Relations Commission to adduce statistics in respect of the precise number of part-heard claims which had been remitted to a fresh hearing. With respect, the legality of the decision to remit the applicant's claim falls to be assessed solely by reference to the particular circumstances of that claim. The fact—if fact it be—that only a small proportion of claims may have been remitted to a fresh hearing does not affect this analysis.

PRODUCTION OF DOCUMENTS

86. The applicant has sought an order for *mandamus* compelling the (original) adjudication officer to direct the applicant's former employer to produce certain documents, namely, emails for a six-hour period on the night of 29 March 2019.

Procedural history

87. The applicant had first sought the production of these documents by written request to the adjudication officer dated 23 March 2021. The written request

was made some six months after the hearing on 20 October 2020 at which the evidential dispute as to the events on 29 March 2019 and as to the conversation the following Monday (1 April 2019) had arisen.

88. The adjudication officer responded to the written request by letter dated 24 March 2021 as follows:

> "I have considered your request for me to require the Respondent to produce all emails pertaining to the deal that was being closed on 29th and 30th March 2019. I do not deem it necessary that these emails are produced to me at this time.
>
> If, during the course of the proceedings, it becomes apparent that I need sight of these emails, then I will review the matter accordingly."

89. Thereafter, the applicant's former employer confirmed by letter dated 25 March 2021 that the applicant had been correct in her recollection in respect of the timing of the commercial transaction. The operative part of this letter has already been set out at paragraph 13 above.

90. The applicant reiterated her request for the production of the emails by letter dated 26 March 2021, saying that she was challenging in full Mr. Lynch's evidence in respect of the events that occurred on 29 and 30 March 2019, and that it was essential that the emails be produced to establish the facts of the matter.

91. By letter of the same date (26 March 2021), the adjudication officer confirmed that her position remained unchanged as follows:

> "Further to your letter to me of 26th March 2021, I wish to confirm that my position with regard to your request for me to require the Respondent to produce certain emails remains unchanged from my position as stated in my letter to you of 24th March 2021."

92. The applicant, by letter dated 29 March 2021, made a detailed submission as to why she considered that the production of the emails was necessary.

93. The adjudication officer replied by letter dated 31 March 2021, stating that she would address the matters raised at the outset of the hearing on 31 March 2021. As it happens, the hearing date was postponed at the request of the applicant's former employer. Thereafter, matters were overtaken by events in that the adjudication officer indicated at the resumed hearing on 12 May 2021 that the claim for unfair dismissal would have to be heard afresh.

Applicant's submissions

94. The applicant has made very detailed and comprehensive submissions on this issue. The court has carefully considered all of the submissions made. The summary below is not intended to be exhaustive, but rather is intended to assist the reader in understanding the gravamen of the applicant's complaint.

95. In brief outline, the applicant has argued that an adjudication officer is under an obligation to give the parties to a complaint the opportunity to present any evidence relevant to that complaint. Such evidence is not limited to what the adjudication officer *herself* considers relevant, but extends to "*any evidence*" relevant to the dispute. It is further submitted that an adjudication officer does not have an absolute, unqualified or arbitrary power to grant or refuse disclosure of evidence at her will.

96. The refusal to direct the production of the emails is said to represent, in effect, a breach of the rule of *audi alteram partem*, and to be so serious as to consist of a "*complete failure*" on the part of the adjudication officer to follow fair procedures.

97. It is further submitted, *inter alia*, that the emails are crucial to determining the facts of the dismissal, and represent the best evidence that can be obtained in relation to the circumstances of 29 and 30 March 2019.

98. It is then alleged that, by her refusal to direct or even request disclosure, the adjudication officer blatantly favoured the applicant's former employer, Arthur Cox Solicitors, and that the "*only possible explanation for the refusal is a desire to protect the interests and position of Arthur Cox*".

99. As explained at paragraphs 75 to 77 above, there is no basis whatsoever for the applicant's attempted criticisms of the adjudication officer personally, and the applicant subsequently withdrew this allegation on the second day of the hearing before me.

Findings of the court

100. Section 8(13)(a) of the Unfair Dismissals Act 1977 provides as follows:

> "An adjudication officer may, by giving notice in that behalf in writing to any person, require such person to attend at such time and place as is specified in the notice to give evidence in proceedings under this section or to produce to the adjudication officer any documents in his or her possession, custody or control that relate to any matter to which those proceedings relate."

101. The next subsections, subsections 8(13)(b) and (c), confer certain immunities and privileges on a person served with such a notice, and make it an offence, *inter alia*, to fail or refuse to produce any document to which the notice relates.

102. As is apparent, a decision as to whether or not to direct the production of documents involves the exercise of a statutory discretion by an adjudication officer. This discretion must, of course, be exercised in accordance with law. Moreover, the exercise of this discretion is, in principle, amenable to judicial review before the High Court.

103. It is important, however, to recognise the gravity of what the applicant is asking this court to do. The applicant seeks to have this court intervene in a part-heard claim for unfair dismissal and to make a significant decision as to how the claim is to be conducted. This is done against a background where the applicant has put only the most limited evidence before the court as to what has occurred before the adjudication officer.

104. For the reasons which follow, I am satisfied that this is not an appropriate case in which to grant mandatory relief of the type sought by the applicant.

105. First and foremost, any complaint in respect of the production of documents has been rendered moot. This court has upheld the validity of the decision that the hearing of the applicant's claim for unfair dismissal should commence afresh before a different adjudication officer. The new adjudication officer will have had no prior involvement in the claim, and it will be open to the applicant to make a fresh request for the production of documents if she considers it necessary. The new adjudication officer will not be bound by any views—preliminary or otherwise—expressed by the original adjudication officer.

106. Secondly, it is obvious from the exhibited correspondence that the original adjudication officer had not reached a concluded view in relation to the production of documents. The adjudication officer had expressly stated that she would review the matter if, during the course of the proceedings, it became apparent that she needed sight of the emails. The adjudication officer had also indicated that she would address the detailed written submission made by the applicant in her letter of 29 March 2021. Matters were, however, overtaken by events.

107. Having regard to the fact that it remained open to the adjudication officer to direct the production of documents, it would be premature to grant judicial review. See, by analogy, *Huntstown Air Park Ltd v. An Bord Pleanála* [1999] 1 I.L.R.M. 281.

108. Thirdly, judicial review will not normally be granted in circumstances where, first, the decision-making at first instance has not concluded, and, secondly, there is a full right of appeal against the first-instance determination. As this point has relevance to the other relief sought in these judicial review proceedings, it is discussed under a separate, dedicated heading below.

JUDICIAL REVIEW OF INTERIM PROCEDURAL RULINGS

109. For the reasons set out already, I have concluded that the applicant's challenge both to (i) the decision that the claim for unfair dismissal be heard afresh by a different adjudication officer, and (ii) the decision not to direct the production of documents, should be dismissed. This is sufficient to dispose of the within proceedings.

110. It is, however, apposite to make some general observations as to the appropriateness of seeking judicial review of interim procedural rulings made by an adjudication officer in the context of a claim for unfair dismissal. Judicial review is a discretionary remedy and the circumstances in which relief will be refused include those where the application is premature or where there is an adequate alternative remedy prescribed. In most instances, a party will be expected to await the substantive determination of a claim for unfair dismissal before contemplating an application for judicial review. It will only be in exceptional cases that it is appropriate to challenge an interim procedural ruling

by way of judicial review. Even in the case of a substantive determination, a party will normally be expected to exhaust their statutory right of appeal to the Labour Court (with a right of appeal thereafter to the High Court on a point of law).

111. The significance of the existence of an appeal to the Labour Court is unaffected by the finding of the Supreme Court in *Zalewski* to the effect that an adjudication officer is exercising a limited judicial function for the purpose of Article 37 of the Constitution of Ireland. Even in the case of a judicial body, such as the District Court or the Circuit Court, the existence of a statutory right of appeal is something to be considered in determining whether or not judicial review is appropriate. See, generally, the judgments of the Supreme Court in *Sweeney v. Fahy* [2014] IESC 50 and *E.R. v. Director of Public Prosecutions* [2019] IESC 86.

112. (As an aside, it should be noted that Mr. Zalewski had not been required to exhaust the procedures under the legislation in circumstances where he challenged the constitutionality of that very legislation: *Zalewski v. An Adjudication Officer* [2019] IESC 17; [2019] 2 I.L.R.M. 153).

113. There are both principled and practical reasons as to why the statutory procedures (including a statutory right of appeal) should be exhausted before recourse is had to the High Court by way of an application for judicial review. As to principle, the Supreme Court has held, in *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381, that where the Oireachtas has provided a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the courts, *certiorari* should not issue when use of the statutory procedure for the correction of error is adequate (and, indeed, more

suitable) to meet the complaints on which the application for *certiorari* is grounded. Whereas this principle was stated by reference to a form of quasi-judicial decision-making, I am satisfied that similar logic applies to proceedings before an adjudication officer under Article 37. See, by analogy, the approach to criminal proceedings taken in *E.R. v. Director of Public Prosecutions* [2019] IESC 86.

114. The practical reasons underlying this approach include, first, that the High Court's jurisdiction on judicial review is much narrower than that of the Labour Court on a *de novo* appeal; and, secondly, that the High Court will not have a full appreciation of the "*nuts and bolts*" of the proceedings before an adjudication officer. An adjudication officer will normally be much better placed to make procedural rulings. This is not to say that such procedural rulings are immune to appeal or review, but rather to highlight the practical difficulty faced by the judicial review court. In the present case, for example, this court has only been provided with the barest outline of what evidence has been heard before the adjudication officer. It would have been very difficult for this court to reach an informed view on whether the interim decision not to direct the disclosure of the emails was unreasonable or unfair in the absence of a fuller understanding of the detail of the dispute between the parties.

115. Finally, it should be emphasised that, in deciding whether an interim procedural ruling should be set aside, the court of judicial review is concerned with the *legality* of the ruling. It is not the role of the court of judicial review to micromanage the proceedings before an adjudication officer. The court would have to be satisfied that the ruling was manifestly unfair, unreasonable or

otherwise made without jurisdiction before it could set aside an interim procedural ruling.

PARTIES' RELIANCE UPON EXTRANEOUS MATTERS

116. The scope of the High Court's jurisdiction in judicial review proceedings is confined to the grounds specified in the order granting leave to bring judicial review proceedings or any additional grounds arising from an amendment to that order (*A.P. v. Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729).

117. The applicant and the notice party have both raised issues in their affidavits which go well beyond the issues as delimited by the order granting leave. These extraneous matters included, *inter alia*, an allegation that the adjudication officer had acted improperly and in breach of the Commission's postponement guidelines in granting an adjournment of a five-day hearing scheduled for December 2020, and a counter allegation by the notice party that the applicant and members of her family had behaved unacceptably in the conduct of the hearings before the adjudication officer and had subjected the officer to abusive and oppressive behaviour. None of these matters are relevant to the issues which this court has to decide, and have, accordingly, been excluded from consideration.

SUMMARY OF CONCLUSIONS

118. The procedural requirements identified by the Supreme Court in its landmark decision in *Zalewski v. An Adjudication Officer* [2021] IESC 24; [2021] 32 E.L.R. 213 apply, in principle, to pending claims for unfair dismissal which

had not been subject to a final and conclusive determination prior to the date of the delivery of that judgment. It follows, therefore, that the applicant's part-heard claim for unfair dismissal is subject to those procedural requirements, and now falls to be determined by reference to the amended procedures introduced under the Workplace Relations (Miscellaneous Provisions) Act 2021.

119. Having regard to the serious and direct conflicts of evidence which had emerged at the hearings before the adjudication officer to date, and having regard to the allegation by the applicant that one witness has deliberately given false evidence to the adjudication officer, there can be no doubt but that the decision to discontinue the hearings, and to direct that this claim for unfair dismissal be heard and determined by a different adjudication officer, is legally correct. The determination of the claim for unfair dismissal has potentially grave implications for both parties. It is essential that evidence now be given on oath, and that both parties be entitled to defend their positions by way of cross-examination on oath. (See paragraphs 62 to 68 above).

120. In order to ensure confidence in the process, it was entirely reasonable to direct that the fresh hearing be conducted by a different adjudication officer who has not heard any of the *unsworn* evidence previously tendered. Considerations such as administrative convenience, efficiency or delay cannot trump the requirement that justice is not only done, but is seen to be done. (See paragraphs 69 to 77 above).

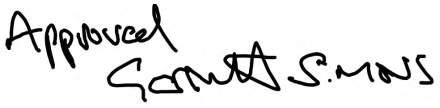
FORM OF ORDER

121. The application for judicial review is dismissed in its entirety. The parties are directed to file written legal submissions, in the following sequence, as to the

appropriate costs order, if any, to be made. The respondents and the notice party are to file their submissions within two weeks of today's date; the applicant will have a further two weeks thereafter to file her submissions. The case will be listed before me on 16 December 2021 at 10.30 am for oral argument on costs.

Appearances

The applicant represented herself
Catherine Donnelly, SC and Sharon Dillon-Lyons for the respondents instructed by the Workplace Relations Commission
Peter Ward, SC and Mairead McKenna for the notice party instructed by Daniel Spring & Co.



THE HIGH COURT

[2016 No. 29JR]

BETWEEN

CAPITAL FOOD EMPORIUM (HOLDINGS) LIMITED

(FORMERLY CAPITAL FOOD EMPORIUM LIMITED)

APPLICANT

– AND –

JOHN WALSH

FIRST RESPONDENT

– AND –

THE EMPLOYMENT APPEALS TRIBUNAL

SECOND RESPONDENT

– AND –

THE EMPLOYMENT APPEALS TRIBUNAL

SECOND RESPONDENT

– AND –

MAUREEN STEWART

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 15th December, 2016.

I. Key Questions Arising

1. If a party and its representative do not turn up for an official hearing and the presiding officer is satisfied that there has been due notification of the hearing, is it a breach of constitutional or natural justice, or the *audi alteram partem* principle, for the hearing to proceed? If a party participates in proceedings to the extent that it acknowledges and accepts that those proceedings were rightly brought against it, can the party later allege that the proceedings were not so brought? These are key issues arising for resolution in the within application.

II. Background Facts

i. Ms Stewart's Work History.

2. In 1987, Ms Stewart started working at the restaurant in Arnott's department store on Henry Street, in Dublin City Centre. She commenced work as a catering assistant and rose ultimately to become a supervisor/cashier. In May, 2011, the restaurant in Arnott's was taken over and Ms Stewart became an employee of Capital Food Emporium Limited. Difficulties arose in the relationship between employee and employer which Ms Stewart, as will be seen later below, has previously established as having resulted in her constructive dismissal in February, 2012. Following her departure, Ms Stewart invoked the assistance of union officials at SIPTU in a bid to see what could be done about the state of affairs that had arisen between herself and her employer.

ii. The Workplace Relations Complaints Form.

3. With the benefit of SIPTU's advice, on 8th March, 2012, Ms Stewart completed a workplace relations complaints form in which she sought a recommendation under s.8 of the Unfair Dismissals Act 1977 from Mr Walsh, the first respondent, a Rights Commissioner. Among the details provided in the form are the following:

> *"Employment Details....*
>
> | | |
> |---|---|
> | *My Work Address:* | *Capital Foods Imporium* |
> | *Address 2:* | *Arnotts PLC* |
> | *Address 3:* | *Henry Street* |
> | *Address 4:* | *DUBLIN 1* |
> | *Contact Name:* | *Mr Michael Andrews....* |
>
> *Respondent/Employer's Full Legal Details*
>
> | | |
> |---|---|
> | *Name/Company:* | *Mr Michael Andrews, General Manager* |
> | *Trading as...:* | *Clodagh McKenna Restaurants* |
> | *Address 1:* | *Arnotts PLC* |
> | *Address 2:* | *Henry Street* |
> | *Address 3:* | *Dublin 1."* |

4. The workplace relations complaints form was submitted under cover letter of 12th March, 2012, from SIPTU to the Rights Commissioner Service. On the same date, SIPTU sent a copy of the form to the following person/address:

> Mr Michael Andrews
>
> Capital Food Imporium

t/a Clodagh McKenna Restaurants

Arnotts PLC

Henry Street

Dublin 1.

iii. Initial interactions with the Rights Commissioner Service.

5. On 22nd March, 2012, the Rights Commissioner Service wrote to SIPTU acknowledging receipt of Ms Stewart's complaint. On the same day, the Rights Commissioner wrote to advise the other side that, absent objection (possible under s.7(3)(b) of the Unfair Dismissals (Amendment) Act 1993), it would proceed to an investigation of the complaint made. This letter, headed "*Re Clodagh McKenna Restaurants/Maureen Stewart*" was sent to the following person/address

Mr Michael Andrews

General Manager

Clodagh McKenna Restaurants

Arnotts PLC

Henry Street

Dublin 1.

6. On 5th April, 2012, an entity, it seems a partnership, known as 'ESA Consultants', whose official notepaper bears the following rubric "*employee relationship management | health and safety, employment law | safety education and training*" wrote to the Rights Commissioner Service. It is not clear to the courts whether ESA is a specialist firm of

solicitors or is an entity offering some alternative form of workplace support services. However, under the notably generic heading "*Re: Clodagh McKenna Restaurants/Maureen Stewart*", ESA indicated as follows in its letter of 5th April:

> "*We refer to your letter dated 22nd March 2012 regarding the above matters and we advise that we act on behalf of Capital Food Emporium Ltd.*
>
> *We kindly request that any further correspondence in relation to these matters be issued directly to our offices at the above address. Please find enclosed an acceptance to a Rights Commissioner's Investigation...*".

7. What would any rational person make of such a letter? It appears to the court that any rational person would understand this letter to mean that when it came to Ms Stewart's complaint her employer was satisfied for the Rights Commissioner to proceed with the investigation at hand and that ESA Consultants were dealing with matters for the employer. A professional lawyer who read the letter would doubtless (a) have noted that ESA Consultants expressly stated themselves to be representing Capital Food Emporium Limited and (b) 'put two and two together' and deduced, correctly, that the legal identity of Ms Stewart's employer was Capital Food Emporium Limited. But we are not all lawyers; and such a deductive exercise would not have advanced matters in any event. After all, the party against whom it was sought to make complaint (Ms Stewart's employer) had been notified of the complaint, had appointed ESA to act on its behalf in the complaints process, and had indicated to the Rights Commissioner Service that it had no objection to the matter proceeding to investigation.

8. On 26th June, 2012, it appears that the Rights Commissioner Service wrote to both SIPTU and ESA indicating that the investigation of Ms Stewart's complaint would be heard at 10 a.m. on 2nd August, 2012, at a stated venue. On 2nd August, 2012, Ms Stewart turned up for the hearing, presumably with her SIPTU representative. However, no-one turned up for the other side. This, the court was advised by counsel for Ms Stewart at hearing, is not un-typical, though off-hand it would seem a little un-typical for professional consultants not to appear for a client at a hearing. Be that as it may, however, on 2nd August, 2012, the Rights Commissioner satisfied himself that the standard notification letter had been sent to ESA and had not been returned by the postal authorities. Having so satisfied himself, the Rights Commissioner then proceeded to hear Ms Stewart's complaint. It was suggested before this Court that rather than just relying on the 'paper trail' before him, the Rights Commissioner could and should have rung ESA to ask if they had got the letter of 26th June and enquired whether they were coming. There was and is no obligation of any nature on a Rights Commissioner so to do. The Rights Commissioner was fully entitled to have regard to the paper record, and he was fully entitled to proceed to hearing having satisfied himself, from the paper record, that a suitable letter of notification had been sent to ESA and not returned by the postal authorities.

iv. After the Rights Commissioner's Hearing.

9. After the hearing of 2nd August, 2012, there appear to have been continuing efforts by SIPTU to contact ESA, who proved strangely uncontactable. Eventually, on 15th August, 2012, a SIPTU official wrote the following letter to the Rights Commissioner under a heading that stated the relevant case number:

"*Dear Mr Walsh*

Further to the above hearing where neither the employer, nor their Representative showed at the hearing.

I have tried on several occasions to contact the Company Representatives ESA Consultants and have repeatedly got no answer from their telephone number [number stated] *being told number not in use.*

I would appreciate if you would issue your recommendation on this matter. The Company is Capital Food Emporium Limited T/A Clodagh McKenna Restaurants. The [affected SIPTU] *member's name is Ms Maureen Stewart.*

Thanking you..."

10. On 6th September, 2012, the Rights Commissioner issued his recommendation. This notes at the outset that "*The Rights Commissioner Service of the Labour Relation Commission advised the employer of the date time and venue of the hearing. Neither the employer nor a representative on their behalf attended the hearing.*" After going through the details of Ms Stewart's complaint, the Rights Commissioner made the following recommendation:

"*RECOMMENDATION*

Based on the uncontested evidence presented at the hearing, I find that the employer constructively dismissed the claimant. It is clear from the evidence submitted by the claimant that the employer failed to address the claimant's legitimate grievance

resulting in causing the claimant stress and isolation in her workplace. The employer also failed to engage with the claimant in a positive manner in relation to her grievances, leaving her no choice but to resign from her employment after 24 years' service.

I recommend that the employer pay to the claimant compensation in the sum of €26,000 for breaches of the Unfair Dismissals Acts 1977-1993.

This sum should be paid within 6 weeks of the date of this recommendation."

11. On 10th September, 2012, ESA, who had, by this time, clearly received the text of the recommendation, wrote to the Rights Commissioner Service and under the notably generic heading "*Re: Maureen Stewart/Clodagh McKenna Restaurants t/a Capital Food Emporium*" sought a fresh hearing of matters. The court cannot but note in passing that there is no confusion in this letter as to what matter the recommendation was concerned with. Sender and recipient each knew exactly what matter was in issue. And the heading does not seek to be legally exact in referring to Capital Food Emporium Limited. The letter states, *inter alia*, as follows:

"*We refer to our telephone conversation on Friday 7th September 2012 regarding the above matters and the Rights Commissioner's decision.*

We advise that despite the Rights Commissioner Service's records indicating a letter of notification of a hearing date was issued to our offices on 26th June 2012 we confirm that this office and our Client have not received same. We are disappointed

with this fact as we have received previous correspondence from the Labour Relations Commissioner notifying us of scheduled or adjourned hearings and we find it unusual that we have not received this letter of the 26th June 2012. We would ask for the Commissioner's understanding and request that another hearing take place."

12. So far as this last request was concerned, this was not possible. The Rights Commissioner Service wrote to ESA on 12th September, 2012, indicating that the letter of 26th June had been sent and that there was no jurisdiction on the part of the Rights Commissioner to convene a new hearing following the issuance of his recommendation. This letter reads, *inter alia*, as follows:

"*...The notification of the hearing was issued on 26th June 2012 (copy enclosed). To date the correspondence to your office has not been returned by An Post.*

Please note that once the Rights Commissioner issues his/her findings they do not have the jurisdiction to schedule another hearing in the matter.

If the employer wishes to proceed further, the Recommendation can be appealed to the Employment Appeals Tribunal within 6 weeks of the issue of the Recommendation."

13. The right of appeal to which reference is made arose under the then s.9 of the Unfair Dismissals Act 1997-2007.

v. Capital Food Emporium Limited Commences an Appeal.

14. On 21st September, 2012, ESA wrote to the Employment Appeals Tribunal under the heading "*RE: Ms Maureen Stewart and Capital Food Emporium Limited, Appeal against Rights Commissioner's Recommendation*" indicating that ESA had been instructed by Capital Emporium Limited to appeal the Rights Commissioner's recommendation. Curiously, and perhaps somewhat discourteously, neither Ms Stewart nor SIPTU were copied on this letter. But what is truly notable is that there was clearly no confusion on the part of Capital Emporium Limited that it was the party to whom the recommendation had been directed and that it was the party which enjoyed a consequent right of appeal. Indeed, in the appeal form which accompanied the letter, Capital Emporium Limited stated itself to be the affected employer, Ms Stewart to be the party against whom the appeal was to be brought, and under the hearing "*The Reasons for My Appeal Are*" addressed substantive concerns regarding the actions of the Commissioner that did not in any way touch upon or flag any confusion arising regarding the identity of the parties involved. Thus the form reads:

> "*THE REASONS FOR MY APPEAL ARE...*
>
> [The text that follows is written by hand onto the form]. *In the first instance neither the Employer or their advisers, ESA received notice of the hearing date. Nonetheless, the Commissioner failed to take into consideration the fundamental principles of industrial relations and employment legislation. The Claimant is required to prove that her circumstances of employment were such that it was unsafe, so detrimental to her welfare, that having exercised all her rights to include but not limited to raising her complaints before the Labour Relations Commission under the Industrial Relations Acts and having thereof exhausted all avenues, was left with no alternative but to resign from her position. These are well established principles that have been*

examined at both common law and civil law and case precedent. It should be noted that the claimant has had union support and representation at all material times. She had left the Company on other occasions and was accepted back. The nature of her complaints as to why she left do not support a claim that her employment and the conditions therein were so grievous and repugnant that she had no alternative but to leave her employment. We shall provide further and better particulars in due course and we are seeking that the Division will set aside the Commissioner's decision".

15. An appeal to the Employment Appeals Tribunal, such as that which ESA, in its letter, indicated its client to be desirous of now commencing, takes the form of a *de novo* appeal on the merits. Thus the appeal very much represents a 'second bite at the apple' so far as an appellant is concerned. As in the covering letter, there is no mention in the above-quoted extract from the form that there is any doubt of any nature as to why Capital Food Emporium Limited has been brought into matters. On the contrary, Capital Food Emporium Limited, acting through ESA, knows perfectly well (i) what is going on, (ii) who Ms Stewart is, and (iii) what it is seeking to achieve via its appeal to the Employment Appeals Tribunal.

vi. Ms Stewart Seeks an Implementation Decision.

16. Unaware that an appeal had been brought by Capital Food Emporium Limited, SIPTU wrote on behalf of Ms Stewart to the Employment Appeals Tribunal on 1st November, 2012, (i) noting that (a) Ms Stewart was satisfied to accept the Rights Commissioner's decision, and (b) that the time for an appeal had passed, and (ii) seeking an implementation decision of the Tribunal in respect of the Rights Commissioner's recommendation. Subsequently, Ms Stewart became aware of Capital Food's appeal when, in a letter dated 27th November, 2012

and sent to her by the Employment Appeals Tribunal under the heading "*Appeal of CAPITAL FOOD EMPORIUM LIMITED against the Recommendation of a Rights Commissioner in the case of: MAUREEN STEWART –V- CAPITAL FOOD EMPORIUM LIMITED*", the Employment Appeals Tribunal indicated to Ms Stewart that an appeal was being brought by Capital Food Emporium Limited against the Rights Commissioner's recommendation of 6th September, 2012. By letter of 20th December, 2012, SIPTU wrote to the Employment Appeals Tribunal for Ms Stewart and entered an appearance in the appeal on her behalf. The formal notice of appearance contains in prominent text the following words "*NOTICE OF APPEARANCE by a party against whom a claim has been lodged under the legislation ticked above* [the Unfair Dismissals Acts 1977 to 2007] by CAPITAL FOOD EMPORIUM LIMITED *against MAUREEN STEWART*".

vii. Capital Food Emporium Limited Withdraws Its Appeal.

17. Just over a year after the appeal was lodged by Capital Food Emporium Limited, the Employment Appeals Tribunal, in a letter of 15th November, 2013, wrote to Ms Stewart advising that the said appeal would be heard at a stated venue at 10.30 a.m. on 17th December, 2013. Belatedly, Capital Food Emporium Limited now withdrew its appeal. By letter of 16th December, 2013 from the Employment Appeals Tribunal to ESA (and copied by fax of the same day to SIPTU), the Employment Appeals Tribunal noted receipt of a letter from ESA concerning the withdrawal of the appeal and confirming that, in consequence of the withdrawal of the appeal, the file on the matter had been closed by the Tribunal.

viii. Ms Stewart Seeks an Implementation Decision Again.

18. With the Rights Commissioner's recommendation still extant and the appeal against same now abandoned, SIPTU wrote to the Employment Appeals Tribunal on 19th December, 2013, and made fresh application for an implementation decision in respect of the Rights Commissioner's recommendation. By letter of 2nd April, 2014, the Employment Appeals Tribunal advised the parties that the application would be heard at a stated venue at 2.30 p.m. on 29th April, 2014. By letter of 14th April, 2014, ESA wrote to the Employment Appeals Tribunal indicating that Capital Food Emporium Limited would "*not be in attendance at the hearing or entertain a claim for enforcement of implementation of a Rights Commissioner's recommendation*".

ix. Capital Food Emporium Limited's Explanation for Its Actions.

19. Why did Capital Food Emporium Limited (i) elect to abandon its appeal against the Rights Commissioner's recommendation back in December, 2013, and (ii) decide not to attend the determination hearing in April, 2014? Surprisingly, despite having (a) raised no objection when matters went to the Rights Commissioner, (b) never mentioned this as a ground of objection when it decided to bring its appeal, (c) been at all times and in every respect satisfied to join battle with Ms Stewart as her employer, and (d) enjoying the possibility of a *de novo* appeal on the merits before the Employment Appeals Tribunal, Capital Food Emporium Limited now indicated a concern as to whether it was affected by the Rights Commissioner's recommendation at all. This is so remarkable a contention at so late a stage in matters that counsel for Ms Stewart, at the hearing of the within application, described Capital Food's behaviour in this regard as a "*stunt*". That is powerful language; yet sometimes powerful language expresses but a powerful truth. ESA's letter of 14th April,

2014, which sought to explain the actions of Capital Food Emporium Limited states as follows:

"RE: Appeal of Maureen Stewart for Implementation of the Recommendation of a Rights Commissioner
Maureen Stewart –v– Capital Food Emporium Ltd & Clodagh McKenna under Unfair Dismissals Acts, 1997-2007...

Dear Sirs...

[W]*e advise that we act on behalf of Capital Food Emporium Limited.*

In the first instance our Client will not be in attendance at the hearing or entertain a claim for enforcement of implementation of a Rights Commissioner's recommendation as the recommendation was made against several different parties, none of which is our Client.

The Claimant's complaint form submitted by her representative, on 14th March 2012, stated that the complaint was against Mr Michael Andrews, General Manager, t/a Clodagh McKenna. Neither of these are registered as companies nor have they ever employed Ms Stewart. The Rights Commissioner issued a decision against Capital Food Emporium t/a Clodagh McKenna Restaurants, not our Client. There was no application to seek an amendment or change of Respondent's name as set out under the Organisation of Working Time Act, 1997, nor was Capital Food Emporium

Limited put on notice of such application. Capital Food Emporium Limited does not consent to any change of Respondent and the matters are out of time.

Therefore the Employment Appeals Tribunal does not have jurisdiction to hear or enforce the Rights Commissioner's recommendation.

We have instructed our Clients to consider whatever legal remedy [is] *available to them to protect their company.*

We trust this clarifies all matters."

x. A Technical Correction.

20. On 29th April, 2014, Ms Stewart's determination application came on before the Employment Appeals Tribunal. As expected, no-one attended for Capital Food Emporium Limited. As it happened, the hearing did not proceed. Instead Ms Stewart was advised that she should make fresh application in the first instance to the Rights Commissioner for him formally to amend the employer's name in his recommendation. This was done and, on 14th May, 2014, the Rights Commissioner Service wrote to SIPTU to confirm that a correction order had been made, amending the employer's name in the recommendation to Capital Food Emporium Limited. It is important to note that in all the circumstances arising this was but the merest of technical changes. The correct party had been notified of Ms Stewart's complaint and the correct party had participated, as employer, in all the interactions that ensued. In what was an employee-employer dispute, employee and employer had at all times been engaged. In making much a-do as to whether the correct party had been involved and

engaged and the subject of an adverse recommendation, Capital Food Emporium Limited was, in all the circumstances arising, making much a-do about nothing. But having embarked on its chosen path of action, Capital Food Emporium Limited now persisted. In a letter of 16th May, 2014, to the Rights Commissioner Service, under the notably generic heading "*RE: Clodagh McKenna Restaurants/Maureen Stewart*", ESA indicated as follows for Capital Food Emporium Limited:

> "*We refer to your letter dated 14th May 2014 and we advise that we act on behalf of Capital Food Emporium Limited.*
>
> *In the first instance the Respondent does not consent to the Correction Order in respect of the Rights Commissioner's Decision of the 6th September 2012 to amend the name of the Respondent to Capital Food Emporium Ltd.*
>
> *The Respondent was put on notice of a Rights Commissioner hearing date and to this effect they were not in attendance on the day of the hearing. The Claimant sought to amend the Respondent's name before the Rights Commissioner after the fact and before the Employment Appeals Tribunal on enforcing the Rights Commissioner's determination.*
>
> *The Claimant then sought to amend the Respondent's name without notice to your Client and here again erred by seeking the amendment to some other entity, not our Client. This process of naming the wrong party and in particular by a person who is learned is inexcusable and not without precedent. We refer to the matter of a Supreme Court case: Sandy Lane Hotel Limited –v– Times Newspaper Limited.*

Furthermore, in accordance with section 39(3) of the Organisation of Working Time [Act], *1997, the Respondent did not have the opportunity to counter claim the Claimant's complaint under Unfair Dismissals. Therefore the Rights Commissioner does not have consent or jurisdiction to amend the Respondent's name on the Rights Commissioner's decision. In light of this, the Claimant must decide either to have the Unfair Dismissals claim heard before a Rights Commissioner or reject the Correction Order. Should the Claimant refuse, the Respondent will be left with no other alternative but to proceed with civil action for judicial review.*

We trust this clarifies all matters."

21. The court turns to the legal arguments raised in the letter later below. Suffice it for now to note that the bringing of a judicial review application by Capital Food Emporium Limited was clearly being contemplated as a possibility, indeed being raised as a threat, as early as 16th May, 2014.

xi. Issuance of the Implementation Decision.

22. Following the issuance of the correction order, there was some to-ing and fro-ing between SIPTU (which, throughout the entire process, appears to have done Trojan work on behalf of Ms Stewart) and the Employment Appeals Tribunal; these interactions concerned the technicalities of seeking an implementation decision and nothing rides on them. The next event of significance was the implementation hearing; this took place on 20th August, 2015. Both Ms Stewart and Capital Food Emporium Limited were represented at this hearing. On

20th October, 2015, the following determination issued from the Employment Appeals Tribunal:

"Determination

Section 7(4)(a) of the Unfair Dismissals Act, 1977 to 2007, states:

'Where a recommendation of a rights commissioner in relation to a claim for redress under this Act has not been carried out by the employer concerned in accordance with its terms, the time for bringing an appeal against the recommendation has expired and no such appeal has been brought, the employee concerned may bring the claim before the Tribunal and the Tribunal shall, notwithstanding subsection (5) of this section, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the recommendation.'.

The Respondent submitted that it had initially not been on notice of the hearing before the Rights Commissioner. It had not been on notice subsequently of an application for a correction order by the Rights Commissioner in relation to the name of the Respondent either. It had initially lodged an appeal to the E.A.T., but had, on legal advice, withdrawn that appeal. The Respondent submitted, notwithstanding that withdrawal of the appeal, that the E.A.T. had no jurisdiction in the matter.

The Tribunal notes that the Respondent was on notice of the correction order of the Rights Commissioner, and had initiated an appeal within time but chose not to pursue

that appeal. In the circumstances, the Tribunal is confined to making the order for implementation as sought.

Accordingly, the Tribunal makes a determination to the like effect as the Rights Commissioner recommendation, that the respondent pay the appellant the sum of €26,000 for breaches of the Unfair Dismissals Acts 1977 to 2007."

xii. Judicial Review Application.

23. By notice of motion of 20th January, 2016, Capital Food Emporium (Holdings) Limited (formerly Capital Food Emporium Limited) commenced the within judicial review proceedings seeking, *inter alia*, the following reliefs: (i) an order of *certiorari* quashing the Rights Commissioner's recommendation of 6th September, 2012, (ii) an order of *certiorari* quashing the Employment Appeals Tribunal's determination of 20th October, 2015, (iii) a declaration that the Rights Commissioner acted *ultra vires* and/or in breach of the requirements of natural or constitutional justice in the manner in which he reached his recommendation of 6th September, 2012, and (iv) a declaration that the Employment Appeals Tribunal acted *ultra vires* and/or in breach of the requirements of natural or constitutional justice in the manner in which it reached its determination of 20th October, 2015.

III. Some Notable Points Arising

24. It appears to the court that a number of notable points arise from the above description of the background events to the within application:

a. The Initial Complaint Form.

(1) In completing the initial complaint form, Ms Stewart may not have stated the full legal details of her employer but there can have been no doubt – none – that she was seeking redress from her former employer.

b. The Conduct of the Rights Commissioner on 2nd August, 2012.

(2) As mentioned above, once the Rights Commissioner had satisfied himself at the hearing of 2nd August, 2012, that correspondence had been sent to ESA advising of the date, time and venue of the hearing of Ms Stewart's complaint, he was fully entitled to proceed to hearing and to issue a recommendation thereafter. Contrary to the complaint made at the hearing of the within application, there was no obligation on the Rights Commissioner to ring ESA (and/or Capital Food Emporium Limited for that matter) and ask what was happening. There is not even the beginning of a breach of the principle of *audi alteram partem*, nor any semblance of a breach of the rules of constitutional or natural justice, in the Rights Commissioner's proceeding as he did. The principle of *audi alteram partem* and the rules of constitutional or natural justice afford one a right to be heard, not a right to hold things up indefinitely until one elects, if one elects, to attend for hearing.

c. Right (and Abandonment) of Appeal.

(3) Insofar as Capital Food Emporium Limited was aggrieved by the decision of the Rights Commissioner, it had remedies galore in the form of a *de novo* appeal on the merits to the Employment Appeals Tribunal pursuant to the Unfair Dismissals Acts, with onwards appeals into the courts system. But Capital Food Emporium Limited, having elected to commence such an appeal, abandoned it on what can only be described as, with every respect, entirely spurious grounds. There was no impediment to its continuing its appeal, it was clearly the party concerned within the meaning of s.9 and had repeatedly acknowledged and accepted this last fact. Its failure to exhaust this right of appeal is a matter which the court would be entitled to take into account in deciding whether to grant the discretionary relief now sought, if the court considered any basis for such relief to arise, and it does not. The court notes that there is not even the beginning of a breach of the principle of *audi alteram partem*, nor any semblance of a breach of the rules of constitutional or natural justice when a party who considers some shortcoming to present in the actions of a body or tribunal of first instance avails properly of a right to a full *de novo* appeal on the merits (and so of the right to have any, if any, error on the part of the body or tribunal corrected) and, having commenced such appeal, later elects of its own free will and for whatever reason, to withdraw from that appeal.

d. Acknowledgement and acceptance that Capital Food was the concerned party.

(4) On 10th September, 2012, ESA wrote, on behalf of Capital Food Emporium Limited to the Rights Commissioner's Service regarding the dispute with Ms Stewart and the Rights Commissioner's recommendation. No issue was taken

with the title or name ascribed the employer in that recommendation. ESA sought the "*Commissioner's understanding*" and expressly requested "*that another hearing take place*". In doing so, Capital Food Emporium Limited, acting through its agent, clearly acknowledged and accepted that Capital Food Emporium Limited was the party concerned with the employment dispute which formed the subject-matter of the Rights Commissioner's investigation and recommendation. There was no attempt in this correspondence to reserve the rights of Capital Food Emporium Limited as regards, say, the title ascribed it in the recommendation.

On 21st September, 2012, ESA wrote, on behalf of Capital Food Emporium Limited to the Employment Appeals Tribunal enclosing the requisite form necessary to commence an appeal from the Rights Commissioner's recommendation. In doing so, Capital Food Emporium Limited, acting through its agent, again clearly acknowledged and accepted that Capital Food Emporium Limited was the party concerned with the employment dispute which formed the subject-matter of the Rights Commissioner's investigation and recommendation. There was no attempt in this correspondence to reserve the rights of Capital Food Emporium Limited as regards, say, the title ascribed it in the recommendation.

e. Quod approbo non reprobo.

(5) *Quod approbo non reprobo.* ('That which I approve, I cannot disapprove'). In acting as mentioned at point (4) above, *i.e.* in (a) acknowledging and accepting

that Capital Food Emporium Limited was properly the party concerned with the employment dispute which formed the subject-matter of the Rights Commissioner's investigation and recommendation, and then (b) later seeking to disavow that Capital Food Emporium Limited was properly the party joined to the proceedings, Capital Food committed almost the exact same error that was identified by Henchy J., and reported almost forty years ago, in *Corrigan v. The Irish Land Commission* [1977] I.R. 317. That was a case in which the applicants appeared before a tribunal whose jurisdiction they later challenged when it gave a decision adverse to them, a sequence of actions that led Henchy J. to observe, at 326, that "*That is something the law will not and should not allow. The complainant* [or, in the present case, Capital Food Emporium Limited] *cannot blow hot and cold; he* [it] *cannot approbate and then reprobate; he* [it] *cannot have it both ways*". By doing as it did in December, 2013, by withdrawing its appeal against the Rights Commissioner's recommendation on the grounds that it was not the party affected by that recommendation, Capital Food Emporium Limited was seeking to deny what by that time, thanks to its own repeated actions, had become, for it, no longer properly, never mind convincingly, undeniable.

f. Section 39 of the Organisation of Working Time Act 1997.

(6) It will be recalled that in its letter of 16th May, 2014, ESA, writing for Capital Food Emporium Limited contended, *inter alia*, that in making the correction order earlier that month, the Rights Commissioner had breached s.39(3) of the

Organisation of Working Time Act 1997. This contention, with respect, is wrong. Section 39 of the act of 1997 provides, *inter alia*, as follows:

> *"(1) In this section 'relevant authority' means a rights commissioner...*
>
> *(2) A decision (by whatever name called) of a relevant authority under this Act or an enactment or statutory instrument referred to in the Table to this subsection* [the said Table includes the Unfair Dismissals Acts] *that does not state correctly the name of the employer concerned or any other material particular may, on application being made in that behalf to the authority by any party concerned, be amended by the authority so as to state correctly the name of the employer concerned or the other material particular.*
>
> *(3) The power of a relevant authority under subsection (2) shall not be exercised if it would result in a person who was not given an opportunity to be heard in the proceedings on foot of which the decision concerned was given becoming the subject of any requirement or direction contained in the decision.*
>
> *(4) If an employee wishes to pursue against a person a claim for relief in respect of any matter under an enactment or statutory instrument referred to in subsection (2), or the Table thereto, and has already instituted proceedings under that enactment or statutory instrument in respect of that matter, being proceedings in which the said person has not been given an opportunity to be heard and –*

(a) the fact of the said person not having been given an opportunity to be heard in those proceedings was due to the respondent's name in those proceedings or any other particular necessary to identify the respondent having been incorrectly stated in the notice or other process by which the proceedings were instituted, and

(b) the said statement was due to inadvertence,

then the employee may apply to whichever relevant authority would hear such proceeding in the first instance for leave to institute proceedings against the said person ('the proposed respondent') in respect of the matter concerned under the said enactment or statutory instrument and that relevant authority may grant leave to the employee notwithstanding that the time specified under the enactment or statutory instrument within which such proceedings may be instituted has expired:

Provided that that relevant authority shall not grant such leave to that employee if it is of opinion that to do so would result in an injustice being done to the proposed respondent.

A number of points might be made as regards the above-quoted text:

(i) s.39(2) of the Act of 1997 expressly contemplates the doing of that which the Rights Commissioner did in May, 2014, *viz.* the correction

of the name of an employer in a previous "*decision*" (here a recommendation) of the Rights Commissioner.

(ii) there are no time limits imposed by s.39 as regards (a) applying for a correction order, or (b) the making of an order consequent upon such application.

(iii) s.39(2) does not require, nor is it a requirement of natural or constitutional justice, or the principle of *audi alterem partem*, that there should be a fresh hearing of a relevant authority into the making of an amendment of the style contemplated by s.39(2).

(iv) s.39(3) is an irrelevance in the circumstances arising; this is because the Rights Commissioner, back at the hearing of 2nd August, 2012, satisfied himself that correspondence had been sent to ESA advising of the date, time and venue of the hearing of Ms Stewart's complaint, *i.e.* he satisfied himself that Capital Food Emporium Limited had been given an opportunity to be heard in the proceedings on foot of which his recommendation was given (and, for the reasons identified by the court previously above, having so satisfied himself, the Rights Commissioner was entitled in the circumstances arising then to proceed with the hearing).

(v) s.39(4) deals with a situation, irrelevant to the within proceedings, whereby the name of a party was inadvertently mis-stated and, as a

consequence, the party that ought to have been pursued was not heard. The within application does not concern a situation in which a party that ought to have been pursued was not given an opportunity to be heard. It concerns a situation in which a party that ought to have been pursued was fully aware of the proceedings, acknowledged and accepted that it was the party concerned, and – so the Rights Commissioner found on 2nd August, 2012 – was given an opportunity to be heard.

(vi) the making of the correction order must be viewed in the context of Capital Food Emporium Limited having (a) submitted to the jurisdiction of the Rights Commissioner, (b) sought in its letter of 10th September, 2012, the "*understanding*" of the Rights Commissioner for the purpose of seeking a re-hearing of the complaint, and (c) confirmed and acknowledged, when lodging its appeal, on 21st September, 2012, that it was the relevant party concerned with the employment dispute.

g. Limited jurisdiction of Employment Appeals Tribunal at implementation hearing.

(7) Following the making of the correction order, Ms Stewart proceeded with pursuing her right to bring the issue of implementing the Rights Commissioner's recommendation before the Employment Appeals Tribunal. The Tribunal's jurisdiction at an implementation hearing is quite constrained by

s.8(4)(a) of the Unfair Dismissals Act 1977, as amended by s.7(4)(a) of the Unfair Dismissals (Amendment) Act 1993. Section 8(4)(a) provides as follows:

> "*Where a recommendation of a rights commissioner in relation to a claim for redress under this Act has not been carried out by the employer concerned in accordance with its terms, the time for bringing an appeal against the recommendation has expired and no such appeal has been brought, the employee concerned may bring the claim before the Tribunal and the Tribunal shall, notwithstanding subsection (5) of this section, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the recommendation.*"

As can be seen, the Employment Appeals Tribunal's jurisdiction pursuant to the above-quoted provision is effectively confined to establishing the objective elements/facts touched upon in the provision, *viz.* (i) that there is an existing determination of a rights commissioner in favour of a particular person who has brought a claim for redress, (ii) that the recommendation has not been carried out by the employer, (iii) that the time for bringing an appeal against the said recommendation has expired, and (iv) that no appeal has been brought within the time aforesaid. Provided these four elements are satisfied, "*the Tribunal shall*", *i.e.* must as a matter of law, "*without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the recommendation.*" It appears to the court that its reading of s.8(4)(a) of the Act of 1977, as amended, finds support in the

reading afforded by the Supreme Court, in *Hussein* v. *The Labour Court* [2015] IESC 58, to the once almost identically worded (though since amended) s.28(8) of the Organisation of Working Time Act 1997. The decision of the Supreme Court in *Hussein* also lends support to the contention that provided the Employment Appeals Tribunal exercises its powers properly and within the parameters defined by the sections in question, there is no basis for setting aside its ensuing implementation order by way of judicial review application. There is no evidence before the court to suggest that, when dealing with Ms Stewart's application pursuant to s.8(4)(a) of the Act of 1977, as amended, the Employment Appeals Tribunal did not exercise its powers properly or stray beyond the parameters defined by that provision.

h. The Decision in Sandy Lane Hotel [2011] 3 I.R. 334.

(8) It will be recalled that in its letter of 16th May, 2014, ESA, writing for Capital Food Emporium Limited, contended, *inter alia*, that "*naming the wrong party*" in Ms Stewart's initial application, "*and in particular by a person who is learned is inexcusable and not without precedent. We refer to the matter of a Supreme Court case: Sandy Lane Hotel Limited –v– Times Newspaper Limited.*" As touched upon elsewhere above, Capital Food Emporium Limited repeatedly accepted and acknowledged that it was the correct party to Ms Stewart's proceedings, at least until it suited it to contend that it was not. Does the decision of the Supreme Court in *Sandy Lane Hotel* lend any support to the contention that Capital Food Emporium Limited now seeks to make that it was not the subject of the Rights Commissioner's initial recommendation and that

this failing effectively taints all that follows in terms of its being a counterparty to Ms Stewart's proceedings?

Sandy Lane Hotel was a case in which two Barbadian companies (Sandy Bay Hotel Limited and Sandy Lane Properties Limited) were owned respectively by two St Lucian companies (Sandy Lane Hotel Limited and Sandy Lane Holdings Limited). In April 1997, Sandy Bay Hotel Limited (one of the Barbadian companies) changed its name to Sandy Lane Hotel Co. Limited. In June 1998, libel proceedings were commenced by Sandy Lane Hotel Limited against, *inter alia*, Times Newspapers Limited. In point of fact, the proceedings ought to have been commenced by Sandy Lane Hotel Co. Limited. Pursuant to an application heard in November 2005, the High Court allowed a substitution of Sandy Lane Hotel Co. Ltd. for Sandy Lane Hotel Limited. The order of substitution was made pursuant to O.63, r.1(15) of the Rules of the Superior Courts which allows for "*the correction of clerical errors*". On appeal, the Supreme Court held that the application made before the High Court did not come within this rule. In his judgment, having characterised a clerical error as an error made in a mechanical process, as distinct from an error arising from *e.g.*, lack of knowledge or wrong information, Hardiman J., for the Supreme Court, observed, *inter alia*, as follows:

> "*It appears to me, from a consideration of* [the company secretary of Sandy Lane Hotel Ltd.]...*that the mistake made in this case is not one which can be described as a clerical error, or anything like it. He* [the company secretary] *frankly admits that the name* 'Sandy Lane Hotel Co.

Limited' *was not originally intended to be used in the proceedings. This was because, although he knew of the history of the companies, it was not present to his mind, or to the mind of the lawyers, that the company actually operating the hotel was the* Sandy Lane Hotel Co. Limited. *This in turn was because, as he very frankly says 'at the time of the change of name in 1997 I thought nothing of the inclusion of the word 'Co.' in the title of the plaintiff.'*

This is not, in my view, a clerical error. The error here arose due to a mistaken belief and a failure to ascribe any significance to the change of name in 1997. This is a misguided state of mind with which one cannot have much sympathy, given that it was made by or on behalf of 'a consortium of businessmen', in the course of a complicated series of arrangements made for tax planning purposes, in which they obviously had the benefit of the best legal and taxation advice.

The consortium running the Sandy Lane Hotel were of the view that it was important for corporate or tax planning purposes that the entity operating the hotel should be the Sandy Lane Hotel Co. Limited. *Nor did this simply involve a change of name: there was another, completely different, company called the* Sandy Lane Hotel Limited. *The operating company was a Barbados Company but the latter Company, which appears as plaintiff at present, is a St Lucia Company. The plaintiff's case would in my opinion have been a stronger one if it had simply failed to get the name of the operating company right. But in the events that happened they actually used the name of an entirely different company, which however appears to be the parent company of the*

operating company. This in my view is not a clerical error or anything similar to a clerical error. It requires, if it is to be remedied, the substitution of a new entity which co-existed the plaintiff at all material times."

It might perhaps be contended that: (a) the Supreme Court's decision in *Sandy Lane Hotel* is notably harsh, (b) the plaintiff in that case had, to borrow from the wording of Hardiman J. "*simply failed to get the name of the operating company right*" and that the wrong name used just happened to be the name of another company from a different jurisdiction, and (c) if a 'clerical error' is a mistake made in copying or writing out a document, it is difficult to see how writing out the name 'Sandy Lane Hotel Limited' in lieu of 'Sandy Lane Hotel Co. Limited', when it is the latter company to which one means at all times to refer, is anything other than a clerical error. However, (i) it is not for this Court to address any such contention, and (ii) it appears to this Court that the within case is distinguishable in a number of respects from *Sandy Lane Hotel*, *viz*: (A) the appellants in *Sandy Lane Hotel* contended that Sandy Lane Hotel Limited was not the right party to the proceedings whereas in the within proceedings Capital Food Emporium Limited repeatedly acknowledged that it was the correct party to the within proceedings, until it suited it to seek, entirely unconvincingly, to deny this, (B) the Supreme Court, in *Sandy Lane Hotel*, appears to have placed no little emphasis on the fact that the basis for the confusion arising derived from "*a complicated series of arrangements made for tax planning purposes, in which they* [the respondent and those behind it] *obviously had the benefit of the best legal and taxation advice*" whereas in the

within proceedings Ms Stewart is a so-called 'ordinary' person who was acting with the benefit of trade union assistance: she is not a sophisticated commercial group acting with the benefit of 'blue chip' legal and tax advice, and (C) the Supreme Court, in *Sandy Lane Hotel*, also seems to have had regard to the fact that the company secretary appears to have been, perhaps, somewhat sanguine in terms of seeking to join the right party whereas Ms Stewart has always sought to bring her claim against the correct party and, again, was repeatedly acknowledged and accepted by that party as having pursued the correct party until it elected, unconvincingly, to deny this.

i. Delay.

(9) Finally, the court notes that with regard to the Rights Commissioner's initial recommendation, the representatives of Capital Food Emporium Limited became aware of the making of that recommendation on 7th September, 2012. A period of in excess of three years and four months elapsed between the making of this initial recommendation and the application for leave to bring the within judicial review proceedings. Having regard, *inter alia*, to the standard timeline contemplated by O.84, r.21 of the Rules of the Superior Courts, the duration of this delay is very considerable, and all the more egregious in the absence, and there is a complete absence, of any convincing explanation or justification. When it comes to the correction order, a period in excess of 20 months lapsed between the making of same and the making of the *ex parte* application for leave to apply for judicial review. This period too is considerably outside the standard timeline contemplated by O.84, r.21, and again no convincing

explanation or justification has been offered for this delay. Moreover, as highlighted elsewhere above, the first threat to seek judicial review appears to have been in the letter of 16th May, 2014, yet Capital Food Emporium Limited waited another 20 months or so before moving the application for leave to apply for judicial review. It is trite law that prescribed time limits exist to bring finality and certainty to administrative decisions. Of course, the courts are ever alive to the possibility that in any one case, a particular delay may be capable of being explained and justified and, in consequence, excused, but the within application does not concern such a case.

IV. Conclusion

25. Having regard to all of the foregoing, the court must respectfully decline to grant any of the reliefs sought by Capital Food Emporium (Holdings) Limited (formerly Capital Food Emporium Limited).

Approved
15/Jul/16

the main proceedings, the court is permitted, by way of modest derogation from the *Campus Oil* principles, to look to the underlying strength of the respective positions of the parties in the manner indicated by the Supreme Court in *Lee*. If, as here, the plaintiff's case appears particularly strong, it is only just and equitable that she be granted the interlocutory relief which she seeks, not least where (as here) the point is a net one of construction, not dependent on oral evidence or elaborate argument, and where damages would not be an inadequate remedy.

Conclusions

33. It is for these reasons and having regard to the very special circumstances of this case that I propose to grant the plaintiff an interlocutory injunction restraining the Authority from placing her on administrative leave pending the outcome of her appeal against the disciplinary decision of April 2, 2012.

Solicitors for the plaintiff: *O'Gorman*
Solicitors for the defendant: *A & L Goodbody*

Cathy Hamilton
Barrister

[**Reporter's note:** The interlocutory application in effect disposed of the substantive proceedings and the plaintiff was subsequently awarded the costs of the action.]

Allied Irish Banks Plc (respondent/appellant) v Brian Purcell (claimant/respondent): Circuit Court 2011 No. 2674 (Judge Linnane) May 24, 2012 ([2012] E.L.R. 189)

Unfair dismissal – Disciplinary procedure – Conduct of employee – Fair procedures – Natural justice – Reasonableness – Whether dismissal unfair – Whether dismissal disproportionate response – Whether dismissal unreasonable – Whether improper motive – Whether employer acted fairly on the basis of evidence – Unfair Dismissals Act 1977 (No 10), s.7(2)(f)

Facts The claimant was the employee of the respondent. As a result of the claimant accessing the bank accounts of a number of his work colleagues, a disciplinary process was entered into which culminated in a decision to terminate the claimant's employment. The claimant exercised his right to appeal this decision on two occasions but the decision to dismiss was upheld.

The claimant then brought a claim of unfair dismissal to the Employment Appeals Tribunal, which found that the respondent's decision to dismiss based on the unauthorised accessing of accounts was a disproportionate response, was unreasonable and was unfair in all the circumstances. The respondent appealed this decision to the Circuit Court.

Held by the Circuit Court (Judge Linnane) in allowing the appeal:

(1) What constitutes misconduct must be decided depending on the circumstances of a particular case. The list of conduct in a disciplinary policy given which merits dismissal is not an exhaustive list but merely guidelines. The fact that the misconduct complained of was not included in the list of misconduct meriting dismissal did not assist the claimant in his claim.

(2) Fair procedures were followed in the disciplinary process and it was conducted in accordance with the principles of natural justice.

(3) It is not for the Employment Appeals Tribunal or the Circuit Court to ask whether it would dismiss in the circumstances or substitute its view for the employer's view. The appropriate approach is to ask was it reasonably open to the employer to make the decision it made. *British Leyland UK Ltd v Swift* [1981] I.R.L.R. 91 applied

(4) The decision to dismiss was a reasonable one and the dismissal was fair.

Cases referred to in the decision

British Leyland UK Ltd v Swift [1981] I.R.L.R. 91

Roddy Horan SC and Mairéad McKenna BL **for the respondent/appellant**
Michael Forde SC and Trevor Loughnane BL **for the claimant/respondent**

JUDGE LINNANE delivered her judgment on May 24, 2012 saying: This matter comes before the court by way of an appeal by the respondent from a determination of the Employment Appeals Tribunal (the EAT) dated February 7, 2011. The claimant was an employee of the respondent since 1993. Over a period of two days, March 25 and 26, 2008, on several occasions he accessed the bank accounts of a number of his work colleagues, including his superiors. It was not done for any purpose connected with his work or with consent. This is not in dispute. As a result he was suspended on full pay pending an investigation and by letter of April 23, 2008 he was provided with full details of the allegations against him which the respondent considered to be extremely serious and informed that the matter would be progressed under its disciplinary policy. He was further informed that if the allegations were upheld, disciplinary sanction may be imposed up to and including the termination of his employment. A copy of the disciplinary procedure was furnished, he was informed of the person who

would be dealing with the matter and that he was entitled to be represented.

The disciplinary process then followed – in the first investigation there were four meetings at which the claimant was represented by a solicitor for three of those and by his father at the last meeting. The claimant accepted he had accessed the accounts of his colleagues not for any legitimate business purpose in connection with his employment but to find out if they were paid a bonus and what bonuses his colleagues got. This investigation found that the allegations in the letter of April 23, 2008 were proven, that his accessing of the accounts on March 25 and 26, 2008 was not for business use and was inappropriate and as a consequence the decision was made that his employment be terminated. The claimant was so informed of the findings and decision by letter of September 1, 2008 and of his right to appeal the decision.

The claimant exercised his right to appeal that decision and another senior official from the respondent was appointed to deal with same and a hearing took place on October 23, 2008 regarding the allegations in the letter of April 23, 2008. By letter of November 10, 2008, the claimant was furnished with the determination of that appeal. That determination refers to the imperative of customer confidentiality which derives from a fundamental duty of care owed between a bank and its customers. It considered the breach of trust was particularly serious given that the claimant was accessing the private financial information of his own colleagues and the wrongdoing alleged in the letter of April 23, 2008 was sufficiently serious to warrant dismissal. It considered that what he did on March 25 and 26, 2008 constituted a breach of trust between the employer and employee such as to render the continuation of his employment unsustainable and upheld the sanction of dismissal.

The claimant had a further right of appeal under the disciplinary procedure and Mr Peter Ward (now Senior Counsel) was agreed as an independent external person to deal with same. This hearing took place on March 11, 2009. The claimant was represented by Dr Forde SC. Mr Ward dealt with the matter on the basis as to whether the respondent's decision to dismiss was reasonable – that is whether the decision to dismiss was within a band of decisions reasonably open to the employer, was it reasonably open to the respondent to make the decision it made. This was accepted and agreed by the claimant's Senior Counsel as the correct approach. Applying that test and having considered the matter Mr Ward found the decision to terminate by the respondent was a reasonable one and the claimant's employment was then terminated on April 9, 2009. Up to then and during the period of his suspension his salary had been paid.

The claimant then brought a claim of unfair dismissal to the EAT seeking reinstatement. That hearing took place over a number of days and he was represented by Dr Forde SC. The decision of the EAT records that no issue was taken by the claimant with the investigation that was conducted. It also records that an inordinate amount of time was given over by counsel for the claimant to

the entwining of the speak-up system with the subsequent events which led to his dismissal, that this was an unnecessary exercise in muddying the waters and that on balance it (the EAT) did not accept that his activation of the speak-up policy had any bearing on the ultimate reasons given for the dismissal. It also accepted that the management decisions made regarding the payment or non-payment of any bonuses predated the activation of the speak-up policy by the claimant.

The EAT found that the decision to dismiss based on unauthorised accessing of accounts – which the claimant admitted to – was a disproportionate response to the claimant's actions and was unreasonable and accordingly the dismissal was unfair in all the circumstances. It found that the response never fell within the bands of reasonableness proportion put forward by the respondent. The EAT felt a more reasonable approach would have been to suspend him without pay for a period of time such as six months. Accordingly it determined that he be re-engaged backdated to six months after the dismissal and paid at the same salary as he had at the date he was dismissed.

At the outset counsel for the claimant made it clear to the court that while he was not claiming that the disciplinary procedure was unfair he would be maintaining that the disciplinary procedure was flawed in that the respondent would not allow on the agenda the claimant's argument that what motivated the decision (to dismiss) was his invoking the speak-up policy and or having sued the respondent. He also submitted that the disciplinary process focused on the accessing of the accounts and that was what the court should focus on. It was further made clear to the court that he would be maintaining that the real reason for the dismissal was due to the litigation which the claimant had brought against the respondent and the whistle-blowing (or invocation of the speak-up policy) and the accessing of the accounts was the pretext to get rid of him.

This was a serious allegation to make and more or less made the claim that the respondent officials acted from an improper motive.

With regard to the litigation in the High Court – the claimant initiated those proceedings (the nature of which this court is not concerned with) in 2003. Since then he accepts that he was promoted and also received bonus payments. Unfortunately those proceedings have not yet concluded or even been set down for hearing at this stage eight years after they commenced. It is accepted that the decisions regarding bonus payments for 2007 were made prior to the claimant invoking the speak-up policy so there is no question that the non-payment of a bonus to the claimant had anything to do with his invocation of the speak-up policy. The concerns he had raised under the speak-up policy were thoroughly investigated and dealt with separately.

It was also argued on behalf of the claimant that while he accepted that what he did was inappropriate, his conduct, *i.e.* the unauthorised accessing of accounts of his colleagues and obtaining private personal information regarding their bank accounts – was not a matter listed in the respondent's grievance and disciplinary

policy which sets out various instances of conduct meriting dismissal. With regard to this point in my view it is clear that the list of conduct given meriting dismissal is not an exhaustive list but merely guidelines. It seems to me that what constitutes misconduct must be decided depending on the circumstances of a particular case and the fact that the unauthorised accessing of accounts is not included in the list of conduct meriting dismissal does not assist the claimant or support his claim that his dismissal was unfair.

In my view it is quite clear that fair procedures were followed in the disciplinary process and it was conducted in accordance with the principles of natural justice. In any event, on this point, at the end of this hearing, counsel for the claimant, in his submissions, conceded that the disciplinary process was not flawed due to the withdrawal towards the end of the hearing of this appeal by the claimant of other claims and allegations he had made against the respondent.

As I have referred to earlier, counsel for the claimant at the outset made it clear that his claim was that the decision to dismiss was based on the claimant's invocation of the speak-up policy and the fact that he had brought proceedings against the respondent in 2003 which are still extant. This was persisted in until towards the end of this appeal hearing and after hearing evidence from various witnesses called by the respondent when the claimant eventually accepted and conceded that these matters had no bearing on and nothing to do with the decision to dismiss him and he withdrew those claims. He agreed that the only issue in the decision to dismiss him was what he admitted to doing in March 2008 – namely accessing the accounts of his colleagues.

Counsel on behalf of the respondent contends that in the event of this court finding the dismissal was unfair, which he does not accept, that re-engagement in the circumstances is not the appropriate remedy due to the complete breakdown in trust and rupturing of the relationship and that it would be unworkable. In relation to any compensation it is argued that the court has to take into account the fact that the claimant has accepted he has not taken any meaningful steps to obtain employment and mitigate his loss which he has a duty to do. It is further submitted that under s.7(2)(f) of the Unfair Dismissals Act 1977, the court can also consider the extent to which the conduct of the employee contributed to the dismissal in dealing with the remedy of compensation.

In the written submissions on behalf of the respondent, reference is made to the following:

Section 6(1) of the Unfair Dismissals Act 1977 states the following:

> "Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purpose of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal."

Section 6(4) states:

> "Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:
>
> a) …
> b) the conduct of the employee.
> c) …"

Section 6(7) of the Act of 1977 provides:

> "Without prejudice to the generality of subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had if the rights commission, the Tribunal or the Circuit Court, as the case may be, considers it appropriate to do so:
>
> a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal, and
> b) to the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee with the procedure referred to in section 14(1) of this Act or with the provisions of any code of practice referred to in paragraph(d) of section 7(2) of this Act."

In both the oral and written submissions made by counsel on behalf of the respondent, reliance is made on the band of reasonableness test – namely the test which counsel for the claimant agreed was the appropriate one to be applied in the hearing of the appeal before Mr Ward. Reference is made to the decision of the Court of Appeal in *British Leyland UK Ltd v Swift* [1981] I.R.L.R. 91 and the following statement of Lord Denning MR at p.93:

> "The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, another quite reasonably take a different view."

It is clear that it is not for the EAT or this court to ask whether it would dismiss in the circumstances or substitute its view for the employer's view but to ask was it reasonably open to the respondent to make the decision it made rather than necessarily the one the EAT or the court would have taken.

Counsel on behalf of the claimant submits that the band of reasonableness test in England is a majority view but not held unanimously, that here the tribunal or the court makes the overall decision whether this dismissal was fair and the test is did the employer act fairly in all the circumstances on the basis of the evidence.

He argues that the conduct here merited a measure short of dismissal.

One of the witnesses called on behalf of the respondent and whose account was one of the many accessed over the course of the two days in question in his evidence referred to the fact that in accessing his accounts, which were joint accounts with his wife who was not employed by the respondent, the claimant would have seen his total financial position, his lifestyle, what both he and his wife earned, what they spent their money on.

As counsel for the respondent puts it, was this such a breach of confidentiality and invasion of privacy as to warrant the ultimate sanction?

Taking into account the circumstances here and the position of trust the claimant as an employee of the respondent was in, in my view the decision made by the respondent to dismiss the claimant was a reasonable one and the dismissal was fair. Accordingly I am allowing this appeal.

Solicitors for the respondent/appellant: *Byrne Wallace*
Solicitors for the claimant/respondent: *Conor Maguire & Co*

Cathy Hamilton
Barrister

[**Reporter's note:** This decision is under appeal. Section 6(7) of the Unfair Dismissals Act 1997 referred to by Judge Linnane was inserted by s.5(b) of the Unfair Dismissals (Amendment) Act 1993.]

Gustave Bigaignon (claimant) v Powerteam Electrical Services Limited (respondent): Employment Appeals Tribunal UD939/2010 (March 21, 2012) ([2012] E.L.R.195)

Unfair dismissal – Misconduct – Proportionality – Breach of drug and alcohol policy – Safety-critical duties – Reasonableness of conduct of employer in relation to dismissal – Whether dismissal proportionate – Unfair Dismissals Act 1977 (No. 10), s.6(3)

Facts The claimant was employed by the respondent to carry out maintenance work, at a height, on overhead lines for electrical supply. He agreed to the respondent's policy on drug and alcohol use, which included random testing of employees and made clear that a positive test could result in dismissal. A test was carried out on the claimant under this policy and he tested positive for cannabis. The claimant admitted taking illegal drugs. Following an investigation meeting,

Donal Hurley v. Royal Yacht Club: Circuit Court, (Judge John F. Buckley) 17 June 1997

Issue – Unfair dismissal – Appeal to the Circuit Court – Settlement – Jurisdiction – Section 13 of the Unfair Dismissals Act 1977 (No. 10)

Facts This was an appeal from a determination of the Employment Appeals Tribunal which held that the claimant was precluded from pursuing proceedings before the Tribunal by reason of his signing an agreement accepting certain payments in full discharge of all claims against the respondent. There was a conflict of evidence as to whether the appellant was advised that he should take advice.

Held by Judge Buckley in granting the appeal and declaring the agreement to be void: It cannot have been the intention of the legislature to prevent employers and employees from compromising claims under the Act.

(1) The doctrine of informed consent applies to the contracting out provisions and to section 13.

2) The appellant was entitled to be advised of his entitlements under the employment protection legislation. Any agreement or compromise should have listed the various acts which were applicable or at least made it clear that they have been taken into account by the appellant.

(3) The appellant should have been advised in writing that he should take appropriate advice as to his rights

Cases cited in the judgment

Fowler and Bergin v. Hardware Distributors Dublin Ltd, UD 872 and 873/194, *Unfair Dismissals Cases and Commentary* by Madden and Kerr, p. 29

Gaffney and Mulholland v. Fannin Ltd, UD 1/1989, *Unfair Dismissals Cases and Commentary* by Madden and Kerr, p. 28

Gatien Motor Co. v. Continental Oil [1979] IR 406

McMullen v. Joe Keane (Taney) Ltd, UD 342/1984, *Unfair Dismissals Cases and Commentary* by Madden and Kerr, p. 31

M'Grane v. Avery Label Ltd, UD 573/1988, *Unfair Dismissals Cases and Commentary* by Madden and Kerr, p. 29

Moran v. Microtherm Ltd, UD 343/1982, *Unfair Dismissals Cases and Commentary* by Madden and Kerr, p. 32

Names of counsel unavailable at time of going to press.

BUCKLEY J delivered his judgment on 17 June 1997 saying: The only issue to be determined by me in this case is as to whether the applicant is precluded from pursu-

ing proceedings before the Employment Appeals Tribunal by reason of his having signed an agreement accepting certain payments 'in full discharge of all claims' against the respondent, It comes before me on appeal from the Employment Appeals Tribunal which held that he was so precluded.

There was some conflict of evidence, minor as to the dates on which certain meetings took place, significant in one respect – as to whether the applicant was advised that he should take advice. The view which I have taken of the case does not require me to make a decision as to which of the accounts is correct.

Counsel directed me to certain decisions of the Employment Appeals Tribunal on the application of section 13 of the Unfair Dismissals Act 1977. There does not appear to be any reported decision of the Circuit or any higher court on the point. Those decisions, *Gaffney and Mulholland v. Fannin Ltd*, UD1/1989 and UD1127/1988, *Fowler and Bergin v. Hardware Distributors Dublin Ltd*, UD 872/873/1984. *McMullen v. Joe Keane (Taney) Ltd*, UD342/1984, *McGrane v. Avery Label Ltd*, UD573/1988 and *Moran v. Microtherm Ltd*, UD343/1982 are not *ad idem* in the approach they have taken.

There is only one leading case on contracting out in a different area, which seems to me to be of assistance. That case *Gatien Motor Co., v. Continental Oil* [1979] IR 406. considered the provisions of section 42 of the Landlord and Tenant Act 1931 which was in the following terms:

> A contract, whether before or after the passing of this Act by virtue of which a tenant would be directly or indirectly deprived of his right to obtain relief under this Act or any particular such relief shall be void.

The judgments of Griffin J and Kenny J in that case affirmed that the contracting out provision could not apply until the tenant had a right to relief under that Act.

Section 13 of the Unfair Dismissals Act 1977 is in the following terms:

> A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of this Act) shall be void in so far as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act.

In the present case it is clear that the applicant, once the respondent decided to dismiss him, was entitled to the benefit of the provisions of the Unfair Dismissals Act (and other related employment protection legislation, including the Redundancy Payments Act). Did the agreement completed by the applicant purport to exclude or limit the application of or is it inconsistent with any provision of the Act? It cannot have been the intention of the legislature to prevent employers and employees from compromising claims under the Act. The question which therefore arises is: under what circumstances can claims be legitimately compromised. Not, I think, until the employee is in a proper position to agree to a compromise.

In several areas of the law the Supreme Court has held that any consent by a person to waive a legal right which that person has, must be an informed consent. This doctrine must surely apply to contracting out provisions and to section 13 in

particular.

Reviewing the Unfair Dismissals cases it is notable that in *Gaffney and Mulholland v. Fannin Ltd* the agreement listed four acts under which the applicants may have had rights and the applicants had the benefit of advice from a Trade Union official. This was also the position in *Fowler and Bergin v. Hardware Distributors Ltd* and in *McMullen v. Joe Keane (Taney) Ltd*, the matter was settled before a Rights Commissioner.

I am satisfied that the applicant was entitled to be advised of his entitlements under the employment protection legislation and that any agreement or compromise should have listed the various Acts which were applicable, or at least made it clear that they had been taken into account by the applicant. I am also satisfied that the applicant should have been advised in writing that he should take appropriate advice as to his rights, which presumably in his case would have been legal advice. In the absence of such advice I find the agreement to be void. My finding that the agreement was void, should not be taken as an indication that the officers of the club behaved improperly, or that they- unfairly pressurised the applicant. I am satisfied that they genuinely believed it was in the interests of the club, once a decision to dismiss the applicant had been taken, to ensure a speedy agreed settlement with the applicant.

As I have found the agreement to be void, it follows that the applicant will be obliged to return any monies paid to him by the club under the agreement. His substantive claim against the club can now be pursued in the Employment Appeals Tribunal.

Names of solicitors unavailable at time of going to press.

Eilis Barri
Solicitor

Leopard Security Ltd (employer) v. David Campbell (employer): Employment Appeals Tribunal MN 1874/96 (Dublin 5 February 1997 and 12 March 1997)

Issue – Minimum Notice and Terms of Employment Act 1973 (No. 4) – Minimum Notice and Terms of Employment (Reference of Disputes) Regulation 1973, SI No 243/73 – Resignation of employee without notice – Dispute - 'In the prescribed manner' – Misconduct

Facts The employer brought a claim alleging that the employee had resigned without the requisite one week's notice. The employee agreed that

> dismissed, but ended his employment by agreement when he took retirement. In one sense this may be so, but the claimant argued that this situation was forced on him when the NRB was dissolved and no agreement was reached on his transfer to any of the other bodies. There are other factors involved."

This passage taken in isolation would support the plaintiff's contention. However, later on in the decision there is a specific finding of the Tribunal as follows:

> "We find, therefore, that the reason for the termination of employment was redundancy, and that the claimant is taken to be dismissed for that reason."

It is clear from that passage that the tribunal did indeed address the question of whether the defendant retired or was made redundant. It found that he was made redundant. The earlier passage was merely a statement of the arguments which were to be considered by the Tribunal. The plaintiff's claims on this ground are not sustained.

I will discuss the appropriate order to be made with counsel.

Solicitors for the plaintiff: *Chief State Solicitor*
Solicitors for the defendant: *O'Mara Geraghty McCourt*

John D. Fitzgerald
Barrister

Niaomh Humphries (claimant) v Westwood Fitness Club (respondent): Labour Court No. EED037 ED/02/59 (December 18, 2003), Circuit Court, Dunne J., February 13, 2004 ([2004] E.L.R. 296)

Unfair dismissal – Discrimination on grounds of disability – Whether an eating disorder a disability – Failure to follow proper procedures – Employment Equality Act 1998 (No.21), s.6, s.8(6)(c), s.16(3), s.77

Facts The claimant worked for the respondent as a childcare assistant in a crèche facility operated by them. She developed anorexia which later developed into bulimia. The claimant went on sick leave to undergo treatment. After her return to work, and just as it appeared that her condition had stabilised, a number of incidents occurred which caused the respondent concern in respect of the manner in which she was performing her duties. The claimant received two

verbal warnings in respect of these matters. A number of months later the claimant became depressed and requested more time off work as she wished to be readmitted to hospital. At this stage, the respondent, without obtaining medical or psychiatric advice in respect of the claimant's disorder or any form of risk assessment in relation to her condition, formed the view that the claimant was a danger to herself and the children in her care and resolved to dismiss her. The respondent asked the claimant to attend a meeting where she was informed of the decision to dismiss her, and was subsequently sent a letter of dismissal.

Determined by the Labour Court:

(1) That as the claimant's dismissal arose primarily from the respondent's belief that her disorder would impair her ability to carry out the duties for which she was employed, her dismissal was prima facie discriminatory under s.8 of the Employment Equality Act 1998.

(2) There is a complete defence under s.16 of the Employment Equality Act 1998 to a claim of discrimination on grounds of disability under s.8, if it can be shown that the respondent formed a bona fide belief that the claimant was not fully capable of performing the duties for which she was employed.

(3) In order to form such belief, the respondent would normally be required to make adequate enquiries to establish fully the factual position in relation to the claimant's capacity. The nature of the enquiries would depend on the circumstances but would at a minimum involve looking at medical evidence to determine the level of impairment arising from the disability and its duration. If it is apparent that the employee is not fully capable, the respondent is required under s.16(3) to consider what if any special treatment or facilities may be available by which the employee can become fully capable and account must be taken of the cost of such facilities or treatment.

(4) Such enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.

(5) That the appropriate redress is an award of compensation, and having regard to all the circumstances, the sum of €13,000 is the appropriate figure.

No cases are referred to in the determination

The respondent appealed to the Circuit Court.

Held by by Dunne J.:

(1) Anorexia is a disability within the meaning of the Employment Equality Act 1998.

(2) The employer may have legitimate concerns about the employee's ability to undertake the duties attached to her position, but is required to take appropriate

medical advice in relation to those concerns prior to dismissing an employee.

(3) The respondent employer did not take such advice, and therefore did not carry out the dismssal in an approprate manner. Accordingly the determination of the Labour Court is affirmed.

The full text of the Labour Court's determination was as follows:

Subject
Alleged unfair dismissal under s.7 of the Employment Equality Act 1998.

Background
The claimant was employed by the respondent as a child-care assistant from October 15, 2000 until June 6, 2002, when she was dismissed. She claimed that her dismissal was wholly or mainly on grounds of her disability and constitutes discrimination within the meaning of s.8 and contrary to s.6 of the Employment Equality Act 1998 (the Act).

The facts
The facts as found by the Court or as admitted can be summarised as follows.

The claimant worked as a childcare assistant in a crèche facility operated by the respondent. Her duties involved the care of young children.

The claimant suffered from anorexia, which later developed into bulimia. She suffered from this condition throughout the period of her employment with the respondent. It is accepted that this disorder constitutes a disability for the purposes of the Act.

During the course of her employment the claimant was hospitalised on a number of occasions. In March 2001 the respondent gave the claimant three months' sick leave in order to allow her to undergo treatment. She was admitted to hospital and was later treated as an outpatient. By June 1, 2001 the claimant was certified as fit to return to work. However, within three weeks she suffered a recurrence of the symptoms of the disorder and was again forced to take sick leave.

The claimant was not paid during her absence on sick leave.

The claimant remained on sick leave until late September, 2001 when she was certified as fit for work. She continued to receive counselling and other outpatient treatment for the disorder. She kept the respondent informed in this regard. It appeared that by December 2001 the claimant's condition had stabilised.

From January 2002 onwards a number of incidents occurred which caused the respondent some concern as to the manner in which the claimant was performing her duties. These matters related to the wearing of jewellery at work (which was not permitted on safety grounds) and alleged erratic behaviour.

The claimant was issued with two verbal warnings in respect of these matters.

On or about the month of May 2002 the claimant became depressed and, it was suggested that she had developed suicidal tendencies. She requested more time off as she wished to be readmitted to hospital. At this stage the respondent had formed the view that the claimant was a danger to herself and the children in her care. The manager of the respondent resolved to dismiss the claimant.

The claimant was asked to attend a meeting with the manager and assistant manager of the respondent on May 27, 2002. At this meeting she was informed that it had been decided to terminate her employment. She was subsequently dismissed by letter dated June 6, 2002. The letter of dismissal stated in the relevant part as follows:

> "With reference to our meeting, I would like to reiterate that we are terminating your employment here at [the respondent's premises]. You were given personal leave on two occasions in the last year as requested by yourself. As discussed, we believe you need an extended period of time to complete the treatment you are receiving for the condition that you have. It is also unsuitable that you would be working in a childcare facility under the present conditions as confirmed by your doctor."

The respondent did not obtain any medical or psychiatric advice in relation to the claimant's disorder nor did they undertake any form of risk assessment in relation to her condition. The respondent told the Court that they had taken the conduct of the claimant, in relation to which the verbal warnings had been issued, into account in deciding to terminate her employment. They had also decided that her disorder rendered her unfit for the duties for which she was employed.

Statutory requirements

Section 6 of the Act provides, in effect, that discrimination shall be taken to occur where, on any of the discriminatory grounds, one person is treated less favourably than another is, has been or would be treated.

Section 8(6)(c) of the Act provides, in effect, that an employer shall be taken to have discriminated against an employee in relation to conditions of employment, if the employee is afforded less favourable terms, on any of the discriminatory grounds, in respect of, *inter alia*, dismissal and disciplinary measures.

In the present case it is clear from the letter sent to the claimant dated June 6, 2002, that her dismissal arose wholly or mainly from the respondents belief that the disorder from which she suffered impaired her ability to carry out the duties for which she was employed. Thus she was treated less favourably than a person who did not suffer from a similar disability resulting in the same

perceived impairment, would have been treated. It follows that the dismissal was prima facie discriminatory and unlawful.

However a dismissal which appears to be discriminatory within the meaning of s.8 of the Act may be saved by s.16. This section provides, as follows:

> "16.—(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—
>
> (a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or
>
> (b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.
>
> (3)(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties.
>
> (c) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates.
>
> (d) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer."

This section, on which the respondent relies, can provide a complete defence to a claim of discrimination on the disability ground if it can be shown that the employer formed the bona fide belief that the claimant is not fully capable, within the meaning of the section, of performing the duties for which they are employed. However, before coming to that view the employer would normally be required to make adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.

The nature and extent of the enquiries which an employer should make will depend on the circumstances of each case. At a minimum, however, an employer, should ensure that he or she is in full possession of all the material facts

concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision.

In practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee's doctors or obtained independently.

Secondly, if it is apparent that the employee is not fully capable, s.16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. The section requires that the cost of such special treatment or facilities must also be considered. Here, what constitutes nominal cost will depend on the size of the organisation and its financial resources.

Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.

Conclusions of the Court

In this case the respondent was faced with an employee who was suffering from a disorder which had both psychiatric and physical manifestations. The respondent became concerned that she might not be suitable to remain in charge of young children. The Court accepts that an employer is entitled to take account of possible dangers occasioned by a disability from which an employee suffers (and may be obliged to do so in certain circumstances).

However, in the instant case the respondent made no effort to obtain a prognosis of the claimant's condition. They did not discuss the situation with her before taking a decision on her future. They came to the conclusion that she could not be retained because of her disability without the benefit of any form of professional advice or assessment of the risks associated with her condition.

There were a number of courses of action open to the respondent. They could have had the situation assessed professionally and considered the most appropriate approach to adopt in consultation with the claimant and her medical advisor. Further, the claimant intimated her desire to re-enter hospital for further treatment. A decision on her future could have been deferred and she could have been given a further period of sick leave to undergo this treatment.

Had the claimant been given further leave her progress could have been monitored and her return to work made conditional upon medical certification that she was fully fit to resume her duties. Such evidence could have been required from either her own doctors or nominees of the respondent. The

claimant was not paid during absences on sick leave and the respondent accepted that they could have employed a temporary replacement without additional costs.

Determination

The Court is satisfied that the claimant was dismissed wholly or mainly because of her disability. Further it has not been shown to the satisfaction of the Court that the claimant was not fully capable of continuing to perform the duties for which she was employed within the meaning of s.16(3) of the Act.

Accordingly, the claimant is entitled to succeed.

The Court is satisfied that the appropriate redress is an award of compensation for the effects of the discrimination suffered by the claimant.

Having regard to all the circumstances of the case the Court measures the amount of compensation which it considers appropriate at €13,000. An order against the respondent in that amount will be made.

For the claimant: *Martine O'Connor BL instructed by Northside Community Law Centre*
For the respondent: *Marian Becker, Denis McSweeney Solicitors*

Division of the Labour Court: *Mr Duffy (Chairman), Mr Carberry, Mr Somers*

DUNNE J. delivered her judgment affirming the determination of the Labour Court saying: This case came on by way of appeal from the Labour Court in which the Labour Court found that Westwood Health and Fitness Club had dismissed Ms Humphries who was the claimant in the proceedings wholly and mainly because of her disability. The Labour Court also found that it was not shown to the satisfaction of the Court that the claimant was not fully capable of continuing to perform the duties for which she was employed within the meaning of s.16(3) of the Employment Equality Act 1998. The Labour Court was satisfied that the appropriate redress was an award for compensation and measured the amount of compensation which was appropriate as €13,000. The respondent Westwood Club appealed this matter to the Circuit Court.

I am satisfied that the illness anorexia is a disability within the meaning of the Employment Equality Act 1993 and therefore certain statutory provisions come into play. These statutory provisions were considered by the Labour Court when this case was heard before the Labour Court. These provisions required the employer to deal with the plaintiff in a certain manner in accordance with the Employment Equality Act 1998.

During the course of her employment certain situations did arise whereby the employer did make serious attempts to facilitate the plaintiff's illness. To a large extent the employer did bend over backwards to assist and facilitate the

plaintiff and this is where I diverge from the decision of the Labour Court. I understand that there were legitimate concerns during a period from January to June 2002 regarding the plaintiff's health. I am in no doubt but that the employer is entitled to have legitimate concerns. I am in no doubt that the employer did in fact have these concerns regarding the plaintiff. However, the way to deal with these concerns was to take medical advice in order to allay those concerns. An employer should take advice from the plaintiff's own doctor or from an independent doctor. The employer had a legal obligation under the Employment Equality Act 1998 to deal with her in that way.

I believe from the evidence of the witness today that the employer had dealt with the matter honestly and openly and that the employer was honest on the day in Court in relation to the lack of procedures followed. However, the employer went about things in entirely the wrong way and in a totally in appropriate manner. In respect of the employer, it has an obligation to put its concerns to the test. If the employer had taken appropriate medical advice it might have come to the view that it could have dismissed the plaintiff and that there was no way of having the plaintiff in its employment, if it had done that things might be very different today.

However, the employer did not carry out the dismissal in an appropriate manner, the employer just jumped the gun and did not follow the correct procedures. The employer has accepted that and has been open and honest about that. If the employer had taken advices it may have in fact been able to keep the plaintiff on, ultimately the problem was that the problem was that the employer went about things entirely the wrong way. In a number of respects it has fallen down in its obligations as employer to the plaintiff. If it had in fact fulfilled those obligations the plaintiff might still be in her job today.

Accordingly, I find no basis for differing from the decision of the Labour Court and affirm the decision of the Labour Court in its entirety. I also affirm the award that was made by the Labour Court of compensation of €13,000. This is an expensive lesson for the defendant but maybe some good will come of it in that procedures within the company will be reviewed in the future.

For the respondent: *Clíona Kimber BL instructed by Northside Community Law Centre*
For the appellant: *Gerry Ryan BL instructed by Denis McSweeney Solicitors*

Dara Dowling
Barrister

Barbara Atkinson (plaintiff) v Hugh Carty & Others (defendant): Circuit Court No. 2001/04860 (Delahunt J.) May 6, 2004 ([2005] E.L.R. 1)

Employment equality – Sexual harassment – Independent contractor – Vicarious liability – Safe or proper systems of work – Statutory obligation of Employer – Safety, Health and Welfare at Work Act 1989 (No.7)

Complaints of sexual harassment – Flawed investigation – Contributory negligence – Delay in making employer aware of her difficulties

Facts The plaintiff was employed by the defendant as a legal accountant from 1987. Not long after she commenced employment, the plaintiff began to experience problems with an independent contractor who provided accountancy services to the defendant. During the 1990s, an unsafe and unwelcome sexual element began to occur in her relationship with the independent contractor. The problems became more severe, culminating in the plaintiff making a written complaint to the defendant in or around 2000. The plaintiff claimed that the delay in making the complaint was because she felt unable to complain due to the deterioration of her relationship with the managing partner, by whom she felt she was bullied, and on account of the fact that he had a close relationship with the independent contractor. The defendant, on receiving the complaint, adopted a reasonable approach by agreeing to carry out an independent investigation to examine the plaintiff's allegations. However it was then decided that the managing partner would conduct the investigation himself. The plaintiff claimed that the investigation was carried out in a wholly unfair manner in that the managing partner was conducting an investigation into allegations made against a close friend and furthermore that the plaintiff was not afforded full participation in the investigation. The defendant denied all allegations of bullying and argued that the investigation was fully in compliance with the requirements of natural justice.

Held by Delahunt J., in finding for the plaintiff arising from the defendant's breach of statutory and contractual duties:

(1) That the evidence that the plaintiff gave in relation to her difficulties with the independent contractor was credible and that she had suffered a serious case of sexual harassment. The Court was satisfied that the managing partner did not bully the plaintiff in the manner alleged in the course of her employment.

(2) The defendant could not plead immunity from their failure to fulfill their statutory obligation to provide a safe place of work, a safe system of work and a safe working environment simply because the plaintiff failed to make a complaint. There were no adequate procedures in place and this rendered the

defendant liable.

(3) The defendant was correctly before the Court as they were responsible for the actions of the independent contractor.

(4) The purported investigation carried out by the defendant was so flawed that it significantly exacerbated the problems for the plaintiff.

(5) The plaintiff was entitled to damages in the amount of €137,000, less a finding of contributory negligence measured at 25%, on account of the plaintiff being aware for a two-year period prior to making a complaint that she was being sexually harassed in the legal sense.

No cases referred to in judgment

Marguerite Bolger BL **for the plaintiff**
Colm P Condon BL **for the defendant**

DELAHUNT J. delivered her judgment on May 6, 2004 saying: This matter comes before the court by way of the plaintiff's application for damages for breach of contract, breach of duty including breach of statutory duty and ancillary reliefs arising from her employment with the defendants. The plaintiff relied in particular on the failure of the defendants to provide any safe or proper systems of work for the plaintiff pursuant to the Safety, Health and Welfare at Work Act 1989. A full and comprehensive defence was filed denying all allegations and pleading contributory negligence arising from the plaintiff's claims. It was further denied by the defendants that they were responsible for the acts of an independent contractor, Mr John Mahon, whom the plaintiff claimed sexually assaulted and harassed her during the course of her employment with the defendants. The contributory negligence alleged related to the plaintiff's failure to make any or any adequate complaint to the defendants.

The plaintiff commenced employment with the defendants in or around 1987 as a legal accountant. She was given a document setting out her terms and conditions of employment, however this document was not signed or dated. According to the defendants, the plaintiff was the only employee to receive this document despite there being a statutory obligation for the defendants to provide same to all employees. These terms and conditions of employment required the plaintiff to report to Messers Hugh Carty, John Carty and John Mahon.

The plaintiff began to experience problems with Mr Mahon not long after she commenced employment. Mr Mahon was not an employee of the defendants but an independent contractor who provided accountancy services to the defendants. The practice was for Mr Mahon to call on various days and at various times to the office of the plaintiff. The plaintiff objected to the unannounced and irregular nature of Mr Mahon's visits. However the defendants

directed that the plaintiff should comply with Mr Mahon's visits, that they were satisfied with the arrangement they had in place with Mr Mahon and they were entitled to insist on same.

During the 1990s, the plaintiff alleges an unsavoury element commenced concerning her relationship with Mr Mahon when unsafe and unwelcome sexual elements began to occur. In or around 1997–98 these problems became more severe culminating in the plaintiff making a written complaint in or around September 2000 to the defendants. No complaint had been made prior to this date. The plaintiff gave evidence stating that she felt she could not complain due to the deterioration of her relationship with the managing partner, Mr Hugh Carty. She felt that she had been bullied by Mr Hugh Carty and furthermore the fact that Mr Mahon was a close friend of Mr Hugh Carty's meant that she felt unable to make a complaint.

The defendants deny all allegations of bullying. Mr Hugh Carty stated that they had an open door policy in operation in the office and that any member of staff was free to go directly to himself or his secretary at all times in relation to any employment grievance that might arise. This was not contained in any written procedure or policy, however Mr Hugh Carty gave evidence to the effect that the open door policy operated in practice.

I am of the view that the evidence that the plaintiff gave in relation to her difficulties with Mr Mahon is credible. I note that Mr Mahon did not give evidence. However a former employee who was employed at the time that we are concerned with, Ms Mary Kane, did give evidence that corroborated the plaintiff's complaints against Mr Mahon, albeit post-termination of the plaintiff's employment.

However what is of crucial importance here is that an employer is obliged to provide a safe place of work, a safe system of work and a safe working environment. The onus is on the employer by law to provide for same.

I do not accept that the plaintiff was bullied in the course of her employment by Mr Hugh Carty in the manner alleged, but I do believe that the plaintiff suffered a serious case of sexual harassment.

I note that there were no written procedures in place to provide the plaintiff with an avenue to seek redress. It is not sufficient for the defendants to plead that no amount of paper compliance would have helped in the case of the plaintiff. The failure of the defendants to have in place adequate procedures renders them liable and by reason of their failure to fulfill their statutory obligations they are responsible and cannot plead immunity from same simply because the plaintiff failed to make a complaint.

Furthermore I am satisfied that the defendants are responsible for the actions of Mr Mahon and that the defendants are correctly before the court.

In relation to the investigation which the defendant claims they conducted in a manner that complied fully with the requirements of natural justice, this

court is of the view that that purported investigation was so flawed that it significantly exacerbated problems for the plaintiff. On September 5, 2000, the defendants adopted what was a perfectly reasonable approach confirmed by the memo of the meeting that took place between Messers Hugh Carty, John Carty and the plaintiff. At the said meeting it was agreed that there would be an independent investigation carried out to examine the plaintiff's allegations. However after this was agreed, Mr Hugh Carty subsequently decided that he would conduct the investigation himself rather than have it independently investigated.

The investigation was flawed for a number of reasons. First, Mr Carty was investigating a close friend. Secondly, the plaintiff was provided no opportunity in the course of the investigation to respond either verbally or in writing to matters arising. Thirdly, the plaintiff was not furnished with details of the responses of any other person interviewed in the course of the investigation. Fourthly, Mr Carty continued with the investigation whilst at the same time having serious professional difficulties with the plaintiff in relation to the running of his office.

I am finding for the plaintiff arising from the defendant's breach of statutory and contractual duties towards her.

However I do have some sympathy for the defendant as the plaintiff failed to make them aware of her difficulties until September of 2000 even though it is clear from her evidence that she was aware in or around 1997 that she was being sexually harassed in the legal sense as a result of information supplied to her by her husband about the sexual harassment policy that applied in his employment. From that time, the plaintiff was in a position to do something as regards the sexual harassment but she failed to do so for another two years.

I am satisfied that the plaintiff has suffered deep psychological trauma which has prevented her from reverting to her qualified employment. Her psychiatrist, Dr Leader, is of the view that the plaintiff will be unable to work in her chosen profession again. Dr Leader also gave evidence stating that the legal process has had a bad effect on the plaintiff in relation to the trauma suffered. I note that Dr Leader's evidence is based on two reviews and no treatment. The defendants' medical advisor is of the view that within a period of nine to 12 months, the plaintiff will recover fully if she continues her treatment.

It would appear that the plaintiff will achieve recovery within a period of five years after her making the complaint to the defendants.

I am therefore assessing damages in the amount of €40,000 for general damages, €79,000 for special damages to date and €18,000 for loss and damage into the future. I am of the view that the plaintiff is guilty of contributory negligence arising from her failure to act sooner than she did, and I assess that level of contribution at 25%. I direct that the award should be reduced accordingly.

Costs are to be awarded to the plaintiff.

A stay is to be granted on the order pending an appeal conditional on the sum of €15,000 being paid to the plaintiff before the appeal is lodged.

For the plaintiff: *W & E Bradshaw Solicitors*
For the defendant: *Harrison O'Dowd Solicitors*

Kara Turner
Barrister

Total A + B+ C + D 301,479

E Pension adjustment to reflect continuous service to: May 23, 2008

Solicitor for the plaintiff: *Niall T Cawley and Company Solicitors*
Solicitor for the defendants: *Meagher Solicitors*

Claire Bruton
Barrister

Reporter's Note:
After delivering his judgment, Mr Justice Hanna stated that the judgment was not to be perfected until the plaintiff amended his pleadings to reflect the claim for wrongful dismissal.

Arturs Valpeters (complainant) v Melbury Developments Ltd (respondent): Labour Court EDA0917 (September 16, 2009) ([2010] E.L.R. 64)

Employment equality – Race – Less favourable treatment – Entitlement of the Court to take account of the knowledge and experience of its members – Burden of proof – Right to information – Appropriate redress – Appeal against the decision of the Equality Tribunal – Employment Equality Acts 1998 (No.21) to 2007 (No.27), ss.6(2), 8, 74, 76, 83 and 85A

Facts The complainant, a Latvian national, was employed by the respondent as a general operative from May 19, 2005 until April 13, 2007. He claimed that he was treated less favourably than an Irish worker in that:

(a) He was treated as a self-employed sub-contractor rather than an employee engaged on a contract of service,
(b) He received no written contract of employment,
(c) He was not provided with payslips,
(d) He received no health and safety training or no health and safety statement in a language which he understood,
(e) He was not paid in accordance with the registered employment agreement for the construction industry,
(f) He was dismissed from his employment without being afforded the benefit of fair procedures which would have been available to a worker of Irish nationality.

The Equality Officer found that the complainant was an employee on a contract of service but found that the complaints particularised at (b), (c) and (e) had been disposed of under other legislative provisions and that in respect of (a) and (f) the complainant had failed to establish a prima facie case of discrimination and accordingly those complaints could not succeed. In respect of (d), the Equality Officer found that the complainant had been discriminated against on grounds of race and awarded him €500 compensation.

The complainant appealed against the Equality Officer's decision in relation to (a) and (f) and appealed against the quantum of the compensation awarded in respect of (d). There was no cross-appeal by the respondent who did not attend the hearing.

The complainant contended that he was treated badly by the respondent and was so treated because of his race. The solicitor for the complainant contended that the complainant was not in a position to provide evidence concerning how other employees of the respondent were treated and submitted that in such circumstances the Court should apply a "peculiar knowledge principle" so as to place the onus of proving those facts on the respondent.

Determined by the Labour Court in finding that the complainant had failed to establish facts from which discrimination could be inferred and dismissing the appeal, that:

(1) Mere speculation or assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn.

(2) The "peculiar knowledge principle" cannot be applied so as to offset or supplant the clear statutory requirements of the Act in relation to the burden of proof.

(3) Knowledge of how the complainant's fellow workers were treated was not exclusively within the knowledge of the respondent. The workers could have been required to attend the hearing and the complainant could have sought information concerning their employment status under section 76 of the Act.

(4) Where no reply is given or where misleading or equivocal information is provided by an employer under section 76, the Equality Officer or the Court can draw an inference adverse to the respondent.

(5) The Court can rely on the knowledge and experience of its members in concluding facts. In that regard, the Court concluded that the practice of classifying workers as sub-contractors to avoid an employer's responsibilities under employment, tax and social welfare legislation is not confined to workers whose national origin is outside Ireland.

(6) The award of €500 compensation for the respondent's failure to give health and safety training or a health and safety statement in a language which

he understood, is adequate in circumstances where the complainant suffered no material or other loss or any inconvenience or upset in consequence of the discrimination.

Cases referred to in the determination
Attorney General (McGowan) v Carville (1961) 95 I.T.L.R. 41
Briggs v North Eastern Education and Library Board [1990] I.R.L.R. 181
Campbell Catering v Rasaq [2004] E.L.R. 310
Hanrahan v Merck Sharpe and Dohme [1988] I.L.R.M. 629
Inoue v NBK Designs [2003] E.L.R. 98
London Underground v Edwards (No. 2) [1998] I.R.L.R. 364
Mahony v Waterford, Limerick and Western Railway Co. [1900] 2 I.R. 273
Rothwell v Motor Insurance Bureau of Ireland [2003] 1 I.R. 268

The full text of the Labour Court determination was as follows:

Subject
1. Appeal under s.83 of the Employment Equality Acts 1998 to 2007-DEC-E2009-019.

Background
2. The worker appealed against the decision of the Equality Officer to the Labour Court on April 1, 2009, in accordance with s.83 of the Equality Acts 1998 to 2007. A Labour Court hearing took place on September 9, 2009 in Waterford. The following is the Labour Court's Determination.

Determination
This is a complaint by Mr Arturs Valpeters (hereafter the complainant) against Melbury Construction Ltd (hereafter the respondent) alleging discrimination on the race ground. The complaint was made under the Employment Equality Acts 1998–2008 (hereafter the Act). The complainant is a native of Latvia. He was employed by the respondent as a general operative between May 19, 2005 and April 13, 2007.

The substance of the complainant's case is that while employed by the respondent he was treated less favourably that an Irish worker would have been treated. In advancing his claim the complainant relied upon the following particulars:

(a) That he was treated as a self-employed sub-contractor by the respondent whereas he was in reality employed under a contract of service;
(b) He received no written contract of employment;
(c) He was not provided with payslips;

(d) He received no health and safety training and did not receive a health and safety statement in a language which he understood;
(e) He was not paid in accordance with the registered employment agreement for the construction industry;
(f) He was dismissed from his employment without being afforded the benefit of any procedures which would have been available to a worker of Irish nationality.

The complaint was investigated by an Equality Officer of the Equality Tribunal pursuant to s.79 of the Act. The Equality Officer found that those aspects of the complaint particularised at (b), (c) and (e) had been disposed of in proceedings under other legislative provisions and did not fall to be decided upon by him.

The Equality Officer was satisfied that at all material times the complainant was an employee of the respondent under a contract of service. On the particulars of the complaints within his jurisdiction the Equality Officer found that in respect to the complaints at (a) and (f) the complainant had failed to establish a prima facie case of discrimination and that those complaints could not succeed.

On the complaint referred to at (d) the Equality Officer held that the complainant was discriminated against in not being provided with a safety statement in a language in which he was competent.

The Equality Officer awarded the complainant compensation in the amount of €500.

The complainant appealed against so much of the Equality Officer's Decision which held that his complaints under (a) and (f) above could not succeed. He also appealed against the quantum of compensation awarded in respect of his complaint particularised at (d) above.

There is no cross-appeal by the respondent.

The respondent, having been duly notified of the time, date and place of the hearing of the appeal failed to appear.

The complainant's case

The gist of the complainant's case is that he suffered loss in respect to social welfare entitlements and the deduction of additional tax in consequence of being classified by the respondent as self- employed. He submitted that an Irish national working in the construction industry would have known the difference between being a self-employed contractor and being an employee. It was submitted on the complainant's behalf that the Court should infer that an Irish worker would not have been subjected to similar treatment.

With regard to the dismissal, the complainant contends that he was not afforded the benefit of any form of procedure before the decision to dismiss him was taken. He claims that an Irish worker would not have been similarly treated.

It was further submitted that the quantum of compensation awarded by the Equality Officer was not adequate or reasonable in all the circumstances of the case.

Conclusions of the Court

Section 85A of the Act provides for the allocation of the probative burden in cases within its ambit. This requires that the complainant must first establish facts from which discrimination may be inferred. What those facts are will vary from case to case and there is no closed category of facts which can be relied upon. All that is required is that they be of sufficient significance to raise a presumption of discrimination. However they must be established as facts on credible evidence. Mere speculation or assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn. Section 85A places the burden of establishing the primary facts fairly and squarely on the complainant and the language of this provision admits of no exceptions to that evidential rule.

In this case it was submitted that the complainant was treated badly by the respondent and the Court was invited to infer that he was so treated because of his race. Such an inference could only be drawn if there was evidence of some weight from which it could be concluded that persons of a different race or nationality were or would be treated more favourably. All that has been proffered in support of that contention is a mere assertion unsupported by any evidence.

Mr Grogan, solicitor for the complainant has pointed to the difficulty for the complainant in obtaining evidence concerning how others were treated. He submitted that in these circumstances the respondent should be required to prove that others were treated similarly to the complainant. In the Court's view such an approach would amount to placing the entire probative burden on the respondent. That would involve an impermissible departure from the plain language and clear import of s.85A of the Act and the Community law provision upon which it is based.

It was further submitted that in circumstances in which the complainant could have no way of knowing whether or not other employees of a different nationality were wrongly treated as sub-contractors the Court should apply what is known as the peculiar knowledge principle so as to place the onus of proving that fact on the respondent. The *peculiar knowledge principle* is a rule of evidence by which the burden of proofing a fact in issue can, in certain circumstances, be placed on a defendant. It was explained by Palles C.B. in *Mahony v Waterford, Limerick and Western Railway Co.* [1900] 2 I. R. 273 as follows:

> "I rest my judgment on this:—although it is the general rule of law that it lies upon the plaintiff to prove affirmatively all the facts entitling him to relief, there is a well-known exception to such rule in reference to matters which are peculiarly

> within the knowledge of the defendant. In such case the onus is shifted"

The Chief Baron went on to quote from *Taylor on Evidence* as follows:

> "The second exception to the above-named general rule is that where the subject matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character and even though there be a presumption of law in his favour."

There are difficulties in applying that principle in the instant case. First, it is a common law rule and the Court cannot see how it could be applied so as to offset or supplant the clear statutory requirements of s.85A of the Act. In any event it appears that the application of the peculiar knowledge principle operates similarly to s.85A of the Act in that the existence of the presumed fact must be established in a prima facie way before the onus of proof shifts to the defendant. Secondly in *Attorney General (McGowan) v Carville* (1961) 95 I.L.T.R. 41, Davitt P. pointed out that the principle operates where the fact in issue is *exclusively* or *almost exclusively* with the knowledge of the defendant. In *Hanrahan v Merck Sharpe and Dohme* [1988] I.L.R.M. 629, Henchy J. made it clear that mere difficulty of proof would not suffice in shifting the burden of proof to the defendant. More recently, in *Rothwell v Motor Insurers Bureau of Ireland* [2003] 1 I.R. 268, the Supreme Court (per Hardiman J.) approved and applied the dictum of Henchy J in *Hanrahan.* The Judge further pointed out the presumed fact in issue must be "*peculiarly within the range of the defendants capacity of proof*".

Knowledge of how the complainant's fellow workers were treated is not exclusively or almost exclusively within the knowledge of the respondent. Nor could it be said that it is peculiarly within the range of respondent's capacity of proof. It is also plainly within the knowledge of those other workers. The complainant could have sought to ascertain from those workers if they were treated as sub-contractors or as employees. If necessary those workers could have been required to attend at the hearing and testify as to how they were treated.

For these reasons the Court cannot accept that the peculiar knowledge principle can avail the complainant so as to relieve him of the obligation to prove the primary facts upon which he relies in accordance with s.85A of the Act.

There is provision for the obtaining of information from a respondent under s.76 of the Act which is intended to be in ease of a complainant who would otherwise be unable to obtain necessary proofs in order to process a complaint under the Act. Where no reply is given or where a misleading or equivocal information is provided the Equality Officer and the Court can draw an inference adverse to the respondent. That procedure was utilised in this case but questions were not put concerning the employment status ascribed to others employed by the respondent.

These observations on the requirement to prove the primary facts relied upon apply with equal force in respect to the complainant's submissions regarding both his claim alleging discriminatory treatment and his dismissal. In neither case is there a scintilla of evidence to show that others of a different nationality to that of the complainant were treated differently in either respect.

In that regard the instant case is readily distinguishable on its facts from that of *Campbell Catering v Rasaq* [2004] E.L.R. 310, on which reliance was placed by the complainant's solicitor. That case concerned a worker who was dismissed having been accused of stealing goods belonging to her employer. She had not been expressly advised of her right to mount a defence and be represented in a disciplinary inquiry. The respondent contended that the complainant was treated the same as any other worker accused of theft. In considering that point the Court said the following:

> "It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with differences of language and culture. In the case of disciplinary proceedings, employers have a positive duty to ensure that all workers fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence, including the right to representation. Special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilitates and guidance in making a defense. In such cases, applying the same procedural standards to a non-national workers as would be applied to an Irish national could amount to the application of the same rules to different situations and could in itself amount to discrimination."

The complainant herein was not accused of any form of misconduct and the question of an investigative or disciplinary procedure did not arise. Consequently the underlying rationale of that decision is inapplicable to the facts of the instant case.

In respect to the complainant's erroneous classification by the respondent as an independent contractor, the Court has been invited to accept, as a notorious fact, that an Irish worker would not have been similarly treated. The Court cannot make such an assumption. From its own experience over many cases it appears to the Court that many employers in the construction industry wrongly classify workers who are in reality employees as sub-contractors as a device to avoid their responsibilities under employment, tax and social welfare legislation. This practice is by no means confined to workers whose national origin is outside Ireland.

It is well established that the Court, as an expert tribunal, is entitled to take account of the knowledge and experience of its members in concluding facts. This was made clear by this Court in *Inoue v NBK Designs* [2003] E.L.R.

98. That decision echoed a similar approach taken by the Court of Appeal for England and Wales in *London Underground v Edwards (No.2)* [1998] I.R.L.R. 364 where it was acknowledged that tribunals do not sit in blinkers and are entitled to make use of their own knowledge and experience in the industrial field. Similarly in the Northern Ireland case of *Briggs v North Eastern Education and Library Board* [1990] I.R.L.R. 181, the Court of Appeal held that tribunals are not debarred from taking account of their own knowledge and experience in formulating decisions. The knowledge and experience of this Court suggests that the complainant's assertion that his classification as a sub-contractor was discriminatory is not well-founded.

In these circumstances the Court is satisfied that the complainant has failed to establish facts from which it may be inferred that his classification by the respondent as an independent contractor, or his dismissal, were on grounds of his race and hence discriminatory. Accordingly the Court is satisfied that the Equality Officer was correct in the conclusion which he reached on these aspects of the complaint.

Quantum

The Equality Officer found that the complainant did suffer discrimination in not being provided with a safety statement in a language which he understood. The respondent has not appealed against that finding and it is not in issue in this appeal. The complainant has, however, submitted that the quantum of the award made by the Equality Officer is inadequate.

There is no evidence of the complainant having suffered any material or other loss in consequence of the discrimination which the Equality Officer found to have occurred. Nor is there evidence that he suffered any inconvenience or upset attributable to the respondent's conduct. In these circumstances the Court is satisfied that the award made by the Equality Officer is adequate.

Determination

For all of the reasons set out above the Court can see no basis upon which it could interfere with the Decision of the Equality Officer. Accordingly the within appeal is disallowed and the Decision of the Equality Tribunal is affirmed.

For the complainant: *Richard Grogan & Associates Solicitors*
The respondent did not attend the hearing

Division of the Labour Court: Mr Duffy (Chairman), Mr Doherty, Mr Nash

Mairéad Carey
Barrister

Teresa Mitchell (appellant) v. Southern Health Board (Cork University Hospital) (respondent): Labour Court AEE/99/8 (15 February 2001)

Employment equality – Discrimination – Access to employment – Whether claimant had established prima facie case of discrimination on grounds of sex – Onus of proof – Gender imbalance on interview board, although undesirable, not of itself sufficient to amount to discrimination – Employment Equality Act 1977 (No. 16), sections 2(a), 3 and 12 – Council Directive 97/80 on the Burden of Proof in Cases of Discrimination Based on Sex, Article 4

Facts The claimant, a locum physician employed by the respondent since 1990, applied for a full-time position in 1994. She was unsuccessful and a male candidate was appointed to the post. She brought a claim to the Equality Officer who found that the respondent did not discriminate against the appellant contrary to the provisions of the Employment Equality Act 1977. The appellant appealed that recommendation to the Labour Court. In her submissions, which were denied by the respondent, the claimant alleged, *inter alia*, that she had greater experience than the successful candidate, was better qualified than the successful candidate, that discriminatory remarks were made prior to the interview and that her previous experience and academic achievements were ignored at the interview. As a preliminary point, the Labour Court had to determine whether it had jurisdiction to proceed with the substantive complaint or refer the matter back to an Equality Officer who had initially determined that he had no jurisdiction to investigate the substantive complaint according to section 12 of the 1977

Act since the disputed appointment had been made by the Local Appointments Commission.

Determined in dismissing the appeal:

(1) The Court has no statutory authority to refer a complaint back to an Equality Officer when an Equality Officer had made a prior recommendation to the Court and had previously determined that he had no jurisdiction to investigate the substantive complaint under section 12 of the 1977 Act. Accordingly, the Court would proceed to investigate the substantive complaint.

(2) A claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

(3) Only if these primary facts are established to the satisfaction of the Court, and they are regarded as being of sufficient significance to raise a presumption of discrimination, does the onus shift to the respondent to prove that there was no infringement of the principle of equal treatment. *Wallace v. South Eastern Education and Library Board* [1980] NI 38; [1980] IRLR 193 followed.

(4) Gender imbalance in an interview board, although highly undesirable, does not, in itself, lead to a prima facie finding of discrimination in every case. Nonetheless, such a practice is potentially discriminatory and can form part of the evidential chain on which a claim of discrimination could be made out. *Gleeson v. Rotunda Hospital* [2000] ELR 206 considered.

(5) The appellant had not discharged the evidential burden which she carried and the appeal should accordingly be dismissed.

Cases referred to in recommendation

Gleeson v. Rotunda Hospital and Mater Misericordiae Hospital [2000] ELR 206
Wallace v. South Eastern Education and Library Board [1980] NI 38; [1980] IRLR 193

Full text of Labour Court determination:

Background

The full background of the case is set out in the Equality Officer's Recommendation No. EE16/1998.

The appellant was employed as a locum consultant physician in general medicine, diabetes and endocrinology at Cork University Hospital from July 1990 to December 1995. In December 1994, the post she occupied was advertised in a permanent capacity. The appellant applied for the post but was unsuccessful, with a male candidate being appointed to the post.

The Equality Officer in his recommendation found that the Southern Health Board did not discriminate against the appellant, contrary to the provisions of the Employment Equality Act 1977.

The appellant appealed the recommendation to the Labour Court on 23 September 1998, on the following grounds:

(i) the Equality Officer erred in law and in fact in finding that the Southern Health Board did not discriminate against the appellant contrary to section 3 of the 1977 Act;
(ii) the Equality Officer erred in law and in fact in finding that the Southern Health Board was not responsible for the appointment given that the board's chief executive made the appointment following a recommendation from the Local Appointments Commission;
(iii) the Equality Officer erred in law and in fact in not awarding an appropriate remedy to the appellant for the discrimination experienced by her and the consequent distress to her;
(iv) on all grounds submitted during the Equality Officer's investigation and such grounds as may arise during the course of the appeal.

The appellant claims that she:

- had greater experience in general medicine, diabetes, endocrinology and metabolism than the successful candidate (details supplied to the Court) ;
- was better qualified than the successful candidate;
- had more publications, more first authorship, more supervisory authorship, more publications in diabetes than the successful candidate;
- the successful candidate submitted additional data to update his CV on the day of interview;
- there was no correlation between remarks made about candidates at interview and final ranking of these candidates;
- the interviewers did not appear to refer to referees re candidates.

The appellant also claims that she was the subject of discriminatory remarks before the interview. She believes that her experience and academic achievements were ignored at the interview.

The board denies that any discriminatory remarks were made to the appellant, either before or during the interview, or that any sexual discrimination took place. While it accepts that the appellant was sufficiently suitable/experienced/qualified for the post, it asserts that the successful candidate was more suitable/experienced/qualified and that this has been borne out since the appointment.

A Labour Court hearing took place on 28 November 2000. The following is the Court's determination.

Determination

The appellant claims to have suffered discrimination on grounds of her sex in not being appointed to the post of consultant physician in general medicine, diabetes and endocrinology with the Southern Health Board (Cork University Hospital). The selection for the post was carried out by the Local Appointment Commission pursuant to section 14 of the Health Act 1970. The disputed appointment was made in April 1995. The appellant had held the post for the previous five

years in a locum capacity.

The appellant made a complaint to the Court pursuant to section 19 of the Employment Equality Act 1977 (the Act) in June 1996. The Court referred the dispute to an Equality Officer for investigation and recommendation. The Equality Officer concluded that section 12 of the Act precluded him from investigating the substance of the complaint, since the disputed appointment had been made on foot of a recommendation made by the Local Appointments Commission. The Equality Officer found that the named respondent, the Southern Health Board, did not discriminate against appellant as it had not made the selection which formed the subject of the complaint. It was against that finding that the appellant appealed to the Court.

The appeal opened before the Court on 24 March 1999. Having received submissions from both parties, the Court issued Determination DEE 992, dated 2 July 1999. In that determination, the Court held that section 22 of the Act did not preclude an investigation of the appellant's complaint under the Act. The Court adjourned the hearing on the substantive complaint, so as to allow the parties to make submissions on how the Court should proceed with the investigation in the light of its findings on the issue of jurisdiction.

The Southern Health Board then appealed the Determination of the Court to the High Court on a point of law. That appeal came on for hearing before Barr J on 25 February 2000. In an *ex tempore* judgment, the court struck out the proceedings, holding that they were premature since this Court had not made any finding on whether or not the appellant had been discriminated against.

Following the judgment of the High Court, this Court invited the parties to make written submissions on how it should proceed in the investigation of the substantive complaint. Solicitors for the appellant submitted that the Court should refer the dispute back to an Equality Officer for investigation. They claimed that the appellant was entitled to a hearing of all the evidence at first instance before an Equality Officer, with the possibility of a full appeal to the Labour Court. The Southern Health Board did not make any submission on this point.

Having considered the submission received, the Court concluded that it had no statutory authority to refer the case back to an Equality Officer, and was obliged to make a definitive determination on the complaint of discrimination. The Court's reasoning was formulated by way of a preliminary conclusion and was conveyed to the parties by letter dated 21 July 2000. The parties were again invited to make submissions on the view taken by the Court. Neither party demurred from that view.

The substantive case

The submissions of the parties

The appellant's claim is grounded on a number of assertions, namely:

(i) That prior to the interview for the post, a named member of the interview board subjected her to discriminatory remarks.
(ii) That she was better qualified for the post and more experienced than the successful candidate.
(iii) That the interview was not fairly conducted.

Full particulars in relation to each of these assertions were provided to the Court.

The respondent made its submission to the Court without prejudice to its contention that it was not a proper party to the proceedings, as it had not exercised any discretion in the selection or appointment to the disputed post.

The respondent's defence was essentially a contradiction of the appellant's claims. They denied that the named member of the interview board had subjected the appellant to discriminatory remarks, either before the interview or at all. They said that six candidates were interviewed for the post; they were all excellent candidates and each of them was qualified and suitable for appointment. The successful candidate was, however, considered to be outstanding, and for that reason was recommended for appointment.

Onus of Proof

Counsel for both parties made submissions to the Court on how the evidential burden should be applied in this case. Counsel for the appellant submitted that, once the appellant makes out a prima facie case, the onus falls on the respondent to rebut the presumption of discrimination. He relied on the decision of the Northern Ireland Court of Appeal in *Wallace v. South Eastern Education and Library Board* [1980] NI 38; [1980] IRLR 193.

Counsel for the Health Board submitted that the onus is on the claimant to prove, on the balance of probabilities, that she did suffer discrimination.

Council Directive 97/80 of 15 December 1997, on the Burden of Proof in Cases of Discrimination Based on Sex, sets out the procedural rules to be followed in applying the evidential burden in discrimination cases. Article 4.l of the Directive provides that, where a plaintiff in discrimination proceedings establishes facts from which it may be presumed that there has been discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

This Directive has not yet been transposed into Irish law. The date for implementation is 1 January 2001, and it cannot have direct effect before that date. However, in the preamble to the Directive, it is expressly stated that its provisions are derived from the case law of the ECJ. It would appear, therefore, that the aim of the Directive is to formalise in legislation the case law of the ECJ as it presently stands, rather than to introduce a new procedural requirement.

With regard to the *Wallace* case, this decision of the Northern Ireland Court of Appeal is of persuasive rather than binding authority. It was, however, fol-

lowed by this Court in *Gleeson v. Rotunda Hospital and Mater Misericordiae Hospital* [2000] ELR 206.

Wallace is authority for the proposition that, where it is established that a person suffered discrimination in the filling of a post, the onus shifts to the employer to establish that the discrimination did not arise from the gender of the unsuccessful candidate. To that extent, it is consistent with Article 4 of the Onus of Proof Directive and the case law of the ECJ on which it is based.

On that basis, the Court accepts that the principles set out in *Wallace* and Article 4 of the Directive provide the appropriate procedural rule to be applied in the present case.

It is necessary, however, to consider the extent of the evidential burden which a claimant must discharge before a prima facie case of discrimination on grounds of sex can be made out. The first requirement of Article 4 of the Directive is that the claimant must 'establish facts' from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.

Applied to the present case, this approach means that the appellant must first prove as a fact one or more of the assertions on which her complaint of discrimination is based. A prima facie case of discrimination can only arise if the appellant succeeds in discharging that evidential burden. If she does, the respondent must prove that she was not discriminated against on grounds of her sex. If she does not, her case cannot succeed.

The evidence

The original defence made by the respondent was that section 12(3) of the Act precluded an investigation by the Court into the selection by the Local Appointments Commissioners of a person to an office or position. In interpreting the Act in conformity with European law, the Court held in DEE 992 that the Local Appointments Commissioners are immune from liability in a claim of discrimination, but that no such immunity can be extended to the respondent as the prospective employer.

Having so decided, the Court expressed the view that by virtue of section 12(3) of the Act, evidence in relation to the selection process of the Local Appointments Commission might not be compellable in relation to the substantive case. In the event, the Local Appointments Commission co-operated fully with the Court in its investigation of this case and provided the Court (and the parties) with a complete file of all documents in its possession relating to the filling of

the disputed post.

These included the curricula vitae of all candidates interviewed for the post, the notes of the interview, and the marking sheet on which the results were recorded. This file also contained a copy of the report of the interview board to the Local Appointments Commission. This report set out the attributes that the board considered necessary for the post, and the reasons for its decision to nominate the successful candidate for appointment.

Oral evidence was given by the appellant and by four witnesses called by the respondent. All of this oral and documentary evidence, together with the demeanour of the witnesses, has been taken into account by the Court in reaching its conclusions,

The appellant gave her evidence with conviction and clarity. She told the Court that some time before the interview a named member of the interview board told her that she had two disadvantages – she is a locum and a woman. In his evidence to the Court, which was given with equal conviction and clarity, the person named strenuously denied having made this or any similar comment. The appellant also told the Court of having mentioned the offending remark to a medical colleague after the result of the competition became known, and of having raised it at a meeting with the hospital administrator some time later. Both persons gave evidence for the respondent, and neither had any recollection of being told of this remark.

The appellant also told the Court of her professional qualifications and experience, including research and publications, which she claimed were superior to that of the successful candidate. She also told the Court that, in her opinion, all but one of the other candidates for the post were unsuitable for appointment.

Medical witnesses called by the respondent, who had participated in the interview board, said that the appellant had different qualifications and experience to that of the successful candidate, but they did not accept that it was of superior quality. These witnesses accepted that the appellant was an excellent candidate. However, they told the Court that the interview board was unanimous in the view that the doctor recommended for appointment was an outstanding candidate.

It was common case that, once it became known that the appellant was not successful in her application for the disputed post, the hospital management sought to retain her valued services. To this end, management attempted to create a restructured post, at a similar level as the locum post that the appellant had occupied, and to which the appellant could be appointed. Whilst this initiative was being actively pursued for some time, it was discontinued when the appellant commenced the present proceedings.

With regard to the interview, the appellant said in evidence that she felt that she was being hurried and that the board seemed uninterested in her work and experience. The members of the board who gave evidence said that the appel-

lant's interview was conducted no differently to that of other candidates.

Conclusions of the Court

The onus of proving the factual basis on which unlawful discrimination may be presumed rests with the appellant.

The Court found the appellant to be an impressive witness. She appeared to have a clear recollection of the disputed events to which she averred. She was also firm in her opinion as to the superiority of her own qualifications and experience relative to that of the successful candidate. These recollections and opinions were, however, unsupported by any evidence beyond that of the appellant herself. They were also hotly contradicted by equally impressive witnesses called by the respondent.

The Court fully accepts that the appellant had provided five years satisfactory service as a locum in the disputed post. The Court also accepts that the appellant might reasonably have expected that her past service and clinical experience would have been a decisive factor in her favour. However, in the Courts view, these considerations could not of themselves establish that the, selection made was so irrational or unfair as to raise a presumption of unlawful discrimination.

Taking the evidence as a whole, the Court has concluded, with some hesitation, that the appellant has not discharged the evidential burden which she carries. Accordingly, her claim cannot succeed.

There is, however, one further aspect of this case on which the court considers it appropriate to comment. The interview board established by the Local Appointments Commission comprised five members, all of whom were men. There was no evidence to indicate that the Commissioners made any effort to secure the services of a suitably qualified woman to serve on the board.

Relying on the determination of this Court in the *Gleeson* case, counsel for the appellant submitted that such a gender imbalance in the composition of the interview board is sufficient to establish a prima facie case of discrimination. The relevant statement by the Court in *Gleeson* must, however, be read in context. In that case, the Court found five instances of unfairness in the selection process, the cumulative effect of which resulted in a prima facie finding of discrimination. The composition of the board was but one of these instances.

The Court considers it highly undesirable to constitute an interview board made up entirely of men. This is particularly the case where, as in the medical profession, there is a dominance of men at the most senior professional level. *Gleeson* cannot be regarded as authority for the proposition that gender imbalance in an interview board must, in itself, lead to a prima facie finding of discrimination in every case. Nonetheless, the Court considers that such a practice is potentially discriminatory and can form part of the evidential chain on which a claim of discrimination could be made out.

The Court would strongly urge all appropriate parties to have full regard to the now accepted need to ensure gender balance at all levels in the process of selection for appointment.

Determination
It is the determination of the Court that the complaint before it is not well founded, and that the appellant did not suffer discrimination within the meaning of section 2(a) of the Employment Equality Act 1977. The complaint herein is dismissed.

For the respondent: *Conway Kelleher Tobin Solicitors*
For the appellant: *O'Mara Geraghty McCourt Solicitors*

Deputy Chairman: *Kevin Duffy*

Paul A. Christopher
Barrister
1603

DWT0338 October 28, 2003

Cementation Skanska (formerly Kvaerner Cementation) Limited - And - Tom Carroll

Case Details

Body
Labour Court

Date
October 28, 2003

Official
Kevin Duffy

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Tipperary

Decision/Case Number(s)
- DWT0338
- WTC/03/2
- WT5724/01/MR

Note
Enquiries concerning this Determination should be addressed to Jackie Byrne, Court Secretary.

Employer Member
Mr Grier

Worker Member
Mr O'Neill

SUBJECT:

1. Appeal against Rights Commissioner's Decision WT5724/01/MR.

BACKGROUND:

2. The worker claims that he did not receive any holiday/public holiday pay while employed by the Company. The Company states that the claimant was paid holiday pay and public holiday pay under revised contracts of employment which applied from 1st January, 2001.

The worker referred a claim to the Rights Commissioner service on the 6th September, 2001. The worker states that the reason he did not make a claim within the 6 months as specified in Section 27 (4) of the Organisation of Working Time Act, 1997, (the Act) was that he was waiting the results of a test case taken by a fellow employee.

The Rights Commissioner's Decision issued on the 31st December, 2002 as follows:

"In accordance with Section 27 of the Act, I hereby declare that this complaint is out of time."

The worker appealed the Rights Commissioner's Decision on the 9th January, 2003, in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. The Company's case is that the worker's claim is out of time. A Labour Court hearing took place on 22nd April, 2003. The following is the Court's Determination:

DETERMINATION:

Facts.

In this case the respondent made no defence to the claim other than to contend that the complaint was presented out of time.

The factual background to this case, as admitted or as found by the Court, is as follows:

The claimant was employed by the respondent from 1st November 1998 until 1st June 2001. In common with other employees of the respondent he was initially employed on a contract of employment which purported to incorporate an element in his basic pay to cover payment in respect of annual leave and public holidays. On or about January 2000 an employee of the respondent, Mr Martin Treacy, referred a complaint to a Rights Commissioner, pursuant to section 27 of the Organisation of Working Time Act 1997 (the Act), in which he sought to challenge the validity of these arrangements having regard to the provisions of the Act.

By a decision dated 14th April 2000 the Rights Commissioner held with the claimant in that case and directed that he be paid in respect of the relevant periods of annual leave and public holidays. The respondent appealed that decision to the Court. By Determination DWT017, issued on 31st January 2001, the Court dismissed the appeal and affirmed the decision of the Rights Commissioner. In that Determination the Court held, inter alia, that the impugned contractual term was rendered void by the combined effect of section 37 of the Act and Article 7(2) of Directive 93/104/EC on the Organisation of Working Time.

In April 2001 the respondent issued amended contracts of employment to its employees, including the claimant herein, which conformed to the requirements of the Act in respect to holiday entitlements. However, the amended terms were expressly limited in their application to the period from the 1st January 2001 onwards. The contract did provide that the leave year for the purpose of granting leave would be the period specified in section 2(1) of the Act, namely, a period commencing on 1st April in any year and terminating on 31st March in the following year.

The claimant's employment with the respondent terminated on 1st June 2001. On 13th August 2001 he presented a complaint pursuant to section 27 of the Act claiming redress in respect of alleged infringements of his statutory rights in relation to annual leave and public holidays. The complaint was heard by the Rights Commissioner on 1st August 2002.

In his decision issued on 31st December 2002, the Rights Commissioner took the view that the complaint before him was presented outside the time limit specified in section 27(4) of the Act. The Rights Commissioner further held against applying the extended limitation period provided for at section 27(5) of the Act. Accordingly, the Rights Commissioner declined to entertain the complaint. The claimant appealed to this Court.

Application of the Time–Limit.

The respondent contended that since the contract issued to the claimant in April, 2001 provided for compliance with the Act from 1st January 2001, the contraventions of which he complains must relate to a period prior to that date. Consequently, they say, the complaint was made out side the time limit prescribed by section 27(4) of the Act.

It is now clear that the limitation period at section 27(4) starts to run from the date on which the contravention complained of actually occurs. This was made clear by the High Court inRoyal Liver Assurance Limited v Mackin & Others High Court Unreported Lavin J 15th November 2002.The rationale of that decision appears to be that where an employee is granted unpaid annual leave, and brings a complaint seeking payment for that leave in accordance with the Act (as was the nature of the complaint in the Royal Liver case) the limitation period runs from the date on which the payment should have been made.

However in the instant case the complaint predominatly relates to a failure of the respondent to provide the claimant with his statutory entitlement to annual leave rather than a failure to pay for such leave. The respondent's contention that the complaint in that regard is out of time appears to be based on the proposition that the revised conditions of employment issued in April 2001 created a new reference period for holiday purposes commencing on 1st January 2001.

The Court cannot accept that proposition. In advancing that line of argument the respondent is seeking to rely on the strict application of the Act in relation to the limitation period while at the same time seeking to depart from it in relation to the statutory time frame to which the limitation period should be applied.

Section 20 of the Act requires that the leave be granted during the currency of the leave year (except where there is express agreement to an extension). A leave year is defined by section 2(1) as a year commencing on 1st April. The claimant's contract of employment further confirms that the leave year operated by the respondent is the same as that prescribed by statute. The timing of annual leave is, subject to certain qualifications set forth at section 20(1)(a), (b) and (c) of the Act, a matter for the employer and an employee has no general right to insist on holidays at any particular time during the leave year.

Against that background it appears to the Court that where a complaint relates to the failure of an employer to provide an employee with annual leave a cause of action accrues at the end of the relevant leave year (or possibly 20 working days earlier) in which the leave should have been given. It is from then that the limitation period starts to run.

On this construction the complaint herein, in so far as it relates to the failure of the respondent to provide the claimant with 20 days annual leave in the leave year ending 31st March 2001, is not out of time.

The Scope of the Complaint.

The complaint herein relates to alleged continuing contraventions of the Act extending over the entire duration of the claimant's employment with the respondent. Based on the date on which the complaint was presented, section 27(4) of the Act operates, subject to section 27(5), so as to place outside the jurisdiction of the Court all contraventions which occurred before 14th February 2001.

However, section 27(5) of the Act provides discretion to entertain complaints, which are otherwise out of time, in respect of contraventions of the Act which occurred up to 18 months before the date of complaint. That discretion is, however, only exercisable where it is first established that the failure to present the complaint within the 6-month time limit was due to reasonable cause.

Extension of the Time Limit.

Section 27(5) of the Act provides as follows: -

- **"Notwithstanding subsection (4) a Rights Commissioner may entertain a complaint under this section presented to him or her after the expiration of the period referred to in subsection (4) (but not later than 12 months of such expiration) if he or she is satisfied that the failure to present the complaint within that period was due to reasonable cause".**

It is noted that the standard required by this subsection is that of "reasonable cause". This may be contrasted with the much higher standard of "exceptional circumstances preventing the making of the claim" which is provided for in other employment related statutes. The Act gives no guidance as to the type of circumstances that can constitute reasonable cause and it would appear to be a matter of fact to be decided by the Rights Commissioner (and by extension the Court on appeal) in each individual case.

It is the Court's view that in considering if reasonable cause exists, it is for the claimant to show that there are reasons which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the context in which the expression reasonable cause appears in the statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present the claim within the six-month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time.

The length of the delay should be taken into account. A short delay may require only a slight explanation whereas a long delay may require more cogent reasons. Where reasonable cause is shown the Court must still consider if it is appropriate in the circumstances to exercise its discretion in favour of granting an extension of time. Here the Court should consider if the respondent has suffered prejudice by the delay and should also consider if the claimant has a good arguable case.

Has the Claimant shown Reasonable Cause?

The claimant told the Court that he had raised the question of his holiday entitlements with members of management on a number of occasions during the year 2000. Specifically he had discussed the matter with a Mr Barber and a Mr Sanky He was told that a test case was pending and that the position would be reviewed when this case was decided. He understood that this to be a reference to Mr Treacy's case. When Mr Treacy's case was decided he was told that the matter was being considered by the company's head office in the UK.

In April 2001 the claimant was presented with a new contract, which provided for paid holidays with retrospective effect to 1st January 2001. However the respondent was still refusing to pay for holidays prior to that date. The claimant said that he became aware that a number of his colleagues had made complaints under the Act in respect of the period prior to 1st January 2001. He told the Court that he contacted the offices of the Labour Relations Commission with a view to making a similar complaint. He received advice which he understood to be that he should await the outcome of the cases already referred.

The respondent denied that they regarded Mr Treacy's case as a test case or that the claimant had been told that his holiday entitlements would be determined by its outcome. Mr Barber did give evidence to the Court in which he said that he believed that the outcome of the Treacy case would affect other employees and that he may have so indicated to the claimant. He did emphasise that this was a personal view and that he was not authorised by the company to give any such assurances to employees nor did he purport to do so. Mr Sanky did not give evidence.

The company accepted that it was not prejudiced in its defence by the delay in the presentation of the claim.

Conclusions of the Court.

The Court is satisfied that when Mr Treacy succeeded in his claim before the Rights Commissioner, his colleagues, including the claimant, would have pursued similar claims had they not been deflected from so doing by the belief that the final outcome of that case would be of general application.

All parties viewed Mr Treacy's case as a test case in the sense that it would decide whether the respondent could fulfil its statutory obligations under the Act by incorporating an element in basic pay to cover holidays. The Court is satisfied that this view was held by some members of management and was conveyed to the workforce including the claimant.

Whilst the appeal in Mr Treacy's case was pending, it was perfectly reasonable for the claimant to suppose that the respondent would comply with the law when its import was finally decided. Thereafter, there was confusion amongst employees, including the claimant, as to whether or not it was necessary for them to make individual claims under the Act or whether a number of cases then in progress would decide the matter. The Court is further satisfied that the claimant was not to blame for this confusion.

Finally, the Court notes that the claimant did not have the benefit of independent professional advice in relation to his rights or on the procedures for the making of complaints under the Act.

In all the circumstance of the case the Court is satisfied that in respect of those contraventions of the Act which occurred up to 12 months after the expiry of the time limit at section 27(4), reasonable cause has been shown for the claimant's failure to present the complaint within that time limit. The Court is further satisfied that the respondent has not suffered any prejudice by reason of that delay and that the claimant has a good arguable case which ought be heard.

The Court therefore determined to entertain all complaints appertaining to contraventions of the Act alleged to have occurred on or after 14th February 2000 (hereafter the relevant period).

The Claimant's Holiday Record.

The respondent's records show that the claimant took annual leave and Public Holidays in the relevant period as follows:

Leave year 2000 – 2001

The records show that in this period the claimant received 4 days annual leave. He did not work on the August Public Holiday, Christmas Day, St. Stephen's Day and New Years Day. On other Public Holidays he did work and received double time. The claimant was not paid in respect of the annual leave which he took (except that on 4th February 2001) nor was he paid in respect of any of the public holidays on which he did not work other than New Years Day 2001.

The claimant was entitled to 20 days in the leave year. On foot of the revised contract issued to him in April 2001, he was paid in respect of leave accruing after 1st January 2001. Hence, he was paid in respect of one-quarter of the leave year and is now entitled to redress in respect the remaining three-quarters of the year. He is therefore entitled to claim redress in respect of 15 days annual leave and 3 Public holidays.

Leave Year 1999 – 2000.

This leave year ended on 31st March 2000 and any contravention of the Act arising from the respondent's failure to provide the requisite statutory leave accrued within the relevant period. However, in so far as the complaint relates to the respondent's failure to pay the claimant in respect of annual leave actually taken on dates prior to the relevant period, it is statute barred and, to that extent, it is not cognisable by the Court.

The records show that in this leave year the claimant received no annual leave. On the Public Holidays on which he worked he received double time. The only Public Holiday on which he appeases not to have worked was the August Public Holiday 1999. However that holiday fell outside of the reference period for this claim. The claimant was entitled to 20 days leave in respect of the leave year and he is entitled to redress for the loss of that leave.

Determination

It is clear from the foregoing, that the claimant did not receive his full entitlements in respect of both annual leave and Public Holidays throughout the relevant period. His complaint is, therefore, well founded. Accordingly the decision of the Rights Commissioner is set aside and the appeal herein is allowed.

Redress

Where a claimant has not received his or her statutory period of leave a claim cannot be made nor can an award be formulated as being for payment in lieu of holidays. Article 7 of the Working Time Directive expressly prohibits the payment of an allowance in lieu of annual leave except where the employment relationship has ended. In such cases the proper award should be in the form of compensation for loss of annual leave. Such an award need not be limited to the value of the lost holidays.

The obligation to provide annual leave is imposed for health and safety reasons and the right to leave has been characterised as a fundamental social right in European Law (see comments of Advocate General Tizzano inR v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment Cinematography and Theatre Union [2001] IRLR 559which were quoted with approval by Lavin J in the Royal Liver case). InVon Colson & Kamann v Land Nordrhein – Westfalen [1984] ECR 1891the ECJ has made it clear that where such a right is infringed the judicial redress provided should not onlycompensate for economic loss sustained but must provide a real deterrent against future infractions.

In this case the Court is satisfied that the appropriate form of redress is an award of compensation. In considering the element of its award to cover the economic loss suffered by the claimant, the Court has had regard to the rate of pay applicable to the claimant at the material time and the average bonus calculated in accordance with Regulation 3(3)(a) of the Organisation of Working Time (Determination of pay for Holidays) Regulations SI No. 475 of 1997.

Having regard to all relevant considerationsthe Court measures the quantum which is fair and reasonable in all the circumstances at €7,400 and directs the respondent to pay to the claimant compensation in that amount.

Signed on behalf of the Labour Court

Kevin Duffy

28th October, 2003_____

JB/Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Jackie Byrne, Court Secretary.

DWT046 January 21, 2004

The Tribune Printing & Publishing Group
- And -
Gpmu (represented By O'mara Geraghty Mccourt Solicitors)

Case Details

Body
Labour Court

Date
January 21, 2004

Official
Caroline Jenkinson

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Offaly

Decision/Case Number(s)
- DWT046
- WTC/03/4
- WT2321/00/FL

Note
Enquiries concerning this Determination should be addressed to Gerardine Buckley, Court Secretary.

Employer Member
Mr Grier

Worker Member
Mr. Somers

SUBJECT:

1. Appeal against Rights Commissioner's Decision WT2321/00/FL.

BACKGROUND:

2. The worker concerned was employed by the Company from week ending the 7th of December, 1998, until the 8th of April, 2000, as a Print Technician. The issue before the Court is that the worker concerned was required to work excessive hours without rest breaks. The Company states that all workers are free to take their breaks as and when it is practical.

The issue was referred to a Rights Commissioner for investigation. His decision issued on the 28th of November, 2002. He decided that the employer should pay €1,000 to the claimant in compensation.

The Company appealed the Rights Commissioner's decision to the Labour Court on the 6th of December, 2002, in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. The Court heard the appeal on the 14th of October, 2003, the earliest date suitable to the parties.

DETERMINATION:

The Company appealed two aspects of the Rights Commissioner's decision - his findings and decision under Section 11 and Section 12 of the Act.

The employer submitted that the Company was exempted from the provisions of the Organisation of Working Time Act, 1997 by virtue of S.I. 21 of 1998 Organisation of Working Time (General Exemptions) Regulations, 1998. The schedule states that

"an activity falling within a sector of the economy or in the public service -

(b) the nature of which is such that employees are directly involved in ensuring the continuity of production or the provision of services, as the case may be,

(iii) production in the press....."

The provision of the regulation exempts those activities from the application of Sections 11, 12, and 13. However, these regulations state that a provision specifying a rest period or break equivalent to those provided for in Sections 11, 12 and 13 must be provided.

Paragraph 4 of the regulation provides for compensatory rest periods:-

"if an employee is not entitled, by reason of the exemption, to the rest period and break referred to in Section 11, 12, and 13 of the Act, the employer shall ensure that the employee has available to himself or herself a rest period and break that, in all the circumstances, can reasonably be regarded as equivalent to the first-mentioned rest period and break"

Paragraph 5 of the regulation details the duty of an employer in respect to the health and safety of employees:-

(1) an employer shall not require an employee to whom the exemption applies to work during a shift or other period of work (being a shift or other such period that is

of more than 6 hours duration) without allowing him or her a break of such duration as the employer determines.

(2) in determining the duration of a break referred to in paragraph (1) of this regulation, the employer shall have due regard to the need to protect and secure the health, safety and comfort of the employee and to the general principle concerning the prevention and avoidance of risk in the workplace.

The Company is under a duty to ensure that the employee receives his equivalent rest period and breaks. Merely stating that the employee could take rest breaks if they wished and not putting in place proper procedures to ensure that the employee receives these breaks, thus protecting his health and safety, does not discharge that duty.

Having considered the written and oral submissions, and having investigated the details supplied by both parties, the Court is satisfied with the conclusions drawn by the Rights Commissioner that the employer was in breach of Sections 11 and 12 of the Act, in respect of daily rest periods and breaks. The Court is also satisfied that compensatory rest periods equivalent to the rest period and breaks provided for under Section 11 and 12 of the Act were not available to the appellant.

Accordingly, the Court upholds the decision of the Rights Commissioner and the Company's appeal is disallowed.

Signed on behalf of the Labour Court

Caroline Jenkinson

21st January, 2004_____

GB/MB.Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Gerardine Buckley, Court Secretary.

EED037 February 1, 2003

A Health And Fitness Club
- And -
A Worker

Case Details

Body
Labour Court

Date
February 1, 2003

Official
Kevin Duffy

Legislation
- SECTION 77, EMPLOYMENT EQUALITY ACT, 1998

Decision/Case Number(s)
- EED037
- ED/02/59

Note
Enquiries concerning this Determination should be addressed to Carmel McManus, Court Secretary.

Employer Member
Mr Carberry

Worker Member
Mr. Somers

SUBJECT:

1. Alleged unfair dismissal under Section 77 of the Employment Equality Act,1998

BACKGROUND:

2. The complainant was employed by the respondent as a Child-Care Assistant from 15th October, 2000 until 6th June 2002, when she was dismissed. She claimed that her dismissal was wholly or mainly on grounds of her disability and constitutes discrimination within the meaning of Section 8 and contrary to Section 6 of the Employment Equality Act,1998 (the Act).

The Facts.

The facts as found by the Court or as admitted can be summarised as follows:

The complainant worked as a Child-Care Assistant in a cr�che facility operated by the respondent. Her duties involved the care of young children.

The complainant suffered from anorexia, which later developed into bulimia. She suffered from this condition throughout the period of her employment with the respondent. It is accepted that this disorder constitutes a disability for the purposes of the Act.

- During the course of her employment the complainant was hospitalised on a number of occasions. In March, 2001 the respondent gave the complainant three months sick leave in order to allow her to undergo treatment. She was admitted to hospital and was later treated as an outpatient. By 1st June 2001 the complainant was certified as fit to return to work. However, within three weeks she suffered a recurrence of the symptoms of the disorder and was again forced to take sick leave.

The complainant was not paid during her absence on sick leave.

The complainant remained on sick leave until late September, 2001 when she was certified as fit for work. She continued to receive counselling and other outpatient treatment for the disorder. She kept the respondent informed in this regard. It appeared that by December, 2001 the complainant's condition had stabilised.

- From January, 2002 onwards a number of incidents occurred which caused the respondent some concern as to the manner in which the complainant was performing her duties. These matters related to the wearing of jewellery at work (which was not permitted on safety grounds) and alleged erratic behaviour. The complainant was issued with two verbal warnings in respect of these matters.
    - On or about the month of May, 2002 the complainant became depressed and, it was suggested that she had developed suicidal tendencies. She requested more time off as she wished to be readmitted to hospital. At this stage the respondent had formed the view that the complainant was a danger to herself and the children in her care. The manager of the respondent resolved to dismiss the complainant.

The complainant was asked to attend a meeting with the manager and assistant manager of the respondent on 27th May, 2002. At this meeting she was informed that it had been decided to terminate her employment. She was subsequently dismissed by letter dated 6th June, 2002. The letter of dismissal stated in the relevant part as follows:

- **"With reference to our meeting, I would like to reiterate that we are terminating your employment here at [the respondent's premises]. You were given personal leave on two occasions in the last year as requested by yourself. As discussed, we believe you need an extended period of time to complete the treatment you are receiving for the condition that you have. It is also unsuitable that you would be working in a childcare facility under the present conditions as confirmed by your doctor"**

The respondent did not obtain any medical or psychiatric advice in relation to the complainant's disorder nor did they undertake any form of risk assessment in relation to her condition.

The respondent told the Court that they had taken the conduct of the complainant, in relation to which the verbal warnings had been issued, into account in deciding to terminate her employment. They had also decided that her disorder rendered her unfit for the duties for which she was employed.

Statutory Requirements.

Section 6 of the Act provides, in effect, that discrimination shall be taken to occur where, on any of the discriminatory grounds, one person is treated less favourably than another is, has been or would be treated.

Section 8(6)(c) of the Act provides, in effect, that an employer shall be taken to have discriminated against an employee in relation to conditions of employment, if the employee is afforded less favourable terms, on any of the discriminatory grounds, in respect of, inter alia, dismissal and disciplinary measures.

In the present case it is clear from the letter sent to the complainant dated 6th June 2002, that her dismissal arose wholly or mainly from the respondents belief that the disorder from which she suffered impaired her ability to carry out the duties for which she was employed. Thus she was treated less favourably than a person who did not suffer from a similar disability, resulting in the same perceived impairment, would have been treated. It follows that the dismissal was prima facie discriminatory and unlawful.

However a dismissal which appears to be discriminatory within the meaning of Section 8 of the Act may be saved by Section 16. This section provides, as follows:

16.

—
(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—

(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.

(2) [Not relevant]

- **(3)(a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties.**

(c) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates.(d) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.

This Section, on which the respondent relies, can provide a complete defence to a claim of discrimination on the disability ground if it can be shown that the employer formed the bona fide belief that the complainant is not fully capable, within the meaning of the section, of performing the duties for which they are employed. However, before coming to that view the employer would normally be required to make adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.

The nature and extent of the enquiries which an employer should make will depend on the circumstances of each case. At a minimum, however, an employer, should ensure that he or she in full possession of all the material facts concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision.

In practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee’s capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee's doctors or obtained independently.

Secondly, if it is apparent that the employee is not fully capable Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable. The Section requires that the cost of such special treatment or facilities must also be considered. Here, what constitutes nominal cost will depend on the size of the organisation and its financial resources.

Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.

Conclusions of the Court.

In this case the respondent was faced with an employee who was suffering from a disorder which had both psychiatric and physical manifestations. The respondent became concerned that she might not be suitable to remain in charge of young children. The Court accepts that an employer is entitled to take account of possible dangers occasioned by a disability from which an employee suffers (and may be obliged to do so in certain circumstances).

However, in the instant case the respondent made no effort to obtain a prognosis of the complainant’s condition. They did not discuss the situation with her before taking a decision on her future. They came to the conclusion that she could not be retained because of her disability without the benefit of any form of professional advice or assessment of the risks associated with her condition.

There were a number of courses of action open to the respondent. They could have had the situation assessed professionally and considered the most appropriate approach to adopt in consultation with the complainant and her medical advisor. Further, the complainant intimated her desire to re-enter hospital for further treatment. A decision on her future could have been deferred and she could have been given a further period of sick leave to undergo this treatment.

Had the complainant been given further leave her progress could have been monitored and her return to work made conditional upon medical certification that she was fully fit to resume her duties. Such evidence could have been required from either her own doctors or nominees of the respondent. The complainant was not paid during absences on sick leave and the respondent accepted that they could have employed a temporary replacement without additional costs.

DETERMINATION:

The Court is satisfied that the complainant was dismissed wholly or mainly because of her disability. Further it has not been shown to the satisfaction of the Court that the complainant was not fully capable of continuing to perform the duties for which she was employed within the meaning of Section 16(3) of the Act.

Accordingly, the complainant is entitled to succeed.

The Court is satisfied that the appropriate redress is an award of compensation for the effects of the discrimination suffered by the complainant.

Having regard to all the circumstances of the case the Court measures the amount of compensation which it considers appropriate at €13,000. An order against the respondent in that amount will be made.

Signed on behalf of the Labour Court

Kevin Duffy

18th of February, 2003_____

CMCM/MB.Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Carmel McManus, Court Secretary.

EDA0823 December 19, 2008

Dyflin Publications Limited (represented By Conor Hannaway Shrc Limited)
- And -
Ivana Spasic (represented By Svetislav Filipovic)

Case Details

Body
Labour Court

Date
December 19, 2008

Official
Raymond McGee

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 83, EMPLOYMENT EQUALITY ACT, 1998

County
Co. Dublin

Decision/Case Number(s)
- EDA0823
- ADE/08/7

Note
Enquiries concerning this Determination should be addressed to John Foley, Court Secretary.

Employer Member
Mr Grier

Worker Member
Ms Ni Mhurchu

SUBJECT:

1. Appeal under Section 83 of the Employment Equality Act, 1998.

BACKGROUND:

2. The Worker appealed the Equality Officer's Decision in accordance with Section 83 of the Employment Equality Act, 1998 on 7th March, 2008. A Labour Court hearing took place on the 2nd September, 2008.

The following is the Court's Determination:-

DETERMINATION:

Subject:

Appeal under Section.83 of the Employment Equality Acts 1998-2007 against Equality Officer's Decision No. DEC-E2008-002.

Background:

1. The complainant, who is a native of the Republic of Serbia, has claimed that the respondent discriminated against her on the race ground by not paying her the same rate of pay and commission as her chosen comparators. While the respondent accepts that the complainant and her comparators were engaged in like work, it submits that any differences in remuneration were based on grounds other than race.

2. The complainant was employed by the respondent in the position of Advertising Executive with effect from November 2004. She was paid a basic salary of €20,000 per annum. She queried this, as it was lower than the level indicated on the advertisement for the job, but her salary did not increase. She claimed that she could not and did not earn commission on sales, a point contradicted by the respondent.

- **Her sales target was €3,200 per week or €166,000 per annum. She left the Company in February 2006 for another job.**

3. On 31st March 2006, the complainant referred a complaint under the Acts that she was discriminated against on the race ground despite performing like work with two named comparators (Mr C and Mr W) who were paid more than she was. On 16th March 2007, the case was delegated by the Director of Equality Investigations to an Equality Officer for investigation. A hearing was held on 15th November 2007 and further material was supplied by the parties until 23rd January 2008.

4. In her decision, dated 31st January 2008, the Equality Officer found that there were grounds other than race for the difference in pay between the complainant and her named comparators and accordingly found that the respondent did not discriminate against the complainant on the race ground contrary to Section 29(1) of the Acts in relation to her pay.

5. The Complainant appealed this decision to the Court on 7th February 2008. A Labour Court hearing was held on 2nd September 2008.

Complainants' Arguments:

1. The advertisement for the job indicated that the reward for on-target performance could be as high as €55,000-€60,000 in total earnings, yet, when she queried the low level of pay offered by the respondent, the Managing Director told her it was because she was "not from here" and that her performance would be reviewed with a view to an increase if she performed well. Despite being named "sales person of the month" the following month, this did not happen, despite requests from her. She considered this, in conjunction with the above referral, to be indicative of racial prejudice against her.

2. She had considerable expertise in the field of advertising sales and input to trade magazines both in Botswana and in her native Serbia. She outlined details of her employments to the respondent who made only cursory attempts to verify her experience gave up easily and did not credit her with her level of experience and expertise, nor was this reflected in her salary.

3. She never had a chance to earn commission. There was no reference to commission in her letter of appointment and the only time she allegedly got commission (according to the Company) this was actually a recalculation of her salary based on the difference between a "5-week" and a "4 –week" month. The Company had only just changed from weekly to monthly pay). There was no indication on her payslip at that time that the sum in question (€231) was commission. Her two Irish comparators earned 10% commission on sales and this, indeed, was in their letters of appointment.

4. She was entirely interchangeable with her two comparators and, indeed, the respondent was not querying "like work", yet the comparators had a basic salary of €28,000, plus 10% commission compared to her salary of €20,000 with no commission.

5. She did not even get her basic salary in 2005, as her P.60 shows that she only earned €19,039, a shortfall of nearly €1,000 on her basic salary of €20,000.

6. When an Advertising Sales Executive left, his "leads" were unequally distributed in favour of her comparators and against her, thus widening the pay gap and again showing bias in favour of her Irish comparators.

7. A contention by the respondent that 3 other Advertising Sales Executives were also comparators and had salaries similar to hers is not valid. They could all earn commission (and did) and in one case, the woman mentioned was a relative of the Managing Director and had access to lucrative and regular work from which the complainant was excluded.

Respondent's Arguments:

1. The Managing Director of the respondent Company told the Court that he absolutely refuted the complainant's allegation that she was paid a lower salary or that he said she was "not from here". The respondent is an equal opportunities employer with many non-national employees.

2. There were essentially three levels of basic starting salary - €20,000, €25,000 & €28,000, depending on a successful applicant's verifiable previous experience. He had been unable to satisfactorily verify the complainant's previous experience, despite attempts to contact referees. In the circumstances, she was placed on the basic €20,000 salary and monitored to see how she would succeed against a relatively low sales target. She did not, except on one occasion, reach this target.

3. Her comparators were on higher salaries through a combination of years of service and or verified previous performance/experience. This is how the Advertising Industry has always worked; the better sellers have a higher basic and can then earn more in commission. This is true regardless of factors such as nationality, gender etc. One of her comparators started two years before the complainant on a salary similar to hers and had achieved advancement through experience and performance. The other was an experienced and proven sales executive when he came to the Company. Their targets were a lot higher than the complainant's. There were three others who were comparable comparators also, on similar salaries to the complainant (but only one on a comparably low target). They were all Irish. See table below: -

Name	Start Date	Starting Salary	Annual Target	Actual
Comparator(J.C	November 2002	€20,800	€176,800	2005/ €241,000
Comparator(S.T)	September 2003	€20,800	€176,800	2004/ €110,000
Comparator(G.W	July 2004	€28,000	€252,000	2005/ €132,000
Comparator(D.C)	October 2004	€20,000	€166,000	2005/ €132,000
Comparator(ML)	February 2004	€20,000	€166,000	2005/ €130,000
Comparator(I.S)	November 2004	€20,000	€166,000	2005/ €75,000

4. On the only month during which the complainant earned commission, it was paid to her in the next month's pay cheque (an extra €231). This was not reflected on the payslips as the Company had only changed to monthly pay a month previously and was on a "trial" system of payslips. Payslips now show commission, expressed as such. The complainant's contention that the €231 was "an extra weeks pay" i.e. 5 weeks rather than 4, was untrue. The Annual salary was divided simply into 12 equal moieties.

5. There was no bias involved in any lowering of the complainant's salary below the basic, which was guaranteed. The reason for the shortfall was caused by unauthorised absences/extra holidays (details supplied to the Court).

6. The sales opportunities and the sales leads of departing staff were equally available to all sales staff.

7. There is no built in salary review but salaries are always subject to review and depend on sales targets being met.

8. Commission is calculated as 10% of the amount which sales exceed monthly targets.

The Law:

This claim is, in effect, an equal pay claim. It falls to be decided by reference to the provision of s. 29 of the Act. As the ground relied upon is that of race the provisions of Directive 2000/43/EC (the Race Directive) are also relevant.

Section 29(1) of the Act provides a general entitlement to equal pay as between persons who are differentiated on any of discriminatory grounds and who are engaged in like work. However, subsection (5) of s.29 provides a general saver which allows for the payment of different remuneration to employees on grounds other than the discriminatory grounds. It provides as follows: -

- **"nothing in this part shall prevent an employer from paying, on grounds other than the discriminatory grounds, different rates of remuneration to different employee".**

Article 2 of the Directive provides that there shall be no direct or indirect discrimination based on racial or ethnic origin. Article 3 (c) of the Directive provides that the prohibition of discrimination contained at Article 2 extends to employment and working conditions, including dismissal and pay.

Section 85A of the Act, as amended, now provides for the allocation of the probative burden as between the parties. It provides, in effect, that where facts are established by or on behalf of a Complainant from which discrimination may be inferred it shall be for the Respondent to prove the absence of discrimination.

The test for applying that provision is well settled in a line of decisions of this Court starting with the Determination inMitchell v Southern Health Board[2001] ELR 201.That test requires the Complainant to prove the primary facts upon which he or she relies in seeking to raise an inference of discrimination. It is only if this initial burden is discharged that the burden of proving that there was no infringement of the principle of equal treatment passes to the Respondent. If the Complainant does not discharge the initial probative burden which he bears, his case cannot succeed.

The application of this test was recently considered by this Court in Determination EDA0821Cork City Council and Kieran McCarthy. In pointing out that the Complainant must not only establish the primary facts upon which he or she relies but must also satisfy the Court that those facts are of sufficient significance to raise the inference contended for, the Court said the following: -

- **The type or range of facts which may be relied upon by a complainant can vary significantly from case to case. The law provides that the probative burden shifts where a complainant proves facts from which it may be presumed that there has been direct or indirect discrimination. The language used indicates that where the primary facts alleged are proved it remains for the Court to decide if the inference or presumption contended for can properly be drawn from those facts. This entails a consideration of the range of conclusions which may appropriately be drawn to explain a particular fact or a set of facts which are proved in evidence. At the initial stage the complainant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts.**

InMadarassy v Nomura International plc,[2007] IRLR 246 the Court of Appeal for England and Wales considered how a Court or Tribunal should approach the questions posed by the corresponding provision of UK legislation on the burden of proof. In a judgment concurred in by Laws and Maurice Kay LJJ., Mummery LJ had this to say: -

- **Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**

That was a case in which discriminatory treatment on grounds of pregnancy was alleged. Nevertheless the principle enunciated on how the application of the test for determining if the burden of proof shifts is equally applicable in an equal pay claim such as this. What the passage quoted indicates is that the Court should consider the primary facts which are relied upon by the Complainant in their proper context. It also indicates that in considering if the burden of proof shifts the Court should consider any evidence adduced by the Respondent to show that, when viewed in their proper context, the facts relied upon do not support the inference contended for by the Complainant.

In respect to the instant case the Court adopts the approach indicated by Mummery LJ in the passage quoted.

Facts Found by the Court or Admitted:

It is accepted that the Complainant and the cited comparators are engaged in like work within the statutory meaning of that term. It is also admitted that the Complainant and the comparators are remunerated differently.

The Court is satisfied on the evidence adduced that the pay determination system operated by the Respondent is based on assessment of an individuals verifiable prior experience and track record in similar employment. The Court is further satisfied that the Complainant's salary was determined by reference to this criterion

The respondent made some effort to establish the veracity of the complainant's references and previous experience, by making a number of phone calls to Serbia and Botswana. No response was received and the respondent employer did not pursue the matter further.

The Court accepts that it is common practice in the advertising sales industry to remunerate staff by paying a basic salary and commission. This was also the practice of the Respondent.

There is an acknowledgment on both sides that there is a payment of €231 in August 2005 which does not fit within the basic salary structure. The complainant alleges that this is accounted for by the change at that time from weekly to monthly pay. The respondent alleges that it is the only commission earned by the complainant during her period of employment

The sales targets of the comparators who had a higher basic salary were commensurately higher.

There were deductions from the basic salary of the Complainant. However the Court is satisfied that they are accounted for by extra holidays and unauthorised absences.

Court Findings:

The first question which the Court must consider is whether the Complainant has established facts from which discrimination may be inferred. The only fact relied upon by the Complainant in support of her claim is that she is paid less that her comparators and the difference in nationality or ethnic origin as between her and her comparators. However what is alleged in this case is direct discrimination on the race ground in relation to pay. In such cases the application of the test for shifting the burden of proof operates somewhat differently than in cases involving discriminatory treatment or indirect discrimination in relation to pay.

Here there is an acknowledged difference in pay as between the Complainant and her comparators. Such a difference may, in some circumstances, be sufficient to place the probative burden on the employer. Where, however, as in the present case, it is contended that the impugned difference in pay is grounded in factors other than the nationality or ethnic origin of either the Complainant or the comparators, there is an onus on the Respondent to make out that assertion. If the Respondent succeeds in so doing any inference of discrimination which might otherwise arise is thus negated. However, facts may be established from which it could be inferred that the apparently neutral grounds relied upon are a covert means of reducing the Complainant's pay. It might also be established that grounds relied upon constitute a provision, practice or criterion which puts persons of the same nationality or ethnic origin as the Complainant at a particular disadvantage. In either situation a prima facie case of discrimination may arise.

The Court heard evidence that the Complainant was placed on a salary which was within a band of salaries normally applied by the Respondent. She was placed on the lowest band because the Respondent was not satisfied that she had relevant prior experience in a similar role. There was also evidence that employees of Irish nationality who lacked prior experience were similarly placed on the lower pay band. The Court accepts the veracity of that evidence.

The Court also heard evidence that the comparators were on higher salaries than that of the Complainant because of longer service or experience. In that regard the recent Judgment of the ECJ in Case C- 17/05Cadman v Health and Safety Executive[2006] IRLR 969 is apposite. Here, in deciding that differences in pay which are grounded on length of service do not give rise to prima facie discrimination, the Court had this to say: -

- **"Since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard"**

Having evaluated all of the evidence adduced in this case the Court is satisfied that the difference in pay as between the Complainant and her comparators is grounded on considerations which are wholly unrelated to the nationality and ethnic origin of either the Complainant or the comparators. On that basis the Court must hold that the Respondent has made out a defense under s. 29(5) of the Act. Moreover, there is no evidence from which it could be inferred that the Respondent's pay determination system is a covert means of reducing the Complainant's pay nor is there evidence that it places persons of the Complainant's nationality or ethic origin at a particular disadvantage.

It follows that the Complainant has failed to establish facts from which discrimination may be inferred. Accordingly the Complainant cannot succeed.

Determination

It is the determination of the Court that the claim herein is not well founded. The Complainant's appeal is disallowed and the decision of the Equality Officer is affirmed.

Signed on behalf of the Labour Court

Raymond McGee

19th December, 2008_____

JFDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to John Foley, Court Secretary.

Toni & Guy Blackrock Limited (represented By Carley & Connellan Solicitors)
- And -
Paul O'neill (represented By Richard Grogan & Associates)

Case Details

Body
Labour Court

Date
June 18, 2009

Official
Kevin Duffy

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 29(1), SAFETY, HEALTH AND WELFARE AT WORK ACT, 2005

County
Co. Dublin

Decision/Case Number(s)
- HSD095
- HSC/09/5
- R-054076-HS-07/MMG

Note
Enquiries concerning this Determination should be addressed to Madelon Geoghegan, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Mr Nash

SUBJECT:

1. Appeal of a Rights Commissioner's Decision R-054076-HS-07/MMG.

BACKGROUND:

2. The Worker appealed the Rights Commissioner's Decision R-054076-HS-07/MMG to the Labour Court on the 12th March 2009, in accordance with Section 29(1) of the Safety, Health and Welfare at Work Act, 2005. A Labour Court hearing took place on the 21st May 2009. The following is the Determination of the Court:-

DETERMINATION:

This is an appeal by Mr Paul O'Neill (the Claimant) against the decision of a Rights Commissioner in his claim of penalisation, by way of dismissal, against his former employer, Toni and Guy, Blackrock Ltd (the Respondent). The claim was made pursuant to s.27 of the Safety Health and Welfare at Work Act 2005 (the Act).

The Complainant was investigated by a Rights Commissioner who found against the Claimant. The Claimant appealed to this Court.

Background.

The Respondent is a hairdressing salon located in Blackrock Co Dublin. It is operated as a franchise. The Claimant was employed by the Respondent in his capacity as a colour technician between 2001 and March 2007 when he was dismissed. The Claimant contends that his dismissal resulted from having raised certain issues relating to health and safety with the Respondent and with the Health and Safety Authority. The Respondent denies that the decision to dismiss the Claimant was influenced by the complaints which he had made. It contends that the Claimant was dismissed for persistent lateness and other acts of misconduct.

Evidence

In evidence the Claimant told the Court that the current franchisees took over the business in or about August 2006. He said that it was necessary to wear latex gloves while handling colouring agents, which contained chemicals. These gloves were supplied by the Respondent. In or about September 2006 the Respondent started to provide staff with cheaper and lower quality gloves. The Claimant told the Court that he regarded these gloves as inadequate on health and safety grounds. He informed Ms McGrath, one of the franchisees, of his concerns in that regard. According to the Claimant Ms McGrath dismissed his concerns in robust language and told him to buy his own gloves. He said that he raised the matter with the Health and Safety Authority and was advised that he should use suitable gloves when working with chemical substances. He made the Respondent aware that he had contacted the HSA in the matter.

It was the Claimant's evidence that he purchased suitable gloves from his own resources which he used in the course of his work. He said that he continued to raise the matter with the Respondent. He also made a complaint to the National Employment Rights Authority.

The Claimant told the Court that prior to these occurrences he had never experienced difficulty in his employment. After having raised his concerns in relation to the health and safety issues the Respondent's attitude towards him changed and he was generally ignored by the franchisees. He said that an issue arose with the Respondent in or about September 2006 when he was approximately ten minutes later for work. Ms McGrath gave him a verbal warning. Sometime later he was unable to report for work through illness and he asked his sister to inform the Respondent. The Respondent took issue with his failure to phone in personally. He said that the Respondent purported to issue him with a written warning in respect of this matter. He refused to accept the warning because he considered it unjustified. He said that he was later accused of stealing stock from the shop.

On 14th March 2007 he was asked to attend a meeting with the franchisees of the business. He was handed a letter of dismissal. He asked the reason for the dismissal but was refused an explanation.

In cross-examination the Claimant denied that he had often left the shop early by the back door. He said that he and others often used the back door when leaving the premises. He accepted that he had left on one occasion early because he had worked from 10am to 8pm without a break. The Claimant also denied that he was aware of issues concerning the loss of stock from the salon.

Ms Audrey McGrath gave evidence. Ms McGrath is a joint franchisee of the business. She told the Court that she took over the business in August 2006. She said that it was necessary to cut back on expenditure and to this end she decided to discontinue the purchase of a particular type of gloves previously supplied to staff. She said that cheaper gloves were acquired and supplied to staff. According to the witness the Claimant objected to using the newly supplied gloves but that she told him that it was necessary to cut back and expressed the view that the gloves provided were adequate for the purposes for which they were required. It was Ms McGrath's evidence that the Claimant used the gloves with which he was supplied without further complaint.

The witness told the Court that the Claimant was persistently late for work and that he had often left the salon early by the back door. He also failed to ring in personally on occasions on which he was unable to attend work due to illness. The Court was also told that stock was being lost and that the Claimant was found to have had a key to the press in which the stock was held.

According to Ms McGrath the Claimant was issued with a verbal warning, a written warning and a final written warning in relation to his time keeping and other matters. However, the Court was told, the Claimant refused to accept these warnings. Ms McGrath said that she consulted with the head office of Toni and Guy and was advised to keep the warnings on file. On the morning of 14th March 2007 the Claimant arrived for work some 20 minutes late. Ms McGrath told the Court that she discussed the situation with her co franchisee, Ms Moloney, and it was decided to dismiss the Claimant. A letter of dismissal was prepared. When the Claimant arrived for work he was summoned to a meeting with the witness and Ms Moloney and given this letter. The Claimant was dismissed with immediate effect and without notice.

The witness could not recall the content of the warnings issued to the Claimant nor the dates on which they were issued. Records of such warnings were not

made available to the Court. Ms McGrath also accepted that the decision to dismiss the Claimant was taken before the meeting with him on the morning in question.

In cross-examination the witness told the Court that the Respondent has a health and safety policy but she could not recall what it said in relation to the use of chemicals. The witness also confirmed that the Respondent had a disciplinary policy which, she said, provides for three warnings before an employee can be dismissed.

In reply to questions from the Court the witness said that a warning would normally last for six months during which the employee would be given an opportunity to deal with the issues giving rise to the warning. The witness also agreed that the issue of stock loss had not been a factor leading to the Claimant's dismissal. Ms McGrath said that the reason for the dismissal was the Claimant's poor time-keeping, "sneaking" off the premises by the back door and having others ring in for him when he was sick.

Conclusions of the Court

The law applicable

This matter is before the Court by way of a complaint of penalisation within the meaning ascribed to that term by s. 27 of the Act of 20005. Hence, the Court is not concerned with the fairness of the dismissalper se. Its sole function is to establish whether or not the dismissal was caused by the Claimant having committed an act protected by s.27(3) of the Act.

The relevant statutory provision is as follows: -

- **27.—(1) In this section "penalisation" includes any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment.(2) Without prejudice to the generality of subsection (1), penalisation includes—**

(a) suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2001), or the threat of suspension, lay-off or dismissal,(b) demotion or loss of opportunity for promotion,(c) transfer of duties, change of location of place of work, reduction in wages or change in working hours, (d)imposition of any discipline, reprimand or other penalty (including a financial penalty), and(e) coercion or intimidation.

- **(3) An employer shall not penalise or threaten penalisation against an employee for—**
  - **(a) acting in compliance with the relevant statutory provisions,(b) performing any duty or exercising any right under the relevant statutory provisions,(c) making a complaint or representation to his or her safety representative or employer or the Authority, as regards any matter relating to safety, health or welfare at work,(d) giving evidence in proceedings in respect of the enforcement of the relevant statutory provisions,(e) being a safety representative or an employee designated undersection 11or appointed undersection 18to perform functions under this Act, or(f) subject to subsection (6), in circumstances of danger which the employee reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, leaving (or proposing to leave) or, while the danger persisted, refusing to return to his or her place of work or any dangerous part of his or her place of work, or taking (or proposing to take) appropriate steps to protect himself or herself or other persons from the danger.**
- **(4) The dismissal of an employee shall be deemed, for the purposes of the Unfair Dismissals Acts 1977 to 2001, to be an unfair dismissal if it results wholly or mainly from penalisation as referred to insubsection (2)(a).(5)[not relevant](6) [not relevant](7) [not relevant]**

It is clear from the language of this section that in order to make out a complaint of penalisation it is necessary for a claimant to establish that the determent of which he or she complains was imposed"for"having committed one of the acts protected by subsection 3. Thus the detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the Claimant having committed a protected act. This suggested that where there is more than one causal factor in the chain of events leading to the detriment complained of the commission of a protected act must be an operative cause in the sense that"but for"the Claimant having committed the protected act he or she would not have suffered the detriment. This involves a consideration of the motive or reasons which influenced the decision maker in imposing the impugned determent.

Burden of Proof

The act is silent on the question of how the burden of proof should be allocated as between the parties. This question was considered by this Court inDepartment of Justice Equality and Law Reform and Philip Kirwan(Determination HSD082). Here the Court held as follows: -

- **It is clear, however, that in the absence of any contrary statutory provision, the legal burden of proof lies on the person who asserts that a particular fact in issue is true (seeJoseph Constantine Steamship Line v Imperial Sheltering Corporation[1942] A.C.154 where this rule of evidence was described by Maugham V.-C. as "an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons")**

Later, inFergal Brodigan T/A FB Groundworks and Juris DubinaDetermination (HSD0810) the Court qualified the statement made in theKirwancase as follows: -

- **It is, however, settled law that in civil matters there is an exception to this rule known as the peculiar knowledge principle. This is a rule of evidence which provides that where it is shown that a particular fact in issue is peculiarly within a defendant's knowledge the onus of proving that fact rests with the defendant (seeMahoney v Waterford, Limerick and Western Railway Co.[1900] 2.IR 273, per Palles C.B.)**

In the instant case what is at issue is the motive or reason for the Claimant's dismissal. That is to be found in the thought process of the decision makers at the time the decision to dismiss the Complainant was taken. That is something which is peculiarly within the knowledge of the Respondent. It would be palpably unfair to expect the Claimant to adduce direct evidence to show that the Respondent was influenced by his earlier complaints in deciding to dismiss him. Conversely, it is perfectly reasonable to require the Respondent to establish that the reasons for the dismissal were unrelated to his complaints under the Act.

Having regard to these considerations, it seems to the Court that a form of shifting burden of proof, similar to that in employment equality law should be applied in the instant case. Thus the Claimant must establish, on the balance of probabilities, that he made complaints concerning health and safety. It is then necessary for him to show that, having regard to the circumstances of the case, it is apt to infer from subsequent events that his complaints were an operative consideration leading to his dismissal. If those two limbs of the test are satisfied it is for the Respondent to satisfy the Court, on credible evidence and to the normal civil standard, that the complaints relied upon did not influence the Claimant's dismissal.

The facts

The Court has carefully considered all of the evidence tendered in this case. In many material particulars there was a significant conflict in the evidence of the Claimant compared to that of Ms McGrath relating to the issuance of warnings and the subject matter of those warnings. The Court is, however, satisfied that the Claimant did make complaints concerning health and safety matters arising from the change in the quality of gloves provided by the Respondent. The Court is also satisfied that following on from those complaints the Respondent appeared to take issue with the Claimant in respect of employment related matters which had not previously been a source of difficulty.

It also appears to the Court that the Respondent adopted a formalistic approach to the use of its disciplinary procedure and appeared to proceed, with inordinate haste, from one stage to the next until the point was reached where the Claimant's employment was terminated. The whole exercise was characterised by an absence of procedural fairness. In these circumstances it is difficult for the Court to avoid the conclusion that the Respondent, whether consciously or unconsciously, was proceeding with a predisposition that the Claimant's employment should be brought to an end.

The Court has no doubt that there were other employment related issues with the Claimant, of which the Respondent has justifiable cause to complain. Nonetheless, the Court is satisfied, as a matter of probability, that, were it not for his complaints regarding health and safety, those issues would not have resulted in his dismissal. Accordingly the Court must hold that the aforementioned complaints were an operative reason for his dismissal and that his complaint of penalisation has been made out.

Determination

The appeal herein is allowed. The decision of the Rights Commissioner is set aside and substituted with a finding that the within complaint is well founded. The Court further determines that the appropriate redress is an award of compensation. The Court measures the amount of compensation which is just and equitable having regard to the circumstances of the case at €20, 000.

Signed on behalf of the Labour Court

Kevin Duffy

18th June, 2009_____

MG.Chairman

NOTE Enquiries concerning this Determination should be addressed to Madelon Geoghegan, Court Secretary.

TED161 January 8, 2016

Irish Water
- And -
Patrick Hall (represented By Richard Grogan & Associates)

Case Details

Body
Labour Court

Date
January 8, 2016

Official
Kevin Duffy

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 8 (1), TERMS OF EMPLOYMENT (INFORMATION) ACTS, 1994 TO 2012

County
Co. Dublin

Decision/Case Number(s)
- TED161
- TE/15/6
- R-153422-TE-15/JT

Note
Enquiries concerning this Determination should be addressed to Jason Kennedy, Court Secretary.

Employer Member
Mr Marie

Worker Member
Ms O'Donnell

SUBJECT:

1. Appeal of Adjudication Officer Decision No(s) R-153422-TE-15/JT

BACKGROUND:

2.

This is an appeal by Patrick Hall- (hereafter "the Complainant") against the decision of a Rights Commissioner in his claim against his former employer, Irish Water (hereafter "the Respondent")-under the Terms of Employment (Information) Act 1994 -2012 (the Act).

Background

The Complainant was employed by the Respondent in the role of Project Finance Lead. Following an interview for the post, the Respondent wrote to the Complainant by letter dated 25

thJuly 2014 offering him employment with effect from 11thAugust 2014. Under cover of that letter the Complainant was furnished with a document headed "**Terms and Conditions of Employment. Project Finance Lead – West". This document set out the terms and conditions applicable to the employment being offered. It was intended to comply with the Respondent's obligations under the Act.**
The letter dated 25

thJuly 2014 concluded with an invitation to the Complainant to contact a named person if he wished to discuss or seek clarification on any matter relating to the terms and conditions of the employment. The Complainant signed and returned the document without raising any issue in relation to its content.

The Complainant's contractual salary was fixed at €78,000 pa. He also had the possibility of receiving what is described as an additional award of 14% of salary.

The Claims

Following the termination of the Complainant's employment he instituted proceedings before a Rights Commissioner / Adjudication Officer, claiming that the document containing the particulars of his terms and conditions of employment, with which he had been furnished, did not comply with s. 3 of the Act.

The Rights Commissioner / Adjudication Officer found that there has been a technical contravention of the Act in that the statement did not particularise the times and duration of the rest periods and breaks to which the Complainant was entitled in accordance with S.I.49 of 1998. The Rights Commissioner directed that the Respondent furnish the Complainant with a revised statement containing these particulars. The Respondent did not cross-appeal against that finding and has complied with the direction of the Rights Commissioner / Adjudication Officer.

The Complainant appealed to this Court. The only redress sought by the Complainant in his appeal is an award of compensation.

The Appeal

In grounding his appeal the Complainant contends that the statement with which he was provided did not comply with the Act in the following respects: -

- 1. The address of the Respondent was not provided
  2. The statement did not specify the pay reference period for the purpose of the National Minimum Wage Act 2000 (the Act of 2000).
  3. The statement did not expressly state that the employee may request a statement of his average earnings pursuant to s.23 of the Act of 2000.
  4. The statement provides that the leave year is to run in tandem with the calendar year whereas the Organisation of Working Time Act 1997 provides that a leave year runs from 1st April to 31st March.
  5. The statement did not comply with S.I 49 of 1998 in that it did not specify the times and duration of rest period and breaks.

Position of the Parties

The Complainant did not give evidence and his case was advanced on his behalf by his solicitor by way of submissions only. It is accepted that the Complainant did not suffer any monetary loss or any other form of material detriment or prejudice in consequence of the claimed contraventions of the Act. His claim is based solely on his complaint that the Respondent did not provide all of the information that the law obliged it to provide.

The Respondent denies that it contravened the Act in the manner alleged. It further submitted that if there were contraventions (which is denied) they were due to inadvertence and had no practical significance for the Complainant. The Respondent accepts that S.I. 49 of 1998 was not technically complied with but it pointed out that this omission was corrected following the recommendation of the Rights Commissioner. On that point, the Respondent relies on the absence of any detriment to the Complainant flowing from the omission from the statement of a reference to the time and duration of rest periods and breaks in accordance with sections 11, 12, and 13 of the Organisation of Working Time Act 1997.

The Law

Section 3 of the Act, as amended, provides: -

- **Written statement of terms of employment**
  (1) An employer shall, not later than 2 months after the commencement of an employee's employment with the employer, give or cause to be given to the employee a statement in writing containing the following particulars of the terms of the employee's employment, that is to say—
    - **(a) the full names of the employer and the employee,**
      (b) the address of the employer in the State or, where appropriate, the address of the principal place of the relevant business of the employer in the State or the registered office (within the meaning of theCompanies Act, 1963),

      (c) the place of work or, where there is no fixed or main place of work, a statement specifying that the employee is required or permitted to work at various places,

      (d) the title of the job of nature of the work for which the employee is employed,

      (e) the date of commencement of the employee's contract of employment,

      (f) in the case of a temporary contract of employment, the expected duration thereof or, if the contract of employment is for a fixed term, the date on which the contract expires,

      (fa)a reference to any registered employment agreement or employment regulation order which applies to the employee and confirmation of where the employee may obtain a copy of such agreement or order

      (g) the rate or method of calculation of the employee's remuneration, and the pay reference period for the purpose of the National Minimum Wage Act 2000

      (ga)that the employee may, under section 23 of the National Minimum Wage Act 2000, request from the employer a written statement of the employee's average hourly rate of pay for any pay reference period as provided in that section

      (h) the length of the intervals between the times at which remuneration is paid, whether a week, a month or any other interval,

      (i) any terms or conditions relating to hours of work (including overtime),

      (j) any terms or conditions relating to paid leave (other than paid sick leave),

      (k) any terms or conditions relating to—

        - **(i) incapacity for work due to sickness or injury and paid sick leave, and**
          (ii) pensions and pension schemes,

          (l) the period of notice which the employee is required to give and entitled to receive (whether by or under statute or under the terms of the employee's contract of employment) to determine the employee's contract of employment or, where this cannot be indicated when the information is given, the method for determining such periods of notice,

      (m) a reference to any collective agreements which directly affect the terms and conditions of the employee's employment including, where the employer is not a party to such agreements, particulars of the bodies or institutions by whom they were made.

  (2) A statement shall be given to an employee under subsection (1) notwithstanding that the employee's employment ends before the end of the period within which the statement is required to be given.
  (3) The particulars specified in paragraphs (g), (h), (i), (j), (k) and (l) of the said subsection (1), may be given to the employee in the form of a reference to provisions of statutes or instruments made under statute or of any other laws or of any administrative provisions or collective agreements, governing those particulars which the employee has reasonable opportunities of reading during the course of the employee's employment or which are reasonably accessible to the employee in some other way.

(4) A statement furnished by an employer under subsection (1) shall be signed and dated by or on behalf of the employer.

(5) A copy of the said statement shall be retained by the employer during the period of the employee's employment and for a period of 1 year thereafter.

(6)

- **(a) The Minister may by order require employers to give or cause to be given to employees within a specified time a statement in writing containing such particulars of the terms of their employment (other than those referred to in subsection (1)) as may be specified in the order and employers shall comply with the provisions of such an order.**
  (b) The Minister may by order amend or revoke an order under this subsection, including an order under this paragraph.

(7) This section (other than subsection (6)) shall not apply or have effect as respects contracts of employment entered into before the commencement of this Act.

S.I 49 of 1998, Terms of Employment (Additional Information) Order 1998, provides, at Regulation 3(1), as follows: -

- **In relation to an employee who enters into a contract of employment after the commencement of this Order, the employee's employer shall, within two months after the employee's commencement of employment with the employer, give or cause to be given to the employee a statement in writing containing particulars of the times and duration of the rest periods and breaks referred to in sections 11, 12 and 13 of the Act that are being allowed to the employee and of any other terms and conditions relating to those periods and breaks.**

The Act was transposed in domestic law to give effect to Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. Article 2 of the Directive provides: -

- **An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as 'the employee', of the essential aspects of the contract or employment relationship.**

It is trite law that in construing a provision of national law enacted to transpose a directive a Court or Tribunal must do so, as far as possible, in light of the wording and purpose of the Directive so as to produce the result envisaged by the Directive.

Each of the Complaints Considered

The Court has considered each of the complaints raised by the Complainant and has concluded as follows:

- 1.**Failure to provide the Respondent's address.**
  The statement provided to the Complainant clearly does contain details of the Respondent's registered address. That was accepted on behalf of the Complainant in the course of the hearing.

  2.**The statement did not specify the pay reference period for the purpose of the National Minimum Wage Act 2000.**

  - The document furnished did not contain such a statement. However, the Complainant's contractual salary was set at five times the national minimum wage. A statement of the type envisaged by s.3(1)(g) of the Act could not have had any practical significance in the circumstances of the Complainant. Nor is it suggested by him that the omission of such a statement had any practical significance in the circumstances of his employment.

  3.**The statement does not expressly state that the employee may request a statement of his average earnings pursuant to s.23 of the Act of 2000.**
  Section 23(2) of the Notional Minimum Wage Act 2000 provides: -

  - **An employee shall not make a request under subsection (1) in respect of any pay reference period during which the hourly rate of pay of the employee was on average not less than 150 per cent calculated in accordance withsection 20, or such other percentage as may be prescribed, of the national minimum hourly rate of pay or where the request would be frivolous or vexatious**.

    In the circumstances of the Complainant's employment (in which his salary was fixed at over 500% of the national minimum wage) this information, if furnished, could have no practical significance. The Complainant was precluded by s.2 of the Act of 2000 from seeking a statement pursuant to s.23 of that Act and any such request, if made, could only be frivolous or vexatious.

  4.**The statement provides that the leave year is to run in tandem with the calendar year whereas the Organisation of Working Time Act 1997 provides that a leave year runs from 1st April to 31st March**.

  - Section 3(1)(j) of the Act provides that the statement furnished to the employee must provide information on**any terms or conditions relating to paid leave (other than paid sick leave).**The statement provided did contain information on the terms and conditions relating to annual leave. If it is suggest that the contractual provisions in the Complainant's contract of employment in relation to annual leave contravened the Organisation of Working Time Act 1997 that is a matter that could only be adjudicated upon in proceedings under that Act.

  5.**The statement did not comply with S.I 49 of 1998 in that the statement did not specify the duration of rest period and breaks.**

  - The statement provided that the Complainant's normal hours of work were to be from 9am to 5pm over a 35 hour week. It is perfectly obvious what his rest periods were intended to be. While it is factually correct to say that the statement did

not specify the duration or times of breaks it is an affront to common sense and reason to claim that a person in a senior position, such as that in which the Complainant was employed, could suffer any form of detriment from not being told when or for how long he could take a break in the course of his working day. Moreover, the Complainant accepts that he took breaks and that he had adequate rest periods and that he did not suffer any prejudice or detriment in consequence of this omission.

The Rights Commissioner / Adjudication Officer recommended that the Respondent correct this omission and it was so corrected.

Discussion

As appears from the above, these complaints are wholly devoid of any substantive merit. The State has already incurred the costs associated with providing the Complainant with a hearing of these complaints at first instance and it is now obliged to incur the cost in time and expense of providing him with a full appeal before a division of the Court. That takes no account of the cost incurred by the Respondent in defending this case, both at first instance and now on appeal. The combined associated costs of processing and hearing these complaints is grossly disproportionate to any value that could have accrued to the Complainant if the technical infringements of which he complains had not occurred. Moreover, the letter of offer furnished to the Complainant dated 25

thJuly 2014 invited him to contact a named person if he wished to discuss or seek clarification on any of the terms proffered. The Complainant signed the statement without demur and returned it to the Respondent. Neither then or at any subsequent time did he request further or better particulars on any matter pertaining to his employment. The Court has no doubt that had he sought further information on any matter pertaining to his employment, including the matters which form the subject of his present complaints, it would have been provided by the Respondent.

In the circumstances of this case that represents an unacceptable squandering of public resources. It is a manifest absurdity to suggest, as the Complainant does, that these contraventions, if such they are, could or should be met with an award of monetary compensation. That is particularly so in circumstances in which the matters now complained of could easily have been rectified by a simple request to the Respondent to provide any further information that the Complainant considered necessary.

De Minimis rule

It is an established principle of the common law that a Court should not squander its resources in dealing with claims that are without substance because the contraventions complained of had no practical consequence for the plaintiff. This principle is encapsulated in the Latin maxim

de minimis non curat lex(the law does not concern itself with trifles). The classic statement of where this principle should be applied is contained in the judgment of Henchy J. in the Supreme Court's decision inMonaghan UDC v Alf-a-Bet Publications Ltd. [1980] I.L.R.M. 64, at page 69. Henchy J articulated a generally applicable test in the following terms: -

- **"In such circumstances, what the Legislature has, either immediately in the Act or immediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the**de minimis**rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."**

The Court is satisfied that, in the circumstances of this case, any deviations that may have occurred from what the strict letter of s. 3 of the Act, or from what the statutory instrument at issue prescribes, are so trivial, technical, peripheral or otherwise so insubstantial as to come within the

de minimisrule. There can be no doubt that the Respondent provided the Complainant with all the information that he required in relation to the essential elements of the terms and conditions attaching to his particular employment. What is complained of is a failure to provide information on matters that had no practical significance in the context of the employment that he was offered and accepted.

Finally, the Complainant's solicitor calls in aid what he describes as "

the principles in Von Colson and Karmann". The import of the submission on this point appears that even if no measurable loss or detriment was suffered by the Complainant compensation should nonetheless be awarded for a failure to provide a statement that complied with the Act in every particular. The reference tothe principles in Von Colson and Karmannis understood to be a reference to the principles adumbrated by the CJEU (formally the ECJ) in in case C-14/83Von Colson and Karmann v Land Nordrhein-Westfahlen[1986] C.M.L.R 430 on the criteria to be applied in measuring the quantum of compensation to be awarded in cases in which the principle of equal treatment between men and women is found to have been infringed. The import of that decision was recently comprehensively reviewed by this Court in Labour Court Determination DWT15125,C and F Tooling Limited and Jason Cunniffe. Here the Court stated as follows: -

- **That case**[Von Colson]**needs to be understood in the context of the factual matrix in which it was decided. It concerned female social workers who had applied for posts at a male prison in West Germany. The**

authorities appointed two male candidates with lesser qualifications to those posts. The German Labour Court found that there had been discrimination and awarded the plaintiff's compensation pursuant to s.611a(2) of the German Civil Code. That section purported to implement Council Directive 76/207 on the implementation of equal treatment for men and women as regards access to employment. The Court found that that section only enabled it to award reimbursement of travelling expenses incurred by the Complainants in pursuing their applications for the posts.
The CJEU pointed out that the Directive did not prescribe the range of sanctions that should be applied in cases where discrimination was found to have occurred. However the Court went on to say that if a Member State chooses to penalise infringements of the prohibition of discrimination by an award of compensation, such compensation has to be adequate in relation to the damage sustained and that it must have a deterrent effect. The Court pointed out that compensation has to be more than merely nominal damages which the German law provided in restricting compensation to the reimbursement of travelling expenses incurred by a candidate who was discriminated against in the filling of the post.

The formulation used by the Court in answer to the third question posed by the referring Court is as follows: -

- Although Directive 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves the member-States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a member-State chooses to penalise breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law**,**in so far as it is given discretion to do so under national law.

Like every case, the decision in Von Colson is authority only for what it decided. While in the passage quoted above the Court referred to where a Member State chooses to penalise breaches of a Directive with an award of compensation that cannot be taken to mean that a statutory tribunal, such as this Court, can purport to apply a sanction in the nature of punishment for a contravention of the law. In our law, punishment for illegality can only be imposed by the ordinary courts and not by statutory tribunals exercising limited civil jurisdiction. It follows that any compensatory redress awarded by this Court must remain within the bounds of what is capable of being redressed by compensation. That includes any present or future loss suffered by the Claimant as well as any loss, damage inconvenience or expense which flows from the wrong which he or she suffered.
The decision in

Von Colsonis not authority for the proposition that the Complainant should be awarded compensation in circumstances where he clearly suffered no present or future detriment from any of the omissions ofwhich he complains.
Right to Redress

Section 7(2) of the Act provides as follows in relation to redress: -

- **A recommendation of a rights commissioner under subsection (1) shall do one or more of the following:**
  - **(a) declare that the complaint was or, as the case may be, was not well founded,**

(b)
(i) confirm all or any of the particulars contained or referred to in any statement furnished by the employer under section 3, 4, 5 or 6, or

(ii) alter or add to any such statement for the purpose of correcting any inaccuracy or omission in the statement and the statement as so altered or added to shall be deemed to have been given to the employee by the employer,

- **(c) require the employer to give or cause to be given to the employee concerned a written statement containing such particulars as may be specified by the commissioner,**
  (d) order the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 4 weeks remuneration in respect of the employee's employment calculated in accordance with regulations undersection 17 of the Unfair Dismissals Act 1977,

and the references in the foregoing paragraphs to an employer shall be construed, in a case where ownership of the business of the employer changes after a contravention to which the complaint relates, as references to the person who, by virtue of the change, becomes entitled to such ownership.

In this case the only redress sought by the Complainant is an award of compensation. Such an award can only arise where the complaints made are well founded. Moreover, it should be emphasised that compensation, if any, must be within the bounds of what is fair and equitable having regard to all the circumstances. On any reasonable view, even if the complaints herein were well founded in the technical sense, the dictates of fairness or equity could not justify an award of compensation in the circumstances of this case.

DETERMINATION:

The Court can see no reasonable or justifiable basis upon which it could interfere with the recommendation of the Rights Commissioner / Adjudication Officer. The within appeal is without merit and it is dismissed. The recommendation of the Rights Commissioner / Adjudication Officer is affirmed.

Signed on behalf of the Labour Court

Kevin Duffy

_____8th January 2016_____

JKChairman

NOTE Enquiries concerning this Determination should be addressed to Jason Kennedy, Court Secretary.

UDD1738 July 28, 2017

Dhl Express (ireland) Ltd Dhl (represented By Irish Business And Employers' Confederation) - And - Michael Coughlan (represented By Services Industrial Professional Technical Union)

Case Details

Body
Labour Court

Date
July 28, 2017

Official
Alan Haugh

Legislation
- SECTION 8A, UNFAIR DISMISSAL ACTS, 1977 TO 2015

County
Co. Dublin

Decision/Case Number(s)
- UDD1738
- UD/17/27
- ADJ-00001367
- CA-00001933

Note
Enquiries concerning this Determination should be addressed to Sharon Cahill, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Mr McCarthy

SUBJECT:

1. Appeal of Adjudication Officer's Decision No.ADJ00001367

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BACKGROUND:

2. The Employer appealed the Decision of the Adjudication Officer in accordance with the Unfair Dismissals Act, 1977 to 2015. A Labour Court hearing took place on 13th July, 2017. The following is the Determination of the Court:

DETERMINATION:

Background to the Appeal

This appeal is brought on behalf of DHL Express (Ireland) Limited ("the Appellant") against the decision of an Adjudication Officer (ADJ00001367, dated 30 January 2017) under the Unfair Dismissals Act 1977 ("the Act"). The Notice of Appeal was received by the Court on 20 February 2017. The Court heard the appeal in Dublin on 13 July 2017.The Appellant called three witnesses: Ms Lorna Quinlan, Mr Alan Butler and Mr Michael Farrell. Mr Coughlan ("the Respondent") gave evidence on his own behalf and did not call any other witness.

The Respondent had been employed by the Appellant as a courier/van driver for some 11 years up until he was summarily dismissed on 24 November 2015 as a consequence of an incident involving his van that had occurred on 19 October 2015. He was paid €692.72 gross per week. He referred a complaint under the Act to the Workplace Relations Commission on 14 January 2016. The Adjudication Officer assigned to hear the matter determined that "the sanction of dismissal for gross misconduct was disproportionate having regard to all the circumstances." She awarded re-instatement with effect from 28 September 2016 (the date of hearing at first instance).

The Respondent has had a number of incidents in the past (in 2012 and 2013) that resulted in some damage to the Appellant's company vehicle. The Respondent received a written warning for the 2012 incident and a final written warning for the 2013 incident. Both written warnings were active for a period of 12 months from the date they were applied to the Respondent. Following the 2013 incident, the Respondent successfully availed of a driver's retraining course (paid for by the Appellant) and did not have any further incidents for a period of some two years until 19 October 2015.

On 19 October 2015, the Respondent returned to the Appellant's Cork depot in his seven-metre van. There was an articulated truck parked adjacent to the entrance to the depot with the result that the space available to vehicles entering or leaving the premises was extremely narrow. The driver of the truck was present at the entrance. The Respondent believed that that driver beckoned at him to continue to drive his van through the available gap. In doing so, the Appellant scraped one side of the van, causing some damage to it. The Complainant immediately brought the incident and the damage to his manager's attention. The Appellant told the Court that it cost €2,500.00 to repair the damage.

An investigation meeting took place on 4 November 2015 in the course of which CCTV footage recorded at the time of incident was reviewed. The footage proved to be of no assistance as it did not record either the incident itself or the actions of the other driver whom the Respondent believed had gestured at him to continue driving the van into the depot yard. That driver was also interviewed. His version of events was that he had no recollection of directing the Appellant to continue driving into the yard on 19 October 2015. The Respondent admitted at the meeting that he had misjudged the space available to him when trying to drive into the depot compound between the parked truck and the fencing on the other side of the entrance. The investigation was conducted by Mr Gary Molloy, the Service Centre Manager at the Appellant's Cork depot.

Mr Molloy wrote to the Respondent on 12 November 2015 with the outcome of the investigation. He states as follows in this letter:

- **'In summary you misjudged the space when trying to drive past a truck parked at the gate of the Cork depot and consequently caused significant damage to the driver's side of the van when you collided with the fencing. You are therefore requested to attend a disciplinary hearing in regard to the aforementioned incident.Please be advised that the above incident could be considered Gross Misconduct under 5.4.3 of the company's disciplinary process:"Failure to protect and safeguard company property"And a disciplinary hearing could result in disciplinary action up to and including your dismissal from the company"'.**

The disciplinary hearing was conducted by Mr Alan Butler, an Area Operations Manager with the Appellant. It took place on 16 November 2015. The Respondent was represented at the meeting by his SIPTU Representative. It is common case that the Respondent once again at this meeting accepted responsibility for his actions on 19 October 2015. However, extensive reference was made by Mr Butler to the Respondent's past driving incidents and the final written warning he had received in 2013, notwithstanding the fact that this warning had expired some 12 months previously.

By letter dated 24 November 2015, Mr Butler informed the Respondent that he was being summarily dismissed with immediate effect for gross misconduct. The following paragraph from the letter of dismissal echoes the language used in the letter inviting the Respondent to the disciplinary hearing:

- **'This is a most serious situation from the company perspective and having carefully considered the facts of the case and the representations made by yourself and [PO's] (colleague), the company has taken the view that there is no other alternative in this case except to terminate your employment for reasons under Gross Misconduct where it has been determined that you failed to protect and safeguard company property.'**

However, and of some significance in the Court's view, the letter appears to recite a number of additional grounds to justify the Appellant's decision to dismiss the Respondent, including by reference to the Respondent's previous incidents with the van in respect of which the warnings he had received had clearly expired:

- **•'It is the company's opinion that you were driving carelessly and your poor judgment caused over €2,500 of damage to the driver's side of the van when you collided with the fencing.**
  •This is an extremely serious issue in light of your history with causing damage to both the company van and customer property.

  •The company has previously provided you with substantial training and has gone to extensive efforts to ensure that you were driving in a safe manner.

  •The company has serious concerns about your ability to safely carry out your duties as a driver and can't trust that you won't have a similar lapse in judgment which may result in further damage or potential injury to yourself or others.

  •The company cannot accept this level of negligence and poor judgment from a driver who takes a van on public roads on a daily basis.'

The penultimate paragraph of Mr Butler's letter to the Respondent advises him that as his behaviour is deemed to constitute 'Gross (sic) misconduct manifesting itself in an ongoing basis' his employment is to be terminated with immediate effect. In short, the Respondent was summarily dismissed without notice or payment in lieu of notice.

The Respondent appealed from this decision by letter dated 25 November 2015 to Mr Michael Farrell, Head of Operations. In setting out the basis for his appeal, the Respondent raised concerns about the company's apparent reliance on previous incidents to justify his summary dismissal. Mr Farrell replied with his decision on the appeal by letter dated 15 December 2015 in which he states the following:

- **'Whilst I appreciate the point you have made that this latest incident was just an error of judgement, I do not accept that we cannot and should not consider the other serious incidents that you have been involved in over recent years. As a responsible organisation we have made every effort to assist you through retraining in an effort to address any driving skills; however, we now need to recognise the duty of care we have to the public, other staff and to you yourself. With that in mind I feel I must uphold the finding of dismissal in the letter dated 24th November 2015.'**

Evidence Given by the Appellant's Witnesses

Ms Lorna Quinlan, a HR Business Partner with the Appellant, gave evidence in relation to the Appellant's Disciplinary Procedure and the fact that it is a procedure agreed jointly with SIPTU. She told the Court that the duration for which a final written warning remains live on an employee's record in accordance with the Disciplinary Procedure is twelve months. She also gave evidence in relation to the practice whereby the Appellant's Facilities Department in Dublin retains records of road traffic accidents involving vehicles in the Appellant's fleet which are used to calculate drivers' safe driving bonus. On cross-examination, Ms Quinlan accepted that she had no access to the records retained by the Facilities Department and therefore could not give evidence in relation to the relative cost of the damage that may have been caused by other drivers to company vehicles in 2015 vis-�-vis the damage estimated at €2,500.00 caused by the Respondent on 19 October 2015. Neither was the witness able to confirm or deny that other sanctions short of summary dismissal had been considered in the Respondent's case.

Mr Alan Butler, Area Operations Manager, gave evidence of his role in the disciplinary process involving the Respondent in late 2015. He told the Court that he met with the Respondent and his representative on 16 November 2015. He said he gave the Respondent an opportunity to recount his version of the incident of 19 October 2015. Mr Butler informed the Court that has was fully aware of the Respondent's previous incidents of poor driving causing damage to a company vehicle as in the normal course the local Station Manager reports such matters routinely to the Area Manager. He went on to tell the Court that he made the decision to summarily dismiss the Respondent for the following reasons:

- **•As Area Manager, he had to be sure that a driver of a large company vehicle, such as the one assigned to the Respondent, was capable of driving such a vehicle safely;**
  •He had a responsibility to ensure the safety of the public in the circumstances;

•He had concerns about the Respondent's capability as a driver arising from the poor judgement he had displayed on 19 October 2015 when he attempted to drive his vehicle through a very small gap which the Respondent had acknowledged in the course of the disciplinary meeting and had apologised for.

Mr Butler told the Court that he formed the view that the only option open to the Appellant at that stage was to dismiss the Respondent. He said that the company had offered the Respondent the following options following the 2013 incident: redundancy; redeployment to a job in the warehouse; or a driver's retraining programme. The Respondent chose the latter option. Mr Butler told the Court that these options could not be offered to the Respondent following the October 2015 incident because the company had lost trust in the Respondent by that stage.

On cross-examination, Mr Butler was asked why – if it was the case that he posed such a risk to the public – the Respondent was allowed to continue to drive for the company for a period of some two weeks following the 19th of October before he was eventually suspended. In reply, Mr Butler said that the local manager in place at the Cork depot at the time was inexperienced and unaware of the correct procedure whereby he was required to report such incidents up the line. Mr Butler also confirmed, in response to a question from the Respondent's representative, that he had not taken a written statement from the other driver that the Respondent believed had gestured at him to continue driving his van through the available gap on 19 October 2015. Nevertheless, he told the Court that he had preferred that driver's version of events over the Respondent's. Mr Butler also stated that his decision to summarily dismiss the Respondent was not based on the value of the damage he had caused to the company van but on his poor judgement on the date in question. He accepted that the Respondent hadn't set out to deliberately damage company property. However, the poor judgment displayed by the Respondent, according to the witness, caused him to have concerns about public safety should the Respondent be permitted to continue driving on the company's behalf. When asked by the Court, whether or not he had considered the possibility of dismissing the Complainant on notice, Mr Butler- in confirming that he hadn't done so - made an admission to the effect that he wasn't aware that this was an option open to him.

Mr Michael Farrell, Head of Operations, was the third witness called on behalf of the Appellant. This witness, as previously noted, conducted an appeal from Mr Butler's decision to summarily dismiss the Respondent. He confirmed to the Court that prior to hearing the appeal he had been aware of the historical incidents involving the Respondent's driving. His evidence was that the incident of 19 October 2015, in light of those earlier incidents, caused him to have great concerns about the risk posed by the Respondent's driving for the safety of the public. In his view, the most recent incident involving the Respondent demonstrated the latter's inability to drive a vehicle with sufficient care and judgement. The witness stated that he believed it was appropriate to consider an employee's entire relevant employment history in the context of a disciplinary process, notwithstanding that – as in the Respondent's case – any and all previous disciplinary warnings had lapsed by the passage of time. When asked about the 2013 options given to the Respondent and why they were not offered again, Mr Butler was adamant that it had been made clear in 2013 that those options comprised 'a once-off offer'.

The Respondent's Evidence

The Respondent gave evidence in relation to his efforts to mitigate his loss following his dismissal. He told the Court that in the period since October 2015 he has applied for some 23 or 24 jobs without success. He applied for various roles including that of courier, driver, general operative, cleaner and store person. The Respondent was called to a small number of interviews by named employers but no job offer ensued from any of them. He commenced on a Community Employment Scheme in May 2017 as a result of which his weekly payment from the Department of Social Protection is increased by €22.00.

Discussion and Decision

Ground or Grounds for Dismissal?

It is evident, from a comparison of the letter inviting the Respondent to the disciplinary meeting with the letter, authored by Alan Butler, setting out the outcome of that disciplinary meeting that the Respondent was in fact confronted with multiple allegations at the disciplinary meeting that had not been advised to him in advance of that meeting. It follows that the Appellant based its decision to summarily dismiss the Respondent (and continues to defend that decision) on numerous grounds not referred to at all at the investigation stage or in Mr Molloy's letter inviting the Respondent to the disciplinary meeting. This is indeed confirmed by Mr Butler's direct evidence to this Court.

Likewise, it would appear from Mr Farrell's letter setting out his decision on the internal appeal, that his decision to confirm Mr Butler's decision to summarily dismiss the Respondent was based on the company's 'need to recognise the duty of care we have to the public, other staff and to you yourself.' This is also altogether different from the subject of the disciplinary process notified to the Respondent in Mr Molloy's letter of invitation to the disciplinary meeting wherein Mr Molloy stated the allegation which the Respondent was being invited to meet was 'failure to protect and safeguard company property'.

Gross Misconduct?

As recited previously, the incident which gave rise to the chain of events that culminated in the Respondent's summary dismissal for gross misconduct occurred on 19 October 2015 when he accidently, and through an error of judgement, caused damage to a company van to the tune of €2,500.00. The established jurisprudence in relation to dismissal law in this jurisdiction takes a very restricted view of what constitutes gross misconduct justifying summary dismissal. This is evidenced, for example, by the determination of the Employment Appeals Tribunal inLennon v BredinM160/1978 (reproduced at page 315 of Madden and KerrUnfair Dismissal Cases and Commentary(IBEC, 1996)) wherein the Tribunal states:

- **'Section 8 of the Minimum Notice and Terms of Employment Act 1973 saves an employer from liability for minimum notice where the dismissal is for misconduct. We have always held that this exemption applies only to cases of very bad behaviour of such a kind that no reasonable employer could be expected to tolerate the continuance of the relationship for a minute longer; we believe the legislature had in mind such things as violent assault or larceny or behaviour in the same sort of serious category. If the legislature had intended to exempt an employer from giving notice in such cases where the behaviour fell short of being able to fairly be called by the dirty word 'misconduct' we have always felt that they would have said so by adding such words (after the word misconduct) as negligence, slovenly workmanship, bad timekeeping, etc. They did not do so.'**

This Court finds that the grounds that the Respondent was advised were to form the basis of a disciplinary action against him – viz. 'failure to protect and safeguard company property' – considered in the context of the events of 19 October 2015, does not come within the category of 'very bad behaviour of such a kind that no reasonable employer could be expected to tolerate the continuance of the relationship for a minute longer', described above by the Tribunal. In any event, the uncontested evidence before the Court was that the Appellant allowed the Respondent to continue driving his company vehicle for some two weeks after the 19 October 2015 before he was suspended.

Proportionality of Sanction?

It follows, from the Court's discussion above that the Respondent's failure to properly judge the width of the gap through which he was attempting to drive the Appellant's van on 19 October 2015 cannot reasonably be considered to amount to gross misconduct justifying the imposition of a sanction of summary dismissal. In this regard, therefore, the Court finds that the sanction of summary dismissal imposed on the Respondent by the Appellant was disproportionate and unwarranted in all the circumstances.

Failure to Consider Alternative Sanctions

Both Mr Butler and Mr Farrell stated in their evidence to the Court that they did not consider imposing any lesser sanction on the Respondent. In fact, Mr Butler told the Court that he was unaware that he could have imposed a sanction of dismissal on notice. It follows that the Appellant did not give due consideration to imposing an alternative and more proportionate sanction on the Respondent. Likewise, the Appellant's failed to offer the Respondent an opportunity to contribute to the cost of the repairs to the company van necessitated by his error of judgement.

Undue Weight Placed on Previous Incidents Involving the Respondent's Driving

As stated previously in this determination, the Respondent had had a number of incidents in the past (in 2012 and 2013) that resulted in some damage to the Appellant's company vehicle. He received a written warning for the 2012 incident and a final written warning for the 2013 incident. Both written warnings were active for a period of 12 months from the date they were applied to the Respondent and each expired thereafter in accordance with the Appellant's Disciplinary Policy. However, it is abundantly clear from the correspondence opened to the Court and from both Mr Butler's and Mr Farrell's evidence that the Appellant's decision to summarily dismiss the Respondent was, nevertheless, informed to no small extent by those previous incidents and associated which clearly provides for the expungement of disciplinary warnings on their expiry.

For all of the above reasons the Court finds that the Respondent's dismissal was unfair within the meaning of the Act.

Award

Having regard to the totality of evidence adduced by the Parties at the hearing, including the Respondent's evidence in relation to his loss to date attributable to his dismissal and his efforts to mitigate that loss, the Court awards the Respondent €72,042.88 by way of compensation, being the equivalent of 104 weeks' remuneration. As the award is made by way of compensation for loss of earnings it is subject to income tax.

The decision of the Adjudication Officer is, therefore, varied accordingly.

The Court so determines.

Signed on behalf of the Labour Court

Alan Haugh

28th July 2017_____

SCDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Sharon Cahill, Court Secretary.

EDA1124 July 26, 2011

County Cork Vec (represented Mairead Mckenna B.L. Instructed By Michael Powell Solicitors) - And - Ann Hurley

Case Details

Body
Labour Court

Date
July 26, 2011

Official
Kevin Duffy

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 83, EMPLOYMENT EQUALITY ACTS, 1998 TO 2008

County
Co. Dublin

Decision/Case Number(s)
- EDA1124
- ADE/10/63

Note
Enquiries concerning this Determination should be addressed to Ciaran O'Neill, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Ms Ni Mhurchu

SUBJECT:

1. Appeal under Section 83 of the Employment Equality Acts, 1998 to 2008

BACKGROUND:

2. The worker appealed her case to the Labour Court on the 6th August, 2010. A Labour Court hearing took place on the 10th May, 2011. The following is the Court's determination:

DETERMINATION:

- **This is an appeal by Ms Anne Hurley against the decision of the Equality Tribunal in her complaint of victimisation against County Cork VEC under the Employment Equality Acts 1998 to 2008.**
  Introduction

This is a determination of the Court on preliminary issues raised in the course of the hearing of the appeal. The Court is satisfied that the determination of these issues by way of a preliminary ruling could be determinative of the whole case.There are some unusual aspects to this case which should be recorded in some detail. The Complainant who was originally represented by a firm of solicitors appeared in person at the hearing, on 10th May, 2011, having apparently lost the services of her solicitors. At the commencement of the hearing the Complainant was invited to apply for an adjournment if she felt that she might obtain representation from an alternative source. The Complainant told the Court that she wished to proceed.It was clear from the written submission filed by the Respondent that it would be contending that many of the incidents relied upon by the Complainant as constituting victimisation occurred outside the time limit prescribed by s. 77 of the Act and were therefore statute barred. The Court suggested that this point could be considered as a preliminary matter. In that regard the Court suggested that occurrences outside the time limit could only be considered if the last act relied upon was within the time limit and the other acts complained of were sufficiently connected to the final act so as to make all of them part of a continuum. A further issue arose as to whether occurrences not referred to in the Complainant's original complaint, and occurrence after the complaint had been presented, could be relied upon.The Court suggested to the parties that an occurrence after the complaint had been presented could not have been comprehended by the claim and could not be relied upon for the purpose of obtaining redress. It did, however, indicate that evidence in relation to these later incident, which was relevant and probative in relation to the earlier occurrences, could be admitted in respect of those earlier incidents.The Court proposed to the parties that it should proceed with the preliminary point in relation to the time limit only. It proposed that for that purpose the Complainant should adduce evidence in relation to the occurrences that were within the time limit. It suggested that if these occurrences were found to be acts of victimisation the Court would hear evidence in relation to all of the occurrences relied upon. If, however these occurrences where found not to have involved victimisation the complaint relating to the earlier occurrences could not be entertained having regard to s.77(5) of the act as the most recent occurrences would have been outside the time limit.Counsel for the Respondent agreed with this proposal. The Complainant was asked to consider this proposal and the Court rose for 30 minutes in order to allow her an opportunity of so doing. On resumption of the hearing the Complainant indicated her agreement to proceed in the manner suggested by the Court.It was submitted by Counsel for the Respondent that the two occurrences about which there was no issue as to admissibility related to the filling of posts in Bandon Macroom School Completion Project (January 2008) and Clonakilty Community College (May 2008). It was proposed that evidence should only be taken in relation to these incidents. Again the Complainant agreed to confine her evidence to these two occurrences for the purpose of the preliminary investigation.The Complainant gave her evidence in relation to these occurrences and did not call any other witnesses. The Respondent presented its evidence by calling two witnesses. Following short closing statements the Court reserved its decision and the hearing terminated. The Court indicated that it would give its determination in writing on the preliminary question and depending on its determination the hearing might or might not be resumed. The Complainant did not raise any objection to the process adopted nor did she seek to adduce evidence in relation to any other matter.Later that day the Complainant contacted the Secretary to the Court and expressed concern that she had not properly presented her case. She claimed that the two occurrences which had been identified and in relation to which she had given evidence were not the 'final acts of victimisation' and she wished to rely on two later occurrences for the purpose of the preliminary issue. The Complainant then attended personally at the Court and presented the Court Secretary with a written document setting out her position in relation to these matters and asking that the case be reopened. The Court wrote to the Complainant asking her to particularise the additional evidence that she wished to produce including the identity of any witness that she wished to call. The document presented by the Complainant together with the Court's reply thereto was copied to the Respondent. The Solicitor for the Respondent replied objecting to a reopening of the case.Further correspondence ensued between the Court and the Complainant in relation to this matter. In the course of this correspondence the Court indicated that it would consider reopening the case if the Complainant provided written details of the additional evidence that she wished to adduce in relation to the matters in issue at this stage in the appeal, namely whether she was subjected to an act of victimisation in the six-month period prior to the date on which the within complaints were presented to the Equality Tribunal. It was pointed out to the Complainant that the Court could not accept mere assertion or hearsay. The Complainant was also asked to provide the names of additional witnesses that she wished to proffer together with a statement of the evidence that the proposed witnesses would give.At all times the Respondent objected to the matter being reopened and claimed that to do so would be fundamentally unfair to the Respondent.In a document submitted to the Court under cover of a letter dated 5th July, 2011, the Complainant set out details of the additional evidence that she now wished to adduce. It is clear from that document that the Complainant wishes to give further evidence in relation to a matter in respect to which she has already given evidence at the hearing of 10th May, 2011, namely the filling of a post at Bandon / Macroom Completion Project. Furthermore, the Complainant indicated that she wishes to give evidence in relation to events which she claim to be acts of victimisation that occurred after her complaint was made to the Equality Tribunal. No details were provided of the nature of that evidence or its relevance or probative value to the preliminary point now before the Court.The Complainant also indicated that she wishes to call two witnesses both of whom where present in Court on 10th May but were not called by the complainant to give evidence on that occasion. Both of these witnesses had submitted statements of the evidence they

proposed to give. Conscious of the fact that the Complainant is a lay litigant and without prejudice to the Respondents contention that the case could not be reopened the Court reviewed these statements and in the view of the Court they are comprised almost entirely of hearsay, assertion and expressions of opinion. Any evidence given on the basis of these statements could not assist the complainant in advancing her complaint.Again in ease of the Complainant the Court has also examined the written submissions originally filed on behalf of the Complainant by her former legal advisers. While reference is made therein to the filling of posts and to competitions in which the Complainant participated unsuccessfully in July, 2008, and in September, 2008, the Court cannot identify any admissible evidence of probative value in these submissions which could avail the Complainant in advancing her claim.In considering whether or not to allow the case to be reopened the Court must balance two conflicting considerations. On the one hand it is anxious to ensure that an unrepresented party is given the maximum latitude to present her case as she wishes. On the other hand the Court must ensure that the Respondent does not suffer an injustice by being required to incur additional inconvenience and expense in having to defend ill defined and apparently tenuous complaints.Having regard to all the circumstances of the case and in light of the strong objections of the Respondent, the Court decided that there is an insufficient basis upon which the reopening of the case would be justified. Accordingly, what follows is the determination of the Court formulated on the basis of the submissions advanced and the evidence adduced at the hearing held on 10th May, 2011.

Background

The Complainant is a qualified second level teacher. She completed a Higher Diploma in Education in English and C.S.P.E in 2003. She has since obtained a Modular Certificate in Dyslexia in 2004 and a Diploma in Teaching Children with Special Educational Needs.The Complainant worked in a number of substitute teaching positions in various primary schools in the period 1998 to 2001. Having obtained the Higher Diploma in Education the Complainant obtained temporary employment with the Respondent as a resource teacher during the academic year 2003 – 2004. Her temporary contract with the Respondent was not renewed and this gave rise to a complaint under the Act. This complaint was dealt with by the Equality Tribunal through a process of mediation. The matter was resolved through this process in 2006 on confidential terms.Since the resolution of that complaint the Complainant has sought several teachings posts with the Respondent but has been unsuccessful on each occasion. The Complainant believes that her failure to obtain further employment with the Respondent is related to the proceedings which she previously brought.The Complainant referred a complaint to the Equality Tribunal on 11th June, 2008, alleging that she had been victimised within the meaning of s.74(2) of the Act by being denied employment with the Respondent.

Provision of information

By way of a preliminary issue the Complainant told the Court that she had requested certain information from the Respondent which she regarded as essential if she was to adequately present her claim. She said that this information related to the marks issued to the candidates in various competitions in which she had participated. She said that she had also requested interview notes and the marking scheme used in these competitions. The Court was asked to direct the production of documents containing this information.Counsel for the Respondent told the Court that a statutory questionnaire had been served on the Respondent and such information as was available was furnished. Counsel told the Court that interview notes were not retained but that other information had been furnished to the Complainant's former Solicitors.Without reaching any conclusion on whether or not the information had been provided, the Court asked that the Respondent furnish the Complainant with copies of such documents as were available. The Court rose so as to allow these documents to be furnished and for the Respondent to examine the documents.The Court is satisfied that such documents in the possession of the Respondent as are material to the case were provided to the Complainant either before the hearing or in the course of the recess.

Position of the parties

The essence of the Complainant's case is that she was unsuccessful in applications for employment which she made in March, 2007, June, 2007, July, 2007, on two occasions in August 2007, September 2007, January, 2008, May 2008 and July 2008. It is the Complainant's case that the incidents cited were all part of a continuing act of victimisation because of the earlier proceedings which she brought against the Respondent.By way of preliminary objection, the Respondent contends that the complaints of victimisation, in so far as they relate to events which occurred before 12th December, 2007, are outside the time-limit prescribed by s.77(5) of the Act and are statute barred. The Respondent further contends that the incidents referred to by the Complainant which occurred in May 2008 and July 2008 were not referred to in her complaint to the Equality Tribunal and cannot now be proceeded with. The Respondent accepts that the complaint, in so far as it relates to the decision not to appoint the Complainant to a post in January, 2008, is within the time limit but it contends that there is no evidence to connect that decision which either the earlier decisions impugned or with her previous complaint under the Act.Without prejudice to its submissions in that regard, the Respondent denies that the Complainant was victimised in the manner alleged or at all. The Respondent contends that on each occasion the posts in issue were filled on the basis of the merit of the candidates as determined by an interview board. The Respondent further contends that those involved in the interview process had no knowledge of the previous proceedings taken by the Complainant.

Consideration of the preliminary objection

The various posts at issue in this case were filled by differently constituted interview boards. If the filling of each of these posts was put in issue in this appeal a considerable number of witnesses would be required to give evidence and a significant number of documents would have to be produced and examined. Conversely, if the appeal could be disposed of by considering only the conduct of those competitions held within the time limit the hearing could be significantly abridged.The Court suggested to the parties that in these circumstances it might be convenient to deal with the time limit issue as a preliminary matter. Both parties indicated their agreement to this approachThe Court proceeded accordingly.

Application of the Time Limit

Section 77(5)(a) of the Acts provides: -

- **(a) Subject to paragraph (b) , a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence.**

Section 77(6A) provides: -

- **For the purposes of this section —**
  (a) discrimination or victimisation occurs—
    - **(i) if the act constituting it extends over a period, at the end of the period,**
    - **(ii) [not relevant]**
      - **(iii) [not relevant]**

Subsection (5) and subsection (6A) of s.77 deal with different forms of continuing discrimination or victimisation. Under subsection (6A), an act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (Barclays Bank plc v KapurIRLR 387). This subsection would apply where, for example, an employer maintains a discriminatory requirement for access to employment or promotion. In the case of victimisation, it would apply, for example, where an employer pursues a policy or practice of not affording certain benefits to employees who brought equality claims. In such a case the time limit will only run from the time that the policy or practice is discontinued. Hence an aggrieved party could maintain a claim in respect of acts or omissions which occurred in pursuance of the policy or practice regardless of when the act or omission occurred. There is, however, authority for the proposition that an act occurring after the presentation of the Complainant's complaint may not be taken into account when determining whether there was a continuing act.The decision of the Court of Appeal for England and Wales inRobertson v Bexley Community Centre[2003] IRLR 434, concerned a claim of racial discrimination by Mr Robertson under the Race Relations Act 1976, which contains similar provisions as to time limits as our Act, except that the standard time limit is three months rather than six-months as provided for by our Act. The salient facts of this case are as follows: -The Complainant was subjected to racial abuse by a work colleague, Mr Pankhurst, in April 1999. He made a complaint to his employer, Bexley Community Centre. The matter was resolved by Mr Pankhurst making an apology in writing to Mr Robertson, which Mr Robertson accepted.Other issues arose in relation to Mr Robertson's employment which resulted in disciplinary action being taken against him by his employer. On 4th October he made a complaint to an Employment Tribunal alleging that he was the victim of racial discrimination. He relied on the racial abuse to which he had been subjected by Mr Pankhurst and the subsequent disciplinary action taken against him by his employer.On the day after he filed his complaint, a meeting was held between Mr Robertson and Mr Pankhurst which was described as a "reconciliation meeting". At this meeting Mr Robertson was again subjected to racial abuse by Mr Pankhurst .At the hearing

of his claim it was found that the complaints in relation to the disciplinary action taken against Mr Robertson were without foundation. It was accepted that the racial abuse which occurred in April 1999 amounted to unlawful discrimination but as this had occurred outside the three –month time-limit prescribed by the UK Race Relations Act 1976 that aspect of the claim could not be entertained. An issue then arose as to whether the later incident in which Mr Robertson had been subjected to racist abuse, on the day after he presented his complaint, could be taken into account for the purpose of showing a continuing contravention of the Act. At first instance the Employment Tribunal held that it could not. On appeal the EAT took a different view. On Further appeal the Court of Appeal restored the original decision of the Employment Tribunal.In considering this point Auld LJ, with whom Chadwick and Newman LJJ agreed, said the following, (at par 10): -

- **"On the following day, 5 October, the planned reconciliation meeting between the two men took place. But it was a dismal failure. Mr Pankhurst was racially abusive to Mr Robertson and refused to shake his hand. The Community Centre immediately set in train procedures to discipline him for that, but he pre-empted that outcome by resigning on the following day. Those events of 5 and 6 October, postdating, as they did, Mr Robertson's application to the employment tribunal, were not and could not be considered as part of his application. If he had wished to have them considered, he could have issued a fresh application asking the tribunal to dispense with service and hear the complaints in both applications at the same time. But he did not do that.**

Later, at par 21, the Judge said: -

- **"There was, contrary to Mr Robertson's submissions, no evidence that his employer, the Community Centre, had acquiesced in, or condoned, Mr Pankhurst's behaviour at any time. And, in any event, the Appeal Tribunal was not entitled to take 5 October 1999 incident into account in considering whether there was a continuing act. That behaviour took place, as I have said, after the date of Mr Robertson's application, and could not properly be taken into account for the purpose of determining whether the complaint was out of time. Though it may be that it could have been relevant to the second and quite distinct issue whether it was just and equitable to consider the claim out of time (seeDin (Ghulam) v Carrington Viyella Ltd (Jersey Kapwood Ltd)[1982] IRLR 281 EAT, and alsoPonsford-Jones v Hampshire Education Authority and another(unreported, 25 November 1997)).**

Subsection (5) of s.77 deals with a situation in which there are a series of separate acts or omissions which, while not forming part of regime, rule, practice or principle, are sufficiently connected so as to constitute a continuum. The circumstances in which a corresponding provision of UK law can come into play was considered by the Court of Appeal inArthur v London Eastern Railway Ltd[2007] IRLR 58. Here the Court was concerned with a claim of victimisation in the form of a series of acts directed against the complainant, some inside the three-month time limit provided at s.48 of the UK Employment Rights Act 1996, (which corresponds to s.77(5) of our Act) and some outside that limit. In considering if the time-limit in respect of all of the acts relied upon stated to run from the last such act Mummery LJ said (at para 30,31): -

- **The provision in s.48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the three-month period. There must be an act (or failure) within the three-month period, but the complaint is not confined to that act (or failure.) The last act (or failure) within the three-month period may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it. The acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within s.48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them.**

It is clear for the passage just quoted that in order for acts or omissions outside the time limit to be taken into account there must have been acts or omissions of victimisation (or discrimination) within the time limit. There can be practical difficulties in applying that provision. There must be some reality in the claim that acts of victimisation actually occurred within the limitation period. Otherwise a complainant could revive a claim which had been extinguished by the time limit simply by raising an additional related claim, no matter how tenuous, within the time limit.Nature of the Complainant's claim

The gist of the Complainant's case appears to be that the Respondent had adopted a policy of denying her further employment because of her earlier claim under the Act and that each of the refusals upon which she relies are mere manifestations of that policy. If she is correct in that assertion her claim would fall to be decided by application of s.77(6A) of the Act and the time limit would run only from the time when the policy was discontinued.It appears to the Court that the pursuance of a policy of victimisation against the Complainant would have involved a conspiracy between various employees of the Respondent and a number of different independent interview boards. It is for the Complainant to produce credible evidence from which the existence of such a conspiracy could be inferred. Neither in her oral evidence nor in her written submissions to the Court has the Complainant offered any evidence from which the Court could draw such an inference. In that regard the Court could not accept that the mere coincidence of her having brought a claim under the Act, and her subsequent failure to obtain employment through open competition, is a sufficient basis from which to draw an inference of victimisation. Accordingly, the Court cannot accept that the acts or omissions complained of can be regarded as a continuum for the purpose of s.77(6A)The Court then considered if all of the incidents relied upon could be regarded as part of a continuing act of victimisation for the purpose of s.77(5) of the Act. In that regard, applying the principles identified above to the instant case, it appears that the admissibility of the claim in so far as it relates to alleged acts of victimisation in the period before 12th December, 2007, depends upon the validity of the claims of victimisation which allegedly occurred in the period after that date. Their admissibility is also dependent upon some link being established between the occurrences outside the time limit, and those inside the limitation period, which makes it just and reasonable for them to be treated as part of a continuing act upon which the Complainant can rely.In relation to the occurrences upon which the Complainant seeks to rely which occurred after her claim was presented to the Equality Tribunal on 11th June 2008, the positions is substantially different. The decision inCounty Louth VEC v The Equality Tribunal and Pearse Brannigan, Unreported, High Court, McGovern J. 24th July 2009, is clear authority for the proposition that a claim under the Act may be amended so as to rely on additional acts or omissions which occurred before the claim was initiated provided that the nature of the claim remains the same. In this case the Complainant is seeking to rely on incidents which occurred after her claim was presented for the purpose of obtaining redress. The decision inRobertson v Bexley Community Centreindicates that this is not permissible.The Court did, however, indicate in the course of the hearing that it would hear any evidence which the Complainant wished to tender, in relation to later incidents, which had probative value in relation to the incidents which are encompassed by her claim.The admissibility of Complainant's claim of victimisation in the filling of posts in the period before 12th December, 2007, is dependent upon there having been an act of victimisation in the filling of posts after that date and before her claim was presented. In these circumstances the Court put it to the parties that it should proceed to hear evidence in relation to the Complainant's claim in so far as it relates to the filling of posts in January 2008 and May 2008; that it should reserve its decision on those claims and in the event that it upholds those claims it would reconvene the hearing so as to deal with the other aspects of the claim. On this proposal if the Complainant did not succeed in relation to these claims, those outside the time limit would be statute barred.Following a recess to allow the parties to consider this proposal the Court was informed by the Complainant and by Counsel for the Respondent that they were agreeable to proceed in the manner proposed by the Court.

The Evidence

The Complainant gave evidence in relation to both incidents. In relation to the incident in May 2008 the Complainant told the Court that she checked the Respondent's website and found application forms in relation to a number of teaching posts including one in respect to a resource teacher. The Complainant downloaded the form and sent an e-mail to the school in question asking when the post would be advertised and what the closing date was to be.The Complainant received a reply to the effect that there was in fact no vacancy for a resource teacher and the reference to this post was removed from the website. The Complainant said that other posts referred to on the website were subsequently advertised and filled. The Complainant told the Court that she believed that the Respondent had decided not to fill the resource teacher post because it was the one for which she was most qualified.In relation to the incident in January 2008, the Complainant told the Court that she applied for a position with the Bandon – Macroom School Completion Programme. She was told that she was unsuccessful and that her nominated referees had not replied to requests from the Respondent for references. The Complainant said that she believed that this failure was a major reason for the rejection of her application. The Complainant said that she had reason to believe that the Respondent had never written to her nominated referees requesting a reference. She said that she was relying on this failure as constituting an act of victimisation.In relation to the May incident evidence was given on behalf of the Respondent by Ms Anne Dunne who is Principal of Clonakilty Community College. This witness told the Court that at the time in question the Collect was carrying work on its website and certain tests were being performed. As part of this process forms were placed on the website for the purpose of testing if they could be downloaded. The witness told the Court that there never was a vacancy for a resource teacher and it is not the practice of the College to employ teachers solely in that role.Ms Dunne told the Court that she sent an e-mail to the Complainant on 15th May 2008 pointing out that the website was under reconstruction. She also pointed out that there may be vacancies later in the year and that these would be advertised. The witness said that some posts were subsequently advertised but since no vacancy for a resource teacher existed such a post was not advertised. The witness told the Court that she had no knowledge of the Complainant having previously taken proceedings against the Respondent.Mr Kevin Earlie, who was Local Coordinator- Bandon – Macroom Schools Completion Programme, gave evidence in relation to the posting of a letter to persons nominated as referees by the Complainant. This witness referred the Court to copies of two letters addressed to the nominated referees, dated 20th December 2007, seeking references for the Complainant. The witness told the Court that he typed the letters and placed them in the post on the day they were written. No reply was received to either letter. It was Mr Earlie's evidence that the failure of the referees to respond was not a factor which influenced the decision not to appoint the Complainant to the post under consideration. He said that it was his practice only to follow up requests for references in the case of an applicant whom the Respondent proposes to employ.

Conclusion of the Court

On the evidence adduced there is no basis whatsoever upon which the Court could conclude that the either of the incidents relied upon by the Complainant within the time limit were acts of victimisation. Accordingly, the Court must conclude that no acts capable of constituting victimisation occurred in the period of six-months ending on the date on which she presented her claim to the Equality Tribunal. Accordingly, even if the Complainant's case were to be taken at its height in relation to all other incidents relied upon, they are outside the time limit prescribed by s.77(5) and are statute barred.For all of the reasons the set out in this Determination the within appeal cannot succeed and the decision of the Equality Tribunal is affirmed.

Signed on behalf of the Labour Court

Kevin Duffy

26th July, 2011_____

CONChairman

NOTE Enquiries concerning this Determination should be addressed to Ciaran O'Neill, Court Secretary.

DWT1627 April 11, 2016

Gino's Italian Ice-cream Limited
- And -
Ewelina Gacek (represented By E M O' Hanrahan Solicitors)

Case Details

Body
Labour Court

Date
April 11, 2016

Official
Kevin Foley

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 28 (1), ORGANISATION OF WORKING TIME ACT, 1997

County
Co. Dublin

Decision/Case Number(s)
- DWT1627
- WTC/16/24
- R-156397-WT-15/RG

Note
Enquiries concerning this Determination should be addressed to Michael Neville, Court Secretary.

Employer Member
Mr Marie

Worker Member
Mr Shanahan

SUBJECT:

1. Appeal of an Adjudication Officer's Decision No r-156397-wt-15/RG

BACKGROUND:

2. An Adjudication Officer hearing took place on 23 September 2015, and 1 December 2015 , and a Decision was issued on 27 January 2016.

The Worker appealed the Decision of the Adjudication Officer to the Labour Court on 11 February 2016, in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. A Labour Court hearing took place on 22 March 2016.

DETERMINATION:

This is an appeal by Ms Ewelina Gacek (the Appellant) against a decision of an Adjudication Officer / Rights Commissioner on a claim brought by her against her former employer, Gino's Italian Ltd (the Respondent), under the Organisation of Working Time Act, 1977 – 2015 (the Act).

The Adjudication Officer / Rights Commissioner found that the Appellant's claim was well founded in part.

The Appellant was employed by the Respondent from July 2014 until her employment terminated on 19

thMay 2015. A complaint under the Act was made to the Labour Relations Commission on 15thMay 2015.

Preliminary issue

The Respondent drew the Court's attention to a confirmation in the Appellant's appeal documentation that a claim was being pursued by the Appellant in relation to personal injuries. That confirmation was phrased as follows:

- "Claimant is pursuing a personal injuries claim in relation to a burn injury which she sustained at work, an attributes same to the Respondent's negligence and breach of duty, including the breaching of the Acts herein".

The Respondent asserted that the factual matrix for liability in respect of the personal injury claim is the same as that of the within matter. The Respondent requested the Court to adjourn the hearing of the within appeal pending the completion of the personal injuries litigation.

The Court has considered this request in detail. The Court understands that no procedures have as yet been progressed to the point where the Appellant's Personal Injuries action is before another Court, Tribunal or other adjudicative forum. The Appellant confirmed to the Court her wish to proceed with her Appeal before this Court.

The Court considers that the within Appeal is properly before it and that no circumstance arises whereby this Court should not proceed to hear this matter. It will be a matter for any other Court, Tribunal or adjudicative body considering any future litigation founded on the same factual matrix as that before this Court to consider any issue for that forum that might be raised by the Respondent consequent on this Court's exercise of its jurisdiction.

Discussion and Conclusions

The Respondent contended to the Court that the Appellant was the manager of the Store and as such was responsible for ensuring compliance with the Act. The Court finds that the responsibility for ensuring compliance with the Act rests with the employer. That responsibility extends to the Appellant notwithstanding that she was a manager employed by the Respondent.

Section 11 of the Act

The Appellant made a complaint on 15

thMay 2015 to a Rights Commissioner as regards an alleged breach of Section 11 of the Act. The cognisable period for the complaint as regards daily rest is therefore 16thNovember 2014 to 15thMay 2015. The within complaint however relates to the period from 6thto 18thMarch 2015. The Appellant supplied payslips setting out her working hours. The employer was not in a position to supply records of the Appellant's working hours for the material dates.

Section 11 of the Act provides that

- **'An Employee shall be entitled to a rest period of not less than 11 consecutive hours in each period of 24 hours during which he or she works for his or her employer'.**

The Court finds that the Respondent breached the Act at Section 11 in the cognisable period.

Section 12 of the Act

The Appellant made a complaint on 15

thMay 2015 to a Rights Commissioner as regards an alleged breach of Section 12 of the Act. The cognisable period for the complaint as regards daily rest is therefore 16thNovember 2014 to 15thMay 2015.

The Act at Section 12 provides as follows:

- **12.—(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.**
  (2) An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes; such a break may include the break referred to in subsection (1).

  (3) The Minister may by regulations provide, as respects a specified class or classes of employee, that the minimum duration of the break to be allowed to such an employee under subsection (2) shall be more than 30 minutes (but not more than 1 hour).

  (4) A break allowed to an employee at the end of the working day shall not be regarded as satisfying the requirement contained in subsection (1) or (2).

The Appellant confirmed to the Court that her complaint as regards Section 12 of the Act related to the period from 16

thNovember 2014 to 15thMay 2015. She was unable to specify the detail of dates on which she alleges that breaches of the Act occurred during this period.

The Respondent did not provide the Court with records of the breaks taken by the Appellant during the cognisable period.

The Court finds that the respondent breached the Act at Section 12 in the cognisable period.

Section 13 of the Act

The Appellant made a complaint on 15

thMay 2015 to a Rights Commissioner as regards an alleged breach of Section 13 of the Act. The cognisable period for the complaint as regards daily rest is therefore 16thNovember 2014 to 15thMay 2015.

Section 13 of the Act provides as follows:

13.— (1) In this section "daily rest period" means a rest period referred to in section 11 .

- **(2) Subject to subsection (3), an employee shall, in each period of 7 days, be granted a rest period of at least 24 consecutive hours; subject to subsections (4) and (6), the time at which that rest period commences shall be such that that period is immediately preceded by a daily rest period.**
  (3) An employer may, in lieu of granting to an employee in any period of 7 days the first-mentioned rest period in subsection (2), grant to him or her, in the next following period of 7 days, 2 rest periods each of which shall be a period of at least 24 consecutive hours and, subject to subsections (4) and (6)—
    - **(a) if the rest periods so granted are consecutive, the time at which the first of those periods commences shall be such that that period is immediately preceded by a daily rest period, and**
      (b) if the rest periods so granted are not consecutive, the time at which each of those periods commences shall be such that each of them is immediately preceded by a daily rest period.

  (4) If considerations of a technical nature or related to the conditions under which the work concerned is organised or otherwise of an objective nature would justify the making of such a decision, an employer may decide that the time at which a rest period granted by him or her under subsection (2) or (3) shall commence shall be such that the rest period is not immediately preceded by a daily rest period.

(5) Save as may be otherwise provided in the employee's contract of employment—

- **(a) the rest period granted to an employee under subsection (2), or**

(b) one of the rest periods granted to an employee under subsection (3),

- **shall be a Sunday or, if the rest period is of more than 24 hours duration, shall include a Sunday.**
  (6) The requirement in subsection (2) or paragraph (a) or (b) of subsection (3) as to the time at which a rest period under this section shall commence shall not apply in any case where, by reason of a provision of this Act or an instrument or agreement under, or referred to in, this Act, the employee concerned is not entitled to a daily rest period in the circumstances concerned.

The Appellant contended that she worked 13 consecutive days from 6

thto 18thMarch 2015. The Respondent did not dispute that contention.

The Court finds that the respondent breached the Act at Section 13.

Determination

The Court determines that the complaints under sections 11, 12 and 13 of the Act are well founded. The Court measures the level of compensation which is just and equitable in all of the circumstances at €2,250.

Signed on behalf of the Labour Court

Kevin Foley

11 April 2016_____

MNDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Michael Neville, Court Secretary.

PDD162 September 5, 2016

Aidan & Henrietta Mc Grath Partnership (represented By Purdy Fitzgerald Solicitors)
- And -
Anna Monaghan (represented By Peter Daly Bl Instructed By Kilfeather & Company Solicitors)

Case Details

Body
Labour Court

Date
September 5, 2016

Official
Caroline Jenkinson

Legislation
- SECTION12(2), PROTECTED DISCLOSURES ACT, 2014

County
Galway

Decision/Case Number(s)
- PDD162
- PD/15/1
- SECTION122

Note
Enquiries concerning this Determination should be addressed to John Deegan, Court Secretary.

Employer Member
Ms Cryan

Worker Member
Ms Tanham

SUBJECT:

1. Appeal Of Adjudication Officer Decision R-151162-PD-14/SR

BACKGROUND:

2. The Worker appealed the decision of the Adjudication Officer to the Labour Court on the 12 May 2015. A Labour Court hearing took place on 6 April 2016 and was resumed on 9 August 2016. The following is the Court's Determination:

DETERMINATION:

This is an appeal by Ms Anna Monaghan against the Decision of a Rights Commissioner (now known as an Adjudication Officer) in her claim of penalisation against her former employer Aidan & Henrietta McGrathPartnership under Section 12(1) of the Protected Disclosures Act, 2014 (the Act). The Adjudication Officer held that Ms Monaghan's issues with her employer were not related to any "protected disclosures" as defined by the Act and accordingly held that there was no "penalisation" as defined by the Act.

For ease of reference the parties are given the same designation as they had at first instance. Hence Ms Anna Monaghan will be referred to as "the Complainant" and Aidan & Henrietta McGrathPartnership will be referred to as "the Respondent".

Background

The Complainant was employed as a Care Assistant with the Respondent from 17th August 2010. Her employment terminated on 5th December 2014.

Aras Chois Fharraige Nursing Home is based in Co. Galway and was established in its current format by the Respondent in 2009. It cares for 42 residents and has 40 employees.

The claim was referred to the Labour Relations Commission (now known as the Workplace Relations Commission) on 14th November 2014.

Summary of the Complainant's Case

Mr Peter Daly, B.L., instructed by Kilfeather & Company, Solicitors, on behalf of the Complainant submitted that the Complainant made a protected disclosure to the Respondent and to the Health Information and Quality Authority(HIQA), in consequence of which she was penalised by being intimidated, bullied, alienated, harassed, victimised and placed on suspension and that these actions constituted penalisation of her within the meaning of Section 12 of the Act.

Mr Daly stated that the Complainant made a number of telephone calls to HIQA to report matters which she considered were having a serious and detrimental effect on patients at the Respondent's nursing home. He said that these calls were made on the following dates:- 28th March 2014; 31st March 2014; 2nd April 2014; 7th April 2014 and 1st May 2014. He submitted that the Respondent became aware that the Complainant had made these calls when HIQA visited the nursing home on 14th May 2014.

Furthermore, at a meeting with the Respondent on 29th April 2014, the Complainant outlined details to management of alleged wrongdoings regarding patient care. Mr Daly submitted that these events come within the definition of "protected disclosures" within the meaning of the Act. He said that the Complainant informed her colleagues at a meeting on 4th April 2014 that she had disclosed information to HIQA and that the Complainant herself had informed management of this when HIQA visited the nursing home on 14th May 2014. He said that as a result of these protected disclosures the Complainant was subjected to penalisation by the Respondent.

Therefore, Mr Daly submitted that there was a causal link between the protected disclosures and the detrimental treatment the Complainant was subjected to in the aftermath of the visit by HIQA at the nursing home on 14th May 2014.

Summary of the Respondent's Position

The Respondent was represented by Purdy Fitzgerald Solicitors. Mr Alastair Purdy represented the Respondent on the first day of the hearing before the Court and Ms Síobhan McGowan represented the Respondent on the second day.

Mr Purdy referred to the complaint made by the Complainant's representative to the Labour Relations Commission dated 13thNovember 2014, in which it referred to the disclosure made to the employer on 5thMay 2014 and the penalisation complained of which consisted of (a) suspension from duty on basic pay only from 20thJune 2014 to 7thNovember 2014 and (b) suspension without pay from 7thNovember 2014. Mr Purdy submitted that the letter dated 5thMay 2014 referred to the Respondent was in reality a grievance complaint made by the Complainant rather than a "protected disclosure". In addition he submitted that the issues raised in that letter do not come within the definition of "relevant wrongdoings" as defined by Section 5(3) of the Act. Therefore he contended that the Complainant had failed to satisfy the requirements of the Act.

Notwithstanding the above he contended that the suspensions (which he said were paid suspensions) referred to were entirely unrelated to her alleged protected disclosure. He said that the first period of suspension arose on foot of the findings of an investigation carried out to examine,inter alia, the complaints she referred to in her letter dated 5thMay 2014. Mr Purdy stated that the investigator's report found that a number of the persons interviewed had indicated that the Complainant might have been motivated by malice when she made her complaints regarding the conduct of a fellow colleague. The report recommended that the allegations of malice should be the subject of a further investigation and in the meantime the Complainant should be suspended. Mr Purdy said that in order to facilitate this investigation and in line with the Respondent's best practice, the Complainant was suspended on pay.

He said that the second period of suspension arose as the Complainant unreasonably refused to furnish the Respondent with various pieces of documentation in order to comply with applicable legal and regulatory matters including the Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older Persons) Regulations 2013.

In summary, Mr Purdy submitted that there was no causal link between the alleged protected disclosures and the periods of suspension. He submitted that the allegations of intimidation, bullying, alienation, harassment and victimisation were not included in the original claim but had been "added" to the claim during the hearing before the Adjudication Officer held on 16thFebruary 2015 and were accordingly out of time and therefore statute barred.

Witness Evidence

Evidence was given under oath on behalf of the Complainant by the following:-

- **The Complainant;Ms Kathleen Larkin, colleague of the Complainant; andMs Kathleen Gallagher, colleague of the Complainant**

Evidence was given under oath on behalf of the Respondent by the following:-

- **Mr Aidan McGrath, Registered ProviderMs Patricia Folan, Matron & Registered Person in Charge**

The Facts

The material facts as admitted by the parties or as found by the Court are as follows:-

On 30thMarch 2014 the Complainant advised the Matron of the difficulties with a named supervisor regarding her daughter's hours (her daughter was a student Care Assistant in the nursing home at the time).

The Complainant also brought to the attention of the Matron certain concerns regarding the treatment of patients and asked for a meeting of care staff to discuss the matter. The Matron agreed to this. However, the Complainant organised a meeting of Care Assistants on 4thApril 2014 in a local pub, without the Matron's knowledge. Between 6 and 8 Care Assistants attended the meeting. The issues discussed included reference to a named supervisor and her instructions regarding the care of residents. A number of days later when she became aware that a meeting had taken place, the Matron made enquiries of a number of those who attended, including the Complainant, as to the issues discussed at the meeting and was informed what had taken place.

The Complainant told the Court that after the meeting on 4thApril 2014 she was isolated and supervised in the course of her work having heretofore worked on her own. On 29thApril 2014 she was called to an appraisal meeting during which she was told that she was a trouble maker and should have followed procedures. She told the Court that the isolation continued after the appraisal meeting. The Complainant stated that she made a number of calls to HIQA including a call on 14thMay 2014, the day HIQA visited the nursing home.

The Registered Provider, Mr McGrath, told the Court that he decided to hold a meeting with the Complainant as the Matron was unable to resolve the issues she had discussed with the Complainant. He held a staff appraisal meeting with the Complainant on 29thApril 2014. During the first hour of the meeting, the discussion was focused on the issue of the Complainant's daughter's hours. The Complainant then raised concerns regarding the care of the residents and alleged abuse by the same supervisor. At this point in the meeting Mr McGrath decided to call the Matron in to the meeting and the meeting lasted a further hour discussing these issues. Mr McGrath asked the Complainant to put her concerns in writing which she did in a letter dated 5thMay 2014.

Mr McGrath told the Court that having received this letter, which was described as a grievance letter, in accordance with the required regulations he notified HIQA of the Complainant's written complaint on 12thMay 2014. He completed NF06 form on 14thMay 2014 and emailed it to HIQA at 3.53pm that day, informing HIQA that it had initiated a Provider Lead Investigation into the matters raised in her grievance and had placed the alleged abuser on extended leave.

HIQA inspectors made an unannounced visit to the nursing home that evening at around 5.30pm.

The draft report of the Provider Lead Investigation was issued to the Complainant on 20thJune 2014, and she was invited to give comments on the report within four days. The report found that here were several allegations of malice from different staff members regarding the Complainant's motivation in making the complaints and held that in the interest of fairness that this should be dealt with in a separate investigation. It recommended that as there was no evidence to substantiate the allegations made against the supervisor she should be recalled to work. In addition it recommended that the Complainant should be temporarily suspended on pay pending the further investigation.

By letter dated 20thJune 2014, from Ms Folan the Complainant was placed on suspension due to the recommendations made in the report and the issues raised during the investigation itself.

By letter dated 15thAugust 2014, the Complainant, along with all other staff, was requested to complete certain regulatory forms. When the Complainant failed to do so, further letters were sent to her on 29thSeptember 2014, 28thOctober 2014 and by 7thNovember 2014 when the Complainant had still not completed these forms, she was placed on suspension pending the outcome of a disciplinary meeting to be held on 14thNovember 2014.

Statutory Provisions

The Protected Disclosures Act became law on 15thJuly 2014. The Act has retrospective effect, therefore a disclosure made before the date of the Act may be a protected disclosure. The Act provides for a tiered disclosure regime and encourages a worker to make a disclosure to his/her employer or a responsible person in the first instance. It provides that a worker may make a protected disclosure to his/her employer where he/she reasonably believes that information being disclosed shows or tends to show wrongdoing.

The Act defines a protected disclosure at Section 5 as follows:-

Protected disclosures

5. (1) For the purposes of this Act "protected disclosure" means, subject to subsection (6) and sections 17 and 18 , a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6 , 7 , 8 , 9 or 10 .

(2) For the purposes of this Act information is "relevant information" if—

- **(a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and(b) it came to the attention of the worker in connection with the worker's employment.**

(3) The following matters are relevant wrongdoings for the purposes of this Act—

- a)**that an offence has been, is being or is likely to be committed,**b)**that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,**c)**that a miscarriage of justice has occurred, is occurring or is likely to occur,**d)**that the health or safety of any individual has been, is being or is likely to be endangered,**e)**that the environment has been, is being or is likely to be damaged,**f)**that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,**g)**that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or**h)**that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.**

(4) For the purposes of subsection (3) it is immaterial whether a relevant wrongdoing occurred, occurs or would occur in the State or elsewhere and whether the law applying to it is that of the State or that of any other country or territory.

(5) A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.

(6) A disclosure of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is not a protected disclosure if it is made by a person to whom the information was disclosed in the course of obtaining legal advice.

(7) The motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.

(8) In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is.

Conclusions of the Court

- **Protected Disclosure**

The protection provided under the Act is afforded to persons who have made a protected disclosure within the meaning of the Act.Section 12(1) of the Act provides :-

- **12. (1) An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure.**

The Court must first establish that a protected disclosure has been made before it can examine whether a penalisation within the meaning of the Act has occurred.

A Protected Disclosure as defined by the Act at Section 5 is a disclosure of relevant information. The Act at Section 2 clarifies that information is relevant information if

- **(a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and (b) it came to the attention of the worker in connection with the worker's employment.**

The Respondent contended that the Complainant's letter dated 5thMay 2014 was in the nature of a grievance and does not come within the definition of a protected disclosure. A grievance is a matter specific to a worker whereas a protected disclosure is where a worker had information about a relevant wrongdoing. In this case, the Act was not in force when the Complainant made her alleged disclosure. There is no impediment on such a disclosure being encompassed by the protections of the Act where the Court is satisfied that it comes within the definition of a protected disclosure.

The Court was faced with a direct conflict of evidence on whether or not the Respondent was aware of the fact that the Complainant had made telephone calls to HIQA in the period from 28thMarch 2014 to 1stMay 2014. However, having considered the evidence, the Court is satisfied that it was accepted by both parties that at the appraisal meeting held on 29thApril 2014, the Complainant informed the Respondent of information concerning alleged wrongdoings regarding patient care which she reasonably believed was occurring within the nursing home and which had come to her attention in connection with her employment. These concerns related to alleged health and safety risks to residents. On that basis the Court is satisfied that the Complainant made a protected disclosure on 29thApril 2014 within the meaning of Section 5(3)(d) of the Act.

The Court must now consider whether or not she was penalised for having made such a protected disclosure.

The Act is a new piece of legislation with limited case law, however, the provisions regarding penalisation are broadly similar to those provided in the Safety Health and Welfare Act, 2005. As this Court pointed out inO'Neill v Toni and Guy Blackrock Limited[2010] E.L.R. 21, it is clear from the language of Section 27 of the 2005 Act that in order to make out a complaint of penalisation it is necessary for a complainant to establish that the detriment of which he or she complains was imposed"for"having committed one of the acts protected by Section 27(3) of the 2005 Act. Thus the detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the Complainant having committed a protected act. This suggests that where there is more than one causal factor in the chain of events leading to the detriment complained of the commission of a protected act must be an operative cause in the sense that"but for"the Complainant having committed the protected act he or she would not have suffered the detriment. This involves a consideration of the motive or reasons which influenced the decision maker in imposing the impugned detriment.

The Court is of the view that theToni and Guycase involved penalisation under the 2005 Act, nevertheless, the general principle enunciated in that case remains valid in the case under consideration.

- **Allegations of Penalisation(i)intimidation, bullying, alienation, harassment, victimisation**

The Respondent submitted to the Court that certain allegations of penalisation, i.e. allegations of being intimidated, bullied, alienated, harassed, victimised were submitted out of time. The complaint to the Workplace Relations Commission did not refer to these allegations of penalisation. However, for the sake of completeness, the Court has considered the allegations.

The Court is satisfied that the meeting in the pub on 4thApril 2014 could not be held to be a protected disclosure to her employer or other responsible person within the meaning of Section 6 of the Act as there was such disclosure, it follows therefore that a complaint of penalisation could not be sustained in such circumstances. The telephone calls which the Complainant said she made to HIQA could come within the definition of protected disclosures, however, based on the evidence given by both sides, the Court is of the view that due to the conflicting evidence furnished it is not convinced that there is sufficient evidence to support the Complainant's allegations that she was treated in such an alleged manner following either the making of such calls or the 29thApril 2014 meeting. Accordingly, there is no basis to conclude that penalisation occurred as outlined above.

- (ii)**Suspension from 20thJune to 7thNovember 2014**

The Respondent in its submission and in evidence before the Court unequivocally denied the allegations relied upon by the Complainant in advancing her case in regard to penalisation when she was placed on suspension from 20thJune 2014 and again on 7thNovember 2014. The Court notes that the investigator's report was issued in its draft form and the parties were invited to make comments on it within four days.

The reference to malice in the report related to an allegation by the Complainant's colleagues regarding her motives in making complaints of abuse and wrongdoings. The draft report contained a recommendation to the Respondent to temporarily suspend the Complainant pending a further investigation into the allegations of malice. The Court finds that the Complainant's reporting of abuse and wrongdoings lead to the investigation being carried out, as a result of which the Complainant was placed on suspension on 20thJune 2014 on the day the draft report was circulated and before she had an opportunity to makes comments on its findings.

In her evidence to the Court Ms Larkin, a Care Assistant in the nursing home, said that when the Complainant was placed on suspension, she enquired of Matron when she would be returning to work. The Matron responded by saying "over my dead body will she be in this home again". In her evidence the Matron disputed this contention and said that the response she gave was that the Complainant was not on duty and she had no idea when she would be back. On this point, the Court has to determine whether it prefers the testimony of Ms Larkin or that of the Matron. Ms Larkin impressed the Court as a reliable witness who gave her evidence honestly and to the best of her ability. When taken in the context of the evidence as a whole,there was also a consistency in her testimony which coincided with evidence given in other aspects of the evidence adduced. For that reason, on balance, the Courthas come to the conclusion that the testimony of Ms Larkin was more reliable.

The Court notes that no investigation into the allegations of malice took place. Mr McGrath said that the reasons for not conducting such an investigation were related to advice he received from the Complainant's trade union representative in a letter dated 30thJune 2014, yet the Complainant continued on that suspension until 7thNovember 2014, when she was placed on further suspension for purported alternative reasons.

By letter dated 28thNovember 2014 the Respondent's legal representatives wrote to the Complainant's Solicitor's to inform them that that having taken the time to consider the matter the Complainant had "no case to answer" in respect to the matters outlined in the investigator's report and the matter was now at an end.

The question arises as to whether or not the Complainant would have been placed on suspension on 20thJune 2014 had it not been for the protected disclosure made to her employer on 29thApril 2014. In considering this question the Court must consider the motives which influenced the Respondent to place her on suspension at that time. While the Registered Provider advised the Court that HIQA would expect him to act on the investigator's recommendations, the Court is of the view that the suspension of the Complainant by the Registered Provider was influenced by the complaints made by her prior to and in the course of the investigation. The undue haste which the suspension was effected without giving the Complainant an opportunity to comment on the report (having been invited to do so) and before the final report was issued on 15thJuly 2014 reinforces the Court's view that there was a causal connection between the making of the complaints by the Complainant and her suspension. Finally, the comment made by the Matron to Ms Larkin is noteworthy in that it is illustrative of a mindset on the part of the Respondent towards the Complainant.

In such circumstances, the Court must find that the making of a protected disclosure to her employer was an operative reason for placing the Complainant on suspension from work for the period from 20thJune until 7thNovember 2014. The Court finds that the detriment giving rise to the complaint incurred because of, or in retaliation for, the disclosure of information related to the alleged abuse and alleged wrongdoings regarding patient care made by the Complainant on 29thApril 2014. For all of the forgoing reasons,the Court is satisfied that were it not for that complaint the Complainant would not have been placed on suspension.

- (iii)**Suspension from 7thNovember 2014**

Evidence was submitted to the Court by the Respondent to substantiate its position that the second period of suspension from 7thNovember 2014 was directly related to the Complainant's failure to furnish it with various pieces of documentation as required to comply with applicable legal and regulatory matters as outlined above. To this effect, the Complainant had received a number of letters between 15thAugust 2014 and 28thOctober 2014 giving her a warning that if she did not complete the forms she would be liable to be placed on suspension pending the outcome of a disciplinary meeting to be held on 14thNovember 2014.

Although there was communication between the Respondent and the Union on the issue, the Complainant did not deny that such documentation was not furnished in accordance with the Respondent's requirements as outlined above.

The Court finds the Complainant's suspension from work from 7th November 2014 was wholly unrelated to the protected disclosure made and that the Respondent was not motivated in doing so by the Complainant having committed a protected act.

Determination

For the reasons referred to herein the Court is satisfied that the Complainant was penalised when she was placed on suspension for the period from 20th June until 7th November 2014 for having committed a protected act under the Act. The Court orders the Respondent to pay her the sum of €17,500 in compensation for the detriment suffered.

Accordingly, the Court varies the Decision of the Adjudication Officer and the appeal is allowed in part.

The Court so Determines.

Signed on behalf of the Labour Court

JD_____

5 September 2016Caroline Jenkinson

Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to John Deegan, Court Secretary.

DWT1468 July 18, 2014

Paris Bakery & Pastry Limited
- And -
Igor Mrzljak (represented By Brendan Archbold)

Case Details

Body
Labour Court

Date
July 18, 2014

Official
Kevin Duffy

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Co. Dublin

Decision/Case Number(s)
- DWT1468
- WTC/14/58
- R-137528-WT-13/GC
- R-137529-WT-13/GC

Note
Enquiries concerning this Determination should be addressed to Sharon Cahill, Court Secretary.

Employer Member
Ms Cryan

Worker Member
Ms Tanham

SUBJECT:

1. Appeal of Rights Commissioner's Decision R-137528-WT-13/GC and R-137529-WT-13/GC.

BACKGROUND:

2. The Worker appealed the Rights Commissioner's Decision to the Labour Court in accordance with Section 28(1) of the Organisation of Working Time Act, 1997 on the 1st May, 2014. The Court heard the appeal on the 25th June, 2014. The Employer was not present and was not represented at the hearing. The following is the Determination of the Court:

DETERMINATION:

This is an appeal by Igor Mrzljak (hereafter the Claimant) against the decision of a Rights Commissioner in his claim against his former employer, Paris Bakery & Pastry Limited (hereafter the Respondent) under the Organisation of Working Time Act 1997 (the Act).

Background

The Claimant was employed by the Respondent in his capacity as a waiter. His employment commenced on or about 16thApril 2013 and ended on or about 10thAugust 2013. The Claimant brought claims before a Rights Commissioner alleging contraventions of various provisions of the Act by the Respondent in relation to his employment. They included a claim that he was penalised by the Respondent contrary to s.26 of the Act. The Rights Commissioner found that the claims were well founded in part. In so far as is material for present purposes the Rights Commissioner found that the Claimant's claim of penalisation contrary to s.26 of the Act was not well- founded. It is against that aspect of the Rights Commissioner's decision that the Claimant appealed to this Court.

The Appeal

The Respondent did not appear and was not represented at the hearing of the appeal. The Court is satisfied that the Respondent was informed of the date time and place at which the appeal would be determined.

Sworn evidence was tendered by the Claimant, the substance of which was as follows.

According to the Claimant he commenced work at or about 11am on Saturday 10thAugust 2014. He expected to finish at 11pm that night. The Claimant worked alone in the restaurant area of the Respondent's premises on the night in question and he was so overworked that he was unable to take a break of any kind. He was not offered the opportunity to take a break and no assistance was made available to him. At or about 3pm on the day in question the proprietor of the Respondent entered the restaurant and spoke to the Claimant in demeaning and insulting language. The Claimant responded by informing the proprietor that he was working alone and did not receive a break at work. He informed the proprietor that he was entitled to receive a break.

According to the Claimant he was followed by the proprietor who then head-butted him without warning. He left the premises and did not return.

The Claimant reported the assault to the Gardai. He later confirmed his report in writing (a copy of which was put in evidence).

On these facts the Claimant contends that he was constructively dismissed by the Respondent for having opposed by lawful means an act which is unlawful under the Act, namely a requirement that he work for more than 4 hours and 30 minutes without a break.

Conclusions of the Court

Section 26 of the Act provides: -

- **26.—(1) An employer shall not penalise an employee for having in good faith opposed by lawful means an act which is unlawful under this Act.**
  - **(2) If a penalisation of an employee, in contravention of subsection (1), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts, 1977 to [2007], relief may not be granted to the employee in respect of that penalisation both under this Part and under those Acts.**

The term "dismissal" is not defined by the Act. However, the reference in subsection (2) of s.26 of the Act to the Unfair Dismissals Act 1977 to 2007 suggests that the term should be given the same meaning as it ascribed to it by those Acts.

Section 1 of the Unfair Dismissals Acts 1977 -2007 defines dismissal as: -

- **(a) the termination by his employer of the employee's contract of employment with the employer, whether prior notice of the termination was or was not given to the employee,**

(b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer, or

(c) the expiration of a contract of employment for a fixed term without its being renewed under the same contract or, in the case of a contract for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment), the cesser of the purpose;

Paragraphs (b) and (c) of this definition are relevant in the instant case. Paragraph (b) applies where an employer behaves in a way that amounts to a repudiation of the contract of employment. It was described by Lord Denning M.R. inWestern Excavating (ECC) Ltd v Sharp[1978] I.R.L.R. 332 as follows:

- **"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself discharged from any further performance".**

Where an employer commits a repudiatory breach of contract the employee is entitled to accept the repudiation and consider him or herself dismissed. However, not every breach of contract will give rise to repudiation. It must be a breach of an essential term which goes to the root of the contract.

Paragraph (c) of the definition deals with a situation in which the employer conducts his or her affairs in relation to the employee, so unreasonably that the employee cannot fairly be expected to put up with it any longer. Thus, an employer's conduct may not amount to a breach of contract but could, nonetheless, be regarded as so unreasonable as to justify the employee in leaving there and then.

In this case the conduct of the proprietor of the Respondent in perpetrating a serious and unprovoked assault on the Claimant had the effect of undermining the duty of mutual trust and confidence which lies at the root of every contract of employment. It was also conduct that was so unreasonable that no employee could be expected to tolerate it any further. Consequently, whether by reference to paragraph (b) or paragraph (c) of the statutory definition the conduct of the Respondent constituted a dismissal of the Claimant.

The Court is fully satisfied on evidence that the Respondent's conduct a direct result of the Claimant's complaint at being required to work without being afforded the breaks to which he was lawfully entitled. Consequently, it amounted to penalisation within the statutory meaning of that term.

Determination

For the reasons set out above the Claimant is entitled to succeed in his appeal. The appropriate form of redress is an award of compensation. The Court measures the quantum of compensation that is fair and equitable in the circumstances at €10,000. The Respondent is directed to pay the Claimant compensation in that amount.

The decision of the Rights Commissioner is varied in terms of this Determination.

Signed on behalf of the Labour Court

Kevin Duffy

18th July 2014_____

SCChairman

NOTE Enquiries concerning this Determination should be addressed to Sharon Cahill, Court Secretary.

UDD1636 December 1, 2016

Allianz Worldwide Care S.A. (represented By Irish Business And Employers' Confederation)
- And -
Emmanuel Ranchin

Case Details

Body
Labour Court

Date
December 1, 2016

Official
Caroline Jenkinson

Legislation
- SECTION 9 (1), UNFAIR DISMISSAL ACTS, 1977 TO 2015

County
Co. Dublin

Decision/Case Number(s)
- UDD1636
- UD/16/59
- ADJ-00000217
- CA-00000266

Note
Enquiries concerning this Determination should be addressed to Michael Neville, Court Secretary.

Employer Member
Mr Marie

Worker Member
Ms Tanham

SUBJECT:

1. Appeal of Adjudication Officer's Decision No: ADJ-00000217

BACKGROUND:

2. The Complainant appealed the Decision of the Adjudication Officer to the Labour Court in accordance with Section 9(1) of the Unfair Dismissals Acts 1977 to 2015 on 21 June 2016. A Labour Court hearing took place on 23 November 2016. The following is the Determination of the Court:

DETERMINATION:

This is an appeal by Mr Emmanuel Ranchin against the decision of an Adjudication Officer under the Unfair Dismissals Act 1977 – 2015 in a claim of constructive dismissal by his employer Allianz Worldwide Care S.A. The Adjudication Officer held against him and found that he had voluntarily resigned his employment on 25th June 2015. Mr Ranchin appealed against that decision.

For ease of reference the parties are given the same designation as they had at first instance. Hence Mr Emmanuel Ranchin will be referred to as "the Complainant" and Allianz Worldwide Care S.A will be referred to as "the Respondent".

Background

The Complainant was employed as a Project Manager from May 2012, he tendered his resignation on 25th June 2015 and finished working on 31st July 2015. He had previously withdrawn his resignation which he tendered in February 2015. In an exit interview in July 2015 he informed management that the reason for his resignation was due to bullying by his manager. He referred his complaint to the Workplace Relations Commission on 15th October 2015.

Summary of The Complainant's Case

The Complainant alleged that up until the end of 2014 his work was highly rated as "Exceeds Expectations" however, that year he was rated as "Fully Meets Expectations", which was a lower level rating. He said that he tried to discuss this with his managers but was faced with a bullying nature from his direct line manager, who would not provide any constructive input, would not communicate vital information and treated him with passive aggressive contempt on a regular basis.

Later that year the Complainant said that after he had a one to one performance planning and review meeting with his direct line manager on 24th June 2015, where he was subjected to further bullying he resigned the following day. At the exit interview when he mentioned that he had been the subject of bullying, Management supplied him with a copy of its anti-bullying policy and he was invited to submit a formal complaint, which would be investigated. He submitted a formal complaint under the Respondent's Anti-Bullying Policy on 18th August 2015. He received a report on the outcome of the investigation in December 2015, which had been conducted in September 2015. He said that at no stage was he notified or approached by the Company for a submission or for feedback during the course of the investigation.

He submitted that the Company's attitude to suggestions, constructive engagement was always to talk down issues, brush them aside and ignore genuine concerns, treating them with promises that things would change, but these promises were not acted upon. Therefore he left his employment to focus on rebuilding his career.

Summary of The Respondent's Case

The Respondent submitted that the Complainant voluntarily resigned from the Company. It submitted that the Complainant raised the issue of bullying for the first time within the written exit interview form after he tendered his resignation. He was invited to make a formal complaint, an investigator was appointed. The Complainant's complaint was not upheld and the final investigation report was issued on 11th November 2015. It was not appealed.

The Respondent said that following the Complainant's 2014 rating under the PMAD performance rating system he spoke to Ms L, his direct line manager's superior, as he was unhappy with his rating. The rating did not change as a result of this discussion and the Complainant resigned on 24th February 2015. He was invited to re-consider his position and to submit a grievance if he wished, which he did. This was investigated but was not upheld. He was invited to appeal but declined, accepting that the grievance was handled in a fair and professional manner.

The Respondent said that it made a number of attempts to reconcile issue with the Complainant, to no avail and he tendered his resignation on 25th June 2015 and worked until 31st July 2015. In his resignation letter, he referred to his grievance complaint and said:-

"We all agreed on the 2014 rating itself and move on. All agreed also to keep engaging and talk through issues to promote a healthy working environment".

Prior to his resignation the Complainant was involved in meetings with management to work towards the goal of a "healthy working environment". However, the Respondent stated that this task was made difficult by his refusal to agree any performance targets for 2015. It submitted that even if the Complainant established that the Respondent had in some way acted unreasonably, the Complainant must still satisfy the second arm of the test for constructive dismissal and show that in tendering his resignation he also acted reasonably and that he exhausted the internal procedures available to him.

The Law

Section 1 of the Act defines constructive dismissal as follows:-

- **"the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer"**

Section 6(1) of the Act states

- **6.—(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.**

Issues for the Court

As the Complainant is alleging constructive dismissal therefore the fact of dismissal is in dispute, the onus of proof rests with the Complainant to establish facts to prove that the actions of the Respondent were such as to justify him terminating his employment.

Section 1 of the Act envisages two circumstances in which a resignation may be considered a constructive dismissal. This arises where the employer's conduct amounts to a repudiatory breach of the contract of employment and in such circumstances the employee would be "entitled" to resign his position, often referred to as the "contract test". This requires that an employer be"guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance"as held in Western Excavating (ECC) Ltd v Sharp [1978] IRL 332.

Secondly, there is an additional reasonableness test which may be relied upon as either an alternative to the contract test or in combination with that test.This test asks whether the employer conducted his or her affairs in relation to the employee so unreasonably that the employee cannot fairly be expected to put up with it any longer,if so he is justified in leaving.

The question for the Court to decide is whether, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment.

In this case the Complainant resigned his position by letter dated 25thJune 2015. In his submission the Complainant stated that instead of giving his three months' contractual notice, he gave four weeks' notice:-"having been through a grievance process in March 2015, following disagreement over my 2014 year end appraisal and with the manner in which my manager was behaving .....I had no intention of giving the company more than 4 weeks".

While the Complainant's resignation letter dated 25thJune 2015 is long and detailed, he at no point stated that he was being bullied. Neither was bullying mentioned in a letter sent to the Respondent by his Solicitor dated 24thJuly 2015, prior to his departure from the Company. He made no complaint of bullying; he did not seek to invoke the Respondent's Dignity at Work Policy. The Complainant's resignation letter outlined the difficulties he encountered at the one-to-one PMAD monthly meeting held the day before, when his direct line manager asked him"how do you think you are managing your projects".He said that she followed this remark by informing him of complaints which had been raised about him. He found her demeanour passive aggressive and said that he felt incapable of doing his work properly and his self-confidence was gone. Consequently he was now calling a halt to all this. He said that he could go on but it was best for him"just give up".

The Court notes that the letter of resignation discloses no allegation of bullying. Instead it conveys the Complainant's dissatisfaction with (i) his performance rating at the end of 2014; (ii) the one-to-one performance meeting held with his line manager the day before and (iii) generally with his working conditions, whereby his project sponsor had not been replaced since April 2015, no decision making by management, weekly reports unread, formats and structure constantly changing.

Following the tendering of his resignation he informed the Respondent that the reason he resigned was due to the bullying he encountered by his line manager. At the conclusion of his exit interview he said"I can honestly say I am very sad that the bullying situation I found myself entangled with could not be addressed and that the only option left for me was to resign..... I will now be seeking legal advice regarding next steps."

The Complainant in his evidence to the Court accepted that he did not invoke the Respondent's Dignity at Work Policy prior to his resignation. He accepted that he was aware that such a policy existed and that he had been supplied with a copy of the policy at his induction. When he formally notified the Respondent of such an allegation having tendered his resignation, he was informed how to progress such a complaint through the policy, the Respondent followed up on his complaint, carried out an investigation and issued a report to him.

Findings of the Court

In reaching its conclusion the Court has taken account of the written submission of the parties and has had full regard to the evidence adduced in the course of the appeal. The net issues for consideration is whether the Complainant's employment came to an end in circumstances of dismissal within the meaning of the statutory definition of that term contained at section 1(1)(b) of the act.

The Court notes that having raised a formal grievance regarding his performance rating in February 2015 the matter was dealt with through the Respondent's Grievance Procedures. At that time he received notification of his performance rating and as he was dissatisfied with the rating given to him, he tendered his resignation on 24thFebruary 2015. The Respondent then engaged in discussions with him in an effort to resolve matters. He then rescinded his resignation and raised a formal grievance which was investigated in accordance with the Respondent's Grievance Procedure. He expressed satisfaction with the process stating that it was professional and fair, despite the fact that it did not result in an outcome in his favour and he revoked his resignation at that time. Furthermore, he agreed to move on and to engage in a process at the time to address his concerns, to move forward and to embark on the task of building a positive work environment. The Respondent told the Court that every effort was made to address the Complainant's concerns however; this task was made more difficult by his refusal to agree any performance targets for 2015.

Evidence was given to the Court from the Head of Marketing and from the Head of HR. They both told the Court that meetings were held with the Complainant in an effort to address his work related concerns and he was invited to consider alternative roles if he was unhappy in his present role.

In constructive dismissal cases, the Court must examine the conduct of both parties. In normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the step to resign:Conway v Ulster Bank LimitedUDA474/1981.

The Complainant told the Court that he accepted that he did not raise a grievance with the Respondent prior to tendering his resignation in June 2015, he accepted that this was one last resort he could have invoked however, he decided not to as he said that he did not have faith in the Respondent dealing with his grievances or bullying allegations. Furthermore, if he reported it to the Respondent, he said that he felt that he could not continue to work alongside the person he was accusing of bullying while the matter was being investigated.

The Court finds it difficult to accept as valid that he had no faith in the Respondent's ability to deal with his grievances and/or allegation of bullying as he had already invoked the Respondent's Grievance Procedure only a few months earlier. He described that process as positive and professionally conducted and he was willing to try to move on in the aftermath of that process. The Court cannot accept that the Complainant's grievances could not have been dealt with in a similar manner in June 2015. InBeatty v Bayside SupermarketsUD142/1987, in referring to the existence of grievance procedures in a company the Employment Appeals Tribunal held:-

- **"The Tribunal considers that it is reasonable to expect that the procedures laid down in such agreements be substantially followed in appropriate cases by employer and employee as the case may be, this is the view expressed and followed by the Tribunal in Conway v Ulster Bank Limited 475/1981. In this case the Tribunal considers that the procedure was not followed by the claimant and that it was unreasonable of him not to do so. Accordingly we consider that applying the test of reasonableness to the claimant's resignation he was not constructively dismissed".**

On the other hand inAllen v Independent Newspapers (Ireland) Limited[2002] ELR 84 the Employment Appeals Tribunal held that it was not unreasonable in the circumstances for the complainant not to have faith in the employer's ability to properly or effectively address her grievances. However, in the instant case, the Court is not satisfied that there were factors present which might excuse the Complainant's failure to formally complain to the Respondent before resigning. The Respondent had a grievance procedure in place; the Complainant was aware of it and had used it only a few months earlier, and found it a fair process. As a result of that latter process every effort was being made by management with his cooperation to move forward and to embark on the task of building a positive work environment.

The Court is of the view that the Respondent cannot be deemed to have failed to take steps to remedy a situation where the Complainant raised no grievance and in such circumstances his work related concerns cannot be converted into the "conduct of the employer" such as to render it impossible for him to continue in employment and be used to ground a complaint of constructive dismissal within the meaning of the Act.

Determination

In all the circumstances, the Court cannot find that the Respondent's conduct was unreasonable or could justify the Complainant's terminating his employment by way of constructive dismissal nor was it such as to show that it no longer intended to be bound by one or more of the essential terms of his contract of employment.

The Court determines that the Complainant's complaint is not well founded. The appeal is rejected. The decision of the Adjudication Officer is affirmed.

The Court so Determines.

Signed on behalf of the Labour Court

Caroline Jenkinson

1 December 2016_____

MNDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Michael Neville, Court Secretary.

LCR21798 October 16, 2018

Beechside Company Limited T/a Park Hotel Kenmare (represented By Gore And Grimes, Solicitors) - And - A Worker (represented By M.P Guinness B.L., Instructed By O' Mara Geraghty Mc Court, Solicitors)

Case Details

Body
Labour Court

Date
October 16, 2018

Official
Caroline Jenkinson

Legislation
- SECTION 20(1), INDUSTRIAL RELATIONS ACT, 1969

County
Kerry

Decision/Case Number(s)
- LCR21798
- CD/18/214

Note
Enquiries concerning this Recommendation should be addressed to Ciaran Roche, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Ms Treacy

SUBJECT:

1. Unfair Dismissal.

BACKGROUND:

2. The case concerns a claim by the Claimant that he was unfairly dismissed.

The Employer's said it was entitled to dismiss the Claimant during his probationary period by the giving of notice to that effect, as provided for in his contract of employment.

The Claimant referred this dispute to the Labour Court on the 13th August 2018 in accordance with Section 20(1) of the Industrial Relations Act, 1969 and agreed to be bound by the Court's Recommendation.

A Labour Court hearing took place on the 28th September 2018.

WORKER'S ARGUMENTS:

3. 1. The Claimant said he was headhunted by the Employer to accept a role as General Manager of the Hotel.

2. He moved from Dublin to Kenmare to take up the role in January 2018.

3. He was dismissed without warning on 27th April 2018 by the Managing Director.

EMPLOYER'S ARGUMENTS:

4. 1. The Employer disputed that the Complainant had been headhunted.

2. The Managing Director was entitled to dismiss the Claimant.

3. The contract of employment unequivocally provides that either party can terminate the contract by giving written notice during the probationary period.

RECOMMENDATION:

The matter before the Court was brought under Section 20(1) of the Industrial Relations Act 1969 and concerns a claim of unfair dismissal.

The Claimant alleged that he was headhunted by the Respondent to accept a role as General Manager of the Hotel. He said that following negotiations on his terms and conditions of employment he moved from Dublin to Kenmare and commenced in the role on 29thJanuary 2018. The Claimant maintained that he was dismissed without warning on 27thApril 2018 when the Managing Director called him to a meeting and informed him that"this was not working out"and asked him to leave with immediate effect.

The Respondent did not appear before the Court, however, it was represented by its legal representatives, who disputed that the Claimant had been headhunted. The Respondent's Solicitor submitted that the Respondent was entitled to dismiss the Claimant during his probationary period by the giving of notice to that effect, as provided for in his contract of employment.

The Court has given careful consideration to the submissions of both parties. The Court notes that the Claimant was furnished with a 36-month fixed term contract, which provided that"All dismissals will be carried out in accordance with the Provisions of Part Two of this Contract".Part Two of the contract outlines the disciplinary procedures, which includes:- the carrying out a full investigation before dismissal; being informed of the reasons for the dismissal; the right to reply; the right to be accompanied at meetings and the right to appeal a decision to dismiss.

Having considered the positions of both sides, the Court is of the view that the procedures adopted in the termination of the Claimant's employment were seriously flawed. He was not afforded fair procedures in accordance with the Code of Practice on Grievance and Disciplinary Procedures S.I. No. 146 of 2000.

Where an employee is considered unsuitable for permanent employment, the Court accepts that an employer has the right, during a probationary period, to decide not to retain that employee in employment. However, the Court takes the view that this can only be carried out where the employer adheres strictly to fair procedures.

In the particular circumstances of this case, there is no reason to doubt the Claimant's assertion that his reputation was seriously damaged by the actions of the Respondent. The Court has consistently held the view that it is imperative that an employer in a dismissal case must not only show that there were substantial grounds justifying the dismissal but also that fair and proper procedures were followed before the dismissal takes place. This requirement of procedural fairness is rooted in the common law concept of natural justice.

The Court is satisfied that the Claimant was not provided with details of any performance issues; no warning was given that his employment was in jeopardy; he was not afforded the right to representation; he was not provided with reasons for his dismissal and he was not afforded an opportunity to reply. Therefore, the Court is satisfied that he was denied natural justice.

In all the circumstances of this case and bearing in mind the level of remuneration the Claimant was earning, the Court recommends that the Respondent should compensate the Claimant by the payment of €90,000.00 to be accepted in full and final settlement of the claim.

The Court so Recommends.

Signed on behalf of the Labour Court

Caroline Jenkinson

CR_____

16 October, 2018Deputy Chairman

NOTE Enquiries concerning this Recommendation should be addressed to Ciaran Roche, Court Secretary.

EDA1615 June 30, 2016

Salesforce.Com (represented By Mc Innes Dunne Solicitors) - And - Alli Leech (represented By Neville Murphy & Co Solicitors)

Case Details

Body
Labour Court

Date
June 30, 2016

Official
Kevin Foley

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 77 (12), EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

County
Co. Dublin

Decision/Case Number(s)
- EDA1615
- ADE/16/23
- ET-154650-EE-15/FP

Note
Enquiries concerning this Determination should be addressed to Clodagh O'Reilly, Court Secretary.

Employer Member
Ms Cryan

Worker Member
Mr Shanahan

SUBJECT:

1. Appeal of Adjudication Officer Decision No et-154650-ee-15/FP.

BACKGROUND:

2. On the 21 January 2016 the Employer referred the dispute to the Labour Court in accordance with Section 77 (12) of the Employment Equality Acts, 1998 to 2011 as amended. A Labour Court hearing took place on the 9 June 2016. The following is the Determination of the Court:

DETERMINATION:

This is an appeal by Salesforce.com (the Respondent) against the decision of an Adjudication Officer to grant Ms Alli Leech (the Complainant) an extension of time in which to initiate her claim that the Respondent discriminated against her contrary to the Employment Equality Acts 1998-2015 (the Act)

The appeal is before the Court under s.77(12) of the Act. Consequently the only issue for determination by the Court is whether the Adjudication Officer was correct in granting an extension of time.

The substantive claim to which this application relates was presented to the Equality Tribunal on 18thFebruary 2015. The Complainant gave the date of the most recent occurrence of the discrimination alleged as 19thFebruary 2014. Hence, if that was the date of the occurrence of the event, or the omission, giving rise to the claim, the six-month time limit prescribed s.77(5)(a) of the Acts expired on 18thAugust 2014.

Section 77(5)(b) of the Act provides, in effect, that the time for presenting a claim under the Act may be extended for reasonable cause shown for a period up to but not exceeding 12 months from the date of the occurrence of the event giving rise to the claim. That 12 month extended period, assuming that time started to run from 19thFebruary 2014, would have expired on 18thFebruary 2015, the day the claim was presented.

Background

The Complainant alleges discrimination relating to a promotional opportunity.

The Complainant was pregnant from February to November 2014 and stated to the Court in evidence that issues associated with her pregnancy were such that on medical advice she sought at all times to avoid stressful situations. She stated to the Court that initiating a complaint with the Equality Tribunal would be a stressful situation which she sought to avoid.

The Complainant stated to the Court in evidence, and provided a medical document to support that evidence, that within 10 days of the birth of her child in November 2014 she fractured her wrist and was placed on an opioid medicine.

The Complainant attended for work throughout the period from February 2014 to the commencement of her statutory period of maternity leave on 29thSeptember 2014. During that period she made a grievance complaint to the Respondent on 25thMarch 2014 alleging discrimination arising from the events which form the basis for the within complaint. That grievance was processed internally within the Respondent company and the Complainant was found to have made out her case. That process concluded in May 2014.

The Legal Principles

The issue arising in this appeal is whether reasonable cause has been shown for an extension of time.

The established test for deciding if an extension should be granted for reasonable cause shown is that formulated by this Court in Labour Court Determination DWT0338CementationSkanska (Formerly Kvaerner Cementation) v Carroll. Here the test was set out in the following terms: -

- **It is the Court's view that in considering if reasonable cause exists, it is for the claimant to show that there are reasons which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the context in which the expression reasonable cause appears in the statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present the claim within the six-month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time.**

In that case, and in subsequent cases in which this question arose, the Court adopted an approach analogous to that taken by the Superior Courts in considering whether time should enlarged for 'good reason' in judicial review proceedings pursuant to Order 84, Rule 21 of the Rules of the Superior Courts 1986,. That approach was held to be correct by the High Court inMinister for Finance v CPSU & Ors[2007] 18 ELR 36.

The test formulated inCementationSkanska (Formerly Kvaerner Cementation) v Carrolldraws heavily on the decision of the High Court inDonal O'Donnell and Catherine O'Donnell v Dun Laoghaire Corporation[1991] ILRM 30. Here Costello Costello J. (as he then was) stated as follows:

- **-The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84 r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay.**

It clear from the authorities that the test places the onus on the applicant for an extension of time to identify the reason for the delay and to establish that the reason relied upon provides a justifiable excuse for the actual delay. Secondly, the onus is on the applicant to establish a causal connection between the reason proffered for the delay and his or her failure to present the complaint in time. Thirdly, the Court must be satisfied, as a matter of probability, that the complaint would have been presented the complaint in time were it not for the intervention of the factors relied upon as constituting reasonable cause. It is the actual delay that must be explained and justified. Hence, if the factors relied upon to explain the delay ceased to operate before the complaint was presented, that may undermine a claim that those factors were the actual cause of the delay. Finally, while the established test imposes a relatively low threshold of reasonableness on an applicant, there is some limitation on the range of issues which can be taken into account. In particular, as was pointed out by Costello J in the passage quoted above, a Court should not extend a statutory time limit merely because the applicant subjectively believed that he or she was justified in delaying the institution of proceedings.

The Factors Relied Upon

The Complainant gave oral evidence concerning medical issues arising during her pregnancy. She supplied medical documents which outlined the nature of her interaction with her GP Service throughout the period of her pregnancy and up to 28thNovember 2014. In addition the Complainant supplied medical documentation recording the dates of her interaction with her Consultant throughout her pregnancy together with a medical note describing a visit by her to a hospital in April 2015.

The Complainant told the Court that in April or May of 2014 a Doctor in her GP Service advised her to avoid stressful situations during her pregnancy. She told the Court that on the basis of that advice she decided not to make a complaint to the Equality Tribunal until after the birth of her child.

The Complainant told the Court that consequent upon her breaking her wrist within ten days of the birth of her child she was placed on morphine by her doctor in late November 2014 and that as a result she was not in a position to make a complaint to the Equality Tribunal until 18thFebruary 2015.

It was the Complainant's evidence that during the period following the incident in February 2014 she always intended to make a complaint outside the respondent Company but refrained from doing so initially on the basis of the advice given to her by a Doctor in her GP service in April or May 2014 and ultimately as a result of the implications of her sustaining a wrist injury in November 2014.

Conclusion

The Court has applied the test formulated inCementation Skanska (Formerly Kvaerner Cementation) v CarrollDWT0338 to the Complainant's explanation for the delay in instituting the within complaint.

The Court notes that no medical evidence has been supplied which supports the contention that a Doctor in the Complainant's GP Service advised her in April or May 2014 to avoid stressful situations. In fact the evidence presented to the Court,which the Complainant told the Court was a comprehensive record of her attendance at her GP service during her pregnancy, does not record any visit by the Complainant to her GP service in April or May 2014. Neither does the medical information supplied to the Court make any reference after March 2014 to stress related concerns.

The Court has been supplied with medical evidence dated November 2014 confirming that the Complainant had been prescribed an opioid product. No independent medical evidence has been supplied to explain how that prescription affected the Complainant's capacity to make a complaint to the Equality Tribunal between November 2014 and 18thFebruary 2015.

In considering this appeal, the Court should ask itself if a reasonably diligent person, in the same circumstances as the Complainant and having the same state of knowledge of the material facts, would have delayed in pursuing a claim under the Act for the reasons advanced by her. Having regard to all the circumstances of the case the Court has concluded that it must answer that question in the negative.

The Court accepts that the Complainant was pregnant from February 2014 to November 2014. However no clear evidence has been presented to the Court to support the contention that the Complainant's medical advice during her pregnancy was such as to cause her to refrain from making a complaint to the Equality Tribunal in that period. Neither does the Court accept that the making of such a complaint could reasonably be seen to be significantly more stressful than the making of the internal complaint which was made and processed between March and May 2014. `

The Court also accepts that the Complainant suffered a serious wrist break in November 2014. The Court has not been provided with medical evidence to support the contention that the nature of the treatment of the Complainant's wrist injury was such as to justify a delay of approximately three months in making a complaint to the Tribunal from November 2014 to 19th February 2015.

Outcome

For all of the reasons referred to herein and based on the evidence before it, the Court has concluded that the Complainant has failed to establish a causal connection between the factors relied upon by her and the delay in presenting the within claim. Accordingly the Court must hold that the Complainant has failed to adequately explain the delay and provide a justifiable excuse for the delay. It follows that the Court cannot uphold the decision of the Adjudication Officer, which it must set aside.

Disposal

The appeal is allowed and the decision of the Adjudication Officer is set aside and substituted with this Determination.

Signed on behalf of the Labour Court

Kevin Foley

COR_____

30 June 2016Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Clodagh O'Reilly, Court Secretary.

PWD1729 November 8, 2017

Bord Gáis Energy Ltd (represented By Arthur Cox)
- And -
Niall Thomas

Case Details

Body
Labour Court

Date
November 8, 2017

Official
Louise O'Donnell

Legislation
- SECTION 7(1), PAYMENT OF WAGES ACT, 1991

County
Co. Dublin

Decision/Case Number(s)
- PWD1729
- PW/17/44
- ADJ-00006952
- CA-00009460-001

Note
Enquiries concerning this Determination should be addressed to Ceola Cronin, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Mr Shanahan

SUBJECT:

1. Appeal Of Adjudication Officer Decision No ADJ-00006952

BACKGROUND:

2. This is an appeal of an Adjudication Officer's Decision made pursuant to Section 7(1) of the Payment of Wages Act 1991. The appeal was heard by the Labour Court on the 31 October, 2017 in accordance with Section 44 of the Workplace Relations Act 2015. The following is the Court's Determination:

DETERMINATION:

Determination

This is an appeal by Bord Gais Energy Ltd against an Adjudication Officer's Decision ADJ-00006952 given under the Payment of Wages Act 1991(the Act) in a claim by Mr Thomas that he suffered an unlawful deduction from his wages when he was not paid his 2016 bonus. The Adjudication Officer found in favour of the workers claim and directed that the Bonus be paid as soon as is practicable.

In this Determination the parties are referred to as they were at first instance. Hence Bord Gais is referred to as the 'Respondent' and Mr Thomas as 'the Complainant'.

Background

The Complainant is a former employee of the Respondent. He ceased employment with them on 6th January 2017. The Respondent operates a Performance Related Award (PRA) scheme and any payments arising from that scheme are normally paid in the February following the year under assessment. One of the requirements of the scheme is that in order to receive an award you must still be in employment on the date that payment is to be made. The date of payment can vary because the scheme includes a number of factors such as corporate performance and business unit performance. The payments in previous years have been made in mid-February or early March. The complainant believes that excluding people who have resigned from receiving a payment is unfair and discriminatory particularly as pro rata payments are made to people who retire or commence work during a review period. The Complainant worked for the full year of the review January 2016- December 2016. He left the employment in January 2017 and therefore did not receive any payment under the PRA scheme

Complainant's case

The Complainant's case is that he is entitled to the bonus for 2016 and that the non- payment of same by the Respondent was an illegal deduction from his wage and a breach of the Act. The scheme allows for payment to workers who retire, or are on long term sick leave on a pro rata basis and the same formula should apply to a worker who resigns. He believes that clause 61 of the "Bord Gais Introduction of a Market Bases Reward Model FAQ's" is unfair and discriminatory.

The Complainant also argued that the respondent did not fully comply with the scheme themselves when they asked him and the rest of his business unit to write their objectives retrospectively therefore they have the flexibility to deviate from the scheme if they want.

Respondent's case

The Complainant has been with the company for a number of years and during that period he was promoted on a number of occasions. On each occasion he was promoted it was a contractual requirement that he participate in the PRA scheme. It is not disputed by the Complainant that he was familiar with the requirements of the scheme. Therefore he would have known when he handed in his notice with a termination date in early January that he would not qualify for the PRA payment even though his performance was assessed for that period.

It is the respondent's position that the Complainant's contract clearly states that payment of the PRA is solely at the discretion of the company and is dependent on compliance with the criteria established by the Company. The requirement to be still in employment at the time of payment of award is one such criteria.

The Respondent in support of their argument citedSullivan v Department of Education [1998] 9 E.L.R. 217where "payable" was defined to mean "properly payable" and argues that the PRA only became properly payable if you were still in employment at the time of payment or were covered by one of the exemptions in the scheme.

They distinguished this case from the case ofCleary & Ors v B&Q LTD [2-16] 27 ELR 121on the basis that the respondent in that case was relying on a general variation clause. Whereas in this case the Complainant did not meet one of the criteria of the scheme.

The applicable law

Section 5 of the Payment of Wage Act 1991 deals with regulation of certain deductions made and payments received by employers, section5(6) states;

- **"Where—**
  - **(a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or**
    (b) [....]

then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion".

Discussion

There was no dispute on the facts of this case. Both parties accepted that one of the criteria attaching to the PRA scheme was, that to benefit you must be in employment at the payment date. Nor was it disputed that the Complainant's contract set out the circumstances in which the PRA became payable including the following phrase "...your eligibility for such a PRA payment in any year shall be considered and determined in accordance with the criteria established by the company".

The question that arises is whether, or not the PRA payment was properly payable to the complainant. In considering that question the Court places considerable weight on the fact that the complainants contract sets out the eligibility requirements for payment of the PRA and that the Complainant confirmed in evidence that he was aware that one of the criteria of the scheme required that he be in employment on the date of payment.

Conclusion

In all the circumstances of this case and on the evidence before it the Court is satisfied that the Complainant did not meet the criteria to be eligible for a payment under the scheme. Therefore, the bonus arising from the PRA scheme was not "properly payable" and no contravention of the Act occurred.

Finding

The within appeal is allowed and the decision of the Adjudicator is set aside.

Signed on behalf of the Labour Court

Louise O'Donnell

8 November, 2017_____

CCDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Ceola Cronin, Court Secretary.

DWT1489 October 15, 2014

Viking Security Limited
- And -
Tomas Valent (represented By Richard Grogan & Associates)

Case Details

Body
Labour Court

Date
October 15, 2014

Official
Kevin Duffy

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Wicklow

Decision/Case Number(s)
- DWT1489
- WTC/14/94
- R-141336-WT-13/RG
- R-140684-WT-13/RG

Note
Enquiries concerning this Determination should be addressed to Jonathan McCabe, Court Secretary.

Employer Member
Mr Murphy

Worker Member
Mr McCarthy

SUBJECT:

1. Appeal Against Rights Commissioner Decision R-141336-Wt-13/Rg & R-140684-Wt-13/Rg

BACKGROUND:

2. The Worker appealed the Rights Commissioner's Decision to the Labour Court on 23rd July, 2014. A Labour Court Hearing took place on 4th September, 2014. The following is the Labour Court's Determination:

DETERMINATION:

This is an appeal by Tomas Valent (hereafter the Claimant) against the decision of a Rights Commissioner in his claim under the Organisation of Working Time Act 1997 against his employer, Viking Security Limited (hereafter the Respondent).

While other matter were before the Rights Commissioner the only point pursued in the appeal relates to the findings of the Rights Commissioner in relation to Claimant's contractual obligation to work on Sundays and whether his rate of pay took that obligation into account.

The Claimant commenced employment with the Respondent on or about 27thSeptember 2012 and he remains in that employment.

The Complaint

In effect, the Claimant contends that the Respondent contravened s.14(1) of the Act in relation to his employment. That Section provides: -

- **14.—(1) An employee who is required to work on a Sunday (and the fact of his or her having to work on that day has not otherwise been taken account of in the determination of his or her pay) shall be compensated by his or her employer for being required so to work by the following means, namely—**
  - **(a) by the payment to the employee of an allowance of such an amount as is reasonable having regard to all the circumstances, or(b) by otherwise increasing the employee's rate of pay by such an amount as is reasonable having regard to all the circumstances, or(c) by granting the employee such paid time off from work as is reasonable having regard to all the circumstances, or(d) by a combination of two or more of the means referred to in the preceding paragraphs.**

The Claimant is paid a rate of €10.00 per hour for all hours worked. He is regularly required to work on Sundays. He does not receive additional payments when he works on a Sunday, for which he was paid €10.01 per hour.

Position of the Parties

The Respondent contends that the obligation to work on a Sunday was taken into account in the determination of the Claimant's rate of pay. The Court was referred to a document entitled" Viking Security Limited Terms of Employment Security Personnel". In relevant part this document provides as follows: -

- **SalaryYour salary will be based on agreed rates or future rates if any set out by the Security Industry Joint Labour Committee. Employees who work on Sunday or unsocial hours will be paid a premium as set out by the Security Industry Joint Labour Committee if applicable. Viking Security will comply fully with any directive set out by the Security Industry Joint Labour Committee, a copy of which is posted on our company board. Currently agreed salaries are above the minimum wage and incorporate a Sunday premium.**

The Respondent relies on this document as evidence that the rate of €10.00 paid to the Claimant takes account of his obligation to work on Sundays.

The Claimant told the Court in sworn evidence that the only document in relation to his conditions of employment that he received at the commencement of his employment was one headed "Letter of Engagement". This document, in relevant part, provides as follows: -

- **I the undersigned understand that as and from my commencement of employment as a Security Officer I will be paid €10.00 per hour. I have read and fully understand my conditions of employment**

It was the Claimant's evidence that he requested copies of his conditions of employment on several occasions but it was only in November 2013 that the document relied upon by the Respondent was furnished to him.

It was submitted on behalf of the Claimant that the only document that he received at the commencement of his employment was the Letter of Engagement which merely specified his rate of pay and made no reference to an obligation to work on Sundays or to payment for working on Sundays.

Discussion

Section 14(1) of the Act provides, in effect, that an employee who is required to work on a Sunday is entitled to an additional benefit in respect of that requirement where "the fact of his or her having to work on that day has not otherwise been taken account of in the determination of his or her pay".What is intended by this provision is that a worker who is obliged to work on a Sunday is entitled to compensation for that obligation in the form of a benefit which he or she would not receive it they were not so obligated. As is clear from the opening words of s.14(1), in brackets, that compensation can take the form of an enhanced rate of pay over and above that which he or she would have received if the obligation to work on Sunday was not present. Not only must an additional benefit be provided but that benefit must be reasonable in all the circumstances. That entitlement is one of substance which a Rights Commissioner, and this Court on appeal, is obliged to vindicate.

The Court is aware from its own knowledge and experience that the normal mode of compliance with s.14(1), in the case of hourly paid workers, is to pay a premium on the basic rate in respect of each Sunday worked. Indeed, in the security sector that was the mode of compliance historically prescribed in the Employment Regulation Order for the sector before the statutory basis upon which those Orders were made was rendered void following the decision of the High Court inJohn Grace Fried Chicken Ltd v Catering JLC & Ors[2011] 3 IR 211. It remains the normal mode of compliance for those employees of the Respondent whose contracts of employment were concluded before the High Court delivered judgment in that case.

The decision inJohn Grace Fried Chicken Ltd v Catering JLC & Orsdid not impact on the entitlement of workers previously covered by Employment Regulation Orders to the benefit of s.14(1) of the Act. But it allowed for a mode of compliance other than the payment of a premium for work actually performed on a Sunday.

The question that arises in this case is whether the requirement to work on Sunday was taken into account in determining the Claimant hourly rate of €10.00. That rate was unilaterally determined by the employer and it is for the employer to show that at the time of its determination it contained an element intended to compensate the employee for the requirement to work on Sunday. In the Court's view it is insufficient for the employer to simply say (as the Respondent does in this case) that because the rate exceeds the national minimum wage it compensates for Sunday working. If such a contention were to be accepted the effectiveness of the statutory provision would be seriously undermined in the case of all workers whose pay exceeds the statutory minimum.

In practice the Court can only be satisfied that an employee has obtained his or her entitlement under s.14(1) of the Act where the element of compensation for the obligation to work on Sundays is clearly discernable from the contract of employment or from the circumstances surrounding its conclusion. Where an hourly rate is intended to reflect a requirement for Sunday working that should be identified and clearly and unequivocally specified at the time the contract of employment is concluded either in the contract itself or in the course of negotiations.

In this case the Claimant gave sworn evidence that he only received the document relied upon by the Respondent containing a statement to the effect that his rate of pay took account of the obligation to work on Sunday in November 2013, over 12 months after his employment commenced. The document that he received and signed on the commencement of his employment did not mention the obligation to work on Sunday nor did it indicate in any way that his rate of pay reflected such an obligation. It was also accepted that the computation of the rate was neither explained to the Claimant nor discussed with him in the course of negotiations prior to the conclusion of his contract of employment. Moreover, no evidence was proffered to show that a rate of €10.00 per hour exceeds the rate generally applicable to Security Officers who do not work on Sundays in this or other employments within the sector.

Conclusion

For all of the reasons set out herein the Court does not accept that the Respondent has complied with s.14(1) of the Act in relation to the Claimant. Accordingly, the Claimant is entitled to succeed in this appeal.

In the course of his evidence the representative of the Respondent accepted that following the striking down of the ERO for the sector certain employers (excluding the Respondent) entered into a collective agreement with a trade union representing workers in the sector which provided, in effect, for a Sunday premium of time-plus-one-third. Section 14(3) of the Act obliges the Court to have regard to any such collective agreement in determining the value or minimum value of compensation for Sunday working that is reasonable in all the circumstances.

The Court measures the level of compensation for working on Sundays that is reasonable in all the circumstances at time-plus-one-third for each hour worked on a Sunday. The Respondent is directed to pay the Claimant a premium in that amount. Having regard to the time limit specified in s.27 of the Act, the Respondent is further directed to pay the Claimant arrears of Sunday premium, so calculated, for each Sunday on which he worked in the six months prior to the date on which the within claim was presented to the Rights Commissioner.

The appeal is allowed and the decision of the Rights Commissioner is substituted with the terms of this Determination.

Signed on behalf of the Labour Court

Kevin Duffy

15th October, 2014_____

JMcCChairman

NOTE Enquiries concerning this Determination should be addressed to Jonathan McCabe, Court Secretary.

DWT0425 July 19, 2004

Cementation Skanska (formerly Kvaerner Cementation Limited) (represented By J.J. Fitzgerald & Co. Solicitors) - And - A Worker (represented By James O'brien & Co Solicitors)

Case Details

Body
Labour Court

Date
July 19, 2004

Official
Caroline Jenkinson

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Tipperary

Decision/Case Number(s)
- DWT0425
- WTC/03/42
- WT6732/01/MR

Note
Enquiries concerning this Determination should be addressed to Jackie Byrne, Court Secretary.

Employer Member
Mr Doherty

Worker Member
Mr O'Neill

SUBJECT:

1. Appeal against Rights Commissioner's Decision WT6732/01/MR.

BACKGROUND:

2. The worker claims that he had not received holiday pay or public holiday pay in respect of the bulk of his employment and that the Company is in breach of the Organisation of Working Time Act, 1997. The Company claims that the worker had been paid holiday pay and public holiday pay under revised contracts of employment which applied from 1st January 2001 onwards.

The worker referred a claim to the Rights Commissioner service on the 13th October, 2001. The reason for the worker's failure to formally submit a complaint within the period required by Section 27 sub-section 4 of the Organisation of Working Time Act, 1997 was because he genuinely believed that this employer would recognise and honour the workers entitlements to paid annual leave and paid public holiday leave as provided for under Section 20 and 21 of the Organisation of Working Time Act, 1997, once the outcome of Labour Court appeal was known in the case of determination number DWT017. The worker regarded that case to be a test case and believed that the outcome if successful from the workers point of view would be honoured by the employer.

A Rights Commissioner's hearing took place on the 9th April, 2003 and his decision was issued on the 28th April, 2003 as follows:

"In accordance with Section 27 of the Act, I hereby declare that this complaint is out of time."

The worker appealed the Rights Commissioner's Decision on the 6th June, 2003, in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. The Company claims that if the worker case is based on the outcome of determination DWT017 dated 31st January, 2001, than time should run from that date. On that basis the Company submit that the worker's claim is statute barred. A Labour Court hearing took place on 1st June, 2004. The following is the Court's Determination:

DETERMINATION:

This is an appeal by the worker against the decision of the Rights Commissioner in WT6732/01/MR who found that the complaint under the Organisation of Working Time Act was out of time in accordance with Section 27 of the Act.

Counsel for the appellant submitted a case concerning the company's failure to comply the following provisions of the Organisation of Working Time Act, 1997:

(a) Sections 19, 20 and 21 dealing with an employee's entitlement to pay annual leave as well as an employee's entitlement in respect of public holidays.

(b) Section 14 which deals with Sunday work.

(c) Section 15 dealing with weekly working hours.

(d) Counsel also stated that the employer has failed to comply with and honour the terms of Programme for Prosperity and Fairness (PPF) by failing to make the appropriate pay awards to the employee as recommended under the terms of the programme during the time the employee was employed by the employer.The Court pointed out to Counsel that other than (a) these matters were not the subject of the Rights Commissioner's recommendation and could not therefore be the subject of a Labour Court appeal. Furthermore, a failure to honour the terms of the PPF is not a matter within the remit of the Organisation of Working Time Act, 1997. Consequently, the Court will only deal with item (a).

In this case the respondent contended that the complaint was presented out of time and is therefore statute barred. It submitted that the six months period provided by section 27 (4) of the Act, begins to run on the 31st day of January 2001, being the date that the Labour Court issued Determination DWT017. Alternatively, if the annual leave period, as defined by section 2 (i) of the Act as 1st April, is taken to mean the 31st March 2001, then the claim may begin to run from that date and consequently the claim of the appellant is also statute barred.

The claimant in this case was employed by the respondent from 1st November 1998 until 28th September 2001. In common with other employees of the respondent he was initially employed on a contract of employment, which purported to incorporate an element into his basic pay to cover payment in respect of annual leave and public holidays. On or about January 2000 an employee of the respondent, Mr. Martin Tracey, referred a complaint to a Rights Commissioner, pursuant to section 27 of the Organisation of Working Time Act 1997 (the Act), in which he sought to challenge the validity of these arrangements.

By a decision dated 14th April 2000, the Rights Commissioner held with the claimant in that case and directed that he be paid in respect of the relevant periods of annual leave and public holidays. The respondent appealed that decision to the Court. By Determination DWT017, issued on 31st January 2001, the Court dismissed the appeal and affirmed the decision of the Rights Commissioner. In that Determination, the Court held,inter alia, that the impugned contractual term was rendered void by the combined effect of section 37 of the Act and Article 7(2) of Directive 93/104/EC on the Organisation of Working Time.

On April 2001 the respondent issued amended contracts of employment to its employees which conformed to the requirements of the Act in respect to holiday entitlements. However, the amended terms were expressly limited in their application to the period from the 1st January 2001 onwards. The contract did provide that the leave year for the purpose of granting leave would be the period specified in section 2(1) of the Act, namely, a period commencing on 1st April in any year and terminating on 31st March in the following year.

The claimant's employment with the respondent terminated on 28th September 2001. On 24th October 2001, he presented a complaint to a Rights Commissioner pursuant to section 27 of the Act claiming redress in respect of alleged infringements of his statutory rights in relation to annual leave and public holidays. The complaint was heard by the Rights Commissioner on 9th April 2003.

The Scope of the Complaint.

The complaint herein relates to alleged continuing contraventions of the Act extending over the entire duration of the claimants employment with the respondent. The Court is satisfied that the claim in respect of the leave year 1st April 2001 to 31st March 2002 was presented within the time limit prescribed by section 27(4) of the Act. Consequently the Court overturns the Rights Commissioner's decision issued on 28th

April 2003. The Rights Commissioner declined to apply the extended time limit permitted by section 27(5) and so declined to entertain the complaints in respect of previous leave years. Consequently in this appeal the first issue to be decided is whether the benefit of section 27(5) can be afforded to the claimant so as to give the Court jurisdiction to adjudicate on his complaint.

Extension of the Time Limit.

Section 27(5) of the Act provides as follows: -

- **"Notwithstanding subsection (4) a Rights Commissioner may entertain a complaint under this section presented to him or her after the expiration of the period referred to in subsection (4) (but not later than 12 months of such expiration) if he or she is satisfied that the failure to present the complaint within that period was due to reasonable cause".**

It is noted that the standard required by this subsection is that of "reasonable cause". This may be contrasted with the much higher standard of "exceptional circumstances preventing the making of the claim" which is provided for in other employment related statutes. The Act gives no guidance as to the type of circumstances that can constitute reasonable cause and it would appear to be a matter of fact to be decided by the Rights Commissioner (and by extension the Court on appeal) in each individual case.

It is the Courts view that in considering if reasonable cause exists, it is for the claimant to show that there are reasons, which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the context in which the expression reasonable cause appears in the statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present his or her claim within the six-month time limit must have been due to the reasonable cause relied upon. Hence, there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time.

In the context in which the expression reasonable appears in the statute it imports an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time.

The length of the delay should be taken into account. A short delay may require only a slight explanation whereas a long delay may require more cogent reasons. Where reasonable cause is shown the Court must still consider if it is appropriate in the circumstances to exercise its discretion in favour of granting an extension of time. Here the Court should consider if the respondent has suffered prejudice by the delay and should also consider if the claimant has a good arguable case.

Has the Claimant shown Reasonable Cause?

The claimant told the Court that the question of holiday entitlements became a live issue amongst the respondent's workforce after the decision of the Rights Commissioner in Mr. Tracey's case. The claimant had discussed the matter with Mr. Steve Barber and Mr. Mark Sanky (both of whom are managers with the respondent) and had been advised that Mr. Tracey's case was a test case and that when this was finally determined the outcome would be applied to all employees.

Following the determination of Mr. Tracey's appeal the claimant submitted that it was a widely held view amongst the workforce that it was unnecessary to make an individual claim to the Labour Relations Commission, as a number of claims already submitted would be treated as test cases.

The respondent has consistently denied that they regarded Mr. Tracey's case as a test case or that the claimant had been told that his holiday entitlements would be determined by its outcome. Neither Mr. Barber nor Mr. Sanky were present in Court to give evidence. The respondent contends that in any event, given that the determination of the Court in Mr. Tracey's case was made on 31st January 2001, then the time period should run from that date.

Conclusions of the Court.

The Court is satisfied that when Mr. Tracey succeeded in his claim before the Rights Commissioner his colleagues, including the claimant, would have pursued similar claims had they not been deflected from so doing by the belief that the final outcome of that case would be of general application.

All parties viewed Mr. Tracey's case as a test case in the sense that it would decide whether the respondent could fulfil its statutory obligations under the Act by incorporating an element in basic pay to cover holidays. The Court is satisfied that this view was held by some members of management and was conveyed to the workforce including the claimant.

Whilst the appeal in Mr. Tracey's case was pending it was perfectly reasonable for the claimant to suppose that the respondent would comply with the law when its import was finally decided. Thereafter, there was confusion amongst employees, including the claimant, as to whether or not it was necessary for them to make individual claims under the Act or whether a number of cases then in progress would decide the matter.

Finally, the Court notes that the claimant did not have the benefit of independent professional advice at the time, in relation to his rights or on the procedures for the making of complaints under the Act.

In all the circumstance of the case the Court is satisfied that in respect of those contraventions of the Act which occurred up to 12 months after the expiry of the time limit at section 27(4), reasonable cause has been shown for the claimants failure to present the complaint within that time limit. The Court is further satisfied that the respondent has not suffered any prejudice by reason of that delay and that the claimant has a good arguable case which ought be heard.

The Court, therefore, determines to entertain all complaints appertaining to contraventions of the Act alleged to have occurred on or after 25th April 2000 (hereafter the relevant period).

The Claimant's Holiday Record.

The leave year 2000 to 2001 ended on 31st March 2001. Hence any contravention of the Act arising from the respondent's failure to provide the claimant with the requisite leave in respect of that leave year accrued within the relevant period. Further, any contravention arising from the respondent's failure to pay the respondent in respect of outstanding holidays on the cesser of his employment accrued within the permitted time limit under section 27 (4). However, in so far as the complaint relates to the respondents failure to pay the claimant in respect of annual leave or public holidays actually taken on dates prior to the relevant period, it is statute barred and, to that extent it is not cognisable by the Court.

Leave Year 2000 - 2001

The records show that in this period the claimant received 20 days leave, however, as the annual leave was not paid the claimant is entitled to redress for the loss of the annual leave.

In relation to public holidays, only those, which fell after 25th April 2000 and prior to 31st March 2001, can be taken into account in the claim before the Court. From the records, it appears that he did not receive an entitlement in respect of one public holiday in that period, which fell on 17th March 2001, consequently the claimant is entitled to redress for this loss.

Leave Year 2001 - 2002

The appellant confirmed for the Court that he received his full paid annual leave entitlement and public holiday entitlement for the leave year 2001 to 2002 and the records show that a termination payment in respect of outstanding holidays for the amount of £6119.04 was paid on 4th October 2001.

Determination

It is clear from the foregoing that the claimant did not receive his full entitlements in respect of both annual leave and a public holiday for the leave year 2000 - 2001. This complaint is, therefore, well founded.

Redress

As the claimant received his statutory period of leave but did not receive payment in accordance with the provisions of section 20 and 21 of the Act, then he is entitled to seek redress under the Act. Article 7 of the Working Time Directive expressly prohibits the payment of an allowance in lieu of annual leave except where the employment relationship has ended. In such cases the proper award should be in the form of compensation for loss of annual leave. Such an award need not be limited to the value of the lost holidays.

The obligation to provide annual leave is imposed for health and safety reasons and the right to leave has been characterised as a fundamental social right in European Law (see comments of Advocate General Tizzano inR v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment Cinematography and Theatre Union [2001] IRLR 559which were quoted with approval by Lavin J in the Royal Liver case). InVon Colson & Kamann v Land Nordrhein – Westfalen [1984] ECR 1891the ECJ has made it clear that where such a right is infringed the judicial redress provided should not only compensate adequately for economic loss sustained but must provide a real deterrent against future infractions.

In this case the Court is satisfied that the appropriate form of redress is an award of compensation. In considering the element of its award to cover the economic loss suffered by the claimant the Court has had regard to the rate of pay applicable to the claimant at the material time and the average bonus calculated in accordance with Regulation 3(3)(a) of the Organisation of Working Time (Determination of Pay for Holidays) Regulations SI No. 475 of 1997.]

The Court measures the quantum which is fair and reasonable in all the circumstances at €3800 and directs the respondent to pay to the claimant compensation in that amount.

Accordingly, the decision of the Rights Commissioner is set aside and the appeal is allowed.

Signed on behalf of the Labour Court

Caroline Jenkinson

19th_July, 2004_____

JBDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Jackie Byrne, Court Secretary.

Auto Depot Limited (represented By Aoife Sheehan , B.L. Instructed By Hanley And Lynch Solicitors) - And - Mr Vasile Mateiu (represented By Mr Marius Marosan)

Case Details

Body
Labour Court

Date
October 2, 2019

Official
Caroline Jenkinson

Legislation
- SECTION 8A, UNFAIR DISMISSAL ACTS, 1977 TO 2015

Decision/Case Number(s)
- UDD1954
- UD/19/77
- **ADJ-00009617** 3
- CA-00012611-005

Note
Enquiries concerning this Determination should be addressed to Mary Kehoe, Court Secretary.

Employer Member
Mr Marie

Worker Member
Ms Treacy

SUBJECT:

1. Appeal of Adjudication Officer Decision No:ADJ-00009617 CA-00012611-005

BACKGROUND:

2. The Employee appealed the Decision of the Adjudication Officerto the Labour Court on 27 December 2018 in accordance with Section 8(A) of the Unfair Dismissals Act 1977 to 2015. A Labour Court hearing took place on 24 September 2019. The following is the Determination of the Court:-

DETERMINATION:

This is an appeal by Mr. Vasile Matieu against the Decision of an Adjudication Officer ADJ-00009617 CA-00013611-005, dated 13thDecember 2018 under the Unfair Dismissals Act 1977 – 2015 ("the Acts") in a claim of unfair dismissal against his former employer, named as Auto Depot Tyres Limited. The Adjudication Officer held that the Complainant had wrongly named the employer, therefore he held that he lacked jurisdiction to investigate the complaint.

For ease of reference the parties are given the same designation as they had at first instance. Hence Mr. Vasile Matieu will be referred to as "the Complainant" and Auto Depot Tyres Limited will be referred to as "the Respondent".

The Complainant made a complaint to the Workplace Relations Commission that the Respondent was in breach of the Unfair Dismissals Acts 1977- 2015, the Payment of Wages Acts, 1991 – 2015, the Terms of Employment (Information) Acts, 1994 – 2014 and the Organisation of Working Time Acts, 1997 – 2015.

The Complainant submitted his claims under the Acts to the Workplace Relations Commission ("WRC") on 18thJuly 2017.

Preliminary Issue

Ms. Aoife Sheehan, B.L., instructed by Hanley & Lynch Solicitors, on behalf of the Respondent, raised a preliminary issue that the Complainant was never employed by the Respondent. She contended that the correct name of the Complainant's employer was Auto Depot Limited. Whilst she confirmed that Mr. Finbarr Sullivan was a Director of both Auto Depot Limited and Auto Depot Tyres Limited the two were separate legal entities, she stated that the latter had never traded and had never had any employees. Ms. Sheehan said that this fact was made known to the WRC by letter dated 29thMarch 2018 and was conceded by the Complainant as his representative wrote to the WRC on 1stJune 2018 appearing to concede that the named Respondent had been incorrectly joined to the proceedings and sought to add Auto Depot Limited as a second Respondent to the complaint.

Mr. Marius Marosan on behalf of the Complainant argued that a lack of a contract of employment, payslips etc to assist in identifying the correct name of the Respondent led to the difficulties identified by Ms Sheehan. When searching the Companies Registration Office , Mr. Marosan said that he could find only one company registered at the Complainant's workplace address, that of Auto Depot Tyres Limited.

Summary of Mr Finbarr Sullivan's Evidence on the Preliminary Issue

Evidence was given by Mr Finbarr Sullivan on the preliminary issue. He told the Court that he was a director of Auto Depot Tyres Limited, a company which was set up to diversify from Auto Depot Limited as he was splitting from his partner in the latter company. However, he said that Auto Depot Tyres Limited was a dormant company, registered in March 2016, it did not trade, and had no employees at any time. He said that was he also a Director of Auto Depot Limited (he has since left that company, and although still a Director, he has not worked in the company since October 2018).

Mr. Sullivan told the Court that the Complainant had been employed by his father who was the sole shareholder in Kingpin Tyres Limited, which was based at the same location as a branch of Auto Depot Limited in Straffan, Co Kildare, as a separate unit. Mr. Sullivan described himself as a "silent" Director of Kingpin Tyres Limited, but he said he had no practical involvement with that company otherwise. He said that the Complainant was employed by Kingpin Tyres Limited from 2007 until he joined Auto Depot Limited on 2ndNovember 2015, as Kingpin Tyres Limited was not doing well at that time and the Complainant was seeking employment.

Mr. Sullivan accepted that the Complainant was employed by Auto Depot Limited from 2ndNovember 2015 until early February 2017 as a tyre fitter, firstly at the garage in Straffan and latterly at the garage in Tallaght. Mr. Sullivan said that he was the Manager at the Tallaght garage, when the manager at the Stafffan garage asked him to take the Complainant on as he was seeking a move from Straffan and he took him on in Tallaght around November/December 2016.

The witness was asked about a letter that the Complainant received from the Department of Social Protection which stated that there were no social insurance contributions records on his behalf in the Department. Mr. Sullivan said that all PAYE/PRSI deductions/payments were made in respect of the Complainant during that time and forwarded to the appropriate authorities. The Complainant was furnished with P60's for 2015, 2016 and 2017. Mr. Sullivan said that each of these stated that this employer was Auto Depot Limited. He said that the Complainant was also furnished with a P45 on the cessation of his employment, though he accepted that the P45 omitted to include the name of the employer. He said the P45 did include the employer's tax registration number. He said that he had asked his accountant to check the matter, and on checking with the Revenue Commissioners he was satisfied that all was in order and printed out the appropriate information from ROS (copy supplied to the Court).

The witness was asked about the notification from the WRC regarding the Complainant's claim under the Acts, dated 18th July 2017. He said that he did not specifically recall receiving it but knows that he passed it on to his Solicitors. He said that he did not know why he didn't take issue with the name of the employer on the WRC documentation at the time of receipt but was satisfied that it was in the hands of his Solicitors at that point. He said that he received further communication from the WRC in March 2018 and that letter was also forwarded to his Solicitors who responded at that point to inform the WRC that the Complainant had never been employed by Auto Depot Tyres Limited. Mr. Sullivan said that he had had a WRC inspection around that time and was actively co-operating with the inspector.

Mr. Sullivan accepted that he did not furnish the Complainant with a contract of employment or any written statement setting out his terms and conditions of employment. When questioned about payslips he said that all employees, including the Complainant, received payslips on a regular basis which contained the name of the employer, Auto Depot Limited, (copies supplied to the Court).

Summary of the Complainant's Evidence on the Preliminary Issue

The Complainant told the Court that he was hired by Mr. Sullivan Junior to work for Mr. Sullivan Senior in 2007. He said that he worked for both Mr Sullivan Snr and Jnr in two different garages in the same courtyard in Straffan, until he transferred to Tallaght. However, he said that he was never informed that he was transferring employment from one company to another. He said that there was no change in his terms and conditions of employment, his rate of pay remained the same, however, he said that he never received any payslips and was paid in cash. He said that he did receive P60's but did not read them. The Complainant said that he was always seeking to be regularised in his employment but that never happened.

Court's Findings on the Preliminary Issue

With regard to the issue of the correct Respondent in this case, Ms. Sheehan submitted to the Court that the only mechanism available to the Complainant to substitute a correct respondent for an incorrect respondent are the provisions of Section 39 of the Organisation of Working Time Act, 1997, and in particular, Subsection (4) of that Section. Ms. Sheehan submitted that no application had been made under Section 39 and that it was therefore not open to the Court to substitute another party for the named respondent.

Section 39 of the Organisation of Working Time Act, 1997 provides, in relevant part, as follows:

- **"39.—(1)In this section " relevant authority" means a rights commissioner, the Employment Appeals Tribunal or the Labour Court.(2) A decision (by whatever name called) of a relevant authority under this Act or an enactment [or statutory instrument] referred to in the Table to this subsection that does not state correctly the name of the employer concerned or any other material particular may, on application being made in that behalf to the authority by any party concerned, be amended by the authority so as to state correctly the name of the employer concerned or the other material particular.**
  Table….
  3) The power of a relevant authority under subsection (2) shall not be exercised if it would result in a person who was not given an opportunity to be heard in the proceedings on foot of which the decision concerned was given becoming the subject of any requirement or direction contained in the decision.(4) If an employee wishes to pursue against a person a claim for relief in respect of any matter under an enactment [or statutory instrument] referred to in subsection (2), or the Table thereto, and has already instituted proceedings under that enactment [or statutory instrument] in respect of that matter, being proceedings in which the said person has not been given an opportunity to be heard and—
  - **(a) the fact of the said person not having been given an opportunity to be heard in those proceedings was due to the respondent's name in those proceedings or any other particular necessary to identify the respondent having been incorrectly stated in the notice or other process by which the proceedings were instituted, and(b) the said misstatement was due to inadvertence, then the employee may apply to whichever relevant authority would hear such proceedings in the first instance for leave to institute proceedings against the said person ("the proposed respondent") in respect of the matter concerned under the said enactment [or statutory instrument] and that relevant authority may grant such leave to the employee notwithstanding that the time specified under the said enactment [or statutory instrument] within which such proceedings may be instituted has expired: Provided that that relevant**

authority shall not grant such leave to that employee if it is of opinion that to do so would result in an injustice being done to the proposed respondent."

As is clear from the wording of subsection (4), these provisions are intended to provide a mechanism by which fresh proceedings can be instituted against an employer which was incorrectly identified in an original complaint. This subsection does not deal with the amendment of either proceedings or a decision. Nor does it allow for the substitution of one respondent for another. This subsection applies to situations in which a complaint is initiated against a wrong party as respondent and the complainant wishes to initiate a fresh complaint concerning the same matter against the correct respondent. What this subsection provides is that, in these circumstances, the complainant may apply to the tribunal of first instance, an Adjudication Officer in this case, for leave to re-initiate proceedings against the correct respondent. That is a stand-alone process and if leave is granted, the Complainant can re-submit his or her complaint afresh. In order to grant leave to an employee to invoke these provisions, the Adjudication Officer will have to be satisfied that the conditions specified in the subsection are met.

The Court must therefore respectfully disagree with Ms. Sheehan's characterisation of the Section 39(4) process. It is not a process for amending proceedings or substituting parties. It is a process whereby a tribunal at first instance, being satisfied that certain conditions have been met, can grant a Complainant leave to initiate a fresh complaint against the correct respondent without falling foul of applicable limitation periods. In any event, no application under Section 39 was made by the Complainant at first instance.

There being no specific statutory mechanism open to this Court in dealing with an appeal to substitute a correct respondent for an incorrect one, the Court must therefore consider whether or not it is legally permissible for the Court to accede to the Complainant's application to substitute in the correct respondent in this case.

This Court in a Decision under the Employment Equality Acts dated 30th June 2015,Travelodge Management Limited -v- Sylwia Wach EDA1511, reviewed the main relevant authorities on this subject. The Court noted the decision of the High Court inCounty Louth VEC v Equality Tribunal[2009] IEHC 370 in which McGovern J. set out the following principle of law: -

- **If it is permissible in court proceedings to amend pleadings where the justice of the case requires it, then, a fortiori, it should also be permissible to amend a claim as set out in a form such as an originating document before a statutory tribunal, so long as the general nature of the complaint remains the same.**

The ratio of that case was that the procedures adopted by statutory tribunals in relation to the amendment of non-statutory forms used in the initiation of claims should not be more stringent than those that apply in the ordinary courts.

The Court also reviewed the case ofSandy Lane Hotel Limited v Times Newspapers Limited [2011] 2 I.L.R.M 139, a case in which Kearns P. in the Supreme Court would not allow the amendment of a name fromSandy Lane Hotel Ltd(a company in St. Lucia) toSandy Lane Hotel Co Ltd(a company in Barbados) and relied on the"long established principle that a court will not add a defendant.....if the action against that party is quite clearly statute barred".

Noting the divergent decisions on the subject, and with particular reliance on theSandy Lanecase, the Court concluded in theTravelodgecase that it could not add or substitute a party to proceedings where the limitation period in the action has expired as against that party.

Bearing in mind the differing authorities, the Court notes the more recent High Court case inCapital Food Emporium (Holdings) Limited -v- Walsh & Others (2016) IEHC 725.This case was an unfair dismissal claim referred by a former employee of Capital Food Emporium to the Rights Commissioner. The representative for the employer acknowledged receipt of the complaint under the Unfair Dismissals Act, 1977 but failed to attend the Rights Commissioner hearing. A recommendation was issued, and the employer appealed it to the EAT and then withdrew the appeal before the hearing. The former employee applied to the EAT seeking implementation of the Rights Commissioner's recommendation and at that stage the representative of Capital Food Emporium Ltd notified that the recommendation was made against the wrong employer. After an application under Section 39 of the Organisation of Working Time Act 1997 the Rights Commissioner issued a correction order amending the name to the correct employer's name. The former employee then applied to the EAT for implementation of the recommendation which was granted. Capital Food Emporium Ltd., then applied for a judicial review on a number of grounds including that the Rights Commissioner and the EAT acted ultra vires.

InCapital Food Emporium, Barrett J distinguished, in a number of significant respects, theSandy Lanecase, a case in which this Court inTravelodgeplaced considerable significance. Barrett J. stated:

- **"it appears to this Court that the within case is distinguishable in a number of respects from Sandy Lane Hotel, viz: (A) the appellants in Sandy Lane Hotel contended that Sandy Lane Hotel Limited was not the right party to the proceedings whereas in the within proceedings Capital Food Emporium Limited repeatedly acknowledged that it was the correct party to the within proceedings, until it suited it to seek, entirely unconvincingly, to deny this, (B) the Supreme Court, in Sandy Lane Hotel, appears to have placed no little emphasis on the fact that the basis for the confusion arising derived from " a complicated series of arrangements made for tax planning purposes, in which they [the respondent and those behind it] obviously**

had the benefit of the best legal and taxation advice " whereas in the within proceedings Ms Stewart is a so-called 'ordinary' person who was acting with the benefit of trade union assistance: she is not a sophisticated commercial group acting with the benefit of 'blue chip' legal and tax advice, and (C) the Supreme Court, in Sandy Lane Hotel, also seems to have had regard to the fact that the company secretary appears to have been, perhaps, somewhat sanguine in terms of seeking to join the right party whereas Ms Stewart has always sought to bring her claim against the correct party and, again, was repeatedly acknowledged and accepted by that party as having pursued the correct party until it elected, unconvincingly, to deny this."

Applying this approach to the within case, this Court notes the following:

(A)

- a.**Mr. Sullivan accepts that as a company director of Auto Depot Tyres Ltd he received notification, by letter dated 19thJuly 2017 from the Workplace Relations Commission (WRC), of the Complainant's complaints under the various statutes. He told the Court that Auto Depot Tyres Ltd had been incorporated by him for a certain purpose, which did not ultimately transpire, and the company was effectively dormant and never traded nor employed anyone.**b.**The notification from the WRC was received by him at the registered address for Auto Depot Tyres Ltd at Unit 5 Cookstown Industrial Estate in Tallaght. This was also the trading address of the Tallaght branch of Auto Depot Ltd, which was also Mr. Sullivan's business and of which he was a company director. The Tallaght branch of Auto Depot Ltd was the business where the Complainant physically worked at the time of the termination of his employment on 10thFebruary 2017 and which was his employer at that time. The Court notes that unlikeSandy Lane, where the two different legal entities were each in a different jurisdiction (one in St. Lucia, the other in Barbados), the legal entities here were both Mr. Sullivan's, both were incorporated in the same jurisdiction and indeed both shared an address in common with one entity trading from it and the other registered at it.**
  c.**From 19thJuly 2017, Mr. Sullivan was on notice of employment complaints from one of his former employees, albeit that he had employed the employee through a different legal entity, Auto Depot Ltd. It is not disputed that he knew precisely who the complaints were being made by and what those complaints related to and that he had previously employed that person at one of his companies.**

  d.**Mr. Sullivan told the Court in evidence that when he received the complaints, he"didn't realise that he wasn't the employer". In other words, he believed himself to be the employer. He told the Court that he passed the documentation on to his solicitors.**

  e.**The parties were notified in January 2018 of a hearing before an Adjudication Officer on 12thFebruary 2018. Up to that point, no issue regarding the correct respondent was notified by Mr. Sullivan to either the Complainant or the WRC. That hearing did not proceed, and a new hearing date of 5thApril 2018 was subsequently arranged.**

  f.**It was not until 29thMarch 2018, eight months after he was notified of the complaints and seven days before the rescheduled hearing, that an email was sent to the WRC by Mr. Sullivan's solicitors alleging that an incorrect respondent had been impleaded.**

  g.**Mr. Sullivan, though his solicitor, raised the incorrect respondent issue in March 2018 at a point in time over twelve months after the termination of the Complainant's employment in February 2017 and some eight months after being notified of the complaints.**

  h.**Mr. Sullivan, who in his capacity as owner and director of Auto Depot Ltd was the Complainant's employer, appeared at the Adjudication Officer hearing on 5thApril 2018 represented by his solicitor and Counsel. It was not accepted by Mr. Sullivan that he was the correct respondent and it was argued that Auto Depot Tyres Ltd was a stranger to any employment proceedings instituted by the Complainant. Mr. Sullivan, as the Complainant's former employer, was in a position to produce P60 documents to the Court from Auto Depot Ltd which showed that the Complainant had been employed by that entity.**

(B)

- a.**The Complainant was not represented by solicitor or counsel in these matters. Nor was he represented by a trade union official. The Court understands that Mr. Marosan was assisting the Complainant in a personal capacity. PerSandy Lane, the Complainant is an"'ordinary' person"and"is not a sophisticated commercial group acting with the benefit of 'blue chip' legal and tax advice".**
- b.**In evidence before the Court, Mr. Sullivan confirmed that, contrary to statutory requirements, the Complainant was never provided with a written statement of his terms and conditions of employment. Such a statement, if it had been provided, would have provided the Complainant with details of the correct identity of his employer, including the address. Mr. Sullivan told the Court that from 2007 until November 2015, the Complainant was employed by an entity called Kingpin Tyres Ltd, the principal of which was Mr. Sullivan's father, but of which Mr. Sullivan Jnr. was a company director. He told the Court that he took the Complainant in to the employment of his company, Auto Depot Ltd, due to the trading difficulties being experienced by his father's company. There was no evidence before the Court**

that the Complainant received any documentation relating to the transfer of his employment from Mr. Sullivan Snr. to Mr. Sullivan Jnr.

- c.**Mr. Sullivan submitted that from November 2015 onwards the Complainant was provided with weekly payslips. He stated that the payslips identified the legal entity which employed the Complainant, Auto Depot Ltd. Following a break in the proceedings at the hearing before the Court, copies of such payslips were obtained from a firm of accountants who deal with Mr. Sullivan's payroll and were produced to the Court. Mr. Sullivan added that the Complainant had received P60's which identified his employer. In evidence before the Court, the Complainant strongly refuted that he ever received any payslips. The Court was told that these documents were being sighted for the first time at the Court hearing.**

(C)

- a.**With the assistance of Mr. Marosan, the Complainant made efforts to identify the entity whom he believed to be his employer.**b.**A Companies Registration Office Search was undertaken. The "Auto Depot" entity which the Complainant identified as his employer was the one which was registered at the address where he had worked, the Tallaght address, at the time of the termination of his employment.**
  c.**The Complainant was doing the best he could with the information and resources that he had at his disposal. Regard must also be had to the fact that he appeared to be at a significant disadvantage concerning the absence of the company documentation which should have been provided to him for referral in order to avoid exactly the circumstances which the Complainant found himself in.**

Having regard to the foregoing and relying in particular on the High Court decision inCapital Food Emporium, the Court is fully satisfied that the correct employer has been pursued by the Complainant. The Court is further fully satisfied that the respondent party that appeared before the Court was the Complainant's employer. That party was fully aware of the Complainant's complaints to the WRC from July 2017. He knew precisely from whom the complaints were and to what the complaints referred. The respondent party has had a full opportunity to be heard and to answer those complaints. The Court is therefore equally satisfied that the employer will suffer no prejudice or injustice by its decision on this preliminary matter.

In arriving at this conclusion, the Court is also conscious of the High Court Judgment inO'Higgins -v- University College Dublin & Another (2013) 21 MCAwherein Mr Justice Hogan held:"Even if the wrong party was, in fact, so named, no prejudice whatever was caused by reason of that error (if, indeed, error it be)…. In these circumstances, for this Court to hold that the appeal was rendered void by reason of such a technical error would amount to a grossly disproportionate response and deprive the appellant of the substance of her constitutional right of access to the courts."

Declining jurisdiction in these circumstances would certainly amount to a"grossly disproportionate response"as envisaged inO'Higgins.

The Court is further satisfied that this approach is in line with the generally accepted principle that statutory tribunals, such as this Court, should operate with the minimum degree of procedural formality consistent with the requirements of natural justice. On that point the decision of the Supreme Court inHalal Meat Packers (Ballyhaunis) Ltd v Employment Appeals Tribunal[1990] I.L.R.M 293 is relevant. Here Walsh J stated, albeit obiter, as follows: -

- **This present case indicates a degree of formality, and even rigidity, which is somewhat surprising. It is a rather ironic turn in history that this Tribunal which was intended to save people from the ordinary courts would themselves fall into rigidity comparable to that of the common law before it was modified by equity.**

Accordingly, the Court considers the erroneous inclusion of 'Auto Depot Tyres Ltd' on the WRC complaint form to be no more than a technical error. The Court is fully satisfied that the Respondent's name can simply be amended on the paperwork to reflect its correct legal title, that of 'Auto Depot Ltd'.

The Court will now proceed to consider the substantive matters referred to the Court.

CLAIM UNDER THE UNFAIR DISMISSALS ACTS 1977-2015

Having dispensed with its investigation on the preliminary issue, the Court proceeded to hear the complaint of alleged unfair dismissal under the Unfair Dismissals Acts 1977-2015 ("the Acts". Without prejudice to its position on the preliminary issue, on behalf of the Respondent Ms. Sheehan presented the Respondent's case on the substantive issues.

At the outset of that hearing, Mr. Marosan informed the Court that the Complainant's claim was one of constructive dismissal, as the Complainant accepted that he resigned his employment in February 2017.

Summary of the Complainant's Evidence on the Unfair Dismissals Claim

The Complainant recounted for the Court his evidence of his last day at work. He said that on that morning he had a quarrel with his manager, Mr. Finbarr Sullivan, regarding his lack of a contract of employment, he said that Mr. Sullivan shouted at him. The Complainant said that he got into his car and went home. He said that the following day Mr Sullivan sent him a text message to tell him to stay at home and he would send him his P45. The witness said that he did not reply to that message. He could not recall the date this took place, but it was sometime in early February 2017. He said that the quarrel concerned his request for a contract of employment which he had been seeking for some time.

In cross examination the witness was asked if it was a pay-rise rather than a contract of employment that he had been asking for since January 2017. He disputed this and said it was a contract of employment. It was put to the witness that he had deliberately caused disruption to the business on the day in question, that he had parked a company van at the entrance to the garage thereby preventing customers from entering. It was also put to him that after the quarrel with Mr Sullivan he had taken his belongings, told him that he was leaving and never coming back, and he left the premises. The witness disputed these events.

The witness told the Court that he left his employment due to the actions of the Respondent in not supplying him with a contract of employment. He accepted that he never raised a formal written grievance, however, he said that he raised the matter with Mr. Sullivan and another Partner/Manager. He said that shortly afterwards he secured alternative employment as a welder on a higher rate of pay and with a contract of employment.

Summary of Mr. Finbarr Sullivan'sEvidence on the Unfair Dismissals Claim

Mr. Sullivan told the Court that the Complainant ceased employment with him on either 8th or 9thFebruary 2017. He recounted the events of that day as he recollected them. He said that at around 10am that morning when he was on duty with three fitters, including the Complainant, and the garage was very busy, he asked the Complainant to move a Company van out of customers way. He said that the Complainant moved the van however, he parked it in a location which blocked three customers' cars so that they could not gain entry and one customer could not exit the garage. Mr. Sullivan said that he could not understand why he did this. He said that they had quarrelled about pay as the Complainant was asking for more money. Mr. Sullivan said that he had spoken to the other Directors about the Complainant's pay rate but as an increase in pay had been given in the past year, the Complainant was told his pay rate would be reviewed in six-month's time, but he was not happy about that. Mr Sullivan said that during this exchange, the Complainant told him that he was going home, the money was s…t and that he did not want to work for him any longer and was leaving. Mr. Sullivan said that he tried to plead with the Complainant not to leave, the garage was very busy at the time and he told him that they would talk later. He said that the Complainant was adamant that he did not want to work there anymore and he then proceeded to get his belongings and leave. The witness said that his father arrived on the scene and also asked the Complainant not to leave, however, the Complainant said that he would not be returning unless Mr. Sullivan paid him more money and then he left. Mr. Sullivan said that he tried to contact the Complainant on a number of occasions later that day to plead with him to return to work, but he got no answer.

Mr. Sullivan said that the following day he sent a text message to the Complainant to say that he was sorry that he was leaving like this and wished him all the best. He told him that he accepted his resignation and would arrange to send him his P45. He said that he never heard from him again until he was inspected by the WRC Inspector. Mr. Sullivan said that up until the Complainant walked out of his job, he had had good relationships with him.

Mr. Sullivan denied that the Complainant ever asked him for a contract of employment.

The Law Applicable

Section 1 of the Act defines constructive dismissal as follows:-

- **"the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer"**

Section 6(1) of the Act states

- **6.—(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.**

Section 1 of the Act envisages two circumstances in which a resignation may be considered a constructive dismissal. This arises where the employer's conduct amounts to a repudiatory breach of the contract of employment and in such circumstances the employee would be "entitled" to resign his position, often referred to as the "contract test". This requires that an employer be"guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance"as held inWestern Excavating (ECC) Ltd v Sharp[1978] IRL 332.

Secondly, there is an additional reasonableness test which may be relied upon as either an alternative to the contract test or in combination with that test. This test asks whether the employer conducted his or her affairs in relation to the employee so unreasonably that the employee cannot fairly be expected to put up with it any longer, if so, he/she is justified in leaving.

Conclusions of the Court on the Unfair Dismissal Claim

There is no suggestion in the instant case that the Respondent repudiated the Complainant's contract of employment. Rather, it is submitted, the Complainant was entitled to terminate his contract of employment by application of the reasonableness test. The Complainant claimed that he was constructively dismissed as he was seeking to have his employment regularised and he was asking to be furnished with a contract of employment from the Respondent.

The question for the Court to decide is whether, because of the conduct of the Respondent, the Complainant was or would have been entitled, or it was or would have been reasonable for him, to terminate his employment.

In constructive dismissal cases, the Court must examine the conduct of the parties. In normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the step to resign:Conway v Ulster Bank LimitedUDA474/1981.

The Court accepts that there can be situations in which a failure to give prior formal notice of a grievance will not be fatal seeLiz Allen v Independent Newspapers [2002] 13 ELR 84, Moy v Moog Ltd, [2002] 13 ELR 261 and Monaghan v Sherry Bros [2003] 14 ELR 293. See also the Determination of this Court inNew Era Packaging v A Worker [2001] ELR 122. However, in this case, there is a conflict of evidence over the nature of the Complainant's grievance with the Respondent.

On the one hand the Complainant says that it related to the non-furnishing of a contract of employment and his efforts to regularise his employment status. It is clear that the Complainant received a letter from the Department of Social Protection which stated that there were no records of PRSI contributions paid on his behalf. By contrast, Mr. Sullivan stated that for the period of time the Complainant was employment with him, all statutory deductions were made, this was supported by documentary evidence. Furthermore, there was a conflict of evidence in relation to the rate of pay the Complainant stated on average he earned €572 per week, some in cash and the rest paid into his bank account. However, the Court notes that the Complainant was inconsistent in his evidence on this point and also told the Court that he was always paid in cash, with no payslips provided. Mr. Sullivan said that the Complainant was paid €390 per week plus tips and provided copies of his payslips and P60's which indicated all deductions made and specified details of his earnings, this was supported by documentary evidence.

On the other hand, Mr. Sullivan said that the quarrel on the day in question concerned his request for a pay increase which he had been asking for since January 2017. Mr. Sullivan informed him that he could not give him an increase at that time and stated that the position would be reviewed in six months.

From the evidence tendered by the Complainant, the Court has found no evidence to indicate that the Complainant acted in a reasonable manner and made reasonable efforts to address his grievances before resigning. Furthermore, the Court is satisfied that there was no evidence of behaviour by the employer such as would justify a finding of constructive dismissal.

Having examined the facts as presented, the Court fails to see how any of the assertions made meets the standard of reasonableness required to substantiate a claim of constructive dismissal.

Determination

For all the reasons set out above, the Decision of the Adjudication Officer is varied. The Court hereby amends the Respondent's name to reflect its correct legal title, that of 'Auto Depot Ltd'.

Having examined the complaint of constructive dismissal under the Acts, the Court finds that the complaint was not well-founded and must fail.

Accordingly, the Complainant's appeal is not allowed.

The Court so Determines.

CLAIM UNDER THE PAYMENT OF WAGES ACT, 1991-2015

This is an appeal by Mr. Vasile Matieu against a decision of an Adjudication Officer ADJ-00009617 CA-00013611-003, dated 13thDecember 2018, under the Payment of Wages Act, 1991 ("the Act").

The Adjudication Officer held that the Complainant had wrongly named the employer, therefore he held that he lacked jurisdiction to investigate the complaint.

For ease of reference the parties are given the same designation as they had at first instance. Hence Mr Vasile Matieu will be referred to as "the Complainant" and Auto Depot Tyres Limited will be referred to as "the Respondent".

The Complainant submitted his claim under the Acts to the Workplace Relations Commission on 18thJuly 2017.

The Claim

The Complainant claimed that his former employer had breached the Act when he was not paid his statutory minimum notice entitlement on the termination of his employment.

Conclusions of the Court

The Court, consequent on a separate claim under the Unfair Dismissals Act 1977 – 2015 notes that the Complainant terminated his own employment and claimed that he was constructively dismissed. In such circumstances, the Court finds that the Complainant had no entitlement to notice when he terminated his own employment.

Determination

For all the reasons set out above under the unfair dismissals case, the Decision of the Adjudication Officer is varied. The Court hereby amends the Respondent's name to reflect its correct legal title, that of 'Auto Depot Ltd'.

The Court finds that there was no unlawful deduction from the Complainant's wages within the meaning of Section 5 of the 1991 Act. Therefore, the Court finds that the complaint was not well-founded and must fail.

Accordingly, the Complainant's appeal is not allowed.

The Court so Determines.

CLAIM UNDER THE TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994-2014

This is an appeal by Mr. Vasile Matieu against a decision of an Adjudication Officer ADJ-00009617 CA-00013611-001, dated 13thDecember 2018, under theTerms of Employment (Information) Act, 1994 – 2014 ("the Acts").

The Adjudication Officer held that the Complainant had wrongly named the employer, therefore he held that he lacked jurisdiction to investigate the complaint.

For ease of reference the parties are given the same designation as they had at first instance. Hence Mr. Vasile Matieu will be referred to as "the Complainant" and Auto Depot Tyres Limited will be referred to as "the Respondent".

The Complainant submitted his claim under the Acts to the Workplace Relations Commission on 18thJuly 2017.

The Claim

As it is common case that the Complainant did not receive a written statement of his terms of employment, the Court finds that the Complainant's claim is well-founded.

Determination

For all the reasons set out above under the unfair dismissals case, the Decision of the Adjudication Officer is varied. The Court hereby amends the Respondent's name to reflect its correct legal title, that of 'Auto Depot Ltd'.

The Court determines that the Respondent (Auto Depot Limited) has breached the Act at Section 3 and orders it to pay to the Complainant the sum of €1,560.00 (four weeks' pay) in compensation, being the amount, the Court considers to be just and equitable in all of the circumstances.

The Decision of the Adjudication Officer is varied accordingly.

The Court so Determines.

CLAIM UNDER THE ORGANISATION OF WORKING TIME ACT, 1997-2015

This is an appeal by Mr. Vasile Matieu against a decision of an Adjudication Officer ADJ-00009617 CA-00013611-004, dated 13thDecember 2018 under the Organisation of Working Time Act ('the Acts').

The Adjudication Officer held that the Complainant had wrongly named the employer, therefore he held that he lacked jurisdiction to investigate the complaint.

For ease of reference the parties are given the same designation as they had at first instance. Hence Mr. Vasile Matieu will be referred to as "the Complainant" and Auto Depot Tyres Limited will be referred to as "the Respondent".

The Complainant submitted his claim under the Acts to the Workplace Relations Commission on 18thJuly 2017.

The period encompassed by the claim is the period 19thJanuary 2017 to 18thJuly 2017.

The Complainant alleges that he was regularly required to work 52 hours per week, in excess of the statutory maximum working week, therefore he alleged that the Respondent was in breach of Section 15 of the Acts.

This allegation was disputed by the Respondent, who maintained that the Complainant consistently worked 39 hours per week.

Summary of the Complainant's Evidence on the Organisation of Working Time Claim

The Complainant told the Court that he regularly worked six days per week, from 9am to 6pm Monday to Friday and 9am to 4pm on Saturdays and sometimes in excess of those hours for which he was not paid and sometimes worked on Sundays. He said that he opened up the garage before starting times and held the keys. He said that he would start work between 8am and 9am on occasions. He said that he could not recount the hours he worked in his last week of employment. He said that his amount of pay varied and that he would receive some in cash and the rest in his bank account. He said he was paid €11.00 per hour.

Summary of Mr. Finbarr Sullivan'sEvidence on the Organisation of Working Time Claim

Mr. Sullivan told the Court that the normal opening hours of the garage are 9am to 6pm, Monday to Friday and 9am to 4pm on Saturdays. He said that the Complainant was rostered to work Mondays, Tuesdays and Fridays from 9am to 6pm, he worked Saturdays from 9am to 4pm and worked a half day on either Wednesdays or Thursdays. Therefore, Mr Sullivan said that he was rostered to work 39 hours per week less breaks however, he was paid for 39 hours per week at a rate of €10.00 per hour. Mr Sullivan said that since the Complainant was employed by Auto Depot Limited from 2ndNovember 2015 until his resignation in February 2017 he was never paid in cash, his wages were always paid into his bank account on a weekly basis and payslips were handed to him every week or so (copies supplied to the Court). The witness said that the Complainant was never given keys to the premises. He said that the garage religiously opened and closed at the same time every day, every week, no overtime was ever worked, and it was never open on a Sunday.

The witness told the Court that all employees, including the Complainant's hours were written in a Daybook.

The Law Applicable

Section 15 of the Act provides:

- **"Weekly Working Hours**
  (1) An employer must not permit an employee to work, in each period of 7 days, more than an average of 48 hours, that is to say an average of 48 hours calculated over a period (hereafter in this section referred to as a "reference period") that does not exceed—
    - **(a) 4 months, or**
      (b) 6 months—
      - **(i) in the case of an employee employed in an activity referred to in paragraph [3, points (a) to (e)] of Article 17 of the Council Directive, or**
        (ii) where due to any matter referred to in section 5, it would not be practicable (if a reference period not exceeding 4 months were to apply in relation to the employee) for the employer to comply with this subsection, or

      (c) such length of time as, in the case of an employee employed in an activity mentioned in subsection (5), is specified in a collective agreement referred to in that subsection.

  (2) Subsection (1) shall have effect subject to the Fifth Schedule (which contains transitional provisions in respect of the period of 24 months beginning on the commencement of that Schedule).
  (3) The days or months comprising a reference period shall, subject to subsection (4), be consecutive days or months.

  (4) A reference period shall not include—

- **(a) any period of annual leave granted to the employee concerned in accordance with this Act (save so much of it as exceeds the minimum period of annual leave required by this Act to be granted to the employee),**
  (aa) any period during which the employee was absent from work while on parental leave, force majeure leave or carer's leave within the meaning of the Carer's Leave Act 2001,

  (b) any absences from work by the employee concerned authorised under the Maternity Protection Acts 1994 and 2004, or the Adoptive Leave Acts 1995 and 2005, or

  (c) any sick leave taken by the employee concerned.

(5) Where an employee is employed in an activity (including an activity referred to in subsection (1)(b)(i))—

- **(a) the weekly working hours of which vary on a seasonal basis, or**
  (b) as respects which it would not be practicable for the employer concerned to comply with subsection (1) (if a reference period not exceeding 4 or 6 months, as the case may be, were to apply in relation to the employee) because of considerations of a technical nature or related to the conditions under which the work concerned is organised or otherwise of an objective nature,

then a collective agreement that for the time being has effect in relation to the employee and which stands approved of by the Labour Court under section 24 may specify, for the purposes of subsection (1)(c), a length of time in relation to the employee of more than 4 or 6 months, as the case may be (but not more than 12 months).”

Conclusions of the Court on the Organisation of Working Time Claim

There was a sharp difference in the evidence tendered by the Complainant and that of Mr. Sullivan on many of the material points in issue in this case. Under cross-examination, the Complainant amended his earlier evidence where he said that he was only paid in cash and confirmed that he had, in fact, been paid at least a portion of his wages into his bank account by credit transfer.

In evaluating the evidence, the Court finds the Complainant’s evidence somewhat inconsistent, hesitant and less forthright. By contrast, the evidence tendered by Mr Sullivan was credible and consistent. Overall the Court has reached the conclusion that the evidence tendered by Mr Sullivan was substantially correct and should be preferred.

The basic issue in question was whether or not the Complainant had worked in excess of 48 hours on average in breach of Section 15 of the Acts. After careful consideration of all the facts, the Court, finds no evidence to support that contention.

Determination

For all the reasons set out above under the unfair dismissals case, the Decision of the Adjudication Officer is varied. The Court hereby amends the Respondent’s name to reflect its correct legal title, that of ‘Auto Depot Ltd’.

Having examined the complaint of a breach of Section 15 of the Acts, the Court finds that the complaint is not well-founded.

Accordingly, the Complainant’s appeal is not allowed.

The Court so Determines.

Signed on behalf of the Labour Court

Caroline Jenkinson

MK_____

2 October 2019Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Mary Kehoe, Court Secretary.

INT1014 August 11, 2010

Gregory Geoghegan T/a Taps
- And -
A Worker (represented By Polish Consultancy Enterprise)

Case Details

Body
Labour Court

Date
August 11, 2010

Official
Brendan Hayes

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 33(1), INDUSTRIAL RELATIONS ACT, 1946

County
Co. Dublin

Decision/Case Number(s)
- INT1014
- CD/10/288

Note
Enquiries concerning this Decision should be addressed to David P Noonan, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Mr O'Neill

SUBJECT:

1. Interpretation of an REA

BACKGROUND:

2. An application was made on behalf of the Worker under the provisions of Section 33 (1) of the Industrial Relations Act, 1946. It is the Workers claim that he is covered by the Construction Industry Registered Employment Agreement. The Company disputed this claim. It is the Company's position that the Worker was never engaged in any work categorised under the Construction Industry Registered Employment Agreement.

A Labour Court hearing took place on the 16th July, 2010.

DECISION:

Having carefully considered the submissions of both parties the Court notes that the relevant Registered Agreement contains dispute resolution procedures for dealing with issues of this nature which should have been utilised in this case. The Court is not prepared to insert itself into the procedural process in a situation where the dispute procedures have been bypassed.

Signed on behalf of the Labour Court

Brendan Hayes

11th August, 2010_____

DNDeputy Chairman

NOTE Enquiries concerning this Decision should be addressed to David P Noonan, Court Secretary.

EDA0419 January 5, 2005

N Employer (represented By Michael Mcinerney & Co Solicitors) - And - A Worker (mr O) (represented By O'mara Geraghty Mccourt Solicitors) (number 1)

Case Details

Body
Labour Court

Date
January 5, 2005

Official
Kevin Duffy

Legislation
- SECTION 83, EMPLOYMENT EQUALITY ACT, 1998

Decision/Case Number(s)
- EDA0419
- ADE/04/2

Note
Enquiries concerning this Determination should be addressed to Ciaran O'Neill, Court Secretary.

Employer Member
Mr Doherty

Worker Member
Ms Ni Mhurchu

SUBJECT:

1. Appeal under Section 83 of the Employment Equality Act, 1998 - DEC-E-2003/052

BACKGROUND:

2. A Labour Court hearing took place on the 26th of October, 2004. The following is the Court's determination:

DETERMINATION:

Mr O (the complainant) claims that he was discriminated against on grounds of disability by his former employer, (the respondent). The complainant was employed by the respondent in a specialist occupation. On or about April, 2002, he was admitted to hospital suffering from a psychiatric illness. The complainant was discharged from hospital in June, 2002, and was advised by his psychiatrist that he could return to work, preferably on a phased basis. The respondent did not allow the complainant to return to work. The complainant was referred to a psychiatrist nominated by the respondent and later to an occupational physician. He was eventually allowed to return to work on 9th October, 2002.

The complainant contends that the respondent's failure to allow him to return to work on a phased basis constituted a failure to accommodate his needs by providing special treatment or facilities, as required by Section 16(3)(b) of the Employment Equality Act, 1998 (The Act).

The complaint was referred to the Equality Tribunal pursuant to Section 77 of the Act and was investigation by an Equality Officer who found that the respondent did discriminate against the complainant in the manner alleged. She awarded the complainant compensation in the amount of €8,000. The complainant also alleged that he had been harassed by the respondent, contrary to Section 32 of the Act, and that he had been victimised within the meaning of Section 74(2) of the Act when the respondent ceased paying him sick pay and making VHI contributions on his behalf. The Equality Officer found against the complainant on these issues.

The respondent appealed against so much of the Equality Officer's decision as found it liable for discrimination against the complainant on the disability ground. There was no cross appeal by the complainant. Accordingly, the only matter for determination by this Court is whether the complainant was discriminated against in the manner in which he was treated by the respondent, in respect of his return to work, following his discharge from hospital.

The complainant also brought a claim alleging that he had been constructively dismissed by the respondent on grounds of his disability. Since the claim heard by the Equality Officer and the dismissal claim being heard at first instance by the Court are grounded on interrelated facts the Court, with the consent of the parties, determined to hear both cases together. However, since they constitute separate referrals, and are subject to separate avenues of appeal, the Court decided to issue separate Determinations in each case. For the sake of completeness, all of the evidence and submissions relative to both issues are summarised in this Determination.

This Determination relates to the respondent's appeal of the Equality Officer's decision.

Complainant's Case:

The complainant had been employed by the respondent for fourteen years in a specialist occupation (details of which were provided to the Court). On or about the 25th March, 2002, he became ill and was absent on sick leave until 8th April of that year. Following his return to work, his condition again deteriorated and on the 15th April, 2002, he spoke to Mr H (a partner with the respondent) about his illness. Mr H arranged for him to be examined by a doctor as a result of which he was admitted to a Hospital. He remained as an in-patient in the hospital until 6th June, 2002, when he was discharged. During this period he was under the care of Dr. L a consultant psychiatrist.

The complainant was advised by his doctors that he should return to work on a phased basis. On or around the 14th June he had a discussion with Mr H in relation to his possible return to work and he requested that he be allowed to do so on a phased basis, as proposed by his doctor. He told the Court that this meeting had taken place outside working hours in a local pub. The complainant felt that Mr H was agreeable to his proposal. The complainant indicated to Mr H that he would visit the workplace informally on Friday 21st June 2002 with a view to resuming work on a phased basis on the following Monday, 24th June.

On 18th June, 2002, Mr H advised the complainant by phone that the respondent wanted a written report regarding his condition prior to his return to work. This was confirmed in writing by letter of the same date. By letter dated 20th June, 2002, a Dr. F who was registrar to Dr. L (the complainant's consultant psychiatrist) issued a letter advising that the complainant was fit to return to work but should do so on a phased basis. The complainant delivered this letter to Mr H when he visited the workplace on the 21st June. The complainant told the Court that he was shocked by Mr H's treatment of him on that date. The complainant said that Mr H had become hostile to the proposal that he would return to work on a phased basis and that his demeanour towards him was antagonistic.

The complainant returned to work as agreed on Monday 24th June and he continued to work as normal hoping to speak with Mr H (who was then absent on sick leave) on the following day about the detail of his proposed phased return to work. He did inform Mr M (a partner with the respondent) that he would be attending hospital on 26th, 27th and 28th of June and that he would be taking one week's holidays the following week.

On the 25th June Mr H meet with the complainant and expressed dissatisfaction with the fact that he would not be returning to work full time. Following his return from holidays, the complainant resumed work on the 9th July. He met with Mr B (who is a partner with the respondent) who informed him that he would not be allowed return to work on a phased basis. The complainant recalled that Mr B also informed him that neither he nor Mr H considered the complainant fit to return to work. The complainant was instructed to attend for examination by a Dr S, a consultant psychiatrist, on the 11th July and not to attend work again until after that examination. The complainant further recalled that Mr B indicated that the respondent could not continue paying him his wages while he was on sick leave. The claimant attended Dr S on the 11th July. On the 15th July he referred a complaint alleging discrimination on grounds of disability to the Office of the Director of Equality Investigations arising from the respondent's failure to allow him return t work. It is this complaint that forms the subject matter of these proceedings.

On the 18th July, the complainant received a letter from Mr B of the same date stating that Dr S had advised that he was not fit to return to work and that his salary would cease with effect from 19th July. The complainant told the Court that he was extremely distressed by the respondent's treatment of him. He attended Dr. L on the 19th July who prescribed anti-depressants. He again attended Dr. L on 25th July and on the 1st August. On 1st of August, Dr. L certified the complainant fit to return work on a full time basis.

Having been so certified, the complainant contacted the respondent on the 2nd August and spoke to Mr M. He told Mr M that he had been certified to return to work on a full-time basis and that he would be doing so with effect from Monday 5th August. Later on the same day the complainant received a letter from the respondent (dated 2nd August) delivered by courier requesting that he agree to be examined by an occupational medical specialist nominated by the respondent. He was instructed not to return to work until this specialist had completed his report.

The complainant attended for examination by Dr. D on 13th August. By letter dated 23rd August, the respondents advised the complainant that because his medication had been changed, it was Dr. D's opinion that he should not resume work until he had been reviewed again by Dr. L.

The complainant again consulted Dr L, who confirmed that he was fit to resume work. He received a written certificate to this effect dated the 23rd September and posted it to the respondent on that day. By letter dated 27th September the respondent informed the complainant that he could return to work on the 9th October.

The complainant returned to work on the 9th October. He told the Court that he was called to a meeting in the boardroom with Mr H and Mr B. He claims to have been subjected to aggressive and hostile treatment by them. He specifically recalled that Mr B raised issues concerning a job which he had undertaken the previous year. The complainant said that he was given a new job description and told that he would no longer deal with clients. He received no indication that this decision might be reviewed in the future. The complainant was also told that his work would be monitored. He had been shown a job description by Dr D but had not had an opportunity to study it. He had never agreed to its terms. The complainant was then given work with deadlines which he regarded as unreasonable.

The complainant told the Court that he felt demeaned by the manner in which the respondent treated him on his return to work. By the second day he felt under stress and feared that he would suffer a relapse of his illness. Mr H and Mr B were ignoring him. He felt that the respondent did not want him back at work and he experienced feelings of apprehension. The complainant told the Court that these events led him to a point where he believed that he had no option but to resign from his employment. He discussed the matter with his wife. She had recently been made redundant and it was not easy to contemplate both of them being unemployed. Nonetheless, the complainant came to the view the situation in which he had been placed was intolerable and would be detrimental to his health and well-being. He decided to resign and did so on 11th October.

In cross-examination the complainant agreed that he had not raised the treatment about which he now complains with the respondent before his resignation. He said that this was because he had been advised by his Doctors not to become involved in argument or confrontation. The complainant also agreed that he had taken almost two days to complete the project which he had been assigned on 9th October and that the respondent had not passed any remark in that regard.

Evidence was also received from MrMcQwho is a former colleague of the complainant. This witness worked for the respondent between 1996 and 2000 in a similar specialist occupation as that of the complainant. He told the Court that he was treated well by his former employer. He found the complainant to be a good colleague and good at his job. His recollection was that the complainant had no difficulty working with clients. He described the working environment with the respondent as very pressurised. He said that the relationship between the partners and their employees was productivity rather than people driven. The witness recalled that employees were required to meet high standards of performance and were often publicly dressed -down by the partners. He said that some employees would answer back but that the complainant rarely did so. He described the management style as blunt and graphic. His recollection was that the complainant had particular difficulties relating to Mr B and it was decided that the complainant's reporting relationship should be directed more towards Mr H. The witness told the Court that he was aware that the complainant suffered from a stress related illness and he thought that the management of the partnership were also aware of this fact.

In cross-examination the witness agreed that he had left his employment with the respondent on good terms. He also agreed that he had never made any formal complaint about the way in which the complainant was being treated.

Evidence was also given by Ms. K who was employed by the respondent between 1993 and 1998. She said that the management style in the employment could be argumentative and that Mr. B was given to shouting at and bullying employees. She said that this approach was adopted consistently with everybody. She said that Mr. B ranted and raved at the complainant regularly when there was no need to do so. The witness knew that the complainant was ill but she didn't know the nature of his illness.

In cross-examination the witness said she remained in the employment for four and a half years as she had just returned from Australia and needed a job. She agreed she had never made any formal complaint in relation to the behaviour of any member of management. She also agreed that she had never sought alternative employment during this time.

The complainant's case is that the respondent failed to accommodate his needs by allowing him to return to work on a phased basis. This, he claims, resulted in him being out of work unnecessarily for over three months. The complainant further contends that another employee, with a different disability, was accommodated in returning to work on a part-time basis and that the less favourable treatment afforded to him constituted discrimination.

The Respondent's Case:

Evidence was given on behalf of the respondent by Mr. B, Mr. H and Mr M. who are partners in the business and also by Ms. H who is also a partner and financial controller with the respondent. Evidence was also received from Dr. S and Dr. D.

The Court was told in evidence that the complainant was absent on sick leave for protracted periods in the past. He went on sick leave on the 25th March, 2002, and returned on 8th April, 2002. One the 15th April, 2002, the complainant informed Mr. H that he was extremely unwell. He further advised Mr. H that his general practitioner had arranged an appointment for him at a hospital in the following month. Mr. H was so concerned as to the complainant's state of health that he informed Mr. B immediately. Mr. B arranged for the complainant to attend his own doctor on that day. This doctor was of the opinion that the complainant's condition was sufficient to warrant his immediate admission to hospital.

After his discharge from hospital the complainant met with Mr. H on 14th June to discuss his return to work. Mr. H's recollection is that the complainant was extremely agitated at this meeting and he informed Mr. H that he was suffering from memory loss. At this meeting the complainant indicated his intention to return to work on 21st June. Mr. H was of the view the complainant's condition had not ameliorated and was still severe. Mr. H recalled the complainant mentioning that he wished to return to work part-time but he had given no commitment that this could be facilitated.

Subsequently, at the respondent's request, the complainant gave his consent for the release of his medical records and information on his condition and prognosis. Mr. B spoke to Dr. F, a register to Dr. L, by telephone and requested a report on the complainant's condition. Dr. F then issued a letter addressed "to whom it may concern" dated 20th June, 2002, in which she stated that the complainant should be able to return to full time employment as in the past. She went on to say that it would be preferable if he could do so on a phased basis.

Mr. H told the Court that he discussed the complainant's proposed return to work with the other partners of the firm. They were of the view that a phased return was not viable, having regard to the nature of the work at which the complainant was employed. Following this discussion, he telephoned the complainant and told him not to come into work on the 21st of June. Notwithstanding this instruction, the complainant returned to work on 21st June at approximately 12:30pm and remained at work for approximately 2 hours. Mr. H spoke to the complainant at this point and said that he could not take responsibility for his return to work. Mr. H indicated to the complainant that he had to attend a meeting and that they would speak again when the meeting concluded. However, the complainant departed before this meeting ended.

Later that evening, the complainant telephoned Mr. H and apologised for leaving. He indicated his intention to return to full-time employment on the following Monday. The complainant also told Mr. H that he (the complainant) would take full responsibility for his return to work full-time. The complainant attended for work on Monday 24th June and also on the next day. The respondent formed the view that the complainant was incapable of performing any meaningful work on these occasions. The respondent also contends that the complainant posed a serious risk to their enterprise while simultaneously exposing himself to an exacerbation of his symptoms.

Mr. M told the Court in evidence that the complainant was skilled at his occupation and that he was on friendly terms with him. He said that in the nature of the business in which the respondent was engaged, those in the position of the complainant frequently had to work to deadlines. He said that whilst the complainant generally worked to deadlines he occasionally panicked if his work fell behind. Mr. M said that the only occasion on which he recalled the complainant making a complaint concerning his working conditions was when he asked that the requirement for him to report to Mr. B be changed. This was addressed and from then on the complainant reported mainly to Mr. H. In relation to his return to work on 24th June, Mr M recalled that the complainant spent the time filing and appeared unable to do any work at his specialist occupation. He said that the complainant had seemed confused. The complainant told Mr M that he was taking holidays but appeared unsure as to where he was going.

The complainant was on holidays from 1st to 8th July. The respondent says that when the complainant returned to work on the 9th July the partners decided to refer him to Dr S, a consultant psychiatrist. The complainant attended Dr. S on the 11th July. It was Dr. S's opinion that the complainant was suffering from an illness (details of which were provided to the Court) to the point that he was unable to do his job. Furthermore, Dr. S was of the view that while the complainant had made some response to treatment, he had not activated a significant level of remission to return to his position with the respondent. Dr. S did advise that the complainant be seen by an Occupational Health Physician and, in accordance with that advice, the respondent referred him to Dr. D. Dr. D was of the opinion that as the complainant's medication had been changed by his consultant psychiatrist he should not return to work until he was further assessed by his own psychiatrist.

The respondent acknowledged that the complainant had sought to return to work on a phased basis. It is their position that such an arrangement was wholly impractical having regard to the nature of the business in which they are engaged. The partners of the respondent told the Court that the complainant's job was such that it would not be practical for one person in his position to start a project and then pass it over to another. They said that any attempt at introducing part-time working in this area would be wholly disruptive of the business. They did accept that they had not discussed the complaint's proposal for a phased return to work with him or with his medical advisors.

The witnesses for the respondent categorically denied that the atmosphere in the workplace or the respondents management style was as described by witnesses for the complainant.

Ms. H gave evidence in relation to the complainant's sick leave record (which was detailed in the respondent's written submission). The record showed that in the year 2002 the complainant has 115 days sick leave, 45 days of which were unpaid. He had varying levels of absence in other years due to illness. During 1995, 1997, and 1998 he also had periods of unpaid sick leave. The witness did, however, accept that on those occasions the complainant asked not to be paid. Ms. H also told the Court the complainant had withdrawn from the firm's group VHI scheme in August, 2002, while on sick leave. She said that had the complainant not withdrawn from the scheme the respondent would have continued paying his contributions. The respondent did continue to pay his pension contributions during the period in which he was on unpaid sick leave.

Ms. H also referred to the evidence given by witnesses for the complainant in relation to the working atmosphere in the firm. She refuted the evidence given that the atmosphere was oppressive or unpleasant. She said that she had never found it so. This witness told the Court that the evidence given by Ms. K, which she totally refuted, shocked her.

This witness also referred to the position of another employee who was allowed time off to recover from illness. She recalled that this employee was recovering from alcoholism and was allowed to take half days off to attend counselling. This was on the basis that the time lost would be worked up at other times. Ms. H also told the Court that this employee worked in a different capacity to that of the complainant and his absences were less disruptive of the business.

Finally, the complainant returned to work on the 9th October, 2002, having been certified to do so by his consultant psychiatrist. He was asked by the receptionist to meet with Mr. H and Mr. B in the boardroom but he did not attend. Instead, he went to the kitchen to drink tea. The complainant was again invited to attend in the boardroom which he duly did. In their evidence, Mr. H and Mr. B recalled that the complainant was welcomed back to work and told of the respondent's satisfaction that his Doctor now considered him fit for work. The complainant was then furnished with a job specification and was told that it was expected that he would conform to its provisions. The Court was told that this job specification had previously been presented to the complainant during his consultation with Dr. D.

It was accepted that the complainant was told that he should have no further contact with clients and that queries should, in future, be channelled through another employee. It was the respondent's evidence that contact with clients was a minor part of the complainant's responsibilities and the change was necessitated by the complainant's admission that he was suffering from memory loss. The respondent contends that this adjustment was in ease of the complainant. The respondent further accepts that the complainant was told that his work would be monitored. They say, however, that he did not demur from this proposal.

Mr. M gave evidence of having assigned a small project to the complainant which, he said, was to ease him back into his work regime. He was given a deadline of 4.5 hours to complete the project, which would normally take 2 to 3 hours. It was Mr M's recollection that the complainant accepted the deadline. The complainant failed to complete the project until 10.45 on the following day. The work which he presented was of poor quality and was not acceptable to Mr M. He was asked to rectify the work and he finally presented the completed project at 3.45 pm on 10th October. On 11th October the complainant was assigned a project which he was asked to complete in one hour. This was double the time which a project of this type would normally take. The complainant passed this project to another employee without having undertaken any work himself.

The respondent says that at 11.45 on 11th October the complainant met with Mr. H and Mr B, at his request. He presented a letter of resignation addressed to Mr. B alleging unreasonable behaviour and referring to a hostile atmosphere in the office. When asked to elaborate on the content of the letter the complainant declined to do so and left the premises.

The respondent contends that there was no basis in fact for the complainant's assertions and that he had not previously complained about the matters referred to in the letter.

It is the respondent's case that the complainant was manifestly incapable of working at his occupation at all times material to his complaint concerning the respondent's refusal to allow him to resume work. The respondent further contends that it acted responsibly in referring the complainant to specialist medical practitioners before allowing him to return to work and that he was treated with every consideration by the firm during his illness. In these circumstances, the respondent contends, there is no basis for his complaints of discrimination.

Medical Evidence.

Evidence was given by the complainant general practitioner Dr. McM, and also by Drs L, S and D. In the case of the latter two Doctors the substance of their evidence was contained in written reposts which were available to the Court and fully considered by it. The Court does not consider it appropriate to recite the content of these reports in this determination. However Dr. McM, the complainants GP, and Dr. L told the Court that the respondent did not seek their advice on matters related to the complainant's return to work. Dr. S also told the Court that he had not been specifically asked to advise on any special measures which should be taken in relation to the complainant's return to work.

In was put to Drs. McM and L in cross-examination that the complainant has been certified by Dr. F (registrar to Dr L) as suffering from a particular illness which was not disclosed to the respondent at the material time or in earlier proceedings. Dr McM told the Court that he had never diagnosed the complainant as suffering from this illness. Dr L was also of opinion that the complainant did not have the condition referred to, notwithstanding the stated opinion of Dr. F.

Findings of Fact

Having reviewed all of the evidence adduced, which is summarised in the preceding paragraphs, the Court has, as a matter of probability, reached the following findings of fact in relation to the complaint to which this determination relates:

- **The Court accepts that the working environment with the respondent was pressurised and that a least one of the partners would, at times, publicly remonstrate with staff in robust language. The testimony of two independent witnesses, Mr. McQ and Ms. K who gave evidence on behalf of the complainant, supports this conclusion. Nonetheless, there is no evidence to suggest that the respondent was other than a reasonable employer in its overall dealings with its staff. In the case of the complainant, he appears to have been content in his employment for over 14 years. He had extended periods of sick leave in respect of which he received his full pay, except on those occasions on which he declined to accept his salary, believing that he would be under less pressure to return if he was no paid. No issue was taken with the complainant concerning the length or frequency of his absences on sick leave.When the complainant indicated that he had difficulty in his reporting relationship to Mr B it was agreed that he should generally report to Mr H instead. Mr H befriended the complainant during times of personal difficulty for him and he did not disagree with the suggestion that Mr. H had provided him with a shoulder to cry on. Further, when his state of health deteriorated in April, 2002, the respondent arranged for him to be admitted to hospital and one of the partners drove him there. The partners also remained in contact with the complainant's wife to check on his progress.**
    - **The respondent contends that at all material times it treated the complainant sympathetically and with consideration in relation to his illness. The Court accepts that at the commencement of his illness the**

respondent did provide commendable assistance to the complainant. However the respondent's later treatment of the complainant could not be so characterised.

- **On his discharge from hospital, the complainant was advised by his consultant psychiatrist that he was fit to resume work but that his return should be phased. The complainant proposed to Mr H that he would return on that basis when they met on 14th June 2002. There appears to have been little in the way of detailed discussion between the parties as to what might have been involved in a phased return to work. Mr H regarded the complainant's demeanour at this meeting as agitated and confused. Yet, what he said at this meeting were the only representations received from the complainant before the partners of the respondent decided that it was not practicable to accommodate his request.**
- **On the evidence before it, the Court is satisfied that the respondent had a marked reluctance to accommodate the complainant in returning to work. He had been certified as fit to resume work (albeit on a phased basis) by his own doctors. Nonetheless the respondent, as was its right, sought a second opinion from Dr S. Dr S was furnished with a document detailing the full extent of the complainant's duties and was asked if he was fit to discharge those duties. The consultant was not asked to advise on what, if any, modifications in those duties might facilitate the complainant in returning to work. On receipt of that consultant's report, the respondent wrote to the complainant on the 18th July 2002, to the effect that, in the consultant psychiatrist's opinion, he (the complainant) was not fit to return to work. He was also advised that his salary would cease from the following day.**
- **In fact, the consultant psychiatrist did not completely rule out the complainant's return to work. He stated in his report that if there was a different job available to the complainant, whereby he could do some routine work which did not involve a high level of critical or analytical mental ability and which did not require him to be aware of other people's emotional boundaries, then he would benefit from a gradual return to work in such a situation. The respondent never sought to develop that aspect of the consultant psychiatrist's advice or to examine the possibilities of providing the type of work referred to in the report.**
- **The complainant visited his own doctor on the 1st August and was certified as fit to return to work on a full time basis. However this was not acceptable to the respondent who referred him to an occupational medical specialist, Dr D (as had been recommended by the respondents consultant psychiatrist) for further examination. This second examination was not conclusive, and the doctor in question simply recommended that the complainant return to his own consultant psychiatrist (who had already certified him as fit for a return to work) because his medication had been changed. Again, Dr D's opinion was sought on the complainant's capability to perform the full range of duties specified in the job description which the respondent provided. He was not asked to advise on what adjustments might facilitate the complainant's return to work**
- **The partners of the respondent told the Court that it was not practical to allow the complainant to return to work part-time having regard to the nature of the work in which he was involved. However, the Court is satisfied that little serious consideration was given to what, if any, adjustment could be made so as to accommodate the complainants request. In that regard, the Court notes that the job description provided to the complainant on his return to work states that projects may need to be completed in a matter of hours or can take months to complete. It is noteworthy, moreover, that when the complainant finally returned to work in October, 2002, he was assigned projects of short duration.The Court is satisfied, as a matter of probability, that he respondent did not seriously consider whether arrangements could be devised whereby the complainant could return to work on a phased basis. Moreover, it is clear from the evidence that the respondent did not seek professional advice from either the consultants which it nominated, or from the complainant's own Doctors, concerning possible adjustments which could be made in the work regime of the complainant so as to ameliorate his difficulties and facilitate his early return to work, nor did they discuss the matter with the complainant in any serious sense.**
- **The respondent said that the complainant suffered from a particular personality defect (details of which were provided) which had a lasting effect. They rely on the discharge note issued by the registrar of the complainant's consultant to suppose this submission. They say that the content of this note was not disclosed and that the complainant had concealed the true nature of his illness. The consultant told the Court that the complainant was never diagnosed with this condition. In the Court's view little turns on this issue. However, for the sake of completeness, the Court has considered this matter and has come to the view that the complainant does not suffer from the type of disorder referred to by Dr F.**
- **The complainant also referred to the treatment of a former colleague who was allowed to take a series of half days off work while he was recovering from illness. This individual was in a different occupational category to that of the complainant and it is the respondent contention that the work pattern agreed with him did not disrupt the business of the respondent.The arrangements put in place to facilitate this person were devised in discussion with him and were implemented on a mutually acceptable basis. By contrast, the respondent never engaged in discussion with the complainant in respect of his request for a phased return nor did it seek to identify an acceptable basis upon which it could be accommodated.**

The Law.

The complainant's case is based on the assertion that the respondent did not do all that was reasonable to accommodate his needs by providing special treatment or facilities so as to facilitate his return to work on or after 9th July, 2004. The complainant also contends that he was discriminated against in being treated differently than another employee of the respondent who was facilitated in phased return to while coping with a different disability.

This latter point can be shortly addressed. Section 6(1)(g) of the Act provides that discrimination on the disability ground occurs where a person with a disability is treated less favourably than a person without a disability or a person with a different disability. The respondent contends that the other employee with whom the complainant draws comparison was capable of doing the job for which he was employed part-time whereas the complainant was not. Whether or not this is a good defence turns on the interpretation and application of section 16 of the Act.

The duty to provide special treatment or facilities, for which the complainant contends, is derived from section 16 of the Act. It provides as follows:

- **16.—(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—**

(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.(2) [Not relevant]

- **(3) (a) For the purposes of this Act, a person who has a disability shall not be regarded as other than fully competent to undertake, and fully capable of undertaking, any duties if, with the assistance of special treatment or facilities, such person would be fully competent to undertake, and be fully capable of undertaking, those duties.**

  (b) An employer shall do all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities to which paragraph (a) relates.

  (c) A refusal or failure to provide for special treatment or facilities to which paragraph (a) relates shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost, to the employer.

The nature and extent of an employer's duty to an employee with a disability was recently considered by this Court inDetermination EDA0413 – An Employer and A Worker,issued on 15th November, 2004. In this case the Court stated as follows:

- **"Unlike the other discriminatory grounds prescribed by the Act, the law does not regard the difference between a person with a disability and others as irrelevant. Baroness Hale of Richmond stated the position thus in relation to the corresponding UK provisions in the recent House of Lord decision inArchibald v Fife Council [2004] IRLR:**

- **"But this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the difference between the genders is generally regarded as irrelevant. The 1975 Act, however, does not regard the difference between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the need of disabled people. It necessarily entails an element of more favourable treatment…."**

Later in the Determination, in relation to the effect of section 16, the Court stated as follows:

- **"Prima facie, subsection (1)(b) of this section allows an employer to treat a person with a disability less favourably than others. An applicant for employment who has a disability may be turned down if they are not fully capable of carrying out all the duties attached to the job for which they applied. An applicant for promotion or for training may likewise be rejected on the same grounds. If an existing employee, by reason of disability, is no longer fully able to do the job for which he or she was employed they can lawfully be dismissed for lack of capacity. Moreover, in certain circumstances, the contract of employment may come to an end by operation of law due to frustration.""Subsection 1(b) is, however, qualified by subsection (3). This subsection provides that a person with a disability is to be regarded as fully capable and fully competent to undertake the duties of a post if with the benefit of special treatment they would be fully capable and fully competent to do so. The subsection goes on to impose a duty on employers, where it is reasonable to do so, to provide special treatment for persons with**

disabilities, or to provide them with special facilities, so as to render them fully competent and capable of doing the job required of them."

- **"The provision of special treatment or facilities is not an end in itself. It is a means to an end and that end is achieved when the person with a disability is placed in a position where they can have access to, or as the case may be, participate in, or advance in employment or to undergo training. This can involve affording the person with a disability more favourable treatment than would be accorded to an employee without a disability. Thus it may be necessary to consider such matters as adjusting the person's attendance hours or to allow them to work partially from home. The duty to provide special treatment may also involve relieving a disabled employee of the requirement to undertake certain tasks which others doing similar work are expected to perform. The scope of the duty is determined by what is reasonable, which includes consideration of the costs involved. This is an objective test which must have regard to all the circumstances of the particular case (seeBritish Gas Services Ltd v McCaull [2001] IRLR 60)"**

The Court adopts that reasoning in its approach to the instant case.

Consequence of failure to Provide Reasonable Accommodation.

In this case it is necessary to consider the legal consequences of an employer's failure to fulfil the duty imposed by section 16(3). It is clear from the Act as a whole that a failure to provide reasonable accommodation in accordance with this section does not, in or of itself, constitute discrimination. Discrimination, for the purpose of the Act, is defined by section 6. That definition does not include any reference to a failure to fulfil the duty imposed by section 16(3). Further, there is nothing in the Act which gives an independent cause of action for an employer's failure to provide special treatment of facilities in accordance with that subsection.

It appears to the Court that the purpose and effect of section 16(3) is to be found in a reading of section 16 as a whole. As was pointed out inDetermination EDA0413 – An Employer and A Worker, section 16(1)(b), prima facie, allows an employer to treat a disabled employee less favourably than others in respect to access to employment if he or she is not capable of fully carrying out the duties of the post in question. Thus, in an appropriate case, this subsection can provide a full defence to a claim alleging discrimination on the disability ground. That defence is, however, qualified by section 16(3)(a). This subsection, in effect, provides that a person with a disability is not to be regarded as other than fully capable of carrying out the duties of a post if, with the assistance of special treatment or facilities, they would be fully capable of carrying out those duties. Section 16(3)(b) then goes on to impose an obligation on employers to do what is reasonable to provide such treatment or facilities.

Considered in this context, the effect of a failure to fulfil the duty imposed by section 16(3)(b) is to negate reliance on section 16(1)(b) as a defence to a claim of discrimination to which that subsection relates rather than to provide a separate cause of action for the failure itself.

Scope of the Duty Imposed by Section 16(3).

InMid Staffordshire General Hospitals NHS Trust v Cambridge [2003] IRLR 566the EATfor England and Wales considered an appeal from the decision of an Employment Tribunal in which it was held that the obligation imposed on an employer by section 6(1) of the Disability Discrimination Act 1995 (which corresponds to S16 of the Act) included an obligation to carry out a proper assessment of the disabled employee's needs. In the headnote of the report the following statement of the law appears:

- **"A proper assessment of what is required to eliminate a disabled person's disadvantage is a necessary part of the duty imposed by S.6(1), since that duty cannot be complied with unless the employer makes a proper assessment of what needs to be done. The submission that the tribunal had imposed on the employer an antecedent duty which was a gloss on s.6(1) could not be accepted. The making of that assessment cannot be separated from the duty imposed by s.6(1), because it is a necessary precondition to the fulfillment of that duty and therefore part of it…"**

That reasoning is based on the corresponding UK statutory provision which is somewhat differently worded to its Irish equivalent. It is, however, authority for the proposition that an employer must make adequate enquires so as to be in possession of all material information concerning the needs of an employee with a disability before taking decisions which are to the employee's detriment. It is persuasive in the context of the instant case and the Court adopts it as equally applicable in identifying the scope of an employer's duty to a disabled employee under section 16(3) of the Act.

Conclusion

It is clear that when the complainant returned to work he was not fully capable of undertaking the duties attached to his occupation on a full – time basis. In these circumstances, the respondent would, prima facie, be entitled to rely on section 16(1) in defending its decision not to allow the complainant back to work. However, that defence could not be relied upon if, with the assistance of special treatment, the complainant would have been capable of resuming work.

Both his own psychiatrist and Dr S believed that the complainant would have benefited from certain adjustments in his normal work arrangements. His own doctors were of the view that a phased return would be desirable. Dr S was of the view that if his duties were modified the complainant would benefit from a gradual return to work. Whilst Dr. S went on to say that since this was not available the complainant could not return to work at that time. However, the possibility of providing such a facility was never considered by the respondent.

It is clear that the respondent wanted the complainant to return to work full-time and fully fit or not at all. It believed that a phased return was impractical. Yet it is clear from the evidence that the respondent had no clear understanding of what was meant by a phased return or of the duration over which it might extend. The decision inMid Staffordshire General Hospital Trustindicated that the duty of an employer to do all that is reasonable to accommodate the needs of an employee with a disability includes the obligation to make an adequate assessment of what is required to meet those needs. That necessarily involves ascertaining the detail of what is required and giving bona fide consideration to how it might be achieved.

On the facts found and set out elsewhere in this Determination, the Court cannot accept that the respondent gave any adequate consideration to providing the complainant with the type of special treatment which would have allowed him to resume work following his discharge from hospital. In these circumstances the respondent cannot rely on section 16(1) of the Act in defending the complainant claim. Consequently, the Court holds that the complainant was discriminated against on grounds of his disability when he was treated differently to employees without a disability, and an employee with a different disability, in not being allowed to resume work following his return from holidays on 9th July 2002. Accordingly, the complainant is entitled to succeed.

It is noted that the Equality Officer also had regard to the events surrounding the complainant's return to work on 9th, 10th and 11th of October, 2002, and held that the conduct of the respondent on those dates constituted a further infringement of section 16(3) of the Act. In the Courts view these events should, more properly, be considered in the context of the complainant's claim that he was constructively dismissed on grounds of his disability, which is the subject of a separate Determination (EED0410) of the Court.

Determination

The Court finds that the respondent did discriminate against the complainant on grounds of his disability when it refused to allow him to resume employment between 9th July, 2002, and 9th October, 2002. The Equality Officer awarded the complainant compensation in the amount of €8,000 for the effects of the discrimination. Whilst the Determination of the Court is based on findings which are somewhat different to those reached by the Equality Officer, the Court is none the less satisfied that the award made by the Equality Officer is appropriate.

Accordingly, the decision of the Equality Officer is affirmed and the appeal is disallowed.

Signed on behalf of the Labour Court

Kevin Duffy

5th January, 2005_____

CONChairman

NOTE Enquiries concerning this Determination should be addressed to Ciaran O'Neill, Court Secretary.

EED0410 January 5, 2005

An Employer (represented By Michael Mcinerney Solicitors) - And - A Worker (mr. O) (represented By O'mara Geraghty Mccourt) (number 2)

Case Details

Body
Labour Court

Date
January 5, 2005

Official
Kevin Duffy

Legislation
- SECTION 77, EMPLOYMENT EQUALITY ACT, 1998

Decision/Case Number(s)
- EED0410
- ED/02/57

Note
Enquiries concerning this Determination should be addressed to Ciaran O'Neill, Court Secretary.

Employer Member
Mr Doherty

Worker Member
Ms Ni Mhurchu

SUBJECT:

1. Alleged unfair dismissal under Section 77 of the Employment Equality Act, 1998

BACKGROUND:

2. A Labour Court hearing took place on the 26th of October, 2004. The following is the Court's determination:

DETERMINATION:

Mr O (the complainant) claims that he was discriminated against on grounds of disability by his former employer (the respondent) by being constructively dismissed from his employment.

The complainant was employed by the respondent in a specialist occupation. On or about April, 2002, he was admitted to hospital suffering from a psychiatric illness. The complainant was discharged from hospital in June, 2002, and was advised by his psychiatrist that he could return to work, preferably on a phased basis. The respondent did not allow the complainant to return to work. The complainant was referred to a psychiatrist nominated by the respondent and later to an occupational physician. He was eventually allowed to return to work on 9th October, 2002.

The complainant contends that on his return to work he was told that he would not be allowed access to the respondent's clients and that his work would be monitored. He further claims that he was treated with hostility by the respondent. The complainant resigned from his employment on 11th October, 2002, in circumstances which, he claims, amounted to a constructive dismissal. He brought a claim before the Court pursuant to Section 77 of the Employment Equality Act, 1998, (the Act).

The complainant also brought a claim alleging that he had been discriminated against on grounds of his disability during the currency of his employment when the respondent failed to facilitate his return to work following his discharge from hospital. That claim was referred to the Equality Tribunal and was heard by an Equality Officer who held with the complainant. The respondent then appealed to this Court. Since the claim heard by the Equality Officer and the dismissal claim being heard at first instance by the Court are grounded on interrelated facts, the Court, with the consent of the parties, determined to hear both cases together. However, since they constitute separate referrals, and are subject to separate avenues of appeal, the Court decided to issue separate Determinations in each case.

The submissions made by the parties on both issues and all of the evidence adduced at the combined hearing are summarised in the Determination of the appeal against the decision of the Equality Officer, Determination DEC E 2003/052 entitled Mr O and an Employer, Number 1. This Determination should, therefore, be read in conjunction with that determination.

Facts.

Based on the submission of the parties and on the evidence adduced, the Court, as a matter of probability, has reached the following findings of fact material to the complainant's dismissal claim.

- **The Court accepts that the working environment with the respondent was pressurised and that a least one of the partners would, at times, publicly remonstrate with staff in robust language. The testimony of two independent witnesses, Mr McQ and Ms K who gave evidence on behalf of the complainant, supports this conclusion. Nonetheless, there is no evidence to suggest that the respondent was other than a reasonable employer in its overall dealings with its staff. In the case of the complainant, he appears to have been content in his employment for over 14 years. He had extended periods of sick leave in respect of which he received his full pay, except on those occasions on which he declined to accept his salary, believing that he would be under less pressure to return if he was not paid. No issue was taken with the complainant concerning the length or frequency of his absences on sick leave.When the complainant indicated that he had difficulty in his reporting relationship to Mr B it was agreed that he should generally report to Mr H instead. Mr H befriended the complainant during times of personal difficulty for him and he did not disagree with the suggestion that Mr H had provided him with a shoulder to cry on. Further, when the complainant's state of health deteriorated in April, 2002, the respondent arranged for him to be admitted to hospital and one of the partners drove him there. The partners also remained in contact with the complainant's wife to check on his progress.**
    - **The respondent contends that at all material times it treated the complainant sympathetically and with consideration in relation to his illness. The Court accepts that at the commencement of his illness the respondent did provide commendable assistance to the complainant. However, its later treatment of the complainant could not be so characterised.The Court has found that the respondent failed to do all that was reasonable to accommodate the complainants needs by providing him with special treatment or facilities so as to enable him to return to work on a phased basis. Moreover, after his discharge from hospital, the respondent appears not to have had any personal contact with the complainant. Apart from one meeting with Mr H on 14th June, 2002, the respondent communicated with the complainant**

by letter. These letters, which were delivered by courier, were terse and business like. They contain no expression of interest in his state of health or enquiry as to his well-being.

- **On his return to work on 9th October, 2002, the complainant attended a meeting with Mr H and Mr B. At this meeting he was presented with a job description which defined in detail the role and responsibilities attaching to his job. Whilst this job description was provided to an occupational medical specialist (to whom the complainant was referred by the respondent), and was shown by him to the complainant, the Court is satisfied that over his 14 years with the respondent, the complainant had never previously been given a detailed job description. The complainant was also told that he could no longer deal with clients. The respondent told the Court that because of the complainant's illness this limitation was considered necessary in order to protect the interest of their business.The complainant had suffered from an anxiety related illness for some time and there was no evidence before the Court that his illness had in any sense adversely affected the relationship between him and the clients with whom he dealt. The respondent contends that this change was made because the complainant suffered from memory loss. The evidence does not support this. While the complainant may have presented with this symptom in the period before his hospitalisation, the evidence indicates that it was no longer a problem by the time he returned to work. In his report to the respondent, Dr S (the psychiatrist nominated by the respondent) stated that he had given the complainant a Mini Mental State test and that this showed that his memory function was reasonably good. There was no mention of memory deficiency in the report prepared by Dr D (the second specialist nominated by the respondent). Moreover, the complainant received no indication that this was a temporary restriction or that the position would be reviewed at a later stage.The complainant described the atmosphere at the meeting of the 9th October as antagonistic. The Court believes, as a matter of probability, that the meeting was business like and formal and was intended to redefine the working relationship between the respondent and the complainant. The Court further accepts the complainant was told that his standard of performance would have to improve relative to what it was previously. In that context he was told that the respondent would be monitoring his work. The complainant also told the Court, and the Court accepts, that he was ignored by Mr H and Mr B over the following two days.In the Court's view the respondent's approach to the complainant on his return to work was not indicative of a caring or sympathetic attitude towards an employee who had been absent from work with a serious psychiatric illness.**
- **The Court also accepts that on his return to work the complainant felt that he was not wanted and that the respondent was intent on making his life difficult. This perception was evidenced by the demeanour of the partners of the respondent towards the complainant and by what was told at the meeting on the morning of 9th October. The complainant testified that he felt demeaned and threatened and that he became concerned that he might suffer a relapse of his illness. The Court accepts the general thrust of the complainant's evidence in this respect and it further accepts that there was a reasonable basis for those concerns.After the second day the complainant discussed the situation with his wife and decided to resign. He had been absent from work since early the previous June. He had been without pay since 19th July. His wife had been made redundant and he was the only breadwinner in his family. He had spent the previous three months actively tying to resume his employment, partially because he wanted to work but mainly because he needed an income. He had 14 years' service with the respondent and a history of illness. Because of his health record, his prospects of obtaining alternative employment would have been limited.**
- **Against that background, the complainant's resignation might appear to have been an irrational and inexplicable act. The respondent suggested that the complainant was intent on resigning at the time he returned to work and that he contrived to lay the basis for a claim against the respondent in the manner of his resignation. The Court can see no basis for this suggestion and it is rejected. In the Court's view, what occurred on 11th October is more consistent with the complainant's explanation of why he resigned, and the Court accepts that what he told the Court on this point is substantially correct.**
- **The Court also attaches significance to the respondent's decision to accept the complainant's resignation there and then. In evidence, the partners of the respondent accepted that the complainant's resignation had the appearance of an impulsive or irrational act. They knew the nature of the complainant's illness and of his emotional vulnerability. In the Court's view, a reasonable employer would have paused before accepting a resignation in these circumstances and might have contacted the employee later to ascertain the reason for the resignation or to provide an opportunity for the employee to recant.From all the surrounding circumstances, and in particular from the respondent's response to the complainant's resignation, the Court has come to the view, as a matter of probability, that at that stage, the respondent was, at best, indifferent as to whether or not the complainant remained in its employment. The Court is further satisfied that the complainant had perceived this to be the position.**

The Law Applicable.

Section 2(1) of the Act defines a dismissal as including:

- **"[T]he termination of a contract of employment by the employee (whether prior notice of termination was or was not given to the employer) in circumstances in which, because of the conduct of the**

employer, the employee was or would have been entitled to terminate the contract without giving such notice, or it was or would have been reasonable for the employee to do so....”

This definition is practically the same as that contained at section 1 of the Unfair Dismissals Acts 1977 –2001 and the authorities on its application in cases under that Act are apposite in the instant case. It provides two tests, either or both of which may be invoked by an employee. The first test is generally referred to as the “contract” test where the employee argues “entitlement” to terminate the contract. The second or “reasonableness” test applies where the employees asserts that in the circumstances it was reasonable for him or her to terminate the contract without notice.

The contract test was described by Lord Denning MR inWestern Excavating (ECC) Ltd v Sharp [1978] IRLR 332as follows:

- **“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself discharged from any further performance”**

This passage describes a situation in which an employer commits a repudiatory breach of contract. In such circumstances, the employee is entitled to accept the repudiation and consider him or herself dismissed. However, not every breach of contract will give rise to repudiation. It must be a breach of an essential term which goes to the root of the contract. This is a stringent test which is often difficult to invoke successfully.

There is, however, the additional reasonableness test which may be relied upon as either an alternative to the contract test or in combination with that test. This test asks whether the employer conducts him or her affairs in relation to the employee, so unreasonably that the employee cannot fairly be expected to put up with it any longer. Thus, an employer’s conduct may not amount to a breach of contract but could, none the less, be regarded as so unreasonable as to justify the employee in leaving. Further, the employer may commit a breach of contract which may not be of such a nature as to constitute repudiation, but is so unreasonable as to justify the employee in resigning there and then.

Finally, the authorities indicate that what is reasonable is pre-eminently a question of fact and degree to be decided having regard to all the circumstances of the particular case.

Conclusion.

It is not suggested that the respondent breached any express term in the complainant’s contract of employment. It is, however, settled law that every contract of employment contains an implied term that the parties will maintain mutual trust and confidence in their working relations with each other.

On the facts which it has found, and set out in this determination, (and in Determination EDA0419) the Court is satisfied that the respondent conducted itself in relation to the complainant in a manner which was destructive of a relationship of mutual trust and confidence. Whilst the conduct of the respondent may not, itself, have amounted to a repudiatory breach of the employment contract, the Court is satisfied that, having regard to the complainant’s undoubted emotional and psychological vulnerability at the material time, the conduct of the respondent was so unreasonable as to justify the complainant in resigning there and then.

Counsel for the respondent submitted that the complainant’s failure to make any complaint in relation to his treatment, prior to his resignation, is fatal to his claim of constructive dismissal. The Court accepts that in normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address what ever grievance they may have. However, there is authority for the proposition that this is not a fixed or universally applicable rule and that there can be situations in which a failure to give prior formal notice of a grievance will not be fatal (seeLiz Allen v Independent Newspapers [2002] 13 ELR 84, Moy v Moog Ltd, [2002] 13 ELR 261 and Monaghan v Sherry Bros [2003] 14 ELR 293. See also the Determination of this Court inNew Era Packaging v A Worker [2001] ELR 122).

There are a number of factors which, in the exceptional circumstances of this case, excuse the complainant’s failure to formally complain to the respondent before resigning. Firstly, the respondent did not have a grievance procedure in place. Secondly, the offending conduct was perpetrated by the principals of the respondent who knew or ought to have known what its likely impact would be on the complainant having regard to his temperament and mental fortitude. Thirdly, the complainant condition was such as to require him to avoid confrontational or stressful situations and this was known or ought to have been known to the respondent.

Determination

Having regard to the foregoing, the Court is satisfied that the complainant's employment with the respondent came to an end in circumstances amounting to a dismissal within the meaning of section 2(1) of the Act. The Court is further satisfied that the dismissal was on grounds of the complainant's disability. Accordingly, the Court holds that the respondent did discriminate against the complainant herein in terms of section 6(2)(g) and contrary to section 8 of the Act.

The Court further determines that the appropriate redress is an award of compensation. The complainant did not obtain alternative employment but started in business on his own account. He had little in the way of earnings in the first year but is now deriving an income. The complainant's gross salary with the respondent was €41,900. The complainant had 15 years' service with the respondent, and the loss of the accrued value of this service must be reflected in measuring the quantum of compensation.

The Court considers that the claimant should receive an award in an amount equal to one year's pay in respect of the economic loss attributable to his dismissal. The Court is further satisfied, on the evidence as a whole, that the complainant suffered stress, anxiety and indignity in consequence of the discrimination to which he was subjected. Further, it is well settled that an award of compensation for the effects of discrimination should not be confined to economic loss but should contain an element which is dissuasive of future infractions of the principal of equal treatment. Accordingly the Court awards additional compensation in the amount of €8,000 under these headings.

An order will be made direction the respondent to pay to the complainant compensation in the amount of €49,900, in accordance section 82(1)(c) of the Act.

Signed on behalf of the Labour Court

Kevin Duffy

5th January, 2005_____

CONChairman

NOTE Enquiries concerning this Determination should be addressed to Ciaran O'Neill, Court Secretary.

EET042 July 29, 2004

Department Of Finance (represented By Chief State Solicitors Office)
- And -
Irish Municipal, Public And Civil Trade Union Civil And Public Service Union Public Service Executive Union

Case Details

Body
Labour Court

Date
July 29, 2004

Official
Kevin Duffy

Legislation
- SECTION 19(5), EMPLOYMENT EQUALITY ACT, 1977

Decision/Case Number(s)
- EET042
- REE/03/1

Note
Enquiries concerning this Decision should be addressed to Ciaran O'Neill, Court Secretary.

Employer Member
Mr Doherty

Worker Member
Mr O'Neill

SUBJECT:

1. Time limit (hearing arising from EET022)

BACKGROUND:

2. A Labour Court hearing took place on the 6th of April, 2004. The following is the Court's decision:

DECISION:

The applications now before the Court are in respect of ten individual cases, which, it is agreed between the parties, are representative of some 500 other individual claims referred to the Court outside the time limit prescribed by Section 19(5) of the Employment Equality Act, 1977. In each case the Court is asked to extend that time limit.

Each of the claims arises from the decision of the European Court of Justice in the case ofGerster v Freistaat and Bayern [1997] ECR 15273, in which judgement was delivered on the 2nd October 1997. It is claimed that by reason of the decision in that case, the previous practice of the respondent in crediting job-sharers with 0.5 years service, for promotional purposes, for each actual year of service was unlawful. The respondent discontinued the practice complained of in February, 1998. Following the referral of these cases, the Court discussed with the parties the procedural steps that should be followed in processing applications for an extension of time. It was agreed that a number of sample cases would be selected and processed on the understanding that the decision of the Court in respect of those cases could facilitate the parties in determining which, if any, of the remaining cases are admissible. It was further agreed that in each case the reasonable cause replied upon would be the decision inGerster. In that regard, the then Chairman of the Court wrote to the parties on 10th June, 1998, in the following terms:-

- **"That the principle "reasonable" cause in every case will be that the Gerster decision changed the jurisprudence in Equality cases, and the claims are based on this new jurisprudence which was not available to the claimants for promotion prior to 2nd October 1997".**

In the same letter the Chairman went on:-

- **"It is, however, important that the test case or cases only rely on the facts of the Gerster decision as the reason why no application was made earlier than the 2nd October 1997".**

This matter was previously dealt with by the Court in Determination EET/022, which was subsequently appealed by the respondent herein on a point of law. The High Court allowed the appeal and by consent ordered that the matter be remitted to the Labour Court for the determination of the following issues in the light of such agreed facts, affidavits or oral evidence as may be adduced by either party in respect of any or all of the ten claimants.

- **"Whether in light of the factual position as agreed or determined by the Labour Court in respect of all or any of the ten complainants the decision of the European Court of Justice in Gerster v Freistaat Bayern Case-C-1.95 [1997] ECR15273 constituted reasonable cause to extend time within the meaning of Section 19(5) of the Employment Equality Act, 1998".**

The Court was subsequently informed that evidence would be adduced by each of the applicants by way of affidavit.

Background to the Issue:

The applicants in these proceedings are all civil servants and are employed by various government departments. At various times they participated in a job sharing scheme introduced by the respondent in 1984. Under this scheme, the attendance liabilities associated with a single, full-time post are shared equally between two officers. The pay and other benefits attaching to the post are also shared equally between the two participants. Crucially, as far as the present proceedings are concerned, the scheme provided that each 12 month period spent on a job-sharing contract would accrue as 6 months' service for purposes of seniority and promotion.

It is common case that the vast majority of civil servants who participated in the job-sharing scheme are women.

The European Court of Justice gave judgement in theGerstercase in October 1997. In a preliminary ruling under Article 117(234) of the treaty, the Court held that a system of pro-rating service for promotional purposes, similar to that operated by the respondent, was contrary to Directive 76/207 (Equal Treatment Directive). Each of the applicants seeks to rely on that decision in the proposed proceedings against the respondent.

The Evidence:

Affidavits showing cause for the delay in presenting these applications were sworn by each of the representative applicants and opened to the Court. Their content can be summarised as follows:

- **Affidavit of Lorraine PhibbsMs Phibbs was promoted to Clerical Office Programmer in November, 1986. She commenced job sharing in 1998. In July, 1990, the issue of her promotion to Senior Programmer was discussed. The deponent was informed that it would be necessary for her to resume working full time and that she would not be eligible to reapply for job-sharing for the period of one year. She refused the promotion as she was expecting her second child in September in 1990.Ms. Phibbs was promoted to Senior Programmer on the 7th December, 1992, conditional upon her resuming full-time employment. She again resumed working on a job-sharing basis on 18th January, 1993, and she has not been offered any promotion since that date. A male colleague, with whom she was concurrently appointed as a Senior Programmer was promoted to Executive Officer, Junior Systems Analyst in May, 1995, and is therefore entitled to a technical allowance which no longer applies to the post. Ms Phibbs further averred that in December, 1997, a colleague who was promoted to Senior Programmer approximately six months after she was promoted, was subsequently promoted to Executive Officer, Junior Systems Analyst.The deponent was promoted to Executive Officer Junior Systems Analyst in July 1998, which was backdated to 1997. However she does not qualify for the technical allowance.Ms Phibbs averred that she was unhappy about the pro-rata calculation of her service and thought it unfair but that she was not aware that it might be unlawful. She said that in October, 1997, she became aware, as a result initially of discussions amongst her work colleagues, of theGersterdecision of the European Court of Justice which received wide publicity at that time. She considered that the decision might be relevant to her service as a job-sharer and she contacted her Union, the CPSU. Her Union subsequently lodged a claim under the Employment Equality Act, 1977, on her behalf on the 27th January, 1998.Affidavit of Louisa HeneghanMs Heneghan commenced employment as a Clerical Assistant in the Revenue Collector Generals Office in 1976. She transferred to Customs and Excise in Tullamore in 1983 as a Departmental Clerical Assistant and was subsequently promoted to Departmental Clerical Officer in November, 1991. She had been job-sharing since 1986.Ms Heneghan averred that she obtained the required standard in the Indoor Officer qualifying examination on 18th October, 1995. This is a requirement for promotion to Indoor Officer. A second requirement is to have the prescribed service. The deponent applied on 14th November, 1995, for promotion to Indoor Officer. Her application was refused, as she did not have the required service because she had been job-sharing between 1991 and 1995.Ms Heneghan averred that she was unhappy about the way her service was calculated and she raised the matter with her Trade Union in 1996. She was informed by her Union that under the job-sharing scheme job-sharing service was halved. She understood that the scheme was agreed between her Trade Union and her employer and she therefore assumed that it was lawful, if unfair.She went on to say that in October, 1997, she became aware, as a result of television reports, of the judgement in theGerstercase and, as she considered it might have implications for her employment, she contacted her Trade Union for more information. Following advice from her Trade Union, the CPSU, she subsequently instructed them to lodge a claim under the Employment Equality Act, 1977, which they did on the 8th January, 1998.Affidavit of Kathleen DurkanMs Durkan was appointed as a Staff Officer with the Department of the Environment on 31st July, 1989. She commenced job-sharing on 7th September, 1992, and was subsequently promoted to Executive Officer on 10th April, 2000.Ms Durkan averred that she was classified as being not suitable for promotion to Executive Officer on or about 8th June, 1995, because her job-sharing service was calculated on a pro-rata basis and was deemed insufficient.The deponent further averred that in October, 1997, she became aware, as a result of media coverage, of the Gerster decision of the European Court of Justice which received wide publicity at that time. She says that the case was also covered in her Trade Union Magazine. Ms Durkan considered that the decision might be relevant to her service as a job-sharer and she contacted her Union, the CPSU. The Union subsequently lodged a claim under the Employment Equality Act, 1977, on her behalf on the 27th January, 1998.In her Affidavit, the deponent stated that an equality claim was lodged on her behalf by her Trade Union in October, 1995, in respect of the pro-rata calculation of her service while on maternity leave. However, the Union withdrew her claim in October, 1999. After the hearing, the Court raised a query with Ms Durkan's Trade Union in relation to this averment. A supplemental Affidavit sworn by this applicant was subsequently filed with the Court dated 2nd July, 2003.In her supplemental Affidavit, the applicant averred that in 1993, whilst still job-sharing, she took a period of maternity leave for which she was paid at the normal job-sharing rate. She subsequently initiated a claim under the Employment Equality Act, 1977, seeking full pay in respect of this period. The claim was subsequently withdrawn in October, 1999, after a number of similar claims failed either before an Equality Officer and the Labour Court on appeal. She said that this matter is of no relevance to the application herein and was referred to in her original Affidavit for the sake of completeness.Affidavit of Terezina BoyleMs Boyle was recruited as a Clerical Assistant job-sharer in 1985 and remained job-sharing in the Department of Foreign Affairs until 1987. She transferred to a full-time post as a Clerical Assistant in 1987 and was promoted to Clerical Officer in the Department of Social, Community and Family Affairs in Letterkenny in 1991.Ms Boyle applied for promotion to Clerical Officer pursuant to the provisions of circular 15/90. The service requirement was four years. She averred that the personnel section of the Department in which she worked advised her that job-sharing service of two years counted as one year for promotional purposes and that her overall service at that point amounted to three years and 340 days.Ms Boyle averred that she was recruited as a job-sharer and that when she was recruited she was informed of the conditions of her employment as a job-sharer and she signed all entry dockets as such. She further says that she was made aware when commencing employment as a job-sharer that her conditions of employment would be pro-rata with that of full time employees. She says she was unhappy about the pro-rata calculation of her service and she thought it unfair**

but that it was explained to her by a member of the staff of the Civil Service Commission that it was a condition of her employment under the job-sharing scheme. Ms Boyle did not approach her employer or her Trade Union, as she understood that the said conditions of employment were agreed between the Department of Finance and her Trade Union.In October, 1997, she became aware, as a result of newspaper and television reports, of the judgement in theGerstercase. She made enquires of her Trade Union Representative shortly afterwards and was informed that a circular would be issued which would clarify the significance of the decision. In or around January, 1998, she became aware as a result of information from her Trade Union, the CPSU, of the implications of theGersterjudgement for job-sharers service and she considered that the judgement might have implications for her employment. She then contacted her Trade Union and subsequently instructed them to lodge a claim, on her behalf under the Employment Equality Act, 1977 which they did on the 2nd of February, 1998.Affidavit of Elizabeth MonaghanMs Monaghan has been employed as a Clerical Officer in the Department of Agriculture since September, 1993. She participated in a job-sharing arrangement from 1st September, 1993, until the 1st December, 1997. The deponent is currently employed as a Clerical Officer acting up to Executive Officer.Ms. Monaghan applied for promotion to Staff Officer and to Executive Officer in August, 1996. Her application was refused as she was deemed not to have the required service because she had been job-sharing. The deponent consulted her Trade Union in this matter who advised that the Department was correct in calculating her service pro-rata. Ms Boyle accepted this advice. She further confirmed that it was through a circular dated 13th August, 1996, notifying her of the competition to fill promotional vacancies that she became aware that the pro-rata calculation of her service while job-sharing would render her ineligible to compete for these posts. She considered this to be unfair.The deponent appealed the decision in a letter dated August, 1996, a copy of which was exhibited. In a reply, a copy of which was also exhibited, she was advised that the pro-rata calculation of service under the job-sharing scheme was mandatory and that the Department had no discretion to change it. In light of this letter, the deponent came to the view that the situation could not be altered. Although she was unhappy about the way her service was calculated she assumed it was lawful, if unfair.On or about October, 1997, Ms Monaghan became aware, as a result of newspaper reports, of theGersterdecision of the European Court of Justice, which received wide publicity at that time. She considered that the decision might be relevant to her service as a job-sharer and she wrote to the personnel division of the Department by letter dated the 5th October, 1997, requesting a review of her situation. She received a reply by letter dated 31st October, 1997, stating that the matter was receiving attention. A copy of that letter was exhibited. Shortly thereafter she contacted her Union the CPSU. The Union subsequently lodged a claim under the Employment Equality Act, 1977, on her behalf on the 27th January, 1998.Affidavit of Rosanna KearnsMs Kearns commenced employment with the Department of Social & Family Affairs in October, 1986, as a graduate Executive Officer. She worked full time until December, 1991, when she availed of the job-sharing scheme in order to take care of her three children. She continued job-sharing for six years until December, 1997, when she returned to full time employment.Ms. Kearns averred that during the time in which she was job-sharing, she was credited with six months service for seniority purposes for each year of service. At the time of making her claim of discrimination in 1998, she was still an Executive Officer after almost twelve years in the Department. Full-time colleagues who had entered the Department at the same time as her were promoted on seniority after between 9/10 years service.The claimant was aware that when job-sharing she would only receive six months credit for seniority purposes for each year. This rule was set out in the job-sharing circular and she understood that both her employer and her Trade Union accepted the pro-rata principle.The deponent averred that it was only after theGersterdecision of the European Court of Justice that she came to realise that she was being discriminated against. Her realisation was confirmed in Department of Finance Circular 4/98 dated the 10th February, 1998. A copy of this circular was exhibited by the deponent. Ms Kearns subsequently contacted her Union, the CPSU. The Union then lodged a claim under the Employment Equality Act, 1977 on her behalf on the 27th January, 1998.Affidavit of Sharon DoyleMs Doyle commenced employment in the Office of Public Works as a Clerical Assistant and she participated in the job-sharing scheme between 1989 and 1995. Ms Doyle averred that a colleague who commenced employment on the same day as her was promoted to Clerical Officer on a seniority/suitability basis on 12th January, 1990. She further averred that she was not promoted due to the fact that the time which she spent job-sharing only accrued at half its full value for the purpose of promotion.The claimant was aware that while job-sharing her service would be halved and she assumed that this complied with the law.Ms Doyle said she was unaware that this practice was unlawful until she read a Union circular following theGersterdecision of the European Court of Justice. Ms Doyle then contacted her Union, the CPSU. The Union subsequently lodged a claim under the Employment Equality Act, 1977.Affidavit of Maria CurleyMs Curley commenced employment as a Clerical Officer Programmer in the Revenue Commissioners in September 1979 and was promoted to Executive Officer in February 1989.Ms Curley averred that in 1990 the Department of Finance entered into an agreement with her Trade Union that Executive Officers who worked in the I.T section and who met certain criteria would be paid a gratuity of £1,750. This agreement also stated that a two year qualifying period and a one year earning period would be required before the gratuity would be paid. The Department of Finance also ruled that a job-sharer would also have to work twice the qualifying period for half the gratuity.The deponent says that her Union challenged this matter on her behalf. The Revenue Commissioners confirmed that a job sharer would have to work four years for the qualifying period and two years for the earning period and would receive only half of the gratuity. Ms Curley's Union's representations to the Revenue Commissioners were on the basis of unfairness rather than on the basis of it

being discriminatory within the meaning of the Employment Equality Act, 1977.During her time as a job sharer, Ms. Curley knew that she was being given 6 months' credit for each 12 months' actual service for seniority purposes as per the rules of the job-sharing scheme set out in the Department of Finance circular. She averred that she was not aware of the equality legislation and, furthermore, it was only after theGersterjudgement in the European Court of Justice that she came to realise that she was being discriminated against. Her realisation was confirmed by the Department of Finance Circular 4/98 which she exhibited with her affidavit. Ms Curley subsequently contacted her Union, the PSEU, which lodged a claim under the Employment Equality Act, 1977, on her behalf on the 12th February, 1998.Affidavit of Margaret O'KeeffeMs O'Keeffe commenced job sharing as an Executive Officer on the 26th April, 1993 and continued in that capacity until 24th March, 1998. She was informed by the Department by which she was employed on the 22nd June, 1997, that she had been assigned to the Executive Officer higher scale with effect from 1st October, 1996. Under the Union's restructuring agreement with the Department, 25% of Executive Officers are assigned to the higher scale.On or around the 15th July, 1997, the deponent was informed verbally by Mr Dave Hanley, Assistant Principal of the Personnel Division, that due to an error her record on the seniority list had not been adjusted because of her job sharing. When it was adjusted she was not entitled to the higher scale and this was not then granted to her.The deponent knew that as a job sharer she was credited with 6 months' service per actual year of service for seniority purposes and for the purpose of promotion and/or the purpose of obtaining the higher scale as set out in the Department circulars. She understood that both her employer and her Union accepted this application of the pro-rata principle.Following publicity surrounding of theGersterjudgement in the European Court of Justice, the deponent contacted her Union, the PSEU. The Union lodged a claim under the Employment Equality Act, 1977, on her behalf on the 27th July, 1998.Affidavit of Bernadette HalpinMs Halpin commenced employment as a Clerical Assistant in 1979. She was appointed to the Revenue Commissioners. In 1983 she was promoted to the grade of Tax Officer and then in 1986 she passed the Higher Tax Officer Qualifying Examination.Ms Halpin commenced job sharing on the 17th April, 1989, under the terms of the job sharing circular. She continued job sharing until 25th October, 1993. She understood, as per the circular, that her service for seniority purposes would be on a pro-rata basis and, in effect, this meant that over her period as a job sharer she would, for seniority purposes, fall behind full-time workers who were appointed to their grade at the same time or after her.The deponent commenced a career break on the 25th October, 1993, and returned to work in April, 1994, on a full time basis. On 13th February, 1995, she recommenced job sharing and was promoted to Higher Tax Officer on 7th May, 1998. She continued to job share in the new grade.Ms Halpin averred that the seniority list did not indicate the location at which the Officer was serving and that job sharers were not separately identified as such on the seniority list. Therefore, it was virtually impossible for her to keep track of her position on the list. At a later stage, seniority lists denoted job sharers by an asterisk but the acting seniority positions on the list were not adjusted to take account of the job sharing period. At a later date, Revenue adjusted the seniority list to take account of the period of job sharing in respect of full time staff. This adjustment was only made at the date of issue of the seniority list.Ms Halpin further averred that the seniority list was not freely available in the Revenue Tax Offices. Information could only be obtained from the personnel department and information was only provided on the inquirers own position. The full seniority list was only provided to her Union on a confidential basis. To the best of the deponent's knowledge the seniority lists were not regularly updated and were issued only on an annual basis. She believed that it was unfair that she lost seniority but she believed that this was an inevitable result of job sharing.In October, 1997, theGerstercase was reported in National and Union newspapers. She then contacted her Union, IMPACT, and they subsequently lodged a claim under the Employment Equality Act, 1977 on her behalf. The deponent further averred that as a direct result of theGersterdecision she was promoted on the 7th May, 1998. She estimates that she would have been promoted in 1983/1984 had job sharing been treated in the same regard as full service.

Evidence Adduced on behalf of the Respondent:

- **Affidavit of Marie McLaughlinMs McLaughlin is a Principal Officer within the civil service and is assigned to the Equality Unit of the Department of Finance. She had caused certain enquires to be made with relevant Government Departments and considered their responses for the purpose of making her affidavit.Ms McLaughlin referred to the previous hearing before the Labour Court and to the subsequent proceeding before the High Court. She then went on to refer to the affidavits sworn by the applicants herein and to respond to those affidavits.The deponent referred to the affidavit of Elizabeth Monaghan who averred that in August, 1996, she had appealed against the decision deeming her ineligible to compete in a certain competition because her service while job sharing was calculated pro-rata with that of full-time Officers. Ms McLaughlin further referred to the affidavit of Ms Maria Curley who confirmed that she had made representations objecting to the manner in which her service as a job sharer was treated for the purpose of becoming eligible for the I.T gratuity.Finally, the deponent pointed out that while each of the applicants had clarified that they were aware of the manner in which job sharing service was calculated, they had not exhibited the standard job-sharing contract into which they had entered. Ms McLaughlin pointed out that this contract specifically stated that the job sharing position was approved under the terms of circular 3/84 a copy of which was enclosed with each standard contract. Each job sharer was required to sign a form of undertaking stating that she had read the circular 3/84 (a copy of which was exhibited with the affidavit).Ms**

Mac Laughlin then made a number of corrections in relation to matters of detail in the affidavits of four of the claimants.

Based on the foregoing the Ms McLaughlin asserts:

- **Each of the applicants was aware of the manner in which job sharers were treated for the purpose of seniority by virtue of circular 3/84 ("the job sharing scheme"). Ms McLaughlin further asserts that each of them was aware of the factual scenario which is alleged to have arisen by virtue of the application of the job sharing scheme which in turn gave rise to the alleged difference in treatment. Ms McLaughlin went on to say that the applicants were aware of the underlying facts in respect of which they all complain. What the claimants were not aware of was that the bringing of a claim in relation to this factual situations to the European Court of Justice was likely to be successful.It was pointed out that these factual assertions allowed the respondent to contend at the previous hearing of this matter before the Court that, as a matter of law, ignorance of ones legal position could not constitute justification for the extension of a time limit. The fact that the claimants are now aware, on the basis of the decision inGerster, that their claim could be successful, is not, the respondent contends, a basis for extending the time limit prescribed by Section 19(5).The respondent contended that each of the applicants has now clarified that she was aware that service of job-sharers for seniority purposes was calculated pro-rata. In addition, each of the applicants was aware that they were either excluded from a particular competition by virtue of not being eligible due to the manner in which seniority was calculated or that their colleagues who were more junior in years of seniority were being promoted ahead of them. In that regard, the respondent pointed out that certain applicants went so far as to take issue with the discrimination to which they were allegedly subjected.**

Findings of Facts:

On the evidence adduced, the Court is satisfied that at the time they entered into the job sharing scheme, and at all material times thereafter, each of the applicants was aware of the terms and conditions under which the job sharing scheme applied. As appears from the affidavit of Ms McLaughlin, each of the applicants entered into a standard form contract which specifically provided that the job sharing position was approved under the terms of circular 3/84. Furthermore, a copy of that circular was enclosed with the standard contract and every job sharer was required to sign an undertaking stating that she had read the contends of circular 3/84. In the absence of any evidence to the contrary, the Court accepts that each of the applicants signed this form of undertaking.

Appendix A of circular 3/84 provides, in relation to promotion, as follows

- **"Job sharing staff will be eligible for promotion on the same basis as full time staff, subject to the following conditions-**

(i)for the purpose of the service requirements governing promotion, each year of service in a job sharing capacity will be reckoned as the equivalent of 6 months service in a full time capacity.

(ii)While it may be possible in some cases for officers to continue to serve in a job sharing capacity on promotion, an offer of promotion will normally be conditional on the officer concerned undertaking to perform the duties of the higher grade on a full time basis".

It is against that background that the respondent contends that the applicants were aware of the underlying facts of which they now complain. They say that what the claimants were not aware of was that the bringing of a claim in relation to these facts could ultimately succeed. The Court accepts the substance of the respondent's submission in this respect.

It is also evident on the face of circular 3/84 that the job sharing scheme was introduced by the Minister for the Public Service in 1984 in conformity with a Government decision to that effect. It is, in the Court's view, self evident that in introducing the scheme the Minister for the Public Service and the Government believed that its terms complied with the States obligations under European Law and in particular the State's obligation to faithfully implement Article 5 of Directive 76/207/EEC (The Equal Treatment Directive).

It is also apparent from the evidence that while the decision to introduce the job-sharing scheme was taken by the Minister for the Public Service in conformity with a government decision, it was, in effect, accepted by the Trade Unions representing Civil Servants. The Court is further satisfied that in accepting the scheme, including the impugned provision on the calculation of service, the unions did not believe that it offended against the principal of equal treatment as between men and women.

Date when the Time Limit starts to run:

Section 19(5) of the Employment Equality Act, 1977 provides: -

- **"Save only where a reasonable cause can be shown, a reference under this section shall be lodged not later than 6 months from the date of the first occurrence of the act alleged to constitute the discrimination."**

The act alleged to constitute the discrimination complained of was the respondent's alleged failure to consider the applicants for promotion (or other benefits) for which they would otherwise have been eligible had their service not been pro-rated. It is the respondent's contention that it is from this date that the time limit prescribed by Section 19(5) starts to run and not the date on which they had actual or imputed knowledge that the practice contravened European Law. This point is rightly conceded by the Unions and is fully accepted by the Court.

Consequently, the time limit must be measured from the date on which the first act of alleged discrimination occurred in each case. Since all of the applications now under consideration were presented more than six months from that date they are each out of time and statute barred unless a reasonable cause can be shown as to why the time for the making of the claims can be enlarged. Whether or not reasonable cause has been shown is, therefore, the net question for consideration by the Court.

Reasonable Cause:

The principles which should be applied by the Court in deciding if reasonable cause exists so as to justify the extension of the time limit appears not to have been considered by the Superior Courts. Counsel for the respondent did, however, refer the Court to authorities dealing with the enlargement of time for bringing judicial review proceedings pursuant to Order 84, Rule 21 of the Rules of the Superior Courts which, it was submitted, could be applied by analogy. Here, a relatively short time limit is also provided within which an applicant must move. However, the High Court may extend time where there is "good reason to do so". What is meant by the term "good reason" was considered by the High Court inO'Donnell v Dun Laoghaire Corporation [1991] ILRM301.Here Costello J stated as follows: -

- **"The phrase "good reason", is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the Court should not extend the time merely because an aggrieved plaintiff believed he/she was justified in delaying the institution of proceedings. What the plaintiff has to show(and I think the onus under Order 84, Rule 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay".**

Counsel for the respondent also referred to the decision of the Supreme Court in the case ofDeckra Eireann Teo v Minister for the Environment [2003] 2IR 270which, it was submitted, is authority for the proposition that a party must move as rapidly as possible in challenging the decision of a public authority. This was a case involving an application for judicial review under Order 84A of the Rules of the Superior Courts 1986.

Here, the applicant was an unsuccessful tenderer for the operation of a new national car testing system. The applicant was informed on the 24th November, 1998, that it was intended to award the contract to another tenderer. On the 25th March, 1999, the applicant instituted proceedings against the respondent. The relevant Rule under which the application was brought provides that a review of a decision to award a public contract shall be made at the earliest opportunity and in any event within three months from the date when grounds for the application first arose, unless the Court considers that there is good reason for extending such a period.

As was pointed out by Denham J, the time constraints in this rule reflect the objective in the law and policy of the European Union and was intended to give effect to Council Directive 89/665/EC which provides, in effect, that decisions taken by contracting authorities must be reviewed as rapidly as possible. There is no corresponding requirement in the Employment Equality Act, 1977 or in Directive 76/207/EC. Consequently, the dictum inDeckrato the effect that a party must move rapidly against a public authority is not applicable in this case.

The respondent also contends that ignorance of ones legal position as distinct from the underlying facts which may constitute the alleged wrongful act, cannot, as a matter of law, constitute a justification for the extension of a time limit. In support of that proposition, the Court was referred to the decision of Carroll J inMurphy v Ireland [1996] 3 IR 30.In that case, the plaintiff was a County Engineer with a local authority who was convicted by the Special Criminal Court of a scheduled offence under the Offences Against the State Act 1939. Following his conviction, the plaintiff was required to forfeit his post with the local authority pursuant to Section 4 of the 1939 Act. Some years later the plaintiff claimed damages for breach of his right to earn a livelihood and his right to fairness and fair procedure.

Two years earlier, the Supreme Court had held inCox v Ireland [1992] 2 IR 503that Section 4 of the 1939 Act, which was the basis for the forfeiture of the plaintiff's post, was unconstitutional. One of the issues which arose was whether or not the Statute of Limitations Act 1957, which provided for a six year limitation period for actions founded in tort, could be relied upon against the plaintiff.

The plaintiff argued that the wrong at issue was a continuing wrong and that the plaintiff did not realise the wrong done to him until the Supreme Court decision inCox v Ireland. In rejecting this argument Carroll J stated as follows: -

- **"There is no substance in the plaintiffs arguments that there was no cause of action until he knew that Section 4 of the Act of 1939 had been held to be unconstitutional. He had the right to bring proceeding once**

he was notified that his job was forfeited but he had to bring such action within the statutory period. The forfeiture complained of was a single act and not a continuing wrong.

It was submitted by the respondent that similar reasoning ought to be applied in this case.

Murphy v Irelandwas a case which primarily concerned the application of the Statute of Limitations Act, 1957. It established that the limitation period starts to run from the date of the occurrence of the act giving rise to the action rather than from the date on which the plaintiff first knew he had a cause of action. That principle is not in contention in this case. The applicants accept that the time limit under Section 19(5) started to run from the various dates on which the applications were denied an opportunity to apply for promotion and not from the date of theGersterdecision. The second principle to emerge from theMurphy v Irelandcase is that the Statute of Limitations Act 1957 acts as an absolute bar to the bringing of proceedings outside of the statutory limitation period. That is clearly not the case under the Employment Equality Act, 1977, since there is express provision for the enlargement of time where reasonable cause is shown. Consequently, the Court is satisfied that the decision inMurphy v Irelandcan be distinguished from the instant case.

Another area where assistance can be obtained in approaching the present application is in relation to the attitude of the Courts to the extension of time for applications pursuant to the Arbitration Acts 1954-1980. Here, Order 56, Rule 4 provide that an application to set aside the award of an Arbitrator must be brought within 6 weeks from the date in which the decision is communicated to the parties or such further time which may be allowed by the Court. A test for deciding when an enlargement of time should be granted under a corresponding UK provision was laid down in the case ofCitland Limited v Kanchan Oil Industries PVT Limited [1980] 2 Lloyd's Reports. Here Mustill LJ said

- **The reported case shows that the period can, in appropriate circumstances, be enlarged. It is often convenient for the purpose of discussion to extract from these decisions a list of factors that are relevant to the question of whether an extension should be granted. Such a list does not lay down a rigid test. The only criterion is whether the interest of justice requires that the time limit should be enlarged and the weight to be given to each factor would depend on the circumstances of each case".**

In the Irish case ofBord Na Mona v Sisk and others, [1990] 1 IR 85,the approach of Mustill LJ was adopted. Here Blayney J laid down five criteria which should be considered in deciding on an application for an extension of time. They are:

1. Desirability of adhering to the time limits as prescribed by the Rules of Court

2. The likelihood of prejudice to the party opposing the application if the time is extended.

3. The length of the delay by the applicant

4. Whether the applicant has been guilty of unreasonable or culpable delay.

5. Whether the applicant has a good arguable case on its merits.

In this case, the Court also made it clear that the weight to be given to each of these criteria can vary greatly from case to case.

Whilst these cases are not directly apposite in the present case they are illustrative of the approach taken in broadly similar applications and offer some guidance as to criteria that should be applied in the instant case.

English Case Law.

There are a number of English authorities on the extension of the time limit for the bringing of unfair dismissal proceedings, which could usefully be considered in the present context. The Employment Protection (Consolidation) Act 1978 provided, in effect, that a complaint of unfair dismissal had to be presented to an Industrial Tribunal within three months of the dismissal. However, the Tribunal was empowered to extend the time where "it was not reasonably practicable" for the claimant to present his or her complaint in time. InBodha v Hampshire Area Health Authority [1982] ICR 200it was held that the expression used in this statute imposed a standard which lies somewhere betweenreasonableon the one hand andreasonably capable physically of being doneon the other. It is, however, a somewhat higher standard than that of reasonable cause.

The English Court of Appeal considered the circumstances in which the discretion to extend the time should be exercised by Industrial Tribunals in a number of cases. The first such case was that ofDedman v British Building and Engineering Appliances Ltd [1973] IRLR 379. Here the dismissed employee consulted his solicitor within the time limit but the solicitor did not tell him that the claim must be made within that time. In relation to the approach which should be adopted Lord Denning MR said:

- **"In my opinion the words "not practicable" should be given a liberal interpretation in favour of the man. My reason is because a strict construction would give rise to much injustice which Parliament cannot have intended."**

Whilst the Court of Appeal has given some guidance as to the type of circumstances in which an extension should be granted, it has emphasised that the essential question of what is reasonably practicable is one of fact to be decided by the Industrial tribunal. InWalls Meat Co Ltd v Khan[1978]IRLR 499, Shaw LJ stated the position thus:

- **'It seems to me axiomatic that what is or is not reasonably practicable is in essence a question of fact. The question falls to be resolved by finding what the facts are and forming an opinion as to their effect having regard to the ordinary experience of human affairs. The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the Industrial Tribunal, and that their decision should prevail unless it is plainly perverse or oppressive. S.88 of the Employment Protection Act 1975 provides for appeal to the Appeal Tribunal only on questions of law.'**

In the same case Lord Denning MR considered the circumstances in which ignorance of the time limits could be a justifiable excuse. He said:

- **'I would venture to take the simple test given by the majority in Dedman's case [1973] IRLR 379. It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights -- or ignorance of the time limit -- is not just cause or excuse, unless it appears that he or his advisors could not reasonably be expected to have been aware of them. If he or his advisors could reasonably have been so expected, it was his or their fault, and he must take the consequences. That was the view adopted by the Employment Appeal Tribunal in Scotland in House of Clydesdale Ltd v Foy [1976] IRLR 391 and in England in Times Newspapers Ltd v O'Regan [1977] IRLR 101 -- a decision with which I agree.**

The position was considered again by the Court of Appeal inPalmer and Saunders v Southend –on –Sea Borough Council[1984] 1 All ER 945. Here the Court again pointed out that the discretion to extend time is a matter which turns on questions of fact and is within the province of the Industrial Tribunal. The position was summarised by May LJ as follows:

- **What, however, is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It will no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Industrial Tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed; in some cases the Tribunal may have to consider whether there has been any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisors' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there has been any substantial fault on the part of the employee or his advisor which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal taking all the circumstances of the given case into account.**

The Law Applicable

Having considered the authorities referred to, it appears to the Court that it is for the applicants to show that there are reasons which both explain the delay and which afford an excuse for the delay. The Court must also be satisfied that the explanation offered is reasonable, that is to say, it must be agreeable to reason and not be irrational or absurd. This is essentially a question of fact and degree to be decided by applying common sense and normally accepted standards of reasonableness. The standard is an objective one but it must be applied to the facts known to the applicants at the material time.

While it is not expressly provided in the Act, it seems implicit that even where reasonable cause is shown the Court should go on to consider if there are any countervailing factors which would make it unjust to enlarge the time limit. These factors would include those identified inBord na Mona v Sisk, namely, the degree of prejudice which may have been suffered by the respondent (or third parties) in consequence of the delay, the length of the delay, whether the applicant has been guilty of culpable delay and whether the applicant has a good arguable case on its merits.

The explanation offered by the applicants for not initiating their claims before the decision inGersteris that they did not know that the rules of the job-sharing scheme constituted unlawful discrimination or that they had a cause of action against the respondent in European Law. It has been suggested that this type of explanation is acceptable where the applicant or his or her advisors could not reasonably have been expected to be aware of their rights (Walls Meat Co Ltd v Khan). A similar view appears to have been taken by Costello J (as he then was) inO'Donnell v Dun Laoghaire Corporation.

Conclusions of the Court

The job sharing scheme giving rise to these applications was introduced by the Minister of the Public Service on foot of a Government decision. An integral part of that decision was that service for promotion purposes would be calculated on a pro rata basis. The conditions of service applicable to Civil Servants are regulated through sophisticated and highly formulised arrangements involving consultation between the government as an employer and the recognised Civil Service Trade Unions. It was within these arrangements that the impugned conditions relating to promotions were effectively agreed.

Any reasonable person would have accepted that, in introducing the provision now impugned, the Government must have believed that it was acting in conformity with the obligations of the State under National and European Law. Moreover, such a person would have been reinforced in that view by the knowledge that their Trade Unions shared the Government's view as to the legality of applying service pro rata.

As appears from the affidavits opened to the Court, all of the applicants believed that the system of pro rating their service was unfair but none of them considered that it might be unlawful. Some of the applicants raised the issue with their employer while others raised it with their Trade Union. In all cases, they were told that the calculation of service pro rata was standard and, by implication, could not be challenged. While individuals may not have been happy with the advice which they received it was, in the Court's view, perfectly reasonable for them to have accepted that the advice was nonetheless sound in terms of the options available to them.

This factual background provides a reasonable explanation and a justifiable excuse as to why the applicants did not take the initiative, before the decision inGerster,to challenge the Government as an employer alleging that the job-sharing scheme offended against European Law. Even if they did suspect that the scheme did offend against employment equality law (and there is no evidence to suggest that they did) it is highly unlikely that any of the applicants would have been in a position to take on the financial and other hazards associated with bringing such an action which, in all probability, would have ended in the ECJ. The decision in theGerstercase brought about a significant change in these circumstances in that the Trade Unions, realising that the state of the law was not as they and the Government had understood it to be, felt able to pursue the present cases before this Court.

In light of the decision inGersterthere is no doubt that the applicants have a good arguable case on its merits, which in the interest of justice should be heard. Moreover, it is accepted by the respondent that they have not suffered any prejudice as a result of the delay in that all witnesses and records necessary to defend all and every action are still available.

In all the circumstances of the case, the Court believes that reasonable cause has been shown as to why the within complaints were not made within the limitation period prescribed by Section 19(5). The Court determines that the time for bringing these complaints should be enlarged and that they are, accordingly, in time and should be referred to the Director of Equality Investigations for investigation and recommendation

Signed on behalf of the Labour Court

Kevin Duffy

29th July, 2004_____

CONChairman

NOTE Enquiries concerning this Decision should be addressed to Ciaran O'Neill, Court Secretary.

EDA094 March 25, 2009

Government Department (represented By Chief State Solicitors Office)
- And -
A Worker (represented By J D Scanlon & Co. Solicitors)

Case Details

Body
Labour Court

Date
March 25, 2009

Official
Kevin Duffy

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 83, EMPLOYMENT EQUALITY ACTS, 1998 TO 2007

County
Co. Dublin

Decision/Case Number(s)
- EDA094
- ADE/07/23

Note
Enquiries concerning this Determination should be addressed to Madelon Geoghegan, Court Secretary.

Employer Member
Mr Doherty

Worker Member
Mr O'Neill

SUBJECT:

1. Appeal under Section 83 of The Employment Equality Acts, 1998 to 2007.

BACKGROUND:

2. A Government Department appealed the Decision of the Equality Tribunal DEC-E2007-025 to the Labour Court on the 27th June, 2007, in accordance with Section 83 of the Employment Equality Act, 1998 - 2007. A Labour Court hearing took place on the 10th March, 2009.

The following is the Determination of the Labour Court:-

DETERMINATION:

Introduction

This is an appeal by the Minister for Justice Equality and Law Reform against the decision of the Equality Tribunal in a complaint of discrimination brought by a Worker under the Employment Equality Acts 1998 to 2007 (the Act). In this determination the parties are referred to using the designation prescribed by s.77(4) of the Act. Hence the Minister for Justice, Equality and Law Reform is referred to as the "Respondent" and the Worker is referred to as the "Complainant".

Background

The factual background in which this case arose is not seriously in dispute and can be briefly stated. The Complainant is a prison officer. She commenced her employment in that capacity on 7th October 2002. Her employment was subject to a probationary period of two years.

From January 2003 onwards the Complainant took successive periods of sick leave all of which were supported by medical certificates. By the time her probationary period was due to expire in October 2004, the Complainant had accrued 70 days sick leave. In consequence of this level of sick leave the Prison Governor extended the Complainant's probationary period by a further six months. The Complainant's extended period of probation was due to expire in February 2005. At that time the total sick leave, which the Complainant had accrued since the commencement of her employment, was 158 days. On that account the Prison Governor again extended her probation by a further six months. At the end of this further period the Complainant was confirmed in her appointment.

The certified reason for most of the Complainant's absences was "work related illness"or"work related depression / stress".The Complainant also furnished the Respondent with a letter from her General Practitioner, dated 6th September 2004, wherein it was stated that the Complainant was suffering from"anxiety and sleeping difficulties as a result of abuse and bullying at work".

The Complainant had complained to the Prison Governor that she was being bullied and abused by a fellow female prison officer. The management of the prison investigated this complaint. The investigation concluded that the Complainant had not been subjected to bullying behaviour as alleged.

In or about the month of October 2004 the Prison Governor caused an advertisement to be posted in the prison inviting applications for the post of acting clerk 2 in the general office and stores area of the prison. At that time the Complainant was absent on sick leave. She was not notified of the vacancy. On 18th October 2004 the Prison Governor sanctioned, with immediate effect, appointments to the temporary post which was the subject of the advertisement.

The Complainant contends that she suffered, and continues to suffer from a depressive illness which is a disability within the meaning ascribed to that term by s.2 of the Act. She contended that the Respondent discriminated against her on the disability ground in (a) extending her probationary period and (b) in failing to provide her with an opportunity to compete for the temporary clerical post which became vacant in or about October 2004.

The complaint was referred to the Equality Tribunal and was investigated by an Equality Officer. The Equality Officer found that the Respondent had discriminated against the Complainant in extending her probation. But she found that the Respondent's failure to inform the Complainant of the temporary vacancy in the general office did not amount to discrimination. The Complainant was awarded compensation in the amount of €8,000 for the effects of the discrimination that she was found to have suffered.

The Respondent appealed to this Court.

Position of the parties.

The Complainant.

The Complainant contends that at the times material to the case she suffered from a depressive illness. This, she contends, is a condition, illness or disease that affects a persons thought process, perception of reality, emotions or judgment and which results in disturbed behaviour. It was therefore submitted that the Complainant's condition comes within the definition of the term"disability"which the Act itself provides. In reliance on previous decisions of this Court the Complainant contends that it is not open to the Court to go outside the statutory definition in deciding what constitutes a disability.

While the Complainant contended before the Equality Officer that she was treated less favourably than another prison officer without a disability in being deprived of the opportunity to apply for the temporary clerical officer post, she did not pursue that contention before this Court. She contends, however, that she was brought to less favourable conditions of employment because of her disability in having her probation extended.

The Complainant further contends that the quantum of compensation awarded by the Equality Officer is now inadequate in all the circumstances of the case.

The Respondent.

The Respondent conceded that the Complainant was subjected to less favourable treatment in having her probation extended. However it denies that this amounted to unlawful discrimination because, it is contended, the condition from which the Complainant suffered does no amount to a disability within the statutory meaning. The Respondent conceded thatclinicalormanicdepression amounts to a disability. But it submitted that the Complainant's General Practitioner diagnosed her condition aswork related depression/stressand that this, in the Respondent's submission, cannot amount to a disability for the purposes of the Act.

The issues before the Court

Having regard to the position adopted by the parties there are two net issues before the Court, namely whether the Complainant suffered from a disability at the material time and, if so, whether the quantum of compensation awarded by way of redress is adequate in the circumstances of the case.

The evidence.

Prof. Patricia Casey gave evidence on behalf of the Respondent. Prof. Casey is Professor of Psychiatry at University College Dublin and is Consultant Psychiatrist at the Mater Misericordiae Hospital Dublin.

Prof Casey told the Court that she had reviewed a number of documents relating to the Complainant's condition. These included copies of the sick notes provided by the Complainant's GP and reports on her condition prepared by Dr Gillian Byers, Consultant Psychiatrist, Blackrock Clinic. Dr Byers report was prepared at the request of the Complainant's Solicitors.

The import of Prof. Casey's evidence was that the Complainant suffered from a condition properly described as adjustment disorder rather than a depressive illness. The witness told the Court that adjustment disorder represents a position mid way between normal distress or unhappiness and clinical depression. It is, the Court was told, an exaggerated form of unhappiness.

According to Prof. Casey the term adjustment disorder is used to describe the overall reaction of individuals to situation or events which threaten to disrupt their physical or psychological wellbeing, referred to as stressors. The symptoms overlap with those of depressive illness. In consequence adjustment disorder is often conflated with depressive illness. It was Prof Casey's evidence that what distinguishes a depressive illness from an adjustment disorder is whether the symptoms persist after the removal of the stressor.

The Court was told that the prognosis for adjustment disorder is excellent since it resolves spontaneously when the stressor is removed. Further, those who suffer from adjustment disorder are not at risk of further psychiatric illness. Prof Casey's evidence was that antidepressants do not impact on the symptoms of adjustment disorder but tranquillizers do lead to relief.

Prof Casey gave it as her opinion that adjustment disorder could not be properly classified as a disability since it involves a normal human reaction to stressful or unpleasant circumstances.

In relation to the instant case, Prof Casey told the Court that according to the reports which she had seen the Complainant's difficulties arose from her experience of being bullied at work and her disappointment at not being promoted. Moreover, the witness said, thirteen medical certificates were provided by the Complainant's GP all of which, save one, gave the reason for the absences to which they related as"work related depression". The one exception gave the reason as"work related stress".

Prof. Casey noted that the Complainant's GP had initially prescribed antidepressants and that this medication had limited effect. Subsequently the Complainant was prescribed another antidepressant with a small dose of sedative and that on this combination the Complainant had improved. The witness further noted that Dr Byers had found that the Complainant's mood is euthymic whilst she is off work.

Having regard to all of these factors Prof. Casey gave it as her opinion that the condition from which the Complainant suffered should properly be classified as adjustment disorder rather than a depressive illness. The witness based her opinion on the fact that the cause of the condition could be traced to a particular set of circumstances which she experienced at work and that the symptoms ceased when she was removed from the stressor causing her condition. The witness was further influenced in her opinion by the fact that the Complainant had not responded positively to antidepressants but had responded when she was placed on sedatives.

In response to questions from the Court Prof. Casey accepted that adjustment disorder was a condition or illness which could produce symptoms identical to those characterising depressive illness. In that regard the witness accepted that the condition could give rise to at least some of the effects referred to at paragraph (e) of the statutory definition of disability.

Dr Gillian Byers gave evidence on behalf of the Complainant. Dr Byers is a Consultant Psychiatrist who carries on practice at the Blackrock Clinic in Dublin. Dr Byers told the Court that the Complainant was referred to her for assessment in relation to the within proceedings. The witness saw the Complainant on 25th May 2005.

Dr Byers outlined the psychiatric symptoms with which the Complainant presented. These symptoms are recorded in a report from the witness dated 1st July 2005, which was put in evidence. It is unnecessary for the Court recite those symptoms in this Determination. Based on her assessment Dr Byers concluded that the Complainant has suffered a depressive episode with marked features of anxiety.

Dr Byers gave it as her opinion that the distinction between adjustment disorder and depressive illness is often one of degree. In the instant case the witness was satisfied that the symptoms with which the Complainant presented placed her in the depressive illness category. Dr Byers was referred to paragraph (e) of the definition of disability contained at s.2 of the Act and she agreed that the symptoms displayed by the Complainant comported with the provisions of that paragraph.

The Court was told that the Complainant remains on treatment for her condition although the circumstances initially giving rise to her difficulties have since been resolved. Dr Byers opined that the Complainant's depressive episode has incompletely resolved and that she remains vulnerable to further episodes of depression in the future.

Dr Patrick O'Mathuna gave evidence. Dr O'Mathuna is a General Practitioner who has treated the Complainant since July 2004. This witness gave evidence of his assessment of the Complainant's condition and the treatment which he prescribed. Dr O'Mathuna diagnosed the Complainant as suffering from depression and anxiety secondary to bullying at work. The witness told the Court that he prescribed antidepressants and referred the Complainant for counselling. He said that the Complainant condition went beyond mere stress or unhappiness at her work situation. Dr O'Mathuna told the Court that he would not prescribe antidepressants to patients who were merely suffering from negative feelings or unhappiness at a particular situation or occurrence. He said that he was satisfied that the Complainant suffered from a depressive illness and that he had treated her accordingly.

The witness told the Court that as of October 2008 the Complainant continues to receive treatment for stress, depression and anxiety. She remains on medication for depressive illness (details of which was provided to the Court). The Court was told that when the Complainant stopped her medication the symptoms of which she originally complained returned.

Conclusions of the Court

The Law

In light of concessions made by the parties the only issue which the Court must decide is whether the condition from which the Complainant suffered is a disability within the statutory meaning ascribed to that term. That is a mixed question of law and fact which turns on the true construction of paragraph (e) of the definition of disability contained at s.2 of the Act and the application of that definition to the facts as admitted or as found by the Court. The statutory definition provides: -

- **"disability" means—**
  - **(a) [not relevant]**
    (b) [not relevant]

    (c) [not relevant]

    (d) [not relevant]

    (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,

It is noteworthy that the definition is expressed in terms of the manifestations or symptoms produced by a particular condition, illness or disease rather than the taxonomy or label which is to be ascribed thereto. Further, the definition does not refer to the extent to which the manifestations or symptoms must be present. However, ade minimisrule must apply and effects or symptoms, which are present to an insignificant degree, would have to be disregarded. Moreover, the classification of a condition, illness or disease as a disability is not limited by its temporal affect on the sufferer. This is clear from the definition which provides that it:-

- **"shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person"**

It is now well settled that where a terms used in a statute is defined by the statute itself a Court cannot look outside that definition in construing that term. As this Court stated inGemma Leydon Customer Perceptions Ltd,Determination EED0317 and again in

A Worker v A Government Department17 ELR 225: -

- **It is settled law that where a statute defines its own terms and makes what has been called its own dictionary, a court may not depart from the definition given by the statute and the meaning assigned to the words used in the statute. (See the decision of the Supreme Court in Mason v Levy [1952] I.R. 40.)**

Hence the question for the Court is whether the condition from which the Complainant suffered had any of theeffectsor symptoms referred to at par (e) of the statutory definition.

The Complainant condition.

The Court heard expert evidence in relation to the Complainant's condition. The witnesses who gave that evidence are eminent practitioners in the field of psychiatric and general medicine. They differed on whether the condition from which the Complainant suffered should be classified as adjustment disorder or a depressive illness. They agreed, however, that the symptoms of both conditions overlap and in many respects they are the same. It is accepted that depressive illness or clinical depression is a disability within the statutory meaning. It would appear to follow that adjustment disorder, which manifests itself in the same symptoms as depressive illness, should be likewise classified as a disability.

However, Mr Kerr B.L. for the Respondent argued that a strictly literal interpretation of the statutory definition would produce the result that mere unhappiness or ordinary stress or disappointment which effects a person's emotions would have to be classified as a disability. This, it was submitted, would be an absurd result. There is considerable cogency in that argument.

The Court must take the definition of disability as it finds it. Further, as the Act is a remedial social statute it ought to be construed as widely and as liberally as possible consistent with fairness (seeBank of Ireland v Purcell[1989] IR 327). Nevertheless no statute can be construed so as to produce an absurd result or one that is repugnant to common sense. That common law rule of construction has now been given statutory effect by s.5(1) of the Interpretation Act 2005. It would appear to the Court that if the statute were to be construed so as to blur the distinction between emotional upset, unhappiness or the ordinary human reaction to stressful situations or the vicissitudes of life on the one hand, and recognised psychiatric illness on the other, it could be fairly described as an absurdity. But it is not necessary for the Court to reach a concluded view on that point in the instant case because the Complainant is not contending for such an interpretation of the statute.

The case advanced on the Complainant's behalf is that she suffered and continues to suffer from a depressive illness of a type which is a known psychiatric disability. In advancing that argument her Counsel, Ms McKenna B.L., relied upon the evidence given by Dr Byers and Dr O'Mathuna. In considering the expert evidence tendered the Court notes that Prof. Casey, through no fault of her own, did not have an opportunity to examine the Complainant. Dr Byers did have such an opportunity. Furthermore Dr O'Mathuna has been involved in the care of the Complainant since July 2004. Both Dr Byers and Dr O'Mathuna are satisfied, as a matter of professional opinion, that the Complainant suffers from a depressive illness rather than adjustment disorder. Moreover, it emerged from Dr O'Mathuna's evidence that the Complainant continues to show symptoms of her illness notwithstanding the removal of the circumstances giving rise to her condition. This, on the evidence before the Court, is more suggestive of depressive illness than of an adjustment disorder.

In these circumstances the Court is satisfied, as a matter of probability, that the Complainant did suffer from a depressive illness. It is also satisfied that this condition is a disability for the purposes of the Act. Accordingly the Court is satisfied that the findings of the Equality Tribunal are correct.

Quantum of compensation

Ms McKenna B.L. submitted that having regard to the manner in which the appeal had been run by the Respondent the Complainant was obliged to incur significant additional expense in advancing her case. Counsel submitted that this should be taken into account in measuring the quantum of compensation to which the Complainant is entitled.

Mr Kerr B.L. on behalf of the Respondent pointed out that the Court cannot incorporate an award of costs into any redress which it might order. Counsel submitted that the Complainant had not suffered any actual or potential financial loss in consequence of having her probation extended. He submitted that in these circumstances the award of €8,000 made by the Equality Officer is adequate.

The jurisdiction of the Equality Tribunal, and of this Court on appeal, to award redress is grounded on s. 82 of the Act. Section 82(1)(c) of the Act provides that the Court may make an order for compensation for the effects of acts of discrimination. Where this mode of redress is decided upon the Court is required to follow the decision of the ECJ inVon Colson andKamann[1984] ECR 1891. Here the ECJ held that the sanction for breaches of Community rights must be effective, proportionate and dissuasive. This means that the compensation awarded must fully compensate the complainant for the economic loss which he or she sustained as a result of the breach of his or her Community rights. It must also contain an element that reflects the gravity of the infringement and acts as a disincentive against future infractions.

The Court has no jurisdiction under either the Act or the dicta inVon Colson andKamanntomake an award of costs or an order for the recovery of expenses incurred in the prosecution or defence of a case under the Act. The Court accepts that the Complainant was required to incur additional costs in providing medical reports and expert evidence in order to meet the case made by the Respondent. However it has no jurisdiction to increase the award made by the Equality Officer in order to allow for recovery of all or part of those costs.

It is accepted that the Complainant suffered no pecuniary loss or other disadvantage in terms of her conditions of employment in consequence of the discrimination which she suffered. In these circumstances the Court is satisfied that the award of €8,000 made by the Equality Officer is appropriate and that it adequately meets the criteria enunciated by the ECJ inVon Colson.

Determination

The appeal herein is disallowed and the decision of the Equality Tribunal is affirmed.

Signed on behalf of the Labour Court

Kevin Duffy

25th March, 2009_____

MG.Chairman

NOTE Enquiries concerning this Determination should be addressed to Madelon Geoghegan, Court Secretary.

EDA128 March 16, 2012

Trailer Care Holdings Ltd (represented By Irish Business And Employers' Confederation)
- And -
Deborah Healy (represented By Kevin Tunney & Co Solicitors)

Case Details

Body
Labour Court

Date
March 16, 2012

Official
Kevin Duffy

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 83, EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

County
Co. Dublin

Decision/Case Number(s)
- EDA128
- ADE/11/28

Note
Enquiries concerning this Determination should be addressed to Sharon Cahill, Court Secretary.

Employer Member
Ms Cryan

Worker Member
Ms Tanham

SUBJECT:

1. Appeal under Section 83 of the Employment Equality Acts, 1998 to 2011.

BACKGROUND:

2. This is an appeal under Section 83 of the Employment Equality Acts, 1998 to 2011. A Labour Court hearing took place on 5th January, 2012 and 27th February, 2012. The following is the Court's Determination.

DETERMINATION:

This is an appeal by Trailercare Holdings Limited against the decision of the Equality Tribunal in a complaint by Deborah Healy made under the Employment Equality Acts 1998 to 2011 (the Acts). Ms Healy contends that she was discriminated against by her former employer, Trailercare Holdings Limited, on grounds of gender and disability in relation to her conditions of employment. It is further alleged that she was dismissed on grounds of pregnancy and that she was victimised by her former employer for having sought advice from the Equality Authority.

In line with the normal practice of the Court the parties are referred to herein as they were at first instance. Hence Trailercare Holdings Limited, which is the appellant in this case, is referred to as the Respondent. Ms Healy is referred to as the Complainant.

The Respondent denies all of the Complainant's claims.

The complaints were investigated by the Equality Tribunal and in a decision dated 23rdJune 2011 the Equality Officer found that the complaints had been made out. The Equality Officer directed the Respondent to pay the Complainant compensation in the amount of €40,000 for the discrimination which he found to have occurred. He awarded additional compensation in the amount of €10,000 in respect of victimisation. The Respondent was further directed to pay interest at the Courts rate in respect of the award for discrimination from the date on which the complaint was presented to the Equality Tribunal (being 24thJanuary 2008) until the date of payment. The Equality Officer also made ancillary orders directing the Respondent engage an appropriate person to undertake a programme of training in matters relating to employment equality law and requiring all persons employed by the Respondent to participate in such training.

The Respondent appealed to the Court by notice dated 14thJuly 2011.

Background

The background against which this dispute arose, as admitted or as found by the Court, can be summarised as follows:

The Respondent is a cold, chill and storage Company and is also involved in other ancillary activities. Its principal facility is located at Ballymount in Dublin.

The Complainant commenced employment with the Respondent on 9thOctober 2006 as a personal assistant / bookkeeper. She was furnished with a contract of employment in writing on 28thNovember 2006. Her salary on the commencement of the employment was fixed at €28,000 per annum. This was later increased to €30,000, after the Complainant had been in the employment for two months and one month earlier that was provided for in a commitment given to her on recruitment.

On or about 10thApril 2007 the Complainant informed the Respondent that she was pregnant. She further advised the Respondent that she would require time off to attend anti-natal hospital appointments. The Respondent asked the Complainant to furnish it with information in writing concerning the legal entitlements of pregnant employees. The Complainant took issue with this instruction and told her manager that it was the Respondent's responsibility to inform itself on these matters.

Issues arose between the Complainant and the Respondent in relation to the scheduling of her hospital appointments. The Respondent wanted the Complainant to arrange these appointments at times that were least disruptive of its business. The Complainant was unable to change the appointments from the times given by the hospital. Issues also arose concerning sick leave taken by the Complainant in relation to her pregnancy and the payment for these absences. The Complainant suffered complications in her pregnancy resulting in impaired mobility. The Complainant contends that the Respondent failed to provide her with reasonable facilities to accommodate this disability. Issues also arose between the parties in relation to certain changes in the physical environment in which the Complainant was required to work, which she contends, adversely impacted on her condition.

It is common case that the interaction between the parties on these matters caused their working relationship to deteriorate.

In or about August 2007 a further issue arose between the Complainant and her then employer concerning what the Complainant regarded as the Respondent's failure to include her in a performance appraisal for the purpose of assessing a pay increase. The Complainant also took issue with the Respondent's failure to pay her a holiday bonus to which she considered herself entitled. The Complainant consulted the Equality Authority on this matter and communicated with the Respondent by e-mail reciting the advice that she had obtained. The Managing Director took exception to the Complainant having raised the matter of the bonus with a statutory agency. While the Complainant was paid the bonus the Respondent decided to discontinue these payments for all employees because of what had occurred and informed the Complainant's work colleagues accordingly. The Complainant asserts that in consequence of the Respondent's actions she was subjected to adverse treatment by her work colleagues and that this amounted to victimisation by the Respondent.

A further issue arose between the Complainant and her manager concerning the completion of a form for the purpose of claiming maternity leave. The form was given to the Respondent for completion in mid-July 2007 and was not completed 27thAugust 2007. This for was due to be returned to the Department of Social Protection by 3rdSeptember 2007. The Complainant contended that the completion of the form was being unduly delayed. The manager took the view that she was being pressurised to deal with the matter immediately before she went on annual leave and in circumstances in which she was trying to deal with other pressing issues.

On 7thSeptember 2007 the Complainant was asked to attend a meeting with the Managing Director and a Director of the Respondent at 5.20pm, some ten minutes before she was due to finish work and commence her annual leave. At this meeting the Complainant was informed that her employment was being terminated with immediate effect due to redundancy. The Complainant was due to commence her maternity leave shortly after her return from leave. The Respondent offered to pay the Complainant her full salary, including four weeks' pay in lieu of notice, up the end of October 2007 when her maternity leave was due to commence.

The Respondent contends that a genuine situation of redundancy existed at the material time in consequence of staff reorganisation and that the dismissal of the Complainant arose solely because of the redundancy. The Complainant contends that her dismissal was on grounds of her pregnancy or matters related thereto.

Position of the Parties

The Respondent

Evidence was given on behalf of the Respondent by Ms Collette McCrann who is a Director of the Respondent and by Mr William Fleming who is Managing Director of the Respondent. Their evidence can be summarised as follows:

Evidence of Ms McCrann

This witness outlined the history of the Complainant's employment with the Respondent. She was the Complainant's immediate manager. According to Ms McCann the Complainant's work performance was entirely satisfactory and she characterised the working relationship between them as excellent.

The witness confirmed that in early April 2007 the Complainant told her that she was pregnant. She congratulated her and wished her well. The witness said that she had three pregnancies while employed by the Respondent but had not dealt with any other pregnant employees. The witness thought that she should obtain advice on the Complainant's entitlements, and the Respondents responsibilities, in relation to her pregnancy as it was some time since she had been required to familiarise herself on such matters. Two days after she was told of the Complainant's pregnancy the witness asked the Complainant to go to the computer and run off the relevant information on the Citizens Information Centre website. According to Ms McCrann the Complainant said that this was information that the witness should have and she seemed annoyed at being asked to obtain the information. The witness said that it was necessary to update the Respondent on its legal responsibilities and that this would help her to understand the Complainant's entitlements. The Complainant obtained the information and furnished it to the witness.

Turning to the Complainant's hospital visits, Ms McCrann recalled an occasion on which the Complainant told her that she would have to leave at 1.pm to attend a hospital visit. The witness asked the Complainant if it would be possible for her to arrange visits on her way into work. She pointed out to the Complainant that they were a small company and the timing of her appointments could cause the Respondent considerable inconvenience and disruption. The Complainant reacted very badly to this suggestion. The Complainant said that she had a right to go whenever she wished. The Complainant told her that she had to accept whatever appointments were offered by the hospital. The witness suggested to the Complainant that if she (witness) could speak with the appropriate person in the hospital it might be possible to arrange the appointments at a time which was less disruptive of the business. The Complainant objected to the witness adopting such a course. From then on the appointments went ahead as arranged by the Complainant and the witness did not pursue the matter further. Ms McCrann denied having told the Complainant that she would have to arrange her hospital visits around the needs of the Respondent's business. She said that her comment in that regard was merely a suggestion. The witness was asked if she had told the Complainant that she (witness) would have to talk to Mr Fleming about the Claimants hospital appointments. She said that she had not.

The witness was asked if she had told the Complainant that the time spent attending hospital appointments would have to come out of her holidays. The witness denied having said that. She said that she accepted that the Complainant was entitled to time off for hospital appointments.

The witness said that there were about 7 seven appointments, none of which were stopped.

The Court was told that shortly after the initial discussion concerning her hospital appointments the Complainant started to communicate with the witness by e-mail. She regarded that as strange. The witness recalled another occasion on which the Complainant came into her and demanded that her maternity form be completed. That was late in the pregnancy. The witness said that she felt that their relationship deteriorated after that.

When asked to comment on the Complainant's complaint that she was subjected to criticism concerning her work the witness denied that the Complainant has been subjected to any criticism.

The witness acknowledged that the Complainant had been absent from work due to morning sickness but denied that she had taken issue with her absences. In particular, the witness denied that she had told the Complainant that morning sickness was unacceptable as an excuse for not coming to work.

The witness was asked if a risk assessment had been undertaken. She said that there were no risks which could have posed a hazard to the Complainant. The witness described the physical layout of the premises. She said that there was an office on the ground floor in which the Complainant worked. She said that the Complainant was not required to move around the premises. The witness told the Court that she was never made aware that there was a possibility that the Complainant would have to use crutches due to a pregnancy related complication.

In relation to the maternity benefit form, the witness said that the Complainant gave her the form in or about mid-July 2007 and asked her to complete it. On or about 27thAugust the Complainant came back to ask her about the form and demanded that it be filled in immediately. At the time the witness said that she was busy and did not have the time to fill in the form. She told her that she would deal with it as soon as possible. At the time the witness was going on holidays. She told her that it would be dealt with when she returned from holidays. The witness said that the maternity benefit form was filled in by a colleague the next day.

While Ms McCrann acknowledged that the relationship between her and the Complainant has deteriorated she did not know why that had occurred.

In dealing with the circumstances surrounding the termination of the Complainant's employment, Ms McCrann provided the Court with details of changes in the structure of the Respondent's business activities that occurred in 2007. She said that the caf€ business had closed down resulting in financial loss to the Respondent. It also had an involvement in a social housing project in the UK and this too had performed badly. Certain contracts in which the Respondent was involved were also lost in this period. The witness also described changes in staff structure that had occurred at the material time. She said that a paper business that the Respondent operated on the north side of the city had been relocated to the facility in Ballymount in which she worked and that the manager of that facility, Mr C, was relocated there. This person took over some of the administration work in which the witness had been involved. The Respondent also agreed to employ a warehouse manager, Mr E, in or around August 2008, to take over the role previously undertaken by other staff members who had left the employment, although this person actually commenced employment after the Complainant's dismissal. Apart from working in the forecourt this person also took over some of the office administration work previously undertaken by the witness. According to Ms McCrann, as a result of these changes her work load had significantly diminished and there was insufficient work in the administration of the business for herself and the Complainant. The Court was told that in these circumstances it was decided that the Complainant's role should be taken over by the witness, as she had previously undertaken these duties, and it was decided to make the Complainant redundant.

The witness recalled the events of 7th September 2007. She told the Court that the Complainant was summoned to a meeting at approximately 5.20 in the afternoon. The witness accepted that the Complainant was not given notice of this meeting. Mr Fleming, the Managing Director, and the witness were present at this meeting. The Complainant was told of the difficulty that had arisen and of the decision to make her redundant. The Complainant asked if her husband, who was waiting outside the premised to collect her from work, could attend the meeting. The Respondent agreed that he could.

At the meeting the Complainant was told that because of the staffing and business changes described she would be taking over the Complainant's role. The Complainant was told that she would not be required to work out her notice and that she could clean out her desk and leave that evening. The Respondent agreed to pay the Complainant up to the expected commencement date of her maternity leave, including one month's pay in lieu of notice. When asked why the Complainant had not been warned of the impending redundancy the witness said that the Complainant should have known that there was a falloff in her work and the redundancy should not have come as a surprise to her. The witness agreed that no one else was considered for redundancy. She said that it was the Complainant's job that had become redundant. The witness also agreed that she never considered retraining the Complainant to take on the role for which the new warehouse manager had been employed.

The witness said that the administration work associated with the caf business was a significant consideration in the decision to employ the Complainant. It closed some two months after the Complainant commenced employment. They had been trying to hold on for as long as possible. The witness said that there was also a significant amount of administrative work associated with the social housing projects and this too had diminished. The witness agreed that the caf business had been in decline for some time before the Complainant was employed.

The witness agreed that Mr E was employed after the Complainant was let go but she maintained that he did not do the comparable work to that of the Complainant.

Evidence of William Fleming

Mr William Fleming, who is Managing Director of the Respondent, gave evidence.

Mr Fleming referred the Court to a document which he had prepared headed'Operational and Staff Changes in Trailercare Holdings'dated 7thSeptember 2007. This document, which was put in evidence, set out the operational and staff changes upon which the Respondent relied in making the Complainant redundant. It was created for the purpose of the meeting with the Complainant at which her employment was terminated and it was given to her at the meeting of 7thSeptember 2007. Mr Fleming took the Court through the detail contained in the document.

This witness said that the paper business, formally located on the north side of the city was transferred to the Ballymount site. Mr C, who managed that business, transferred to Ballymount. He was a senior person in the Company and his relocation resulted in some restructuring of working arrangements. This document also referred to the loss of the Respondent's biggest customer, which accounted for approximately 65% of the Respondent's business. The caf business operated by the Respondent had also closed. The Respondent had an investment in social housing and it was found that this was not working out with the result that the Respondent was forced to sell on a number of properties.

The witness said that there were other significant changes in staffing arrangements around that time. The most significant of these changes was the arrival of Mr C. According to Mr Fleming both he and Ms McCrann had managed the various aspects of the Respondent's business ventures that had gone into decline. Mr C had managed the paper business.

Mr Fleming referred to other changes. He said that in the first quarter of 2007 the warehouse manager, Ms F, had left the employment. He had tried to bring in people who were not experienced in warehousing to replace Ms F. He had recruited a Mr S and a Ms G but that did not work.

Changes were made in the reporting structures within the business during 2007. Mr C took over responsibility for administration and that released Ms McCrann from those duties. Furthermore, the loss of the main business of the major customer, previously referred to, reduced the administrative requirements of the business. During this time the Respondent did take on a driver. Ms G, who was employed to replace Ms F, left the employment in July of that year. The witness told the Court that he then decided that the business needed a good warehouse manager. He approached the manager of a company with which the Respondent did business (Mr E) and asked him if he would take on the role of warehouse manager. Terms were agreed on which Mr E would join the Respondent. While terms were agreed in or about August of that year Mr E's commencement date was to be in September.

Dealing with the basis for the decision to make Complainant redundant, the witness said that when Mr E agreed to join the business it became clear that Ms McCrann would be released from a significant amount of her workload. The Respondent had incurred a significant trading loss, of the order of €500k, in the year up to 30thJune 2007. According to the witness some remedial action was required to deal with the situation that had emerged. There was a requirement for administrative work and the Complainant had done that job well. It was clear, however, that Ms McCrann was being freed of much of her workload. They were then faced with a situation in which there were two people able to do the same job and only one was required. In these circumstance the decision was taken to make the Complainant redundant and for Ms McCrann to take over her role. Mr Fleming told the Court that having come to that decision he decided that it would be best to tell the Complainant sooner rather than later. He arranged to meet the Complainant on the evening of 7thSeptember and inform her of the decision. The pivotal consideration in arriving at that decision was that Ms McCrann had become free to take over the role of the Complainant.

The Complainant was given a letter dated 7thSeptember 2007 informing her that her employment was terminated with immediate effect and that payment in lieu of notice would be provided.

Mr Fleming accepted that the difficulties in the trading position of the Respondent were apparent at the time the Complainant was employed. When asked to what degree the losses incurred by the business had influenced the decision to make the Complainant redundant, Mr Fleming told the Court that this was not a material consideration. Mr Fleming also agreed that Mr E had in fact commenced employment with the Respondent after the Complainant had been made redundant. He agreed that Mr E was the effective replacement for Ms F. He said that he had not considered assigning this role to Ms McCrann so as to avoid making the Complainant redundant nor had he considered assigning this role to the Complainant and providing her with any necessary training. Mr Fleming also accepted that another contract had been obtained after the loss of the major customer previously referred to in his evidence.

Turning to the remedial work undertaken at the Robinhood premises, Mr Fleming told the Court that the building was flooded in or around July 2007. Ground floor offices were principally affected. It became necessary to take up carpets and replace them. Around the same time it was decided to change the layout of the office and this involved the demolition of a wall. The work extended over a two week period. According to Mr Fleming during the demolition and reconstruction work a strong plastic cover was used to prevent dust and other building particles from entering the office area where staff, including the Complainant, worked. Re-painting work was undertaken at weekends when the premises were not being used by staff. The witness accepted that there was a noticeable smell of paint in the office and an extractor fan was used to ameliorate this smell. The witness accepted that the Complainant had raised issues with him concerning the physical state of the building at that time but he was satisfied that adequate measures had been taken to eliminate any inconvenience or discomfort occasioned by the works.

With reference to the Complainant's requirement to use crutches in consequence of her pregnancy related condition, Mr Fleming said that she had never actually used them at work. He said that the Complainant never had to use stairs in the course of her work. The witness accepted that approximately two weeks before she left the employment the Complainant had told him that she would probably be required to use crutches because of a pregnancy related complication. He said that there were no hazards or dangers affecting the Complainant in the workplace and there was no need to involve her in undertaking a safety assessment.

Turning to the Complaint's complaints at not being given a performance related pay increase in 2007, the witness said that the use of that term was somewhat of a misnomer. It was not the practice of the Respondent to assess the performance of staff for the purpose of awarding pay increases. He said that the business is driven by the demands of customers and this, rather that the individual performance, determined the level of productivity. The witness said that almost without exception he personally decided what increases, if any, should be applied. He generally took into account the financial circumstances of the business and the increases in the cost of living since the last increase in deciding on adjustments in pay. The review date was 30thJune each year. He said that any increase decided upon did not apply to staff members with less than a full year's service. It was Mr Fleming's evidence that the reason for not including the Complainant in the review at 30thJune 2007 was that she did not have the requisite full years' service at that point. The witness accepted that two named workers, with less than a full years' service, had received increases of €4,000 each in July 2007. Mr Fleming said that the two workers in question were initially employed at €2 per hour less than the standard rate for their job and he had promised to bring their rate up to the standard rate subject to satisfactory service. He felt compelled to honour his word in that regard. The witness denied that the Complainant had received a commitment to a salary review.

In relation to what was described as a holiday bonus, Mr Fleming told the Court that it was his practice to make special payments to staff when they went on their annual holidays as a 'thank you' gesture. He said that these were small amounts of around €100. They were paid personally by the witness in cash from his own resources and not from the Company accounts. Mr Fleming characterised these payments as gratuitous and informal. Staff did not have a contractual entitlement to these payments.

Mr Fleming told the Court that he became aware that in or about 9th August 2007 the Complainant mentioned to Ms McCrann that she was not included in a pay review and had not been paid a bonus. The witness was on holidays at that time. According to Mr Fleming only one employee, who had less than one year's service was paid a bonus that summer and that was in error. He said that Mr C did not understand the basis for these payments and had paid a bonus to a named employee with less than the required service without the witness's knowledge.

The Complainant insisted that this matter be dealt with and had sent an e-mail to the Respondent stating that she had consulted the Equality Authority in the matter and believed that she was entitled to receive the payment. Mr Fleming paid the Complainant the disputed bonus but he accepted that he felt aggrieved that she had raised the matter with a statutory authority. He said that had she come to him directly he would have paid the bonus.

It was Mr Fleming's evidence that because the Complainant had elevated the question of the bonus to what he described as 'another level' he was forced to reconsider his pervious practice in this matter and decided that the payment of bonuses would have to be discontinued. Some weeks later he informed all staff accordingly. He said that he informed staff that a situation had arisen whereby the informal practice could not continue and in consequence the bonuses would no longer be paid. He said that he had not mentioned the Complainant's name in the course of his discussions with other staff and he was not aware that she had been 'victimised' by others in consequence of what he had told them. When reminded that in his evidence to the Equality Officer he said that he had told the staff that the matter had been raised with the Equality Authority, the witness accepted that this was probably what he had said.

In dealing with the Complainant's complaints concerning the Respondent's attitude towards her hospital appointments, the witness accepted that the pattern of the Complainant's absences did cause difficulty between Ms McCrann and the Complainant. Nevertheless the Complainant was facilitated in attending all of the appointments that she needed to attend. Mr Fleming told the Court that he was very hurt by the assertion that the Complainant was told that the time attending at the hospital would have to come out of her holidays. He said that the Complainant was paid in respect of all of the time spent attending hospital. The witness told the Court that the Company did not have a sick-pay arrangement and it was normal policy that when staff were absent through illness they were offered the opportunity to have the absence treated as holidays rather than suffering a loss of pay.

Mr Fleming agreed that in or about May 2007 he held a meeting with the Complainant and Ms McCrann to discuss the Complainant's grievances concerning the hospital visits. He told the Court that he considered Complainant was being unreasonable in not trying to arrange these visits around the requirements of the business. He felt that there was an onus on an employee in the circumstances of the Complainant to help a small business in minimising disruption caused by attending such appointments.

The Complainant

Evidence of the Complainant

The Complainant told the Court that she commenced employment with the Respondent in October 2006 as a bookkeeper and as personal assistant to Mr Fleming and Ms McCrann

The Complainant recalled meeting with Ms McCrann on 10th April 2007 and informing her that she was 11 weeks pregnant. She informed Ms McCrann that she would require time off to attend hospital appointments. On or about 24th April 2007 Ms McCrann asked the Complainant how she wanted to be paid for these absences. Ms McCrann told her that if she wanted to be paid the time would have to be taken as holidays. The Complainant told Ms McCrann that she was entitled to be paid for these visits. Ms McCrann then told her to print off the relevant information on pregnancy related entitlements from the Citizens Information Centre's web-site. She remarked to Ms McCrann that she should be aware of her obligations as an employer but she nevertheless printed off the information and gave it to Ms McCrann. `Ms McCrann told her that she would have to talk to Mr Fleming about the hospital visits

In the course of her enquiries the Complainant became aware that she was obliged to give her employer two weeks' notice in writing of anti-natal appointments. She sent an e-mail to Ms McCrann providing details of her next hospital appointment. According to the Complainant, Ms McCrann took issue with her for communicating in that way.

The Court was told that in or about April 2007 issues again arose around the Complainant's hospital appointments. Ms McCrann told the Complainant that she would have to arrange appointments around the Company's work requirements. The Complainant told Ms McCrann that she was attending the hospital as a semi-private patient and that she would have to take the appointments that she was offered. Ms McCrann suggested that she could contact the hospital to see if more suitable times could be arranged. The Complainant said that she explained to Ms McCrann that this would be pointless as there was no scope for flexibility having regard to her status as a semi-private patient.

The Complainant told the Court that she suffered from morning sickness from early in her pregnancy. She recalled that on one occasion she had come to work but was ill during the course of the day. She informed Ms McCrann that she would have to go home. According to the Complainant Ms McCrann became very annoyed and told her that morning sickness was unacceptable as an excuse for not being at work. She said that she then visited her GP who placed her on certified sick leave for one week.

The Complainant said that she did attend all of her hospital appointments and confirmed that she was paid in respect of the absences concerned. She did not accept that the issues around these absences had been satisfactorily resolved. According to the Complainant, on each occasion on which she informed the Respondent of an impending appointment Ms McCrann's demeanour was one of annoyance. She also told the Court that at a meeting with Mr Fleming, held on 24thMay 2007, she was again told that she should arrange her hospital appointments around the needs of the business.

The Complainant told the Court that in the initial stages of her employment the relationship between her and her managers was excellent. She recalled that when she moved house the Respondent provided her with the use of a trailer and storage facilities. She said that she got on well with colleagues in the office although she was advised by Ms McCrann that she should not be too familiar with colleagues in view of the sensitive nature of her work in so far as it involved the payroll. She helped out in the caf€ business and in other areas of the Respondent's business outside of her main duties. According to the Complainant, the relationship went downhill after the issues arose concerning her hospital visits.

In relation to staff changes, the Complainant recalled that Ms G came to work with the Respondent in or about July 2007 as warehouse manager. The Complainant was asked to show Ms G what she did despite having previously been told by Ms McCrann that her work was of a confidential nature. Around that time the Complainant formed the view that she was effectively being asked to train Ms G to do her job. It was the Complainant's evidence that as well as her normal duties she had taken over the major part of the job previously undertaken by Ms F, the previous warehouse manager, apart from overseeing work undertaken in the yard of the premises.

In dealing with the events of 7thSeptember 2007, the Complainant recalled that she was going on holidays at the end of that day and that she had been extremely busy in the preceding period. She was due to finish work at 5.30 and her husband had called to the premises to drive her home. At 5.20pm she received a call to attend a meeting with Mr Fleming in his office. She had no prior indication of what the meeting was about. She was given the document referred to by Mr Fleming in his evidence and told that she was being dismissed for reasons of redundancy. She was told that Ms McCrann was to take over her role within the employment. The Complainant told the Court that she was devastated and found it difficult to take in what was happening. She asked if her husband, who was waiting outside in their car, could attend the meeting. It was agreed that he could attend and she went outside and asked him to join them. She said that Mr Fleming told her that she was to finish on that day and that she would be paid up to the end of October when she was due to commence maternity leave. She had no prior warning that redundancy was being considered. There had been no fall-off in the work in which she was engaged and in fact she was busier than ever in the previous number of weeks.

The Complainant gave it as her opinion that she could have undertaken the job that Mr E was employed to do. This was effectively the role previously undertaken by Ms F, the major part of which she was already doing. It was put to the Complainant that the Respondent's case was that this role involved driving a forklift truck and lifting heavy boxes. She said that she had never seen Ms F driving a forklift truck although she understood that she may have been required to lift boxes but this would have rarely arisen.

The Complainant went on to detail to the Court the nature and effect of the pregnancy related disability which she developed in mid-2007. In or about July of that year she was required to wear a special belt for support. Both Mr Fleming and Ms McCrann were aware of her disability and its affects. She was in considerable pain at that time but she got on with her work. Contrary to Mr Fleming's evidence, the Complainant said that she was asked to use the stairs five or six times a day. She was never asked to undergo a risk assessment at that or any other time.

In dealing with the renovations at the office the Complainant said that while she was on leave the premises had been flooded, she thought from the overflow of a stream at the back of the premises. The carpets were destroyed but still on the floor. There was also a smell of sewerage in the offices. She could not remain in her normal place of work and went to sit in the kitchen. Ms McCrann came in a said that she needed to get back to her desk. The remedial work did not commence until approximately two weeks after the damage was caused. It was then decided to take down a wall in the office. The Complainant recalled that the office area was covered in dust and there was a very strong and unpleasant odour throughout her work area. The Complainant asked Ms McCrann if she could move but was told that she was being ridiculous. The Complainant raised the matter with Mr Fleming who said that he would get extractors and keep the windows open. She felt nauseous and uncomfortable in consequence of the environment in which she was required to work.

In relation to the July appraisal and the bonus issue, the Complainant said that when she accepted employment with the Respondent she was offered a salary of €28,000 per year. Her previous employment had been as an assistant manager of a restaurant where her salary was €30,000 per annum and she was somewhat unhappy with the amount offered. She was told that her salary would be reviewed after three months. Some two months after she commenced employment she was told that the Respondent was very happy with her performance and her salary was increased to €30,000. She was assured by Ms McCrann that she would be included in the July appraisal. The Complainant went on holidays in July. On her return she was asked by colleagues if she had received a holiday bonus and if she had been included in the July appraisal. She raised the matter with Ms McCrann whose response was that she did not like her attitude. She then contacted the Equality Authority by phone and obtained advice. She did not take a note of the name of the person to whom she spoke. On or about 13thAugust 2007, as a result of the advice that she received, she sent an e-mail to the Respondent on the matter. Mr Fleming called her up to his office and expressed his annoyance at her for having raised the matter with the Equality Authority. Mr Fleming told her that the bonus was not paid because she had less than one year's service. The Complainant told the Court that she had never previously heard that a full year's service was a condition for payment of the bonus. She said that she was aware that the bonus varied in amount and she thought that this was related to service. She gave an example of one employee who, to her knowledge, had received a bonus of €300. Having raised the matter Mr Fleming then gave the Complainant a cheque which the Complainant thought was for around €130.

In reply to a question from the Court the Complainant said that the cheque was drawn on the Respondent's account. It was pointed out to the Complainant that in his evidence Mr Fleming had said that bonuses were paid in cash and from his own resources. The Complainant said that she had a clear recollection of the payment being by way of a Company cheque. The Complainant also told the Court that in the course of her work she had seen at least some bonus payments being processed through the payroll.

On the following day the Complainant was approached by named colleagues who were angry and remonstrated with her for having had the bonus payments taken from them. As a result of what they said to her the Complainant became aware that Mr Fleming had immediately gone to other employees and informed them that the bonus was being withdrawn. As a result of what had been conveyed to them by Mr Fleming her colleagues were aware that the bonus was being withdrawn because she had contacted the Equality Authority in the matter. The Complainant was reminded that in his evidence Mr Fleming had told the Court that it was some weeks after her meeting with him that he had spoken to other employees on this matter. The Complainant said that she was sure that it was on the following day that she had the encounter with her colleagues.

Issues arising

The issues arising for decision in this case are, firstly, whether the Complainant was dismissed solely on grounds of redundancy, as contended for by the Respondent, or whether the dismissal was tainted by discrimination on gender grounds by reason of the Complainant's pregnancy; secondly, whether the Complainant was discriminated against on gender grounds by reason of pregnancy in relation to her conditions of employment in the attitude adopted by the Respondent towards her anti-natal hospital appointments and in the failure of the Respondent to attend to her application for maternity benefit in a timely manner and in failing to provide her with a safe place of work having regard to her pregnancy related disability; thirdly whether she was victimised by the Respondent for having consulted the Equality Authority in relation to the bonus payment. While there are significant questions of law arising in the case these are essentially questions of fact and degree to be determined on the evidence. The Court has carefully evaluated all of the testimony proffered in the case and had taken account of the demeanour of the witnesses in giving their evidence. The Court has also taken account of the many documents put in evidence.

The law applicable

Protection of Women during Pregnancy

In a line of authorities starting with the decision in C-177/88,Dekker v Stichting Vormingcentrum voor Junge Volwassenen[1990] ECR 1-3841 the Court of Justice of the European Union (formally the ECJ) has made it clear that since pregnancy is a uniquely female condition any adverse treatment of a woman on grounds of pregnancy is direct discrimination on ground of her sex. Thus, the law of the European Union recognises the reality that to treat a woman less favourably because she is pregnant is to discriminate against her because she is a woman. That can never be justified. Issues such as disruption caused to an employer's business or costs associated with accommodating a pregnant woman in employment are, as a matter of Union law, wholly irrelevant.

Since the decision inDekkerthe protection afforded to pregnant women in employment has been strengthened considerably in the case law of the CJEU and in the legislative provisions of the European Union. Equality on grounds of gender is now expressly guaranteed by Article 23 of the Charter of Fundamental Rights of the European Union. Article 33.2 of that Charter also incorporates the prohibition of dismissal on grounds of pregnancy established in jurisprudence of the CJEU. It provides: -

- **To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the**

birth or adoption of a child.

The Charter is now incorporated in the Treaty on the Functioning of the European Union (the Lisbon Treaty) and has the same legal standing as all preceding and current Treaties. It can thus be properly regarded as part of the primary legislation of the European Union.

The jurisprudential principle that discrimination on grounds of pregnancy constitutes direct discrimination on grounds of sex is now codified in Directive 2006/54/EC on the Principle of Equal Treatment of Men and Women (the Recast Directive). This Directive provides, at Article 2. 2 (c), that any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC constitutes unlawful discrimination for the purpose of that Directive.

Directive 92/85/EEC (the Pregnancy Directive) provides a comprehensive legal framework in which special protection is afforded to the safety health and welfare of pregnant women in employment. Article 4 of the Directive places an obligation on employers to assess risks that may be imposed on pregnant women in employment and requires them to address any risks identified. Article 9 of the Directive provides pregnant women with a right to time off work, without loss of pay, to attend anti-natal examination if such examination must take place during working hours. Article 10 of the Directive is of particular and far reaching significance. It provides: -

- **In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:**
- **1.Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;**
- **2.If a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;3.Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.**

The underlying rationale for the prohibition of dismissal on grounds of pregnancy is discernible from recital 15 of the Directive which provides: -

- **"Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; provision should be made for such dismissal to be prohibited"**

The importance of this latter provision, in deciding cases within the ambit of the Equal Treatment Directive, has been emphasised by the CJEU on a number of occasions. Most recently in case C-232/09Danosa v LKB Lizings SIA[2011] CMLR 45, at 60, the Court said: -

- **"It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the EU legislature provided for special protection for women, by prohibiting dismissal during the period from the beginning of pregnancy to the end of maternity leave"**

The Court then continued at par 61 of the report: -

- **"During that period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition on dismissing pregnant workers, save in exceptional cases not connected with their condition, provided that the employer gives substantiated grounds for the dismissal in writing"**

It is noteworthy that in reaching its decision inDanosathe CJEU, at par 71 of its Judgment, had regard to Article 23 of the Charter of Fundamental Rights of the European Union.

In Case 406/06Paquay v Soci�t� d'architectes Hoet + Minne SPRL[2007] ECR 1-8511, the Court pointed out that in accordance with its case law the prohibition of less favourable treatment, including dismissal, on grounds of pregnancy comes within the ambit of both the Equal Treatment Directive and the Pregnancy Directive. As the Court pointed out at par 29 of the report: -

- **BeforeDirective 92/85came into force, the Court had already held that, under the principle of non-discrimination and, particularly,Articles 2(1)and5(1) of Directive 76/207, protection against dismissal should be granted to women not only during maternity leave, but also throughout the period of the pregnancy. According to the Court, a dismissal occurring during those periods affects only women and therefore constitutes direct discrimination on the grounds of sex (see, to that effect, Case C-179/88 Handels-**

og Kontorfunktion�rernes Forbund [1990] ECR I-3979, paragraph 15; Case C-394/96 Brown [1998] ECR I-4185, paragraphs 24 to 27; and McKenna , paragraph 47).

The importance of providing real and effective redress in cases where the rights of pregnant workers are infringed was emphasised by the Court at pars 45 -47 of its judgment inPaquay. Here the Court said: -

- **45However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. Those measures must guarantee real and effective judicial protection and have a real deterrent effect on the employer (Marshall , paragraph 24).46Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. Where financial compensation is the measure adopted in order to achieve the objective previously indicated, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules (Marshall , paragraphs 25 and 26).47It is necessary to recall that, in accordance withArticle 12 of Directive 92/85, Member States are also bound to take the necessary measures to enable all workers who consider themselves wronged by failure to comply with the obligations arising from that directive, including those arising from its Article 10, to pursue their claims by judicial process.Article 10(3) of Directive 92/85specifically states that Member States shall take the necessary measures to protect pregnant workers or those who have recently given birth or are breastfeeding from the consequences of dismissal which is unlawful by virtue of paragraph 1 of that provision.**

At paragraph 49, the Court continued: -

- **49While recognising that the Member States are not bound, underArticle 6 of Directive 76/207orArticle 12 of Directive 92/85, to adopt a specific measure, nevertheless the fact remains, as is clear from paragraph 45 of the present judgment, that the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered.**

Also of relevance, in the context of the appropriate form of redress, particularly in cases involving discriminatory dismissal, is the decision of the CJEU inMarshall v (No 2) Southampton and South-West Hampshire Area Health Authority[1993] IRLR 445 which was referred to in the passage fromPaquay, recited above. Here, at paragraph 31, the Court said: -

- **"With regard to the second part of the second question relating to the award of interest, suffice it to say that full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment."**

It abundantly clear from these authorities, and from the legislative provision of the European Union, that women are to be afforded special protection from adverse treatment, and in particular from dismissal on account of their condition, from the commencement of their pregnancy until the end of their maternity leave. The entitlement to that protection is to be regarded as a fundamental and inviolable right within the legal order of the Union which the Courts and Tribunals of the Union must vindicated within the limits of their jurisdiction. It seems equally clear that where a pregnant woman is dismissed during this period of special protection the employer bears the burden of proving, on cogent and credible evidence, that the dismissal was in no sense whatsoever related to her pregnancy. This is a matter that the Court will consider further in addressing the application of the burden of proof in cases such as the instant case.

Burden of Proof

Section 85A of the Act now provides for the allocation of the probative burden as between the Complainant and the Respondent in cases coming with its ambit. This section provides, in effect, that the Complainant bears the initial burden of proving facts from which discrimination may be inferred. If those facts are established, and if they are regarded by the Court as of sufficient significance to raise an inference of discrimination, the onus passes to the Respondent to show that the principle of equal treatment was not infringed in relation to the Complainant.

Where the probative burden shifts the Respondent must show a complete dissonance between the discriminatory ground relied upon and the impugned conduct or omission. Thus, inWong v Igen Limited[2005] IRLR 258 (a decision of the Court of Appeal for England and Wales), Peter Gibson LJ pointed out that where the Respondent fails to show that the discriminatory ground was anything other than a trivial influence in the impugned decision the complaint will be made out.

As was pointed out by this Court in Determination EDA0821,Kieran McCarthy v Cork City Council, at the initial stage the complainant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the facts proved. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts.

For reasons already mentioned in this Determination, the special protection afforded to pregnant woman against dismissal in European law requires that where a pregnant woman is dismissed the employer must bear the burden of proving that the dismissal was grounded on exceptional circumstances unrelated to pregnancy or maternity. Hence, in every case in which pregnancy related dismissal is in issue, the factual combination of the dismissal and the woman's pregnancy must, in and of itself, place the onus of proving the absence of discrimination firmly on the Respondent.

However, for reasons that follow, there is a significantly broader factual matrix in the instant case from which the existence of discrimination on grounds of pregnancy can be inferred.

The facts

The Court heard evidence from two witnesses on behalf of the Respondent and from the Complainant herself. Overall the Court found the evidence tendered by the witnesses for the Respondent unsatisfactory and lacking in candour in many material respects. By contrast the Court found that the Complainant gave honest evidence to the best of her recollection. Where there is conflict in that evidence tendered on behalf of the Respondent and that tendered by the Complainant, the Court prefers the evidence tendered by the Complainant.

It is clear from the evidence that in the initial stages of her employment the working relationship between the Complainant and her employers was positive and cooperative. After the Complainant informed the Respondent of her pregnancy that relationship deteriorated to the point where the dominant disposition of the Respondent towards the Complainant descended into one of enmity.

It is clear from the evidence that the reason for this deterioration stemmed from the Complainant's insistence on exercising her legal right to take time off work to attend anti-natal hospital appointments and her insistence on being paid for these absences. In that regard the Court accepts as a fact that both Ms McCrann and Mr Fleming believed that the Complainant was acting unreasonably in not arranging her hospital appointments around the convenience of the Respondent's business and that her instance on being paid for the time in question, rather than taking it as holidays, placed an undue burden on the Respondent. While the Respondent had no choice but to allow the Complainant to attend these appointments during normal working hours the Court accepts the Complainant's evidence that throughout the period in question she was made to feel uncomfortable at so doing and that her manager displayed her displeasure on each occasion on which she was informed of an impending visit.

The Court is also satisfied that the Respondent displayed a total lack of consideration for the Complainant physical condition during what it knew was a difficult pregnancy. It failed to undertake any meaningful risk assessment or to discuss with her adjustments that could be made in the duties that she was required to undertaken or in the physical environment in which she was required to work.

The Court also accepts as a fact that the Complainant was promised that her salary would be reviewed in June 2007 and that the Respondent resiled from that commitment. The Court believes, as a matter of probability, that this was because of various issues that were inexorably connected with the Complainant's pregnancy. The Court also accepts that the Respondent failed to attend to the completion of the Complainant's application for maternity benefit in a timely manner. This caused the Complainant undue anxiety and distress. The relevant form merely required the Respondent to answer six basic questions and the Court finds it impossible to accept Ms McCrann's evidence that she was too busy to attend to the form, particularly in light of her claims that her work load had diminished around that period to the point that she was able to take over the Complainant's role.

In all of these issues the Court is satisfied that the Complainant was discriminated against in respect to her conditions of employment.

In relation to the events surrounding the bonus payments, it is clear that the Complainant believed that she was being denied this payment for reasons related to her pregnancy. She sought advice from the Equality Authority, as was her right. She was forthright in informing her employer of the import of the advice that she had received and of the source of that advice. In his evidence to the Court Mr Fleming did not seek to disguise his annoyance at what the Complainant had done. He then withdrew the benefit of this bonus from all other employees and the Court has no doubt that the manner in which he conveyed that decision to other staff members pointed to the Complainant as being responsible for bringing it about. Inevitably, those from whom the benefit was withdrawn vented their anger at the Complainant and caused her further distress. The Court cannot accept that Mr Fleming did not appreciate or intend what were the natural and probable consequences of his actions.

The Court is satisfied that the actions of Mr Fleming in this regard constituted an act of victimisation directed against the Complainant for seeking to assert a right under the Act.

The most serious issue arising in this case relates to the decision to dismiss the Complainant and in the manner of its implementation. As previously adverted to in this determination, the law recognises that during pregnancy women are physically and emotionally vulnerable and the effects of dismissal can have a particularly deleterious effect on their physical and mental health. It is for that reason that the law provides special protection to pregnant women against dismissal except in exceptional circumstances. It is for the Respondent to prove, on the balance of probabilities, that such exceptional circumstances existed in this case. In the Court view it has wholly failed to discharge that burden.

At the time of her dismissal the Complainant was due to commence maternity leave and would have been absent from her employment for a period of a least six months during which she would not have been paid. At the time of her dismissal she was paid her full salary up to the time that her maternity leave was due to commence. There could be no justification for dismissing the Complainant at that time regardless of what circumstances may have existed. However, on the evidence, the Court is not convinced that a genuine situation of redundancy existed at the material time. While there was some restructuring in the staffing arrangements, they did not, in fact, result in the Respondent having fewer employees. At the time of the Complainant's dismissal the Respondent was in the process of recruiting a new employee and no consideration whatsoever was given to assigning the role to be undertaken by that person to either Ms McCrann or to the Complainant. On this point the Court accepts the Complainant's evidence that she had previously undertaken a substantial part of the job to which the new employee was assigned.

The manner in which the dismissal was implemented is a serious aggregating factor in this case. The decision to dismiss the Complainant must have been in the contemplation of the Respondent for some time yet the Complainant was given no prior indication of what was to occur. She was informed of her dismissal some ten minutes before she was due to finish work and go on annual leave. She was merely informed of the decision and given no opportunity to make representations on her own behalf. In the Court's view no reasonable employer, acting bona fide, would have behaved in such a manner.

Having regard to all the evidence Court cannot accept that the decision to dismiss was taken solely on grounds of redundancy. In these circumstances the Court must conclude that the Respondent was motivated by consideration of the Complainant's pregnancy or by matters related thereto.

Conclusion

For all of the reasons set out herein the Court is satisfied that Complainant was discriminated against on grounds of her gender, that she was victimised and that she was subjected to a discriminatory dismissal. Accordingly, the Court affirms the decision of the Equality Tribunal and the Respondent's appeal is disallowed.

Redress

In relation to redress, the Court affirms the award of compensation in the amount of €40,000 for the effects of the discrimination suffered by the Complainant. The Court also affirms the award of €10,000 for the victimisation suffered by the Complainant.

The Court also affirms the decision of the Equality Officer directing the Respondent to pay interest at the Court rate on the compensatory award for the effects of the discrimination suffered (€40,000) in respect of the period beginning on 24thJanuary 2008, being the date on which the within complaint was presented to the Equality Tribunal, and ending on the date of payment.

For the avoidance of doubt, no part of the awards made is in respect of remuneration.

The Court further affirms the ancillary order made by the Equality Officer at paragraph 6.8 of his decision.

Signed on behalf of the Labour Court

Kevin Duffy

16th March 2012_____

SCChairman

NOTE Enquiries concerning this Determination should be addressed to Sharon Cahill, Court Secretary.

EDA1710 April 24, 2017

Connaught Airport Development Limited T/a Ireland West Airport Knock (represented By Ms Mary Fay B.L. Instructed Pembroke Solicitors)
- And -
John Glavey (represented By Services Industrial Professional Technical Union)

Case Details

Body
Labour Court

Date
April 24, 2017

Official
Caroline Jenkinson

Legislation
- SECTION 83 (1), EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

County
Mayo

Decision/Case Number(s)
- EDA1710
- ADE/16/74
- ADJ-00001463
- CA-00002054-001

Note
Enquiries concerning this Determination should be addressed to Michael Neville, Court Secretary.

Employer Member
Mr Marie

Worker Member
Ms O'Donnell

SUBJECT:

1. Appeal of Adjudication Officer's Decision No: ADJ-00001463.

BACKGROUND:

2. The Employer appealed the decision of Adjudication Officer to the Labour Court on 11 August 2016. A Labour Court hearing took place on 5 April 2017. The following is the Court's Determination:

DETERMINATION:

This is an appeal by Connaught Airport Development Ltd t/a Ireland West Airport Knock against the decision of an Adjudication Officer of the Workplace Relations Commission under the Employment Equality Acts 1998 – 2011(the Acts). Mr John Glavey complained that he was subjected to discriminatory treatment on the age ground in terms of Section 6(2)(f) of the Acts and contrary to Section 8 of the Acts when his former employer imposed a mandatory retirement age of 65 years.

For ease of reference, the parties will be referred to as they were at first instance, therefore Connaught Airport Development Ltd t/a Ireland West Airport Knock will be referred to as "the Respondent" and Mr John Glavey will be referred to as "the Complainant".

The Adjudication Officer held that the Complainant had established aprima faciecase of discrimination on the ground of age, and held that his complaint of discrimination was well founded. He awarded reinstatement and required the Respondent to pay the Complainant compensation in the sum of €6,500 for the effects of discrimination.

The complaint was referred to the Workplace Relations Commission on 20thJanuary 2016.

Background

The Complainant was employed as a Senior Bar Tender within the catering department of the Airport until his retirement on 6 January 2016. He was initially employed by Campbell Catering at the Airport from 1991 until 2003 and transferred to the employment of the Respondent in 2003 under the

European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003(the Regulations) when the Airport's catering staff was taken over by the Respondent.
The Respondent is a regional airport which opened in May 1986 and is now the fourth largest airport in Ireland directly employing 159 staff and additional temporary staff in the summer season. It directly employs all staff involved in the day to day running of the airport. The critical operational functions include, Air Traffic Control; Fire and Security; Airline Ground Handling Services; Aircraft Refuelling and Technical and Navigation Services. Other commercial functions include Retail and Catering services.

Summary of the Complainant's Case

Ms Martina Weir, SIPTU on behalf of the Complainant submitted that the Complainant had been discriminated against as his employment was terminated when he reached his 65th birthday. Ms Weir clarified for the Court that the redress sought by the Complainant is the award of €6,500 in compensation as decided by the Adjudication Officer.

Ms Weir submitted the following points in support of the claim:-

- **•Neither the Campbell Catering contract of employment nor the Respondent's contract of employment post the transfer furnished to him in 2006 contained a retirement age. The latter contract was the subject of negotiations between the Respondent and SIPTU and resulted in the final proposals being balloted upon by those employees, including the Complainant, who transferred to the Respondent in 2003.•It came as a surprise to the Complainant when the Respondent informed him that he would be retiring in January 2016.•Negotiations conducted between 2004 and 2006 concluded in an agreement to harmonise the terms and conditions of employment of former Campbell Catering's staff with existing terms for established Airport employees. However, the new contracts issued did not fix a retirement age, despite the Respondent having the opportunity to do so.•While the Complainant was aware of retirements from the Airport he may not necessarily have been aware of the ages of the retirees. There were at least two employees who were retained beyond their 65th birthdays.•The Complainant is fit and well and had no difficulty carrying out the duties associated with his job. Therefore there is no justification for a mandatory retirement age in this situation.•The Government has increased the age for receipt of the state pension to 66 years; there is a requirement on those between 65 and 66 years to be available for work. Therefore there can be no justifiable objective reason for the Respondent's decision to place the Complainant in such a position, and no legitimate aim or objective, can be served which could not be achieved by allowing the Complainant to remain until he reaches 66 years.•The Complainant is one of a few who hold a 39 hour per week contract of employment whereas new recruits are on temporary and/or part-time contracts, and this seems to be the**

influencing factor in the decision taken by the Respondent, as opposed to the aim of freeing up positions for younger people entering the employment.•The Complainant is not a member of an occupational pension scheme and will not qualify for the state pension until he reaches 66 years. While the Respondent introduced an occupational pension scheme in 2010, the Complainant did not join as it was his belief that he would not gain any benefit from it.

Summary of the Respondent's Position

Ms Mary Fay, B.L., instructed by Pembroke Solicitors, on behalf of the Respondent, disputed the claim that the Complainant was discriminated against on the age ground.

Ms Fay submitted the following points in support of the Respondent's position:-

- **•The Respondent's age of retirement of 65 years had been justified within the meaning of section 34(4) of the Acts and Article 6 of the Directive 2000/78/EC "Establishing a General Framework for Equal Treatment in Employment and Education" (the Directive), and that the means chosen by the Respondent are both appropriate and necessary for achieving that aim.•It was an express term of the Complainant's terms and conditions of employment with Campbell Catering that employment would not continue past an employee's 65th birthday. The Complainant signed and accepted these terms in 1998. While all Campbell Catering employees who transferred to the Respondent pursuant to the Regulations in 2003 did so on their existing terms and conditions, some of those terms were revised pursuant to a collective agreement reached with SIPTU in 2004. All affected employees including the Complainant were issued with new contracts of employment.•An occupational pension scheme has been available to all hourly paid employees, including the Complainant, since 2011 which provides for employees to make a contribution of 5% to the scheme and the Respondent makes a matching contribution. All employees of the Respondent were notified of the introduction of the scheme and the pension provider gave presentations to the staff in 2010. Prior to 2011 the Respondent facilitated all employees wishing to make arrangements for a private pension through a PRSA. The Complainant elected not to make contributions to a PRSA or the occupational pension scheme once established.•The Respondent strives for cohesion throughout the workforce and has one universal retirement age for all staff. This ensures consistency amongst all of its employees and creates certainty in succession planning for the airport.•This certainty allows it to plan ahead to find suitable replacements for workers who leave or are coming up to retirement.•It allows the Respondent to avoid the need to terminate an employment contract in situations which are humiliating for workers by reasons of their advanced age, thus preserving their dignity and avoiding humiliation and the need to avoid costly disputes about capacity or underperformance.•Having a retirement age at 65 years allows it to free up positions so that younger workers can enter the Respondent workforce and have a defined career path where their ambitions can be realised. The lack of new young entrees to the airport would have an adverse effect not only on the catering department, but on all departments within the Respondent, especially critical ones like the fire service, security, ground services and customer service. This would not only have an effect on productivity but also on health and safety.•While it is accepted that the new contract did not contain a mandatory retirement clause, it is submitted that such a clause should be implied as it has been the accepted custom and practice of the Respondent since 1986 for employees to retire when they reach the age of 65, save in the most limited and exceptional of circumstances. The Complainant would have been aware, or ought reasonably to have been aware of this.McCarthy v HSE[2010] ELR 165;andSweeney v Aer Lingus Teo[2013] 24 ELR 162.•The two exceptions related to (i) an employee who worked in retail retired in July 2009 at age 65, approximately 11 months post her 65th birthday. This arose in exceptional circumstances due to operational requirements at that time as passenger numbers increased by 73,080 from 2007 to 2008 and (ii) an employee, who was compulsorily retired at age 65, was re-engaged on a fixed term contract in exceptional circumstances relating to work for a stand-alone capital runway overlay project and his salary was reclaimed from the Department of Transport.•The Respondent fully believes in creating promotional opportunities for more junior staff and its preference is always to promote from within. Job vacancies are posted internally first, as internal promotion is good for staff morale.•The sharing of employment opportunities is particularly relevant in the instance case as the Respondent is the main employer in the area at a time when employment opportunities in the area are limited.To free up jobs so that younger workers can enter to the workforce and younger workers have an opportunity for advancement / promotion.•The Respondent endeavours to establish a balanced age workforce to ensure motivation and dynamism are at the core of each department. This can be increased with the prospect of promotion within each department. The staff turnover rate for permanent employees is very low, average turnover rate from 2013 to present is 2.7%.**

In support of her contention that there were objective grounds for the imposition of a retirement age, Ms Fay relied upon a number of cases,viz.Palacios de la Villa v Cortefiel Services SA(Case c-411/05) [2007] ECR 1-8531wherethe Court of Justice accepted Spain's justification for a compulsory retirement age of 65, namely that retirement ages assisted in promoting employment for younger people, particularly in difficult economic circumstances. Similarly, inDomnica Petersen v Berufungsausschuss fur Zahnarzte fur den Bezirk Westfalen-Lippe(Case c-341/08) [2010] ECR 254the Court of Justice appeared to accept that sharing out of employment between the generations (in this case through the forced retirement at 68 of the exercise of the activity of a public panel dentist in Germany) was not precluded by Article 6(1) if, taking into account the situation in the labour market concerned, the measure was appropriate and necessary for achieving that aim.

InRosenbladt v Ollerking Gebaudereinigungsge GmbIta referral concerning a provision for compulsory retirement at age 65 in a collective agreement for the commercial cleaning sector, the Court of Justice held that the aims of sharing employment between the generations, making it easier for younger workers to find work, particularly, at a time of chronic unemployment and not requiring employers to dismiss employees on grounds of incapacity, which might be humiliating, were in principle capable of objectively and reasonably justifying a difference in treatment on grounds of age.

Also,John Roche v Complete Bar SolutionsDEC-E2013-197where similar arguments regarding certainty in business planning and encouraging staff morale by using consequential vacancy as an internal promotion opportunity was accepted by the Equality Tribunal as justifying a retirement age of 65 in respect of the Respondent's business servicing equipment in licenced premises.

Evidence

Mr Eoin Flanagan, HR Manager:

Oral sworn evidence was given by Mr Eoin Flanagan, HR Manager since 2014, gave evidence on behalf of the Respondent. He said that while the Respondent does not have a policy on retirement age, the custom and practice had been that all employees retire at age 65 years. He said that it was "a given" that employees retire at 65 years. He said that all contracts of employment for all new employees state a retirement age of 65 years.

Mr Flanagan said that the Complainant was invited to attend all retirement functions of employees who retired. He referred to the two exceptions and said that there were exceptional circumstances in those cases. The first was kept on due to the significant increase in the volume of passengers at the time and the second was brought back from retirement to undertake a special project (upgrade of a runway), which was funded externally.

Mr Flanagan said that approximately half of the Respondent's employees are on full time contracts and the remainder are on part time contracts. All vacancies are advertised internally as the Respondent has a policy to promote from within. He outlined for the Court the various roles within the airport, i.e. those in critical functions and those in commercial/retail functions and number of employees in each role. He stated that there was interchangeability within the roles within each of the functions.

In cross examination, Mr Flanagan said that the Complainant was replaced by a person on an "if and when" contract, a part time casual contract on a fixed term basis, renewable every six months. He was placed on the new entrants' scale which is a five point scale. Mr Flanagan said that he was not given a permanent contract as it is the Respondent's policy for new starters to be put on a part time casual contract. Where such contracts are renewed for a period of four years then employees are given a contract of indefinite duration. All new contracts since 2014 now contain reference to a retirement age of 65 years. However, Mr Flanagan told the Court that as the Complainant's replacement is on a fixed term contract, it does not contain such a reference.

Mr Flanagan said that the Complainant's job was not advertised internally; instead his replacement was recruited into the job having submitted a CV to the Respondent at an earlier stage. As he was employed elsewhere at the time, he did not commence employment with the Respondent until 16 May 2016 and in the meantime the Complainant's hours were distributed among other employees.

Mr John McCarthy, Operations and Commercial Manager

Mr John McCarthy, Operations and Commercial Manager had previously been employed as a Unit Manager with Campbell Catering based at the Airport. Prior to the transfer in 2003, he became an employee of the Respondent. He then became responsible for the pending arrival of catering staff to the airport in 2003. He said that it was clear that 65 years was the retirement age in Campbell Catering and in the airport that would have been known. He said that during the negotiations with SIPTU, the issue was never raised.

Mr McCarthy said that with 14 departments across the airport it is important to have cohesion; therefore a common retirement age is required. He said that as the airport is very heavily regulated it suits to have a retirement age of 65 years and the Respondent has been operating on that basis for the past 10 years.

The Law Applicable.

Section 6(1) of the Employment Equality Acts 1998 and 2004 (the Act) provides, in relevant part, as follows: -

- **"(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances discrimination shall be taken to occur where—**
    - **(a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the 'discriminatory grounds')which—(i) exists,(ii) existed but no longer exists,(iii) may exist in the future, or(iv) is imputed to the person concerned,**

Section 34(4) of the Act provides for certain savings and exceptions relating to the family, age and disability grounds. Subsection (4) of that Section provides: -

- **(4) Without prejudice to subsection (3), it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees.**

Subsection (3) deals with occupational benefit schemes and is of no relevance to the issues arising in this case.

The Act gave effect in domestic law to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Directive). Recital 14, 25 and Articles 2 (5), 4(1) and 6 (1) of the Directive are of particular relevance to the instant case.

Recital 14 provides: -

- **"This Directive shall be without prejudice to national provisions laying down retirement ages."**

Recital 25 provides: -

- **The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.**

Article 4(1) of the Directive provides as follows

- **"Notwithstanding Article 2(1)and 2(2),Member States may provide that a difference in treatment which is based on a characteristic referred to in Article 1 shall not constitute discrimination where, by nature of the particular occupational activities concerned or of the context in which they are carried out, such acharacteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."**

Article 6 (1) of the Directive provides: -

- **Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.**

Issues for Consideration by the Court

- **Existence of a contractual retirement age**

Section 34(4) of the Act,prima facie,allowed the Respondent to fix a retirement age without contravening the prohibition of discrimination on grounds of age. The jurisprudence of the CJEU on the circumstances in which compulsory retirement is saved by Article 6 of the Directive is relevant only if the Court finds that a retirement age was in fact fixed by the Respondent and that the retirement age applied to the Complainant.

InEaragail Eisc Teoranta v Richard LettEDA1513 the Court held that as a matter of general principle, a termination of employment by way of retirement should be distinguished from a dismissal on grounds of age. A retirement occurs where the employment comes to an end pursuant to a condition of employment which limits an employee's tenure to the point at which they attain a specified age. It held that a term of employment regarding a retirement age, within the provision of Section 34 (4) of the Act, can be provided in an employee's conditions of employment either expressly or by implication, or it can be provided by incorporation where some other document or instrument, of which the employee had notice, can be read in conjunction with the formal contract of employment. The Court further accepts that an employer's employment policy in relation to retirement can take effect as a contractual condition of employment which is,prima facie,protected by Section 34(4) of the Act. However, in the Court's view that could only arise where the policy is promulgated in such a manner that the employees to whom it applies either knew, or ought to have known, of its existence.

On that point the judgment handed down by Hedigan J inMcCarthy v HSE[2010] 21 ELR 165 is instructive. In that case a public servant sought to challenge a decision of the HSE requiring her to retire at age 65. The HSE, in common with all public sector employments, maintained an employment policy requiring employees to retire at age 65, in line with certain statutory provisions. Ms McCarthy claimed that the policy did not apply to her because she had never been informed that she would be required to retire at that age and no such term was included in her contract of employment.

It is noteworthy that rather than relying on the existence of the policy,per se,the approach taken by the Court was to consider if the employer's policy on retirement took effect as an implied term in the applicant's contract of employment. Having reviewed the evidence and the submissions made by the parties Hedigan J said: -

- **"In addressing the substantive issues raised, the crux of the application lies in whether the retirement age of 65 could be viewed as having been implied into the contract as submitted by the respondent. Two alternative approaches were suggested utilising the "officious bystander test" on the one hand and implication by**

custom on the other. It is my opinion that in the circumstances of the case, the former provides a more suitable formula to determine whether such a term has been implied, although there is necessarily a large degree of overlap. The court is of the opinion that such a term should indeed be implied into the applicant's conditions of employment. The applicant is a highly intelligent woman who is legally qualified. It is difficult to accept that she had no knowledge of the retirement age applicable in that part of the public service in which she worked. Furthermore, irrespective of any actual knowledge of this fact, I would consider the dicta of Maguire P. in O'Reilly that anyone concerned "should have known of it or could easily have become aware of it" to be particularly apt in this case. Moreover in addition to the broad awareness of the retirement age among most working adults, the applicant may be deemed as "on notice" that there was an applicable retirement age by virtue of the superannuation scheme. The superannuation scheme, of which she was a member, made reference to the existence of a retirement age, and more specifically, a cut-off for contributions at age 65. I therefore find that such a term can be implied into the terms and conditions of employment."

Again inShirlaw v Southern Foundaries Ltd[1939] 2 K.B. 206, the Court held that a term as to retirement age may be implied in the contract by application of the so called "officious bystander" test. Here the test was set out in the following terms: -

- **"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying that if, while the parties were making the bargain, an officious bystander were to suggest some express provision for it in the agreement they would testily suppress him with a comment 'Oh of course'."**

A term can also be implied in the alternative, and somewhat overlapping, 'custom and practice' test adopted in this jurisdiction by Maguire P in

O'Reilly v Irish Press[1937] 71 I.L.T.R 194. Here it was held that the practice must be: -

- **"…so notorious, well-known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties…it is necessary in order to establish a custom of the kind claimed that it be shown that it was so generally known that anyone concerned should have known of it or easily become aware of it."**

It seems to the Court that this custom and practice test can appropriately be applied in considering if the policy of an employer took effect as a contractual term or a condition of employment. The terms of a pension scheme may also be relied upon as either implying a term as to retirement or by incorporating the terms of the scheme into the contract. A crucial consideration in addressing the question of incorporation or implication is whether the employee knew, or ought to have known, of the term contended for.

Findings of the Court

It is accepted that the Complainant's contract of employment with the Respondent did not contain any express term as to retirement age.The Respondent relied on the Campbell Catering contracts which stated:-

- **"the minimum age of employment is 18 years of age and employment shall not continue beyond the 65thbirthday."**

The Court notes that the terms and conditions of employment of those employees who transferred from Campbell Catering in 2003 were the subject of negotiations between the Respondent and SIPTU, and resulted in enhanced terms for the former, including the Complainant. These terms were eventually balloted upon and agreed in 2004. Each of the employees affected, including the Complainant were issued with new contracts of employment incorporating all the revised terms in October 2006. However, it contained no provision regarding retirement age, despite the Respondent having the opportunity to do so.

In 2010 the Respondent and the Union were before the Court under the Industrial Relations Acts, where the Union sought the introduction of a defined contribution pension scheme for hourly paid employees at the airport, in line with that in existence for management and salaried staff. The Court recommended the introduction of a defined contribution pension scheme which was duly introduced. This scheme provided for a normal retirement age of 65 years and was open to any employee interested in joining the scheme to opt into it. For reasons outlined to the Court, the Complainant decided not to join. Likewise the Court notes that despite having the opportunity to do so the Respondent did not revise the Complainant's contract to include the provisions of the pension scheme thus incorporating its terms into the contract.

The Court notes that the contract of employment issued to the Complainant's replacement does not contain a retirement age; however, it does make reference to the option to join the pension scheme.

The Court notes that the first retirement that occurred in the Respondent was in November 2006, after the Complainant transferred over to the Respondent and after he was supplied with new terms and conditions that had been the subject of negotiations between the Respondent and SIPTU and which he was required to ballot on. There have been 10 retirements since 2006, two of whom worked beyond their 65thbirthday due to exceptional circumstances.

Having regard to the all the circumstances, the Court cannot accept that the Complainant had knowledge of a retirement age of 65 years. The Respondent had ample opportunity to inform the Complainant of a requirement that he retire at age 65. No evidence was adduced of the Complainant having been so informed or having been provided with any document from which such a requirement could have been discerned. There was no express term in his conditions of employment requiring him to retire at age 65 years and, in the Court's opinion, no such term can be regarded as having been implied or incorporated on any of the accepted tests.

In these circumstances the Court must hold that the Respondent had not fixed a retirement age in respect of the Complainant and that he was dismissed because of his age. Therefore, the Court finds that the Respondent cannot avail of Section 34(4) of the Act. In such circumstances it is not necessary for the Court to consider Respondent's arguments of objective justification for a retirement age of 65 years.

Determination

For the reasons set out above, the Court finds that the Complainant herein was dismissed by the Respondent by reason of his age, and that this dismissal constituted an act of discrimination within the meaning of Section 6(2)(f) of the Act. Therefore the Respondent's appeal is disallowed.

Having been told that the Complainant was not seeking reinstatement, the Court determines that the appropriate form of redress is an award of compensation pursuant to Section 82(1)(c). Therefore the Court orders the Respondent to pay the Complainant the sum of €6,500 for the effects of the Act of discrimination.

The Decision of the Adjudication Officer is varied accordingly.

The Court so determines.

Signed on behalf of the Labour Court

Caroline Jenkinson

24 April 2017._____

MNDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Michael Neville, Court Secretary.

DWT11104 August 2, 2011

Terminal Four Solutions Limited (represented By Irish Business And Employers' Confederation)
- And -
Yinka Rahman

Case Details

Body
Labour Court

Date
August 2, 2011

Official
Brendan Hayes

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Co. Dublin

Decision/Case Number(s)
- DWT11104
- WTC/11/56
- R-090719-WT-10/DI

Note
Enquiries concerning this Determination should be addressed to John Foley, Court Secretary.

Employer Member
Mr Murphy

Worker Member
Ms Ni Mhurchu

SUBJECT:

1. Appealing against a Rights Commissioner's Decision r-090719-wt-10/DI.

BACKGROUND:

2. The Company provides enterprise web content management systems and solutions to medium and large sized organisations. The Complainant, Ms Yinka Rahman, worked as a Project Co-ordinator for Terminal Four Solutions Limited, the Respondent, from 18th August 2008 until 25th November 2009. Her normal hours of work were 9.00 a.m. to 5:30 p.m. Monday to Friday.

On March 19th 2010, Ms Rahman lodged a complaint with the Labour Relations Commission alleging breaches of Section 11, 12 and 13 of the Act by the Respondent in respect of her employment with Terminal Four Solutions Ltd. The Respondent rejected the complaints as untrue and unfounded.

A Rights Commissioner conducted an investigated into the complaints made. He rejected the complaints in respect of Sections 11 and 13 of the Act. He upheld the complaint under Section 12 of the Act and awarded the Complainant €1,750.00 in compensation for the denial of her rights under that Section of the Act.

It is this Decision that was appealed by the Respondent to the Labour Court in accordance with Section 28(1) of the Organisation of Working Time Act, 1997 on the 12th April, 2011. The Court heard the appeal on the 13th July, 2011, the earliest date suitable to the parties.

EMPLOYEE'S ARGUMENTS:

3. 1. The general practice was that Employees were free to take breaks as and when it was practical to do so. However, it was frowned upon if you took breaks when you were working on something important.

2. During my time working with the Company I was often required to work excessive hours without taking breaks.

COMPANY'S ARGUMENTS:

4. 1. The period from 20th September, 2009 to 25th November, 2009 can only be considered in this case as only contraventions that occurred during the six months prior to the referral which is dated 19th March, 2010 are at issue. At no stage during her employment did the Claimant raise any grievance that she was not getting her breaks as per Section 12 of the Act.

2. The Claimant referred numerous cases under various pieces of legislation. The records show that some of the allegations are untrue, this calls into question the veracity of her claim under Section 12 of the Act.

DETERMINATION:

This case comes before the Court pursuant to Section 28(1) of the Organisation of Working Time Act 1997 (the Act)The Labour Court considered the appeal on 13th July in accordance with the provisions of Section 28(1) of the Act.

The Law

Section 11 provides

- **An employee shall be entitled to a rest period of not less than 11 consecutive hours in each period of 24 hours during which he or she works for his or her employerSection 12 provides12(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes(2)An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes; such a break may include the break referred to in subsection (1)(3) The Minister may by regulations provide, as respects a specified class or classes of employee, that the minimum duration of the break to be allowed to such an employee under subsection (2) shall be more than 30 minutes (but not more than 1 hour)(4) A break allowed to an employee at the end of the working day shall not be regarded as satisfying the requirement contained in subsection (1) or (2)**

Section 13provides

13.—(1) In this section "daily rest period" means a rest period referred to insection 11

(2) Subject to subsection (3), an employee shall, in each period of 7 days, be granted a rest period of at least 24 consecutive hours; subject to subsections (4) and (6), the time at which that rest period commences shall be such that that period is immediately preceded by a daily rest period

(3) An employer may, in lieu of granting to an employee in any period of 7 days the first-mentioned rest period in subsection (2), grant to him or her, in the next following period of 7 days, 2 rest periods each of which shall be a period of at least 24 consecutive hours and, subject to subsections (4) and (6)

a) if the rest periods so granted are consecutive, the time at which the first of those periods commences shall be such that that period is immediately preceded by a daily rest period, and

b) if the rest periods so granted are not consecutive, the time at which each of those periods commences shall be such that each of them is immediately preceded by a daily rest period

(4) If considerations of a technical nature or related to the conditions under which the work concerned is organised or otherwise of an objective nature would justify the making of such a decision, an employer may decide that the time at which a rest period granted by him or her under subsection (2) or (3) shall commence shall be such that the rest period is not immediately preceded by a daily rest period

(5) Save as may be otherwise provided in the employee's contract of employment

- **(a) the rest period granted to an employee under subsection (2), or**
  (b) one of the rest periods granted to an employee under subsection (3) shall be a Sunday or, if the rest period is of more than 24 hours duration, shall include a Sunday

Section 25 of the Act provides

25.—(1) An employer shall keep, at the premises or place where his or her employee works or, if the employee works at two or more premises or places, the premises or place from which the activities that the employee is employed to carry on are principally directed or controlled, such records, in such form, if any, as may be prescribed, as will show whether the provisions of this Act are being complied with in relation to the employee and those records shall be retained by the employer for at least 3 years from the date of their making

Complainant's position

(2) The Minister may by regulations exempt from the application of subsection (1) any specified class or classes of employer and regulations under this subsection may provide that any such exemption shall not have effect save to the extent that specified conditions are complied with

(3) An employer who, without reasonable cause, fails to comply with subsection (1) shall be guilty of an offence

(4) Without prejudice to Subsection (3), where an Employer fails to keep records under Subsection (1) in respect of his or her compliance with a particular provision of this Act in relation to an Employee, the onus of proving, in proceedings before a Rights Commissioner or the Labour Court, that the said provision was complied with in relation to the Employee shall lie on the Employer

Complainant's case

The Complainant submitted that in the course of her employment with the respondent she was often required, contrary to Section 12 of the Act, to work in excess of 4.5 hours without a break. She said that Employees were free to take breaks but it was frowned upon if one did so whilst working on an important task.

She submitted that she was required to travel long distances to meet clients and that time spent travelling to and from such meetings was not considered working time. She said this travel regularly resulted in her not being in a position to avail of her daily rest period of 11 hours between successive shifts contrary to Section 11 of the Act.

Respondent's position

The Company policy on breaks was that all staff were entitled to a 45 minute break for lunch. This policy was outlined in Complainant's contract of employment and in the Office Procedures Manual that was supplied to all staff in the Company.

The Company had a relaxed policy towards staff taking breaks. A fully equipped kitchen was provided and there was in practice no restriction on staff going to the kitchen to make tea or coffee etc at any time during the day.

The Complainant kept records of the time she spent on company assignment that showed she took her lunch break every day and indeed exceeded the 45 minute break on a regular basis.

These records do not record the short tea and coffee breaks that the Complainant regularly availed of. In this regard Ms Laura Murphy, the Complainant's manager, told the Court that she distinctly remembers the Complainant leaving her desk to take tea/coffee breaks during the day and to take her lunch at a time of her own choosing each day.

Whilst the Employer did not keep records in the format required by Section 25 of the Act the evidence available to the Court is sufficient to discharge the burden of proof of compliance with the Act placed on the Employer by that Section.

Findings of the Court

The Respondent has admitted that it did not, contrary to Section 25 of the Act, keep records in the prescribed form "as will show whether the provisions of this Act are being complied with in relation to the employee"

Consequently, pursuant to Section 25 (4) of the Act "the onus of proving, in proceedings before a rights commissioner or the Labour Court, that the said provision was complied with in relation to the employee shall lie on the employer."

The Court finds that the records of work performed by the complainant submitted to the Court by the Employer are not sufficient to discharge the onus of proving compliance with the provisions of the Act. Those records were

•not designed to record the Complainant's time at work

•are not consistent with other records of the Employees movements provided to the Court by the Employer

•not signed or otherwise approved by the Respondent

•internally inconsistent in some respects

Consequently they cannot be relied upon to prove compliance with the provisions of the Act.

The Court further finds that the evidence by Ms Murphy was not sufficiently precise to enable discharge the obligation of proving compliance with the provisions of the Act.

The Court finds that the evidence of the Complainant regarding the alleged breaches of Sections 11 and 13 of the Act established no prima facie case for consideration by the Court.

Section 11

The Court accepts the evidence of the Company that there was no occasion on which the Complainant was denied her entitlement to 11 consecutive hours rest in any period of 24 hours. The one occasion contended for by the Complainant did not fall within the statutory time limit for bringing a complaint pursuant to Section 11 of the Act.

Section 13

The Complainant told the Court that she was not required to work weekends. Consequently no breach of Section 13 of the Act arises in this case.

Section 12

The Court finds that on the balance of probabilities there were occasions on which the complainant was not in a position to take her rest breaks pursuant to Section 12 of the Act. The Court further finds that the burden of proving compliance with this Section of the Act has not been discharged by the Respondent either by way of the documentation provided to the Court or by the submissions made to it on the Respondent's behalf or by the evidence presented to it by the company representatives Ms Dempsey and Ms Murphy.

Accordingly the Court upholds the complaint under Section 12 of the Act.

Remedy

Taking all of the evidence into account and the Decision of the ECJ in relation to the level of award that should be made in cases where a personal right established under a Directive of the European union has been denied to an individual, cf(C – 14/83 Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891),Court finds that the Rights Commissioner's Decision in this case should be upheld.

Signed on behalf of the Labour Court

Brendan Hayes

2nd August, 2011_____

JFDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to John Foley, Court Secretary.

EDA1511 June 30, 2015

Travelodge Management Ltd (represented By Mc Cartan & Burke Solicitors)
- And -
Sylwia Wach (represented By Services Industrial Professional Technical Union)

Case Details

Body
Labour Court

Date
June 30, 2015

Official
Kevin Duffy

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 83, EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

County
Co. Dublin

Decision/Case Number(s)
- EDA1511
- ADE/14/37

Note
Enquiries concerning this Determination should be addressed to Ceola Cronin, Court Secretary.

Employer Member
Ms Cryan

Worker Member
Ms Tanham

SUBJECT:

1. Appeal Under Section 83 Of The Employment Equality Acts, 1998 To 2011

BACKGROUND:

2. The Worker appealed the Decision of the Equality Officer to the Labour Court on the 19th September, 2014. A Labour Court hearing took place on the 27th January, 2015. The following is the Court's Determination:-

DETERMINATION:

This is an appeal by Travelodge Management Limited against the decision of the Equality Tribunal in a claim of discrimination and victimisation by Sylwia Wach (represented by SIPTU). The Complainant succeeded at first instance and was awarded total compensation in the amount of €63,000. There is a cross appeal by the Complainant which relates to an unsuccessful application made to the Equality Officer to amend the name of the Respondent.

The Respondent did not appear at the hearing before the Equality Officer nor did it file a submission.

The claims are made on grounds of gender, family status and race. The Complainant is of Polish nationality

As is the normal practice of the Court the parties are referred to herein as they were at first instance. Hence Ms Wach is referred to as the Complainant and Travelodge Management Limited is referred to as the Respondent.

There is a net issue in the case, namely, whether the Respondent employed the Complainant at any time material to her claim.

Position of the parties

The Respondent contends that the Complainant was employed by a company named Smorgs (Ireland) Limited. That company has since transferred its business to a company named Smorgs ROI Management Limited. Travelodge Management Limited is a company incorporated under the Companies Acts which has, since these proceedings commenced, changed its name to Smorgs Property Holdings Limited.

Evidence was given by Mr Richard O'Sullivan, who is a director of Smorgs ROI Management Limited in which he told the Court that the aforementioned company is the Complainant's employer. The Court was told that at the time material to these claims her employer was Smorgs (Ireland) limited. That company carried on business under the registered business name of 'Travelodge'. The business of Smorgs (Ireland) Limited was transferred to Smorgs ROI Management Limited and the Complainant's employment transferred to that company pursuant to the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I.131/2003)

The Complainant's cross appeal relates to the refusal of the Equality Tribunal to amend the name of the Respondent. It appears from the decision of the Equality Officer that the Complainant's representative contended that since the initiation of the claim the Respondent had changed its name and that it transpired that the Respondent was a subsidiary of a larger company.

The Equality Officer found that the Respondent was correctly identified as the Complainant's employer at the time the complaint arose and that it was her employer within the meaning of the Acts (see pars 4.1 and 4.2 of the decision)

SIPTU, on behalf of the Complainant, told the Court that all of the employment related documentation provided to the Complainant gave the name of her employer as 'Travleodge', or 'Travel Lodge'. Following a search of the Companies Registrations Office the Complainant's representative identified a company named Travelodge Management Limited, the Respondent herein, which, it was assumed, was the legal designation of the employer.

It appears that sometime in 2011 a colleague of the Complainant, in the same employment, had occasion to initiate proceeding against her employer pursuant to the Organisation of Working Time Act 1997and impleaded the Respondent. SIPTU acted for the Complainant in that case. The Respondent engaged with the Labour Relations Commission and attended a hearing before a Rights Commissioner in that complaint without objection. The matter was settled between the Respondent and the Complainant in that case.

The Complainant had occasion to initiate proceedings against her employer in 2012 pursuant to the Maternity Protection Act 1994 and the Organisation of Working Time Act 1997. The Respondent, Travelodge Management Limited t/a Travelodge Waterford was impleaded as the employer in that case. The Respondent was professionally represented in relation to that case and its representative engaged with the Union and the LRC, on behalf of the Respondent, as the Complainant's employer without demur.

A settlement was reached in that case the terms of which were reduced to writing in a document dated 5thNovember 2012. The document is headed"Settlement Agreement between Travelodge Management Limited and Sylwia Wach" It goes on to record that Travelodge Management Limited agreed to pay the Complainant compensation for not having received a premium for Sunday working and that the Complainant agreed to withdraw her claim under the Act of 1997 in consideration of that payment.

SIPTU further pointed out that the Respondent corresponded with the Equality Tribunal in respect of the within claim and did so without raising any objection to being impleaded as the Complainant's employer.

The Union relied on s.88 of the Act which provides in relevant part as follows: -

- **(2) By notice in writing to the parties, the Director or, as the case may be, the Chairman of the Labour Court may correct any mistake (including an omission) of a verbal or formal nature in a decision or determination under this Part.**
  (3) In this section "the parties "means—
  - **(a) in the case of a decision under section 79, the complainant and the respondent as defined in section 77(4),**
    (b) in the case of a determination under section 83, the parties to the appeal,

    (c) in the case of a decision under section 85, the Authority and the persons referred to in subsection (2)(b) and (c) of that section, and

    (d) in the case of a decision under section 86 or a determination under section 87, the complainant and the respondents, within the meaning of section 86.

  (4) If any person who participated in an investigation under section 79 or 86 is not correctly identified in the resulting decision or determination, the correction of that error shall be regarded as falling within subsection (2).

Discussion

Records obtained from the Companies Registration Office show that the Business Name 'Travelodge' was designated to Smorgs (Ireland) Limited on 1stJanuary 2003.

The Respondent, in its appeal, seeks to have the decision of the Equality Tribunal set aside as having been made against an entity that was not the Complainant's employer. In its cross-appeal the Union seeks, in effect, to have the name of the Respondent amended to Smorgs (Ireland) Limited, or to Smorgs ROI Management Limited. The Court was informed that the Complainant has now initiated fresh proceedings before the Equality Tribunal in respect of this matter against the aforementioned company or companies.

The Complainant appears to have applied to the Equality Officer to amend the proceedings so as to correctly name the intended Respondent. That application was grounded on a belief that the Respondent herein had changed its name or that it is a subsidiary of another company. The Equality Officer correctly held that in either case a change in the name of the Respondent for the purposes of his investigation was unnecessary.

The Respondent failed to appear before the Equality Tribunal. But that was not because it regarded itself as a stranger to the proceedings. Rather, it claims that this arose through inadvertence.

The Court has no doubt that the Complainant named the wrong Respondent in her claim as a result of abona fidemistake. That state of affairs may well have been compounded by the fact that the Respondent appears to have held itself out as the Complainant's employer in earlier proceedings. Moreover, the Respondent accepted proceedings in the within case and failed to deny that it was the Complainant's employer until the initiation of this appeal, some 30 months after the claim was first initiated.

The only evidence before the Court is that the Complainant was never employed by Travelodge Management Limited. In the absence of any evidence to the contrary that must be accepted. Consequently, the only question that the Court must decide is whether the entity that is the actual employer can be substituted for the entity impleaded in the claim.

The Complainant relies on s.88 of the Act in urging the Court to amend the proceedings. In the Court's view s.88 is not intended to deal with a situation such as that which arose in this case. That section is intended to enable the Court (or the Equality Tribunal) to amend a determination or a decision, as the case may be, where an error of a formal or verbal nature appears on the face of a written determination or decision. That can include a formal or verbal error in the name of a party that participated in the investigation.

What is in issue in this case does not involve a formal or verbal error. Nor does the Complainant's application relate to a Determination issued by the Court. The wrong Respondent was impleaded and the Union's application is to amend the claim by substituting another legal person for the Respondent cited. In the Court's view that goes beyond was intended by s.88 of the Act.

The decision of the High Court inCounty Louth VEC v Equality Tribunal[2009] IEHC 370 is a seminal case on the question of when proceedings before a statutory tribunal can be amended. In that case McGovern J set out the following principle of law: -

- **If it is permissible in court proceedings to amend pleadings where the justice of the case requires it, then, a fortiori, it should also be permissible to amend a claim as set out in a form such as an originating document before a statutory tribunal, so long as the general nature of the complaint remains the same.**

Theratioof that case appears to be that the procedures adopted by statutory tribunals in relation to the amendment of non-statutory forms used in the initiation of claims should not be more stringent than those that apply in the ordinary courts. That is in line with the generally accepted principle that statutory tribunals, such as this Court, should operate with the minimum degree of procedural formality consistent with the requirements of natural justice. On that point the decision of the Supreme Court inHalal Meat Packers (Ballyhaunis) Ltd v Employment Appeals Tribunal[1990] I.L.R.M 293 is relevant. Here Walsh J stated, albeit obiter, as follows: -

- **This present case indicates a degree of formality, and even rigidity, which is somewhat surprising. It is a rather ironic turn in history that this Tribunal which was intended to save people from the ordinary courts would themselves fall into rigidity comparable to that of the common law before it was modified by equity.**

It is also relevant that the Court of Justice of the European Communities held in Case C-326/96Levez v TH Jennings (Harlow Pools) Ltd[1998] E.C.R. I-7835 (at par 18) and in Case 268/06IMPACT v Minister for Agriculture and Food[2008] 19 ELR 181 (at par 46) that the well-established principle of equivalence requires that the detailed procedural rules governing actions for safeguarding an individual's rights under Union law must be no less favourable than those governing similar domestic actions

Order 15, Rule 13 of the Rules of the Superior Courts (S.I. No.15 of 1986) makes provision for the amendment of proceeding initiated in the High Court in which parties are improperly named. It provides: -

- **"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added...."**

It could cogently be argued that in keeping with the decision inCounty Louth VEC v Equality Tribunal, and by application of the principle of equivalence, the Court should not adopt a more stringent stance in relation to the substitution of parties that is available in the High Court pursuant to that rule.

The authorities on the application of O.15 r.13 of Rules of the Superior Court were considered by Kearns P. inSandy Lane Hotel Limited v Times Newspapers Limited[2011] 2 I.L.R.M 139. While that case was ultimately dealt with by application of O.15 r 2 of the Rules, (which concerns adding a person as plaintiff) in the course of his judgment the President conducted an extensive and instructive analysis of the case law on the application of O.15 r 13.

Having considered the judgment of Geoghegan J. in

Kennemerland Group v Montgomery[2000] 1 I.L.R.M. 370, the President referred to a long established principle that a court will not add a defendant under Ord.15, r.13 if the action against that party is quite clearly statute barred
Later in the course of his judgment the President stated : -

- **Order 15, r.13 concerns the procedure for adding, substituting or striking out a party. The names of any parties may be added, whether plaintiffs or defendants, who ought to have been joined, or "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter".**
  There are, however, two important distinctions between Ord.15, r.2 and Ord.15, r.13. First, in relation to r.13, it is not necessary for the applicant to establish that a bona fide mistake occurred. Secondly, where a court makes an order pursuant to Ord.15, r.13 the proceedings against the new party are deemed to have commenced only on the date of the making of the order adding that party. This may, therefore, have significant implications concerning the computation of the relevant limitation period in accordance with the Statute of Limitations 1957 (as amended). Ord.15, r.2 does not contain such a provision, however, it nonetheless contains the requirement that the mistake be one of a bona fide nature.

From its reading of that judgment it appears to the Court that while there are some apparently divergent decisions on this subject, the preponderance of authority is that the Superior Courts will not add or substitute a party to proceedings where the limitation period in the action has expired as against that party. It appears to the Court that even if it had a discretion analogous to that available to the Superior Courts under O.15 r13 of the Rules of the Superior Courts, (and the Court makes no such finding) it would not be appropriate to exercise that discretion in this case. The applicable statutory time-limit prescribed is that prescribed by s.77(5) of the Act. The section provided that a complaint under the Act must be referred to the Equality Tribunal within a period of six months from the occurrence of the event giving raise to the complaint, with a possibility of an extension of a further six months for reasonable cause shown.

Prima facie, the time limit has passed in this case but whether that is or is not the case would depend on other considerations. In that regard it is noted that the Complainant has instituted fresh proceedings against her actual employer. It will be a matter for the Equality Tribunal in considering that claim to decide whether the claim is statute barred as against the Respondent in that case. It would be inappropriate to pre-empt the decision of the Equality Tribunal on that point, which can be appealed by either party to this Court.

Outcome

It is clear on the only evidence available that Travelodge Management Limited, the Respondent herein, was not the Complainant's employer at any time material to this claim. For all of the reasons set out herein the Court has come to the conclusion that, notwithstanding thebona fidesof the mistake in this case, and the other circumstances referred to in the course of this Determination, the Court it cannot substitute Smorgs (Ireland) Limited or Smorgs ROI Management Limited for the Respondent against which the case was taken.

In these circumstances the Court considers that it has no option but to find that the Respondent herein has no liability to the Complainant under the Act. Consequently the decision of the Equality Tribunal cannot stand and must be set aside.

Determination

The Respondent's appeal is allowed and the decision of the Equality Tribunal is set aside.

Signed on behalf of the Labour Court

Kevin Duffy

30th June, 2015_____

CCChairman

NOTE Enquiries concerning this Determination should be addressed to Ceola Cronin, Court Secretary.

Nutweave Ltd T/a Bombay Pantry (represented By Paramount Hr)
- And -
Dinesh Kumar (represented By Amorys Solicitors)

Case Details

Body
DWT1537 Labour Court

Date
April 27, 2015

Official

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Co. Dublin

Decision/Case Number(s)
- DWT1537
- WTC/14/149
- R-139806-WT-13/JT

Note
Enquiries concerning this Determination should be addressed to Helen Tobin, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Ms Tanham

SUBJECT:

1. Appealing Against A Rights Commissioner's Decision r-139806-wt-13/JT

BACKGROUND:

2. A Rights Commissioner hearing took place on the 23 April, 2014, and a Decision was issued on the 16 September, 2014.

The Worker appealed the Decision of the Rights Commissioner to the Labour Court on the 23 October, 2014, in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. A Labour Court hearing took place on the 8th April, 2015.

DETERMINATION:

This is an appeal by Dinesh Kumar (hereafter the Claimant) against the decision of a Rights Commissioner in his claim against his former employer, Nutweave Limited t/a Bombay Pantry (hereafter the Respondent), under the Organisation of Working Time Act 1997 (the Act). The claim relates to an alleged failure of the Respondent to afford the Claimant breaks in accordance with s.12 of the Act.

The claim was taken before the Rights Commissioner in conjunction with a claim under s. 20(1) of the Industrial Relations Act 1969 and both matters were heard together. A single "recommendation" issued. The Rights Commissioner did not expressly make a decision on the claim under the Act in terms required by s.27(2) of the Act. However the Court assumes that what the Rights Commissioner erroneously referred to as his 'recommendation'was intended to constitute his decision.

Period covered by the claim

The claim was presented to the Rights Commissioner in November 2013. Consequently the period cognisable for the purposes of the case is between April 2013 and November 2013.

Position of the Parties

It was the Claimant evidence that he did not obtain breaks during the time in issue. He told the Court that he prepared food which he consumed while continuing to work. He said that he rarely received more than 5 minutes break.

Evidence on behalf of the Respondent was given by Mr Ray McGuinness who was the Claimant's manager during the material time. He told the Court that the Claimant was employed at this time as a curry chef. He alternated in that position with another chef. According to Mr Mc Guinness, employees of the Respondent, including the Claimant, generally started work at 3pm. They then worked up to 10pm or 10.30 pm depending on the day of the week. Normally a meal was prepared around 4pm and all employees took a break together at around 4.30pm. The premises in which the Claimant was employed is a take- out restaurant and it remained open during that period. If a customer called to the premises they would have to be attended to. This could involve an interruption in the break. The Court was told by Mr McGuinness that if the Claimant's break was interrupted he would obtain a compensatory break at the end of his shift.

The Respondent accepted that during the period cognisable by the within claim it did not maintain records of breaks in accordance with s.25 of the Act.

The Law

Section 12 of the Act, the application of which is in issue in this case, provides as follows: -

- **12.—(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.**
  (2) An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes; such a break may include the break referred to in subsection (1).

  (3) The Minister may by regulations provide, as respects a specified class or classes of employee, that the minimum duration of the break to be allowed to such an employee under subsection (2) shall be more than 30 minutes (but not more than 1 hour).

  (4) A break allowed to an employee at the end of the working day shall not be regarded as satisfying the requirement contained in subsection (1) or (2).

For the purposes of the Act a break is a period which the worker knows in advance will be uninterrupted, which is not working time and which he or she can use as he or she pleases (see dicta to that effect of Peter Gibson LJ inGallagher v Alpha Catering services t/a Alpha Flight Services[2005] I.R.L.R.102).

The expression "working time" is defined by s.2(1) of the Act as follows: -

- **working time" means any time that the employee is—**

- **(a) at his or her place of work or at his or her employer's disposal, and**
  (b) carrying on or performing the activities or duties of his or her work,

In case C-302/98Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana[2000] E.C.R. I-7963 the CJEU pointed out that a period during which a worker is required to resume his or her duties immediately he or she is required to do so is to be regarded as working time.

The provisions of s.25 of the Act are also relevant in considering this claim. That section provides: -

- **.—(1) An employer shall keep, at the premises or place where his or her employee works or, if the employee works at two or more premises or places, the premises or place from which the activities that the employee is employed to carry on are principally directed or controlled, such records, in such form, if any, as may be prescribed, as will show whether the provisions of this Act are being complied with in relation to the employee and those records shall be retained by the employer for at least 3 years from the date of their making.**
  (2) The Minister may by regulations exempt from the application of subsection (1) any specified class or classes of employer and regulations under this subsection may provide that any such exemption shall not have effect save to the extent that specified conditions are complied with.

  (3) An employer who, without reasonable cause, fails to comply with subsection (1) shall be guilty of an offence.

  (4) Without prejudice to subsection (3), where an employer fails to keep records under subsection (1) in respect of his or her compliance with a particular provision of this Act in relation to an employee, the onus of proving, in proceedings before a rights commissioner or the Labour Court, that the said provision was complied with in relation to the employee shall lie on the employer.

- **The Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations 2001 (S.I. 473 of 2001) prescribes the form in which records are to be maintained for the purpose of subsection (1) of that section.**
  It is accepted by the Respondent that it did not keep records in the statutory form during the period cognisable in this case. Consequently, by operation of subsection (4) of s.25 the Respondent bears the burden of proving compliance with s.12 of the Act in the period with which the Court is concerned.

Conclusion

- **Taking the evidence tendered on behalf of the Respondent at its height the following facts emerge: -**
  - **•The Claimant commenced work at 3pm each afternoon. He had a break at or about 4.30pm. He then continued working until 10pm or 10.30 pm.•During his break he was required to resume his duties if a customer called to the restaurant and required service.**
    •He received a further break at the end of his shift

Section 12(1) provides that an employee shall not be required to work for a period of more than 4.5 hours without a break of at least 15 minutes. Assuming that the Claimant had a 15 minute break at 4.30 (and for reasons that follow the Court does not accept that he had) he was then required to work for a period of at least 5 hours 15 minutes without a break. Section 12(4) makes it clear that a break given at the end of a shift does not meet the requirements of subsection (1) of that section.

It is also clear that during the period that purported to be a break at 4.30pm the Claimant was at the Respondent's disposal and could be required to resume his duties if so required. That could not amount to a break within the statutory meaning ascribed to that term.

Outcome

For the reasons set out herein the Court is satisfied that the within claim is well-founded. Accordingly, the decision of the Rights Commissioner cannot stand and the Claimant is entitled to succeed in his appeal.

Redress

The Court considers that the appropriate mode of redress is an award of compensation. The Court measures the amount of compensation that is fair and equitable in all the circumstances at €2,000. The Claimant is awarded compensation in that amount.

Disposal

The decision of the Rights Commissioner is set aside and substituted with the terms of this Determination.

Signed on behalf of the Labour Court

Kevin Duffy

27th April 2015_____

HTChairman

NOTE Enquiries concerning this Determination should be addressed to Helen Tobin, Court Secretary.

EED045 March 8, 2004

Citibank (represented By Mr Mark Connaughton S.C., Instructed By Matheson Ormsby Prentice - And - Massinde Ntoko (represented By Mr Conor Power B.L., Instructed By The Equality Authority)

Case Details

Body
Labour Court

Date
March 8, 2004

Official
Kevin Duffy

Legislation
- SECTION 77, EMPLOYMENT EQUALITY ACT, 1998

Decision/Case Number(s)
- EED045
- ED/01/13

Note
Enquiries concerning this Determination should be addressed to Madelon Geoghegan, Court Secretary.

Employer Member
Mr Carberry

Worker Member
Mr. Somers

SUBJECT:

1. Alleged unfair dismissal under Section 77 of the Employment Equality Act 1998.

BACKGROUND:

2. The complainant was employed by the Company from the 17th of August, 2000 until the 27th of November, 2000 when he was dismissed. He claims he was discriminated against on grounds of race. He referred the complaint to the Labour Court in accordance with Section 77 (2) of the Employment Equality Act, 1998. A Labour Court hearing took place on the 10th of February, 2004.

DETERMINATION:

Mr Massinde Ntoko (the complainant) is a native of the Democratic Republic of the Congo. He was assigned to work for Citibank (the respondent) on the 17th August 2000 by an employment agency, CPL Resources Ltd. His employment was terminated on the 27th November 2000 for allegedly making a personal telephone call on the respondents telephone system. The complainant contends that his dismissal was on grounds of his race and that this constitutes unlawful discrimination in terms of Section 6 of the Employment Equality Act 1998, (the Act) contrary to Section 8 of the Act.

Submissions:

The submissions of the party, which were supported by oral evidence, can be summarised as follows: -

The Complainants Case:

The complainant told the Court that he was employed in the sorting and distribution of post. He was referred to Citibank by CPL because he spoke French. He told the Court that he was on three months probation and that he had been advised by CPL that his performance was satisfactory and that he would be retained by the respondent.

On the evening of the 24th November the complainant received a telephone call on his mobile phone. He told the caller that he would ring them back at 5:30pm, which was after working hours. He did not have access to a phone at his own work station but he asked a colleague, Mr Gregory Pepin, for permission to make the call from his phone. The respondent had a log in system in operation on its phone system and Mr Pepin's phone was already logged in. He told the complainant he could make the phone call and showed him how to log out of the system when he completed his call.

While the complainant was engaged in making the call he was approached by Ms Kathy Olesen, a manager with the respondent, who asked him what he was doing. He responded that he was making a private telephone call. Ms Olesen informed him that it was the respondent's policy that employees were not allowed use the phones for private purposes. He then terminated the phone call and logged out. The complainant told the Court that two other employees were engaged in making private telephone calls at that point and that this was not commented on in any way by Ms Olesen. On the following Monday morning, 27th of November, he was approached by Ms Jean Fitzhenry, the assistant manager, who informed him that Ms Olesen was furious over the incident on the previous Friday and that he was being dismissed.

The complainant told the Court that at no stage had he ever been informed that it was contrary to company policy for employees to make private phone calls. He said he had never received any induction training from the respondent nor had he been given an employee handbook or details of the respondent's disciplinary code. He did not believe that he was doing anything wrong in making a personal telephone call and that he understood that it was permissible to do so provided the call was made outside of working hours. The call was international and lasted for 24 minutes. He said that he was not given any opportunity to explain the circumstances in which he came to make the call or to make any representations in his own defence.

Ms Olivia Farrell who was employed by the respondent as a Customer Relations Representative at the material time gave evidence before the Court. She said that in November 2000 she became aware that the complainant had been dismissed for making a personal phone call. She and other colleagues were outraged at what had occurred. Ms Farrell told the Court that a number of staff had stopped work in protest at the complainant's dismissal and demanded to speak with the manager responsible, Ms Olesen. Initially Ms Olesen refused to meet with them but after they held a work stoppage a meeting was convened in the conference room.

Ms Farrell went on to tell the Court that a number of employees, herself included, had told Ms Olesen that they were all guilty of making personal phone calls and that it was unfair to single out the complainant for having done so. The Witness had also heard Mr Pepin tell Ms Olesen that he had given the complainant permission to use his phone and that if the complainant was to be disciplined so also should he. According to Ms Farrell, Ms Olesen told the meeting that she had "turned a blind eye" to people using the phone for personal reasons but would not do so again. Those present pleaded with her to give the complainant a second chance but she refused to do so. Ms Farrell told the Court that at that time they were seriously overworked and understaffed. There were three managers at the meeting, namely, Ms Olesen, Ms Fitzhenry and a Mr de Decker. It was Ms Farrell's evidence that none of them gave any reason for the complainant being dismissed other than that he had made a personal phone call.

In cross-examination the witness said that she had been supplied with a copy of the Company handbook (which states that staff are not allowed to make personal phone calls) but had not read it. She was adamant that Ms Olesen had used the words "turned a blind eye" to employees making personal phone calls. The witness told the Court that she had prepared a statement on this matter on the 13th February 2001 when events were still fresh in her mind. She pointed out that in her statement she had put the expression "turned a blind eye" in quotation marks and that she would not have done so if she were unsure that these were the precise words used.

The Respondents Case:

Ms Kathy Olesen gave evidence. At the time material to this case Ms Olesen was manager of the customer services division of the respondent, which included responsibility for the complainant. She outlined the history of her employment by the respondent, which commenced in 1984 in the United States. She held a series of managerial posts which included postings in Belgium, Germany and the UK as well as in the United States. She was posted to Dublin between the years 1998 and 2001. She told the Court that during her career she had dealt with employees and clients of diverse nationalities including Belgians, Germans, French, Pakistanis and Nigerians.

The customer call centre of the respondent, at which the complainant was employed, handled customer complaints from Belgium, France and the Netherlands. There was a wide range of nationalities working together in this section of the business. The complainant was employed as a temporary agency worker to fill a junior clerical position in the Diners Club Business. According to Ms Olesen the complainant was employed on a week-to-week contract. At the material time the sale of the business in which the complainant worked was in contemplation and there would have been no question of the complainant being retained on a permanent basis.

Ms Olesen had little personal contact with the complainant although his desk was situated not far from her office and she would have greeted him in passing. The complainant's job did not involve any interaction with customers either in writing or by telephone. She told the Court that the phone system in Dublin was set up in such a way that each person who needed to use the phones had a personal identification code. This code then gave access to open the phone lines for outside dialling as well as for incoming calls in some cases. The complainant was not provided with such a code and did not have a phone situated on his desk, as this was not part of his job requirement.

It was Ms Olesen's evidence that all personnel working for the respondent were fully aware that abuse of business systems is an extremely serious issue and would result in disciplinary action being taken. She said that all staff are given orientation when they join the respondent and this orientation specifically includes instruction as to the prohibition on making personal phone calls on the business system. She said that she was certain that all staff knew that they could not make such calls except in the case of an emergency. Whilst she could not say with certainty that all staff observed this rule she was firmly of the view that if it came to the attention of management that any staff member was breaking this rule they would be disciplined for so doing. The witness did not know if the complainant had received orientation. She said, however, that after the initial orientation staff are regularly reminded through daily and weekly staff meetings that no personal calls were to be made. According to Ms Olesen the complainant would have been included at such meetings.

Turning to the events of the 24th November 2000 the witness recalled that while working late she had left her office to take a short break. She noticed that the complainant was not sitting at his own desk but at that of another employee Mr Gregory Pepin. He was using the phone and was speaking in French. She used an option of silent monitoring to listen in on the call. The witness does not speak French but judging by the tone of the conversation she concluded that it was a personal call. She approached the complainant and asked him if he was making a personal call to which he replied in the affirmative. She asked him to disconnect the call and to leave for the evening.

Later the witness asked Mr Pepin if he had given the complainant access to his code for the phone or if he had forgotten to log off before leaving. Mr Pepin said that he could not remember. The witness claimed that it was she who logged out of Mr Pepin's system that evening after the complainant had left. The witness was not aware that two other employees were in the process of making personal calls at the time she came upon the complainant. She said that she was unaware of any other staff in the vicinity at that time but that both the named employees had access to the phone and could have been dealing with customer queries at the time. She told the Court that she had not been sufficiently satisfied that Mr Pepin was involved in this incident so as to justify disciplinary action against him.

Ms Olesen told the Court that on Monday 27th November 2000 she discussed the incident of the previous Friday with Ms Fitzhenry who was the complainant's immediate manager. They agreed that he should be dismissed. She understood that Ms Fitzhenry spoke with him and told him that his employment was terminated. The witness took the view that the complainant was a temporary agency worker employed on a week-to-week basis and as such she was entitled to dismiss him without invoking the normal disciplinary procedure. She did so solely because he was found to be abusing a business system. She told the Court that she would have treated any other temporary employee in exactly the same manner. If it had been a permanent worker she would have initiated the disciplinary process and a warning would have been issued.

The witness recalled the reaction of staff when they became aware of the complainant's dismissal. She said that they had become emotional and wanted the complainant reinstated. She explained what had happened and indicated that they all knew that they were not allowed use their phone systems to make personal calls. According to Ms Olesen they agreed that that was the policy but some of those present indicated that they had made calls in contravention of that policy. The witness explained to the meeting that the respondent's policy was that employees were subject to disciplinary action if they were caught making personal calls.

After this meeting Ms Olesen was again approached by staff requesting another meeting, which was held, and at which she was again asked to reconsider her decision. No member of staff mentioned discrimination at that meeting. The witness also said that she did not consider taking action against those who admitted to using the system for private calls because their transgressions were in the past. The witness specifically denied using the expression "turned a blind eye" to people using the phone for personal reasons. She said she was American and that she would not use such a phrase, which she understood to be an Irish phrase.

Ms Olesen told the Court that she had worked for the respondent for almost twenty years and had worked in a multicultural environment, which she always found to be free from discrimination of any sort. Further, she told the Court there had never been any complaint against her in her entire career and that she had never made decisions which were influenced by the race of those whom she managed. She strongly rejected the allegation that the decision to terminate the complainant's employment was influenced by racial discrimination. Ms Olesen said that her decision was based solely on the complainant's blatant abuse of business systems in the Company.

In cross examination the witness accepted that when the call centre was located at Burlington Road in Dublin a special telephone had been installed in the coffee deck area for personal use by employees. She said this had been done to avoid abuse of their business system during working hours. She accepted that this initiative had been taken due to high instances of personal call use on the respondent's system. No such facility had been provided when the call centre moved to its present location. The witness said that she described the complainant's breach of policy as "blatant" because his demeanour was what she described as "in your face" when she observed him making the call.

The witness accepted that the complainant's response when challenged in relation to making the call was consistent with his stated belief that he had not done anything wrong. She also accepted that she did not make any enquires as to whether the complainant was aware that the making of such calls was prohibited nor did she seek to interview the complainant or give him any opportunity to speak in his own defence before deciding to terminate his employment. She said that she was not obliged to do so as he was a temporary agency worker. The witness was clear that the making of personal calls was a disciplinary matter and that other employees had been disciplined for breaching that policy.

Ms Olesen accepted that her statement recalling the event material to the case was prepared some three months ago.

Evidence was given by Mr Frazier Mushibwe. Mr Mushibwe had no direct involvement in the events giving rise to this claim but gave evidence as to the practice and policies of the respondent regarding the use of their business systems. He told the Court that he was first employed in 1998 as a Diner Services Establishment Analyst. In 1998 he became a team leader in Diner Customer Services with direct responsibility for thirteen Customer Services Representatives. In May 2000 he was promoted to assistant manager of the customer services division with Diners. In May 2001 he moved to Citibank International Plc as a trust officer. He worked in the trust area up to October 2003 when he was transferred to Citigroup London with direct responsibility for six members of staff. Mr Mushibwe is of black African ethnic origin.

The witness told the Court that in August 2000 he was the customers team leader for Diner Club in Dublin. He was therefore working in the same division as the complainant at the time of his dismissal. He had become aware that the complainant was dismissed for abuse of business systems. He told the Court that it was part of the business culture of the respondent as a whole, that business systems should be used for business purposes only and that there were pop-up warnings on the system to that effect. The witness accepted that as in all business some staff would abuse the system and he was sure that employees of the respondent had done so. However all staff knew of the consequences of so doing.

The witness told the Court that he was never the subject of any racial discrimination and he believed that no one within the respondent considered colour or race to be of relevance. The witness said that he had never known Ms Olesen to make decisions based on considerations of race and that it would be out of character for her to do so.

When asked if he could recall any incident in which an employee had been disciplined for abusing a business system the witness replied that he was aware of an employee having being disciplined for downloading pornographic material from a computer. The witness had no direct knowledge of disciplinary action having been taken against any employees for making a personal phone call.

Ms Moira Lynam also gave evidence. This witness is Country Human Resource Officer for Ireland and has held that position since October 2001. She was first employed by the respondent as a human resource generalist supporting the British operations in Dublin. Prior to this she worked for eleven years as a HR Manager in the financial services sector.

The witness told the Court that she was aware that the respondent had strived to create a business culture whereby all staff were aware that business systems were to be used for business purposes only. She was personally aware that staff members had been disciplined for breaching this policy. Ms Lynam said that since 1997, eighteen members of staff had been disciplined for abuse of business systems. This ranged from the abuse of phone systems to computer e-mail and internet systems. Of this number, seven were dismissed. The witness had prepared a schedule of the individuals who were disciplined and an abridged version of this (which did not contain the names of individuals) was provided to the Court. This schedule also listed the nationalities of the individuals concerned.

In cross-examination Ms Lynam gave details of the misconduct for which the individuals listed had been disciplined. In dealing with phone abuse the witness told the Court that two individuals had received a final written warning for having returned to the office after office hours and leaving an inappropriate message on a colleagues answering machine. The witness accepted that the majority of the incidents recorded related to the inappropriate use of e-mails and the internet. The witness confirmed that apart from the complainant no other individual had ever been disciplined for making a personal call simplicitor. The witness further accepted that in the case of the complainant there had been what she described as "an excess of management". However she was satisfied that this was because of the complainant's status as a temporary agency worker and not because of his race.

Findings of Fact

The Court has carefully considered all of the evidence adduced in this case and has reached the following conclusions of fact.

The Court found the complainant an honest and reliable witness who gave his evidence clearly and frankly. The Court accepts that he was never given an orientation session when he joined the respondent nor was he ever told that the use of the phone system for private purposes was prohibited. The Court is further satisfied that in relation to the incident giving rise to his dismissal, the complainant was told by Mr Pepin that he could use the telephone provided he did so after working hours. The Court also accepts the complainant's evidence that two colleagues were engaged in making personal calls at the time he was approached by Ms Olesen. However, it is not clear if Ms Olesen was aware of this.

The Court also found Ms Farrell's evidence helpful and reliable. She had prepared and written up a statement concerning the events on which she gave evidence within three months of their occurrence. The Court accepts Ms Farrell's evidence that a number of employees used the telephone system for their own private use and that during the currency of her employment, staff had not been expressly told that this was prohibited. While it is clear that the staff handbook does refer to such a prohibition the Court is satisfied that this was not systematically enforced through the disciplinary procedure.

The Court is further satisfied that at meetings following the complainant's dismissal Ms Farrell informed Ms Olesen that other staff had used the phones for private use and that she herself had engaged in this practice. The Court prefers Ms Farrell's recollection of the ensuing discussion and in particular accepts that Ms Olesen had told those at the meeting that she had turned a blind eye to this practice in the past but would not do so again. The Court also accepts Ms Farrell's evidence that Mr Pepin stated at this meeting that he had given the complainant permission to use his phone.

Ms Farrell's evidence with regard to the respondent's attitude towards the use of the business telephone system for private calls is largely supported by the evidence of Ms Lynam. She accepted that where disciplinary action had been taken for a breach of this kind, it amounted to more than simply making an unauthorised phone call. She also accepted that the disciplinary procedures, which gives examples of serious misconduct likely to lead to dismissal, does not contain any reference to the unauthorised use of telephones. She did, however, point out that this list is expressly not exhaustive. Moreover, on the facts of this case as they were put to Ms Lynam she accepted that the response of Ms Olesen was excessive.

Having considered the evidence of Ms Olesen the Court is satisfied that she was mistaken in a number of material respects. The thrust of her evidence was that where employees are found to be making unauthorised telephone calls, disciplinary action inevitably follows. That is clearly not the case. Ms Olesen also described the complainant's demeanour while making the call as "blatant and in your face". The Court interprets this as to mean that the complainant had acted in a defiant manner and had shown total disregard for the Company rules. Such a construction is wholly unreasonable. It is clear from the evidence that the complainant did not believe that he was doing anything wrong and that his demeanour when making the call was relaxed and casual. He did not react to Ms Olesen's presence when she approached him, because he had no reason to believe that he was doing anything wrong.

The respondent does have a policy against abuse of its business systems which is enforced through its disciplinary procedure. This, however, mainly relates to inappropriate use of the internet and its e-mail system. Having considered the evidence as a whole the Court is satisfied on the balance of probabilities that while it was the stated policy of the respondent to prohibit staff from using its telephone system for private purposes, this policy was not routinely or regularly enforced at the material time. This is further confirmed by the reaction of the respondent's staff to the complainant's dismissal in effectively going on strike in protest and in demanding his reinstatement. The Court does not believe that they would have reacted in this way if, as the respondent contends, it was well known and understood that the making of a private telephone call constituted serious misconduct.

The Court is further satisfied that the complainant was dismissed without being given the slightest opportunity to defend himself although he had a perfectly innocent explanation for what occurred. It is also noteworthy that the complainant was dismissed for the mere fact of having made a private call rather that because of the destination to which it was made or its duration.

The Court accepts from the evidence that the respondent is a reasonable employer committed to the attainment of good practice in its employment policies. For some reason Ms Olesen departed from those standards in her treatment of the complainant which, by any objective standard, was wholly unfair. The question, which the Court must answer, is why.

The Law Applicable.

The complainant is an agency worker within the meaning of section 2(1) of the Act and the respondent is a provider of agency work, in relation to the complainant, within the meaning of section 2(5) of the Act. The respondent accepts that it is an appropriate party to these proceedings.

Section 8(1) of the Act provides that an employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker on any of the discriminatory grounds, inter alia, in relation to access to employment or conditions of employment. Section 8(2) of the Act provides that in relation to an agency worker discrimination can only occur where that agency worker is treated less favourably (on one of the discriminatory grounds) than another agency worker is, has been or would be treated.

The complainant must, therefore, make out his case of discrimination by reference to the treatment of a comparator of a different racial origin in circumstances similar to his own and that comparator must be another agency worker. There is no actual comparator in this case but the complainant can rely on a hypothetical agency worker ("or would be treated") of a different racial origin. In establishing how such a hypothetical agency worker would be treated by the respondent, the treatment which it afforded it's permanent employees of a different racial origin to the complainant, in materially similar circumstances to those of the complainant, is of evidential value. (see the speech of Scott L.J. inShamoon v Chief Constable of the RUC [2003] IRLR 285 at paragraph 109).

The respondent submitted that the sanction of dismissal, rather than a warning, was applied in this case because the complainant was a temporary agency worker. However, the Court has no reason to believe that it would be the practice of the respondent to dismiss an agency worker for a transgression which would be overlooked if committed by a permanent employee.

The respondent does not contend that the prohibition on the use of the telephone system is confined to agency workers. It is their case that the company policy in that regard is applicable to all staff regardless of their status. It follows that if infringement of this policy was not generally regarded as serious misconduct by the respondent and that the complainant was singled out for special treatment, it is reasonable to believe that he was treated less favourably than another agency worker of a different racial origin would be treated.

Burden of Proof.

Mr Power BL, for the complainant, submitted that in the circumstances of this case the onus is on the respondent to prove that the dismissal was not on grounds of race. He relied on the determination of this CourtFlexo Computer Stationary Ltd and Kevin Colton (Determination EED0313)in which the Court stated that in all cases of alleged unlawful discrimination a procedural rule similar to that prescribed by Directive 97/80/EC (the Burden of Proof Directive) should be applied. Counsel also referred to Directive 2000/43 (the Race Directive) and contends that this is further authority for his submission that the respondent must bear the burden of proving that the complainant was not dismissed because he is a black African.

Mr Connaughton SC submitted that the there is no basis in law by which the respondent can be fixed with the onus of proving the absence of discrimination. He argued that the Burden of Proof Directive can have no application beyond cases of alleged discrimination on the gender ground and that the Race Directive cannot avail the complainant since it has not been transposed in law and cannot have horizontal direct effect.

Counsel submitted that as a matter of law it is insufficient for the complainant to establish that his dismissal was unfair and that he must prove that it was on grounds of his race. Counsel further submitted that in so far as the decision of this Court in the Flexo Computer Stationary case purported to hold otherwise, it was wrongly decided. In support of this submission the Court was referred to the decision of the House of Lords inGlasgow City Council v Zafar [1998] 2 All ER 953.

Flexo Computer Stationary and Coltonis but one in a line of decisions of this Court which held that where a complainant establishes facts from which discrimination may be inferred it is for the respondent to prove that there has been no infringement of the principle of equal treatment. The Court normally requires the complainant to establish the primary facts upon which the assertion of discrimination is grounded. If those facts are regarded by the Court as being of sufficient significance to raise an inference of discrimination, the respondent must prove the absence of unlawful discrimination. (seeMitchell v Southern Health Board [2001] ELR 201)

This approach is based on the empiricism that a person who discriminates unlawfully will rarely do so overtly and will not leave evidence of the discrimination within the complainant's power of procurement. Hence, the normal rules of evidence must be adapted in such cases so as to avoid the protection of anti-discrimination laws being rendered nugatory by obliging complainants to prove something which is beyond their reach and which may only be in the respondents capacity of proof.

Support for this approach can be found in the speech of Lord Browne-Wilkinson inGlasgow City Council v Zafar,at p. 958, in which he quoted with approval the guidance given to Employment Tribunals by Neill LJ inKing v Great Britain China Centre [1992] I.C.R. 516, as follows:

- **'From these several authorities it is possible, I think, to extract the following principles and guidance. 1. It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail.2. It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that "he or she would not have fitted in."3. The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire.4. Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May L.J. put it in North West Thames Regional Health Authority v. Noone ([1988] ICR 813 at 822), "almost common sense."5. It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.'**

This passage was adopted in this jurisdiction inDavis v Dublin Institute of Technology High Court, Unreported Quirke J 23 June 2000.It should, however, be noted thatKing(which was a race case) was decided before the Burden of Proof Directive was adopted and that this Directive and the transposing domestic legislation appears not to have been opened to the Court inDavis.

The Judgment inKingwas more recently relied upon by the UK Court of Appeal inAnya v University of Oxford [2001] IRLR 377. This was a case in which the appellant claimed to have been discriminated against on race grounds in the filling of a post. An Industrial Tribunal had found that his claim was not made out. In the course of a Judgement by Sedley LJ setting that decision aside, the following passage appears at paragraphs 13 and 14which the court considers apt in the instant case:

The industrial tribunal's decision

Here the industrial tribunal were satisfied, on balance, that despite inconsistencies which emerged under cross-examination Dr Roberts was essentially a truthful witness. Dr Roberts had explained his reasons, which had to do entirely with Dr Anya's qualities as a scientist, for not choosing him for the new post. It followed, in the industrial tribunal's judgment, that the inevitably less favourable treatment of Dr Anya had nothing to do with his race.

Such a conclusion was without doubt open to them, but only provided it was arrived at after proper consideration of the indicators which Dr Anya relied on as pointing to an opposite conclusion. His case was that the evidence showed two critical things. One was a preconceived hostility to him: this depended on matters of fact which it was for the industrial tribunal to ascertain or refute on the evidence placed before them. The other was a racial bias against him evinced by such hostility: this was a matter of inference for the industrial tribunal if and in so far as it found the hostility established. Experience shows that the relationship between the two may be subtle. For example, a tribunal of fact may be readier to infer a racial motive for hostility which has been denied but which it finds established than for hostility which has been admitted but acceptably explained. The industrial tribunal in paragraph 5 of its reasons directed itself correctly in law about this, with one arguable exception: it concluded the paragraph with this remark:

'If an employer behaves unreasonably towards a black employee, it is not to be inferred, without more, that the reason for this is attributable to the employee's colour; the employer might very well behave in a similarly unreasonable fashion to a white employee.'

As Neill LJ pointed out in King [1991] IRLR 513, such hostility may justify an inference of racial bias if there is nothing else to explain it: whether there is such an explanation as the industrial tribunal posit here will depend not on a theoretical possibility that the employer behaves equally badly to employees of all races, but on evidence that he does.

In the Courts view the guidance contained at paragraph (4) inKingdoes not differ materially from the approach formulated inMitchell v Southern Health Boardas it would apply to the instant case. The complainant has established as a fact that he was treated differently than other employees of the respondent who made personal telephone calls and who are of a different racial origin. Since the same rules in this respect apply to permanent employees and agency workers the treatment of permanent workers provides a sufficient evidential basis for concluding that the complainant was treated differently than another agency worker of a different racial origin would be treated. Moreover, the Judgement inAnyamakes it clear that in comparing the claimant's treatment to that of a hypothetical comparator reliance cannot be placed on the theoretical possibility that Ms Olesen would behave equally badly towards an agency worker of a different racial origin, but on evidence that she does. No such convincing evidence was adduced. The complainant's treatment in this regard is a fact from which discrimination may be inferred.

Moreover,Glasgow City Council v Zafaris authority for the proposition that a finding of discrimination and a finding of a difference in race can be sufficient to constitute prima facie evidence of racial discrimination. The complainant cannot prove the motivation for his dismissal. That is peculiarly within the knowledge of the respondent or, more particularly, within the knowledge of Ms Olesen. In these circumstances it is just and equitable to call upon the decision maker for an explanation and to require her to prove the veracity of the explanation offered. This, as stated inNorth West Thames Regional Health Authority v. Noone,is not a matter of law but almost common sense.

The correctness of this approach in cases such as this has now been confirmed by Article 8 of the Race Directive [and Article 10 of Directive 2000/78 (the Framework Directive)] which provides as follows:

- **"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them, establish before a Court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."**

The provision is clearly addressed to the Member states and their institutions including arbitral tribunals whose jurisdiction may be invoked where unlawful discrimination is alleged. Its purpose is to require the common application in all discrimination cases of the rule of evidence hitherto prescribed by the Burden of Proof Directive.

The effective date for the implementation of the Race Directive was 19th July 2003. However it has not yet been transposed in this jurisdiction. On that account Counsel for the respondent contends that it can have no application in this case. The Court cannot accept that submission.

InMarleasing SA v La Comercial International De Alimentacion SA [1990] ECR 4135the ECJ developed further its earlier decision inVon Colson and Kamann v Land Nordrhein- Westfalen [1984] ECR 1819, in confirming that a non-implemented Directive could be relied upon to inform the interpretation of national law in cases involving individuals. However, the Court went further than it did inVon Colsonin holding that this interpretive obligation equally applies in cases where the national law in question pre-dates the Directive. Paragraph 8 of the Judgment contains the following statement of the law:

- **"In order to reply to that question, it should be observed that, as the Court pointed out inVon Colson and Kamann v Land Nordrhein- Westfalen [1984] ECR 1819, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."**

Whilst it will be noted that the Court referred to the obligation of national courts to interpret national law, as far as possible so as to achieve the result envisaged by the directive, it went on, at paragraph 9, to rule that the Spanish Court was precluded from interpreting its national law in a way which did not comply with the Directive concerned.

This interpretative obligation was approved in this jurisdiction by the Supreme Court inNathan v Bailey Gibson Ltd, Irish print Union and Minister for Labour [1998] IR 2 IR 162. Here, Hamilton CJ adopted the following statement of Murphy J made in the course of his Judgment in the High Court:

- **"Reference was made to the judgement of the European Court given on the 13th November 1990 in Marleasing SA v La Comercial International De Alimentacion SA. That is a far-reaching decision in so far as it determines that national courts are bound to interpret their national laws in the light of the wording and purpose of a relevant EEC Directive even where the national law in question was adopted before the directive was given. That was, as I say, a far-reaching application of the general rule on interpretation which itself is not open to challenge".**

The Court is satisfied that it is obliged to interpret and apply the relevant provisions of the Act and the rules of evidence in line with the wording and purpose of Article 8 of the Race Directive. Accordingly, the Court is satisfied that it, in this case, should apply a procedural rule similar to that formulated inMitchell v Southern Health Board [2001] ELR 201.

Conclusion.

The Court is satisfied that the complainant has proved as a matter of probability that he was singled out for special unfavourable treatment by his manager, that another agency employee of a different racial origin would not be so treated and that his dismissal arose as a direct consequence of the special treatment to which he was subjected. Having regard to all of the surrounding circumstances this is a fact of sufficient significance to raise a presumption of discrimination. The Court has considered the respondent's explanation of what occurred and in light of the evidence as a whole, finds it unconvincing. Accordingly the respondent has failed to satisfy the Court that it's decision to dismiss the complainant was not racially motivated and the complainant is entitled to succeed.

Determination.

The complainant was discriminated against on grounds of his race contrary to Section 8 of the Act. The Court is satisfied that the appropriate redress is an award of compensation. The Court notes that the complainant was employed in a temporary capacity at approximately €270 per week. The Court estimates that the economic loss suffered by the complainant is unlikely to have exceeded €2,000. However, it is now well settled that an award of compensation for the effects of discrimination must be proportionate, effective and dissuasive. Apart from economic loss the complainant was humiliated, deprived of his fundamental right to equal treatment and freedom from racial prejudice. In all the circumstances the Court determines that an award which is fair and equitable should be measured at €15,000,

€2,000 of which should be regarded as compensation for loss of earnings. The respondent herein is ordered to pay compensation to the complainant in that amount.

Signed on behalf of the Labour Court

Kevin Duffy

8th March, 2004_____

MG/BRChairman

NOTEEnquiries concerning this Determination should be addressed to Madelon Geoghegan, Court Secretary.

Sword Risk Services Ltd (represented By Baily Homan Smyth Mc Veigh)
- And -
Mr Damien Sheahan (represented By Mr.Dominic Wilkinson, B.L. Instructed By Warren Parkes Solicitors)

Case Details

Body
Labour Court

Date
April 7, 2014

Official
Brendan Hayes

Legislation
- SECTION 28(1); ORGANISATION OF WORKING TIME ACT; 1997

County
Co. Dublin

Decision/Case Number(s)
- DWT1435
- WTC/13/187
- R-129895-WT-13/JT

Note
Enquiries concerning this Determination should be addressed to Helen Tobin, Court Secretary.

Employer Member
Ms Doyle

Worker Member
Mr Shanahan

SUBJECT:

1. An appeal against a Rights Commissioner's Decision r-129895-wt-13/JT.

BACKGROUND:

2. The Employer appealed the Decision of the Rights Commissioner to the Labour Court on the 14 October 2013 in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. A Labour Court hearing took place on the 15 January 2014. The following is the Decision of the Court.

DETERMINATION:

This is an appeal under the Organisation of Working Time Act 1997 ("the Act") by Swords Risk Services Limited ("the Respondent") against Rights Commissioner Decision No r-129895-wt-13/JT dated 23 September 2013. The appeal was received by the Court on 14 October 2013 within the six week time limit set out in the Act. Mr Damien Sheahan ("the Complainant") had complained to the Rights Commissioner that the Respondent in this case, his employer, had during his employment infringed sections 12, 15, 19 and 23 of the Act in the relevant statutory reference period. The Respondent did not attend at the hearing. The Rights Commissioner accepted the evidence of the Complainant, decided that the complaints were well founded and awarded him compensation in the sum of €20,000. The Respondent appealed against that decision to this Court. The case came on for hearing on 15 January 2014.

Background

The Respondent is a security company that provided static guard services on a contract basis to a range of retail stores. The Complainant was employed as a static security guard from 27 March 2009 until he resigned his employment on 17 October 2012. For the greater part of his employment he was assigned to work in the Aldi store on Parnell Street Dublin. He submits that during his employment he,

- **•contrary to section 12 of the Act, did not receive the statutory rest and intervals at work set out in the Act**
  •contrary to section 15 of the Act worked in excess of an average of 48 hours per week.

  •contrary to sections 19 and 23 of the Act did not receive annual leave in the amount set out in the act and was not paid cesser pay for the amount outstanding on the termination of his employment.

The Respondent disputes the complaints and argues that it was at all times compliant with the Act. It further submits that the level of compensation awarded by the Rights Commissioner was disproportionate in all the circumstances of the case.

Section 12

Section 12 of the Act states:

- **(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.**
  (2) An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes; such a break may include the break referred to in subsection (1)

Statutory Instrument No 21 of 1998 (Organisation of working time (General Exemptions) Regulations1998):

- **4. If an employee is not entitled, by reason of the exemption, to the rest period and break referred to in sections 11, 12 and 13 of the Act, the employer shall ensure that the employee has available to himself or herself a rest period and break that, in all the circumstances, can reasonably be regarded as equivalent to the first-mentioned rest period and break.**

Position of the Complainant

The Complainant in evidence stated that he worked a normal roster of twelve hours per day Tuesday through Saturday. He stated that he took no breaks during that time. He stated that he is a smoker and that while employed he smoked in the region of 10 – 15 cigarettes during the working day. He stated that each cigarette lasted roughly two minutes and that he normally smoked outside the back of the shop. He stated that the shop is located in a high pressure area. He said that as a result he could not take breaks. He said that he normally drank coffee at his post or in the back of the shop. He said that he normally had no more than a chocolate snack at such times. He stated that at all times he was at work and did not receive any time to rest during the working day. He stated that on three days of the week there was a second security guard in the shop. In answer to Counsel for the Respondent he agreed that the other officer took his breaks. He said that he submitted his time sheets, signed off by the store manager, on a daily basis that recorded that he worked 12 hours each day without a break. He stated that he was paid for all hours returned. He stated that the time sheets he returned recorded no breaks as he worked each day without a break.

Position of the Respondent

The Respondent argued that the Complainant was responsible for organising his own breaks in consultation with the Store Manager. It argued that the Complainant smoked 10 – 15 cigarettes per day and that this amounted to a break of between 20 and 30 minutes per day. It argued that the Complainant took other breaks and that amounted to at least one hour per day. It stated that it had carried out a calculation that disclosed that the Complainant was working an average of 45 hours per week in the relevant period.

Ms Fiona Cowhey, General Manager, gave evidence to the Court. She stated that the Complainant worked in Aldi Parnell Street in accordance with a roster that was notified to him by sms message each week. The rosters were standard and the sms message was normally brief and advised the Complainant that he was working the same roster each week. That roster was for five 12 hours shifts Tuesday through Saturday. She stated that the agreement with Aldi provided that security staff would take their statutory breaks in consultation with the store manager. She stated that the Company expected their employees to do so. She stated that all staff were so advised when they received their induction training on commencing assignment is Aldi. She stated that she had no personal knowledge of the induction training given to the Complainant. She said that she did not personally supervise the breaks. She acknowledged that the Company had paid the Complainant on the basis of 12 hours work per 12 hour rostered shift. She acknowledged that it made no deduction for breaks from the hours in respect of which he submitted store approved time sheets. She stated that another security guard employed in the store took his breaks, returned time sheets reflecting the hours worked and the breaks taken during each shift and was paid accordingly. She stated that Aldi did not pay the Respondent for breaks taken by staff. She stated that the Complainant should not have been paid for the 12 hours he was rostered but rather for 11 hours with a one hour unpaid break.

Findings of the Court

Section 25 of the Act in relevant part states

- **(1) An employer shall keep, at the premises or place where his or her employee works or, if the employee works at two or more premises or places, the premises or place from which the activities that the employee is employed to carry on are principally directed or controlled, such records, in such form, if any, as may be prescribed, as will show whether the provisions of this Act [and, where applicable, the Activities of Doctors in Training Regulations] are being complied with in relation to the employee and those records shall be retained by the employer for at least 3 years from the date of their making.**
  (4) Without prejudice to subsection (3) , where an employer fails to keep records under subsection (1) in respect of his or her compliance with a particular provision of this Act [or the Activities of Doctors in Training Regulations] in relation to an employee, the onus of proving, in proceedings before a rights commissioner or the Labour Court, that the said provision was complied with in relation to the employee shall lie on the employer.

Facts

The Court finds that the Complainant was rostered to work 12 hour shifts. The Court also finds that the Respondent intended that provisions for the taking of statutory breaks was provided for in the roster. It further finds that responsibility for the taking of breaks was delegated to the store manager and the security guard in each store.

In this case it is clear from the evidence presented and the records put in evidence by both parties that the Complainant was assigned to carry out a 12 hour duty each day five days per week. It was intended that he would be paid for 11 hours and take one hour as an unpaid break. In fact the records show that he worked 12 hours per day and was paid for each of those hours. Time sheets signed off by the store manager to this effect were submitted to the Company each day and the Complainant was paid on the basis of those sheets. The Court finds therefore that the Respondent had knowledge of the circumstances that applied in the store. It was aware that the Complainant was not afforded a break from work in line with Section 12 of the Act. No evidence was presented to the Court that compensatory rest was provided to the Complainant in respect of his entitlement to a daily rest period of 11 hours or of his entitlement breaks at work.

The Court finds therefore that the Respondent was aware that the Complainant was not in receipt of the statutory entitlement to breaks on each occasion on which he submitted a time sheet recording his working hours. The Court further finds that the Respondent Company took no action to ensure that he was afforded breaks in accordance with the statute.

Accordingly the Court determines that the complaint is well founded.

Determination

The Court determines that the Complaint is well founded. The Court orders the Respondent to pay the Complainant compensation in the sum of €4,750.

Section 15

Section 15 of the Act states

- **(1) An employer must not permit an employee to work, in each period of 7 days, more than an average of 48 hours, that is to say an average of 48 hours calculated over a period (hereafter in this section referred to as a "reference period") that does not exceed—**
  - **(a) 4 months, or**
    (b) 6 months—
    - **(i) in the case of an employee employed in an activity referred to in paragraph 2 , point 2.1. of Article 17 of the Council Directive , or**
      (ii) where due to any matter referred to in section 5 , it would not be practicable (if a reference period not exceeding 4 months were to apply in relation to the employee) for the employer to comply with this subsection, or

    (c) such length of time as, in the case of an employee employed in an activity mentioned in subsection (5) , is specified in a collective agreement referred to in that subsection.

(2) Subsection (1) shall have effect subject to the Fifth Schedule (which contains transitional provisions in respect of the period of 24 months beginning on the commencement of that Schedule).

(3) The days or months comprising a reference period shall, subject to subsection (4) , be consecutive days or months.

(4) A reference period shall not include—

- **(a) any period of annual leave granted to the employee concerned in accordance with this Act (save so much of it as exceeds the minimum period of annual leave required by this Act to be granted to the employee),**
  - **[(aa) any period during which the employee was absent from work while on parentalleave, force majeureleave or carer's leave within the meaning of the Carer's Leave Act 2001 ,]**

  (b) any absences from work by the employee concerned authorised under the Maternity Protection [Acts 1994 and 2004] , or the Adoptive Leave [Acts 1995 and 2005] , or
  (c) any sick leave taken by the employee concerned.

(5) Where an employee is employed in an activity (including an activity referred to in subsection (1)(b)(i))—

- **(a) the weekly working hours of which vary on a seasonal basis, or**
  (b) as respects which it would not be practicable for the employer concerned to comply with subsection (1) (if a reference period not exceeding 4 or 6 months, as the case may be, were to apply in relation to the employee) because of considerations of a technical nature or related to the conditions under which the work concerned is organised or otherwise of an objective nature,

then a collective agreement that for the time being has effect in relation to the employee and which stands approved of by the Labour Court under section 24 may specify, for the purposes of subsection (1)(c) , a length of time in relation to the employee of more than 4 or 6 months, as the case may be (but not more than 12 months).

Position of the Complainant

The Complainant in evidence stated that he was rostered to work 12 hour shifts five days per week during which he received no breaks. He told the Court that he was notified of his rosters by sms message each week. He stated that his working week did not vary. He stated that he normally worked 60 hours per week and was paid accordingly. He stated that his average working week exceeded 48 hours per week.

Counsel for the Complainant argued that the evidence before the Court disclosed that the he was rostered to work five successive 12 hour shifts each week each of which included a break of one hour over the course of the day. The Complainant's time sheets disclosed that he in fact worked 12 hour shifts five days per week during which he did not receive a break from work. He argued that the Respondent was aware that the Complainant was scheduled to work 60 hours per week. He argued that it paid the Complainant on the basis that he was working 60 hours per week. He argued that it took no steps to ensure that the Complainant received breaks during the working day. He further argued that the Respondent rostered and paid the Complainant to work 60 hours per week. He argued that the evidence established that the Respondent infringed section 15 of the Act.

Position of the Respondent

Counsel for the Respondent argued that the company is engaged in the Security Industry and, for the purposes of calculating the average working week, the statutory reference period is six months. He argued that the Complainant left work in October 2012 and did not submit his complaint to the Rights Commissioner until February 2013. It submits that the Court cannot consider a complaint under the Act unless it relates to an infringement that occurred within six months of the date on which the complaint is made to the Court. As the Company is entitled to calculate the average length of the working week over a six months period the infringement complained of could not have occurred within the two months reference period over which the Court has jurisdiction. It argues that the complaint therefore cannot be made out and cannot therefore be well founded.

Ms Fiona Cowhey, General Manager stated that the Complainant was rostered to work 11 hours per day over a 12 hour shift. It was intended that the roster would include a one hour break. She stated that the Complainant worked 12 hours per day and was paid accordingly.

Findings of the Court

The Court finds that the complaint is properly before it. The Act does not prohibit the Court from calculating the average working week over a period of six months provided the effect of that calculation crystalises into an infringement of section 15 of the Act within six months of the date on which the complaint was made by the Complainant to the Rights Commissioner. In this case the Complaint was made in February 2013. The Complainant left work in October 2012. The Complainant and the Respondent are entitled to calculate the average working week in the six months up to and including the date on which he ceased working for the Company. The effect of that averaging, on the information before the Court, discloses that the Complainant was required to work in excess of 48 hours per week in that period.

The Court also finds that the evidence of both the Complainant and Ms Cowhey confirms that the Respondent was at all times aware of the hours the Complainant was rostered to work and was actually working and paid him his weekly salary on that basis.

Determination

The Court determines that the complaint is well founded. The Court orders the Respondent to pay the Complainant compensation in the sum of €4,750.

Section 19 and 23

Section 19 of the Act states:

- **(1) Subject to the First Schedule (which contains transitional provisions in respect of the leave years 1996 to 1998), an employee shall be entitled to paid annual leave (in this Act referred to as "annual leave") equal to—**
  - **(a) 4 working weeks in a leave year in which he or she works at least 1,365 hours (unless it is a leave year in which he or she changes employment),**
    (b) one-third of a working week for each month in the leave year in which he or she works at least 117 hours, or

    (c) 8 per cent of the hours he or she works in a leave year (but subject to a maximum of 4 working weeks):

  Provided that if more than one of the preceding paragraphs is applicable in the case concerned and the period of annual leave of the employee, determined in accordance with each of those paragraphs, is not identical, the annual leave to which the employee shall be entitled shall be equal to whichever of those periods is the greater.

Section 23 of the Act states:

- **(1) Where—**
  - **(a) an employee ceases to be employed, and**
    (b) the whole or any portion of the annual leave in respect of the current leave year or, in case the cesser of employment occurs during the first half of that year, in respect of that year, the previous leave year or both those years, remains to be granted to the employee,

  the employee shall, as compensation for the loss of that annual leave, be paid by his or her employer an amount equal to the pay, calculated at the normal weekly rate or, as the case may be, at a rate proportionate to the normal weekly rate, that he or she would have received had he or she been granted that annual leave.

Position of the Complainant

The Complainant submits that he had accrued an entitlement to 15.5 days annual leave when he terminated his employment. At that time he had taken two days leave. He submits that he is owed 13.5 days annual leave.

Position of the Respondent

The Respondent submits that the Complainant took two days holidays on the 13th and 14th July 2012 and was paid cesser pay of €933.15 in respect of his outstanding leave entitlements. It submitted copy weekly time sheets and pay slip in support of its submission.

Findings

Section 19(1) of the Act states:

- **(a) 4 working weeks in a leave year in which he or she works at least 1,365 hours (unless it is a leave year in which he or she changes employment),**

The statutory leave year commences in April each year. The Complainant resigned on 17 October 2012. In total that amounts to 25 weeks working time. The Complainant contends that he had accrued an entitlement to 15.5 days leave at that time. The Respondent submitted documents that disclose that the Complainant took two days leave in the course of the year and was paid cesser pay in respect of the balance of his entitlement. However an analysis of the Complainants hours discloses that he had accrued an entitlement to 3 days leave for which he was not compensated by way of cesser pay when his employment terminated.

Determination

The Respondent infringed Sections 19 and 23 of the Act. The Court orders the Respondent to pay the Complainant in respect of the 8 days due to him and €300 compensation for the breaches involved.

The Court so determines.

Signed on behalf of the Labour Court

Brendan Hayes

7 April 2014_____

HTDeputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Helen Tobin, Court Secretary.

AWD201 January 9, 2020

Pj Personnel Ltd
- And -
Clint Maguire (represented By Unite The Union)

Case Details

Body
Labour Court

Date
January 9, 2020

Official
Louise O'Donnell

Legislation
- SECTION 25 (2), PROTECTION OF EMPLOYEES (TEMPORARY AGENCY WORK) ACT, 2012

Decision/Case Number(s)
- AWD201
- AWC/19/3
- ADJ-00015350
- CA-00019947

Note
Enquiries concerning this Determination should be addressed to David Campbell, Court Secretary.

Employer Member
Mr Marie

Worker Member
Ms Tanham

SUBJECT:

1. An appeal of an Adjudication Officer's Decision No(s)ADJ-00015350 CA-00019947

BACKGROUND:

2. The Employer appealed the Decision of the Adjudication Officer to the Labour Court. A Labour Court hearing took place on 08 January 2020. The following is the Court's Determination:-

DETERMINATION:

This is an appeal by PJ Personnel Ltd (the Respondent) against the Decision of an Adjudication Officer under the Protection of Employees (Temporary Agency Work) Act 2012 (the Act). The claim was referred to the Workplace Relations Commission on 22nd June 2018 by Clint Maguire (the Complainant). The Complainant's employment terminated with the Respondent on the 7th January 2018. The Adjudication Officer upheld the complaint and awarded compensation.

Background

The Complainant commenced employment with the Respondent in July 2016 and was placed with the Hirer on the 31st May 2017. The Complainant's last day on site was the 22nd December 2017 and his last day in work was 7th January 2018. The Complainant states that unlike his comparator he did not receive a "greasing allowance". A Preliminary issue relating to time limits arises in this case.

Preliminary Issue – Time Limit

Position of the parties

It is the Complainant's submission that although the complaint was submitted outside of the time limits there was "reasonable cause" for doing so. It was the Complainant's submission that he had mandated his Union to advance the matter on his behalf. The Union had engaged with the Hirer in relation to same as it was the Union's belief that based on the practises in the construction industry this was the appropriate person to engage with. The Union does not dispute that it was aware of who the Employer was, but the Hirer was the person who was around the site. The Union official believed that it was reasonable for them to exhaust the local process first. The Complainant noted the case law relating to "reasonable cause" and argued that the case law supported the fact that it was accepted that each case was considered on its own merits.

The Respondent submitted that reasonable cause had not been established. The test for reasonable cause had been set out a number of times by the Court and the failure of the Complainant's representative to make a complaint within the relevant time period did not meet the test of "reasonable cause". The Respondent submitted that the fact that the Complainant's representative chose to exhaust local procedures albeit with the wrong Respondent did not prevent him from lodging a claim in a timely manner. The Respondent citied case law in support of theirsubmissions.

The Law

The Workplace Relations Act 2015 at section 6 states:

(6) Subject to subsection (8), an adjudication officer shall not entertain a complaint referred to him or her under this section if it has been presented to the Director General after the expiration of the period of 6 months beginning on the date of the contravention to which the complaint relates.

(8) An adjudication officer may entertain a complaint or dispute to which this section applies presented or referred to the Director General after the expiration of the period referred to in subsection (6) or (7) (but not later than 6 months after such expiration), as the case may be, if he or she is satisfied that the failure to present the complaint or refer the dispute within that period was due to reasonable cause.

Conclusions of the Court on the Preliminary Matters

The Legal Principles

The issue arising in this appeal is whether reasonable cause has been shown for an extension of time.

The established test for deciding if an extension should be granted for reasonable cause shown is that formulated by this Court in Labour Court Determination DWT0338CementationSkanska (Formerly Kvaerner Cementation) v Carroll. Here the test was set out in the following terms: -

- **It is the Court's view that in considering if reasonable cause exists, it is for the claimant to show that there are reasons which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the**

context in which the expression reasonable cause appears in the statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present the claim within the six-month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time.

In that case, and in subsequent cases in which this question arose, the Court adopted an approach analogous to that taken by the Superior Courts in considering whether time should enlarged for 'good reason' in judicial review proceedings pursuant to Order 84, Rule 21 of the Rules of the Superior Courts 1986. That approach was held to be correct by the High Court inMinister for Finance v CPSU & Ors[2007] 18 ELR 36.

The test formulated inCementationSkanska (Formerly Kvaerner Cementation) v Carrolldraws heavily on the decision of the High Court inDonal O'Donnell and Catherine O'Donnell v Dun Laoghaire Corporation[1991] ILRM 30. Here Costello Costello J. (as he then was) stated as follows:

- **-The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84 r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay.**

It clear from the authorities that the test places the onus on the applicant for an extension of time to identify the reason for the delay and to establish that the reason relied upon provides a justifiable excuse for the actual delay. Secondly, the onus is on the applicant to establish a causal connection between the reason proffered for the delay and his or her failure to present the complaint in time. Thirdly, the Court must be satisfied, as a matter of probability, that the complaint would have been presented the complaint in time were it not for the intervention of the factors relied upon as constituting reasonable cause. It is the actual delay that must be explained and justified. Hence, if the factors relied upon to explain the delay ceased to operate before the complaint was presented, that may undermine a claim that those factors were the actual cause of the delay. Finally, while the established test imposes a relatively low threshold of reasonableness on an applicant, there is some limitation on the range of issues which can be taken into account. In particular, as was pointed out by Costello J in the passage quoted above, a Court should not extend a statutory time limit merely because the applicant subjectively believed that he or she was justified in delaying the institution of proceedings.

The Court is satisfied that the Complainant's complaint was presented to the WRC outside of the statutory time limit. The Complainant's last date on site was 22nd December 2017. The Court is satisfied that, if there was a contravention of the Act, that date is the last date when such a contravention took place. As the Complainant's claim was not presented to the Workplace Relations Commission until 22nd June 2018, it was outside of the statutory time limit. The Court finds that the reason proffered by the Complainant while it might explain the delay, does not afford an excuse for the delay.

Determination

For all the reasons set out above, the Court finds that the complaint under the Act is outside the statutory time limits and therefore must fail. In these circumstances, the Court cannot proceed to hear the substantive matter.

Accordingly, the Respondent's appeal is allowed, and the Decision of the Adjudication Officer is set aside.

The Court so Determines.

Signed on behalf of the Labour Court

Louise O'Donnell

DC_____

9 January 2020Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to David Campbell, Court Secretary.

EDA1019

FULL RECOMMENDATION

ADE/10/25 DETERMINATIONNO.EDA1019

INDUSTRIAL RELATIONS ACTS, 1946 TO 1990SECTION 83, EMPLOYMENT EQUALITY ACTS, 1998 TO 2008

PARTIES :

PUBLIC APPOINTMENTS SERVICE (REPRESENTED BY CHIEF STATE SOLICITORS OFFICE) - AND - KEVIN RODDY

DIVISION : Chairman: Ms Jenkinson Employer Member: Ms Doyle Worker Member: Ms Ni Mhurchu

SUBJECT: 1. Appeal under Section 83 of The Employment Equality Acts, 1998 to 2008.BACKGROUND: 2. The Complainant appealed a decision of an Equality Officer No. DEC-E2010/024 to the Labour Court on the 13th April 2010 in accordance with Section 83 of the Employment Equality Acts 1998 to 2008. A Labour Court hearing took place on the 6th October, 2010. The following is the Determination of the Court:-DETERMINATION:This is an appeal by Mr. Kevin Roddy ("the Complainant") against the decision of an Equality Officer in a claim alleging he was subjected to victimisation by the Public Appointments Service ("the Respondent") contrary to Section 74 (2) of the Employment Equality Act 1998 and 2008 (The Acts).At the outset of the Equality Officer's hearing an issue arose over whether the Complainant has submitted his complaint within the time limit provided for under Section 77(5) of the Acts and proceeded to hold a preliminary hearing on that matter. However, in the course of his investigation the Equality Officer held that the Complainant had failed to establish a*prima facie*case of victimisation and consequently held that the issue of timeliness became moot. It was against that decision that the Complainant appealed to the Court.*Background*The Complainant applied for a position as Senior Executive Planner with Donegal County Council in July 2006. The Public Appointments Service undertook the recruitment and selection process. On 8th September 2006 he was informed that he was not among those candidates short-listed to attend for interview. As the Complainant was dissatisfied with the outcome, he sought to challenge the Respondent's decision. On 13th September 2006 he submitted a series of question under the Freedom of Information (FOI) Acts, 1997 and 2003 to the Respondent, one of which specifically sought information on the composition of the Selection Board. By letter dated 13th October 2006, the Respondent supplied details of the names and positions held by all four persons on the Selection Board. One of the names gave the Complainant serious cause of concern (hereinafter referred to as "Ms. A") and he sought further information on details of any contacts made between Donegal County Council (in particular Ms. A) and the Respondent concerning the criteria for selection.After he received full details of such contacts, he wrote to the Respondent to inform them that the presence of Ms. A on the Selection Board may have given rise to a conflict of interest which he submitted may not have been made known to the Respondent. In his letter he said:

- *"I have had issues in the past with both [Ms. A] and Donegal County Council."*

In his letter he proceeded to recount details of a case he took in Northern Ireland where he had previously worked with Ms. A and*"matters of equality and fair treatment resulted in a case to the Equality Commission"*,which he subsequently withdrew for financial reasons.Matters with Donegal County Council seemed to have related to "*staffing levels and treatment of staff arising from over working".Summary of The Complainant's case:*The Complainant submitted that he had been victimised by the Respondent in that included in the composition of the Selection Board was a person whom he had made a previous complaint against to the Equality Commission in Northern Ireland. He submitted that the manner in which Donegal County Council nominated Ms. A onto the Selection Board suggested a strategy to favour candidates already in employment or at least to influence the outcome and given the history between himself and Ms. A and separately with Donegal County Council, the fact that none of this was declared meant that his application was at an unfair advantage which amounted to victimisation by the Respondent.He submitted that had he not been subjected to prejudice against him he

would have been successfully short-listed for interview due to the level of his qualifications, experience and skills. This contention he submits is further strengthened by the lack of evidence on the methodology used to assess candidates for the short-list.*Summary of The Respondent's Case*Ms. Kathy Smith B.L on behalf of the Respondent submitted that the Equality Officer was correct in holding that the Complainant had failed to make out a*prima facie*claim of victimisation.The Respondent held that in accordance with normal practice, it set up a selection panel comprising of individuals external to the client body - Donegal County Council, and of a member nominated by the client itself. It stated that it is normal practice when notifying panel members of a date for short-listing candidates, to bring to their attention the following element of caution:

- *"It is always possible that having agreed to assist, you may subsequently become aware of an issue which could be seen to cause a conflict of interest for you in your role in this competition. The Public Appointments Service fully accepts that such occurrences are inevitable from time to time. To ensure that the selection process remains independent, objective and fair you should advise this Office of any such matters at an early stage, so that alternative arrangements can be put in place should that prove necessary. Your co-operation in this matter is greatly appreciated."*

In this case, no possible conflicts were drawn to the Respondent's attention by any members of the Board.The Respondent disputed the claim of victimisation, holding that in order for there to be such a claim there must be adverse treatment of an employee by his or her employer. It argued that there was no relationship of employer/employee between the Respondent and the Complainant and in such circumstances the allegation of victimisation made cannot be sustained. Secondly, it held that it cannot be held accountable if it was not even aware of the facts grounding such a claim and therefore could not be held to be "*a reaction*"by the Respondent. It held that it took all reasonable steps to advise members of the possibility of any conflicts of interest and the course of action they should take in the event of such a conflict.The Law Applicable

- Victimisation is defined by Section 74(2) of the Acts, as follows:

  (2) For the purposes of this Part victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to—

  - *(a) a complaint of discrimination made by the employee to the employer,(b) any proceedings by a complainant,*

    (c) an employee having represented or otherwise supported a complainant,

    (d) the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act ,

    (e) an employee having been a witness in any proceedings under this Act or the Equal Status Act 2000 or any such repealed enactment,

    (f) an employee having opposed by lawful means an act which is unlawful under this Act or the said Act of 2000 or which was unlawful or any such repealed enactment, or

    (g) an employee having given notice of an intention to take any of the actions mentioned in the preceding paragraphs.

The definition of victimisation contained in the Section contains essentially three ingredients. It requires that: -(a) The Complainant had taken action of a type referred to at Section 74(2) of the Acts (a protected act),(b) The Complainant was subjected to adverse treatment by an employer and,(c) The adverse treatment was in reaction to the protected action having been taken by the Complainant.The Law enables those who considered themselves wronged by not being afforded equal treatment to raise complaints without fear of retribution. Article 11 of Directive 2000/78/EC requires Member States to introduce into their legal systems such*"measures as are necessary to protect employees against dismissal or other adverse treatment by employers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment"*The question the Court must first examine is whether the

Complainant has taken an action of a type referred to at Section 74(2) of the Acts (a protected act).The Complainant informed the Court that a number of years previously he had taken a complaint of discrimination on grounds of gender against his employer at the time in Northern Ireland. Ms. A, referred to above, was named in these proceedings as she also worked for the Northern Irish employer at the time. Subsequently he withdrew the proceedings, for financial reasons. The Complainant submitted that this action - the initiations of proceedings - comes within the definition of "victimisation" as contained in Section 74(2)*(b "any proceedings by a complainant;"*.To be encompassed within the ambit of section 74(2)(b)"proceedings" must come within the definition asdefined by Section 2 under Interpretations:

- *"proceedings" means—*
  - *(a) proceedings before the person, body or court dealing with a request or reference under this Act by or on behalf of a person, and(b) any subsequent proceedings, including proceedings on appeal, arising from the request or reference, but does not include proceedings for an offence under this Act ;"*

Under the Act the Complainant must prove that the catalyst alleged for the adverse treatment complained of came within the ambit of one of the protected acts referred to at Section 74(2) of the Acts. The Court is being asked to accept that the initiation of proceedings of a complaint of discrimination against a distinctly separate employer in another jurisdiction could constitute a "protected act" and be combined with his alleged adverse treatment by the Respondent in this case. There clearly is no causal connection between the taking of proceedings against another employer and his non-selection in a job competition conducted by the Respondent in this case. Therefore, in the Court's view the facts as presented do not come within the ambit of a protected act and consequently do not come within the intendment of Section 74(2) of the Acts.*Conflict of Interest*Based on the undisputed facts of this case the Court accepts the Complainant's contention that the presence of Ms. A on the Selection Board clearly constituted a conflict of interest, however this of itself does not amount to victimisation within the statutory meaning of the Acts.Determination.

For all of the reasons referred to above the Court is satisfied that the within complaint of victimisation is unsustainable in law. The decision of the Equality Tribunal is varied and substituted with a determination that the Complainant was not subjected to victimisation within the meaning of the Acts.However, while the Court accepts that the Respondent had procedures in place designed to safeguard against a conflict of interest arising they clearly were not effective in this case, therefore the Court is of the view that the procedures should be reviewed to ensure that a similar situation to one described above does not happen in the future.The Complainant's appeal fails.The Court so Determines.Signed on behalf of the Labour CourtCaroline Jenkinson15th October, 2010_____MG.Deputy ChairmanNOTE Enquiries concerning this Determination should be addressed to Madelon Geoghegan, Court Secretary.

EDA1513 July 31, 2015

Earagail Eisc Teoranta (represented By O'donnell Mc Kenna Solicitors)
- And -
Richard Lett (represented By John A Sinnott & Co Solicitors)

Case Details

Body
Labour Court

Date
July 31, 2015

Official
Kevin Duffy

Legislation
- INDUSTRIAL RELATIONS ACTS, 1946 TO 1990
- SECTION 83, EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

County
Co. Dublin

Decision/Case Number(s)
- EDA1513
- ADE/14/45

Note
Enquiries concerning this Determination should be addressed to Ceola Cronin, Court Secretary.

Employer Member
Ms Cryan

Worker Member
Ms Tanham

SUBJECT:

1. Appeal under Section 83 of the Employment Equality Acts, 1998 to 2011.

BACKGROUND:

2. The Worker and the Employer appealed the decision of the Equality Officer to the Labour Court on 10th and 12th December, 2014 in accordance with Section 83 of the Employment Equality Acts, 1998 to 2011. Labour Court hearings took place in April and in June, 2015 with further information submitted to the Court by the parties at later stages. The following is the Determination of the Court:

DETERMINATION:

This is an appeal by Richard Lett and a cross appeal by Earagail Eisc Teoranta against a decision of the Equality Tribunal. The case arises from the termination of the Mr Lett's employment on reaching his 66th birthday. He claims that the circumstances of what he characterised as his dismissal constituted discrimination against him on grounds of his age. Mr Lett was also reduced to a three day week in February 2011, at which time he was also informed that he would be compulsorily retired on 7th September 2011, the date of his 66th birthday.

Mr Lett brought a claim before the Equality Tribunal pursuant to the Employment Equality Acts 1998 -2011 (the Act) contending that he was discriminated against on grounds of his age. The Equality Tribunal found for Mr Lett on both points and awarded him compensation in the amount of €24,000.

In this Determination the parties are referred hereafter as they were at first instance. Hence, Mr Lett is referred to as the Complainant and Earagail Eisc Teoranta is referred to as the Respondent.

The Complainant now appeals against the quantum of the award of compensation made by the Equality Officer. The Respondent cross appeals against the totality of the Equality Officer's decision.

The parties made helpful written and oral submissions on the issues arising in the case and the Court heard oral evidence tendered by both parties. Following the hearing the parties made final written submissions. All of the submissions and the evidence adduced have been carefully evaluated by the Court in reaching its determination.

Background

While there are significant issues of material fact in dispute between the parties the background factual matrix against which the dispute arose is not in dispute and can be summarised as follows: -

The Complainant was born on 8th September 1945. He was formally a director and shareholder of Lett and Company Limited and Lett Group Limited. These companies operated a family business engaged in fish processing and distribution. The Complainant's co-directors were his two brothers. In or about 1988 or 1989 Lett Group Limited acquired the shareholding in the Respondent. It appears that the Complainant became a director of the Respondent and continued in that capacity until 1998, at which time he resigned so as to facilitate a restructuring of the business.

In or about April 2007 the Respondent was acquired by an entity known as the Navid Group. The consideration for the acquisition was that the Navid Group took on the liabilities of the Respondent and procured the release of the Complainant and members of his family from personal guarantees against the bank borrowings of the Respondent.

As a condition of the acquisition the Respondent undertook to employ the Complainant as a fish buyer and engineering consultant. On foot of that agreement the Complainant was employed by the Respondent in 2007 on a contract of service for a period of two years. On the expiry of that fixed term contract the Complainant continued in the employment of the Respondent although his fixed-term contract was not formally renewed at that time.

On or about 1st March 2010, the Respondent furnished the Complainant with a draft of a further fixed-term contract which was expressed to commence on 30th March 2009 and to run for a period of 18 months from that date. The Complainant refused to sign this contract. He nonetheless continued in the Respondent's employment

Neither the contract entered into in 2007 nor the draft contract proffered to the Complainant in 2010 contained an express term stipulating a retirement age. However, the Respondent had produced a staff handbook in which normal retirement age for all staff was expressly stated to be 65.

The Respondent operated a pension scheme the rules of which stipulated that a pension can be paid to a member at any time between the ages of 60 and 75. The Complainant was a trustee of this scheme.

By letter dated 21st February 2011 the Managing Director of the Respondent wrote to the Complainant informing him that in the course of restructuring the business his position had been identified as superfluous to its continuing requirements. He was informed that a decision would shortly be made as to the viability of his position. In this letter the Managing Director of the Respondent also referred to the Complainant's retirement date as being 7th September 2011. By the same letter the Complainant was advised that with effect from 28th February 2011 he would be reduced to a three day week and that this would continue until his retirement date. The Complainant's employment was terminated with effect from 28th February 2011.

At the time his employment terminated the Complainant was 66 years of age.

Position of the Parties

The Complainant

The Complainant contends that he was not contractually required to retire at any particular age. He denies that the Respondent ever introduced a compulsory retirement age or that any compulsory retirement age applied to his employment. The Complainant further contends that other named employees worked beyond the age at which his employment was terminated.

The Complainant further relies on Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Education (hereafter the Directive) in contending that the use of age as a criterion for less favourable treatment in employment constitutes unlawful discrimination. He submitted that national law, and in particular the Act, must be interpreted and applied in harmony with the Directive.

The Respondent

The Respondent contends that the Complainant knew, or ought to have known, that his retirement age was fixed at 65. His retirement was delayed until the end of the year in which he turned 65 because of a view taken by the Respondent as to what was meant by the stipulation in the company handbook.

The Respondent contends that the stipulation as to retirement contained in the handbook was part of the Complainant's conditions of employment and was, in any event, saved by s.34(4) of the Act, which provides: -

- **"Without prejudice to subsection (3), it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees."**

The Respondent submitted, in reliance on authority, that s.34 (4) of the Act is consistent with the requirements of the Directive.

The Respondent further contends that a retirement age of 65, or 66, has been applied consistently to other employees. In support of that contention, details were provided to the Court showing the dates of birth and retirement dates for all employees whose employment, according to the Respondent, came to an end by retirement since 2006, as follows: -

Employee	Date of Birth	Termination Date	Age
A	20/08/47	19/01/10	62yrs, 151 days
B	13/08/47	09/03/12	64yrs, 360 days
C	27/06/46	22/06/12	65yrs, 360 days
D	28/02/50	29/06/12	62yrs, 120 days
E	18/08/48	30/11/13	65yrs. 103 days
F	07/08/48	06/02/14	65yrs, 188 days
G	26/02/49	20/02/15	65yrs, 361 days

Note: The employees referred to are named in information furnished by the Respondent and have been anonymised by the Court

Without prejudice to its contention that the Complainant had actual or constructive knowledge of the requirement that he retire between the ages of 65 and 66, Counsel for the Respondent submitted that the validity of a retirement age is not dependent upon the employee to which it applies having knowledge thereof.

Evidence

Oral sworn evidence was given by the Complainant, Mr Michael Jacob, who was Chairman of Lett Group Limited and the Respondent between 1990 and 2014, and Mr Jim Lett, who was Chief Executive of the Respondent up to 2007. Mr Aodh O'Domhnaill, who is Chief Executive of the Respondent, gave evidence on behalf of the Respondent.

The salient points of the evidence adduced are as follows: -

The Complainant told the Court in evidence that he had never known of the existence of a retirement age in the company. He had been a director of the Respondent up to 1998 but thereafter, while not formally a member of the Board of the Respondent, he attended Board meetings and received copies of all Board papers.

He was employed by the Respondent as a fish buyer and consultant in engineering in 2007 following the restructuring of the company. Prior to that date, he was employed in a similar capacity by Lett and Company limited. The Complainant's initial employment with the Respondent was on a fixed-term contract for two years. On the expiry of this contract it was 'rolled over' and he continued in the employment of the Respondent.

It was the Complainant's evidence that in 2007 he was asked to remain on by Mr Aodh O'Domhnaill although it was provided for in the Heads of Agreement leading to the restructuring that he would be employed by the Respondent.

In March 2010 the Complainant was proffered a draft contract of employment which was expressed to run from 30thMarch 2009 (the date on which his prior contract expired) for a period of 18 months. He refused to sign that document as there were a number of terms with which he disagreed. In particular, he did not accept the proposed duration of the contract which he accepted coincided approximately with his 65thbirthday. He said that in so far as this implied a retirement date, it was the first time that he had heard of a retirement date.

Turning to the company handbook, the Complainant told the Court that the first time that he had sight of this document was in 2011, in the course of the proceedings before the Equality Tribunal.

The Complainant named two former colleagues who, he claimed, worked beyond age 66. One of these persons worked to age 70 while the other worked to age 67. In cross examination the Complainant accepted that this latter person in fact ceased to be employed at age 66. These named employees ceased to be employed in 2005 and 2000 respectively.

According to the Complainant other members of the Lett family whose services were not retained following the restructuring of the business received a financial compensatory package. He expected that he would have received a similar package if his services were not being retained.

Mr Jacob told the Court that he was Chairman of the Respondent between 1990 and 2014. He said that he was personally unaware of any particular retirement age for employees. He accepted that the day-to-day management of the company and the responsibility for the development of employment related policies was the function of management rather than of the Board. He said that he would have expected the management to have a retirement age in place but he had no knowledge of whether there was such a policy or of what it was. He was unaware of any issue relating to age having arisen within the Respondent prior to the 2007 restructuring.

Turning to the handbook, Mr Jacob told the Court that he was certain that he had never seen the document relied upon by the Respondent. He said that if he had seen this document he would have been unhappy with its content and would have said so. It was Mr Jacob's evidence that this document was never seen nor approved by the Board although it would not have required Board approval. He would have expected management to produce an employee handbook.

Mr Jacob described the management of the Respondent as careful reporters.

Mr Jim Lett gave evidence. He was Chief Executive of Lett Group Limited up to 2007. The Lett Group controlled the Respondent up to that time. According to Mr Lett, the first time that he saw the handbook relied upon by Respondent was in the course of the proceedings before the Equality Tribunal. He also considered this handbook inadequate and would not have agreed with its content had he seen it. Mr Lett told the Court that the question of retirement, or matters relating to the age of employees, was never discussed with him while he was in charge of the holding company.

Mr Lett accepted that a named consultant had been engaged by the Respondent in or about 2006 but the focus of his work was directed at reducing costs. He met with the consultant on three or four occasions to discuss his work. He said that he would have expected that employees would be informed of the changes that were being proposed. The consultant recommended the introduction of an annualised hour's arrangement for employees and he was aware that this change had been implemented in 2008.

Mr Aodh O'Domhnaill gave evidence. This witness is currently Chief Executive of the Respondent and has held that position since 2007. He had been General Manager of the Respondent from 1992. Prior to the restructuring the Respondent was owned and controlled by Lett Group Limited. The directors of the company were all members of the Lett family.

According to Mr O'Domhnaill, it became obvious by 2006 that every aspect of the Respondent's business would have to be examined. On foot of recommendations made by the consultant referred to in the evidence of other witnesses, it was decided to introduce a staff handbook and to introduce annualised hours. The handbook was produced in 2006, when the company was controlled by the Lett family. It was originally produced on A4 sheets and was formally printed in 2007and some 300 copies produced.

The staff were not represented by a trade union and a works council was established for the purpose of providing a forum for consultation with staff. It was Mr O'Domhnaill's evidence that the handbook was discussed individually with all staff members. Copies of the handbook were left in the staff canteen in Donegal. Mr O'Domhnaill accepted that the Complainant was based in Wexford and a copy of the handbook may not been sent to that location. Mr O'Domhnaill accepted that it was conceivable that the Complainant has not seen this document. However, the Complainant had a standing invitation to attend Board meetings and did so regularly. He said that the Complainant should have become aware of the existence of the handbook through his involvement with the Board. Mr O' O'Domhnaill did not take issue with Mr Jacob's evidence that the handbook had not been placed before the Board.

Mr O'Domhnaill's told the Court that the handbook's provision relating to retirement reflected the previous practice in the Respondent. No retirement age was specified in the first contract issued to the Complainant in 2007 because it was for a fixed-term of two years. The second contract, while not specifying a retirement age, was to run for eighteen months to the 29thSeptember 2010, at which time the Complainant would have attained the age of 65. It was known that the Complainant did not wish to retire and, having obtained legal advice, it was concluded that he would remain aged 65 until his 66thbirthday and should be allowed to remain in employment up to that date.

The witness told the Court that an advertisement had been placed for a replacement of the Complainant as a fish buyer but the position was never in fact filled.

Discussion

Section 34(4) of the Act,prima facie,allowed the Respondent to fix a retirement age without contravening the prohibition of discrimination on grounds of age. The jurisprudence of the CJEU on the circumstances in which compulsory retirement is saved by Article 6 of the Directive is relevant only if the Court finds that a retirement age was in fact fixed by the Respondent and that the retirement age applied to the Complainant.

As a matter of general principle, a termination of employment by way of retirement should be distinguished from a dismissal on grounds of age. A retirement occurs where the employment comes to an end pursuant to a condition of employment which limits an employee's tenure to the point at which they attain a specified age. In that regard, it appears to the Court that the authority conferred on an employer by s.34(4) of the Act is to apply a condition of employment to that effect. Such a term can be provided in an employee's conditions of employment either expressly or by implication, or it can be provided by incorporation where some other document or instrument, of which the employee had notice, can be read in conjunction with the formal contract of employment. The Court further accepts that an employer's employment policy in relation to retirement can take effect as a contractual condition of employment which is,prima facie,protected by s.34(4) of the Act. However, in the Court's view that could only arise where the policy is promulgated in such a manner that the employees to whom it applies either knew, or ought to have known, of its existence.

On that point the judgment handed down by Hedigan J inMcCarthy v HSE[2010] 21 ELR 165 is instructive. In that case a public servant sought to challenge a decision of the HSE requiring her to retire at age 65. The HSE, in common with all public sector employments, maintained an employment policy requiring employees to retire at age 65, in line with certain statutory provisions. Ms McCarthy claimed that the policy did not apply to her because she had never been informed that she would be required to retire at that age and no such term was included in her contract of employment.

It is noteworthy that rather than relying on the existence of the policy,per se,the approach taken by the Court was to consider if the employer's policy on retirement took effect as an implied term in the applicant's contract of employment. Having reviewed the evidence and the submissions made by the parties Hedigan J said: -

- **"In addressing the substantive issues raised, the crux of the application lies in whether the retirement age of 65 could be viewed as having been implied into the contract as submitted by the respondent. Two alternative approaches were suggested utilising the "officious bystander test" on the one hand and implication by custom on the other. It is my opinion that in the circumstances of the case, the former provides a more suitable formula to determine whether such a term has been implied, although there is necessarily a large degree of overlap. The court is of the opinion that such a term should indeed be implied into the applicant's conditions of employment. The applicant is a highly intelligent woman who is legally qualified. It is difficult to accept that she had no knowledge of the retirement age applicable in that part of the public service in which she worked. Furthermore, irrespective of any actual knowledge of this fact, I would consider the dicta of Maguire P. in O'Reilly that anyone concerned "should have known of it or could easily have become aware of it" to be particularly apt in this case. Moreover in addition to the broad awareness of the retirement age among most working adults, the applicant may be deemed as "on notice" that there was an applicable retirement age by virtue of the superannuation scheme. The superannuation scheme, of which she was a member, made reference to the existence of a retirement age, and more specifically, a cut-off for contributions at age 65. I therefore find that such a term can be implied into the terms and conditions of employment."**

The existence of a contractual term stipulating a retirement age was also a central consideration in the earlier case ofCalor Teoranta v McCarthy, [2009] IEHC 139. That case involved an appeal to the High Court from a decision of this Court in which the age at which Mr McCarthy was required to retire was in issue. The Respondent employer had an established and, it claimed, an agreed policy of requiring employees to retire at age 60. Pursuant to that policy, Mr McCarthy was required to retire on reaching that age. Mr McCarthy claimed that pursuant to an agreement that he entered into with the Respondent his retirement age was fixed at 65.

In giving judgement Mr Justice Clarke focused on Mr McCarthy's'agreed'or'contractual'retirement age rather than on the policy in pursuance of which his employer required him to retire.

At paragraph 5.2 of the judgment Clarke J. observed: -

- **"I did not understand counsel for Calor to disagree that, at the level of principle, it would amount to discrimination on the grounds of age to terminate someone's employment because the person concerned had reached an age which was short of that person's agreed retirement age."**

The Judge then continued, at paragraph 5.4 of the judgment: -

- **".....the Labour Court considered that there were serious questions concerning the proper interpretation of s.34(4) of the Act having regard to the jurisprudence of the ECJ. It is clear that the Labour Court would have given very serious consideration to making a reference to the ECJ if it had come to the conclusion, as a matter of fact, that Mr McCarthy's retirement age was 60 rather than 65. In that eventuality there would have been no doubt but that Mr McCarthy had been required to retire at his contractual retirement age. The question which then would have arisen is as to whether s.34(4), properly interpreted in the light of the Directive which it seeks to implement in Irish law, provides, in all cases, an immunity in respect of a discrimination claim where someone retires at a contractual retirement age. However, because the Labour Court came to the view that, as a matter of fact, Mr McCarthy's retirement age was 65, the Labour Court did not consider it necessary to deal with s.34(4) on the basis that Mr McCarthy had not, in its view, therefore, been required to retire at his contractual retirement age".**

The decision in that case and that inMcCarthy v HSEindicate that in cases such as this the Court should look to the employee's contract or conditions of employment in order to ascertain his or her agreed or contractual retirement age.

It is accepted that the Complainant's contract of employment did not contain any express term as to retirement. That was in part explained by the fact that his employment was intended to be for a fixed-term and so the stipulation of a retirement age was unnecessary. However, the Respondent relies on the staff handbook as containing the stipulation as to retirement.

The terms of a staff handbook can attain contractual status in a number of ways. The individual contract of employment may refer to the handbook thus incorporating its terms into the contract. A term as to retirement may also be implied in the contract by application of the so called officious bystander test enunciated inShirlaw v Southern Foundaries Ltd[1939] 2 K.B. 206. Here the test was set out in the following terms: -

- **"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying that if, while the parties were making the bargain, an officious bystander were to suggest some express provision for it in the agreement they would testily suppress him with a comment 'Oh of course'."**

A term can also be implied in the alternative, and somewhat overlapping, 'custom and practice' test adopted in this jurisdiction by Maguire P in

O'Reilly v Irish Press[1937] 71 I.L.T.R 194. Here it was held that the practice must be: -

- **"...so notorious, well-known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties...it is necessary in order to establish a custom of the**

kind claimed that it be shown that it was so generally known that anyone concerned should have known of it or easily become aware of it."

It seems to the Court that this custom and practice test can appropriately be applied in considering if the policy of an employer took effect as a contractual term or a condition of employment.

The terms of a pension scheme may also be relied upon as either implying a term as to retirement or by incorporating the terms of the scheme into the contract.

A crucial consideration in addressing the question of incorporation or implication is whether the employee knew, or ought to have known, of the term contended for.

Findings on the evidence

The Court was told that the applicable pension scheme in this case provided that an employee may retire at any age between the age of 60 and 75. That did not preclude the employer from fixing a retirement age within that range. It is the Respondent's case that it did fix a retirement age of 65 when the handbook was produced.

The contract of employment that the Complainant entered into in 2007 did not refer to the handbook. Likewise, the draft contract proffered to the Complainant in 2010 contained no such reference. In these circumstances the terms of the handbook were not formally incorporated as a condition of his employment. That, however, does not dispose of the question of whether a retirement age of 65 (or 66) should properly be implied as a condition of the employment by reason of the Complainant's actual or constructive knowledge of the term.

The Complainant told the Court in his evidence that he was unaware of any purported retirement age until he received notice that his employment was to end. He further gave evidence that he never had sight of the handbook until it was shown to him in the course of the proceedings before the Equality Tribunal. Mr O'Domhnaill was unable to say if or when the Complainant was provided with a copy of the handbook. His evidence was that copies of the handbook had been left in the staff canteen in Donegal but that a copy may not have been sent to the Wexford offices in which the Complainant was based. Mr O'Domhnaill felt that the Complainant should have been aware of the existence of the handbook and the retirement age that it specified through his attendance at Board meetings. But this contention is undermined by the evidence of Mr Jacob.

Mr Jacob served as chairman of the Respondent from 1990 to 2014 and he was quite clear in his evidence that neither the handbook nor the fixing of a retirement age was discussed by the board or referred to in papers or reports given to the Board.

In these circumstances the Court accepts the Complainant's evidence that he neither has sight of, nor knew of the handbook until it was produced at the hearing before the Equality Tribunal.

The Court has also considered the submissions to the effect that the draft contract proffered to the Complainant in 2010 impliedly stipulated a retirement age by limiting the proposed tenure of the Complainant to a period of 18 months commencing on 30thMarch 2009. This draft contract would have brought the Complainant's employment to an end on 29thSeptember 2010. He attained the age of 65 on 8thSeptember 2010. This proposed term could not be interpreted as implying that the Complainant's tenure was fixed to age 65. Moreover, that document appears to the Court to have been carefully drafted and the absence of any reference to the company handbook, or to any policy on a retirement age, seems remarkable if it was intended that either would have contractual effect.

Finally, the Court has considered the submissions advanced on behalf of the Respondent concerning the existence and effect of a policy on retirement. On that point, no authority was opened to the Court for the proposition that the mere existence of a policy, in and of itself, could attract an immunity against liability for a unilateral termination of employment on grounds of age. All of the authorities opened to the Court relate to cases in which a retirement age was fixed, either by national law, a collective agreement or by the individual contract of employment.

As previously observed, the Court accepts, in principle, that a policy on retirement can take effect as a contractual term if it is promulgated in such a manner that those to whom it applies either knew, or ought to have known, of its existence. In so far as the policy was promulgated through the handbook, for reasons already stated, the Court does not accept that the terms of the handbook were incorporated in the Complainant's contract of employment or that they became an implied term in his contract.

Nevertheless, the decision inMcCarthy v HSEindicates that an employer's retirement policy could be implied into a contract of employment by application of either the 'custom and practice test' or the 'officious bystander test', referred to earlier. The Court is satisfied on the evidence that the existence of such a policy was not so well known and acquiesced in as to attract a contractual status by application of either test.

In reaching that conclusion the Court has considered the submissions made on behalf of the Respondent to the effect that a retirement age of 65 or 66 has consistently applied since the adoption of the retirement policy in 2006. The information upon which those submissions are based has been tabulated earlier in this Determination. Two points of significance arise from an examination of this information. Firstly, all but one of the employees referred to ceased to be employed after the Complainant's employment came to an end and after the within proceedings were initiated on 7th October 2011. That person, it should be noted, ceased to be employed not at age 65 or 66 but at age 62. Secondly, none of the employees referred to ceased to be employed on either their 65th or 66th birthday, as would usually be the case where the tenure of employed is fixed by reference to a retirement age.

The Complainant did not know of any retirement policy pursued by the Respondent. Nor did Mr Jim Lett, who was Chief Executive of the Respondent until 2007, after the putative adoption of the policy in 2006, know of its existence. Significantly, Mr Jacob, who was Chairman of the Respondent at all times material to this claim, was also unaware of the existence of such a policy. Moreover, no evidence was proffered from any former or current employee of the Respondent concerning the degree of knowledge amongst the workforce of either the existence or import of a retirement policy independently of what was contained in the handbook.

Outcome

Retirement

Having regard to the totality of the evidence adduced the Court cannot accept that the Complainant had actual or constructive knowledge of either the handbook or of a fixed retirement age of either 65 or 66. The Respondent had ample opportunity to inform the Complainant of a requirement that he retire at age 65 or 66 over the currency of his employment. No evidence was adduced of the Complainant having been so informed or having been provided with any document from which such a requirement could have been discerned. There was no express term in his conditions of employment requiring him to retire at either age and, in the Court's opinion, no such term can be regarded as having been implied or incorporated on any of the accepted tests.

In these circumstances the Court must hold that the Respondent had not fixed a retirement age in respect of the Complainant and that he was dismissed because of his age. In these circumstances s.34(4) of the Act cannot avail the Respondent.

Three day week

In the course of the hearing of this appeal no evidence was adduced concerning the circumstances in which the Complainant's working week was reduced to three days per week. The documentary evidence provided to the Court indicates that the reason given for that decision was the trading and financial circumstances in which the Respondent found itself at that time. Since there is nothing to indicate that this was not the real reason for the decision the Court is unable to find that this constituted discrimination on grounds of age.

Redress.

The Court has considered the adequacy of the redress awarded by the Equality Tribunal. It is clear from the evidence that the Complainant was originally employed by the Respondent on foot of the agreement leading to the restructuring of the business in 2007. There is nothing in the evidence to indicate that the parties envisaged or intended that the Complainant would remain in employment for as long as he wished.

Having considered all of the surrounding circumstances the Court has come to the conclusion, as a matter of probability, that at the time the Complainant's employment terminated, the Respondent was entitled to conclude that the requirement for the position that he occupied had ceased or diminished having regard to the prevailing economic and commercial circumstances of the business. It is also accepted that he was not directly replaced. In these circumstances, had the Respondent not mistakenly believed that the Complainant could be compulsorily retired he would, as a matter of probability, have been dismissed on grounds of redundancy at or around that time. The Complainant appeared to have implicitly accepted the reality of that situation in that the thrust of his representations to the Respondent were directed at obtaining an ex grata redundancy payment. In these circumstances his potential loss arising from his dismissal must be regarded as significantly reduced.

Furthermore, the Court has differed from the decision of the Equality Tribunal in finding that the Complainant did not suffer discrimination in being placed on a three day week

The Court has concluded that an award of compensation for the effect of the discrimination found to have occurred in the amount of €24,000 is fair and equitable in the circumstances of this case. This award is not in the nature of remuneration.

Disposal

In light of its decision on the facts of the case it is unnecessary for the Court to address the legal submissions made by the parties on the compatibility of s.34(4) of the Act with the provisions of the Directive.

The Complainant's appeal is disallowed and the Respondent's cross appeal is allowed in part. The decision of the Equality Tribunal is amended in the terms of this Determination.

Signed on behalf of the Labour Court

Kevin Duffy

31st July 2015_____

SCChairman

NOTE Enquiries concerning this Determination should be addressed to Ceola Cronin, Court Secretary.

DWT0342 October 28, 2003

Cementation Skanska (formerly Kvaerner Cementation) Limited - And - Michael Mcgrath

Case Details

Body
Labour Court

Date
October 28, 2003

Official
Kevin Duffy

Legislation
- SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

County
Tipperary

Decision/Case Number(s)
- DWT0342
- WTC/03/10
- WT5921/01/MR

Note
Enquiries concerning this Determination should be addressed to Jackie Byrne, Court Secretary.

Employer Member
Mr Grier

Worker Member
Mr O'Neill

SUBJECT:

1. Appeal of Rights Commissioner's decision WT5921/01/MR

BACKGROUND:

2. The worker claims that he did not receive any holiday/public holiday pay while employed by the Company. The Company states that the claimant was paid holiday pay and public holiday pay under revised contracts of employment which applied from 1st January, 2001.

The worker referred a claim to the Rights Commissioner service on the 6th September, 2001. The worker states that the reason he did not make a claim within the 6 months as specified in Section 27 (4) of the Organisation of Working Time Act, 1997, (the Act) was that he was waiting the results of a test case taken by a fellow employee.

The Rights Commissioner's Decision issued on the 31st December, 2002 as follows:

"In accordance with Section 27 of the Act, I hereby declare that this complaint is out of time."

The worker appealed the Rights Commissioner's Decision on the 28th January, 2003, in accordance with Section 28(1) of the Organisation of Working Time Act, 1997. The Company's case is that the worker's claim is out of time. A Labour Court hearing took place on the 22nd April, 2003. The following is the Court's Determination:

DETERMINATION:

Facts.

In this case the respondent made no defence to the claim other than to contend that the complaint was presented out of time.

The factual background to this case, as admitted or as found by the Court, is as follows:

The claimant in this case was employed by the respondent from 1st November 1998 until 21st May 2000. In common with other employees of the respondent he was initially employed on a contract of employment which purported to incorporate an element into his basic pay to cover payment in respect of annual leave and public holidays. On or about January 2000 an employee of the respondent, Mr Martin Treacy, referred a complaint to a Rights Commissioner, pursuant to section 27 of the Organisation of Working Time Act 1997 (the Act), in which he sought to challenge the validity of these arrangements.

By a decision dated 14th April 2000 the Rights Commissioner held with the claimant in that case and directed that he be paid in respect of the relevant periods of annual leave and public holidays. The respondent appealed that decision to the Court. By Determination DWT017, issued on 31st January 2001, the Court dismissed the appeal and affirmed the decision of the Rights Commissioner. In that Determination the Court held, inter alia, that the impugned contractual term was rendered void by the combined effect of section 37 of the Act and Article 7(2) of Directive 93/104/EC on the Organisation of Working Time.

In April 2001 the respondent issued amended contracts of employment to its employees which conformed to the requirements of the Act in respect to holiday entitlements. However, the amended terms were expressly limited in their application to the period from the 1st January 2001 onwards. The contract did provide that the leave year for the purpose of granting leave would be the period specified in section 2(1) of the Act, namely, a period commencing on 1st April in any year and terminating on 31st March in the following year. At that time the claimant had ceased to be employed by the respondent and was unaffected by this change.

The claimant's employment with the respondent had terminated on 21st May 2000. On 6th September 2001, he presented a complaint to a Rights Commissioner pursuant to section 27 of the Act claiming redress in respect of alleged infringements of his statutory rights in relation to annual leave and public holidays. The complaint was heard by the Rights Commissioner on 1st August 2002.

The Scope of the Complaint.

The complaint herein relates to alleged continuing contraventions of the Act extending over the entire duration of the claimant's employment with the respondent. It was clearly presented outside the time limit prescribed by section 27(4) of the Act and the Rights Commissioner so held in his decision issued on 31st December 2002. Further, the Rights Commissioner declined to apply the extended time limit permitted by section 27(5) and so declined to entertain the complaint. Consequently in this appeal the first issue to be decided is whether the benefit of section 27(5) can be afforded to the claimant so as to give the Court jurisdiction to adjudicate on his complaint.

Extension of the Time Limit.

Section 27(5) of the Act provides as follows: -

- **"Notwithstanding subsection (4) a Rights Commissioner may entertain a complaint under this section presented to him or her after the expiration of the period referred to in subsection (4) (but not later than 12 months of such expiration) if he or she is satisfied that the failure to present the complaint within that period was due to reasonable cause".**

It is noted that the standard required by this subsection is that of "reasonable cause". This may be contrasted with the much higher standard of "exceptional circumstances preventing the making of the claim" which is provided for in other employment related statutes. The Act gives no guidance as to the type of circumstances that can constitute reasonable cause and it would appear to be a matter of fact to be decided by the Rights Commissioner (and by extension the Court on appeal) in each individual case.

It is the Court's view that in considering if reasonable cause exists, it is for the claimant to show that there are reasons which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the context in which the expression reasonable cause appears in the statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present the claimwithin the six-month time limit must have been due to the reasonable cause relied upon.Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he or she would have initiated the claim in time.

The length of the delay should be taken into account. A short delay may require only a slight explanation whereas a long delay may require more cogent reasons. Where reasonable cause is shown the Court must still consider if it is appropriate in the circumstances to exercise its discretion in favour of granting an extension of time. Here the Court should consider if the respondent has suffered prejudice by the delay and should also consider if the claimant has a good arguable case.

Has the Claimant shown Reasonable Cause?

The claimant told the Court that the question of holiday entitlements became a live issue amongst the respondent's workforce after the decision of the Rights Commissioner in Mr Treacy's case. The claimant became aware that other employees had discussed the matter with Mr Steve Barber and Mr Mark Sanky (both of whom are managers with the respondent) and had been advised that Mr Treacy's case was a test case and that when this was finally determined the outcome would be applied to all employees.

The respondent denied that they regarded Mr Treacy's case as a test case or that the claimant had been told that his holiday entitlements would be determined by its outcome. Mr Barber did give evidence to the Court in which he said that he believed that the outcome of the Treacy case would affect other employees and that he may have so indicated to the claimant. He did emphasise that this was a personal view and that he was not authorised by the company to give any such assurances to employees nor did he purport to do so. Mr Sanky did not give evidence.

The company accepted that it was not prejudiced in its defence by the delay in the presentation of the claim.

Conclusions of the Court.

The Court is satisfied that when Mr Treacy succeeded in his claim before the Rights Commissioner, his colleagues, including the claimant, would have pursued similar claims had they not been deflected from so doing by the belief that the final outcome of that case would be of general application.

All parties viewed Mr Treacy's case as a test case in the sense that it would decide whether the respondent could fulfil its statutory obligations under the Act by incorporating an element in basic pay to cover holidays. The Court is satisfied that this view was held by some members of management and was conveyed to the workforce including the claimant.

Whilst the appeal in Mr Treacy's case was pending, it was perfectly reasonable for the claimant to suppose that the respondent would comply with the law when its import was finally decided. Thereafter, there was confusion amongst employees, including the claimant, as to whether or not it was necessary for them to make individual claims under the Act or whether a number of cases then in progress would decided the matter.

Finally, the Court notes that the claimant did not have the benefit of independent professional advice in relation to his rights or on the procedures for the making of complaints under the Act.

In all the circumstance of the case the Court is satisfied that in respect of those contraventions of the Act which occurred up to 12 months after the expiry of the time limit at section 27(4), reasonable cause has been shown for the claimants failure to present the complaint within that time limit. The Court is further satisfied that the respondent has not suffered any prejudice by reason of that delay and that the claimant has a good arguable case which ought be heard.

The Court therefore determined to entertain all complaints appertaining to contraventions of the Act alleged to have occurred on or after 7th March 2000 (hereafter the relevant period).

The Claimant's Holiday Record.

The respondent' records show that the claimant took annual leave and public holidays as follows:

Leave year 2000 – 2001.

The relevant period in this leave year is from 1st April 2000 to 21th May 2000. He was entitled to 2.8 days annual leave in this period. He received 2 days holidays in week commencing 7th March 2001 for which he was not paid. There were 2 Public Holidays in the period on which he worked and received double time.

The claimant is entitled to redress in respect of the loss of cesser pay for 0.8 days and non payment for 2 days

Leave Year 1999-2000

The leave year 1999 to 2000 ended on 31st march 2000. Hence any contravention of the Act arising from the respondents failure to provide the claimant with the requisite leave in respect of that leave year accrued within the relevant period. However, in so far as the complaint relates to the respondents failure to pay the claimant in respect of annual leave or public holidays actually taken on dates prior to the relevant period, it is statute bared and, to that extent it is not cognisable by the Court.

It appears that the claimant received a total of 3 annual holidays during this leave year They were taken in April 1999, and December 1999. The claimant was not paid for this leave but his claim in respect of it accrued outside the relevant period and cannot be taken into account. However, at the close of the leave year he was due 17 days holidays and this can be taken into account for the purpose of providing redress.

Determination

It is clear from the foregoing, that the claimant did not receive his full entitlements in respect of both annual leave and Public Holidays throughout the relevant period. His complaint is, therefore, well founded. Accordingly the decision of the Rights Commissioner is set aside and the appeal herein is allowed.

Redress

Where a claimant has not received his or her statutory period of leave a claim cannot be made nor can an award be formulated as being for payment in lieu of holidays. Article 7 of the Working Time Directive expressly prohibits the payment of an allowance in lieu of annual leave except where the employment relationship has ended. In such cases the proper award should be in the form of compensation for loss of annual leave. Such an award need not be limited to the value of the lost holidays.

The obligation to provide annual leave is imposed for health and safety reasons and the right to leave has been characterised as a fundamental social right in European Law (see comments of Advocate General Tizzano inR v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment Cinematography and Theatre Union [2001] IRLR 559which were quoted with approval by Lavin J in the Royal Liver case). InVon Colson & Kamann v Land Nordrhein – Westfalen [1984] ECR 1891the ECJ has made it clear that where such a right is infringed the judicial redress provided should not only compensate for economic loss sustained but must provide a real deterrent against future infractions.

In this case the Court is satisfied that the appropriate form of redress is an award of compensation. In considering the element of its award to cover the economic loss suffered by the claimant, the Court has had regard to the rate of pay applicable to the claimant at the material time and the average bonus calculated in accordance with Regulation 3(3)(a) of the Organisation of Working Time (Determination of Pay for Holidays) Regulations SI No. 475 of 1997.

Having regard to all relevant considerations the Court measures the quantum which is fair and reasonable in all the circumstances at €1,600 and directs the respondent to pay to the claimant compensation in that amount.

Signed on behalf of the Labour Court

Kevin Duffy

28th October, 2003_____

JB/Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Jackie Byrne, Court Secretary.

EDA1632

FULL RECOMMENDATION

ADE/16/52 DETERMINATIONNO.EDA1632

DEC-E2016-070

SECTION 83 (1), EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

PARTIES :

TRANSDEV LIGHT RAIL LIMITED (REPRESENTED BY BYRNEWALLACE) - AND - MICHAEL CHRZANOWSKI

(REPRESENTED BY SERVICES INDUSTRIAL PROFESSIONAL TECHNICAL UNION)

DIVISION : Chairman: Ms Jenkinson Employer Member: Mr Marie Worker Member: Mr McCarthy

SUBJECT: 1. Appeal of Adjudication Officer's Decision No: DEC-E2016-070BACKGROUND: 2. The appellant appealed the Decision of the Adjudication Officer to the Labour Court on 27 May 2016. A Labour Court hearing took place on 17 November 2016. The following is the Court's Determination:DETERMINATION:This is an appeal by Mr Michael Chrzanowski (the Complainant) against the decision of an Adjudication Officer/Equality Officer under the Employment Equality Acts 1998 – 2011. The Complainant complained that he was subjected to discriminatory treatment on the age ground in terms of Section 6(2)(f) of the Acts and contrary to Section 8 of the Acts when Transdev Dublin Light Rail Limited (the Respondent) imposed a mandatory retirement age of 65 years. Further claims referred under the Act relating to (i) discriminated in relation to getting a job and (ii) dismissal for opposing discrimination on the ground of age were not pursued. This was confirmed by the Complainant's representative at the hearing of the appeal.The Adjudication Officer/Equality Officer held that the Complainant had established a*prima facie*case of discrimination on the ground of age, however, he also found that the Respondent had rebutted that presumption. Therefore, he held that the Complainant's complaint failed.The complaint was referred to the Director of the Equality Tribunal on 22ndOctober 2014.*Background*The Complainant was employed as a tram driver from 6thMarch 2007 until the termination of his employment on 3rdOctober 2014, on his 65thbirthday. He claimed that by retiring him at age 65 he was subjected to discriminatory treatment by the Respondent. He submitted that there was no retirement age in his written contract of employment.*Summary of the Complainant's Case*Mr Paul Henry, SIPTU on behalf of the Complainant, submitted that the decision to retire the Complainant in circumstances where the decision was influenced by his age, constitutes direct discrimination on the grounds of age, as found in*DominicaPetersen v Berufungsausschuss fur Zahnarzte fur den Berzik Westfalen-Lippe*Case C-341/08 [2010] ECR 1-00047.Mr Henry further relies on Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Education (hereafter the Directive) in contending that the use of age as a criterion for less favourable treatment in employment constitutes unlawful discrimination. He submitted that national law, and in particular the Act, must be interpreted and applied in harmony with the Directive. He disputes the Respondent's contention that the Respondent has obligations under the Railway Safety Act 2005 which require it to retire a worker at age 65. The 2005 Act requires the Respondent to ensure that safety critical workers must undergo an assessment by a medical practitioner to determine their fitness to perform safety critical tasks but does not stipulate that they must retire at 65 years.Mr Henry said that the Complainant had a legitimate expectation that he would be allowed continue to work past his 65thbirthday, as there was no mention in the contract of employment that he would have to retire at 65 years and furthermore, there were precedents in the Company for workers to be retained. He referred to the fact that two persons were retained in employment by the Respondent beyond age 65 years. Therefore, he submitted that the Respondent had exercised discretion in their case and in its engagement with the Respondent sought similar treatment for the Complainant. Mr Henry submitted that in both cases the workers concerned were "safety critical workers".Mr Henry disputes the Respondent's contention that health and safety

concerns prevented the Complainant from being retained. The Complainant had a very good attendance record, he requested a fixed term contract for a maximum of two years and he was willing to be medically assessed on an ongoing basis.Mr Henry also questioned the Respondent's assertion that it was appropriate and necessary to have a retirement age in order to promote good workforce planning and to allow access to employment by means of better distribution of work between generations of workers. He disputes the Respondent's reliance on information furnished to the Court which outlines that in January 2014, in planning for retirement and long term absences, the Respondent sought permission to recruit four new tram drivers commencing 24thFebruary 2014. Mr Henry questioned how the Complainant's request to be retained, could impact on the Respondent's workforce planning, where he was only one of three workers facing retirement who was making such a request.The Complainant raised the issue of the Complainant's request to be retained with management, on a number of occasions prior to his 65thbirthday, however, Mr Henry contended that the Respondent gave no serious consideration to proposals made by the Complainant in this regard.In support of its contention that the Respondent's objective grounds for having a retirement age were not genuine, the Union cited a number of authorities where it was held that there were no objective grounds to substantiate an employer having a retirement age. Mr Henry cited*Sweeney v Aer Lingus Teo*DEC-E2013-135 where an Equality Officer found that the Respondent had failed to rebut the presumption of age discrimination. Mr Henry submitted that this case was of particular relevance as in that case the Respondent had failed to include details of a retirement age in the complainant's contract of employment and moreover, it held that entitlement to a pension does not of itself necessitate retirement.Mr Henry relied upon the CIE companies, Iarnrod Eireann and Dublin Bus, as comparators. He said that a direct comparison can be drawn with a train driver in Iarnrod Eireann who is allowed to work to age 66 years. This increase from 65 to 66 years was provided for in*C*ras Iompair Éireann Pension Scheme for Regular Wages Staff (Amendment) Scheme (Confirmation) Order*2016, S.I. No. 63 of 2016.*Summary of the Respondent's Position*Mr Loughlin Deegan, Solicitor, Byrne Wallace Solicitors, on behalf of the Respondent stated that 65 is the established retirement age for all employees in the Company. This practice has been consistently applied and is an implied term in the Complainant's contract of employment, as reflected in the Respondent's pension scheme, of which he is a member. It has been expressly contained in all tram drivers' contract of employment since 2007. The Complainant has been a member of the Veolia Transport Limited Retirement Solution Plan since 25thApril 2012. This specifically states *"your normal retirement age (NRA) is 65 years".*Mr Deegan relied upon Section 34(4) of the Act, which*prima facie,*allows a Respondent to fix a retirement age without contravening the prohibition of discrimination on grounds of age.The Directive imposes an obligation to provide that, where an employer fixes a retirement age in respect of any particular class of employee, any employer who fixes such a retirement age must be able to objectively justify that retirement age.He submitted that the validity of Section 34(4) of the Acts had been upheld in numerous national domestic and European cases, he cited the CJEU case*Palacios de la Villa v Cortefiel Servicios SA,*Case C-411/05.In assessing the question of whether the retirement age that was examined in*Palacios de la Villa*constituted an appropriate and necessary means of achieving the legitimate objective being pursued, the CJEU said the following:-

- *'It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that atissue in the main proceedings may be appropriate and necessary in order toachievealegitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market.Furthermore,the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subjecttocompulsory retirement because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life,such as that provided for by the national*

legislation atissue in the main proceedings,the level of which cannot be regarded as unreasonable.'

Mr Deegan cited the case *Wolfv Stadt Frankfurt am Main (Case-229/2008),*wherethe CJEU determined that a maximum recruitment age for fire services personnel was not precluded by the Directive. The CJEU determined that *"the fire-fighting and rescue duties which are part of the intermediate career in the fire service can only be performed by younger officials'*and therefore comparative youth was a genuine occupationalrequirement. The maximum recruitment age could therefore be justified by reference to Article (4). Mr Deegan said that the CJEU did not address Article 2(5), notwithstanding that a justification on health and safety grounds might also have been available.In*Saundersv CHC Ireland Ltd DEC-E2011-142*the Equality Officerreferred to the *Wolf*decisionin reaching a decision that a retirement age of 55 that applied to a category of emergency services personnel (helicopter winchmen) was justified by reference to Article 4(1) of the Directive.Mr Deegan contended that the retirement age in question is objectively justified by legitimate aims within the meaning of Article 6(1) of the Directive. He cited a number of authorities in support of his contention. He said that the agefacilitates good workforce planning and equitable distribution of employment opportunities between generations. Furthermore, he submitted that as provided for underArticle 2(5) there is a 'a genuine and determining occupational requirement' for a tram driver to be young enough to carry out his or her role safely and therefore the retirement ageis permitted by reference to Article 4(1).Mr Deegan outlined for the Court details of available medical evidence which evidence indicates that the age of 65 is an appropriate age to have set as a retirement age for tram drivers and is also the age at which benefits are available under the occupational pension established by the Respondent. He said that the evidence suggests thatadvancing age of tram drivers can give rise to health and safety concerns and suggests that there is a concern that the ability to safely operate a tram may diminish with advancing age. This medical opinion is reflected in the frequency of health surveillance examinations which tram drivers undergo. These are medical examinations that include the completion of a medical questionnaire by the employee; a full physical examination by, vision/hearing exam, urine test for drugs and alcohol, a cardiac screen (resting and/or exercise ECG) and a lung function (spirometry) examination.

- Tram drivers who are under the age of 50 are required to undergo this examination not less than every five years.
- Tram drivers who are aged 50 and over but who are not yet 60 are required to undergo this examination not less than every three years.
- Tram drivers who are under the age of 65 are required to undergo this examination not less than every two years.

Part of the way in which the Respondent protects the health and safety of its employees, passengers and other members of the public is by ensuring that safety critical workers (including tram drivers) are fully capable of carrying out their functions. This is achieved by a range of measures, including (but not limited to):

- (a) appropriate pre-employment medical screening;(b) periodic medical examination of safety critical workers;(c) compliance with the*Safety Health and Welfare at Work Act 2005;*(d) compliance with the*Railway Safety Act 2005;*(e) performing regular checks, such as unannounced drug and alcohol screening.

The average number of days lost to illness (including injury) by tram drivers over the age of 60 is 5.5 times higher than the average number of days lost to illness by tram drivers under the age of 50.Mr Deegan stated that the Respondent does not have a custom and practice which permits tram drivers to remain as employees after age 65. He told the Court that on one occasion a tram driver, Mr B, was permitted to remain in employment after reaching the age of 65. In that case, Mr B was retained on a one year fixed term contract after his due date of retirement. However, within a few months he suffered a heart attack and retired. A second person employed as a Revenue Protection Officer, was allowed to remain in employment after age 65 however, he was not a tram driver. Mr Deegan informed the Court that Revenue Protection Officers had been categorised as a "safety related role" within the Respondent's Safety Management System (SMS) which was audited and

certified by the Railway Safety Commission.Mr Deegan stated that the High Court in*Donnellan v Minister for Justice Equality and Law Reform and others [2008] IEHC*467 set out guidance for determining how an objective justification advanced in respect of a retirement age is to be assessed. The Court summarised the applicable law by saying that the aim pursued by the person setting the retirement age must be rational and legitimate and the measure used in pursuit of that aim (i.e. the retirement age and the manner in which it is applied) must be a proportionate (i.e. appropriate and necessary) means of pursuing that aim.The Respondent submitted that it is able to objectively justify the retirement age that it has fixed in respect of tram drivers on grounds identified at Article 2(5) and 4(1) of the Directive.The aims pursued by the Respondent for the retirement age of 65 years are as follows:-

- i.Tram drivers are 'safety critical workers' within the meaning of the*Railway Safety Act 2005*.Because of the nature of their work, it is very important that they are in a position to perform their roles safely, to ensure the protection of the health and safety of tram drivers, passengers and members of the public.ii.It promotes better access to employment by means of better distribution of work between the generations; it allows for efficient workforce planning; new drivers were recruited in anticipation of the retirement of the Complainant and others.iii.Medical opinion suggests that advancing age gives rise to health and safety concerns; it suggests that the ability to safely operate a tram may diminish with advancing age.

  Mr Deegan disputed the point raised by the Union that CIE was an "associated employer" of CIE and accordingly could be cited as a comparator for the purposes of the Act. Section 2(2) of the Act provides as follows:-

  - *"(2) For the purposes of this Act, two employers shall be taken to be associated if one is a body corporate of which the other (whether directly or indirectly) has control or if both are bodies corporate of which a third person (whether directly or indirectly) has control."*

  Mr Deegan confirmed that :-

  - (a) The Respondent does not control CIE.(b) CIE does not control the Respondent.(c) The Respondent and CIE are not (directly or indirectly) controlled by any third person.

*The Law Applicable.*Section 6(1) of the Employment Equality Acts 1998 and 2004 (the Act) provides, in relevant part, as follows: -

- *"(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances discrimination shall be taken to occur where—*
  - *(a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the 'discriminatory grounds')which—(i) exists,(ii) existed but no longer exists,(iii) may exist in the future, or(iv) is imputed to the person concerned,*

Section 34(4) of the Act provides for certain savings and exceptions relating to the family, age and disability grounds. Subsection (4) of that Section provides: -

- *(4) Without prejudice to subsection (3), it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees.*

Subsection (3) deals with occupational benefit schemes and is of no relevance to the issues arising in this case.The Act gave effect in domestic law to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Directive). Recital 14, 25 and Articles 2 (5), 4(1) and 6 (1) of the Directive are of particular relevance to the instant case.Recital 14 provides: -

- *"This Directive shall be without prejudice to national provisions laying down retirement ages."*

Recital 25 provides: -

- *The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.*

Article 4(1) of the Directive provides as follows

- *'Notwithstanding Article 2(1)and 2(2),Member States may provide that a difference in treatment which is based on a characteristic referred to in Article 1 shall not constitute discrimination where, by nature of the particular occupational activities concerned or of the context in which they are carried out, such acharacteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'*

Article 6 (1) of the Directive provides: -

- *Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.*

Issues for Consideration by the Court

- *Existence of a contractual retirement age*

Section 34(4) of the Act,*prima facie,*allowed the Respondent to fix a retirement age without contravening the prohibition of discrimination on grounds of age. The jurisprudence of the CJEU on the circumstances in which compulsory retirement is saved by Article 6 of the Directive is relevant only if the Court finds that a retirement age was in fact fixed by the Respondent and that the retirement age applied to the Complainant.

It is accepted that the Complainant's contract of employment did not contain any express term as to retirement. The Respondent told the Court that at the commencement of its operations in 2003, contracts of employment issued to workers did not contain details of a retirement age, although it did operate a pension scheme which specified such an age. The terms of which scheme had been collectively agreed with the recognised trade union for employees of the Respondent. Furthermore, the Respondent said that from 2007 all contracts of employment contained such details.In*Earagail Eisc Teoranta v Richard Lett*EDA1513 the Court held that as a matter of general principle, a termination of employment by way of retirement should be distinguished from a dismissal on grounds of age. A retirement occurs where the employment comes to an end pursuant to a condition of employment which limits an employee's tenure to the point at which they attain a specified age. It held that a term of employment regarding a retirement age, within the provision of Section 34 (4) of the Act, can be provided in an employee's conditions of employment either expressly or by implication.In the instant case, while the Complainant's contract of employment did not specify a retirement age, he was provided with and signed a copy of the collective agreement between the Respondent and the Union. This document provided details of the Group Pension, Life Assurance and Disability Scheme. The Complainant opted not to join the latter scheme until 2012, when he was provided with details which explicitly stated that the retirement age was 65.It is clear to the Court that from at least the date he joined the scheme, he was aware of the existence of the retirement age; he was furnished statements of his pension contributions on an annual basis which clearly specified the retirement age. Furthermore, the Complainant accepted that contributions into the pension scheme would cease on his 65thbirthday.In support of its contentions, the Union cited a number of authorities. Mr Henry cited*Sweeney v Aer Lingus Teo*DEC-E2013-135 where an Equality Officer found that the

Respondent had failed to rebut the presumption of age discrimination. Mr Henry submitted that this case was of particular relevance as in that case the Respondent had failed to include details of a retirement age in the complainant's contract of employment. However, in that case the Equality Officer held:-

- *"although her contract of service does not contain an express provision stating a retirement age, I find that 65 was the implied retirement age for all of the respondent's non-flying staff and that an appropriate provision can be inferred into the complainant's contract."*

It seems to the Court that through custom and practice the policy of retirement age at 65 was established by the Respondent and that this was accepted by the Complainant. All workers who retired from the employment did so at age 65. Furthermore, the Respondent confirmed that all of the tram drivers who had retired at 65 (approx. 10) did so during the tenure of the Complainant's employment having previously worked in the same job category/grade as the Complainant. On a discretionary basis two workers were taken back on fixed term contracts. The first person to reach retirement age in the Company in 2010 sought to be retained in employment beyond his retirement age, he was a tram driver and on that occasion discretion was used by the Managing Director leading to a fixed term contract. Unfortunately that person suffered a heart attack within a few months. One other person, a retired Revenue Protection Officer, was also permitted to work beyond his retirement age, in this case the Respondent stated that an exception was made as he was not regarded by the Respondent as a safety critical employee protected by the Railway Safety Act. As that person was not employed as a tram driver and was not engaged in tram driving duties, the Court does not consider that person as comparable.Some months prior to his retirement, with the assistance of his Union, the Complainant sought to extend his employment post 65 years on a fixed term basis, as provided for by Section 6 (3) (c) of the Act. In this case the Respondent gave serious consideration to this request. It engaged in discussions with the Union regarding the possibility of a collective agreement to extend the normal retirement age for all employees, (including the Complainant and all other tram drivers). This exercise took into account the changes to the State Retirement Pension Benefit. The Respondent sought medical opinion on the implication of extending the age and explored the feasibility of extending its insurance-related benefits to employees older than 65 with its insurance brokers. They responded to say that some of the products currently provided to tram drivers would not be available to tram drivers who were over 65. Both the expert medical opinion and empirical evidence demonstrated that the ability to safely operate trams diminishes with advancing age. Based on the findings, the Respondent decided that the appropriate course of action was to maintain its retirement age of 65 and the Union's request was denied.In all the circumstances the Court is satisfied that the Respondent had a contractual retirement age in respect of the Complainant and that the Complainant knew or ought to have known of its existence. The Court sees no merit in the Complainant's argument that he had a legitimate expectation of working beyond age 65. Therefore, the Court finds that the Respondent can avail of Section 34(4) of the Act.

- *Comparators*

The Union cited CIE employees as relevant comparators for the purposes of this claim. Mr Henry cited *C[illegible]ras Iompair Éireann Pension Scheme for Regular Wages Staff (Amendment) Scheme (Confirmation) Order*2016, S.I. No. 63 of 2016 which amended the pre-existing 1957 pension scheme, inter alia, to provide an extension of the normal retirement age from 65 to 66, with effect from 1st April 2016.In the first instance the Court notes that this amendment took effect from 1st April 2016, whereas the claim before the Court relates to an alleged discriminatory act which took take on 3rd October 2014, therefore cannot be taken into consideration by the Court and secondly the Court is satisfied that CIE companies are not "associated employers" as defined by Section 2(2) of the Act and accordingly are not appropriate comparators for the purposes of the Act Therefore, the Court cannot accept the proposition that CIE is an appropriate comparator

Not therefore, the Court cannot accept this proposition that SIL is an appropriate comparator.

- *Objective Justification*

Section 34(4) purports to remove the imposition of a retirement age from the ambit of the Act. However, it is clear and settled law in light of theprinciples set out in the*Palacios de la Villa*case that the Court must apply the provisions of Article 6 of the Directive, and the Court accepts Mr Henry's submission in that regard. Consequently, according to the Union, a retirement age can only be saved from the prohibition of discrimination on grounds of age where it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. It was submitted that there was no evidence of such objective justification in this case.

In*Palacios de la Villa*the Court of Justice held that the retirement age in issue in the main proceedings was lawful where, in accordance with Article 6 of the Directive: -

- *-[T]he measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose.*

The Court notes that the terms of the pension scheme were arrived at through collective agreement with the Union and with two exceptions the retirement age has been consistently applied since the inception of the Company in 2003.

- *- Health & Safety Concerns*

Article 4(1) of the Directive permits difference of treatment where it is a genuine occupational requirement. The Court must examine whether the imposition of a retirement age on the Complainant who was a tram driver was justifiable as a genuine and determining occupational requirement under Article 4(1) of the Directive.The Respondent stated that the Complainant as a tram driver was a safety critical employee, governed by the Railway Safety Act 2005 and its retirement age policy has been set to take into account the safety related nature of its operations. To that effect it has sought medical opinion on two occasions, in 2010 and again in 2014, as to whether its retirement age of 65 was appropriate and based on the medical opinion and on its workforce planning requirements, it decided against extending the retirement age.The Respondent furnished the Court with aletter dated 2nd February 2015 from Dr John J McDermott, specialist in occupational medicines and medical advisor to the Respondent for more than 10 year. This letter suggests thatadvancing age of tram drivers can give rise to health and safety concerns. Dr McDermott suggests that there is a concern that the ability to safely operate a tram may diminish with advancing age. He says that these observations are supported both by medical opinion and by empirical evidence.Among otherthings,Dr McDermottadvised the Respondent of the following:-

- *'I believethe current age of 65 is appropriate in the context of this extremelyresponsible safety critical role where medical standards are quite exacting forobviousreasons.""It iscleartomethat our drivers are (understandably) accumulating medicalissuesastheyadvance in years and are longerin service and it becomes more challenging for them tomeet the required medical standards." age associated changes and visual perception are associated withconditionsthatincrease the risk of driving for older workers.There is atendency the vision field contract so that stimuli in the preferable[peripheral] vision may not be noticed (even though standard formal eye test may notrevealadefect)."somedrivers with long periods of service will have accumulated multiplemedicalissues (i.e.it is possible they would have failed their pre-employment medicalhadthese conditions existed at that time).Ithas proved challengingto managethesemedical conditions satisfactorily to allow them to continue in their roleswhile not compromising public safety.'*

The Railway Safety Act 2005 provides a definition at Section 93 of a "safety critical task": -"Safety critical task means a task specified in paragraph (i), (ii), or (iii) when performed in the course of the operation of a railway undertaking.*(a) in the course of a person's employment with the undertaking,(b) under a contract of services with the undertaking,*

(c) in the course of a person's employment with a person who has a contract of services with the undertaking, or

(c) in the course of a person's employment with a person who has a contract of services with the undertaking, or

(d) voluntarily or otherwise, namely— (i) driving a train, or in any other way controlling or affecting the movement of a train, (ii) controlling, affecting or managing, the movement of persons on a train, on a platform, across a level crossing, or, the boarding of, or alighting from, a train of persons, or

(iii) working in a maintenance capacity (as defined in subsection (2)) or as a supervisor of, or look-out for, persons working in such capacity;"

And "safety critical worker" is defined as *"means a person who performs a safety critical task"For the purposes of this Part and*Part 9*, a person works in the course of the operation of a railway undertaking in a maintenance capacity, if his or her work in the operation involves installation, maintenance, repair, alteration or inspection of, railway infrastructure or trains, or involves coupling or uncoupling trains or performing a pre-departure examination of trains."*In *Wolf*the CJEU determined that to impose an upper age limit for recruitment to the fireservice was a genuine and determining occupational requirement under Article 4 (1) of the Directive. In the instant case, the Court notes that the medical opinion furnished, which was not disputed by the Union, associatesage related changes and visual perception withconditionsthatincrease the risk of driving for older workers. In such circumstances, the Court accepts that to impose an upper age limit on the retention of tram drivers in order to protect the health and safety of drivers, passengers and the general public is reasonable in the circumstances and can constitute genuine and determining occupational treatment and is legitimate and proportionate. The Court finds that the Respondent has set out reasonable grounds that objectively justify a retirement age of 65 for tram drivers (including the Complainant) who are classified as safety critical employees, in the interest of the safety of drivers, passengers and the public.

- *-Promotion of Workforce Planning and Access to Employment for a new Generation of Workers*

The Court accepts that it is not unreasonable for employers to have a legitimate interest in workforce planning.

In*Rosenbladtv Oellerking Geb*udereinigungsge GmbH (Case C-45/09) [2011] I.R.L.R. 51*the CJEU examined the justification of a retirement age contained in a collective agreement, it held:-

- *'By guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff, the clause on automatic termination of employment contracts is thus the reflection of a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment. ... It does not appear unreasonable for the social partnerstotake the view that ameasure such [the provision containing the retirement age] may be appropriate for achieving the aims set out above'.*

The Respondent relied upon*Palacios de la Villa*which held that in assessing the question of whether the retirement age constituted an appropriate and necessary means of achieving the legitimate objective being pursued, the CJEU said the following:-

- *'It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as thatatissue in the main proceedings may be appropriate and necessary in ordertoachievealegitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating accesstothe labour market.Furthermore, the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subjecttocompulsory retirement because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pensionatthe end of their working life, such as that provided for by the national legislationatissue in the main proceedings, the level of which cannot be regarded as unreasonable.'*

The CJEU decision of*Fuchs and Kohler v Land Hessen C-159/10 and C-160/10) [2011] I.R.L.R. 1043 concerned the*

The CJEU decision of *Fuchs and Köhler v Land Hessen* C-159/10 and C-160/10 [2011] I.R.L.R. 1043 concerned the compulsory retirement of civil servants where the aims were to achieve a balance between the generations, plus the efficient planning of the departure and recruitment of staff, encouraging the recruitment or promotion of young people, and avoiding disputes about older employee's fitness to work beyond a certain age.In the instant case, the Respondent demonstrated for the Court how the Respondent conducts its workforce planning in the case of tram drivers. In January 2014, over eight months before the Complainant's retirement, to ensure the Respondent met its manning levels - levels which were agreed with the Union which required it to employ 173 tram drivers at any time, it sought approval for the recruitment of extra drivers. Due to the impending retirement of the Complainant (and others), it sought to recruit additional tram drivers commencing from 24thFebruary 2014. This action was required in order to ensure that the new drivers were properly trained prior to the Complainant's (and others) retirement.Taking account of the medical opinions advanced coupled with the workforce planning requirements and the collectively agreed pension scheme, the Court is satisfied that a compulsory retirement age of 65 for tram drivers was reasonable and appropriate in the circumstances. Furthermore, it accepts that it constituted a legitimate aim of employment and labour market policy in order to prevent possible disputes concerning tram driver's fitness to work beyond a certain age.Determination

The Court accordingly determines that the Respondent acted in compliance with Section 34(4) of the Act, the compulsory retirement age of 65 applied to the Complainant was necessary reasonable and proportionate and accordingly amounted to objective justification for that maximum retirement age. Accordingly the Court affirms the Decision of the Adjudication/ Equality Officer and rejects the appeal.

The Court determines that the complaint is not well founded and affirms the decision of the Adjudication/ Equality Officer.

The Court so Determines.

Signed on behalf of the Labour CourtCaroline Jenkinson29 November 2016_____MNDeputy ChairmanNOTE Enquiries concerning this Determination should be addressed to Michael Neville, Court Secretary.

EDA164

FULL RECOMMENDATION

ADE/15/37 DETERMINATIONNO.EDA164

DEC-E2015-100

INDUSTRIAL RELATIONS ACTS, 1946 TO 1990SECTION 83 (1), EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

PARTIES :

DUBLIN BUS (REPRESENTED BY CIE GROUP OF COMPANIES SOLICITOR) - AND - WILLIAM MCCAMLEY

(REPRESENTED BY SERVICES INDUSTRIAL PROFESSIONAL TECHNICAL UNION)

DIVISION : Chairman: Mr Duffy Employer Member: Mr Marie Worker Member: Ms Tanham

SUBJECT: 1. Appeal of Equality Officer (now known as Adjudication Officer Decision No: DEC-E2015-100)

BACKGROUND: 2. This is an appeal of Equality Officer (now known as Adjudication Officer Decision No: DEC-E2015-100). A Labour Court hearing took place on 12th February 2015. The following is the Court's Determination:DETERMINATION:This is an appeal by William McCamley against the decision of the Equality Tribunal in his claims of harassment and victimisation on grounds of race and religion against Dublin Bus. In this Determination the parties are referred to as they were at first instance. Hence, Mr McCamley is referred to as the Complainant and Dublin Bus is referred to as the Respondent.

The case was referred to the Equality Tribunal on 12th June 2012 under the Employment Equality Acts 1998-2011 (hereafter the Acts). It was heard by an Equality Officer on 30th July 2014. The decision under appeal was issued on 30th September 2015. The Equality Officer found against the Complainant.

Material FactsThe material facts of the case are not seriously in dispute and can be briefly stated.

The Complainant is an employee of the Respondent. He is also an activist in SIPTU. In that capacity he represented SIPTU in dealing with industrial relations issues arising within the employment. The NBRU also represents Drivers employed by the Respondent. It is common case that there has been a history of inter-union rivalry between these Unions within the Respondent Company which, at times, has manifested itself in a level of antipathy between some of their respective members.

Following a conciliation conference at the then LRC in a dispute involving the Respondent and both trade unions, a member of the NBRU, who was also an employee of the Respondent, posted abusive comments concerning the Complainant on Facebook. These comments referred to the Complainant in particularly disparaging and offensive terms which related to a religion and a nationality imputed to him (which are not his actual religion or his actual nationality). The offending comments were posted on or about 1st March 2012. This incident will be referred to in this Determination as 'the Facebook incident'

The Complainant referred a complaint concerning this posting to his Manager in reliance on the Respondent's Dignity at Work policy. She responded that as the matter complained of occurred outside the workplace the company could not take any action under the policy in pursuance of which the complaint was referred.

The Complainant appealed against the refusal of the local Manager to address his grievance. The matter eventually came before the Head of Human Resources of the Respondent. He took a different view to that taken by the local Manager. The dealt with the complaint in reliance on Rule 18 of the Company Rule Book which provides:

- *"Employees shall not conduct themselves in any manner prejudicial to the reputation and welfare of fellow employees"*

The Head of Human Resources directed that a disciplinary process be initiated against the author of the offending comments. This resulted in a disciplinary sanction being imposed on the employee concerned. There was a significant delay

between the reporting of the offending comments and the initiation of the disciplinary process. By letter dated 3rdSeptember 2012, the Head of Human Resources wrote to the Complainant informing him that the author of the comments had admitted posting them on Facebook and had been 'charged' under Rule 18 with conduct prejudicial to another employee. The Head of Human Resources explained the delay by referring to the absence of the employee concerned on sick leave in consequence of which he was unavailable for interview.

The Complainant relies on earlier incidents of harassment which he claims are part of a pattern of discriminatory treatment against him by fellow employees. In particular he relies on an incident that occurred in 2008 in which he was the subject of an assault. That incident occurred on an occasion when he was attending a function hosted by the Respondent. The Complainant told the Court that he believed that the assault was motivated by an imputation to him of a certain religious affiliation because of words addressed to him by the assailant before the assault occurred. He claims that this incident and the incidents referred to above form part of a continuum of harassment. This occurrence will be referred to as 'the 2008 incident'

The Complainant further relies on an incident surrounding the placing of graffiti of a personalised and highly offensive nature about him in a staff toilet. This incident appears to have occurred on or about 20thJune 2012. The Complainant contends that it took the Respondent three weeks to have this graffiti removed. It appears from the Complainant's submission that he is relying on this occurrence and a further incident of harassment as an act of victimisation. This will be referred to as 'the graffiti incident'

Finally, the Complainant refers to an incident in which offensive material was posted on Facebook by an employee of the Respondent which was directed at two Managers. In that case the employees concerned were disciplined immediately. He relies on the different approach of the Respondent in his case as an act of discrimination.

Position of the PartiesThe Complainant contends that the offending publications and conduct constitute harassment as that term is defined by the statute. He further contends that he suffered the harassment in the course of his employment in consequence of which the Respondent is fixed with liability under the Acts. It is also the Complainant's case that the Respondent had failed to take effective measures to prevent the harassment and cannot, therefore, avail of the defence provided by the Acts.

The Respondent accepts that the offending comments were published in relation to the Complainant and that the author of the comments was an employee of the Respondent. However, the Respondent denied that the Complainant was harassed in the course of his employment. It was the Respondent's position that the offending conduct occurred in circumstances unrelated to the Complainant's employment. In these circumstances the Respondent submitted that the Court has no jurisdiction to entertain these complaints.

In relation tothe 2008 incident the Respondent contends that they are outside the statutory time limit and are likewise outside the scope of the Court's jurisdiction.

In relation to the complaints concerning graffiti, the Respondent submitted that following the complaint received from the Complainant the defilements were removed as soon as possible and that its response in this case was no different to that which it adopted in all other similar cases.

Legal PrinciplesThe first issue arising in the case is whether the Facebook incident constituted discrimination within the meaning of s.14A of the Act. That section provides: -

- *(1) For the purposes of this Act, where—*
  - *(a) an employee (in this section referred to as "the victim") is harassed or sexually harassed either at a place where the employee is employed (in this section referred to as "the workplace") or otherwise in the course of his or her*

employment by a person who is—(i) employed at that place or by the same employer, (ii) the victim's employer, or

- *(iii) a client, customer or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, or*

(b) without prejudice to the generality of paragraph (a)—

- *(i) such harassment has occurred, and*

(ii) either—

- *(I) the victim is treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or(II) it could reasonably be anticipated that he or she would be so treated*

the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment.

(2) If harassment or sexual harassment of the victim by a person other than his or her employer would, but for this subsection, be regarded as discrimination by the employer under subsection (1), it is a defence for the employer to prove that the employer took such steps as are reasonably practicable—

- *(a) in a case where subsection (1)(a) applies (whether or not subsection (1)(b) also applies), to prevent the person from harassing or sexually harassing the victim or any class of persons which includes the victim, and*

  (b) in a case where subsection (1)(b) applies, to prevent the victim from being treated differently in the workplace or otherwise in the course of the victim's employment and, if and so far as any such treatment has occurred, to reverse its effects.

(3) A person's rejection of, or submission to, harassment or sexual harassment may not be used by an employer as a basis for a decision affecting that person.

(4) The reference in subsection (1)(a)(iii) to a client, customer or other business contact of the victim's employer includes a reference to any other person with whom the employer might reasonably expect the victim to come into contact in the workplace or otherwise in the course of his or her employment.

(5) In this section "employee" includes an individual who is—

(a) seeking or using any service provided by an employment agency, and

- *(b) participating in any course or facility referred to in paragraphs (a) to (c) of section 12(1),*

and accordingly any reference to the individual's employer includes a reference to the employment agency providing the service or, as the case may be, the person offering or providing the course or facility.

(6) Where subsection (5) applies in relation to a victim, subsection (1) shall have effect as if for "in relation to the victim's conditions of employment" there were substituted "contrary to section 11", or, as the case may be, section 12.

(7) (a) In this section—

-

  - *(i) references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds, and*

    (ii) references to sexual harassment are to any form of unwanted verbal, non-verbal or physical conduct of a sexual nature,

  being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

  (b) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.

What is complained of in this case comes within the ambit of subsection (1)(a) of this section. There was no evidence that

the Complainant was treated less favourably in the course of his employment for having accepted or rejected the harassment. Consequently subsection 1(b) is not applicable. This is a point of some relevance when considering whether the Respondent can avail of the defence provided by subsection (2) of s.14A. Where subsection 1(b) applies, subsection (2)(b) provides, in effect, that in order to make out a defence the employer must show that, in addition to having preventative measures in place, it took measures to reverse the effects of any adverse treatment suffered by the Complainant in consequence of having accepted or rejected the harassment.

In this case the defence available to the Respondent is that provided for at s.14A(2)(a). Accordingly, in order to avail of that defence the Respondent must show that it took such steps as were reasonably practicable to prevent the harasser from harassing the victim or any class of persons which includes the victim. The applicability of that defence on the facts of the instant case will be considered later in this Determination.

The liability that subsection (1) of this section imposes on employers is not akin to vicarious liability in common law. Rather, this provision applies a form of constructive direct liability on an employer where an employee is harassed by another employee, or a person in a category referred to at subsection 1(a) (ii) or (iii) of section 14A. That is clear from the use of the words "*the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment*" in the final sentence of subsection (1) of that section.

In the Course of Employment – Facebook IncidentUnlike vicarious liability, in the case of harassment committed by an employee on another employee there is no requirement to show that the wrongdoer was acting in the course, or within the scope, of his or her employment. Hence, it matters not that the harasser was off duty or at home when he posted the offending material. It is, however, essential that the victim suffered the harassment in the course of his or her employment. It follows that in the instant case the focus of the Court's enquiry must be on whether the Complainant suffered the harmful effects of the conduct complained of while in the course of his employment.

The meaning to be ascribed to the expression '*in the course of employment*' was judicially considered by the Court of Appeal for England and Wales in *Jones v Tower Boot Co. Ltd.* [1997] I.C.R. 254 in which the Court was required to construe a similarly worded provision at s 32 of the UK Race Relations Act 1976. Here, having reviewed a line of relevant authorities Waite LJ said the following: -

- *The tribunals are free, and are indeed bound, to interpret the ordinary, and readily understandable, words "in the course of his employment" in the sense in which every layman would understand them. This is not to say that when it comes to applying them to the infinite variety of circumstances which is liable to occur in particular instances — within or without the workplace, in or out of uniform, in or out of rest-breaks — all laymen would necessarily agree as to the result. That is what makes their application so well suited to decision by an industrial jury. The application of the phrase will be a question of fact for each industrial tribunal to resolve, in the light of the circumstances presented to it, with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability in tort.*

As can be seen from that passage, Waite LJ recognised that there are a variety of situations in which it can be held that a person is engaged in the course of his or her employment that go beyond the time spent actually in the workplace or performing the duties and tasks associated with the person's occupation. Hence, it has been held that an employer can be liable for harassment that occurred in situations such as where the victim is attending a social function organised or sponsored by the employer or is attending meetings or conferences . That is acknowledged by the Respondent and it is also made clear in the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (S.I.208/2012), which provides: -

- *The scope of the sexual harassment and harassment provisions extend beyond the workplace, for example to*

conferences and training that occur outside the workplace. It may also extend to work-related social events.

There must, however, be some discernible connection between the harassment and the victim's employment in the sense that the victim suffered the harmful effects of the harassment while he or she was engaged in activity authorised by the employer.Discussion

In the instant case it appears clear that the offending comments posted in the Facebook incident were directed at the Complainant in his capacity as a representative of a group or body of workers employed by the Respondent. He was clearly authorised by the Respondent to act in that capacity. There can be no doubt that the purpose and effect of the publications was to disparage and ridicule the Complainant in the eyes of his colleagues. In these circumstances it follows that, in the words of s14A(7)(a) of the Act, it was conduct having "*the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person*".Moreover, it appears clear from the context and content of the offending comments that their harmful effects were intended to impact on the Complainant while exercising his role as a worker representative; a role that he performed in the course of his employment.

It follows that the posting of the offending comments constituted harassment of the Complainant within the meaning of s.14A(7) of the Act. Consequently the employer is rendered liable for that harassment unless it can avail of the defence provided by s.14A(2) of the Act.

2008 Incident – Time Limit

The Complainant gave evidence in relation to the 2008 incident. That incident occurred when the Complainant was attending an event organised by the Respondent and he was doing so in his capacity as an employee of the Respondent. He was physically assaulted by another employee. As a prelude to the attack this employee addressed the Complainant using a crude and vulgar expression having a religious connotation (details of which were given in evidence). The incident was witnessed by a member of the Respondent's management. No action was taken against the perpetrator of the assault. For reasons that were explained to the Court the Complainant did not make a formal complaint to the Respondent in relation to this incident.

This incident occurred some four years before the within complaint was referred to the Equality Tribunal.*Prima facie*,it was at that stage statute barred. However, the Complainant contends that it should be considered a part of a continuum of discriminatory treatment to which he was subjected and that the time limit started to run on the date of the last act of harassment, namely the Facebook incident, 1st March 2012.

Both s.77(5) and s.77(6A) of the Act provide for circumstances in which acts of discrimination that occurred outside the normal time limit can nonetheless be relied upon where they form part of what is conveniently referred to as continuing discrimination.

Section 77(5)(a) of the Acts provides: -

- *(a) Subject to paragraph (b) , a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence.*

Section 77(6A) provides: -

- *For the purposes of this section—(a) discrimination or victimisation occurs—*
  -
    - *(i) if the act constituting it extends over a period, at the end of the period,*

    (ii) [not relevant]
    - (iii)*[not relevant]*

The application of these provisions was extensively considered by this Court in Determination EDA1124 *Ann Hurley v Co Cork VEC*. It is appropriate to set out the relevant passage in that Determination in full: -

- *Subsection (5) and subsection (6A) of s.77 deal with different forms of continuing discrimination or victimisation. Under subsection (6A), an act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (*Barclays Bank plc v Kapur [1989] ILRM 387*). This subsection would apply where, for example, an employer maintains a discriminatory requirement for access to employment or promotion. In the case of victimisation, it would apply, for example, where an employer pursues a policy or practice of not affording certain benefits to employees who brought equality claims. In such a case the time limit will only run from the time that the policy or practice is discontinued. Hence an aggrieved party could maintain a claim in respect of acts or omissions which occurred in pursuance of the policy or practice regardless of when the act or omission occurred. There is, however, authority for the proposition that an act occurring after the presentation of the Complainant's complaint may not be taken into account when determining whether there was a continuing act (see the decision of the Court of Appeal for England and Wales in Robertson v Bexley Community Centre [2003] IRLR 434, at para 21).*
  Subsection (5) of s.77 deals with a situation in which there are a series of separate acts or omissions which, while not forming part of regime, rule, practice or principle, are sufficiently connected so as to constitute a continuum. The circumstances in which a corresponding provision of UK law can come into play was considered by the Court of Appeal in Arthur v London Eastern Railway Ltd [2007] IRLR 58. Here the Court was concerned with a claim of victimisation in the form of a series of acts directed against the complainant, some inside the three-month time limit provided at s.48 of the UK Employment Rights Act 1996, and some outside that limit. In considering if the time-limit in respect of all of the acts relied upon stated to run from the last such act Mummery LJ said: -
  - The provision in s.48(3) regarding a complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the three-month period. There must be an act (or failure) within the three-month period, but the complaint is not confined to that act (or failure.) The last act (or failure) within the three-month period may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.
    The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it. The acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within s.48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them.

The Complainant relied on s.77(6A) of the Act in advancing his claim that the 2008 incident and the Facebook incident in 2012 should properly be regarded as separate manifestations of continuing discrimination in the nature of harassment and so treated as within the time limit when he made his complaint on 12th June 2012. As is clear from the decision in *Ann Hurley v Count Cork VEC*, s.77(6A) applies where the Respondent has maintained and kept in force a discriminatory regime, rule, practice or principle which extends over a period. It is not contended, nor is there any evidence to suggest, that the Respondent maintained such a rule, practice or principle directed at or facilitating the harassing the Complainant. Consequently, s.77(6A) has no application in this case.

For the sake of completeness the Court has considered if, on the fact of this case, both the 2008 incident and the Facebook

incident can be considered as in time by application of s.77(5) of the Act. That requires a consideration of whether both incidents were sufficiently connected and can properly be regarded as separate manifestations of continuing harassment, so that the time limit started to run from the date of the least such incident (the Facebook incident).

The 2008 incident involved an assault on the Complainant by a named individual. The Facebook incident occurred some four years later. That posting was made by a different person than the assailant in the 2008 incident. There was no evidence proffered of any other incidents of harassment of the Complainant in the intervening period. The 2008 incident was also different in its nature and character than the Facebook incident. In these circumstances, and having regard to the length of time between both incidents, the Court can see no basis upon which it could be held that they were sufficiently connected so as to be characterised as separate manifestations of the same harassment. Consequently the Court is satisfied that they do not constitute a continuum of the harassment for the purpose of s.77(5) of the Act. Accordingly the Court must hold that the 2008 incident was a stand-alone occurrence and that the complaint in relation to that incident was presented outside the statutory time limit and is statute barred.

Graffiti Incident

This incident relates to the placing of graffiti in a toilet on the Respondent's premises which was disparaging of the Complainant. On becoming aware of the presence of this graffiti the Complainant reported it to his Manager and asked that it be removed. According to the Complainant, it was some six days after he made the complaint that the graffiti was removed. The Complainant became aware of the graffiti on or about 20th June 2012. The Complainant was unaware of when the offending graffiti was placed in the toilet.

It the course of the appeal it became clear that this incident occurred after the within complaint was referred to the Equality Tribunal. Consequently, it could not have been comprehended by that complaint. It appears that this incident was first raised in the written submissions filed on behalf of the Complainant with the Equality Tribunal. Those submissions were received by the Equality Tribunal in 2014. In so far as the filing of the submissions constituted the referral of this aspect of the complaint, it was then out of time and statute barred. It follows that this aspect of the Complainant's complaint was not properly before Equality Tribunal and it cannot be properly before the Court in this appeal.

Different Treatment in the Case of two Manager

In presenting his case to the Court the Complainant referred to an incident in which an employee posted offending comments on social media concerning two Managers of the Respondent. In that case immediate action was taken by the Respondent to address the incident through its disciplinary procedures. He contrasts the treatment of his complaint with that of the Respondent in the case of the Managers in question.

There was no evidence proffered, nor was it otherwise suggested, that if there was a difference in treatment in relation how these complaints and those of the Complainant were processed (and the Court makes no such finding) that it was on grounds of either religion or nationality. Accordingly, this matter could not come within the scope of the within complaint.

Defence

Section 14A(2) provides an employer, who would otherwise be liable for harassment by application of subsection (1) of that section, with a full defence in defined circumstances. In order to avail of the defence, the employer must demonstrate that preventative measures were taken before the occurrence of the offending conduct, occurred. The taking of post-hoc action in response to a complaint does not make out the defence.

The Respondent had a policy against harassment and sexual harassment at work. But it did not contain a provision specifically directed at preventing harassment through the use of social media at the material time, although it put such a

policy in place later. Moreover, the initial response of the Complainant's Manager was to deny any responsibility for what

occurred on the basis that the Respondent's dignity at work policy did not cover this type of conduct. The Complainant appealed to the Respondent's Head of Human Resources against the refusal of the local Manager to address his complaints. The Head of Human Resources recognised that the type of conduct giving rise to the Facebook incident was in fact prohibited under Rule 18 of the company rules as conduct "*prejudicial to the reputation and welfare of fellow employees*". That Rule was invoked against the harasser and a disciplinary sanction was imposed against him. There was a delay of some months between the raising of the matter with the Head of Human Resources and the completion of the disciplinary process. However, that was attributable to the absence of the employee concerned on sick leave in the intervening period. While Rule 18 predates and is not part of the Respondent's dignity at work policy, the Court was told in evidence by the Head of Human Resources that it is ascribed a wide ambit and is frequently invoked to deal with any form of offensive conduct perpetrated by one employee on another. Both the Head of Human Resources and the Complainant told the Court that the Rule Book is provided to all employees on commencing employment and that its content is well known by all employees.

This Rule may not be an adequate substitute for a well-defined policy against the use of social media as an instrument of harassment (which the Respondent now has in place). But it is, nonetheless, a comprehensive provision directed at protecting employees from any form of prejudicial or harmful treatment by fellow employees. As this case demonstrates, that can include harassment or discriminatory treatment on any of the grounds prohibited by the Acts by whatever mode it is perpetrated.

OutcomeThe Court accepts that in the Facebook incident the Complainant was subjected to wholly unacceptable personalised abuse in the course of his employment that no worker should be expected to tolerate. However, the net question that arises for consideration by the Court is whether the Respondent can be held liable in law for what occurred. Having regard to all of the evidence before it, the Court has concluded that the Respondent can avail of the defence that the Act provides at s.14A(2). Accordingly the Respondent cannot be fixed with liability.

In these circumstances the Court must affirm the decision of the Equality Tribunal and disallow the appeal.

Signed on behalf of the Labour CourtKevin Duffy18th February 2016_____AHChairmanNOTE Enquiries concerning this Determination should be addressed to Andrew Heavey, Court Secretary.

UD MAY 82.

EMPLOYMENT APPEALS TRIBUNAL

CASE NO. UD474/1981

Appeal of

Margot Conway, 6 High Street, Sligo.

against the recommendation of the Rights Commissioner in the case of:-

Ulster Bank Limited, Personnel Division, Waring Street, Belfast.

Under the Unfair Dismissals Act, 1977

Mrs. Conway was represented on the 1st day by Mr. Oliver Fry, Solicitor and on the 2nd day by Richard Nesbitt, B.L., instructed by William Fry and Sons, Solicitors.

Mr. Andrew Bradley, B.L. instructed by McKeever and Sons, Solicitors, represented the respondent.

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mr. Donal Hamilton,
Mr. P. D. McCann,
Mr. Colm O'Donnell,

heard this appeal at Sligo on Wednesday 13th January, 1982 and Friday 5th March, 1982.

The decision of the Tribunal was as follows:-

This matter came before the Tribunal by way of appeal by the former employee, Margot Conway (hereinafter called "the appellant") from a Recommendation of a Rights Commissioner which was, in effect, a finding that she had not been unfairly dismissed from her employment with the respondent.

This appeal was dealt with on the basis of a de novo hearing as are all appeals from Rights Commissioner Recommendations.

Determination:

The Tribunal, by majority, Mr. O'Donnell dissenting, determine that the appellant was not dismissed from her employment with the respondent. Her claim that she was unfairly dismissed is, therefore, dismissed.

From the evidence the following facts were established.

Employment history

The appellant commenced employment with the respondent as a Bank Official on 1/8/1972 and she signed an agreement as to

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Service on that date which contained a Declaration of Secrecy as to the business affairs of the Bank and its customers. Prior to entering employment with the respondent, the appellant had signed an application form in which she stated her willingness to take up an appointment, if successful, at any of the respondent's branches. During her employment the appellant served in the Tuam, Granard and Ballymote Branches. Then after training as a machinist, she was transferred to Limerick and from there to Sligo in October, 1977.

In March, 1980 the appellant became engaged to a Mr. Conway who was an account holder at the Sligo Branch. Prior to and following her engagement she was advised by Mr. Corcoran, Assistant Manager, of the possibility of her being transferred to another Branch because of her impending marriage to an account holder.

Mr. Corcoran discussed the matter with Mr. Glynn, the Branch Manager and advised him that he thought the appellant should be transferred. Mr. Glynn brought the matter to the attention of Mr. Rowland, Regional Personnel Controller and recommended transfer.

In July, 1980, Mr. Rowland decided that the transfer should take place. The appellant was advised in writing on 14/7/1980 that she was being transferred to the respondent's branch in Ballina with effect from 28/7/1980. By letter dated 21/7/1980 the appellant offered her resignation with notice which was accepted by letter dated 11/8/1980. The appellant married Mr. Conway on 5th September, 1980. It was agreed between the parties that the Contract of Employment came to an end in October, 1981.

Prior to 1973, it was a condition of employment that a lady bank official in the respondent's employment would resign automatically on marriage.

In 1973 it was agreed that this regulation would be abolished. Condition (c) of No. 111 of the Personnel Document establishes the future relationship between the respondent and its married female officials and it provides that:-

> "(c) They will be subject to the same conditions as other Bank Officials including work location and transfer. The Bank can make no special provision for married lady officials in this regard."

It appears from the evidence of Mr. Platt, Personnel Controller and Mr. Rowland, that there is no policy regarding the transfer of female staff on marriage to an account holder. Their evidence stressed equality between male and female and they stated that each case is dealt with individually and on its own merits.

It was common case that the appellant was transferred to Ballina solely because of her impending marriage to an account holder in the Branch in which she was employed viz. Sligo.

The rationale behind the decision to transfer the appellant on marriage was stated by Mr. William Glynn, the claimant's manager in Sligo (who recommended this transfer) as follows:-

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"I saw it (her engagement) as possibly presenting a difficulty due to Mr. Conway's involvement with circa eight accounts and I felt other customers would be concerned."

Mr. Brian Corcoran, Assistant Manager in Sligo Branch of respondent, said he "considered it to be undesirable and restrictive for her to remain taking all factors into consideration."

Both Mr. Glynn and Mr. Corcoran felt that in a similar situation a male employee would be dealt with differently. It was stressed to the Tribunal that the integrity of the appellant was not and never was in question and she carried out her duties to the satisfaction of the respondent at all times.

It was submitted that the right to transfer must be reasonably exercised and that it was not so exercised in this case and that the appellant was justified in resigning and claiming that she was constructively dismissed. Mr.Glynn gave evidence of employees in his Branch who had near relatives with accounts in the same Branch. These included Mr. Corcoran, the Assistant Manager. It appears that those employees were not related to account holders who were in business competition with other or potential account holders. Notwithstanding the evidence of Mr. Platt and Mr. Rowland, that there is no policy of transfer on marriage but that each case is considered on its merits, the Tribunal is of the view that Mr. Corcoran believed that such a policy existed.

In evidence, Mr. Rowland said that Mr. Glynn was concerned that retention of the appellant at the Branch after her marriage might cause problems "because of her fiancé's involvement in the community and the possible reaction of the business community". He also stated that his decision to transfer the appellant was based on Mr. Glynn's recommendation and because he felt from his own judgement and experience that there could be difficulties. On challenge as to his experience, Mr. Rowland said that he was never a Branch Manager and he placed a lot of regard on the advice of the Branch Manager. He said that "our disquiet was what might be in others minds". Mr. Platt, Personnel Controller said he felt that Mr. Rowland should consider, as he did, the Branch Manager's assessment. Mr. Platt also said that Mr. Rowland would be entitled to rely on the Branch Manager's assessment.

Grievance Procedure

The respondent's grievance procedure is set out at p.p. 111 and 111A of the Bank's Personnel Document and states:-

"When any matter arises in a branch or department which may give cause for a feeling of hardship or of unfair treatment on the part of any official it is of vital importance that this should be settled without delay."

The procedure then states that the grievance should be raised in the first instance with the Manager. If not satisfied with the Manager's decision, the official can raise the grievance with the Regional Personnel Controller and if still not

/satisfied

satisfied can refer it to the Chief Executive or his Deputy. If an Official having fully availed himself of the above procedures, is still dissatisfied he may request an independent person agreed between banks and the I.B.O.A. to consider the matter.

The final paragraph of the grievance procedure deals specifically with lady officials and states:-

> "We wish to assure our lady officials that their business and personal problems will also have a sympathetic hearing from Miss A. M. Nash, Personnel Controller's Assistant at Head Office, who is always prepared to make a special visit to any branch if this would be helpful."

Following receipt of the transfer notice, the appellant contacted Miss Healy (successor to Miss Nash, referred to above) by telephone to complain about the transfer and she (Miss Healy) asked her to state the problem in writing.

It is the Tribunal's view that perhaps Miss Healy might have handled the appellant's complaint more adroitly given that the appellant was overwrought and upset when she spoke to her.

However, having asked the appellant to detail her complaint in writing it is conceivable that Ms. Healy would have processed it in accordance with the agreed grievance procedure but the letter written by the appellant was a letter of resignation.

In writing the letter of resignation, the appellant did not take the steps outlined in the grievance procedure. The Tribunal has long considered that such agreements, usually described as Union Management Agreements, are binding on the parties because they choose to be bound by them. Whether or not they are legally binding is not the point. The parties clearly wish such agreements to regulate at least an aspect of their relationship and the Tribunal respects such agreements where same are not in conflict with the law of the land.

TRANSFERABILITY per se is not in issue in this case. It is not disputed that transfer as an expression of mobility was a term of the employment contract. It is common case that the appellant was not consulted regarding her transfer though we accept that following conversations with the Branch Management she was aware of the possibliity of transfer on marriage to the account holder, Mr. Conway. Mr. Rowland said that he does not usually talk to officials when transferring, that they have to accept transfers as part of their agreement and employees know that.

Mr. Rowland said that "given that the transfer was necessary, we tried to accommodate her". Mr. Platt stated that in the circumstances of this case transfer is not automatic and each case is looked at individually and on its own merits. Mr. Platt also stated:-

> "We do have regard to the need of employees; we put that onto the scales as we do the objects of the policy; We temper the exercise of power with concern".

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The Tribunal consider that from the evidence, "the policy" referred to is not identified. It is, in our view, difficult for the respondent to be satisfied that regard is being had to the needs of the employee, when in spite of obvious opportunity, the situation is not discussed with her and her needs ascertained.

We consider that this situation was not a normal transfer situation. It was seen by Management as a problem situation and transfer came into the picture as the suggested solution. We view the statements of Mr. Platt and Mr. Rowland that it would not be normal to call officials into the office to discuss each transfer to apply to the normal transfer situations in the course of business. In the circumstances herein we consider that good industrial relations practice and the desire to comply with the respondent's own standards, referred to by Mr. Platt, (quoted above) necessitated that the situation be discussed with the appellant prior to a solution being decided on. No solution other than transfer was considered. Mr. Rowland considered that "transfer being necessary they should try to accommodate the appellant". He stated that "if she had to go then maybe Ballina was the only reasonable alternative". In so deciding, account was had to the appellant's training as a machinist. The nearest branch with machines was Ballina. Mr. Rowland appreciated that Ballina was circa thirty eight miles from Sligo where Mr. Conway lived and the appellant would also continue to live. He felt that Ballina was within commuting distance of Sligo.

The appellant told the Tribunal that she resigned because she felt the journey to and from Ballina each day would be too long, too time consuming and too expensive. She said she had relatives banking with the Ballina Branch and whilst in Limerick her application for a transfer to Ballina had been refused on the grounds that Ballina was too near her family home.

Whilst transfer was a term of the contract that is not to say that transfer exists as a right of the employer to be exercised by him without regard to competing personal rights or contractually to be exercised by him outside the reasonable limits for the exercise of that power expressly or impliedly imposed by the contract. We appreciate the general headings stated by Mr. Mullen as being the areas where transfer is used. These are:-

(i) at the employee's request;

(ii) to enable the employee to pursue training;

(iii) to enable the employee to gain experience;

(iv) to satisfy the needs of the Bank;

(v) as a result of promotion;

(vi) as a result of disciplinary decision.

The foregoing may not be exhaustive but clearly indicate that transfer exists as part of the contract in relation to understood and accepted situations. It does not exist under the contract as a solution to all problems affecting

/the

the employee. It may be that after full and fair consideration of a problem, transfer will, in fact, be the reasonable solution.

In our view, the right to transfer given in the contract of Service, gives no absolute power to transfer. Any concept of absolute power is an illusion and such power as exists cannot be exercised outside the law of this land which compels the recognition of personal fundamental rights.

Problems might arise in individual cases and after due consideration transfer might result. There was no precedent to be followed. The Manager, Mr. Glynn and his Assistant Manager, Mr. Corcoran thought that a male employee would be dealt with differently.

Mr. Bradley, for the respondent, emphasised, quite rightly, the necessity for institutions such as the respondent to protect themselves against suspicion that they practiced anything less than the highest standards of integrity and confidentiality. We accept this but reject any notion that it entitles them to take any course they wish to the detriment of the employee. It does not entitle them to apply as a general rule different standards or yardsticks to their employees based on their sex.

The recommendation of Mr. Glynn existed and we can understand the tendency to "support" the Branch Management and we do not disagree with Mr.Platt's statement that Mr. Rowland should consider Mr. Glynn's assessment. We do, however, question Mr. Platt's statement that Mr. Rowland was entitled to rely on the Manager's assessment. The decision was to be made by Mr. Rowland, judging each case, in his own words, "on its merits". The recommendation of the Manager would be only one matter to be put onto the scales, Mr. Platt indicating that the needs of the employee would be another.

There was no individual assessment of this matter by Mr. Rowland which met his own standard of judging each case on its merits. He abdicated the transfer decision to the Branch Manager, Mr. Glynn.

We conclude,therefore,that it was reasonable for the appellant to complain to Ms. Healy that her transfer was unfair.

WAS THE APPELLANT CONSTRUCTIVELY DISMISSED?

We have considered the evidence and the opening and closing submissions of Mr. Oliver Fry, Mr. Richard Nesbitt and Mr. Andrew Bradley.

The appellant resigned with notice and her resignation was accepted.

The appellant was not dismissed in any direct way. She resigned and claims that she was dismissed by construction under SI, "dismissal", (b) of the Unfair Dismissals Act, 1977, which states:-

> "dismissal", in relation to an employee, means -
>
> (b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the

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conduct of the employer, the employee was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer."

It is accepted that the appellant resigned because her transfer to Ballina raised difficulties as her residence would continue to be in Sligo. Even if the transfer be considered fair and reasonable, nothing would have been different, the appellant would have resigned. We do not hold the view that the transfer of the appellant was, of itself, a repudiation of the contract of employment and that the resignation was merely an acknowledgement of an acceptance of this. The transfer may have been misused in this case but its use did not demonstrate that the respondent no longer intended to be bound by the contract of employment, nor did the fact of transfer so alter the employment as to make it a thing radically different from what it was before the transfer. Transferability was part of the Contract and could properly and fairly be used to the same effect in different circumstances. The termination of the employment would, we feel, fail on a contractual test to be a constructive dismissal.

The Tribunal notes that the appellant acted without undue delay and gave notice that she was not accepting the transfer and was resigning.

She viewed this unilaterally imposed transfer, about which she had not been consulted, made for reasons which she could not accept as reasonable or necessary, as effectively making it impossible or unacceptably difficult, as to time, travelling and expense for her to continue working for the respondent.

WAS IT REASONABLE FOR HER TO RESIGN AND SO CLAIM THAT SHE WAS CONSTRUCTIVELY DISMISSED?

By majority, Mr. O'Donnell dissenting, the Tribunal considers that the appellant did not act reasonably in resigning without first having substantially utilized the grievance procedure to attempt to remedy her complaints. An elaborate grievance procedure existed but the appellant did not use it. It is not for the Tribunal to say whether using this procedure would have produced a decision more favourable to her but it is possible. She did contact Miss Healy, Deputy Regional Personnel Controller to enquire why she was being transferred. She was told the reason and she felt aggrieved. Miss Healy asked her to state a case in writing but she did not do so. She resigned by letter which resignation was accepted.

The Tribunal, by majority, determines, Mr. O'Donnell dissenting, that the appellant was not contructively dismissed from her employment and, accordingly, we dismiss her appeal and her claim.

Sealed with the Seal of the

Employment Appeals Tribunal

this 28th day of May 1982.

(Sgd.) Chairman

A.C.

UD 843/84

DJ#1

EMPLOYMENT APPEALS TRIBUNAL

CASE NO. UD843/1984

UD 843/1984

Appeal of

Looney & Company Limited, Carey's Road, Limerick.
(appellant)

against the recommendation of the Rights Commissioner in the case of:-

Donal Looney, 95 St. Joseph's Park, Nenagh, Co. Tipperary.
(respondent)

under the Unfair Dismissals Act, 1977.

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mr. Donal Hamilton,

Members: Mr. Tom Kearney,
Mr. Vincent Moran,

heard this appeal at Nenagh, Co. Tipperary on Wednesday 27th March, 1985.

Representation:

Appellant: Mr. O'Halloran, F.U.E.

Respondent: Mr. Michael McGrath, B.L., instructed by James O'Brien and Company, Solicitors, 24 Castle Street, Nenagh, Co. Tipperary.

The decision of the Tribunal was as follows:-

Mr. Tim Mulcaire gave evidence under oath and stated that he was the former manager of the appellant and was manager at the material time. Mr. Mulcaire stated that he dismissed the respondent because he had reason to believe that the respondent was pilfering the appellant's goods in spite of having been warned and because dismissal in the circumstances was the appropriate remedy for such an offence.

The evidence given by Mr. Mulcaire, Mr. Looney and Mr. Foley, led the Tribunal to find the facts as follows:-

The appellant carries on a wholesale supermarket business in which the respondent and Mr. Foley were employed as packers.

From 1983 Mr. Mulcaire believed that pilferage of the appellant's goods was taking place by employees as a result of which he carried out certain investigations. The investigations led him to suspect that Mr. Looney (hereinafter called claimant) was involved in pilferage but the investigations did not indicate any involvement by Mr. Foley. Mr. Mulcaire reacted to the outcome of his investigations by warning both the claimant and Mr. Foley that pilfering should cease.

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On the 12th April, 1984 it came to Mr. Mulcaire's notice that a box of Mars Bars was in a cupboard in the canteen. He went to the canteen and ascertained that there was a box of Mars Bars there and that the box contained thirty bars (a full box would contain thirty-eight bars). Mr. Mulcaire took no action that day but on the morning of the 13th April, 1984 he went to the canteen and cut the wrapper on each bar as a means of identifying same.

At about 10.30a.m. Mr Mulcaire asked Mr. Looney to "put the kettle on". Mr. Looney went to the canteen to do so and Mr. Mulcaire entered with him. The claimant put the kettle on and left with Mr. Mulcaire leaving at the same time. Both Mr. Mulcaire and Mr. Looney accepted that there was no Mars Bars on the counter in the canteen when they left.

After leaving the canteen the claimant went about his work and Mr. Mulcaire gave evidence that he stationed himself in a discreet position from which he could fully observe the entrance to the canteen. The claimant stated that after six to seven minutes (Mr. Mulcaire said ten minutes) he, the claimant, returned to the canteen to make the coffee. After he was there about two minutes Mr. Mulcaire joined him. At this time the claimant was at the counter in the canteen eating a bar of chocolate with another bar nearby. Mr. Mulcaire asked him where he got the chocolate and the claimant stated that Mr. Foley, his workmate, must have bought them in the shops and left them for him in accordance with a continuing arrangement with Mr. Foley whereby either Mr. Foley or the claimant would go to the shop for sweets or chocolate for tea-break and one would buy for the other and be reimbursed later. Mr. Mulcaire pointed out to the claimant the slits or cuts in the wrapping paper on the two bars which were on the counter and went to the place where the box of Mars Bars was stored and pointed same out to the claimant. At Mr. Mulcaire's request the claimant counted the number of bars in the box and these numbered twenty-eight. Mr. Mulcaire indicated that two were missing from that morning and also pointed out to the claimant the identifying cuts or slits on the Mars Bars in the box.

When asked the only explanation offered by the claimant as to how the two Mars Bars had been transferred from the box to the counter into his control was that Mr. Foley must have done it. At this state Mr. Mulcaire suggested that the claimant see him in his office and within a short time the claimant and Mr. Mulcaire met there.

In Mr. Mulcaire's office the claimant was again asked how the Mars Bars came to be in his possession and he repeated that Mr. Foley must have put them on the counter for him. It is clear that Mr. Mulcaire did not accept this as an explanation as he did not believe that Mr. Foley had entered the canteen between the first and second visit by the claimant and Mr. Mulcaire and accordingly that Mr. Foley was not the person who had taken the Mars Bars from the box. Mr. Mulcaire formed the view that the claimant had taken the Mars Bars from the box and appropriated same to his own use and that he was not telling the truth in his account of what had occurred.

Mr. Mulcaire gave evidence that former practice of giving the employees goods such as chocolates or biscuits which came from damaged packets had discontinued and the practice was that employees would purchase their own refreshments or coffee breaks and such like. Mr. Mulcaire was of the view that the box of Mars Bars were the property of the appellant company and represented pilfered goods.

Acting on his own judgement as to the appropriate penalty and bearing in mind the practice in the appellant's Limerick depot that dismissal would follow where pilferage was established, Mr. Mulcaire decided that the claimant be dismissed and he advised the claimant accordingly.

The Tribunal heard evidence that some time later Mr. Mulcaire asked Mr. Foley if he had put the Mars Bars onto the counter and Mr. Foley said that he had not.

The claimant in sworn evidence denied that he had pilfered any goods of the appellant company and he said that when he entered the canteen on the second occasion that the Mars Bars were on the counter and he assumed in accordance with a previous experience that these had been left by Mr. Foley whom he believed to have been to the shops earlier.

The claimant stated that he had not been given previous warnings with regard to pilferage but did know that pilferage would be wrong and that if it was established that serious disciplinary action could be expected such as suspension or even dismissal.

Mr. McGrath, on behalf of the claimant, submitted that there was a conflict of facts in this case in that Mr. Mulcaire's action and decision was precipitate and did not afford the claimant an opportunity to discuss the facts with Mr. Foley. Mr. McGrath submitted that the claimant was effectively denied an opportunity to investigate the charge against him and to defend himself in relation to same and that the investigation carried out by Mr. Mulcaire was not full, fair and reasonable and accordingly that his conclusion as to the claimant's culpability was not reasonably held. Without prejudice to his other points Mr. McGrath submitted that even if any standards applied in unfair dismissal cases, Mr. Mulcaire's investigation and conclusion were held to be reasonable then taking into account the claimant's record and the nature of the "offence" that the penalty of dismissal was too severe and accordingly was unfair.

Mr. O'Halloran on behalf of the appellant submitted that the facts spoke for themselves and that the investigation and conclusion were reasonable and that there was no denial to the claimant of any fundamental right under natural justice as the claimant was advised of the charge against him and the evidence and was given an opportunity to defend himself. Mr. O'Halloran submitted that it was not unreasonable for Mr. Mulcaire to decide that there was no need to check the claimant's story with Mr. Foley as Mr. Foley did not and could not have entered the canteen as suggested by the claimant and that there was only one logical explanation and that is that the claimant had taken the Mars Bars himself and placed them on the counter for consumption. Mr. O'Halloran submitted that the belief in the claimant's culpability was reasonably held and that the appellant's decision to dismiss the claimant was not unreasonable, having regard to Mr. Mulcaire's evidence that discovery of the pilferage and the claimant's involvement caused him to lose confidence and trust in the claimant which went to the root of their relationship and rendered its continuance impossible.

In considering this matter the Tribunal is very conscious of the issue to be decided in this type of dishonesty case. It is not for the Tribunal to seek to establish the guilt or innocence of the claimant nor is it for the Tribunal to indicate or consider whether we in the employer's position would have acted as Mr. Mulcaire did in his investigation or concluded as he did or decided as he did, as to do

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00206418 so would be to substitute our own mind and decision for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in Mr. Mulcaire's position and circumstances at that time would have done and decided and to set this up as a standard against which Mr. Mulcaire's actions and decision be judged.

The Tribunal determines by majority, Mr. Vincent Moran dissenting, as follows:-

(1) that the investigation carried out by Mr. Mulcaire on behalf of the appellant was a full and fair one which established the factual situation and that within the investigation the claimant was not denied the right to know what he was charged with or to defend himself;

(2) that Mr. Mulcaire's conclusion from the facts elicited by his investigation, that the claimant had acted improperly and was knowingly consuming, in the canteen, pilfered goods, was one which a reasonable employer considering the "evidence" could have reached;

(3) that the decision made by Mr. Mulcaire to dismiss the claimant on the basis of his reasonable held belief in the claimant's culpability, was a decision which a reasonable employer, in the circumstances, could have reached.

The Tribunal determines, by majority, that the claimant was not unfairly dismissed from his employment and we uphold the appellant's appeal against the recommendation of the Rights Commissioner.

The following cases were referred to by Mr. McGrath:-

(a) Hennessy v Read and Write Shop Ltd./UD192/1978;

(b) Byrne v Allied Transport Ltd./UD11/1979;

(c) Palmer Products Ltd. v Dwyer/58/1977;

The Tribunal also considered British Home Stores Ltd. v Burchell (1978) I.T.R. 560.

Sealed with the Seal of the

Employment Appeals Tribunal

this 30th day of July 1981

(Sgd.) _____
CHAIRMAN

B.O'C.

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Bernadette McCormack, Corr, Walderstown, Athlone,
Co. Westmeath- *claimant*

CASE NO.

UD1421/2008

against

Dunnes Stores, Montree, Athlone,
Co. Westmeath - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. B. O'Carroll
Mr. P. Clarke

heard this claim at Athlone on 7th July 2009

Representation:

Claimant(s): Mr. John Carty, Mandate Trade Union, Mary Street, Galway

Respondent(s): Mr. Duncan Inverarity, BCM Hanby Wallace, Solicitors, 88 Harcourt Street, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant gave direct sworn evidence that she started working for the respondent company on the 12 May 1975. She worked for a total 32 years for the respondent company. She was initially employed working on the shop floor but later on in her employment she moved to the cash office area. She was employed on a full time contract and worked 39 hours per week. She worked from 9 am until 6pm Monday to Thursday and from 9am until 5pm on Fridays. In the Summer of 2003 she was granted carers leave by her employer as she was caring for her mother and children. Whilst on carers leave she worked 20 hours per week for the respondent and when her carers leave concluded she returned to work on a full time basis resuming her 39 hours per week job.

In June 2006 she applied to her regional manager hereafter known as JG for a part time contract seeking a shorter working week as her domestic circumstances had changed. Her regional manager told her that he could not guarantee her a part time position but he would revert back to her at a

later stage. He did not revert back to her. In September 2007 she wrote to a director of the company seeking a part time contract. She received a reply in October 2007 stating that her request would be passed on to the regional manager for him to discuss the request with her. The claimant was absent from work at this time due to a stress related illness. She returned to work in November 2007 and met with JG, her regional manager to discuss her request. He offered her a flexi contract which meant that she would be obliged to work a minimum of 15 hours and a maximum of 39 hours per week. This was over a 7 day week and could also include Sunday work. This contract did not suit her requirements.

On the 14 February 2008 she again wrote to the director regarding their refusal to offer her a part time contract despite having given 32 years service to the company. She was on sick leave when she wrote this letter. She returned to work on the 19 February 2008 and gave the company one weeks notice of her intention to resign. She finished working for the company on 25 February 2008 as she was left with no other option. The company refused her a reduction in her working week. Since her employment terminated she worked part time for another company but that employment ceased on 6 June 2008. Since then she has done a FAS course and is not currently in employment.

Under cross-examination the claimant confirmed that she is aware of the existence of the company's policy on grievance procedures. She did approach store management before writing to head office on three occasions. She spoke with the textile manager and two other store managers before writing to head office. She felt that she was not getting anywhere when she approached local management. She confirmed that local management had accommodated her when she had requested a change to her starting and finishing times on two occasions in January 2007 and September 2007. She did not wish to accept the offer of a flexi contract as she would have no control over how she would be rostered, and she may still have to work 39 hours some weeks. She was not prepared to accept a flexi contract.

She confirmed that she was actively seeking alternative employment before finishing working for the respondent. She handed in her notice on the 18 February 2008 to the store manager as she felt she had no option but to resign. Her local manager knew that she was suffering from ill health.

In reply to questions from the Tribunal the claimant confirmed that a part time contract where she could work from 10am until 2pm or 11am until 3pm would have suited her needs. These type of contracts were available from the respondent company previously, but were not available at the time she sought one. She confirmed that she had also requested that the company make her redundant. Between 2007 and 2008 nobody in the company had suggested that she should use the company's complaints procedures. She worked 20 hours per week for the company whilst on carers leave and the HR manager told her that such a working arrangement had worked out very well. She was in charge of the cash office when she finished employment.

Respondent's Case:

The first witness for the respondent (JG) was the regional manager. He met with the claimant in August 2006 when she requested a reduction in her working hours. He reverted back to her at a later stage informing her that the only options available were a full time contract or a flexi contract. The flexi contract allows an employee to work between 15 hours and 39 hours per week. The claimant was unwilling to engage with him over the details of the flexi contract. She enquired from him at a later stage about the possibility of being made redundant but a redundancy package was not up for discussion by the company at that time.

Under cross examination he confirmed that he was not aware whether or not the claimant was given a new contract of employment when she moved from a sales position to the cash office. He confirmed that the flexi contract that was on offer to the claimant may have required her to work some Sundays. He has over one thousand employees and he was not prepared to set a precedent by offering a part time contract. He confirmed that the company did offer a temporary arrangement to another employee previously when she was offered an alteration to her contract. This arrangement was based on medical grounds and was a temporary arrangement.

In reply to questions from the Tribunal he confirmed that the flexi contracts were introduced by the company sometime after 2000 as set contracts which had existed previously were discontinued in 2000.

The second witness for the respondent gave evidence that she is a textile manager and has worked for the company since 1997. She became aware in September 2007 that the claimant wanted to work reduced hours. She discussed the request with the store manager and an offer of a flexi contract was made. It was her belief that the flexi contract would have helped the claimant regarding her need to work reduced hours. She confirmed that another employee had been granted reduced hours previously on a temporary basis due to medical grounds. The claimant had never told her that she would have no option but to resign if her request for reduced hours was refused.

The third witness for the respondent gave evidence that he is the store manager. The claimant approached him in September 2007 requesting a reduced hours contract. He told her later that same week that the only contract he could offer her was a flexi contract. When he made this offer the claimant walked away from him. She came into his office on 19 February 2008 and handed her resignation notice to him. He was shocked. He met with the claimant on 21 February 2008 as he wanted to ascertain if he could anything about the stress that she claimed to be suffering from. That was the last occasion he spoke with her.

Under cross-examination he denied that the flexi contract would have made the claimant's working week more unpredictable. The company would not have put her in a position where her hours would not have been flexible. A flexi contract is flexible for both parties. The claimant was previously granted carers leave as it is the company's policy to grant employees carers leave when such a request is made.

In reply to questions from the Tribunal he confirmed that the company wanted to enter into discussions with the claimant about her possible flexi hours before the contract was signed, but the claimant refused to discuss the contract. The contract did not have to be signed before discussions about her possible working hours took place.

Determination

Dismissal in relation to an employee is defined in Section 1(b) of the Unfair Dismissals Act as the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to his employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer.

In advancing a claim for constructive dismissal an employee is required to show that he or she had no option in the circumstances of her employment other than to terminate his or her employment.

In effect the relevant section reverses the burden of proof for an employer set out in Section 6(1) of the Act.

The notion places a high burden of proof on an employee to demonstrate that he or she acted reasonably and had exhausted all internal procedures formal or otherwise in an attempt to resolve her grievance with his/her employers. The employee would need to demonstrate that the employer's conduct was so unreasonable as to make the continuation of employment with the particular employer intolerable. The Tribunal is of the view by majority decision with Mr. Clarke dissenting, based on the evidence that the claimant did not meet the requisite threshold.

Although the claimant had approached local management on a number of occasions to express her grievances and to attempt to get working conditions and times suitable to her domestic circumstances, the action of the claimant in resigning in February 2008 after the respondent had offered her a flexi contract with options for minimum and maximum hours cannot in our view be regarded as reasonable nor could it be said that the conditions and terms, even though not then specified, which would flow from such a contract, would be intolerable for the claimant.

While expressing sympathy with the claimant and recognising her long and hitherto unblemished service with the respondent the Tribunal are of the view by majority decision with Mr. Clarke dissenting, that the claimant has not met the required burden of proof and consequently her claim under the Unfair Dismissals Acts 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This 13th August 2009.

(Sgd.) _____
(CHAIRMAN)

28 different houses, and would be unable to complete those contracts. Quite apart from its loss of profits on the contracts, which would probably be quantifiable, the plaintiff might well also be liable in damages to the 28 purchasers, and its reputation as a developer could be seriously affected. On the other hand, if an injunction is granted and the defendants should ultimately succeed, I think the damage to them would be minimal. While the defendants contend that they are entitled to picket in furtherance of their trade dispute with the employer, they have not demonstrated in any convincing manner just how that trade dispute could be affected by picketing the plaintiff. Certainly, any loss or disadvantage which might be incurred by the defendants would be far outweighed by the enormous damage which would be caused to the plaintiff should an injunction be wrongly refused, and I have no doubt that the balance of convenience strongly lies in favour of the plaintiff. That being so, on terms that the plaintiff give an undertaking as to damages, I will grant the injunction sought.

Solicitors for the plaintiff: *Donal Taffe & Co.*
Solicitors for the defendants: *Malone & Potter & Co.*

Cathal McGreal
Barrister

Liz Allen (claimant) v. Independent Newspapers (Ireland) Ltd (respondent): Employment Appeals Tribunal UD 641/2000 (2 August 2001)

Unfair dismissal – Constructive dismissal – Whether reasonable for claimant to resign – Harassment and bullying – Isolation – Whether claimant exhausted internal procedures

Remedy – Compensation – Claimant unavailable for work due to illness – Whether illness attributable to conduct of respondent – Whether financial loss attributable to dismissal – Unfair Dismissals Act 1977 (No. 10), section 7

Facts The claimant had been employed as a crime correspondent with the respondent from August 12, 1996 until September 20, 2000 when she resigned her position. The claimant alleged that she had been constructively dismissed in that the conduct of her employer and the treatment of her and attitude towards her left her no choice but to terminate her employment. She contended that she had been subjected to harassment and bullying, that she had been isolated at work and that the conduct of the respondent undermined her confi-

dence and her health to such an extent that she was forced to resign. The respondent denied that the claimant had been constructively dismissed and maintained that she had resigned without just cause. It was also alleged that the claimant had failed to attempt to resolve matters internally before her resignation. The claimant had not worked since her resignation due to illness.

Determined

(1) The proper test in this case is whether it was reasonable for the claimant to terminate her contract of employment.

(2) Having regard to the evidence of harassment, bullying and intimidation it was reasonable in all the circumstances for the claimant to terminate her contract of employment. The claimant's conclusion that she could have no confidence in the respondent to either properly or effectively address her grievances was a reasonable conclusion.

(3) The claimant was constructively dismissed and as no evidence was offered to rebut the presumption of unfair dismissal, the claimant was unfairly dismissed for the purposes of the Unfair Dismissals Act 1977 to 1993.

(4) The proper remedy in the circumstances was compensation.

(5) The jurisdiction of the tribunal to award compensation is extremely wide, and there is no reason why the personal circumstances of the employee, including the effect of dismissal on her health, should not be taken into account in ascertaining the appropriate amount of compensation.

(6) The claimant's illness was caused by the factors which led to her constructive dismissal. Given that this illness led to her financial loss, the financial loss is therefore attributable to the conduct of the respondent. Thus the claimant is entitled to be compensated for that loss.

(7) The compensation of £70,500 or 78 weeks renumeration is the appropriate level of compensation.

Cases referred to in determination

Carney v. Balkan Tours Ltd [1997] 1 IR 153
Devine v. Designer Flowers Wholesale Florist Sundries Ltd [1993] IRLR 517
Hilton International Hotels (UK) Ltd v. Faraji [1994] IRLR 265

The full text of the determination of the Tribunal was as follows:

Dismissal was in dispute in this case.

The claimant was employed as a crime correspondent with the respondent from August 12, 1996 to September 20, 2000. On the latter date she resigned her employment with the respondent. It is the claimant's case as set out in the T1A that she was constructively dismissed in that the conduct of her employer and their treatment and attitude towards the claimant left her no choice but to terminate her employment. It is the claimant's contention that she was sub-

jected to continuous harassment and bullying and that she was effectively isolated at work which conduct undermined her confidence and health to such a degree that she could not tolerate her working environment and was left with no other option but to resign. The respondent for its part denies that the claimant was constructively dismissed and maintains that she resigned her position without just cause. The respondent denies any conduct, treatment or attitude towards the claimant such as would justify her resignation. Moreover, the respondent denies the claimant's contention that she made numerous attempts to resolve matters internally before being left with no option but to resign. It is contended on behalf of the respondent that it was open to the claimant to seek to redress any grievance or difficulties she had through recognised NUJ grievance procedures but that the claimant had not availed of this option. Furthermore it is contended by the respondent that the claimant declined to avail of an internal resolution mechanism being made available to the claimant before her resignation.

During the course of the hearing the claimant gave evidence of what she perceived to be hostile treatment of her during the tenure of her employment. The claimant gave specific evidence regarding her working relationship with a colleague, Jody Corcoran who the claimant alleges, behaved in a hostile manner towards her from the commencement of her employment. This hostility consisted of the claimant being ignored by Mr Corcoran and by the latter refusing to communicate with the claimant in any shape or form. Moreover, it is contended by the claimant that Mr Corcoran made unflattering remarks about her to other colleagues and on one particular occasion referred to the claimant as being 'stuck-up'. It is the claimant's evidence that she felt threatened by this, behaviour which situation was not helped by the claimant's perception that her immediate boss, Mr Willie Kealy, news editor, was also behaving in an antagonistic and impatient manner towards her. The Tribunal was told that the claimant made no complaint to anybody about her perception of her working environment until late 1998. The claimant told the Tribunal that up to this time although perplexed at this treatment by a work colleague she made a decision to try and get on with her work. Her evidence was that the hostility intensified in late 1997 and in to 1998.

The Tribunal was told that in August 1998 while on a staff cruise around Dublin Bay, the claimant took the opportunity to speak to Mr Corcoran directly about the atmosphere in the office. It was the claimant's evidence that she took this decision as she felt her work would suffer if matters continued as they did. It was her evidence that, when approached, Mr Corcoran professed not to know what the claimant was talking about. In evidence to the Tribunal Mr Corcoran denied the allegations being made by the claimant but conceded that in August 1998 the claimant had approached him and he agreed that the subject-matter of her discussion was what she perceived to be the bad atmosphere in the office.

Mr Corcoran denies however, being aggressive towards the claimant in his response to her on that date and moreover, it is Mr Corcoran's contention that he had at all times been reasonable and friendly with the claimant in the work environment.

The Tribunal was told by the claimant that following this approach, the situation in the work environment continued as before but the claimant did not raise the issue with senior management between August 1998 and September 1999. In September 1999 the claimant initiated a meeting with her immediate superior, Mr Willie Kealy. The events, which triggered this meeting were as follows.

In August the claimant had been invited to a meeting with Angus Fanning, editor of the Sunday Independent and Ann Harris, features editor and deputy editor. In the course of this meeting the claimant was told by Ms Harris that the respondent had come up with the idea that the claimant might replace Terry Keane who had resigned her position as columnist with the Sunday Independent. The claimant understood this to mean she would no longer be crime correspondent but rather the replacement for the 'Keane Edge'. The claimant's initial response to the respondent's suggestion was one of astonishment and bafflement and she had immediately declined the offer. However, a day later the claimant advised Mr Fanning that she would do the 'Keane Edge' column on a trial basis provided she could continue to do crime stories in the same week. The claimant told the Tribunal that the factor which led her to agree to the 'Keane Edge' column on a trial basis was the fact that she had been approached by two of the most senior people in the newspaper. Having written the 'Keane Edge' column for a week the claimant informed Mr Fanning of her decision not to continue with this column. It is the claimant's evidence that Mr Fanning reacted with anger at her decision. It is around this time that the claimant alleges Mr Corcoran hurled a cigarette at her feet, an action strenuously denied by Mr Corcoran in his evidence to this Tribunal. The Tribunal makes no specific finding in relation to this alleged incident

The Tribunal was told by Ms Allen that within a week of her rejecting the 'Keane Edge' offer she received a memo from Mr Kealy requesting her attendance in the office on a daily basis from 10 a.m. This memo was addressed to the claimant and four other colleagues. The claimant had concerns about the contents of the memo which she saw as an interference with the flexible working conditions agreed between herself and Mr Fanning at the commencement of her employment and which, if she were to accept the memo and still work as an effective crime correspondent, would effectively mean she would be constantly working. Prior to meeting Mr Kealy, the claimant had approached Kevin Moore, Father of the NUJ chapel, to complain about the memo. Mr Moore had told the claimant it was his belief that the memo was designed to get at her. In this regard the Tribunal notes Mr Moore's own evidence regarding the memo,

in particular his evidence of having himself (as a recipient of the memo) approached Mr Kealy about same and having being assured by Mr Kealy that the object of the memo was to get the claimant into the office at a specified time. Mr Moore confirmed to the Tribunal his belief that the memo was designed for Ms Allen.

In addition to her concerns regarding the memo in question the claimant in her evidence outlined the other factors which led her to seek a meeting with Mr Kealy in September 1999. The Tribunal was told by the claimant that at this time she continued to be ignored both by Mr Corcoran and Mr Kealy, which treatment was affecting the claimant both at home and at work. She made this complaint of being ignored by both men to Mr Kealy and told him that she did not want negativity to prevail in the workplace. Moreover, the claimant had heard rumours to the effect that other crime journalists were being recruited by the respondent and that Mr Corcoran had offered the claimant's job to a third party. At the meeting in September the claimant advised Mr Kealy of these grievances and told him of the effect it was having on her morale and the possible it might have on her productivity. The claimant had advised Mr Kealy that if the negativity and hostility in the workplace was not dealt with she felt she would have a nervous breakdown. The claimant had been in tears for most of this meeting.

The Tribunal note Mr Kealy's evidence of the meeting with Ms Allen in September 1999. In his residence Mr Kealy acknowledged that for the greater part of this meeting the claimant was in an extremely upset state. Mr Kealy in his evidence did not dispute that the claimant had made complaint about her working relationship with Mr Corcoran or that she had raised the issue of having heard both from colleagues and on the street that a named third party was being recruited as crime correspondent. The Tribunal was told that Mr Kealy had advised the claimant of the circumstances in which recruiting the third party came about and he had advised the claimant that her job as a crime correspondent was not in jeopardy. Mr Kealy disputed Ms Allen's account of their discussion regarding her work hours. It was Mr Kealy's evidence that at this meeting in September the claimant had requested from him that she work from home, a request Mr Kealy refused on the basis that the claimant would have had no chance of improving her integration into the team and on the basis that it would be detrimental to the running of the office.

Both the claimant and Mr Kealy agreed in evidence that the September 1999 meeting ended with Mr Kealy agreeing to raise with Mr Corcoran the issues outlined by the claimant at the meeting.

In the course of her evidence Ms Allen told the Tribunal that at no stage after this meeting did Mr Kealy revert to her about the issues and concerns she had regarding Mr Corcoran. In his evidence Mr Kealy agreed that he did not revert to the claimant after his meeting with Mr Corcoran. He told the Tribunal

that while he was the claimant's manager he had not received any training in management skills nor had he contacted the human resources manager or any other person for advice as to how to deal with the claimant's grievance.

It was the claimant's evidence to the Tribunal that, rather than matters improving in the aftermath of the September 1999 meeting, they deteriorated to a point where the claimant felt 'ambushed' by the next event that occurred. The Tribunal was told that in October the claimant had been called to a meeting in Mr Fanning's office, which meeting Mr Kealy and Ms Harris attended. She was informed at that meeting that changes were being made in the newsroom in which Mr Kealy would be assuming a more administrative role and that the claimant's new boss would be Mr Corcoran. The claimant was queried as to her feelings about this. At that meeting the claimant advised the respondent that she did not have a problem working with Mr Corcoran. She told the Tribunal that she gave this response at the meeting because she believed that if she had not agreed she would end up being told to get out or to move somewhere else.

Mr Kealy's evidence was that at the meeting with Mr Fanning the claimant did not present in any way as being under threat by the information that was being imparted.

Following this meeting Ms Allen continued to do her work as a crime correspondent, which work continued to be assigned to her by Mr Kealy. Her evidence was that her work environment did not improve and she continued to remain largely unacknowledged by Mr Corcoran and Mr Kealy. The Tribunal was told that at this point the work situation was affecting the claimant's morale in that she found it difficult even to pick up the phone to her contacts.

On the evidence adduced, the Tribunal is satisfied that in September 1999, when the claimant spoke to her immediate manager Mr Kealy, her perception that she was being subjected over a period of time to a hostile working environment was not unreasonable. The Tribunal also concludes that the claimant's belief by September 1999 that her position as crime correspondent was being undermined was not an unreasonable one. The Tribunal concludes that it was reasonable for the claimant to pursue these matters with the respondent.

We have come to our conclusion on the hostility issue for the following reasons. While specific incidents of hostility and or isolation were denied by Mr Kealy and Mr Corcoran it is common case that the claimant approached Mr Corcoran in August 1998 and Mr Kealy in September 1999 with such complaint. The Tribunal accepts that the claimant could hardly have initiated an approach to these persons without some factual basis for such a step. Moreover, the Tribunal also takes into consideration the unchallenged evidence of Andrew Hanlon, the claimant's husband, who stated that in or about November 1998 he took it upon himself to speak to Mr Kealy about his concern that the claimant had been coming home from work in a state of distress on a number

of occasions. We are satisfied therefore that by September 1999 Mr Kealy was or ought to have been on alert, whether it would eventually be established as a matter of fact or otherwise, that the claimant's perception of her working relationship with Mr Corcoran and with himself was an extremely negative one.

We have already stated that the claimant's perception toward the end of 1999 that her job as crime correspondent was being undermined was not an unreasonable one and we so find because of the proximity in time between the claimant being offered and undertaking on a trial basis the job as 'Keane Edge' columnist and the claimant hearing about other journalists being recruited for jobs with the respondent newspaper. Furthermore, the Tribunal cannot disregard the proximity in time between the claimant ultimately declining the position as 'Keane Edge' columnist and the claimant's receipt of a memo requesting her attendance at office meetings. In relation to this issue the Tribunal has paid particular regard to the evidence of the Mr Kevin Moore as to the intent behind the memo. We further accept her evidence that the respondent reacted negatively to her decision not to proceed with the 'Keane Edge' column.

It would appear that for the remainder of the year 1999 no further action was taken by Ms Allen regarding her grievances and it is the case that no one had reverted to her regarding the grievances outlined by her in September.

In evidence the claimant told the Tribunal that in January 2000 she spoke to Mr Kealy with a view to advising him that she intended to take in the spring of 2000 some 16 days leave due to her for the purposes of working on a book. Both Mr Kealy and the claimant agree that she was told to put her request in writing which she duly did in March 2000. On April 6 the claimant received a response in writing from Mr Kealy in which he took issue with the claimant's 'unprecedented accumulation' of days off and moreover, wherein he advised the claimant that such accumulation must not happen again. In that letter Mr Kealy set out the work practices which the claimant was expected to adhere to and advised her that the working day was from 10 a.m. to 6 p.m. Tuesday to Friday and that she was required to be at her desk in the office by 10 a.m. on those days unless by prior arrangement with Mr Kealy. The claimant was further advised as follows: 'failure to comply with this constitutes absence from work and will be recorded as such on the official attendance record'.

In her evidence to the Tribunal the claimant described her reaction to the letter. She viewed Mr Kealy's reaction to the days off requested as completely at variance with what had been verbally agreed by the parties in January and she viewed Mr Kealy's injunction regarding attendance at the office and the consequences if she defaulted as being completely confrontational and, moreover at variance with what had been agreed between the claimant and Mr Fanning, editor, at the commencement of her employment as to how she could carry out her work as crime correspondent. It was the claimant's evidence that she had been given wide latitude by Mr Fanning as to how she could work as

crime correspondent, a latitude which was extended to all correspondents in the newspaper.

The claimant's response to Mr Kealy was a letter written by her on April 7, 2000. Prior to sending this letter the claimant met off-site with Mr Moore, to discuss the contents of Mr Kealy's letter. In her evidence to the Tribunal the claimant was unsure as to whether or not Mr Moore had sight of the letter the claimant had intended to send Mr Kealy. The Tribunal notes however that in his evidence Mr Moore confirmed that at this time the claimant made a complaint to him about being harassed by Mr Kealy and Mr Corcoran. The gist of Mr Moore's evidence was that he took Ms Allen's complaint seriously and was willing to process same. Mr Moore's offer to process her complaint at this time is disputed by the claimant. The Tribunal notes Mr Moore's evidence that while he himself did not observe hostility towards the claimant he did not consider her complaints to be frivolous at that time.

Following her meeting with Mr Moore the claimant sent her letter of April 7 to Mr Kealy. The contents of that letter has been read into the record of the Tribunal and it is not intended to set out same here. From the contents of that letter it is clear to the tribunal that on April 7, 2000 not only did the claimant take issue with what she saw as Mr Kealy's about-turn on the holiday issue and what she saw as Mr Kealy's attempt to change the terms and conditions of her job as a crime correspondent, but more importantly for the first time since her employment began, the claimant put in writing to her employer her complaints about the isolation and marginalisation she felt in the work environment. Furthermore the claimant advised Mr Kealy that she regarded the tone of his letter as evidence of the hostile attitude of which she was now complaining and in respect of which she had made a verbal complaint in 1999.

It is common case that shortly after sending this letter, the claimant had a meeting with Mr Kealy and both Ms Allen and Mr Kealy agreed in evidence that Mr Kealy apologised for his letter and told the claimant that he was in a 'grumpy' mood when he sent it. At this meeting Mr Kealy had requested the claimant to tear up the letter he had sent her and he had puported to throw the claimant's letter of response into the litter bin. Mr Kealy was advised by the claimant that she wanted a written response to her letter from him. It is not disputed but that the claimant retrieved her letter from the bin and placed it back on Mr Kealy's desk. Nor is it disputed that at this meeting the claimant refused to tear up or otherwise disregard Mr Kealy's letter to her which letter had already being carbon copied to another work colleague by Mr Kealy. It was the claimant's evidence that she requested a written response from Mr Kealy to her letter of complaint of April 7, 2000. We accept that she made such request of Mr Kealy and in this regard we note the contents of a memo written by Ms Allen to Mr Kealy in May 2000 reminding him that he had promised to respond to the issues the claimant had raised in her earlier correspondence. It is

common case that no written reply was sent to Ms Allen and in his evidence Mr Kealy's explanation for this was twofold; he felt that he had already clarified the claimant's position and moreover he was not willing to give the claimant 'a charter' (regarding her work hours) which would suggest the claimant was a free agent.

Having given careful consideration to the evidence of the parties, it is the view of the Tribunal that the unilateral decision taken by Mr Kealy after his meeting with the claimant in April 2000 to treat the issues raised by the claimant in her letter of April 7 as having being clarified was somewhat disingenuous. While it was certainly open to Mr Kealy to rescind the strictures he had put on the claimant's work practices in his letter of April 6 it was not, in the view of the Tribunal, open to him, as the claimant's immediate manager, to disregard the complaints regarding isolation and marginalisation at work reiterated by her in the letter of April 7, 2000. The Tribunal is satisfied on the evidence that from September 1999 the claimant continued to have cause for complaint in this regard.

The Tribunal notes the evidence of Declan Carlyle, human resources manager with the respondent who told the Tribunal that in April 2000 he had come in possession of the claimant's letter to Mr Kealy of April 7. The claimant had sent a copy of this letter to the human resources division. Both Ms Allen and Mr Carlyle agree that the latter had approached Ms Allen about the memo and had stated he wished to speak to her. The claimant's evidence is that she made a number of calls to Mr Carlyle seeking such a meeting but that he had not responded to her calls. Mr Carlyle's evidence is that he had gone to Mr Kealy who told him that the matter had been resolved and to forget it. It is accepted by Mr Carlyle that at no point did he revert to Ms Allen after meeting Mr Kealy. In his evidence to the Tribunal, Mr Carlyle stated that as human resources manger his 'antennae would have been up' if he had heard mention of any bullying or harassment of the claimant in view of the fact that by mid-2000 he had participated in the formulation of an anti-bullying policy for the respondent. While Mr Carlyle agreed in cross-examination that references by the claimant to hostility, isolation and marginalisation in her letter of April 9 had nothing to do with leave, his evidence to the Tribunal was that he saw the claimant's letter as just being about leave.

Having regard to the contents of the claimant's letter of April 7, 2000 and having regard to the state of Mr Carlyle's knowledge as to what or what not might constitute bullying or harassment its the work place, the Tribunal cannot accept as reasonable Mr Carlyle's failure to revert to the claimant.

In the course of the hearing the claimant gave evidence of two meetings she initiated with Mr Fanning, editor, on May 10 and 17, 2000 respectively. It is Ms Allen's evidence that she went to Mr Fanning because of the contents of Mr Kealy's letter of April 6, 2000 and because of remarks made by Mr Kealy

to her regarding the level of her salary. The Tribunal has also heard the evidence of Mr Fanning regarding what transpired at these meetings. Mr Fanning does not dispute that at the May 10 meeting the claimant was making a complaint, which complaint he interpreted as the claimant querying her value to the paper. Mr Fanning agreed that he had been shown Mr Kealy's letter of April 6 by Ms Allen. However, Mr Fanning disputes the claimant's evidence that she showed him a copy of her reply of April 7. He further disputes that he had described the contents of Mr Kealy's letter to the claimant as disgraceful. Mr Fanning gave evidence that at the May 17 meeting with Ms Allen, at which Ms Harris also attended she had made reference to Mr Corcoran whose negativity she maintained was contributing to her low morale. Mr Fanning's evidence was that at this meeting he reassured the claimant about her value to the paper and the good stories she had worked on. Mr Fanning told the Tribunal that although at this time he felt that her performance rate had declined he did not communicate this to the claimant so as not to affect her morale. Mr Fanning had received complaints about the claimant's performance rate from Mr Kealy but had not at any stage communicated those complaints to Ms Allen. Mr Fanning told the Tribunal that he had gone back to Mr Kealy with Ms Allen's complaint and he had been told by Mr Kealy that the letter of April 6 had been withdrawn by him. He agreed under cross-examination that in all probability he did not revert to the claimant after speaking to Mr Kealy. He had felt matters had been resolved at this stage.

As already stated, in the course of this hearing a dispute arose between the parties as to whether or not by mid-May 2000, Mr Fanning had sight of the claimant's letter of complaint of the 7 April to Mr Kealy. Mr Fanning is adamant that at no stage did he have this letter, seeing it only for the first time in the course of this hearing. The claimant however has stated that this letter was given to Mr Fanning when she gave him a copy of Mr Kealy's letter. Mr Fanning has suggested that the reason the claimant would not have given him the letter was because of the reference in it to the agreement she says she had with Mr Fanning regarding work hours and work practices. In her letter the claimant had referred to Mr Fanning as agreeing with her on commencement that she could be 'a free agent' and that she could work from home and could operate independently as long as she completed her stories. It is Mr Fanning's contention that the claimant would not have shown him a copy of this letter since the agreement referred to therein between himself and Ms Allen was not the one which had been agreed between them at the commencement of her employment.

On balance, the Tribunal is of the view that the claimant did produce a copy of her letter of April 7 at the May meetings. We so find for a number of reasons. Firstly, because the reason she went to Mr Fanning in the first place was to complain, *inter alia*, about the strictures being put on her work practices.

Secondly, by May 2000 the claimant had already given a copy of the letter to the human resources department and therefore who might see this letter thereafter was to some extent out of the control of the claimant herself. At this time it was entirely feasible that the letter could have gone to Mr Fanning via Mr Carlyle or Mr Kealy. That neither did so is not the relevant consideration. What the Tribunal considers relevant is that Ms Allen would have known that either Mr Kealy or Mr Carlyle could have shown the letter to Mr Fanning. Thirdly, the agreement on work practiced referred to in the claimant's letter does not, in the Tribunal's view, differ in any great respect from the account given by Mr Fanning himself of what was agreed between the parties at the outset of the claimant's employment about how she could operate as crime correspondent. Mr Fanning's evidence was that the claimant would be given 'wide latitude' and 'a free hand' to pursue her stories provide she delivered those stories. The tribunal also notes Mr Fanning's evidence in reply to a question in cross-examination that the request from Mr Kealy for the claimant to be at her desk by 10 a.m. Tuesday to Friday was a significant change to what was agreed between Mr Fanning and Ms Allen when she took up employment with the respondent. Having regard to all these factors the Tribunal accepts that Ms Allen had been given considerable latitude by Mr Fanning regarding how she could operate as crime correspondent.

It was, in the Tribunal's view, incumbent on Mr Fanning by May 2000 to make such an enquiry as was necessary about Ms Allen's complaints given his state of knowledge at that time. This is particularly so in light of Mr Fanning's then knowledge that the time when Mr Corcoran would become the claimant's direct boss was imminent. His failure to pursue the matter and revert to her was something, in the view of the Tribunal, that could reasonably be taken into consideration by her at a later stage.

It is also clear from the evidence that notwithstanding the airing by the claimant of her grievances with Mr Kealy, Mr Fanning, Ms Harris and Mr Carlyle over the months of April and May 2000, the claimant had reason to re-state some of those grievances to Michael Roche, Group Managing Editor of the respondent paper, at a meeting she had with him in June 2000. It would appear that opportunity was taken by the claimant to do so following a request by Mr Roche that she meet with him to discuss aspects of her remuneration, in particular her expenses. In his evidence to the Tribunal Mr Roche agreed that the claimant when approached had indicated to him that she wished to discuss with him problems she was having with the respondent. It is clear that Mr Roche agreed to meet the claimant regarding these issues and ultimately a meeting was set up between the claimant, Mr Kealy and Mr Roche for June 29, 2000.

Between June 1 and 26, 2000 a number of other meetings took place between the claimant and Mr Roche where the parties renegotiated certain as-

pects of the financial terms of the claimant's contract of employment. Mr Roche agreed in evidence that some 12-months prior to this meeting the respondent had made changes to the claimant's expenses agreement, to the detriment of the claimant and about which she was not happy and the series of meetings in June regarding expenses was to sort this matter out. It is submitted on behalf of the claimant in this case that as part of her case for constructive dismissal the claimant is entitled to rely on the changes that were made to her expenses agreement, in particular the removal of notional expenses and the capping of vouched expenses. It is also submitted that benefits such as foreign travel and free car insurance were unilaterally removed from the claimant's contract of employment. The Tribunal has considered this aspect of the case and overall the Tribunal concludes that notwithstanding that the claimant had cause for complaint to Mr Roche in June 2000 as to the manner in which some of these issues were handled by the respondent, the Tribunal is satisfied that agreement on this aspect of the claimant's employment was reached between the parties in June 2000 and therefore the Tribunal does not accept that this issue can form part of the claimant's case for constructive dismissal.

The Tribunal has considered the evidence of the parties regarding what transpired at the meeting of June 29, 2000. The Tribunal is satisfied that the claimant made a complaint to Mr Roche about the atmosphere in the office, the hostility she was being subjected to and the fact that Mr Kealy had made reference to her salary within earshot of fellow workers. We are satisfied that no specific mention was made by Ms Allen of Mr Corcoran at this meeting. We are further satisfied that there was discussion among the parties about the claimant's working hours and the attempts by the respondent, as the claimant saw it, to change the agreement she had with Mr Fanning. It is agreed by all relevant parties that that meeting ended with Ms Allen and Mr Kealy shaking hands and it is Ms Allen's evidence that she was happy with the outcome of that meeting. While, at this hearing, there was disagreement between Ms Allen and Mr Roche as to what was being required of her regarding her attendance in the office, the Tribunal is satisfied to accept Ms Allen's evidence that at the end of that meeting there was recognition by all concerned that she had to be allowed flexibility in her job as crime correspondent.

The Tribunal notes that in his direct evidence Mr Roche stated that at the meeting of June 29, no mention was made by Ms Allen of any deal she had with Mr Fanning regarding how she operated as crime correspondent. However, it is the view of the Tribunal that evidence of what Ms Allen was saying was her agreement was or ought to have been know, to Mr Roche on June 29 as copies of both Mr Kealy's letter of April 6 and the claimant's response of April 7, 2000 were given to him by Ms Allen in the course of the meeting. This he accepted in evidence while disputing Ms Allen's counsel's suggestion that he had received a copy of Ms Allen's memo prior to this from Mr Carlyle.

While the Tribunal notes Mr Roche's very frank reply in cross-examination that he had not read Ms Allen's memo in detail and had only glanced at it, it is the view of the Tribunal that, given that he had received this memo in the course of a meeting initiated by Ms Allen to discuss problems she was having in her workplace it was incumbent on Mr Roche to read same in view of the nature of the complaints being made.

In her evidence to the Tribunal, the claimant describes the next significant event in her working relationship with the respondent as occurring in August 2000. At this time a reporter, Mr Reilly was recruited by the respondent. In her evidence the claimant states that she had no difficulty with Mr Reilly being retained as a staff reporter but that she did begin to have cause for concern when he was assigned crime stories. In her evidence the claimant acknowledged that assigning crime stories to reporters other than crime correspondents was a feature of newspaper life but her concern was that stories were being taken away from her. The claimant gave evidence of Mr Kealy, in early September 2000, having assigned a particular story to Mr Reilly when he had specifically instructed the claimant to return from Donegal where she was working on another story to take up this assignment. The claimant's evidence to the Tribunal is that she returned forthwith to be met with the fact that the story had by then been given to Mr Reilly. The claimant's evidence is that when queried as to why this had happened, Mr Kealy's response was that he 'felt like it'. In his evidence to the Tribunal, Mr Kealy does not dispute that he telephoned Ms Allen regarding the particular story or that she returned the following day to work on same. However, Mr Kealy's evidence to the Tribunal was that he gave the story to Mr Reilly on the basis that he could not be sure when Ms Allen would arrive back.

The Tribunal has considered the evidence of Mr Kealy and that of the claimant regarding this incident, an incident in respect of which the claimant in her evidence has set great store. Having regard to all the factors in this case it is the view of the Tribunal that the claimant was not unreasonable in viewing the reassignment of the story as a cause of concern to her and we do not view as unreasonable the claimant's perception at this time that her job as crime correspondent was being undermined.

The Tribunal was told that on September 9, 2000, the claimant was advised by Mr Kealy to attend an office meeting scheduled for the September 12, the purpose of which was to officially welcome Mr Reilly to the news team as a reporter and to publicise the appointment of Mr Corcoran as assistant editor news. The claimant, Mr Kealy, Mr Corcoran and Mr Liam Collins gave evidence as to what transpired at that meeting. By and large there was no dispute as to what occurred and essentially at this meeting Mr Kealy officially welcomed Mr Reilly, made reference also to Mr Collins and latterly officially welcomed Mr Corcoran as assistant editor news. Conduct of the meeting was then

passed to Mr Corcoran. It is common case that Mr Corcoran scheduled a meeting of the news team for 10 a.m., the next morning.

In her evidence to the Tribunal the claimant outlined her reaction to the manner in which the meeting was conducted which meeting for all intents and purposes appears to be the trigger which led the claimant to seek a meeting with Mr Roche, which took place the following day. In the course of her evidence to the Tribunal, the claimant described herself as the 'invisible person' at this meeting with her work colleagues and her now new boss Mr Corcoran. The Tribunal accepts as credible Ms Allen's evidence as to how she perceived that meeting.

The respondent witnesses have stated in evidence that since nothing had changed regarding the claimant's status on September 12 there was no need to specifically address the claimant or acknowledge her presence.

The claimant perceived what went on as an example of the isolation and hostility about which she previously complained. Was the claimant's perception a reasonable one in the circumstances? We find that it was. We do so for the following reasons. While we accept that Ms Allen's status had not changed it is the case that from the September 12 her working relationship with Mr Corcoran was now different. She would now be reporting to him as deputy news editor. Had not Ms Allen complained previously about her perception of a hostile working environment, the manner in which the meeting of September 12 was conducted might not in itself have been significant but, taking place as it did against a background of complaints made by the claimant about isolation and marginalisation her perception of that meeting was not an unreasonable one in all the circumstances.

The Tribunal also finds that in the circumstances it was not an unreasonable belief on her part that once again strictures were being put on how she did her work. Whether this was the intention or not is not the issue. The claimant was not unreasonable in viewing it as such in light of the earlier events of September 1999 and April 2000 and in light of the fact (as supported by Mr Kealy's own evidence), that the request to the claimant to attend 10 a.m. meetings had been abandoned for a number of months prior to September 2000.

The respondent witnesses have given evidence that they perceived no sign of distress at this meeting. Whatever the demeanour of the claimant at that meeting it is clear from the evidence of her doctor whom she attended on September 9 and indeed from the evidence of Mr Roche who met her on September 13 that the claimant was in considerable distress in September 2000. Prior to the meeting of September 12 the claimant had consulted with her general practitioner, Dr Malone, and the symptoms with which the claimant had presented on that date namely sleeplessness, palpitation, nervousness, headaches, poor appetite are not disputed. Dr Malone was advised by the claimant that her difficulties related to her work situation and in evidence his medical opinion

was that it was her work situation that had caused her health difficulties. We are satisfied, on the claimant's evidence, that her work environment was causing over a period of time the concentration difficulties and loss of confidence she complained of.

On the evidence adduced in this case, the Tribunal is satisfied that the situation that pertained in the claimant's work environment necessitated medical intervention and prompted her to again seek a meeting with Mr Roche, group managing editor of the respondent.

The Tribunal has heard evidence of the meeting of September 13 which took place between Ms Allen and Mr Roche and which the claimant's husband attended. By and large, no great dispute arises about what Ms Allen complained of at that meeting. We are satisfied that she outlined to Mr Roche the problems she said continued to exist in the workplace culminating in the isolation she said she experienced on September 12. We are satisfied that she informed Mr Roche of her belief that crime stories had been taken away from her, and of her concern that the clarification she believed she had after the June 2000 meeting regarding her work hours was again being undermined by the reintroduction by Mr Corcoran of 10.30 a.m. meetings. She complained also of what she perceived to be dismissive remarks made by Mr Corcoran in public regarding the job of crime reporting. She outlined her concern at another reference by Mr Kealy in September 2000, to her being one of the highest paid members of staff which reference according to the claimant was made in front of work colleagues. While Mr Kealy in evidence has set out the context in which he says reference to her salary came about the Tribunal is inclined to favour the claimant's evidence in this regard. The Tribunal accepts that the respondent witnesses at this Tribunal disputed the matters in respect of which the claimant made complaint to Mr Roche but on balance the Tribunal accepts that the claimant had cause for complaint at this time. We note that while Mr Roche himself sought to address some of the claimant's issues in the course of the meeting of September 13, it is not in any way disputed by him that the claimant was extremely distraught throughout the meeting and that she cried for a period of one hour and 50 minutes of that two-hour period. Mr Roche's view of the issues being raised by the claimant were that they were serious allegations which merited investigation indeed, Mr Roche agreed with the claimant's evidence that at the meeting, after hearing what she had to say, he advised her on a number of options open to her namely that she should consider moving, resigning, or going to the union and making an official complaint. Mr Roche also agreed that he told Ms Allen that she could consider taking a case for constructive dismissal though he disputes her evidence that he said to her she would probably win such a case.

Mr Roche has also stated that he told the claimant he would hold a series of meeting with the union and human resources and he would do it quickly. This

was, in his words, to show Ms Allen that the respondent was prepared to act on her complaints.

It is common case that initially the claimant stated at the meeting that she was reluctant to go to any such meetings but she had been persuaded both by her husband and Mr Roche that she would have to attend at such investigation. It was the claimant's evidence that when her meeting with Mr Roche concluded her understanding was that she would be contacted by him to attend a meeting with all concerned. We accept her evidence in this regard.

Ms Allen gave evidence to the Tribunal of a telephone conversation she had with Mr Roche some three hours after meeting him when he informed her that he had spoken to all parties concerned but was not going to tell her what they said save that Mr Fanning and Ms Harris had been "flabbergasted" to hear of the claimant's complaints.

Ms Allen told the Tribunal that her reaction to this information was one of disbelief in view of the fact that both Mr Fanning and Mr Harris had previously been made aware by her of the difficulties she was encountering in the workplace. It was Ms Allen's evidence that Mr Roche advised her to talk to Mr Fanning and Ms Harris and that she would feel better for this. The claimant's evidence was that she told Mr Roche that she would call him back once she had discussed the matter with her husband. The Tribunal was told that before doing so the claimant received a telephone message from Mr Fanning to the effect that he had talked to Mr Roche and that he was sorry she was having a hard time. Mr Fanning had offered her a trip abroad and had stated that he wished to meet her with Ms Harris the following morning at a café in Blackrock.

The Tribunal was told that following receipt of this message the claimant telephoned Mr Roche and advised him she was extremely unhappy with any suggestion that she go back to people (Mr Fanning and Ms Harris) who the claimant believed had already neglected to deal with her grievances.

In his evidence Mr Roche stated that he saw the meeting with Mr Fanning and Ms Harris as a preliminary one and that he planned to be in attendance at such meeting and planned further investigation thereafter which would include, as already stated, the NUJ and the head of human resources. He disputed Ms Allen's evidence that she had told him of her objection to meeting Mr Fanning and Ms Harris. On balance, we accept that Ms Allen did relay her objection to Mr Roche.

In relation to the proposed Blackrock cafè meeting, the Tribunal has had the benefit of hearing from Mr Fanning and Ms Harris as to what was proposed. Mr Fanning's evidence was that, after being told by Mr Roche of the claimant's complaints and of her distraught state, he took 'a solo initiative' to meet Ms Allen and communicated that request to her by telephone. He agreed he offered her a trip abroad. Ms Harris in her evidence agreed with Mr Fanning that the meeting he was offering was to be a meeting 'independent' of the

investigative process.

The Tribunal has considered the evidence of all relevant witnesses regarding the events of September 13 and the Tribunal finds that there is conflict in the evidence of the respondent witnesses as to what was the purpose of and who was to attend the Blackrock café meeting. The Tribunal notes that no mention of Mr Roche's intended presence at that meeting was made by either Mr Fanning or Ms Harris in the course of their evidence. Mr Roche in his evidence stated that he had such intentions. It is the claimant's evidence that her understanding of the message received on Friday, September 13 was that what was being offered was purely a meeting with Mr Fanning and Ms Harris.

The acceptance or otherwise of Ms Allen's understanding of this matter by the Tribunal is important having regard to the fact that her understanding was ultimately one of the factors which led her to resign her employment on September 20, 2000.

Having given careful consideration to the evidence of the relevant witnesses the Tribunal accepts as reasonable the claimant's belief that the meeting proposed for the following day was only to be with Mr Fanning and Ms Harris.

It is the claimant's contention that this meeting with Mr Fanning, about whose ability to deal with her problems she had severe reservations, in light of his failure to deal with her previous complaints, was to be the extent of the respondent's investigation into her grievances. The question for the Tribunal is whether this was a reasonably held belief on her part. Having carefully deliberated on all of the evidence in this case, it is the finding of the Tribunal that this was not an unreasonable assumption on her part.

In arriving at this finding the Tribunal has taken into consideration the very fact that telephone calls were made to Ms Allen at all on the evening of September 13. It is the view of the Tribunal that a reasonable response from the respondent, after Ms Allen's meeting with Mr Roche, would have been written communication to her advising her that an investigation would commence and advising her of the dates of any proposed meetings. The Tribunal also considers it significant, notwithstanding the claimant's refusal to meet Mr Fanning, communicated to Mr Roche on September 13, 2000, that from that date to September 20, no written communication was made with the claimant even acknowledging that she had made complaints of such nature that, in Mr Roche's evidence, merited investigation by him. In all the circumstances of this case the Tribunal accepts as not unreasonable the claimant's belief that she could have no confidence in the respondent to address the complaints she had made.

The Tribunal also considers it surprising that Ms Allen was being offered on September 13 a trip abroad at a time when the respondent knew of the claimant's distraught state and at a time when part of the advice being given to her by Mr Roche was that she take sick leave.

By letter dated September 20, the claimant advised Mr Fanning that she

was resigning her employment and claiming constructive dismissal.

The issue for the Tribunal is whether Ms Allen was dismissed by construction under the definition of dismissal under section 1(b) of the Unfair Dismissal Act 1977, which provides as follows:

> … the termination by the employee of his contract of employment with his employer, whether prior notice of termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of termination to the employer.

Having regard to the aforementioned definition and to the evidence and submissions the Tribunal deems the proper test in this case is whether it was reasonable for Ms Allen to terminate her contract of employment.

Having given careful consideration to the evidence adduced and the submissions made on behalf of the parties and having regard to the various findings and conclusions arrived at by this Tribunal, as already outlined in this determination, it is the unanimous view of the Tribunal that it was reasonable in all the circumstances for the claimant to terminate her contract of employment.

Mr Connaughton BL, on behalf of the respondent, has submitted, *inter alia*, that it was incumbent on the claimant before resigning to utilise the NUJ grievance procedures. The objective of utilising the NUJ grievance procedure would have been to bring the claimant's grievances to the attention of the respondent. The Tribunal is however satisfied that at various stages throughout her employment and more particularly in September 2000 Ms Allen brought her complaints to senior management level within the respondent newspaper. We also note Mr Moore's evidence in cross-examination that an employee's grievance could be processed by either going to the union or directly to management.

Mr Connaughton also submits that the claimant cannot rely on any matter prior to June 29, 2000 as grounds for resigning her employment on the basis that the claimant, in her own evidence, expressed herself happy with the outcome of June 29, 2000 meeting at which she had outlined her grievances.

The Tribunal rejects this argument and does so having regard to the various findings and conclusions arrived at by the Tribunal as set out in this determination. The Tribunal considers it reasonable for the claimant to have taken into consideration the manner in which her various complaints were dealt with from 1999 through to 2000 in arriving at her conclusion that she had essentially lost faith in what was being offered by way of investigation by the respondent in September 2000. She was entitled to do so because we accept that she had cause for complaint after June 2000. The Tribunal therefore finds the claimant's conclusion that she could have no confidence in the respondent to either

properly or effectively address her grievances was a reasonable conclusion in all the circumstances. Moreover, the claimant did not act unreasonably in taking into consideration the likely effect on her health and well-being were she to remain in the work environment. In assessing the reasonableness of her decision in this regard the Tribunal accepts that the effect on her health and well-being was a concern she had prior to her resignation, a concern that had been communicated to the respondent in September 1999.

Accordingly, the Tribunal unanimously finds the claimant to have been constructively dismissed and as no evidence has been offered to rebut the presumption of unfairness the Tribunal determines the claimant was unfairly dismissed for the purposes of the Unfair Dismissals Act 1977 to 1993. We do not find that the claimant contributed in any way to her dismissal.

Having found the claimant to have been unfairly dismissed the Tribunal must now address the issue of remedy. In his closing submission to the Tribunal, Mr Mallon BL on behalf of the claimant has argued that re-employment in any form is not a feasible option in this case having regard to the circumstances which led the claimant to terminate her contract of employment. Having regard to the matters in issue in this case the Tribunal accepts that neither re-instatement nor re-engagement is a suitable remedy in all the circumstances.

The preferred redress of the claimant is compensation. Both parties agree that since dismissal the claimant has been unfit for work by reason of illness. It is submitted on behalf of the claimant that the reason that she has been and remains unfit for work is due to the conduct of the respondent which conduct, it is submitted, has not only led to the, claimant's constructive dismissal but also directly to the claimant's illness.

It is submitted, on behalf of the respondent in its written submissions that the Tribunal, in the event of it finding that the claimant was unfairly dismissed, should reject the arguments being advanced on behalf of the claimant and hold that no financial loss has been suffered by her.

In this regard a number of matters arise for the Tribunal to determine. Firstly, we must determine, either as a matter of fact or probability, whether the matters of which the claimant complains led to her resignation led also to her illness. While as between the medical experts called on behalf of the claimant and the respondent there is dispute as to the nature of the claimant's illness both experts agree that conduct such as that complained of by the claimant can lead to illness. Dr Brophy is of the opinion that the claimant is suffering from a depressive illness occurring in the context of work-related difficulties. The Tribunal also notes the evidence of Professor Casey who gave evidence on behalf of the respondent. She disputes Dr Brophy's diagnosis of depressive illness and states that the claimant is suffering from an adjustment reaction or stress reaction. However, Professor Casey has stated in direct evidence to the Tribunal that bullying, harassment and intimidation in the work place can lead to the

symptoms with which the claimant is presenting. Dr Malone who saw the claimant on September 9 and 5, 2000, stated in evidence that he attributed the symptoms with which the claimant was presenting to work-related difficulties and he had not ascertained any other cause for the claimant's medical condition other than her work environment.

Nowhere in the course of this hearing has the respondent put forward an alternative explanation for the claimant's illness.

On the basis of the findings already made as to what led the claimant to resign her employment with the respondent and on the basis of the medical evidence before the Tribunal, we are satisfied that the claimant's illness was caused by the factors which led to her constructive dismissal.

It is submitted on behalf of the claimant that in these circumstances she is entitled to be compensated for the financial loss suffered by her to date and for financial loss into the future having regard to the evidence of her medical expert.

The jurisdiction of the Tribunal to make an award of compensation is set out in section 7(1)(c)(i) of the Act which provides as follows:

> if the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) as is just and equitable having regard to all the circumstances.

Section 7(2) of the Act goes on to provide a number of factors that must be taken into consideration in determining the amount of compensation payable. One of the factors that shall be taken into account is the extent to which any financial loss incurred was 'attributable to an act, omission or conduct by or on behalf of the employer'.

Financial loss is defined in section 7(3) as:

> . . . any actual loss and any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution, attributable to the dismissal, of the rights of the employee under the Redundancy Payments Acts 1967 to 1991 or in relation to superannuation;
>
> 'remuneration' includes allowances in the nature of pay and benefits in lieu of or in addition to pay.

It is submitted on behalf of the claimant that in the circumstances of this case, section 7(1)(c)(i) of the Act must be read in conjunction with section 7(2)(a). It is argued on behalf of the claimant that the import of these two provisions is that the Tribunal can compensate the claimant for the financial loss she has suffered to date and for financial loss into the future.

Counsel for both parties say they can find no Irish authority dealing specifically with the jurisdiction of the Tribunal to make an award of compensation in circumstances where an employee is unavailable for work due to illness attributable to the conduct or actions of the employer.

However, counsel for the claimant has referred the Tribunal to a number of court decisions in particular the decision of the Supreme Court in *Martina Carney v. Balkan Tours Ltd* [1997] 1 IR 153 and two decisions of the English Employment Appeals Tribunal namely *Devine v. Designer Flowers Wholesale Florist Sundries Ltd* [1993] IRLR 517 and *Hilton International Hotels (UK) Ltd v. Faraji* [1994] IRLR 265.

While it is agreed by the claimant's representative that the English decisions can only be of persuasive authority, reliance is placed on these decisions because of the similarity of section 74(1) of the Employment Protection (Consolidation) Act 1978 to the provisions of section 7 of the Unfair Dismissals Act 1977 to 1993.

The headnote from *Devine* illustrates the approach taken by the English EAT:

> The EAT held … an employee who has become unfit for work wholly or partly as a result of an unfair dismissal is entitled to compensation for loss of earnings for at least a reasonable period following the dismissal, until she might reasonably have been expected to find other employment. The Industrial Tribunal must have regard to the loss sustained by the employee, consider how far it is attributable to action taken by the employer, and arrive at a sum, which it considers just and equitable. There is no reason why the personal circumstances of the employee, including the effect of dismissal on her health should not be taken into account in ascertaining the appropriate amount of compensation. However the employee will not necessarily be entitled to loss of earnings for the whole period of unfitness for work. The fact that unfitness followed upon and was attributable to the dismissal does not perforce imply the whole period of unfitness thereupon must be attributable to the actions of the employer. There may be questions, for example, as to whether the unfitness might have manifested itself in any event.

In the case of *Hilton International Hotels* the English EAT has held that the Industrial Tribunal had not erred in finding that the unfairly dismissed employee was entitled to a compensatory award for loss of earnings notwithstanding that he was in receipt of invalidity benefit during the relevant period. The EAT held that the Industrial Tribunal was entitled to look behind the payment of the benefit, enquire what is the nature of the disability and decide whether same was attributable to the activity of the employer in unfairly dismissing the employee.

Much reliance is also placed by counsel for the claimant on the dicta of the Supreme Court in *Carney*. In that case the Supreme Court had to decide whether this Tribunal was entitled to have regard to the appellant employee's contribu-

tion to her dismissal as one of the relevant circumstances in determining the amount of compensation to be paid to the unfairly dismissed employee. In like manner to section 7(2) (a) of the Unfair Dismissals Act 1977, section 7(2)(b) thereof provides that in determining the amount of compensation payable under section 7, regard shall be had to 'the extent (if any) to which the said financial loss was attributable to an action, omission or conduct by or on behalf of the employee'.

The Supreme Court confirmed the entitlement of this Tribunal to take into consideration the conduct of the employee prior to dismissal in assessing the level of compensation to be paid.

In support of the arguments regarding financial loss being made on behalf of the claimant in this case, counsel had referred the Tribunal to the judgment of Murphy J and in particular to the following passage from that judgment.

> It does seem to me that the discretion conferred upon the Tribunal (or adjudicating body) by s. 7 of the Act of 1977, in relation to the computation of a payment by way of compensation is very wide. Moreover, whilst the specific directives given to the adjudicating body by paras (a) and (b) and more particularly, (c) (dealing with mitigation) may be interpreted as referring to events subsequent to the dismissal the provisions of para. (d) of subs. 2 unquestionably refer to the machinery, which was or should have been resorted to in relation to the dismissal rather than event subsequent thereto. That provision coupled with the discretion conferred upon the adjudicating Tribunal in the widest terms would seem to me compelling reason for inferring the legislature intended that the body determining the nature or extent of the redress to which the employee was entitled should look at all of the circumstances of the case including the conduct of the parties prior to the dismissal. I am fortified in this view by the judgment of Ellis J in *McCabe v. Lisney and Son* [1981] ILRM 289 and the jurisprudence which has evolved based thereon. The fact that the legislature in 1993, made express provision in that regard must in the circumstances be interpreted as a provision made *ex abundante cautela* and to avoid the doubts which might well and, indeed, have arisen in the circumstances.

Having regard to the Supreme Court's interpretation of what was intended by the legislature in section 7(1)(c)(i) and section 7(2) of the Unfair Dismissals Act 1977, the Tribunal is satisfied that, in the circumstances of the present case, it must consider the extent to which the claimant's financial loss is attributable to any act or omission or conduct by or on behalf of the respondent prior to dismissal.

While in no way binding on this Tribunal we are also satisfied to accept as persuasive the English EAT decision in *Devine*.

We have already set out our findings regarding the cause of the claimant's illness in this case. We are satisfied that her illness is attributable wholly to the factors which led her to resign her employment and claim constructive dis-

missal. Her illness had led to her financial loss. Having regard to the series of findings made by this Tribunal it follows that the Tribunal must hold that the claimant's financial loss is attributable to the conduct of the respondent. To hold otherwise, in light of the findings made, would in the view of this Tribunal, have the effect of leaving an unfairly dismissed employee (where reinstatement or re-engagement have been ruled out as unsuitable remedies) without any effective remedy for the financial loss suffered as a result of the dismissal. Such a result would in our view be contrary to the intention and spirit of section 7 of the Unfair Dismissals Act 1977.

The Tribunal must now assess the extent of the financial loss suffered by the claimant. It is clear that she is unable to work since her dismissal and at the time of this hearing she remains unfit for work. We are satisfied that she has sustained financial loss to date. There is dispute between the parties' medical experts not just in relation to the nature of the claimant's illness, but also the likely duration of same. We have considered the evidence of the medical witnesses and overall the Tribunal accepts on balance the evidence of Dr Brophy as to diagnosis and the prognosis for recovery. In his evidence given on February 6, 2001 he envisaged from that time a period of recovery of some 18 months. The Tribunal estimates therefore, that because of her illness, the claimant will suffer financial loss for a period of almost two years from the date of dismissal. The Tribunal also accepts as not unreasonable the submission made on behalf of the claimant that, following recovery (even allowing for some earlier element of recovery) a period of time will elapse before she will achieve a salary commensurate with that of her pre-dismissal earnings. The Tribunal assesses as reasonable, following recovery, that it will take a period of at least a year for the claimant to achieve similar earnings. We accept therefore that she will incur financial loss in this period.

No specific figure was given in respect of the claimant's net weekly loss as a result of her dismissal. A figure of £903.85 per week has been given in the T1A in respect of her weekly gross earnings which figure is indicative of the agreed yearly salary of £47,000 she was on at the time of dismissal. The Tribunal therefore estimates in all probability her average weekly net loss to be in the region of £500 per week. We accept she will have ongoing loss for the period she remains unfit for work and until she achieves similar employment.

In all the circumstances therefore, having regard to her loss to date and the time-frame accepted by the Tribunal for future loss we deem as just and equitable that the claimant be awarded compensation in the sum of £70,500.30 being the equivalent of 78 weeks remuneration (78 x £903.85) for unfair dismissal.

For the claimant: *Rory Brady SC and Tom Mallon BL, instructed by W.G. Bradley Solicitors*

For the respondent: *Mark Connaughton BL, instructed by Matheson Ormsby Prentice Solicitors*

Division of the Tribunal: *M. Faherty BL (Chairperson), M. Hennigan, P. Woods*

Aoife Forrest
Barrister

Fiona O'Hanlon (claimant) v. Educational Building Society (respondent): Equality Officer DEC-E/2001/22 (31 July 2001)

Employment – Parallel complaints of dismissal and discrimination – Jurisdiction – Promotion – Interview – Direct discrimination – Gender – Marital status – Whether prima facie case – Employment Equality Act 1998 (No. 21), sections 6, 8, 77, 84 and 101(4) – Council Directive 75/117 – Council Directive 76/207

Facts In January 1999, the claimant and four male colleagues were interviewed for the vacant position of marketing manager at the Educational Building Society ('EBS'). The claimant was unsuccessful and alleged that she was discriminated against in the selection process on the grounds of gender and marital status. In particular, she alleged that she had a greater level of experience than the appointee. She further alleged that her third level qualifications were more suitable to the post that those of the appointee. She finally alleged that the selection process was not conducted in a transparent manner. She subsequently resigned from the EBS and referred a complaint under section 77(1) of the Employment Equality Act 1998 to the Director of Equality Investigations. Thereafter, the claimant further referred a claim of constructive dismissal to the Labour Court in accordance with section 77(2) of the Employment Equality Act 1998. The respondent contended that the claimant was seeking to rely on the same circumstances to support both claims and submitted that the Employment Equality Act 1998 prevented such a course of action. In addition, it rejected the claimant's allegations of discrimination.

The Equality Officer concluded:

(1) The referral of a complaint of constructive dismissal under section 77(2) of the Employment Equality Act 1998 does not create any obstacle to an Equality Officer investigating a complaint of discriminatory treatment referred to the Office of the Director of Equality Investigations under section 77(1) of the

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	**CASE NO.**
John Travers, Ratheelin, Co. Cavan	UD720/2006 PW44/2006

against the recommendation of the Rights Commissioner in the case of:
MBNA Ireland Limited, Carrick-On-Shannon, Leitrim, Ireland

under

PAYMENT OF WAGES ACT, 1991
UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. M. Flood
Mr P. McAleer

heard this appeal at Cavan on 5th December 2007
and 5th March 2008

Representation:

Appellant(s) : Mr. John Quigley, P.J.F. McDwyer & Co., Solicitors, Elm House, Cavan

Respondent(s) : Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal by an employee against the recommendation of the Rights Commissioners in the case of John Travers –v- MBNA Ireland Limited (r-035800-ma-05-DI).

On the first day of the hearing the appeal under the Payment of Wages Acts, 1991 was withdrawn.

Claimant's Case:

The claimant gave evidence. He stated that he a qualified electrician and had worked in a number of different organisations in England.

In 2003 he decided to move to Ireland and attended the respondent's head office in Chester after submitting his curriculum vitae. At his interview he was informed by the Personnel Officer in Chester that there was a problem in the Facilities department in the respondent's premises in Carrick-on-Shannon. He explained that he had been told that an employee was absent on long-term sick leave. He was informed that he would be recruited into the Telemarketing department but would be seconded into the Facilities department. When asked, he said that the contract of employment given to him was in

relation to Telemarketing. He stated, when asked, that he would be seconded into the Facilities department as a way of getting him "in the back door". The claimant stated that he felt it was a "ruse".

He commenced employment in Carrick-on-Shannon and was met by the Facilities Line Manager and was brought directly to the Facilities department. On March 25th 2004 he was sent a letter from the Personnel Manager to confirm his secondment to the Facilities department for an initial period of 3 months with a salary of € 28,160. The claimant told the Tribunal that he had never anything to do with the Telemarketing department.

When asked if he had questioned whether his position was to be regularised he replied that he had on a number of occasions to Facilities Line Manager. He said that the answer was always the same, there were no vacancies. When asked, he said that the Facilities Line Manager had mentioned the claimant returning to the Telemarketing department on a number of occasions but he never questioned it.

He received a letter, dated March 10th 2005, from the Personnel Manager informing him that his secondment would cease with effect from March 18th 2005 and that he would take up his original contracted role as Telemarketing Customer Specialist. The claimant told the Tribunal that he was "gobsmacked". He spoke to the Facilities Line Manager and was informed that he, the claimant, was included in the "headcount" of the Telemarketing department and the section was short staffed. The employee he had replaced was still on long-term sick leave at the time. The Facilities Line Manager told him that it was "out of his hands". He then approached the Personnel Manager who informed him to put his grievance in writing and it would be investigated.

He submitted a letter of grievance to the Personnel Manager on March 15th 2005. He received a reply dated March 18th 2005 informing him that his grievance was not upheld but informed him that he could raise the issue with the Head of European Telemarketing. The claimant told the Tribunal that he did not see the point in appealing the decision and was very disheartened. He attended his doctor, was diagnosed with severe depression and signed off work.

On March 22nd 2005 he wrote to the Personnel Manager in response to his March 18th letter. Three of the nine points set out in the letter where read out to the Tribunal. He stated that

1. *"It had been made clear to me from the outset that there was an imminent vacancy in Facilities but that it was at the time blocked by the incumbent taking long term sick leave. That he was thought not likely to return, and that if he did he faced serious disciplinary action.*
2. *That my initial appointment was by way of a back door ruse is not of my doing. I feel that (and have felt for some time) that the fact that I was initially appointed in Chester & that the incumbents had no say in selection has quietly worked against me and has led to the present situation, which I deplore.*
3. *To sum up, I fell humiliated & degraded by the Company & in such a state of mind that I have to seek medical assistance which will probably lead to a short period of certified leave."*

While on certified sick leave he was informed of a position available in the Facilities department and submitted an application to the People Relations Manager. This position was the job the claimant had been performing before commencing sick leave. An interview was set for May 4th 2005. On May 2nd 2005 he emailed the People Relations Manager informing him that, on reflection, he was not taking up the interview, was resigning from his position and was reserving the right to seek remedy by way of constructive dismissal. He received a reply on May 5th 2005.

The claimant gave evidence of loss.

When asked he said that he had signed his contract of employment in February 2004. This contract stated that he was employed as an Outbound Customer Specialist. The claimant stated that he signed it as he was going along with the "ruse" and what he had been told in Chester in order to facilitate the respondent. When asked, he said that he had received the company handbook. When asked, he said that the Facilities Line Manager had referred him to the Personnel Manager and not the People Relations Manager. The claimant stated that the company had not followed their own company procedures.

On cross-examination he replied, when asked, that it was common knowledge that the employee from the Facilities that was on long-term sick leave was to be dismissed. When asked, he replied that he had not met anyone from the Telemarketing department on his first day of his employment with the respondent. When asked, he stated that he had not asked anyone formally to deal with the situation of his secondment. He thought the post had been allocated to him.

When asked, he said that he only remembered one call and one meeting with the People Relations Manager before he resigned. When asked if he had lodged a formal complaint against anyone he replied no.

On re-direction he stated that he did not appeal the Personnel's Manager to move him to the Telemarketing department as he felt "abused" by the respondent.

When asked by the Tribunal he stated that the initial interview he had attended was a technical interview, a telecommunications role had not been mentioned.

Respondent's Case:

On the **second** day of the hearing the Personnel Manager gave evidence. He explained that he was not the direct line Manager to the claimant.

He explained that he had met the claimant in Chester and had wrote to him on February 19th 2004 enclosing his contract and informing him that he would contact him later to discuss the temporary position in the Facilities department. He explained that it was unusual to send a covering letter with a contract but he wanted to inform the claimant about the temporary position.

On March 25th 2004 he again wrote to the claimant to inform him of the details of his secondment for a 3-month period. The claimant was also informed that he would be given two weeks notice of any change in this arrangement and on completion of the secondment he would return to European Telemarketing department.

On March 10th 2005 he wrote to the claimant informing him that his secondment would cease on March 18th 2005, he would take up his original role as Telemarketing Customer Specialist and his responsibility allowance of € 8,655 would also cease. The claimant was not happy and told the witness over the telephone. The claimant was asked to put his grievance in writing, which he did on March 15th 2005. The witness replied on March 18th 2005 stating the claimant's grievance was not upheld but he was given the opportunity to appeal. The witness told the Tribunal that, in his view, the respondent had been very clear on the claimant's original employment and temporary position in the Facilities department. When asked, the witness stated that the person the claimant could have appealed the decision to was the head of European Telemarketing department who was the claimant's Manager.

He stated that the claimant had resigned and he had no involvement in it, the Facilities Line Manager had informed him. He explained that the claimant had only been seconded in the Facilities department on a temporary basis. The Facilities Line Manager asked the witness to explain it to the claimant.

When asked about the posting of positions, the witness explained that positions in the respondent company were posted internally first then externally. The Facilities Line Manager informed the claimant of the availability of a position he could apply for once he returned to work from certified sick leave. When asked, he stated that there had not been any permanent positions available in the Facilities department in March 2005. He told the Tribunal that he knew the claimant had completed the application form for the position but had subsequently withdrawn it.

On cross-examination he explained that he had been a Human Relations Manager for six years. In relation to the covering letter attached to the contract of employment, the witness explained that he had been asked to include it by head office in Chester. When asked, he stated that he had met the claimant on the first day of his employment and had brought him to the Facilities department. He stated that he had no further contact with the claimant until his secondment had come to an end. The respondent company had decided to terminate all secondments at that time and staff were to return to their original positions.

When asked, he stated that he did not have notes of various conversations he had had with various people in the respondent's headquarters in Chester. When asked, he stated that he had spoken to the Facilities Line Manager about the claimant's grievance and the fact that the claimant had brought up the subject of a permanent position in the Facilities department. When asked, he stated that the People Relations Manager had reported to him but he felt that he, the witness, should deal with the claimant's grievance. When asked, the witness replied that the respondent did have a long-term sick leave policy. When asked about the position that was available in April 2005 in Facilities, he stated that he had not had prior knowledge of it's availability as all positions had to be approved.

On re-direction he explained that there had been a freeze on staff except those in customer facing areas.

The Facilities Line Manager gave evidence. He explained that he had been the claimant's line Manager in the Facilities department. He was not involved with the claimant's recruitment.

The witness explained that the premises in Carrick-on-Shannon had a staff of 1,000 with only 2 electricians, 1 out on sick leave. The witness explained that there was a freeze on hiring staff at the time but he had still requested a replacement. He explained that he had received a telephone call from headquarters in Chester informing him that the claimant was to be seconded to his department while an employee was on long-term sick leave. This employee was absent from November 2003 and finally leaving his employment in May 2004.

As the freeze on the hiring of staff was still ongoing in 2005, a directive from Management was issued to return all seconded staff to their original positions. The Personnel Manager asked the witness had he promised the claimant the position he had in the Facilities department but he said that all staff knew that all positions had to be posted.

When asked, the witness stated that the claimant's wages were paid from of the European Telemarketing department. When he had compiled the claimant's appraisal he had stated his location was the European Telemarketing department. When asked, he stated that the claimant had spoken to him about the employee absent on sick leave. The witness said that he told the claimant that if the position was approved it would be posted for application.

The witness explained when the employee on long-term sick leave resigned he completed a form for a replacement to be considered by the Resource Allocation Committee. He explained that if a member of a department left the Manager would apply for a new employee. The matter would be decided at Management level and posted for application. When asked, he stated that he had notified the claimant that his temporary position was to cease. When asked, he stated that the claimant had been paid a responsibility allowance.

On cross-examination he explained that at the time of the claimant's employment he had 14 staff including 2 electricians. The department ran 24 hours a day. When asked, he said that he had not been privy to the claimant's interview in Chester. When asked, the witness said that he been informed by head office in Chester that the claimant would be on secondment from European Telemarketing department to his department. When asked, he stated that he did not have any record of the telephone conversation. When asked, he said that he never had any problems with the claimant and had no recollection of the claimant complaining of work practices.

When asked, he stated that there could be 2 or 3 call outs per week with a set payment per callout. When put to him that the other electrician was called out more than the claimant, he replied that the security department would get a text concerning the fault and they would put in the call for an electrician. He said that he had not noticed a variance in the number of callouts between the claimant and the other electrician.

When asked, he stated that he had carried out appraisals on the claimant but could not recall specifically what he had written and did not have copies of them to submit to the Tribunal. He stated that the appraisals stated that the claimant was working in the European Telemarketing department. When asked when the claimant approached him about a full-time position he replied that it was in the first 6 months of his employment but was not sure how many times the claimant had asked him about the position. When asked, he said that he might have told the claimant there was a freeze on applications. When asked if he had a problem with the employee on long-term sick leave he replied that Personnel had been dealing with him but he had little expectation that he would have returned to work.

When asked, he stated that he applied for the position to be filled in May 2004. In 2005 he again wrote to the Committee to tell them how critical it was to fill the position. When asked, he stated that it was very clear from the Personnel Manager's letter of March 2004 that the position in Facilities was only a secondment for an initial period of 3 months. When asked what he had done to assist the claimant when he left on sick leave he replied that the Occupational Health department dealt with it.

Determination:

The contract was formed in Chester and the Tribunal entirely accepted the evidence of the claimant as to what occurred in Chester. It is significant that the evidence of the claimant was uncountered by any company witnesses and therefore is uncontested.

We accept that he was an electrician and had always worked as one. We accept that the basis of his move to Carrick-on-Shannon was that he would be employed as an electrician working in Facilities but was described in his contract as a Telesales employee who was seconded to Facilities. We accept therefore that any change of this agreement by the respondent whereby he "reverted" to a Telesales person was not in keeping with the contract of employment.

We however find that that the claimant did not exhaust the grievance procedure made available to him by the respondent and this proves fatal to the claimant's case. There was no reason put forth as to why

an appeal to the European Head of Telemarketing would have been unfair or biased and we accept that his failure to avail of this right by resigning on May 2nd 2005 is fatal to his claim.

In constructive dismissal cases it is incumbent for a claimant to utilise all internal remedies made available to him unless good cause can be shown that the remedy or appeal process is unfair. Accordingly, the Tribunal uphold the recommendation of the Rights Commissioner and finds that the claimant was not constructively dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		CASE NO.
Mr Tadhg Sheehan, Ballinamuck West, Dungarvan, Waterford.	UD858/1999 MN1116/1999	Co.

against

Continental Administration Company Limited, Unit 1, Waterford Industrial Park, Cork Road, Waterford

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 1991
UNFAIR DISMISSALS ACTS, 1977 TO 1993

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Halpin B.L.

Members: Mr. C. Fay
Ms. B. Fell

heard this claim at Waterford on 9th February 2000 and 28th July, 2000.

Representation:

Claimant : Brian J. Chesser & Co., Solicitors, 19 Catherine Street, Waterford

Respondent(s) : Mr. Niall Beirne,BL., instructed byGerard Doyle, Crowley Millar, Solicitors, 15 Lr Mount Street, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The Respondent company is engaged in the provision of services to resort and property developers in Continental Europe. The company records buyers of time-shares and maintains a computerised database. The Tribunal heard from Mr. Michael Murphy on behalf of the respondent.

Mr. Murphy told the Tribunal that the claimant commenced employment with them on May 1st, 1995 as an accountant. His duties included, inter alia, management information, financial performance and day-to-day office management. He was the third employee to be recruited by the company and he was so engaged on an agreed salary scale which rose from circa £19,000 in the first year to £38,000 in the fourth year. His remuneration package also included a bonus scheme and a ten per cent pension fund.

Mr. Murphy told the Tribunal that during the initial years the claimant was a satisfactory employee and diligent worker. In or about April, 1998 he had received a substantial pay increase with which he was discontent. Instead he stated that he wanted at least £42,000 per annum or else he would leave the company. In this regard, he stated that his performance merited £45,000 per annum, but that he would be willing to accept £42,000 per annum. At that stage the claimant had no written contract of employment. The company felt vulnerable in the event that the claimant left with no notice, even though he said he would give one months notice if it arose. Consequently, the company offered him a draft contract in or about June, 1998 but the claimant declined to accept or sign it as he disputed the notice period. Following subsequent discussions in October, 1998 it was agreeed that the claimant would be paid an additional £3,000 the following Christmas. The claimant accepted this compromise offer, but was not entirely happy with the deal as he wanted to become a director of the company.

It is the respondent's case that the claimant's performance deteriorated after October, 1998. In particular the production of important financial information which was vital to the company was not as forthcoming as it had previously been. The slower stream of financial data it was suggested, was caused by the claimant being intent on doing things at his own pace which was not necessarily consistant with the needs of the company directors.

Mr Murphy also told the Tribunal that in or about the same time staff morale was becoming a problem and that there was a general atmosphere of unhappiness about the workplace. In January, 1999, at Mr Murphy's suggestion, the claimant submitted his grievances in writing to the Board of Directors. The Directors met in mid-February to discuss the possibility of making the claimant a director. Arising out of the meeting the claimant was informed that the Board did not envisage making him a director. The claimant was unhappy with the Board's decision. Mr. Murphy formed the impression that he would be leaving, more or less at any time, with one month's notice.

Prior to this, in or about December 1997, the claimant had expressed an interest in obtaining a share-holding interest in the company. Mr. Murphy told the Tribunal that he at all times made it clear to the claimant that any such matters would have to go to the Board of Directors. The matter was proposed at a Directors meeting in

December, 1997 at which the Board accepted that he (the claimant) should be given a share option which he subsequently took up. By the respondent's evidence, an ongoing dispute regarding certain conditions of the share option offer were ultimately resolved. By early 1999 the company became the subject of a possible take-over. This highlighted the importance of the share options in that the claimant's shares were potentially worth in the region of £100,000. In the interim relations between the claimant and Mr. Murphy continued to be very poor and were having an increasing negative impact on other staff members. The claimant disputed his responsibility for the ongoing difficulties and was reluctant to leave voluntarily without a generous severance package. Despite a number of attempts the parties could not reach a compromise and a decision was taken to dismiss the claimant .

The claimant has since been replaced and by the respondent's evidence there has been a definite improvement in the provision of timely financial information. Staff morale and turnover has also improved.

During cross-examination, it was not denied that the claimant made a significant beneficial contribution to the company which was reflected in his remuneration package. Regarding the claimant's performance, Mr. Murphy stated that while he had no specific recollection of approaching him about it, he was satisfied that the claimant was well aware of his responsibilities in providing timely and regular financial information. He did however raise the issue with him of staff morale and supervision. Mr. Murphy also confirmed to the Tribunal that the company did not have any written personnel procedures.

Claimant's Case:

Mr Tadhg Sheehan told the Tribunal that the first time he became aware that Mr Murphy had a complaint about his work performance was at the Tribunal hearing .The claimant would be in Mr Murphy's office four to five times a week initially but from February 1999 onwards he only had contact about once a week- communication broke down the claimant said, the reason being that he did not sign a contract and Mr Murphy was not getting his own way.

Mr. Sheehan told the Tribunal that his ability to perform his tasks was restricted because of the lack of communication. He cited an incident where on delegating duties to staff some approached him and told him that Mr. Murphy handled the matter differently, the incident he referred to concerned a customer due discount, a new scheme had been introduced and the claimant had not been made aware of it.

Mr. Sheehan would present performance reports every month to Mr. Murphy as part of the accounts package. He would forward them by electronic mail. He presented the figures for March in mid April as usual, he received a phone call from Mr.

Murphy to say that he had not received them. Mr. Sheehan advised him to check the file and edit date, Mr. Murphy said "look I didn't get them", when he did not hear from Mr. Murphy within two days he assumed that he had got the figures.

In October 1998 there was a discussion regarding pay and shares. In February he was told if he signed a new contract he would get his shares which he had purchased in December 1997. The claimant couldn't signed it immediately but took the contract home to look at it. At the end of March he got a complete new contract for shares and terms of employment, he felt they were two separate entities and should not be put together in one contract, he was told to sign and have it returned by 31st March 1998. He had been given one contract in February and asked to sign immediately and a second one for 1998/1999 at the end of March. He was not happy with the link between his terms of employment and his shares options.

He contacted his solicitor because he felt that the contract was too wide ranging for him to sign it on his own. He wanted a legal opinion to clarify if he was signing a contract to get his shares. As the end of the financial year was approaching he had two days only to consider and felt it was a "rushed affair". He was advised not to sign same and told that his solicitor would contact the companys' solicitors.

From 31st March 1998 the claimants' representative told him that they were dealing solely with the share issue, the contract of employment was left aside.

Mr. Sheehan told the Tribunal that, after he requested and was granted two days annual leave for personal reasons at the end of April, his solicitor contacted him and asked him to take a few days extra (not out of his annual leave entitlement), the company needed a few days to consider the issues and a meeting was to take place at the end of the week. On 10th May the claimant met with his solicitor in the Tower Hotel, his employers refused to attend, he said.

Mr. Sheehan stated that he had done his work and met deadlines, he was never given a letter or a lecture regarding his work performance, he had never been warned or told that if he did not improve his work performance he would be sacked.

Determination:

The evidence as presented to the Tribunal has been sufficiently set out above. The Tribunal is satisfied that the respondent Company did not observe fair procedures. It is glaringly obvious that this is indeed the case and the Tribunal does not consider that it is necessary to set out precisely the gravaman of the departure from fair procedures as same is discernable from the facts of the case. Therefore the Tribunal on a full consideration of all the evidence that the Respondent has failed to justify the Claimant's dismissal and has failed to follow the accepted standards to be adopted in dismissing (if indeed dismissal was appropriate or otherwise) the Claimant on just cause, accordingly the Claimant's dismissal constitutes an unfair dismissal as understood by the Unfair Dismissal Acts.

Thus, it is necessary for the Tribunal to consider the appropriate remedy and to assess the extent of the loss presented to the Claimant. In the instant case the Tribunal considers that compensation is the appropriate remedy. In the instant case neither reinstatement nor re-engagement would be an appropriate remedy. Both these remedies cannot be considered, if, firstly, there exists a very definite possibility that it would result in compelling a reluctant employer to continue a relationship of employer/employee, a relationship which is founded on mutual trust and understanding and secondly, the performance of the returning employee may require consistent supervision to ensure adequate performance of duties. If the Tribunal attaches sufficient importance to the workplace on one hand and the actual position of the employee on the other hand and is conscious of the sensitivities that exists, it will be deterred to award relief which has a potential of creating future friction, disharmony and possibly an acrimonious relationship which could spill over into other areas and cause a disruptive work environment resulting in a decrease in productivity or performance. The more senior the position in the company the greater the care necessiated by the Tribunal in assessing the appropriate remedy.

It is clear from the evidence that the Claimant and Respondent are unlikely to have a good working relationship should the Tribunal deem either reinstatement or re-engagement the appropriate remedy. Given the position of the Claimant, Financial and Administrative Officer, it is essential that a good working relationship should exist and that there should exist a good working atmosphere which in the instant case is unlikely, thus, the remedy the Tribunal considers is one of compensation.

In considering the amount of losses and the sum to award all circumstances must be taken into account. Obvious though it may be, that the Claimant was dissatisfied with certain matters at work, namely, his position, his salary and the Share Scheme (or operation of same) and that his performane may have been affected by same, it was not reasonable to have effectively dismissed him in the fashion adopted by the Respondent company. It is clear from the evidence that the Claimant was unhappy with his salary in or around April of 1998. His base line renumeration in 1995 was £19,000 and this increased to £23,000, £28,000 and £38,000 for the years 1996, 1997 and 1998 respectively. Over a three-year period the Claimant's salary had effectively doubled. The Tribunal heard that the claimant at one stage told the Respondent that the company should pay him £42,000 a year or he would leave.

The Claimant expressed his dissatisfaction to the Respondent Company and relied upon the fact that there existed no written contract which entitled him to leave if he so wished. The Claimant told the Respondent that he could leave any time he wanted to. The Respondent offered a draft Contract of Employment, however, no agreement had been reached upon same and consequently there has never been a formal written contract between the Claimant and the Respondent.
The Claimant admits that he wanted a Directorship or such like position in the company and it appears that anything short of this was considered inadequate as the Claimant was of the opinion that he deserved such a position. The Respondent Company has stated that since the time the Claimant discovered that he would not be offered a position as a Director his performance deteriorated. The Respondent states that there was a significant deterioration post 1998.
In relation to the provision of Financial/Management Information , which is essential to the business sensitivities of the company, the Respondent Company states that it was not satisfied with the reports furnished by the Claimant. The Respondent submits that the information was untimely. The under-lying friction between the Claimant and the director of the Respondent Company, Mr Murphy, may have affected the quality of the work performance of the Claimant. The evidence is such as not to allow an actual quantification or precise assessment of same, and notwithstanding this handicap the Tribunal has regard to section 7(2) of the 1997 Act, which provides that the amount of compensation payable may be reduced , inter alia, to :

> "...the extent (if any) to which the said financial loss was attributable to an action,omission or conduct by or on behalf of the employee...."

Not being in a position to ascribe an actual precise per centage figure, the Tribunal is mindful of the situation, without applying an actual contribution.
Section 7(2)(c) of the 1977 Act obliges the tribunal to look at what steps the Claimant has taken to minimise his actual losses. The Claimant is obligated to seek and secure such measures that will minimise the losses potentially sustainable. In other words the Claimant must reasonably avoid the consequences of the Respondent's wrongful act of dismissal. Thus, the Tribunal by virtue of section 7 (2) (c) is required to have regard to :

> ".. the measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the costs aforesaid..."

In considering the element of mitigation under section 7 (2) (c) it is necessary to establish:

1. What steps (if any) the Claimant took to lessen the losses sustained;
2. Were the steps so taken, reasonable, adequate and sufficient; and
3. Ought the Claimant to have taken other steps, not necessarily obvious steps, which a reasonably careful and reasonably prudent employee, would have taken ?

In assessing the loss the Tribunal is conscious of the fact that the Claimant cannot recover for losses that could have been reduced or off-set by a course of action which the Claimant ought reasonably to have undertaken. Furthermore, the Claimant who has taken all reeasonable steps to mitigate hos loss and as a result of so doing sustains expense, may be entitled to be compensated if it can be shown that such expenses is directly attributable or directly related to the dismissal. What's sauce for the 'statutory goose' is sauce for the 'victimised gander.' Thus , any benefit deriving from steps or acts taken by the Claimant in mitigating his losses accrues to the Respondent and lessens the amount recoverable.
There exists ample authority in relation to the element of mitigation. Lord Wrenbury, in *Jamal V Moolla Dawood* [1916] 1 A.C. 175, P.C., at page 179 articulated that :

> " It is undoubted law that a Plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon a breach and cannot claim as damages any sum that is due to his own neglect... If the Plaintiff could do something or did something which mitigated the damage, the Defendant is entitled to the benefit of it .." ".. *in so far as the amount of salary/wage payable by the Respondent is not exceeded by the benefit* ..." (Tribinal's addition)

This is technically incorrect, in that a proper interpretation would mean that the Claimant who successfully eliminates all losses and , indeed, succeeds in gaining a greater amount which would not have been possible from the Respondent's company would mean that this amount would be the property of the Respondent.
The common law principles in relation to mitigating damage equally applies to compensation for unfair damage : *Fay V The Order of Hospitalers of St. John of God* (1980) U.D 92-1980. The onus of proof on the issue of mitigation rests upon the Respondent: see *Fyfe v Scientific Furnishings [1989]* I.R L.R 331; also see *Bessenden Properties Ltd v Corness* [1974] I.R.L.R 338, CA. The Respondent must show that the Claimant did not act reasonably in all the circumstances. The inquest of mitigation of damage is a question of fact and in this vein, Sir John Donaldson in *The Solholt* [1983] 1 Lloyd's Rep. 605 , CA , said that

> ".. Whether a loss is avoidable by reasonable action on the part of the Plaintiff is a question of fact and not a law..."

In adducing proof, the Respondent to a claim of unfair dismissal , may inquire as to the actual steps (if any) taken by the ex-employee to seek alternative work: *Monk v Redwing Aircraft Co Ltd* [1942] 1 k.b. 182. The respondent may put to the Claimant other steps that the Claimant failed to take and inquire as to why such steps were not taken. For example, if the ex-emplyee is a professional it may be reasonable to expect that person to consult specialised magazines, newspapers, institutions, etc., with a view to securing a position commensurate with his qualifications and experience.
If the Claimant has endeavoured to commence or start-up his own private business and has exacerbated his losses, these losses may be underwritten by the Respondent in the Tribunal's aware of compensation.

Moreover, if the Claimant finds work immediately and suffers no loss he is not entitled to an award of compensation but he is entitled to a declaration that he was unfairly dismissed *Isleworth v Richard* [1988] I.r.L.R. 137

Whilst the Claimant is at liberty from the Respondent's workplace, he is obliged to constructively employ his time in seeking to minimise his losses. Even if the Claimant is hopeful of returning to his former employer. Blain J in *Yetton v Eastwoods Froy Ltd.* [1967] 1 W.L.R 104, at 115, states that:

> " The basic principle of damages is *restitutio in integrum* (restored to the original position): the Plaintiff should have what he has lost through the Defendants's fault. But, of course, if a Plaintiff in fact, in the case of a contract of service, earns something elsewhere through being at liberty so to do, then he has lost that much less as the consequences of the default . And if he can minimise his loss by a reasonable course of conduct, he should do so, though the onus is on the defaulting defendant to show that it could be or could have been done and is not being and has not been done .
> Thus, the opportunity to reduce damages by finding reasonable (I repeat reasonable) alternative employment should be taken and , indeed , sought.."

The issue is not a question of what the Claimant could have done , but rather what he could reasonably have been expected to do, as held in the English decision *Jerome v Supervents Ltd.*, unreported, 12 November 1980, per Lawton J.
In the Instant case the Claimant has told the Tribunal that he has registered with the following Employment Agencies:

- Martin Ward Anderson;
- Premier Recruitment
- The Marlborough Group;
- Rigney Dolphin;
- P.P.G Accountancy;
- Skills Group
- Executive Network;
- Eden Recruitment;
- Collins McNicholas;
- Premier Recruitment;
- South East Business & Innovation Centre
- Richmond Recruitment;
- MBI;
- WBS; and
- GRC.

Also, the Claimant stated to the Tribunal that he had made direct applications to the following :

- Waterford Crystal;
- Allied signal;
- Norton;
- AOL;
- Sea Land ;
- Datapac;
- Gropharm
- Kodak;
- Stafford Millar;
- Storling;
- Guidant ; and
- Gram irl.

Furthermore, the Claimant informed the Tribunal that he had attended Recruitment Fairs at Waterford and Dublin. In these days of rapid Word-processed Curriculum Vitae, it is not reasonable to merely swamp every conceivable source of employment with applications. Moreover, it is not reasonable to merely place yourself upon a list with various recruitment agencies. A more pro-active approach must be adopted nowadays. In the nineteen -sixties it may have been resonable to adopt these steps which the Claimant did in the instant matter. In fact Blain J in the *Yetton Case* would have accepted that the Claimant acted resonable, namely , had he:

> ".. made some 57 applications for employment in answer to advertisements within a 12-month period...He made also a number of applications (I think eight altogether) or himself inserted Press Advertisements, those being listed seperatley because that were not in answer to advertisements. And, thirdly, he wrote to some 24 people with whom he was in personal contact... In terms of remuneration he first started as an applicant in the £8,000 to £10,000 - a year class.. he came down to £5,000 and a little later to £4,000..." at page 119

The Respondent questioned the Claimant as to why he did not consult the magazine entitled Accountancy, a magazine which had page after page of position seeking persons with the Claimant's education, skill and experience. The Claimant did not offer an explanation. The Claimant was unsure as to whether he had followed up on ads in various newspapers. Also, an explanation as to why the Claimant did not pro-actively and regularly follow-up with the agencies was not offered.
A claimant who finds himself out of work should employ a reasonable amount of time each weekday in seeking work. It is not enough to inform agencies that you are available for work nor merely to post an application to various companies seeking work.

The Tribunal considers that the first thing that should be done during the weekdays is to purchase a copy of the morning papers and this should be performed early in the morning so that any prospective positions may be followed up in the morning which would send the right mesage to the various companies in which a position is sought. Moreover, a plan of action , particularly for a professional, should be put in place. The time that a Claimant finds on his hands is not his own, unless he chooses it to be, but rather time to be profitably employed in seeking to mitigate his loss. In the words of Sir John Donaldson in *AG Bracey Ltd v Iles* [1973] I.R.L.R 210, the ex-employee

> "...must , or course , use the time well and seek a better job which will reduce this overall loss and the amount of compensation which the previous employer ultimately has to pay..."

All in all, the Tribunal is not statisfied that the Claimant took reasonable steps to mitigate his loss. The Tribunal is of the opinion that the claimant failed to follow-up with the recruitment agencies on at least a weekly basis. Also, the Claimant failed to adequately employ a sufficient amount of time during each weekday to explore options, namely, reading the 'Situations Vacant' in the daily papers, cold-calling of prospective places of employment, following-up on applications, etc. Essentially the Claimant unreasonably failed to seek suitable work at suitable times in suitable circumstances. Accordingly , rather than seek to make an award and decrease it by a per centage figure to reflect an element of non-mitigation, the Tribunal will measure the award having regard to all the circumstances of the case. The Tribunal measures the award of compensation at £27,000 under the Unfair Dismissals Acts, 1977 to 1993
However , the Claimant has received approximately £7,000 net, from working for certain entities. This figure must be deducted from the £27,000 giving a figure of £20,000.
Furthermore, the Solicitor for the Claimant acknowledged that he had £10,000 from the Respondent which means that the Respondent is obliged to pay £10,000 to the Claimant. To simplify matters, the Claimant Solicitor may return the amount of £10,000 to the Respondent Company and the Respondent company may furnish the Claimant with a cheque for £20,000.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 1991, has been allowed and compensation of £1252.56 has been awarded. The said amount is included in the award of £20,000.00 as aforesaid.

Sealed with the Seal of the

Employment Appeals Tribunal

This 28th Nov. 2000

(Sgd.) _____

(CHAIRMAN)

jd/bs

EMPLOYMENT APPEALS TRIBUNAL

CASE NO. UD 192/1978

Appeal of

Mrs. Teresa Hennessy, Avivin, Turners Cross, Cork.

(Appellant)

against the decision of

Read & Write Shop Ltd., Bishopstown Shopping Centre, Cork.

(Respondent)

under the Unfair Dismissals Act, 1977.

Mr. O'Carroll B.L. instructed by Coakley Moloney & Flynn, Solicitors represented the claimant, who also attended.

Mr. Olann Kelleher, Solicitor, Ronan Daly Hayes & Co., Miss Irene Comerford, Director, and Mr. Patrick Jones, Director, represented the respondent Company.

I certify that the Tribunal

(Division of Tribunal)

Chairman : Mr. Donal Hamilton

Members : Mr. James Ryan
Mr. Cornelius Donovan

heard this appeal at County Council Chambers, County Hall, Cork, on Friday, 1st December, 1978.

The decision of the Tribunal was as follows:-

The claimant who is claiming redress for unfair dismissal was employed as a shop assistant by the respondents from August 1976 to 21st December, 1977 when she was dismissed without notice.

The respondents submitted that the claimant was not unfairly dismissed and relied on section 6(4)(b) of the Unfair Dismissals Act, 1977 to show that the conduct of the claimant was such as to merit dismissal. The claimant is a widow whose husband had died a short time prior to the incident resulting in her dismissal. Her daughter Cara also worked for the respondents

The evidence showed that the claimants daughter Cara had, on 16th December, 1977, asked Miss Comerford for a discount on a doll which she wished to purchase. Miss Comerford agreed to allow a discount but did not at that time mention a percentage. On the following day, Saturday, 17th December, Miss Comerford, on being approached again by Miss Hennessy, agreed to a discount of 10%. The price of the doll was £8.49 and with 10% discount the price quoted was £7.64. It appeared from Miss Comerfords evidence that Miss Hennessy was not happy with the discount given and remarked to Miss Comerford

"the till owes me 14p" making the net figure £7.50 and Miss Comerford replied "okay".

Miss Comerford said that the shop closed at about 6.30 p.m. that evening and when she was leaving the premises she heard Mrs. Hennessy ask her daughter if she (Cara) had paid for the doll. Cara replied "yes". We heard that Cara had previously been dismissed but had been re-engaged on condition that she would not use the till. Miss Comerford said that she was bothered on the evening of the 17th about the 14p and Mrs. Hennessy's remark about the payment for the doll. On Sunday, 18th December she went into the shop and checked the till rolls but could not find an entry of £7.50 or an approximate figure. Enquiries were carried out by Miss Comerford and Mr. Jones and as a result of these Cara Hennessy was dismissed from her employment on the following Tuesday and the claimant was dismissed the following Wednesday.

The Employment Appeals Tribunal is not a criminal court. It does not apply itself to establishing the guilt or innocence in the criminal sense of an employee dismissed fundamentally because of the employers belief that at the time of dismissal a monetary transaction had been improperly handled by the employee resulting in a loss to the employer in financial terms and particularly in loss of confidence in the capacity of the employee to maintain a position of trust.

In deciding whether or not the dismissal of the claimant was unfair we apply a test of reasonableness to :

(1) the nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant and

(2) the conclusion arrived at by the respondent that on the basis of the information resulting from such enquiry that the appellant should be dismissed.

The following is a summary of the enquiry carried out by Mr. Jones and Miss Comerford in relation to the investigation in respect of the doll transaction and a summary of the information obtained by the respondents representatives.

We are satisfied that on the evening of 17th December 1977, Miss Comerford overheard Mrs. Hennessy make a remark to her daughter as to whether Cara had paid for the doll and that this remark coupled with the reference to the 14p in Cara Hennessy's conversation with Miss Comerford, caused concern to Miss Comerford. This, due to the fact that Cara was not allowed to use the till resulted in her carrying out an investigation into the doll transaction on Sunday, 18th December.

On 18th December, Miss Comerford inspected the till rolls in the company of Mr. Barriscale, another employee of the Company. As a result of this investigation, it was found that (i) there was no £7.50 entry on the till rolls or any entry for an approximate figure.(ii) Mr. Barriscale informed Miss Comerford that he had seen Cara Hennessy give money to her mother the previous evening when Mrs. Hennessy was inside the counter near till No. 2. Mr. Barriscale checked both till rolls with Miss Comerford.

/On Monday 19th December

On Monday, 19th December, Miss Comerford and Mr. Jones discussed the matter and decided to report same to the Gardai and on Tuesday they reported the matter to the claimants trade union and advised the union that they were going to question Mrs. Hennessy and her daughter regarding the purchase of the doll and the payment and recording of such payment.

On Tuesday, 20th December at approximately 1.30 p.m. Mr. Jones asked Mrs. Hennessy if she had handled a transaction with her daughter Cara regarding the purchase of a doll and Mrs. Hennessy denied handling this transaction. Mr. Jones did not mention to Mrs. Hennessy that Mr. Barriscale had seen a monetary transaction between Cara and her mother and he advised the Tribunal that he accepted Mrs. Hennessys reply without question.

At about the same time Miss Comerford spoke with Cara Hennessy in the company of Margot Murray. Cara Hennessy confirmed that the discount was 10% on the doll and explained that the 14p due to her arose because a card which she bought was over priced. Margot Murray confirmed that this was correct. Miss Hennessy told Miss Comerford that she had paid £7.50 for the doll but could not say whether she had paid the money to her mother or to Alice Meaney (another employee of the Company) who was on her day off on Tuesday 20th December.

At this interview Miss Comerford told Miss Hennessy that she had two till rolls but neither of them showed a figure of £7.50 as being registered. At this stage the gardai arrived followed shortly afterwards by Mr. Jones who advised Miss Comerford that Mrs. Hennessy had told him that she had not handled the transaction.

Shortly after the aforementioned meeting Miss Comerford went into the shop area of the premises. On enquiring as to the whereabouts of Cara Hennessy, she was advised by Miss Murray that Cara had gone out to make a telephone call. Approximately half an hour later Mrs. Hennessy telephoned Miss Comerford and said that she remembered handling the transaction and recalled her daughter Cara paying her for the doll.

On Wednesday morning 21st December, on reporting for work Mrs. Hennessy apologised to Mr. Jones and Miss Comerford for her lapse of memory the previous day when she had advised Mr. Jones that she had not handled her daughters transaction. It was explained to her that there was no £7.50 entry on the rolls and when asked why this was so she replied that she could not understand why there was no such entry on the till rolls. Miss Comerford offered to take Mrs. Hennessy to the garda station where she could see the till rolls for herself. Mrs. Hennessy accompanied Miss Comerford to the garda station and was shown the rolls. On their return from the garda station Mr. Jones spoke with Mrs. Hennessy. He told her he was sorry that she was changing her story and asked her why the entry was not on the roll. She replied that she could not understand why it was not on the roll. Mr. Jones said to her that if she agreed that there was not an entry of £7.50 on the roll and that if she confirmed that she had handled the transaction then he would have no alternative but to draw the conclusion that there was "collusion" and that he would be forced to dismiss her. Mrs. Hennessy replied that she could not change what she had said and at that point Mr. Jones dismissed the claimant from her employment.

In deciding whether or not the dismissal of the claimant was unfair, we applied the test of reasonableness to the nature and extent of the enquiry made by the respondents prior to the decision to dismiss the claimant. We applied the same test to the conclusion arrived at by the respondents that, on the basis of the information resulting from such enquiry, the claimant should be dismissed.

We are satisfied that the claimant was given every reasonable opportunity to defend her position in relation to this transaction. We note the conversation with Mr. Jones at 1.30pm on Monday 19th December, 1977; that she was confronted with the evidence of the rolls when shown same in the garda station and was given a further opportunity to explain the transaction during the conversation with Mr. Jones which resulted in her dismissal.

After a very full enquiry into this case in which both the claimant and the respondent were legally represented, we are satisfied that the respondents had, at the conclusion of the investigation, substantially the same information as is available to the Tribunal and accordingly, we are unanimous in our opinion that the enquiry carried out by the respondent prior to the decision to dismiss the claimant was fair and reasonable and that the principles of natural justice, particularly the affording to the claimant the opportunity to defend herself and be confronted with the allegations made against her and any material "evidence" were fully preserved in this case.

We are satisfied that the claimant was an employee in a position of trust in the Company and noting her unblemished record with the respondents and her former employers (a financial institution) we are unanimous in our opinion that, on the basis of the information resulting from the enquiry, the conclusion arrived at by the respondents that the claimant should be dismissed was fair and reasonable in all the circumstances.

We accordingly dismiss the claim under the Unfair Dismissals Act, 1977.

Sealed with the Seal of the

Employment Appeals Tribunal

the 6th day of February 1979.

(Sgd.) Donal A. Hamilton

Chairman.

EMPLOYMENT APPEALS TRIBUNAL

CASE NO.

M102 UD56/94

CLAIMS OF

Barry St. Ledger, 36 Brookdale Drive, Rathingle, Swords, Co. Dublin

against

Frontline Distribution Ireland Limited, 44 Airways Industrial Estate, Cloghran, Dublin 17

under

Minimum Notice and Terms of Employment Acts, 1973 to 1991 and
Unfair Dismissals Acts, 1977 to 1993

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S.C.

Members: Ms. M. O'Leary
Mr. N. O'Neill

heard these claims at Dublin on the 25th May, 1994 and the 14th July, 1994

Representation:

Claimant: Mr. Justin MacCarthy, Solicitor, Kenny Stephenson Chapman, 10 Upper Mount Street, Dublin 2

Respondent: Mr. Simon McCormick, Solicitor, Eugene F. Collins, 61 Fitzwilliam Square, Dublin 2

During the course of the hearing the Tribunal withdrew to consider a ruling. When the hearing resumed we were informed that the case was settled. Nonetheless the Solicitors for the parties requested us to announce our ruling and, for future guidance, to circulate it in due course.

The claimant was a warehouse supervisor who was dismissed and replaced by a Mr. Kennedy who the respondent company claimed was better trained to do the work.

On behalf of the respondent it was argued that the dismissal was justified because it arose from redundancy. Definition (e) in the Redundancy Payments Acts was relied upon, and to a lesser extent definition (d). These definitions are:

> "(d) the fact that the employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained,

(e) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained."

On the first day of the hearing we were told that Mr. Kennedy had a diploma which made him better qualified than the claimant. It transpired that he did not have a diploma but had only passed an examination which, with further study, might later lead to a diploma.

The hearing was adjourned to allow the parties set out on paper the training, qualifications and general careers of both the claimant and Mr. Kennedy, as well as job specifications covering work done by the claimant before dismissal and by Mr. Kennedy afterwards. The claimant furnished full details of his career and a job specification of the work carried out by him when in the respondent's employ. No details were supplied in respect of Mr. Kennedy's training but two job specifications, before and after the dismissal, were handed in by the company.

On examination of the job specifications it is clear that Mr. Kennedy does the same work as the claimant did, with the exception that he reports to a different person. One other difference is that Mr. Kennedy is able to do the work without the assistance of a part-time helper, but the respondent was not relying on a reduction in numbers as part of its case.

We were also given a comparison of the relative abilities of the claimant and Mr. Kennedy to carry out the work. In the absence of a specific diploma, we were concerned with training rather than qualifications. In fact the respondent did not show that Mr. Kennedy had any special training, and the respondent's solicitor, in argument, tried to equate training with ability.

The solicitor for the respondent argued that these factors made out a case for redundancy within the meaning of definition (e). He said that, though the nature of the work remained the same, the volume had increased and Mr. Kennedy was better able to handle the increase. And he argued that the words "other work" in definition (e) include an increase in the volume of the work. We cannot accept this argument.

Redundancy has two characteristics which are of importance in this case. It is impersonal and it involves change.

Impersonality runs throughout the five definitions in the Act. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job. It is worthy of note that the E.C. Directive on Collective Redundancies uses a shorter and simpler definition: "one or more reasons not related to the individual workers concerned".

Change also runs through all five definitions. This means change in the workplace. The most dramatic change of all is a complete close down. Change may also mean a reduction in needs for employees, or a reduction in number. Definition (d) and (e) involve change in the way the work is done or some other form of change in the nature of the job. Under these two definitions change in the job must mean qualitative change. Definition (e) must involve, partly at least, work of a different kind, and that is the only meaning we can put on the words "other work". More work or less work of the same kind does not mean "other work" and is only quantitative change. In any event the quantitative change in this case is in the wrong direction. A downward change in the volume of work might imply redundancy under another definition, (b) but an upward change would not.

For redundancy to arise in the present case the respondent would have to satisfy us that the nature of the job changed, and that in connection with the change, and only in connection with the change, Mr. Kennedy had certain training that the claimant had not.

We are satisfied that the nature of the work did not change, nor did the manner in which it was done. Therefore there is no redundancy within the meaning of either definition (d) or (e).

There is another reason why redundancy does not arise in this case. We were given no evidence that Mr. Kennedy had any special training, either in the formal sense or related to work experience. The respondent said that Mr. Kennedy had more ability. Ability is not the same as training. It is irrelevant whether Mr. Kennedy is better able to do the work previously done by the claimant. To hold otherwise would be to deny the essential impersonality of redundancy.

Sealed with the Seal of the

Employment Appeals Tribunal

This 5th day of August 1994

(Sgd.) Dorothea MacCarthy

(CHAIRMAN)

MN/lt

EMPLOYMENT APPEALS TRIBUNAL

CASE NO: 1160/1978

Appeals of

Mr. Oliver Lennon, Muckinish, Ennis, Co. Clare.

(Appellant)

against the decision of

Mr. Val Bredin, Barrack St., Ennis, Co. Clare.

(Respondents)

under the Minimum Notice and Terms of Employment Act, 1973.

The appellant appeared in person.

The respondent appeared in person.

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mr. John Gleeson

Members: Mr. Frank O'Connor
Mr. James A. Robertson

heard this appeal at the Courthouse, Ennis

on Tuesday, 28th March, 1978.

The decision of the Tribunal was as follows:-

The appellant is claiming compensation for loss sustained by him by reason of the failure of the respondent to give him the minimum period of notice required by Section 4 of the Minimum Notice and Terms of Employment Act, 1973.

His claim is contested on the ground that the respondent was within his right, under Section 8 of the Act, to terminate his contract of employment without notice.

The appellant and two fellow employees were dismissed, without notice, on the 3rd February, 1978. They were dismissed because they were 35 minutes late coming back after lunch after visiting a licenced premises. The appellant's two fellow employees had been warned previously for similar occurances, that they would be dismissed "on the spot" if it happened again. Respondent contended that the appellant was "aware of the consequences of going to the pub during working hours". Appellant denied that he was so aware.

An incident occurred some two to three months before Christmas, 1977 and respondent admitted that he was looking for an opportunity to dismiss the appellant from that time forward.

The other employees were paid a £100 bonus at Christmas, 1977 but respondent did not pay it to the appellant because, he admitted, he hoped that by not paying it to him the appellant would leave his employment.

Respondent told the

Respondent told the Tribunal that the two fellow employees apologised to him later and he put surplus work that he was unable to undertake himself in their way. He said that he re-employed them on the day of the hearing.

We are not satisfied that the respondent warned the appellant, as he had admittedly warned the other two, that drinking during lunch hour would be punished by dismissal.

On the day of dismissal, the evidence establishes no more than that the three men had a drink in the nearby public house and were 35 minutes late returning to work.

Section 8 of the Minimum Notice and Terms of Employment Act, 1973 saves an employer from liability for minimum notice where the dismissal is for misconduct. We have always held that this exemption applies only to cases of very bad behaviour of such a kind that no reasonable employer could be expected to tolerate the continuance of the relationship for a minute longer; we believe the legislature had in mind such things as violent assault or larceny or behaviour in the same sort of serious category. If the legislature intended to exempt an employer from giving notice in such cases where the behaviour fell short of being able, fairly, to be called by the dirty word misconduct, we have always felt that they would have said no, by adding some such words, (after the word misconduct), as negligence, slovenly workmanship, bad timekeeping etc. They did not do so.

Whilst the breach of a prohibition against drinking during lunch hour might fairly be classified as misconduct in the case of a pilot, or driver, we are of opinion that it would be going too far to classify it as misconduct in the present case.

Consequently, although the employer was in our view, perfectly within his right's in dismissing the appellant, we are of opinion that he should have given notice and that his failure to do so carries a liability to compensate for the loss suffered by the appellant by not getting notice. As he was out of work for the week in question, we fix that liability at £67.52p. and award him compensation in that amount.

Sealed with the Seal of the

Employment Appeals Tribunal

this 12th May 1978

(Sgd.) [signature]

Chairman.

EMPLOYMENT APPEALS TRIBUNAL

CASE NO. UD88/1983

Claim of

Noritake (Ireland) Limited, South Quay, Arklow, Co. Wicklow.

against the recommendation of the Rights Commissioner in the case of:

William Kenna, 12 Ballygarrett, Gorey, Co. Wexford.

under the Unfair Dismissals Act, 1977.

I certify that the Tribunal

(Division of Tribunal)

Chairman: Mr. Donal Hamilton,

Members: Mr. George Lamon,
Mr. Arthur Rice,

heard this claim at Arklow on Thursday 21st July and on adjournment on Monday 12th September, 1983.

Representation:

Company: Mr. G. Byrne, Solicitor, F.U.E., Lower Baggot Street, Dublin 2.

Respondent: Mr. T. Duffy, I.T.&.G.W.U., Bradshaw Lane, Arklow, Co. Wicklow.

The decision of the Tribunal was as follows:

The respondent was employed as a team-leader in the decorating office and was with the Company from 3rd January, 1977 to 5th July, 1982. In this case the Rights Commissioner recommended that the respondent be reinstated.

Before the Tribunal the evidence was that the respondent was a good worker who had a good record and was promoted to team leader. His only fault was that some of his fellow employees complained that he pressed them a bit too hard at times. Up to March, 1983 the company had no cause for complaint.

On 12th March, 1982 the company laid-off the workforce for a period of six weeks with the exception of a small number of employees, including the respondent, who were retained on overtime the following day to complete an order. An incident involving the respondent was brought to the attention of management when another team-leader who also worked on the Saturday furnished a written statement to th

/departmental

departmental manager. The statement alleged that the respondent had misconducted himself that day, i.e. 13th March. An investigation was carried out by the departmental manager who, when he could not verify the allegations, filed away the complaint.

This statement lay filed away until Saturday 3rd July, 1982. That day some employees complained that the respondent was oversupervising them and the respondent in turn complained that some workers were spending too long in the toilets. One employee, who felt aggrieved, reacted by informing management that the team leader's statement in March was substantially true. As far as the company was concerned this resurrected the incident and lead to a further enquiry on 5th July, 1983. The respondent denied the allegations as he had done in March. The company felt that the allegations were established; that the complainants were to be believed and that the respondent's mere denial was not good enough. The respondent was then dismissed.

In considering the evidence, the Tribunal has asked the following questions:-

1. did the company believe that the respondent misconducted himself as alleged? if so

2. did the company have reasonable grounds to sustain that belief? if so

3. was the penalty of dismissal proportionate to the alleged misconduct?

The Tribunal has considered that the reply to question No. 1 was yes. We divided on the reply to question No. 2 and by a majority answered yes. Regarding question No. 3, the Tribunal was unanimously of the view that dismissal was too severe a penalty for this incident, having regard to all the circumstances. Accordingly the dismissal is deemed to be unfair.

With regard to the options open to us under the Act and the wishes of both parties, the Tribunal is of the view that compensation is the most appropriate form of redress. The respondent told the Tribunal on the first day that since his dismissal, he was unfit for work and the liklihood was that he would be unfit for a year. He has claimed disability benefit from the Department of Social Welfare since the termination of employment. Therefore the Tribunal makes no award in this case except to compensate the respondent for the loss of accrued rights under the Unfair Dismissals Act and the Redundancy Payments Acts as a result of the dismissal. This is set out as follows:-

Loss of accrued rights under the Unfair Dismissals Act	£10.00
Loss of accrued rights under the Redundancy Payments Acts	£114.00

Thus the Tribunal makes a total award of £124.00

Sealed with the Seal of the

Employment Appeals Tribunal

this 27th day of September 1983

(Sgd.) CHAIRMAN

P.O'B.

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.
Helen O'Hanlon, 13 Booterstown Hall, UD1096/2014
Booterstown Avenue,
Blackrock, Co Dublin *(claimant)*

against

Ulster Bank Ireland Limited,
Georges Quay, Dublin 2 *(respondent)*

under

UNFAIR DISMISSALS ACTS 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. E. Handley
Mr. N. Dowling

heard this claim at Dublin on 7th October 2015 and 4th December 2015 and 29th January 2016

Representation:
Claimant: Mr. Mark O'Connell B.L. instructed by Mr. Frank Nyhan, Frank Nyhan & Associates, Market Square, Mallow, Co. Cork

Respondent: Mr. Ger Connolly, Mason Hayes & Curran, Solicitors, South Bank House, Barrow Street, Dublin 4

Preliminary issue:

Summary of evidence

Both parties made extensive written (filed) and oral (noted) submissions to the hearing.

A preliminary issue arose as to whether the claimant was employed on a contract of service or a contract for services. The claimant gave evidence and told the Tribunal that she was employed by the respondent, a banking enterprise, through her IT consulting company, as a Project Lead. She commenced her working relationship on 31st July, 2006 and remained working with them until 28th February, 2014. Initially she was employed on a series of short contracts through a recruitment agency. From 1st December, 2007, the claimant was asked by the respondent to work directly for the bank. From December, 2007 onwards, the claimant's company was employed by the bank.

According to the claimant, her work took on the nature of a permanent contract of service. The claimant was paid through her IT consultancy company. She was not paid for annual leave,

although she had to seek approval in advance, nor did the respondent deduct the claimant's tax and PRSI. Sick pay was also not an entitlement.

The claimant maintains that she was a fully integrated member of staff regarding the business and social functions of the bank. She worked exclusively for the respondent during the eight years of her employment. The claimant attended key meetings, including crucial meetings with the Financial Regulator. She also used the respondent's premises and equipment. The claimant indicated that she could not work for another organisation.

At no stage after 1st December, 2007 was the claimant ever asked to sign a contract of employment and worked for up to 50/60 hours per week for the respondent company.

The claimant explained that she wanted certainty regarding her employment. The numerous efforts that she made to speak to the bank were completely stonewalled and her e-mails were not replied to. She asked verbally to meet and discuss her position and she was told "No". She explained that the bank was trying to downsize and it suited the bank not to regularise her employment. She explained that it was cheaper for the bank not to have her as a permanent employee, for example pension costs.

She was told at one time that she would not be provided with permanent employment and she would have to go elsewhere if she wished permanent employment.

Regarding her integration in the company the claimant maintains that she was integrated from day one. She sat with the whole work team. She was provided with a bank computer and had access to the banks e-mail. She was invited to all team events and was included in all team meetings. She had access to sensitive information. The claimant explained that the senior management trusted her and the support staff worked parallel with her.

She organised Christmas parties and a race meeting. She gave speeches at events and was involved in social events. She was also involved in a group involved in women's affairs for development etc.

Regarding her being asked to stay on with the bank and her second contract she explained that CK the head of treasury at the time asked her to stay on. CK contacted the agency (VR) to arrange the paperwork. The same happened again regarding her third contract. Also previous to this in late November 2007 CK and DC asked her if she would like to remain on for a year.

The claimant was asked about control and mutuality of obligation. She explained that everything that she did she needed to provide updates and had to obtain approval. The bank had total control over her work. The bank determined her rate of pay. She looked after her own pension. She did not have professional insurance and was not asked by the bank to provide professional insurance.

The bank did ask her about a contract between her and a third party (G) and also to provide insurance but she did not obtain insurance and she was not perturbed by not having insurance. Regarding sick pay she worked long hours circa 50/60 hours per week so when she was sick for a few days she was paid for those days. She had not asked for sick pay but the bank told her that because she had worked long hours she would be paid for those days.

Regarding substitution, she explained that she always completed her work and that there was no way that she could have appointed a substitute for herself. She did not have other people working for her.

Regarding her work equipment, it was provided for her by the bank. She did not work for anyone other than the bank; she worked solely for the bank. She was paid a daily rate and was not on a fixed term contract for specific tasks.

Regarding holidays, she had worked 35 extra days during a three month period so the bank agreed she could take 17 days leave and be paid. She was not paid holiday pay but was paid holidays in lieu of time worked. When projects were finished she took time off but was not paid holiday pay. The claimant in clarifying to the Tribunal agreed that she was not paid holiday pay.

Regarding reporting, she reported to the treasurer of the bank.

In cross-examination, the claimant agreed that she was paid through her IT consulting company. She was an employee of her own company. She agreed that the earlier contracts covering the period from 31st July 2006 up to 30th November 2007 were contracts for services via a recruitment agency. There were seven contracts over this 16 month period. There were other contractors in the treasury department during her period there. The claimant was never told she could not work for another bank but it was 'not the done thing' and 'would not be acceptable'. She was paid a daily rate of pay and was never paid a bonus. The claimant indicated that she received 17/18 days time in lieu of excess hours worked by her and also received sick pay on this same basis. She had bank staff reporting to her at times. The Group Treasurer told her what work to do.

RH, who was the Treasurer at the time gave evidence on behalf of the respondent. He commenced his employment with the bank in June 2012. RH told the Tribunal that the claimant was a contractor from the bank's point of view. The reason the claimant was on contract for eight years was because she was working on multiple projects. The claimant raised the issue of her employment towards the latter end of her time with the bank. When RH consulted with the HR department in relation to the claimant's employment, he was told that she was a contractor. RH accepted the situation as regards the claimant's status. It was not a cost decision. RH disagreed that it was less expensive to hire the claimant as a contractor as opposed to an employee. Time in lieu was not a normal arrangement with contractors. RH only realised the claimant had no contract during her last months with the bank.

Determination

At the commencement of the hearing the Respondent's Representative submitted that the Tribunal did not have jurisdiction to hear the claim because the claimant was not an employee as defined in the Unfair Dismissals Act 1977 but that she was an independent contractor. The Tribunal could not rule on this application without hearing all the evidence relating thereto. This is clear from a number of High Court decisions referred to hereafter, and the **Supreme Court Case of John Barry, Conor O'Brien, Mary O'Connor, Michael Spratt, Ciara Dolan and The Minister for Agriculture and Food [Appeal No. 86/2011], (hereinafter "the Barry Supreme Court Case").** The Judgement of MacMenamin J. in this case clearly puts to rest once and for all that it:

"*was for the Employment Appeals Tribunal itself to determine, on the facts, whether or not an employment relationship existed between the parties*". *MacMenanin* J also suggested that (i) the parties should agree a case management where the parties prepare "an issue paper" identifying the questions to be identified by the Tribunal; (ii) that the parties prepare written submissions;[and that] (iii) The Tribunal apportion such time as may appear appropriate for oral submissions. The Tribunal also decided to hear relevant evidence from the parties. In the **Barry Supreme Court Case** the court also ruled that: *"the case whether the vets were employed by the Respondent, or were instead self- employed persons doing shifts at the Mitchelstown meat plant is a matter of fact for the Employment Appeals Tribunal on the rehearing of the matter".*

The parties agreed the following issues, as being relevant to the Tribunal's decision: [was the claimant] in business on her own account and/or integration; relevant contracts; mutuality of obligation; the intention of the parties; control; actions of claimant; taxation. The Tribunal did not consider itself confined to the issues agreed between the parties and also indicated that it would have regard to the following: pension entitlements; sick pay; substitution; whether the profit which she derived was dependent on how she carried out her work; was she paid for holidays; did she have support staff; how and where she did the work; could she engage someone else to do the work instead of her. The Tribunal did not close its mind to other factors which might arise during the hearing of the case. All these matters will be dealt with below after the Tribunal has considered the relevant case law.

Relevant Case Law:

The High Court decision in the case of **The Minister for Agriculture and Food V Barry and Others 1998 ELR 36 (7th July 2008)** (hereinafter referred to as **"the Barry Case"**) contains a detailed analysis of the jurisprudence on the tests which should be considered in deciding whether a person is working under a Contract for Service [Independent Contractor] or a Contract of Service [Employee]. It is appropriate that we examine 'the Barry case' in detail as it is relevant to the case brought by the claimant. In **'the Barry case'**, the Court allowed the appeal by the Department of Agriculture and Food against the decision of the Employment Appeals Tribunal (EAT) which had found that five Temporary Veterinary Inspectors (hereafter "the TVI's) were employees and accordingly entitled to payments under the Redundancy Payments Acts 1967-2003 and Minimum Notice and Terms of Employment Acts 1973-2001 following the closure of the Galtee Meats Plant at Mitchelstown, Co. Cork (hereafter "Galtee").Mr. Justice John Edwards found that the TVIs were engaged as independent contractors, in other words, under contracts for service rather than as employees under contracts of service. The Department had argued that the TVIs were private veterinary practitioners who were also in business on their own account, and that they could and did continue in private practice along with undertaking temporary work for the Department. Further, the TVI's remuneration was paid on an hourly fee basis at rates fixed between the Department and their union, Veterinary Ireland. The TVI's paid PAYE and PRSI and each was issued with a P60 annually. The TVI's were not obliged to maintain their own professional indemnity insurance. The TVI's did not charge VAT, and were not paid VAT even though VAT was chargeable on TB testing.

This case has had an eventful legal journey with two hearings before the Employment Appeals Tribunal ("EAT"), two hearings before the High Court and following last year's Supreme Court decision now goes back to the EAT for a third time. EAT (1) On the preliminary point of whether the TVIs were employees or contractors, the EAT found that the TVIs were employees.

It based its decision on the traditional tests set down in the **Henry Denny case** (a previous Supreme Court case on employment status and which we will look at hereafter) and other decisions of the Courts which identify a number of tests to be applied in determining whether workers are contractors or employees. On appeal to the High Court (High Court 1) by the Minister on a point of law, Edwards J ruled that the EAT had "erred in law" by failing to have regard to all the possibilities in determining the nature of the working relationship between the parties. He also decided that the finding of the EAT that there was "mutuality of obligation" between the Minister and the TVIs (i.e. that the Minister was obliged to provide work to the TVIs and that the TVIs were obliged to carry it out), was made on a "flawed and untenable basis". Furthermore, he found that the EAT had misinterpreted the decision in the **Henry Denny case** and should have used the full range of legal tests in coming to the conclusions that they did. The matter was sent back to the EAT (EAT 2) for re-hearing on the basis of the facts of the case and the judgment of Edwards J in the first of the High Court decisions. On that basis, the EAT felt compelled to hold that the vets were independent contractors. The TVIs appealed the second decision of the EAT to the High Court (High Court 2) on a point of law on the basis that it had "erred in law" on a number of grounds, including in finding that it was bound to reverse its decision based on the earlier decision of the High Court. The High Court found that there was nothing in the additional evidence produced by the TVIs which was of such importance that no reasonable Tribunal, having heard it, would be entitled to conclude that the TVIs were engaged other than under a contract for service i.e. contractors rather than employees. The Judge did not deal with the matter as to whether the EAT was bound by the decision of the High Court in arriving at its determination. This decision was appealed to the Supreme Court which overturned the High Court decision and held that the EAT was in error in its second determination. The matter was sent back to the EAT for re-hearing on the basis of the facts of the case and the judgment of Edwards J in the first of the High Court decisions.
The fact that this case is going on for eleven years is testament to the complexity of deciding whether a person is an employee or an independent contractor. It is extremely difficult to decide which is which. Some court/body has to decide it and the Supreme Court has clearly ruled that it is the Employment Appeals Tribunal which must decide it.

Edwards J in High Court 1, considered the following relevant matters, which the Tribunal found useful, in reaching his decision:

Mutuality of Obligation

This exists where the employer is obliged to provide work for the employee and the employee is obliged to perform that work as in a normal employer/employee relationship. Whilst the Court found that it was appropriate to apply the mutuality test, this does not mean that an implied contract of mutual obligation existed. Rather, the High Court agreed with the Department's view that they had no control over the level of work available to the inspectors, as this was within the control of Galtee.

"The so called Enterprise Test"

Edwards J analysed the relevant jurisprudence in relation to "the so called Enterprise test". This test examines whether or not a person is in business on his/her own account. This test originated in a UK decision of **Market Investigations –v- Minister for Social Welfare** and was adopted by the Supreme Court in this Jurisdiction in the case of **Henry Denny and Sons Ireland Limited V The Minister for Social Welfare** (**'the Denny case'**) and the application of the

ratio decidendi in that case and in the subsequent decisions **Tierney –v- An Post (2000)**; **Castleisland Cattle Breeding Society Ltd –v- The Minister for Social and Family Affairs (2004)** and the **Electricity Supply Board –v- The Minister for Social Community and Family Affairs & Others (2006)**. Mr Justice Edwards noted that a very important "particular fact" common to these cases was the existence of a contractual document stating that the relationship between the parties was a contract for services. The fact that the parties agreed that the description of their relationship should be considered a contract for services should not be considered decisive or conclusive. Mr Justice Edwards considered the judgements in **'the Denny case'** and referred to the statement of Keane J that when determining whether a particular employment relationship is to be considered a contract "for service" or "of service" [that] "each case must be considered in the light of its particular facts and of the general principles which the courts have developed" Edwards J quoted the following paragraph from Keane J in the **Denny** case:

"It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general, a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises, or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her"

Mr. Justice Edwards criticised the misinterpretation of this passage which arose from "misguided attempts to divine in the judgement the formulation of a 'one size fits all'" approach to this difficult question. He went on to say that it was unhelpful to speak of a "control test", an "enterprise test" a "fundamental test" an "essential test", a "single composite test" as none of these "tests" can be relied on to deliver a definitive result. None of these tests were conclusive or exhaustive. Accordingly, this Tribunal should not reduce its consideration to a few tests. It is clear from 'the Barry case' and from Denny that all possibilities must be investigated before coming to a conclusion. This is what the Tribunal must now do.

Moreover, the Barry case further stipulated that in deciding whether a person is working under a Contract of Service or a Contract for Services a Court or Tribunal should have regard to the following:

(a) all possibilities should be investigated in determining the nature of the work relationship between the parties;

(b) the "so called enterprise test" is not determinative of the issue and that it is incorrect to assert that questions of control and integration are to be regarded merely as elements to be taken into account in applying the enterprise test;

(c) compare the question of enterprise to questions of control and integration as such a comparison will assist a court or tribunal with valuable assistance in drawing the appropriate inferences from the primary facts and no one factor is subsumed by another;

(d) there is no exhaustive list and there might be other factors which might also assist.

The binding element of the Judgement of Keane J in the **Denny case** is that *"each case must be considered in the light of its particular facts and of the general principles which the courts have developed"*. Therefore, the test regarding whether "a person is in business on their own account" is reduced from being the fundamental test to one of the many factors that have to be taken into consideration in light of the particular facts of the case. Perhaps the main point to take from the case is that the various tests in this area should be considered as useful, rather than fundamental or single composite tests. Furthermore, each case should be examined on its own facts, giving particular attention as to whether or not a written contract containing a statement of the purported nature of the contract exists, or where no clear written contracts exists, whether in fact one, or more contracts or an umbrella type of contract exists. The Tribunal must consider **all** the facts in the case before it and must not have a narrow focus.

The Tribunal found the Denny case, in most part, particularly useful in considering its decision. It is worth setting out the facts of this case: A demonstrator had been engaged by the Appellants to demonstrate its food products in various supermarkets. She was employed under a series of temporary contracts which were renewed every year. Her contract clearly specified that she was not an employee rather she was an independent contractor. Some of these statements were:-

"You are deemed to be an independent contractor",

"It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise",

"It is agreed that the provisions of the Unfair Dismissals Act1977 shall not apply etc",

"You will not be an employee of this company",

"You will be responsible for your own tax affairs"

However, her duties were to be carried out in a very specific way; she would be given a minimum period of notice before each job; if she could not do the job another person approved by the employer could do it for her; she had to wear a uniform provided; she was paid by the days she worked, payment being made on receipt of an invoice which was only valid if signed by the store manager. She submitted an invoice and payment was made each fortnight without deduction of tax or PRSI.The demonstrator was deemed to be an employee notwithstanding statements to the contrary in her contract.

The Judge in the Denny case felt that statements, such as "you are deemed to be an Independent Contractor" etc, in the contract should be disregarded, on the basis that they represent the opinion of the contracting parties but were of minimal value in deciding the work status of the person engaged. This is a somewhat unhelpful part of the Denny judgement, in that there is a view that all things being equal then one must look at the intention of the parties. However, in Denny the intention of the parties was that the relationship between them was one of independent contractor. This is somewhat confusing.

In 'the Denny case'

the Supreme Court held that in order to decide whether a contract is one for service or of service each case should be considered on its own particular facts and in the light of the general principles which the courts have developed **McAuliffe V Minister for Social Welfare 1995 ILRM 421** approved;

Whilst the degree of control exercised by a person may provide guidance in deciding whether a contract is one "for service" or "of service" it may not always be a satisfactory test to apply **Cassidy V Minister for Social Welfare 1951 2 KB 343** and **Queensland Stations Property Limited V Federal Commissioner of Taxation 1945 70 CLR 539** considered. The degree of control is not decisive. **Market Investigations Limited V Minister for Social Security 1968 3 AER 732**.

The inference that a person is engaged in business on their own account is more readily drawn when they provide their own premises or equipment, where they employ others to assist them in their business and where the profit is dependent on the efficiency with which they conduct their business.

Whilst a written agreement was drafted with a view of ensuring that the demonstrator was regarded in law as an independent contractor, this was only one of the factors to be taken into account. The facts or realities of the situation on the ground must also be considered.

The Tribunal then considered the facts of the case before it with commentary of previous case law and taking into account the facts and realities on the ground. In doing so the Tribunal found some factors more helpful than others. The Tribunal notes the observations of Edwards J in **Dillon L.J in Nethermere (St Neots)** that:

"the same question as an aid to appreciating the facts will not necessarily be crucial or fundamental in every case. It is for a court or Tribunal seized of the issue to identify those aids of greatest potential assistance to them in the circumstances of the particular case and to use those aids appropriately".

While in most cases it is obvious whether a person is an employee or self-employed, it can sometimes be difficult to assess whether an individual providing services to another person or business can properly be described as self-employed. The terms "employed" and "self-employed" are not clearly defined in law, but some guidance has been provided by the courts. It is necessary to look at what the worker actually does, the way the worker does it and the terms and conditions under which the worker is engaged. This will be in the mind of the Tribunal when it considers all the facts surrounding the working relationship between the claimant and the Respondent. The Tribunal considered existing case law in this contentious area, cognisant of the fact that it would be difficult to find a set of circumstances in a previously decided case that exactly mirrors "the particular circumstances" of the case in issue. Recourse is therefore made to cobbling *ratio decidendi* from a number of relevant cases to fit the circumstances of the case before the Tribunal.

The Tribunal then considered the evidence adduced taking into consideration all the factors relating to the working relationship between the Claimant and the Respondent. These factors which are now set out in summary hereunder, some supportive of the contention that the claimant was engaged as an Independent Contractor and others supportive of the claimant having employee status.

In Business on her own Account and/or Integration

In **the Barry High Court** case Mr Justice Edwards considered that the appropriate test as to whether a person is engaged in business on his or her own account should consider, among other matters [see below], the following factors:

> *Whether the person provides the necessary premises, or equipment or some other form of investment.*
>
> In the case before the Tribunal the claimant did not provide premises, equipment or any investment. Furthermore, the claimant had no involvement with the ownership or rental of the building.
>
> *Whether the person employs others to assist in the business.*
>
> The claimant did not employ others to assist in the business, and
>
> *whether the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.*
>
> The claimant could not have earned extra money by working harder or conducting the business differently. The pay she received was the same, which was paid on submission by her of an invoice.

These tests are useful in assessing how **integrated** the claimant was in the working relationship between the parties and notes that she was integrated in the respondent's business, working in the same office as other employees, with nothing obviously distinguishing her from these other employees except, that she was paid on submission of an invoice. She sat with the whole work team. She was provided with a bank computer and had access to the bank's e-mail. She was invited to all team events and was included in all team meetings. She had access to sensitive information. The claimant explained that the senior management trusted her and the support staff worked parallel with her.

That it is not confined to these three tests is clear from Mr Justice Edwards reference to "among other matters". The "other matters" which the Tribunal considered were:

Relevant Contracts/Intention of the Parties:
The claimant commenced working for the Respondent in July 2006 through her IT Consulting company.
It appears to the Tribunal that there were three distinct phases of the relationship between the claimant, her company (Clyda IT Ltd) and the respondent, as detailed below:

a) During the period from 31st July 2006 to 30th November 2007, there were seven short term contracts between a company called Vantage Recruitment Services Limited and Clyda IT Services, (the claimant's consulting company) and the claimant worked to these contracts. The seven contracts show clearly, that the intention of the parties to these contracts (Vantage Recruitment Agency and Clyda IT Services Ltd.) was that of a contract for services. Ulster Bank was not a party to these contracts. It follows that

there could not have been a contract either of, or, for service between the claimant and Ulster Bank during this period.

b) During the period from 1st December 2007 to 31st December 2009, the Tribunal was provided with copies of two contracts between the respondent and the claimant's company, which were contracts for service. These contracts were unsigned by either party. However, it is clear that, despite the unsigned nature of the contracts, both parties operated the contents of these contracts to the letter.
c) During the period from January 2010 until the date of termination on the 28th February 2014, there was no written contract in existence between the parties. The claimant, through her company (Clyda IT services), continued to present invoices for payment which the respondent honoured.

Mutuality of obligation

From the evidence before it the Tribunal is satisfied that the employer (respondent) was obliged to provide work for the employee (claimant) and the employee was obliged to perform that work.

Intention of the Parties:
The Tribunal is satisfied that the initial working relationship was one of Contract for Service but this changed over time, which will be dealt with below.

Control:

Whilst the degree of control exercised by a person may provide guidance in deciding whether a contract is one "for service" or "of service" it may not always be a satisfactory test to apply. This is clear from the cases referred to above and **Cassidy V Minister for Social Welfare 1951 2 KB 343** et al. The Tribunal considered the question of "control" and found that the respondent exercised certain control over the claimant's work. She was allocated the work which she then did.

Actions of the claimant
The Tribunal is satisfied that the claimant worked to a Contract for Service initially through her company up to 2010 or thereabouts. The change, which occurred in 2010, will be dealt with below.

Taxation

The claimant was paid on submission of an invoice and she looked after her own taxation, VAT and PRSI. While this may indicate independent contractor status it is not decisive and the Tribunal notes that in **the Denny case** the demonstrator paid her own tax and PRSI and submitted an invoice yet the Supreme Court held she was an employee. However, the demonstrator in the Denny case did not appear to have presented VAT invoices. If she did not then, perhaps, the Supreme Court's decision can be distinguished from the claimant's case in that the claimant's company invariably did present VAT invoices.

The Tribunal notes that even Revenue do not accept the fact that because an individual has registered for self-assessment or VAT automatically makes that person self-employed. In the same way Revenue do not automatically accept that because a person is taxed under the PAYE

system that the person is automatically an employee. This is clear from the 2010 document – *Code of Practice for Determining Employment or Self-Employment Status of Individuals*;

Pension Entitlements:

There was no contribution of pension by the respondent.

Sick Pay/Time off in lieu:
Evidence was given that on one occasion when the claimant missed work because of illness, the company acknowledged that she had worked excessive hours and offered to pay the three day's pay. The claimant estimated that, during an exceptionally busy period, she worked the equivalent, in additional hours, of 35 days approx. She made representations to the respondent regarding these additional hours and was allowed to claim 17/18 days' time in lieu in relation to excessive hours. An independent contractor is not allowed time in lieu by the person engaging him/her.

Substitution: the claimant could not use another person to substitute for her – she had to perform the work allocated to her. Neither was there any provision for the claimant to sub-contract her work.

Whether the profit she derived was dependent on how she carried on her work?
The Tribunal does not believe that if the claimant worked harder, or differently, that she could have earned more money. There was no bonus entitlement. She was paid a standard amount, which did not change.

In business on her own account:

No credible evidence was presented to the Tribunal that the claimant was in business on her own account. In **O'Coindealbhain (Inspector of Taxes V Mooney) [1990]** IR 422 the critical question was considered to be whether the person was performing the relevant services as a person in business in his/her own account.

Holidays:

She was not paid annual leave, but when projects were finished she took unpaid time off in lieu.

Support Staff: At times directly employed bank staff reported to the claimant in relation to project work. This is somewhat supportive of the claimant having employee status.

Conclusion:

Whether a worker is an employee or self-employed depends on a large number of factors. The Tribunal wishes to stress that the issue is not determined by adding up the number of factors pointing towards employment and comparing that result with the number pointing towards self-employment. It is the matter of the overall effect which is not necessarily the same as the sum total of all individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. When the detailed facts have been established the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that of a person working in a self-employed capacity or

a person working as an employee in somebody else's business. If the evidence is evenly balanced, the intention of the parties may then decide the issue. The intention of the parties originally was that the working relationship was one of Contract for Service. The Tribunal is satisfied that this changed over time. The Tribunal is further satisfied that in 2010 on her own evidence, the claimant tried to regularise her status and spoke to HW, CW and later on, RH. The matter was not dealt with properly or at all. The Tribunal notes that the claimant was told she would not be provided with permanent employment but this did not address the issue of her employment status. The Tribunal notes from Edwards J judgement in the Barry High Court case that *"there is no universal test whereby it may be said that if a particular indication is met or not met that a person is employed or not"* Charleton J in the Barry Supreme Court Case [Paragraph 9] case elaborated on this as follows: *"it may need to be factored into any such analysis that it can be that a course of dealings over years may turn from what was initially the engagement of self-employed contractor, to do work on a particular basis into an employment relationship"*. The Tribunal determines that, having regard to all the evidence, this is what happened in the case before it.

In summary there is no single test. Each case must be considered in the light of its own particular facts.

Standing back and looking at the working relationship as a whole, and mindful of the legal principles set out in the cases referred to above, the Tribunal determines that the working relationship between the Claimant and the Respondent drifted into a Contract of Service and that the claimant was working as an employee for the respondent.

The Tribunal therefore does have jurisdiction to hear the claim under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Noreen Donegan, Rooskagh East, Carrigkerry,
Co Limerick - *claimant*

CASE NO.
RP1135/2011

UD828/2011
MN943/2011
WT340/2011

against
County Limerick VEC, Marshal House, Dooradoyle Road,
Co Limerick - *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr G. Andrews
Ms S. Kelly

heard this claim at Limerick on 28th November 2012 and 12th March 2013
and 13th March 2013

Representation:

Claimant: Ms Louise Merrigan BL instructed by Clancy, Solicitors, 35 Inis Carragh, Ennis, Co. Clare

Respondent(s) : Ms Paula O'Hanlon, IBEC, Mid-West Regional Office, Gardner House, Bank Place, Charlotte Quay, Limerick

The claims under the Redundancy Payments Acts 1967 to 2007 and the Organisation of Working Time Act, 1997 were withdrawn by the claimant's representative at the commencement of the hearing.

Claimant's Case

The claimant gave direct evidence that she is a qualified secondary school teacher and is qualified to teach English and religious education. She gave further evidence to the Tribunal in relation to further qualifications which she holds. She commenced employment with the respondent in September 2006 as a teacher on call. She covered classes in many classrooms and in the 2006/2007 academic year worked every day with the exception of three days. In the 2007/2008 academic year she was employed in the same capacity working on a full time-table of 22 hours per week. In the summer of 2008 she successfully applied for the position of English teacher with resource/Teaching English as a Foreign Language (TEFL). This was a fixed term contract from 1 September 2008 until 18 March 2009. She gave evidence that she worked 22 hours per week, every week in that position. She generally spent 11 hours teaching English and spent the remainder teaching religious education, history, resource, CSPE and SPHE. This pattern of work continued into the 2009/2010 academic year and she told the Tribunal that her contract of employment did not specify an exact number of hours that she was expected to work.

She gave evidence of an incident involving herself and a student in September 2009. She reported the matter to the school principal and she subsequently received an apology from the student approximately three weeks later. The student was allowed to return to her class following the apology and she was not aware of any other sanction imposed on the student. She gave evidence that she continued to enjoy a good working relationship with the vice principal and principal following the resolution of this matter.

She gave evidence of a further incident involving herself, a student and the vice principal in March 2010. The incident involved the student's folder of work for the applied leaving certificate. She had a disagreement with the vice principal regarding signing off on this student's folder of work and gave detailed evidence to the Tribunal concerning this issue. She eventually signed off on the student's project of work and believed that the student received a fair result for his folder of work. She told the Tribunal that the relationship between herself and the vice principal felt cool after this incident.

She gave further evidence that some students reported to her that they had consumed alcohol on a school trip in April 2010. The school trip involved male and female students and was under the supervision of two male teachers. She discussed this matter with a school colleague who reported the matter to school management. She was subsequently asked to attend for a meeting with the vice principal and principal and asked to report on what the students had told her. She was called to a subsequent meeting and told that there was no concern for student welfare and the matter had been put to bed. Following this the working relationship between herself, the vice principal and the principal became non-existent. She gave evidence that there was no formal or informal contact between them in relation to her work and she was excluded from a graduation ceremony that she had organised in previous years.

At the end of the 2009/2010 academic year the principal called her to his office and said he was sorry to inform her that there were no hours available to her in the college for the forthcoming year. She did not accept this as she was aware that school numbers were increasing and the school was building extra classrooms. She outlined to the Tribunal numerous requests that she made throughout the summer of 2010 to the school principal to secure employment for the following year without success. She gave evidence that the school advertised for four positions during this period but the combination of subjects advertised were such that she was not in a

position to apply for the positions as she did not have the necessary qualifications. She believed that the school was trying to get rid of her.

In August 2010 she received a phone call from the principal offering her 10 hours work per week. She accepted this offer for now but expected to be offered a full (22 hour time-table) upon her return. She returned to the school in September 2010 and her work was confined to TEFL work which is considered a support subject. Her name no longer appeared on the staff list which she found humiliating. She gave evidence that she had a non-existent relationship with the principal and vice principal. She was allocated a classroom in a portacabin in the school car park and she felt increasingly isolated. She felt she had been labelled as a trouble maker or whistle-blower and did not feel that she could speak with anybody.

She remained in her position until November 2010 when she visited her doctor. She was certified as being unfit for work and did not return to work. She resigned from her position in March 2011 and her letter of resignation was opened to the Tribunal. She attended the company's occupational health physician in February 2011 and was certified as being unfit for work. She told this physician that she did not believe that her workplace was a safe environment in which to work. She gave evidence that during the tenure of her employment she was never provided with any grievance procedures. Following her resignation in March 2011 she received a letter dated 12 May 2011 from her employer asking that she reconsider her decision to resign and requesting a meeting. She did not attend for a meeting as she did not feel strong enough to do so after the terrible year she had encountered. She told the Tribunal that her employer had not afforded her any discussions previously and she felt this was a lame attempt to restore normality.

Since the termination of her employment she has not been successful in securing alternative employment. She has carried out some private tuition and details of her earnings from that work were provided to the Tribunal. She has commenced a masters degree in counselling and psychotherapy and is currently in receipt of job seekers benefit.

Under cross examination the claimant told the Tribunal she was not advised of the background of the student who caused the incident in her class in Sept 2009. There had been a staff meeting about the student but she was not in attendance. Regarding the incident of students on the school trip she said that she was escorted to the principal's office, she was told it would be investigated and later that day was told the issue had been "put to bed". She felt that the relationship deteriorated and there was little or no interaction after this. Asked about the hours allocated the claimant said that the principal told her at a meeting that unfortunately there would be no hours for her in September but then said that at a follow up meeting with her union representative she asked why her hours were being cut. Asked about this discrepancy in her evidence the claimant told the Tribunal that the principal telephoned her in August and offered her 10 hours, she felt in gave in. The claimant was unaware that her union representative also worked in the portacabin and conceded it was fit for purpose but said she was only timetabled for that classroom and it was outside the main building which made her feel isolated.

Respondent's case:

The former school principal gave evidence that he was charged with teacher and staff needs.
He would identify areas that needed further staffing and in the summer of 2006 was made aware that the claimant would be available for casual substitution. She was not "teaching" per se but assigned work would be left by teachers that she would supervise and make sure it was

done. At no time did the claimant teach any subject that was outside her area of expertise. He said that the claimant was very competent and their relationship friendly. The first port of call for the claimant would be to cover any additional hours. In the 2009/2010 the claimant was on a 10 hour contract for resource teaching, the balance of the 22 hours was made up by substitution/ teaching English as a foreign language. The claimant never had an entitlement to 22 hours.

The respondent had 17 feeder schools and it was a mammoth task to try and establish requirements for the coming academic year. It could not be established how many children may have learning needs and how much funding would be available so at a meeting in May hours could not be confirmed for the claimant. The claimant was never advised that there were no hours for her and while the principal understood that she was unhappy he told her he would do his best for her. The following August he was able to offer just short of 11 hours but this would be augmented by other hours e.g. covering sick leave, annual leave etc. It was the same arrangement as other years.

The principal told the Tribunal that the portacabins were modular buildings 20/30 meters from the back door, that were used by resource teaches, it was much more suitable to have an allocated position rather than have an unestablished status. He was not aware that the claimant was unhappy there. The principal stated that he was baffled then and now by the claimants resignation.

Regarding the school trip he said that "it was put to bed" were not words that he would ever use. The incident was fully investigated and it was the following week before the findings were made know, certainly not the same day.

The then vice principal, VG, gave evidence of her role when the claimant was employed. Part of her role was to do a supervision rota. The school allocated resource hours based on needs. Hours were also allocated in teachers were sick, on days away with students etc. In 2006 the claimant contacted her to say she was available for casual substation work. As a casual/sub teacher there is no entitlement to full time hours.

VG was involved with the incident with the student where the claimant was pushed by him. She advised the claimant to go to the doctor and was told by the claimant that she had soft tissue damage. The matter was investigated and the claimant received an apology. VG did not recall any incident about signing or not signing off on a piece of work for any student. Her office was used by students all of the time who wanted access to a computer to finish a piece of work.

Under cross examination VG told the Tribunal that there was always contact between both of them but while the claimant was on sick leave VG did not think it appropriate to contact her during that period. She did not know the claimants name was removed from the staff book and didn't know anything about stress until she seen the medical certificates. She was not aware of any cooling off of the relationship between them.

Both teachers from the school trip gave evidence of being spoken on the Monday following the trip and the issue was resolved.

The H.R. manager EM gave evidence that after 12 weeks of sick leave the claimant was automatically referred for assessment. At the end of January 2011 he made contact, advising her of exhausting her entitlement to paid sick leave. She advised him that she only wanted contact by e-mail or letter. On 8th February a medical certificate was received which referred to stress.

This automatically is referred to the internal medical examiner. It was considered that she was not fit to return to work and was to be reviewed in a further 8 weeks. The claimant wrote to the respondent requesting her terms and conditions of work, the hours being assigned and an explanation for the reduction. This letter was dated 20th January 2011 but only received by the respondent on 16th February 2011. EM advised by follow up letter on 22nd February that as she was not currently medically fit to work, they would engage when she was well enough to do so.

He received her letter of resignation dated 11th March 2011 and immediately contacted the medical examiner who advised not to engage directly with the claimant until she was deemed fit. EM wrote to the claimant on 16th March and suggested that the letter of resignation be set aside until the claimant was medically fit to engage. He arranged a review for her in April/May but she declined to attend.

Determination:

The Tribunal has carefully considered the evidence adduced over this three day hearing. There has been no suggestion that the claimant could be considered in any way other than as an able and capable teacher.

The burden of proof rests with the claimant to demonstrate that her decision to resign her position with the respondent was reasonable in all the circumstances. In particular, the claimant must show that the respondent acted in such a way that no ordinary person could or would continue in the workplace. It is the view of the Tribunal that the respondents conduct in this case was not so unfair or so damaging to the claimants rights and entitlements that she had no option but to resign her position.

The claimant, in this case, did not avail of grievance procedures despite having signed for receipt of same during her employment. The claimant was treated by the respondent in accordance with standard procedures for dealing with allegations of stress related illness. The Tribunal are not satisfied that there was sufficient evidence of the workplace was unsafe or unhealthy.

Despite the exhaustive treatment of the issue the Tribunal find no grounds adduced that could substantiate a claim for Unfair Dismissal

The claim under the Unfair Dismissals Acts 1977 to 2007 must fail.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 is dismissed as this was a constructive dismissal claim.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	**CASE NO.**
Marcus Reid, 24 Hanover Quarter, Hanover Quay, Dublin 2 - ***Claimant***	UD1350/2014

Against

Oracle EMEA Limited,
Eastpoint Business Park, Fairview, Dublin 3
- ***Respondent***

under

UNFAIR DISMISSALS ACTS 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr D. Peakin
Mr J. Flannery

heard this claim at Dublin on 10th November 2015
and 1st March 2016
and 2nd March 2016

Representation:

Claimant: Mr Padraic Lyons B.L instructed by Ms. Maura Connolly,
Eugene F. Collins, Solicitors, 3 Burlington Road, Dublin 4

Respondent: Ms Rosemary Mallon B.L instructed by Mr. Michael Doyle,
Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

Claimant's Case:

The claimant's case is one of constructive dismissal. The respondent is an information technology company which supplies hardware and software to a variety of businesses. The claimant commenced employment with the respondent in April 2004 in Oracle Direct. His initial role in Oracle Direct was primarily telephone based and offered various supports for the Field Sales division, a separate department where employees had face to face interaction with customers. Field Sales roles were more advanced and probably more advantageous than Oracle Direct roles in that they were customer oriented as opposed to a support role and generally sold higher value products than Oracle Direct.

From 2006 onwards the claimant took on what was known as a "Prime role". The claimant considered this a face to face sales role but he still sat within the Oracle Direct structure. The claimant believed himself to be in a unique position in that his role was a combination of a Field Sales role and an Oracle Direct role. In 2010 the claimant was promoted to an "IC4" level and retained his "Prime" title. He continued in this role up until April 2014 when he was informed that his Prime role was to be eliminated. The claimant's main customers were Independent Software Vendors (ISVs) and he had achieved a high level of sales in this role.

One of the reasons was because he had no limits on the type of products he could sell to customers. He could sell the full range of Oracle products to customers which increased the value of certain deals as opposed to individual components which other roles were restricted to. The claimant explained that a 'sales cycle' took anything up to 18 months and during that time, in his Prime role, he was able to essentially develop relationships, have the customer understand the need for full service business solutions and ultimately sell more product. Needless to say this was reflected in the claimant's commission and bonus structure. The claimant's base salary was €56,500, the ATV was €69,000 (100% sales) and he had no car allowance. A rate of 7.5% commission was applied where he achieved 100-125% of his sales target and a rate of 10% applied for where he achieved 125% and above of his sales target. This latter target was where the claimant wanted to be and he considered that he had a track record of delivering these types of results.

In August 2012 the claimant drew up what he called his 'three year plan'. He states that he showed it to and discussed it with senior management JP, LD and GSG. The plan was, *inter alia*, to target certain customers and increase his sales (and commission) incrementally over this period which would be of benefit to him and obviously increase Oracle's sales at the same time. The claimant stated that he had made future decisions based on this plan and it was his opinion that the respondent knew of and approved this plan for him.

The claimant gave evidence that during the course of his employment he received various awards for his sales achievements. One particular thing he was proud of was that he was selected to attend what was known as the "Top Notch Talent Sales Programme" in the UK in April 2013. This course was pitched at employees at IC4 level and above (i.e. IC5) and was designed for the top sales people to create a network among themselves. The claimant was very happy with this as his ultimate goal was to move to a "key account role", one of the highest sales levels in the organisation. The claimant felt that at this stage he was on track for an IC5 role and was gearing towards that (although the respondent maintains that there was no such thing as an IC5 role in Oracle Direct, only in Field Sales).

On the 29 April 2014 the claimant was informed by the Regional Director (JP) that there was no longer a requirement for his Prime role and that two new roles would be created to cover the claimant's customers and sales district (this combination was referred to as a "territory"). This came as a surprise to the claimant and he was of the opinion that as of 1 June 2014 his prime role would no longer exist.

On the 7 May 2014 the two new roles were advertised internally and externally. The claimant was required to interview for the roles although both were at the IC3 level. On the 30 May 2014, having completed the interview process, he met with JP and was offered an IC3 level Field Sales role. The claimant had a number of difficulties with this. Firstly it was at an IC3 level which he considered a demotion from his IC4 role. While the base salary was higher he was limited in the range of products he could sell (previously he could sell all products) and the sales targets were higher. This would invariably reduce his commission payments which the claimant was not happy about. The claimant stated that he had developed his three year plan, which he shared with senior management, and had certain expectations for the future which he was now being denied. Following some discussions the claimant was offered two further roles both of which he rejected. One of these roles was what was called an overlay role at IC4 level in the Oracle Direct structure. The claimant feels that taking this role would put him back ten years in his career. It would have been a telephone based role which he feels would have looked absurd to his customers. Furthermore, he would have been limited in the types of products he could sell thereby affecting his commission. The other role was an IC4 prime role in a UK territory which again, the claimant felt was a demotion. He would have to take charge of dormant accounts, develop a whole new customer base and would have to spend a large amount of time in the UK which was not feasible for him.

On the 18 June 2014 the claimant filed a grievance with the company which was opened to the Tribunal. The claimant at this stage considered that his Prime role was redundant and wanted appropriate compensation in this regard. In the alternative he wanted an IC4 role in the Field Sales organisation with a base salary of €91,000, an ATV of €91,000, a car allowance and the ability to earn in excess of €182,000 by way of commission.

The claimant attended a grievance meeting on the 9 July 2014 and the minutes of that meeting were opened to the Tribunal. A letter dated the 17 July 2014 rejecting the claimant's grievance was also opened to the Tribunal. One of the issues raised by the respondent was that JP did not feel the claimant had adequate experience in Field Sales to warrant an IC4 grade. The grievance was not upheld and claimant appealed that decision. The appeal was conducted by POR and the decision of LD was upheld.

On the 26 August 2014 the claimant tendered his resignation. In that letter he noted that his Prime role was eliminated and that any of the offers subsequently made to him were detrimental to his salary and his status within the organisation. He states that his three year plan was agreed with management at the time and he relied upon those discussions in implementing same but now found himself unable to capitalise, both financially and in career terms, on the investments he made in his role. He does not accept that the respondent is entitled to rely on contractual terms that allow it to change territories to his detriment without applying those charges in a fair and reasonable manner (and he believes the respondent has not been either fair or reasonable). In the circumstances he states that he has no choice, because of the respondent's unilateral actions, but to resign his employment. . The claimant gave evidence and of his efforts to mitigate his losses and provided extensive copies of job applications made and correspondence sent and received by him.

In cross-examination the claimant agreed the respondent worked on a year by year target (1 June to 31 May) and at the end of each year he agreed the respondent could contractually change his and other employees targets, sales products or territories. He also agreed that no-one in Oracle had asked him to devise his three year plan.

When put to him that his Prime role was not a face to face Field Sales role but rather it was a 'happy accident' because of his location and clients that he was able to have face to face meetings, he disagreed. He believes he used his initiative to get the best out of his role which ultimately amounted to a Field Sales type role, if not in name then by his actions. He agreed he was not in receipt of a travel allowance but stated he had raised the issue on a number of occasions with management. The claimant told the Tribunal that he contributed to the Field Sales figures but agreed he was paid and managed by Oracle Direct.

The claimant disagreed that the IC4 grade in Oracle Direct was not equivalent to IC4 grade in Field Sales. When asked where he arrived at the salary and bonus he proposed as an alternative to the positions offered to him he explained he compiled it having compared the salary of a colleague who had previously moved from Oracle Direct to Field Sales at an IC4 grade. This colleague had a received a 44.4% increase in salary and commission.

The claimant told the Tribunal that JP had informed him his Prime role was to be eliminated and the offers of alternative employment made to him by the respondent were unreasonable due to, *inter alia,* grade level, availability of product range he could sell, increased targets and travel that would be required to the UK. Furthermore, he wanted the opportunity to achieve his three year plan and net the commission he had envisaged. In all of the circumstances the claimant felt that he had no alternative but to resign.

Respondent's Case:

The Vice President (LD) for Tech Sales for Ireland and the UK in Oracle Direct gave evidence. LD explained the line of reporting, i.e. the claimant reported to his Line Manager who reported to a Director who in turn reported to her. LD told the Tribunal that the claimant was employed at an IC4 grade in a Prime role based in Dublin. The claimant, as a Prime representative operated on his own and did not work alongside the Field Sales team. In the organisation a Prime role is seen as a developmental role with mostly phone based contact with clients and some face to face interaction. She accepted that the claimant had a significant amount of face to face contact with clients but she believes that was because he was a Dublin based representative and the clients were easy to visit without him requiring approval to travel or a travel

allowance. She distinguished the type of deals the claimant would normally do, being less complex deals with smaller clients to that of Field Sales representatives who were involved in more complex deals with larger clients. In addition Field Sales representatives had assistance from overlay representatives in order to manage the volume of work.

LD told the Tribunal that the claimant wanted to move forward in his career and become a Prime IC5 but there was no such grade in Oracle Direct. However, there was such a grade in Field Sales and a move to this section in general would be considered a career progression for the claimant. LD further explained that an IC4 grade in the Prime role was not equivalent to an IC4 grade in a Field Sales role.

On the 9 July 2014 LD held a grievance meeting with the claimant to deal with the issues he had raised. The claimant's main issues were that the respondent was changing his territory and as a result he would not be able to complete his three year plan. LD told the claimant that the respondent worked to a year to year basis therefore the notion of a three year plan did not exist in the company. Furthermore, no one in management had asked him to devise or work to this three year plan. The claimant informed her he did not want either of the two alternative positions offered to him. He viewed the overlay role as a demotion which would not be good for his status in the organisation. In relation to the Field Sales role he wanted to move as an IC4 grade and not the IC3 offered. The claimant also turned down a third offer of employment, an Oracle Direct Prime Role at IC4 level as he stated he did not want to travel to the UK (for the reasons outlined in his direct evidence). This offer was made to the claimant as he did not want the two previous roles offered and the company wanted to accommodate him as best they could. LD told the Tribunal that she found this unreasonable as the most a representative would have to travel to the UK in one year would be eight times with maybe one overnight stay. LD explained that the appointee that took up this role only travelled to the UK on three occasions. The claimant submitted his letter of resignation on the 26 August 2014. LD wrote to him on the 28 August 2014 and asked him to reconsider his position as he was a good employee but he refused.

In cross examination LD was queried as to whether "in reality" the claimant was part of the Field Sales team in that he appeared on an organisation chart under this title, he was meeting clients face to face, he was providing complex end to end solutions to clients and he had high volume sales. LD stated that the claimant did not have the experience of working in the Field Sales with larger organisations and it was only due to his location and the location of his clients that he was able to meet them face to face. She did not agree that the claimant was selling both complex solutions to complex customers in his current role in the same way a representative in Field Sales would. Furthermore, the IC4 grade in Field Sales also had targets nearly twice as those in a Prime role. LD explained that the natural progression for the claimant's career would have been to move into Field Sales and gain more experience which could, and probably would, have led to promotion. She disagreed that a move to an IC3 Field Sales role was career regression for the claimant.

JP gave evidence. He explained that at the material time he managed the Field Sales team for Ireland and the UK. He gave a detailed explanation of the differences between a Prime role and a Field Sales role. He also explained that an IC4 grade in Prime (Oracle Direct) was not equivalent to an IC4 grade in a Field Sales role. Colleagues of the claimant who had made this transition from an Oracle Direct role to a Field Sales role had done so at an IC3 level and were subsequently promoted within Field Sales. In relation to the awards the claimant had received during his employment, he explained that these awards were bought in a "job lot" and presented quarterly by his team to the staff generally who contributed to the respondent's revenue.

An email dated the 2 September 2013 including an organisation chart was opened to the Tribunal. JP explained that this email was sent to all staff, including the claimant, who supported his team. He did not agree that this organisational chart depicted the team structure but rather it showed the territories for those mentioned in the chart. The claimant was listed under the heading of Oracle Direct as a Prime representative and anyone in the organisation would understand that this was an Oracle Direct role and not a Field Sales role..

JP explained to the Tribunal that on a yearly basis the respondent designated budgets to each division. Decisions were then made how these budgets would be dispersed. Territories and budgets were liable to change in order to secure revenue for the company. JP said it was normal practice to move staff and territories but it was not a decision the respondent made on a whim. In April 2014 a decision was made to move the Prime territory into Field Sales on the basis that the relevant customers had moved from the developmental stage to being potentially more profitable. It was accepted that the particular customers in that territory were developed by the claimant in his Prime role.

JP gave evidence as to the various roles offered to the claimant. He explained that the offer of the position of IC3 grade in Field was made to the claimant after he had "benchmarked" his performance in interview and due to his own knowledge of him as an employee. There were no particular criteria he adhered to when coming to this conclusion. JP stated that he only had two IC4 grades on his team; one had ten years IC3 experience in Field Sales in Oracle and was promoted in 2013, the other had twenty five years total Field Sales, nine of which were in Oracle. The claimant just did not have the level of experience with complex customers and complex solutions that he believed necessary for IC4 grade at that point in time. While JP believed that the claimant was very good in his Prime role he effectively operated as a sole trader. He was not as good in a team environment and this was the feedback JP had received over a number of years. The claimant was very good at organisation and planning but it appeared to be a challenge for him to work outside of the plans he developed for himself. .

On cross examination JP said that no-one in his team received the salary and commission the claimant had proposed as an alternative to the positions he had been offered. JP agreed that the claimant had secured good deals for the respondent and there was no question that some were high value but they were uncomplicated deals with smaller companies than those made in the Field. JP told the Tribunal that the claimant's performance was not an issue and that he had wanted him to join his team. He felt the claimant's career projection was only upwards. When put to him that, in substance, the claimant was performing a Field Sales role JP disagreed and proceeded to repeat what he believed to be the differences between an Oracle Direct role and a Field Sales role. When asked about the interview process and his "benchmarking" he accepted that there was no particular format he followed. He made a judgement call as a senior manager in the organisation and with that in mind he made two job offers to the claimant as he wanted him on his team. In terms of moving territories JP acknowledged that the customers in the Prime territory were developed by the claimant and were at a stage where sales could be forecast (the jargon used to refer to this scenario was a "pipeline"). It was put to him that the claimant developed his "pipeline" over time which superseded expectations and by moving territories JP effectively dismantled the claimants "pipeline" and halted his career progression. The alternatives offered to the claimant involved him starting a new "pipeline" thereby restricting his earning potential and career progression. JP stated that a "pipeline" was not guaranteed to any employee. When a territory is changed another sales person may get the benefit of the claimants "pipeline" but this happens in the organisation all the time.

The Vice President of Business Intelligence & Analytics: "Country Leader" (Ireland) - PO'R gave evidence of the appeal hearing he held in relation to the claimant's grievances raised in the letter dated the 21 July 2014. The claimant had three issues – job title, his three year plan and IC level. (This letter and the notes of the appeal hearing were also opened to the Tribunal.)

At this meeting the claimant wanted to focus on his three year plan. PO'R told the Tribunal the claimant's three year plan was an admirable thing to do but it was not something that fit into the respondents way of doing business given it worked on year to year budgets. In the circumstances it was not something the claimant could rely upon. On the 12 August 2014 PO'R wrote to the claimant detailing his conclusions of the appeal of the grievance which said appeal was not upheld. PO'R said he was surprised and disappointed the claimant had resigned as the team had hoped the claimant would have taken up one of the offers and progressed in his career with the respondent.

In cross examination PO'R stated he felt the respondent had acted fairly and reasonably in dealing with the claimant and his issues and tried to accommodate him with an alternative position as they had not wanted to lose him.

Determination:

The Tribunal carefully considered the evidence given in this claim. Constructive dismissal is defined in Section 1 of the Unfair Dismissals Act 1977 as:

""*dismissal*", in relation to an employee, means—

(*b*) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer".

The burden of proof rests on the claimant to show that he had no choice but to leave his position with the respondent. He must show the Tribunal that his resignation was not voluntary and that the conduct of his employer was so unreasonable that he had no choice but to resign. In this case it was also argued that the respondent was in breach of contract by not exercising discretion in the implementation of the claimant's terms and conditions when changing territory and incorporating the claimant's Prime role into the Field Sales area. It is incumbent on any employee to utilise and exhaust all internal remedies made available to him or her unless he can show that the said remedies are unfair. Unfortunately, the Tribunal feels that the claimant did not discharge the burden of proof in this case.

The claimant was in a somewhat unique position in that he fell between two stools in the organisation. He had a Prime Oracle Direct role that strayed into the Field Sales area. He was good at his job and developed the role in this way when the economy was at a low point. Initially the claimant appeared to be in a somewhat autonomous position in that from about 2008 onwards he was left to his own devices and performed exceptionally well in his sales role which resulted in high commission earnings. Maybe it was for this reason the respondent reviewed his position but one way or another in early 2014 the claimant's commission structure was going to change. At this juncture the respondent chose to change the claimant's territory in order to capitalise on potential revenue and incorporate the relevant customers wholly into the Field Sales domain. The Tribunal accept the evidence of JP that the changes in territory happen regularly and are done to meet the needs of the business. The Tribunal believe that this change was done in accordance with the terms of the claimant's contract and was carried out in a fair and reasonable manner.

In August 2012 the claimant had, of his own volition, developed a three year plan to create increased sales (and increased commission) that would benefit both him and his employer and the evidence of the claimant suggests that the change in territory stymied this plan. The new roles proposed to him would not offer him the opportunity to implement this notional plan therefore for this and the reasons outlined in his evidence, he refused all offers put to him. He decided that his Prime role was made redundant however the Tribunal do not accept this. We accept that there was change in territory rather than a redundancy situation. Even if there was a redundancy situation we believe that suitable alternative employment was offered to the claimant. When no redundancy payment was forthcoming the claimant proposed a salary package that seems far in excess of what he was previously on. It is not simply that he wanted an IC4 role, he wanted it on the terms he proposed and not otherwise. When this was not forthcoming he resigned. The Tribunal does not believe that this amounts to a constrictive dismissal. In all of the circumstances the claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
Employee	UD1469/2003 MN2879/2003

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. K. O'Connor

heard these claims at Tralee on 4 March, 16&17June, 13-15 September 2005 and 17-19 January 2006

Representation:

Claimant: Mr. Donal Tobin, SIPTU, Park Road,
Killarney, Co. Kerry

Respondent: Mr. Henry Downing B.L. instructed by Mr. Seamus Given,
Arthur Cox, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

The respondent employed the claimant from 1997 as a night porter; the employment was uneventful until the incidents, involving three different people, in 2003 that led to his suspension and ultimate dismissal. The first incident occurred late at night or in the early hours of the morning on 20 May 2003 and involved a guest (GP) who was also a performer in the respondent's hotel. GP became frustrated at the difficulty he had in obtaining service in the resident's bar. The respondent's position was that when GP was served he felt that he was subjected to excessive scrutiny as to his being a guest in the hotel. Later on that morning when another individual in his group commenced a singsong with a guitar in the lobby, the claimant aggressively ordered them to stop, as residents were asleep overhead, and picked on GP accusing him of being a "troublemaker", an "upstart" and having "hassled his colleagues in the bar". GP felt aggrieved because he was not the person who was playing the music. Whilst there was a heated exchange and he left to stay in another hotel that night GP decided

against making a complaint to the general manager (GM) of the respondent. However, the claimant and his colleague in the bar (NPS) made a written complaint to GM about the conduct of GP. At a subsequent event in the hotel in early September 2003 when GP met and spoke to the claimant in a friendly manner, he was subjected to an unprovoked barrage of abuse and foul language from the claimant. As a result GP reported both this and the May incident to GM and at GM's request he submitted a written complaint on 1 October 2003.

The claimant's position in regard to the May 2003 incident was that it was a busy night in the bar where NPS was on duty. GP was annoyed at the length of time it took to get served. GP's room had been block-booked in a company name and NPS was trying to confirm that he was a resident. GP became abusive in the bar and later that night he went to the writing room in the lobby with a group of his friends, one of whom proceeded to play a guitar. The claimant asked the group in a polite manner to stop as guests were sleeping overhead. GP remonstrated with him and the group left the hotel. The claimant had received directions from management regarding the noise level at night and no music was allowed in the lobby. NPS and the claimant made a written complaint to GM about GP's behaviour. Whilst the Industrial Relations manager (IR) told NPS and the claimant that an apology would be forthcoming from the company GP had been working for on the night in question; however, no such apology materialised.

The claimant's position in regard to the September 2003 incident was that he went to the conference centre where a performance involving GP was finishing. When GP saw the claimant he made a derogatory comment. The claimant replied that, "I'm not going through what I went through last time" and walked away. The confrontation lasted about one or two minutes. The claimant did not lodge a complaint to anyone and denied that he was abusive on the night.

The second incident concerned a letter of complaint the respondent received from a doctor (DR) about the attitude of two night porters on the morning of 2 October 2003, one of whom was the claimant. She complained about her secretary receiving a belligerent call from the claimant demanding an explanation why a guest at the hotel was not receiving a house call and why the patient had to attend the clinic. She explained that the decision was a clinical one, confidential to the patient, who had been perfectly pleasant and did not complain.

The claimant's position to this event was that on the morning of 2 October 2003, he telephoned DR because an elderly guest was ill and the doctor would not come to the hotel. He spoke to the DR's secretary and told her that it was ridiculous that DR would not make a house call. The guest's wife was annoyed at the service and the elderly guest was still in the lobby when the claimant finished duty over an hour later. His colleague on duty that night (NPM) wrote a report of the incident in the night porter's logbook. Nobody from management approached the couple or the claimant after that night. His main concern was to get the guest to the surgery. He denied being belligerent in his call to DR's secretary. He telephoned DR to enquire why the doctor was not coming. There was no reason at all for DR to send a letter of complaint. The claimant had no recollection of why his entry for that morning in the night porter's logbook was whited out. He assumed it was because NPM had already made an entry.

The third incident occurred on the night of 16 July 2003, before the DR incident, but did not become known to senior management of the respondent until a conversation between the claimant, Garda T and NPS in the hotel lobby at around 2.30am on 1 October 2003. The respondent's position is that the claimant told NPS and Garda T about how he had asked a guest with a Mercedes (MG), who had parked at the steps of the hotel, to move his car. MG threw the keys to the claimant and told him to move it himself. When the claimant relayed this incident to his colleague (NPM) who was on duty in the residents' bar, NPM said, "I'll take care of him"/"I'll fix him". The claimant told them that NPM trebled MG's drinks on three occasions. The claimant then phoned the gardai and MG was subsequently arrested for drink driving. NPO had not mentioned drugs in the conversation in the lobby.

NPS reported this conversation to management and ultimately it was brought to the attention of GM who decided to investigate it. GM established from the CCTV that a conversation between the three individuals did take place in the lobby on the morning in question. On 3 October 2003, GM and the Divisional Accountant (DA) met with the station sergeant and relayed the information to him. He identified Garda T from the CCTV as the garda who was present on the occasion in question. The sergeant got a frank and detailed account of the conversation from Garda T and subsequently got his account in writing. From garda records the sergeant established that Garda M was the arresting officer and established the particulars of the arrest from him. On the Garda Superintendent's instructions, a full garda investigation file was prepared and it, along with a covering report, were submitted to the Director of Public Prosecutions (DPP). A decision was made not to prosecute MG. The only entry in the Night Porter's Book for 16/17 July is a short reference to security and a statement saying, "Nothing else to report". There was no reference in it to any incident. Nor was there a vague reference to it, as is the practice, in the Duty Pass-Over Book.

Garda T confirmed the contents of the conversation in the lobby in his evidence to the Tribunal. Garda F (the station orderly on duty on the night of 16 July 2003) received the first phone call from the claimant regarding MG who was drinking and intending to drive. She radioed the patrol car with this information. She emphasised to the Tribunal that there was no mention of drugs in that phone call, as if there had been, she would have involved plain-clothes officers and she would not have used the radio.

Garda M confirmed receiving the call from Garda F at around 2.30am that MG was drunk and was about to drive from the hotel. As it was race night and busy, the patrol car was unable to respond immediately. When Garda M was at the station at 4.00am, he received a phone call from the claimant again informing him that MG was drunk and about to leave and this time the claimant furnished the registration number of MG's car. In this call, the claimant also informed him that MG was passing "e-tabs" in the bar. Garda M subsequently arrested MG outside the hotel for drink driving. MG was courteous and co-operative. In the course of a routine search of MG in the garda station, Garda M found no controlled substances in his possession.

The sergeant reverted to GM and informed him that Garda T's account confirmed the details of the conversation as reported to him by NPS. GM was very upset about the events and extremely worried about the potential implications for the hotel's license and reputation. NPS, who was reluctant to get involved in the respondent's investigation, confirmed the details of the conversation in the lobby to GM and DA.

He would not provide them with a written statement but would give evidence at a hearing. Unknown to management the rumour that NPO and the claimant had got a fellow from Limerick "bagged" had been circulating around the hotel since July. NPO himself had also told this to NPS in July.

Although concerned about how MG would respond to the alleged events that occurred in July, GM and DA met him on 6 November 2003. MG's recounting of the events of 16/17 July 2003 confirmed the details already known to them (with slight variation on the times and the manner in which he gave his keys to NPO). He further told them he had a few drinks in the bar and paid for them by cash. Knowing that he was unfit to drive MG asked the claimant for a room but NPO had told him that there were no rooms available either in the respondent's hotel or in the two other hotels he had telephoned at MG's request. A friend offered him a spare bed in his room but as he was walking towards it NPO insisted that he move his car from the front of the hotel. When he moved his car he was arrested. MG submitted a written statement to GM for the investigation. MG confirmed these facts to the Tribunal and according to his evidence he was served twice and another guest (AG) had also bought him a drink. For one of the rounds MG handed the claimant a €50.00 note and told him keep the change. The respondent's evidence to the Tribunal was that after normal closing hours cash is not accepted in the resident's bar and drinks are charged to guests' rooms. No cash was returned to the respondent for that night/morning and there were fourteen rooms vacant in the hotel that night.

The Conference and Banqueting Manager was in the bar between approximately 1.45am and 3.30/3.45am on 17 July 2003, roughly the same time that MG was there. She spoke to both the claimant and NPM at the desk on her way in. In the bar she sat at the counter with her friends and the duty manager joined them for some of the time. The claimant served her a round of drinks and charged them to the manager's account. She did not notice MG nor was he brought to her attention. GM asked her about the night but he did not ask her to write a report about it. AG, whose evidence played no part in the dismissal, was a guest in the hotel and in the bar at the relevant time. MG, who was a stranger to him and had been going from group to group in the bar, joined his table and they tolerated him. He insisted on buying them a round of drinks and AG, most likely also included him in a round. Whilst AG saw him order the drinks at the bar; he did not see how he paid for them. Some time later MG became a pest. He produced a Viagra tablet, which caused offence to the females in the group, and the group asked him to leave. AG informed NPM about the Viagra incident and NPM escorted MG from the bar. Whilst AG was the spokesman for the group, all at the table complained to the claimant when he came over to them. They did not mention e-tablets to the claimant. Nor did they say to him that MG "was passing drugs". No female left their table to complain.

The claimant's position was that MG parked his Mercedes at approximately 1.20am on 17 July 2003 at the front of the hotel in the bus bay. The claimant asked MG to move his car and MG replied that he was not a guest but he was just going in to pick up friends. MG said he would only be five minutes "and if you don't believe me, here are my keys". MG went into the bar and a few minutes later NPM, who was on duty in the resident's bar, phoned the claimant at the front desk berating him for allowing a non-resident into the bar where he had tried to get a drink but had been refused by NPM. The claimant told NPM that MG had said he would only be there for a short

time. About ten minutes later the claimant went into the bar and asked MG to leave. MG was in company so the claimant "left him be". Sometime later he got a call from NPM to say that he was sending out a woman who was complaining that MG was offering drugs/tablets to her husband in the bar. She was upset when telling the claimant and he telephoned the gardai who said they would attend as soon as possible. It was a busy night. The claimant had used his own mobile phone, as there were problems with the handsets and walkie-talkies provided by the hotel.

The claimant felt that it would be inappropriate to escort/remove MG from the hotel as it might be deemed assault; it was a job for the gardai. The claimant telephoned Garda M again around 3.00am and explained about MG offering drugs/tablets in the bar. Garda M said, "Leave it with us, we'll be up". He had mentioned the drugs in the first phone call as well. It was his reason for calling the gardai.

MG came out to the claimant and asked for a room. The claimant thought he was intoxicated and told him he had no rooms available. MG asked the claimant to phone other hotels but the claimant didn't do so, even though he gave MG the impression that he had. He told the Tribunal he did not want to "inflict" MG on anyone. MG asked the claimant for his car keys back. The claimant told him to take a seat on the couch where he could keep an eye on him and if he fell asleep there would be "no bother", but MG refused, asked for his keys again and threatened him so the claimant gave him his keys. MG walked towards the bar and the claimant saw the squad car outside at this stage.

The claimant went out to speak to the driver (Sergeant F) and told him that he had telephoned twice about MG who had tablets/drugs in the bar. Sergeant F said, "Leave it with us". MG passed him on the steps as he went back into the hotel. MG got into his car and drove off. He never spoke to the gardai after that. He denied assisting in getting MG arrested. About forty or fifty minutes after this, he met with NPM. He didn't think that they discussed MG's drinks but he might have told NPM about the garda call and MG being arrested. His big fear at all times was about the drugs. He had telephoned the gardai on previous occasions when problems had occurred.

The claimant was called to a meeting with GM and DA on 21 October 2003. At this meeting the claimant and his shop steward were informed about the complaints from DR and GP and were given copies of both letters of complaint. The claimant was suspended with full pay, in accordance with the agreed disciplinary procedure, pending further investigation of the complaints. Despite the fact that rumours of MG'sarrest for drink driving had been circulating around the hotel since July 2003 and while NPS had told management about the rumour of the claimant's and NPM's involvement in it, he was unwilling to put it in writing. Furthermore, Garda T's statement was in the garda file, which they were awaiting. GM therefore felt unable toraise the allegation of the drink driving arrest with the claimant at the meeting on 21October 2003.

The claimant and his union official (TU) attended a disciplinary meeting on 28 October 2003. He was provided with an opportunity to answer the complaints given to him at the previous meeting. A further complaint about the arrest of MG in July was raised at this meeting. The claimant was asked if he knew anything about this incident and if he had anything to do with it. The claimant admitted to telephoning the gardai

from his own mobile phone, as a colleague NPM had informed him that a lady in the bar had made a complaint about something being passed. GM informed him that a garda investigation was ongoing and that the gardai may want to speak to him at a future date about making a false report, wasting garda time and the perversion of the course of justice and that the matter may have serious implications for the hotel. The claimant's shop steward understood this to be by way of advice but felt that it had some effect on the claimant. A further meeting was arranged for a week later.

At a meeting on 5 November 2003 the specific allegations in Garda T's report were disclosed to the claimant. He denied making the comments. TU sought the name of the garda and the NPS to whom the allegations in relation to the drink-driving incident had been made. He was informed of the time and date when the conversation with the garda had taken place, and told if he wanted this name, he needed to contact the garda station directly. The sergeant had advised GM not to release the name of the garda until the file was returned from the DPP but had agreed to disclose this name to TU. The identity and statement of the Garda would be available once the file was back from DPP. Further discussions were then held regarding the other incidents. The transcript from DR was to be available at a later date. The claimant was told that GP was willing to attend a meeting with the claimant to confirm the details in his letter of complaint, which was given to the claimant on 21 October 2003.

Thereafter there followed a course of correspondence between the parties in which GM arranged a further meeting for 14 November 2003. In these GM offered to have DR, GP, MG, a representative of the Garda Síochána and NPS present at the meeting and forwarded a list of the hotel guests who charged drinks to their room on the morning of 17 July 2003, the one transcript available of the conversations with DR/her secretary (for technical reasons the others were not available), the specific details of the conversation in the lobby (as per Garda T's report), as well as MG's statement and he put the claimant on notice that he would be raising questions, arising from MG's statement: MG's paying cash for drinks and his being told that rooms were not available in the hotel on the night. All of those mentioned had agreed to attend the meeting. Although TU on behalf of the claimant had sought the names of some of these, in his letter, which crossed with one of GM's, he did not avail of the offer to have them at the meeting and accordingly GM, with notice to TU, stood the witnesses down. In his latter letter to the claimant GM commented:

> *"As I have spoken to each of the persons listed, conveyed to (the claimant) their comments and furnished all available documentation, I do not believe that it is necessary to call any of them now that (the claimant) has decided not to exercise his right".*

On 14 November 2003, in what turned out to be the final disciplinary meeting, the CCTV stills, names of the Garda T and NPS were furnished to the claimant and TU. TU denied the allegations on behalf of the claimant. GM noted that the claimant had declined to meet with any of the persons who made complaints against him. TU, on behalf of the claimant, denied the statement made to Garda T and denied that the claimant was guilty of the charges alleged against him. The claimant when asked if he had anything to say, replied, "No comment".

GM did not believe the claimant's denials and felt that he had acted inappropriately in

relation to DR, that he had used grossly offensive language to GP and that he had wrongfully colluded with another member of staff in procuring the arrest of a guest as described to Garda T and NPS on 1 October 2003. GM regarded the claimant's behaviour as a serious breach of trust and confidence and it sundered the relationship between employer and employee, in particular considering the senior position of trust the claimant held in the hotel. He felt that this amounted to gross misconduct and as a result the claimant was dismissed.

The claimant's response to the allegations put to him during the disciplinary process was that he did have a conversation on 1 October 2003 in the hotel lobby with NPS and Garda T. They were discussing sport and other general things and the subject of an arrest for drink driving came up in the conversation. He couldn't remember who initiated the subject, but all he said was that the customer "must have been drinking doubles or trebles in the bar because he was fairly drunk when he came out". It was an off-the-cuff remark and just a joke.

The claimant felt that he was suspended on 21 October 2003 without being afforded the opportunity to explain. He was not told under which disciplinary procedure the issue was being dealt with. During the meeting on 28 October 2003, GM had made a reference to Section 12 of the Criminal Justice Act, 1976, where allegations of making a "false report", "wasting police time" and "perverting the course of justice" were thrown at him. He felt shook, very afraid and said he was, "only a mere layman". After this meeting he took legal advice and was advised not to say anything that could implicate himself under this Act but to attend meetings and co-operate as far as he could. He was advised to say nothing that may implicate him in a criminal justice matter.

The claimant was under the impression that Garda T was the complainant and formed that opinion during the meetings, but he could not remember why. He denied the three allegations in relation to making a "false report", "wasting police time" and "perverting the course of justice". No Garda had ever called to his door. He felt he was entitled to know who made accusations against him under the Act. It was a very serious offence he was being accused of. He never made a false report.

Determination:

The Tribunal wishes to state that the claimant accepted, during the hearing before it, that the allegation that MG was involved in the passing of drugs whilst on the respondent's premises was wholly unfounded. The gardai confirmed this.

The fact that there were two parallel investigations arising from the same allegation, a criminal investigation by the gardai into the safety of a prosecution and an investigation by the respondent for the purposes of the disciplinary process, created some difficulties for the respondent.

The claimant and NPM were both dismissed for their alleged involvement in procuring the arrest of MG for drunken driving. On application to the Tribunal by their union representative (TU), both cases were heard separately.

In cases of gross misconduct the function of the Tribunal is not to determine the

innocence or guilt of the person accused of wrongdoing. The test for the Tribunal in such cases is whether the respondent had a genuine belief based on reasonable grounds arising from a fair investigation that the employee was guilty of the alleged wrongdoing.

The allegation that the claimant had colluded with NPM to procure the arrest of MG arose from a statement made by the claimant himself during the course of a conversation with NPS and Garda T in the respondent's hotel lobby on the morning of 1 October 2003. NPS's and Garda T's account of the conversation were almost verbatim. This was confirmed to the respondent by the station sergeant. In the course of the investigation the claimant denied having made such a statement and contended that he had phoned the gardai on the night as NPM said a lady had complained about tablets or drugs being passed by MG.

The Tribunal finds, by majority, that it was reasonable for the employer to believe the contents of the conversation as related by the claimant to Garda T and NPS in the lobby on the morning of 1 October 2003. This finding is supported by the following facts. Neither night porter recorded in the Night Porter's Log an event, so serious that it merited calling the Gardai on two occasions. Neither of them reported it to either the Duty Manager or to the Conference and Banqueting Manager although both were in the bar at the relevant time and instead they decided to telephone the gardai. The evidence shows that the claimant must have known that the Conference & Banqueting Manager was in the bar. Nor did they contact GM whose home and mobile phone numbers were available to them. NPO's refusal to give MG a room or to seek one for him, as requested by him, as well as the claimant's denial that he served MG drinks in the face of evidence to the contrary from MG also go to the reasonableness of the respondent's conclusion.

Furthermore, the testimony of both Garda F and Garda M, given before the Tribunal, is strong corroborative evidence for the version of the incident as relayed by NPO in the lobby on 1 October 2003. It seems to the majority that the respondent was not aware of their evidence as to why the gardai had been called, at the time of the decision to dismiss. Similarly, the evidence of AG strongly corroborates that version as well as the fact that there was no problem about drugs in the bar on 1 October 2003. AG's evidence also corroborates MG's evidence that he bought drink in the bar on the morning of 17 July 2003.

At the meeting of 21 October 2003 the claimant was suspended on pay on the basis of the two complaints involving GP and DR. He was not informed of the MG complaint at that stage as NPS was unwilling to give a written statement and the respondent did not have the Garda statement. This was in the file, which was being submitted to DPP. While it would be best practice to have informed the claimant at this stage that he was being suspended for gross misconduct, this suspension was provided for in the agreed disciplinary procedure. The claimant was represented by his shop steward and according to the disciplinary procedure, suspension with pay only occurs in cases of gross misconduct.

The majority is satisfied that the respondent carried out a fair investigation into the allegations. Whilst the identity of both NPS and Garda T was only disclosed to the claimant at the final disciplinary meeting the full contents of the

conversation/allegation as related by the claimant on 1 October 2003 were disclosed and put to the claimant as early as 5 November 2003. Furthermore the date and time of that conversation were also revealed to him as well as affording his representative the opportunity to meet the sergeant. The claimant declined the respondent's offer to have the various witnesses attend at the meeting on 14 November 2003. The majority is satisfied that the claimant was afforded a fair opportunity to deal with the allegations. The majority does not accept that the mention by GM, at the meeting of 28 October 2003, of possible Garda questioning into making a false report, wasting Garda time and the perversion of the course of justice adversely affected the claimant's participation in the process or rendered the process unfair. This point was never raised throughout the disciplinary process and was first introduced at the Tribunal hearing.

In determining the reasonableness of the respondent's decision to dismiss the claimant the Tribunal has not taken into account the DR incident as DR did not give evidence to the Tribunal. The Tribunal was given conflicting versions of both encounters between the claimant and GP. Following the first encounter there was a complaint to GM from both the claimant and NPS, GP decided against making any complaint as he felt that there was fault on both sides. However, following the second encounter, which occurred in a public place immediately following his performance, GP was so outraged at the unprovoked barrage of obscenities that he sought out GM to make a complaint. Having considered these facts and the whole of the evidence of the incident the majority, on the balance of probability, prefers the evidence of GP in this regard.

For these reasons and having considered all the evidence the Tribunal, by majority, is satisfied that it was reasonable for the respondent to believe that the claimant's behaviour constituted gross misconduct, sundering the relationship of trust and confidence between the employer and the employee. In the circumstances the dismissal was fair and reasonable. It follows that the claim under Unfair DismissalsActs, 1977 to 2001 fails. This being a dismissal for gross misconduct the claim underthe Minimum Notice and Terms of Employment Acts, 1973 to 2001 also fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

Richard J Bunyan v United Dominions Trust (Ireland) Ltd: Employment Appeals Tribunal (Mr Donal Hamilton, Chairman, Mr George Keenan and Mr Arthur Rice) 1980 No. UD 66.

Unfair dismissal - Gradual deterioration of working relationship - Termination of employment - Whether compliance with requirements of natural justice - Relevance of fair procedures - Assessment of compensation - Contribution by claimant - Unfair Dismissals Act, 1977 (*No.* 10) *s.* 7.

Facts The claimant commenced employment as marketing manager with the respondent in 1973 and reported directly to the managing director. After re-organisation in 1976 other managers reported to the claimant. In September 1978 the managing director held an appraisal interview with the claimant and the claimant took issue with him for, inter alia, giving him a 'standard performance' rating and for instructing him to dismiss other managers. From this time on the working relationship between the claimant and the managing director and other managers deteriorated. In June 1979, the claimant received a warning notice which notice threatened dismissal on the grounds that the claimant was undermining the authority of the managing director. After some negotiation it was agreed between the claimant's union and the respondents to refer this 'warning' dispute to a Rights Commissioner. On 6 November 1979, the managing director was told of a conversation which the claimant had with a junior staff employee which conversation, if true, may have undermined the authority of the general manager. The managing director requested reports from other managers and called a board meeting for 10 November 1979, at which meeting the claimant was dismissed. The claimant was not notified of this meeting nor was he notified of the said conversation or reports. The claimant alleges that this dismissal was unfair.

Held The dismissal of the claimant being made on foot of new information conflicted with the requirements of natural justice which requirements require that the person should know the nature of the accusation against him, that he should be given an opportunity to state his case, and that the domestic tribunal (the board of directors) should act in good faith. On the evidence, if these requirements had been complied with the decision to dismiss the claimant may not have been taken. Accordingly, the denial of natural justice was fundamental and renders the dismissal unfair. Compensation is the appropriate remedy.

Cases referred to in judgment
Glover v BLN Ltd [1973] IR 388
NC Watling & Co Ltd v Richardson [1978] ICR 1049

The determination of the Tribunal (Mr Rice dissenting) was as follows: The claimant commenced employment as marketing manager with the respondent in 1973. He reported directly to Mr Bernon, general manager as did other

managers including Mr McGovern and Mr Callan. (In this determination Mr Bernon is referred to variously as the chief executive and as managing director.)

In 1976, following reorganisation of the reporting structure, the claimant continued to report to Mr Bernon. However, Mr McGovern, Mr Callan and Mr Mooney reported to the claimant. The claimant became the general manager, marketing, and in this area or division he was the executive responsible.

There were other areas or divisions in the respondent company, Mr Church being in charge of banking; Mr Hickey was the chief accountant.

The respondent's affairs prospered and in April, 1978, the claimant wrote to Mr Bernon indicating a view that he should be appointed to the board of the respondent. (This suggestion was made simultaneuosly by Messrs Church and Hickey and the claimant). The tribunal is satisfied that at this time the claimant's work and contribution to the respondent was valued and that the personal relationships between him and the other executives were normal in a business context, i.e. they had no difficulties in working as a unit.

This satisfactory working relationship did not continue and appeared to deteriorate as between the claimant and Mr Bernon from September, 1978 and later as between the claimant and Messrs McGovern and Callan. Evidence was heard from many witnesses over several days and circa 144 documents or groups of documents were exhibited in evidence. We do not, therefore, intend or attempt to set out in whole or summary, the cases presented on behalf of the respondent or of the claimant. It is necessary, however, to refer to some aspects of the evidence, or the tribunal's conclusions in the light of evidence, in order to understand the determination herein.

On 8 September 1978, the claimant had an appraisal interview with Mr Bernon, his superior — an annual requirement. The tribunal heard evidence from Mr Bernon and the claimant concerning this interview. The claimant wrote a detailed memorandum on this interview on 9 September 1978 and same was furnished to the tribunal.

During the meeting of 8 September 1978, the claimant according to the evidence and as appeared from his memorandum of 9 September 1978, took issue with and blamed Mr Bernon for:

(i) Giving or intending to give the claimant a 'standard performance' rating;
(ii) not supporting the claimant, Mr Church and Mr Hickey in their application to be made directors of the respondent;
(iii) wishing to dismiss Messrs McGovern, Callan and Mooney and instructing the claimant to 'sack' them;
(iv) treating field personnel as second class citizens.

From the evidence it is not clear to the tribunal that the claimant was instructed to dismiss the executives, though we feel that there was mention by Mr Bernon of moving some executives. As an alternative to board membership the aspirants were appointed to a newly created management board. From this time, September, 1978, the claimant felt he had to keep notes and be extra careful and this, no doubt, affected his behaviour so that due to an increase in the volume of memoranda emanating from him and his strict procedural approach

at meetings others considered him to be somewhat mechanistic and legalistic.

On 18 September 1978, the claimant wrote a memorandum to Mr Bernon with copies to Mr Sandys, chairman of the board of directors, and Mr Bacon, alleging the 'sacking' instructions and his (the claimant's) objections to same and advising that he had joined a trade union (ASTMS).

The 'sacking' allegation was leaked to the executives, Mr McGovern, Mr Callan and Mr Mooney and at a meeting attended by Mr Sandys, Mr Bernon and the claimant they were assured that there was no intention to dismiss them and no instructions had been given to anybody to dismiss them. The claimant did not contradict this assurance. We can conclude, from the evidence, that the claimant told Mr McGovern of the 'sacking instruction' and ought not to have done so before exhausting all reasonable efforts to have the instruction, if given, withdrawn, or any misunderstanding clarified. The claimant acted imprudently in undermining the confidence of his subordinates in Mr Bernon before all avenues of clarification were exhausted. The trust and confidence of subordinates is a valuable asset but an extremely vulnerable one. It would not be in conflict with principle or integrity to verify or otherwise confirm such an important and fundamental instruction before telling any concerned subordinate of it. It is concluded from the evidence that this 'incident' more than anything else upset the senior executives, Mr McGovern, Mr Callan and Mr Mooney and undermined their confidence and caused them confusion which the assurances of Mr Sandys and Mr Bernon, in the presence of the claimant, did not overcome. The situation caused them to be suspicious, firstly of Mr Bernon and then of the claimant. The isolation of the claimant within the workplace was thus increased.

On, or about, 1 June 1979, the management board was disbanded. The claimant received a written warning dated 8 June, 1979. The warning was issued because the claimant was allegedly (a) unduly legalistic and mechanistic (b) failing to fulfill Mr Bernon's instructions to hold regular meetings. The letter warned that:

> 'unless you discontinue this behaviour, which challenges and undermines the authority of your managing director, the company will have no option but to terminate your employment.'

The claimant's union decided to refer 'this matter' to a Rights Commissioner and a Rights Commissioner was requested to deal with the case.

Following representations by the claimant and his union the warning was withdrawn but following a discussion with the claimant that same day, it was restored and the union was notified. The original warning of 8/6/1979 was withdrawn because the respondent accepted the view of the claimant and his union that the claimant had not been given the opportunity of knowing the allegations and so of making a defence in respect of same.

The union referred the matter of the reinstated warning to a second Rights Commissioner and the respondent agreed to the dispute being heard by such Rights Commissioner.

The union later sought the original Rights Commissioner and the respondent

objected in principle on the grounds that the claimant could not be so selective in nominating a Rights Commissioner. This matter was in the control of Mr Hayes-McCoy, the respondent's personnel manager and following a board meeting he wrote to ASTMS on 26 October 1979, setting out the history of the reference of the dispute to the Rights Commissioners and we refer to his letter and quote portion of same as follows:

> (The company) hold the view that a Rights Commissioner's hearing is the most appropriate channel for resolving this dispute and would ask your Union to allow this case to be heard by another Rights Commissioner.
>
> The company believes this matter should be disposed of at a very early date and, therefore, does not consider it appropriate to have it referred to the Labour Court.
>
> The company proposes to hold a further interview with Mr Bunyan with a view to attempting to reconcile the differences between it and him, once and for all.
>
> If a solution is not achieved by this interview, the company will have no alternative but to determine that the problems raised by Mr Bunyan's persistent attitude must be resolved in another way in pursuance of the company's interests.

On November 5 ASTMS agreed to the third Rights Commissioner dealing with the dispute. It was agreed, therefore, that the 'warning' dispute be dealt with at a Rights Commissioner's hearing before an agreed commissioner.

There is no doubt but that the members of the board were aware, generally, since September 1978 of the differences which existed between the claimant and Mr Bernon and that the situation was a cause for serious and continuing concern. The board left it to Mr Sandys to reconcile the differences between the two senior executives and though he tried to do so, he failed, probably because he did not realise the depth of the breach between the claimant and the managing director. The claimant felt that he could not trust Mr Bernon and felt threatened by him. (He felt that Mr Bernon had wrongly denied the 'sacking' instruction and he was clearly dissatisfied with the 'assessment' interview).

The matter of the dispute which had been referred to the Rights Commissioners, was raised regularly at board meetings and the relevant extract from the minutes of the board meeting of 26/10/1979 is as follows:

> (b) STAFF MATTERS
>
> It was reported that Mr R. J. Bunyan had stipulated that he was only willing to go before a specific Rights Commissioner and that in the absence of this request being granted he would withdraw his application to go before the Rights Commissioners and opt to go before the Labour Court. It was agreed that Mr Bunyan's request to go before a specific Rights Commissioner was unacceptable and it was inappropriate to have the matter referred to the Labour Court because of the inevitable delay which would occur. It was agreed that the matter should now be brought to a head in the near furure, and that the union be written to proposing that a further interview with Mr Bunyan be held.

The letter of 26/10/1979, already referred to, from Mr Hayes-McCoy to ASTMS, clearly was written in the light of the view of the board of directors.

At this time, the claimant was elected a member of the union house committee and this gave rise to concern as in a negotiation situation, the respondent's

negotiator viz. the personnel manager, Mr Hayes-McCoy, would have a lesser status in the respondent company than the claimant. Mr Hayes-McCoy shared this problem with Mr Russell Thomas, personnel manager of UDT Ltd. and obtained his written advice which, in our view, was sensible and likely to remove that matter as a source af continuing friction.

At the end of October/early November, 1979, therefore:

> (i) the board had expressed its up to date view of the need to resolve the matter and suggested a course of action which the personnel manager was in the process of implementing;
> (ii) the selection of a Rights Commissioner to adjudicate on the 'warning' dispute was agreed and;
> (iii) Mr Russell Thomas had suggested a course likely to overcome expected problems of a practical nature arising out of the claimant's membership of the union house committee.

Maybe the hearing by the Rights Commissioner would have opened up the problem and allowed the claimant and Mr Bernon to think again on that conversation of 8 September 1978 and particularly the 'sacking' aspect — perhaps the claimant would have noted that from his own memorandum of 9 September 1978 it appears that it was he who raised the question of getting rid of the three executives and not Mr Bernon and maybe Mr Bernon would have conceded that he had spoken of 'moving' the executives. We will never know because on 10 November 1979 the board resolved to dismiss the claimant — that meeting was called at short notice. In considering this matter we ask ourselves:

> (i) Who dismissed the claimant?
> (ii) Why was it concluded that the claimant should be dismissed?
> (iii) What information/facts supported the conclusion that the claimant be dismissed?

(i) *Who dismissed the claimant?*

The board at a meeting on 10/11/1979 passed a resolution terminating the claimant's employment. Mr Bernon abstained from the vote but otherwise there was unanimity amongst those present and voting. It is clear that Mr Bernon, who had at the meeting recommended the termination of the claimant's employment agreed with the decision and that he had abstained for reasons which could not reasonably be interpreted as disagreeing with the resolution. Mr Bernon was the only person present who, being entitled to vote, abstained. There was, therefore, unanimous support for the resolution.

The claimant had been appointed by the board to his original employment in 1973. The dismissal resolution is recorded in the minutes of the meeting of the board on 10/11/1979 as:

> The chairman and the managing director to meet with Mr R. J. Bunyan on Monday 12 November 1979 at 2.30 p.m. and advise him of the board's decision to terminate his employment on the expiration of the appropriate notice and that he be paid his salary during the notice period but that he will not be required to work out his notice.

The decision was communicated to the claimant on 12 November 1979.

(ii) *Why was it concluded that the claimant should be dismissed?*

In considering this question, we set out the minutes of the board meeting of 10/11/1979 in full.

MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF UNITED DOMINIONS TRUST (IRELAND) LTD HELD AT THE BURLINGTON HOTEL ON STAURDAY, 10 NOVEMBER 1979, AT 11.00 A.M.

PRESENT: Mr W. Sandys - In the chair, Mr D. J. Bernon - managing director, Mr G.P.S. Hogan - director, Mr R. A. French - director, Mr K. Flynn - director, Mr A. Haslam - alternate for Mr M. D. McGuane.

IN ATTENDANCE Mr R. J. Church - company secretary.

The meeting was convened at short notice and all directors present agreed to accept short notice.

Apologies were received from Mr G. F. Bacon and Mr P. V. Doyle, directors, who, despite their absence, agreed to the holding of the meeting at short notice.

STAFF

The meeting reviewed in detail the problems created by Mr R. J. Bunyan - his several interviews with the chairman, the issuing of a reprimand to him - the matters arising from his appraisal by Mr D. J. Bernon - his appeal to the Rights Commissioner and subsequent withdrawal of such appeal due apparently to his not being permitted to nominate the particular Commissioner to hear his case - and his continuing undermining of the authority of the chief executive.

Mr Bunyan had not availed of several opportunities afforded him of reconciliation and the board decided that it no longer had confidence in his suitability and disposition to serve UDT satisfactorily and that in the interest of the bank and its responsibility to its depositors and staff, Mr Bunyan's employment be terminated in accordance with the conditions contained in his letter of employment and the following resolution was passed:

It was resolved that:

'The chairman and the managing director to meet with Mr R. J. Bunyan on Monday 12 November 1979, at 2.30 p.m. and advise him of the board's decision to terminate his employment on the expiration of the appropriate notice and that he be paid his salary during the notice period but that he will not be required to work out his notice.'

PROPOSED BY: Mr R. A. French

SECONDED BY: Mr G. P. S. Hogan

The resolution was passed unanimously by all directors present with the exception of Mr D. J. Bernon who abstained from voting.

In order to minimise the effect on Mr Bunyan's career, the board agreed that he be given an opportunity to resign forthwith at the meeting referred to herein on terms which would be agreed in due course.

A number of witnesses stated in evidence why they each supported the resolution. It is not surprising that in a case such as this, they would differ somewhat but it is clear that they supported the resolution.

(a) with the general awareness of the problems stemming from the appraisal and also from the warning and

(b) because of information given at the meeting and

(c) the fact that the managing director, Mr Bernon, recommended to them that the claimant be dismissed.

The board was told that the claimant at a chance meeting in New Ross, had used an expression to a junior staff member (a union house committee member) which they felt could only be interpreted as a further attempt to undermine the authority of the chief executive.

Although Mr Hayes-McCoy was present at the meeting, according to his own evidence, (his attendance was not recorded in the minutes), the preliminary discussion does not note that the problem regarding the choice of Rights Commissioner had been resolved — We conclude from the absence of evidence that this matter was not reviewed in depth, if at all. The evidence told of the board being aware that three executives, Messrs Church, Callan and McGovern had submitted written complaints regarding the claimants' treatment/behaviour towards them. Mr Blake, on behalf of the claimant expressed surprise and emphasised that the existence of these memoranda was not recorded in the minutes.

We are of the view that the minutes reflect the relative unimportance of all matters at that time, save the report of the claimant's continuing undermining of Mr Bernon's authority, which report, in our view, was the reason why the meeting was called at short notice. It is why the executives, Messrs Church, Callan and McGovern were asked to prepare their reports/complaints. It is the reason why Mr Bernon, by recommending the claimant's dismissal, made it clear in practical terms that he was asking the board to decide between the claimant and himself.

We conclude, from the evidence, that the claimant was dismissed primarily because in the light of the history of the dispute known to the board and the boards knowing of the complaints of the three executives and their belief that at the discussion in New Ross (on 2 November 1979), the claimant had used words to a junior staff member of the respondent designed to 'continue' his undermining of the authority of the managing director and in view of this, together with the recommendation of the managing director, the longlasting dispute had assumed proportions which could not be tolerated and which, if unresolved, would seriously undermine the effective management of the respondent company.

(iii) What information/facts supported the conclusion that the claimant be dismissed which did not exist at the last meeting of the Board on 26 October 1979?

On 6 November, 1979, Mr Bernon was in his office having a meeting with Mr Church, when Mr McGovern and Mr Callan interrupted and Mr Callan told of a report he had had from Mr Bohill, a junior staff employee in the Waterford office, of a conversation, he, Mr Bohill, had with the claimant in New Ross (later established to have taken place on 2 November, 1979).

In this conversation, the claimant is reported to have said to Mr Bohill that he was not worried about the prospect of his appraisal dispute coming up for discussion at a forthcoming union committee meeting as he had 'enough in writing to hang D. J. (Mr. Bernon).'

We have no doubt but that Mr Bernon accepted the report as being a true account of the conversation and decided that it was a choice between the claimant and himself and proceeded to call the directors to a meeting on Saturday 10 November 1979 (it being the earliest date on which the Chairman, Mr Sandys would be available). He arranged for an informal meeting with some directors for Friday 9 November and asked for the reports from the executives, Messrs Church, McGovern and Callan, which he received, each dated 9/11/1979.

Mr Bernon also gave written notice to the claimant to attend a meeting at 2.30 p.m. on Monday 12 November 1979. It is clear from this message to the claimant that the managing director felt confident that the claimant would be dismissed in the light of the recent incident in New Ross coupled with the reports of the three executives. The text of the message to the claimant of 9 November, 1979 is as follows:

> In view of the serious dispute that exists between you and the company, I require you to be present at a meeting on Monday 12 November 1979 at 2.30 p.m. to bring this important matter to an immediate conclusion.
>
> You may, if you wish, be accompanied at this meeting by a representative of your union.

Neither the claimant nor his union was notified of the intended meeting of 10 November 1979, its purpose or the report of the 'Bohill' conversation or of the existence of the reports of Messrs Church, Callan and McGovern.

Having heard the evidence of Mr Bohill and of the claimant, concerning the conversation at New Ross on 2 November 1979, we are of the opinion that the reporting to the board of what Mr Callan told Mr Bernon, that Mr Bohill had told him (Mr Callan), that the claimant had said to him was correct but that the account by Mr Bohill of the offending portion of the conversion was not, or at least could not be relied upon to be accurate and so reasonably sustain the view that the claimant had by that conversation undermined the authority of the chief executive. If this allegation had been reasonably investigated and the claimant been given an opportunity to comment on it and challenge it, then it is possible that the board would not have considered it to be an event which would represent a 'last straw' interpretation or an event which would justify the abortion of the plan decided on at the board meeting of October 26 1979 and which was being implemented by the personnel manager, Mr Hayes-McCoy, but particularly would not justify a conclusion that the claimant, by this conversation had shown that he was 'undermining' the authority of the Chief Executive, Mr Bernon.

The 'Bohill' conversation assumed major importance and clearly became the basis of the conclusion that the claimant was continuing to undermine the authority of 'the chief executive'.

The reports/complaints of the senior executives, Messrs McGovern, Church and Callan were not apparently considered in any detail but were taken by the board to show that the claimant had ceased to have a normal working relationship with Mr Church and with the claimant's subordinates Messrs McGovern and Callan.

The tribunal, by majority, (Mr Rice dissenting), is of the opinion that had the board or its representatives had the benefit of hearing the claimant on those matters, i.e. the 'Bohill' conversation and the complaints of the three executives it might not have felt:

> (a) that the Bohill conversation as reported could be relied upon to sustain the conclusion reached viz. that it demonstrated that the claimant was deliberately undermining the authority of Mr Bernon, or,

(b) that the reports/complaints could lead to the view that senior staff members were in danger of being disaffected due to the unreasonable actions of the claimant. Analysis might have shown that in many respects the matters complained of, were the results of the claimant carrying out his duties.

The tribunal, by majority, hold the view that the dismissal of the claimant being made on foot of 'new information' conflicted with the requirements of natural justice, viz. that the person should know the nature of the accusation against him; that he should be given an opportinity to state his case; and that the domestic tribunal (the board of directors) should act in good faith.

The tribunal, by majority, having heard the evidence, which an enquiry might have heard, cannot say that had the aforementioned requirements of natural justice been complied with, the decision would have been the same, or would probably have been the same and so we are unable to say that the denial of natural justice made no difference. We are not aware, from the evidence, of any matter which dictated that the decision had to be made in such haste, that the board could not have, if it desired, deferred the decision until the allegations were investigated with notice of same to the claimant.

We have no doubt that individually the members of the board acted in good faith but we feel that collectively the board:

(1) ignored or failed to give full account to the heresay nature of Bohill's report of the claimant's remarks in New Ross;
(2) did not consider in any depth the contents of the reports/complaints of the three executives but accepted generally that they should be considered as disadvantageous to the claimant;
(3) the board was not protective of its duty and privilege to decide on action in the light of the 'new evidence,' and appears substantially to have delegated that decision to Mr Bernon by giving undue weight to the recommendation that the claimant be dismissed as against the value of the 'new evidence' grounding it. Mr Sarsfield Hogan, director, asked in a memo prior to the meeting of 10/11/1979: 'In other respects how has the situation changed since board meeting of 26 October?' He told the tribunal that in addition to the 'Bohill" conversation the situation had changed because 'Mr Bernon recommended dismissal.'
(4) The board failed to adopt the course which a reasonable employer in that situation, in that line of business would have adopted viz. to withhold a decision until the claimant had been told of the allegations and been afforded a reasonable opportunity to reply to same. Such a reasonable employer would in evaluating the recommendation of Mr Bernon, give due recognition to the fact that he was a substantive party to the dispute which had been referred to the Rights Commissioner.

Counsel for the respondent submitted, inter alia:

If there are substantial grounds for a dismissal then it is not an unfair dismissal. In the present case the applicant could have been in no doubt as to the action which the company was going to take and was in no doubt but that the company would dismiss him. It is submitted that the procedures taken by the company in leading to the dismissal were fair and reasonable. It is further submitted that in any event it is not the procedures leading to a dismissal which govern whether or not the dismissal is an unfair dismissal but the grounds upon which this dismissal is determined. The procedures leading to a dismissal are relevant only insofar as they may show that they were not, in fact, substantial grounds for the dismissal either because there was no

real belief in the facts or because there was a realisation on the part of the employer that the facts did not warrant dismissal. Neither of these circumstances exists in the present case.

The tribunal recognises that it may be argued that fair procedures are necessary or of value only to demonstrate that the employer acted fairly in investigating and gathering the information upon which he made his decision. It is clear that if belief in the culpability of the employee is necessary to justify the dismissal then it is equally necessary that such belief be reasonably held. Fair procedures therefore help to lead an employer to as full possession of information as is reasonably possible and he will then proceed to a decision. If an employer after neglecting fair procedures forms a belief then the mere fact that he holds the belief and has made a decision to dismiss which, if such belief was reasonably held, would have justified dismissal, will not prevent a finding of unfairness where the tribunal considers that an employer who had observed the rules of natural justice in gathering the information would or could have come to a different conclusion and so might not have held such belief at all.

The alleged culpability of the claimant is related in the minutes of the board meeting of 10/11/1979, which referred to the claimant's '(his) continuing undermining of the authority of the chief executive.'

It may also be argued that in relation to its functions under the Unfair Dismissals Act, 1977, the tribunal should consider that a substantive matter should override a procedural breach of natural justice. This view has been applied by the tribunal in cases where it was satisfied that failure to comply with the rules of natural justice made no differences to the decision to dismiss. In such cases the tribunal was satisfied that no injustice was caused by such failure.

In this case, the tribunal holds the view that absence of an opportunity to the claimant to defend himself could have made a difference to the decision reached.

The procedural aspects of Natural Justice as applied by the Supreme Court in *Glover v BLN Ltd* [1973] IR 418 et seq. are clearly of major importance.

The tribunal endorses and applies the following view quoted from *NC Watling & Co Ltd v Richardson* [1978] IRLR 225 EAT (ICR 1049) ... 'the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business, would have behaved.' The tribunal therefore does not decide the question whether or not, on the evidence before it, the employee should be dismissed. The decision to dismiss has been taken, and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded.

As stated we feel that compliance with the requirements of natural justice could have resulted in the decision to dismiss the claimant not being taken. Accordingly, we find that the denial of natural justice was fundamental and renders this dismissal unfair in the spirit and context of the Unfair Dismissals Act, 1977, and we so determine.

The tribunal considers that having regard to all the circumstances of the case that the most appropriate remedy lies in compensation.

ANNUAL REMUNERATION

Having received representations from the parties, we measure the claimant's gross annual remuneration as follows:

1.	Salary	£15,826.00
2.	Annual Bonus	£500.00
3.	Respondents annual contribution to Pension Scheme in relation to the claimant	£3,000.00
4.	Annual value to claimant of private use of car provided by respondent	£2,000.00
5.	Value of lunches and subscription measured at	£200.00
6.	Employees PRSI and state pension contribution — 8.25% of upper limit of £8,500.00	£701.00
	TOTAL ANNUAL REMUNERATION	£22,227.00

We disallowed, wholly, the claimant's claim that he was entitled to have considered as part of his remuneration:
(a) House Mortgage subsidy and
(b) personal Loans subsidy.

The claimant enjoyed a rate of interest on borrowings less than that which was generally available, this being the normal practice in the respondent company and, we understand, in banking institutions generally. He undoubtedly received preferred rates and so gained a benefit because he had borrowings. If he had no borrowings he would have had no such benefit. It is a discretionery matter for the respondent as to whether any loan would be made to the claimant. It is therefore the exercise of the discretion in his favour which combines with normal practice to give him the benefit of the reduced interest rate, not the mere fact of his employment. The benefit is not a reward for his services but is a consequence of the exercise of a discretion in his favour.

The claimant is an employee since June 1981 of a limited company, of which he is a shareholder, at an annual salary of £10,000. We measure a loss differential per annum of £8,000 and assume that such differential will be maintained into the immediate future.

We consider, on the evidence, that the claimant took all reasonable steps to mitigate his loss, save that he failed to apply for unemployment benefit for two months. We consider, having regard to the evidence, that the claimant's decision to start his own business and to devote his time to the advancement of this aim, should not be considered as a failure to mitigate his loss even though this course did not occupy all his time. Neither do we consider that the salary, which he enjoys from his new employer, is so low as to constitute failure to mitigate loss.

In measuring loss, the tribunal is conscious of the fact that the claimant enjoyed the use of the respondent's car for a considerable period after his dismissal.

LOSS — PENSION

The claimant enjoyed the benefit of a non-contributory pension scheme with

the respondent. The claimant does not have a similar benefit in his present employment. Having regard to the claimant's age and the evidence and submissions in relation to his pension loss, generally, and doing the best we can, we assess the claimant's loss in relation to his pension at £44,800.00. This figure has been measured after applying a reducing factor to provide for the likelihood of the claimant leaving the employment pension scheme in non-benefit circumstances and also as a discount for immediate payment.

LOSS — PENSION			£44,800.00
Loss to November, 1981			
We measure this loss as follows:			
(i) March '80 to June '81 Nett Remuneration			
measured at £17,000.00 per annum — 15 months			
@ £1416.00 per month		£21,240.00	
less *Social Welfare* benefits — £334.00			
per month			
(a) unclaimed 2 months	£668.00		
(b) received 13 months	£4,344.00		
		£5,012.00	
		£16,228.00	
(ii) July '81 — November '81			
5 months @ £8,000.00 per annum		£3,330.00	
Sub Total loss to end November '81		£19,558.00	£19,558.00
LOSS — FUTURE (excluding pension)			
We estimate that the loss differential will continue into the future			
and we measure such loss over a period of five years and allow			
5 x £8,000.00			£40,000.00
LOSS — LOSS OR DIMINUTION OF RIGHTS UNDER PROTECTIVE LEGISLATION			
(in relation to future employment until minimum service reached.)			
(a) Unfair Dismissals Act, 1977		Nil	
(b) Minimum Notice and Terms of Employment Act, 1973		Nil	
(c) Redundancy Payments Acts — We measure this			
compensation @ 33½% of accrued rights		£160.00	
SUB-TOTAL		£160.00	£160.00
TOTAL ACTUAL LOSS			£104,518.00

CONTRIBUTION BY CLAIMANT TO HIS LOSS UNDER S. 7 (2)(b)

The tribunal sees substantial contribution by the claimant to the loss sustained by him which by majority we measure at 45%.

This percentage takes into account the neglect of the claimant to verify, or otherwise clarify, the references made by Mr Bernon in September, 1978 to 'moving' or 'sacking'. It takes into account his disclosure of his understanding that the executives were to be sacked which disclosure Mr Sandys considered to be a serious breach of confidence and which, when denied, contributed to the strained atmosphere amongst the top executives. We do not feel it necessary

to detail, further, the matters which influenced our assessment. (Mr Rice holds the view that the claimant's contribution is greater than that measured by the majority).

We apply the contribution factor as follows:

Total Actual Loss	£104,518,00	
Less 45%	£47,033.00	
Nett Loss	£57,485.00	
Statutory Maximum (2 x £22,227.00)		£44,454.00
TOTAL COMPENSATORY AWARD	£44,454.00	

We determine that the claimant was unfairly dismissed and we award him compensation for loss sustained which sum, adjusted to the maximum permitted by s. 7 (1)(c) of the Unfair Dismissals Act, 1977, we measure at £44,454.00 and we are satisfied that such award conforms with and reflects the spirit and concept of justice and equity.

Mr Rice (dissenting)

The tribunal has spent many hours in considering this very difficult case. It has perused in detail the 100 plus documents submitted to it and has reviewed the full evidence provided over the days of the hearing.

I find myself unable to subscribe to the majority opinion of my colleagues for the following reasons:

It is evident that things were not as they should have been in this company for a long time and particularly since September, 1978 up to the date of dismissal.

Events which led to difficulties included:

(1) The non nomination of the applicant to the board of directors.
(2) The proposal to move/change the duties of various executives.
(3) The dissatisfaction caused as a result of the appraisal interviews.
(4) The general attitude of the applicant originally in his attitude to the chief executive and latterly towards his subordinates.
(5) The general atmosphere of unease and the rumours which appeared to be generally circulating about disagreements amongst senior executives in the company.
(6) The loss of trust between the applicant and his chief executive and his immediate senior staff, and the applicant's admitted loss of trust.
(7) The difficulties about the management board, the delay in its being implemented and subsequent difficulties over the minutes.
(8) The efforts of the board, through its chairman, to reconcile the differences.
(9) The disagreements over what procedure to use to try and resolve the problems.
(10) The disclosure of an interview in New Ross, together with the production of letters written to the chief executive by three senior managers.

I am of the opinion that the board were perfectly entitled to exercise their discretion in not promoting the executives to the board, even though they appear to have contributed greatly to the prosperity of the company. I am equally satisfied that the chief executive was not happy with the performance of some of his staff, and was certainly anxious (as was his prerogative) to make changes.

There is no supportive evidence given to the tribunal that the chief executive ever actually requested the dismissal of any of the people concerned.
The appraisal interview is designed to help those being appraised to improve their performance. This can only be done by pointing out weaknesses. The chief executive was within his rights in so doing, but the applicant did not take kindly to any criticism and resented the implications.

A culmination of the above gradually led to the applicant becoming 'out of step' with most of his colleagues.

I am convinced that at all relevant times the board through the good offices of the chairman were anxious to resolve the problems which were causing so much dissension.

In my opinion, the board, in the interests of the well being of the company had very little alternative but to take the action it did, but at the same time I agree with my colleagues that the manner in which they did it, left much to be desired in that there is no corroboration of the 'Bohill disclosures', nor was there any opportunity given to the applicant to offer a defense about this disclosure which was obviously 'the straw that broke the camel's back!'

This failure in my opinion does not convert an otherwise fair dismissal into an unfair dismissal.

I find that the applicant was no longer a suitable person to carry out the duties which he was employed to. I have come to the conclusion on the applicant's own evidence that his conduct was substantially to blame for his dismissal. He raised and clashed on matters which became unnecessarily blown up and acrimonious by his lack of finesse in dealing with them. He also differed seriously from the senior management on major and serious matters of policy.

I got the clear impression from the evidence that the board of directors found the applicant's conduct so aggravating and unacceptable that they felt that they had had enough and wished to see the end of the applicant in the firm.

At this level it is essential that a top manager's activities influence the behaviour of his staff, as individuals and groups to achieve the desired goals.

The development of a healthy team spirit depends to a great extent on the attitude and approach of the manager. The top manager at this level has a vital role to play in ensuring the well being and success of the operation. It is important that all top management should work together in harmony under the chief executive. It is Mr Bunyan's failure to be a member of that team that influences me in the belief that he was not as leader of the orchestra able to accept the conductor's baton and therefore the performance of the orchestra was being seriously affected.

I am also of the opinion that the respondent has made a good case that the dismissal and any resultant financial loss to the applicant was substantially attributable to his own conduct and therefore that such financial loss should be reduced by a percentage of 90%.

Counsel: *Henry Barron SC and Peter Kelly* (for respondent).
Solicitors: *Bruce St. John Blake & Co* (for claimant); *Fred Sutton & Co* (for respondent).

Bruce Antoniotti
Barrister

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD939/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. J. Goulding
Ms. M. Maher

heard this claim in Dublin on 19th September 2011 and 6th December 2011

Representation:

_____

Claimant(s):
Mr. Denis Linehan, Denis A. Linehan & Co, Solicitors,
Rathgoggin South, Charleville, Co. Cork

Respondent(s):
Ms. Rosemary Mallon BL instructed by
Ms Ciara Fulton, Tughans, Solicitors,
Marlborough House,
30 Victoria Street, Belfast BT1

The determination of the Tribunal was as follows:-

The claimant, a linesman for overhead lines for electrical supply, alleged unfair dismissal after employment from August 2003 to January 2010. It was alleged that he had been dismissed without justification and without the respondent taking his disciplinary record into account. It was conceded, by the claimant's representative, that the claimant had been in breach of the alcohol and drugs procedure with the company and that the Company followed proper procedures in dealing with this matter. However the claimant's representative submitted that the penalty of dismissal as a consequence had been unwarranted.

The respondent submitted that the claimant had been fairly dismissed (on grounds of conduct) for breach of the respondent's alcohol and drugs procedure in that the penalty of dismissal had been warranted. On 8 December 2009 the claimant was tested under the respondent's random drug and alcohol testing policy and tested positive for the presence of an illegal drug in his system. The claimant admitted taking illegal drugs. The respondent submitted that the claimant had completed an acknowledgement of its random drug and alcohol testing policy which made it clear that contravention of the respondent's rules could result in dismissal.

The respondent considered it necessary to have strict rules on drug and alcohol use in order to comply with its obligations under the safety, health and welfare at work legislation to ensure, so far as was reasonably practicable, the health, safety and welfare at work of all its employees. Consequently, random alcohol and drug testing was carried out for all employees who worked in safety-critical environments. The claimant was employed as a linesman and his duties involved carrying out maintenance work (at height) on electrical cables. Accordingly, his role was considered to be safety-critical.

It was submitted by the respondent that the claimant had been afforded a full and fair investigation and disciplinary process involving an investigation meeting, a disciplinary hearing and an appeal process and that the claimant had had the benefit of legal representation at appeal stage.

Accordingly, the respondent submitted that the claimant was dismissed for a fair reason following the carrying-out of fair procedures. Furthermore, the respondent submitted that it had acted reasonably in treating as sufficient to dismiss the claimant's breach of its drug and alcohol testing policy given the claimant's safety-critical role, the fact that he was fully aware of the respondent's policy and the fact that he admitted that he had breached this policy.

Giving sworn testimony, ST (a manager with the respondent) said that the respondent worked in

crews on overhead lines for the electrical industry. The respondent took health and safety very seriously. The claimant did the above work. There was also access to a vehicle as part of the job.

The claimant was an overhead linesman with many years of experience. On 8 June 2009 he signed to confirm receipt of a briefing document and revised policy on alcohol/drug use and agreed to the company carrying out random alcohol/drug screening as outlined in related documentation as part of his contract of employment.

However, an alcohol/drug test was carried out on 8 December 2009. The claimant was subsequently found to have tested positive for cannabis and was dismissed. Mindful of the nature of its work (e.g. the climbing of poles), the respondent had a policy of zero tolerance in respect of drugs. It took the view that drugs had the ability to impair judgment and that drug use could affect the health and safety of the claimant and of members of his team. It was said that the claimant had not known that cannabis could stay in his system for a protracted period. The claimant had not brought his drug use to the attention of ST (with a view to getting some assistance towards rehabilitation) prior to his failed drug test.

Under cross-examination, ST said that if the claimant had told him that he had a problem the respondent could have dealt with it. ST accepted that the respondent had had no major problem with the claimant in the past and that he had never previously been subject to disciplinary procedure such that the claimant's employment contract had been renewed without question and he had an excellent work record in general.

Asked if he had had other options apart from dismissing the claimant, ST replied that he felt he had no other option but to treat the claimant's case as gross misconduct.

It was put to ST that an associated U.K. company employee (CW) had consumed alcohol while on duty. ST accepted this but said that CW had gone through a rehabilitation process and had admitted that he was an alcoholic whereas the claimant had not given ST the chance to help him. ST said that, if the claimant had approached him, the respondent could have looked at rehabilitation.

It was put to ST that the respondent's 2009 policy referred to conduct that could (rather than would) result in dismissal. ST admitted that he had not done a study into the effects of cannabis although the claimant's representative contended that the respondent was obliged to carry out further research. The claimant's representative asked if ST had

considered everything including that the effect of cannabis could decrease as time went on (such that psychotic effects would be gone in a few hours). The respondent's representative objected at

this point whereupon the Tribunal clarified that it had to decide whether or not there had been gross misconduct and if the respondent had acted reasonably in opting for dismissal as a sanction.

Regarding whether CW (the abovementioned other worker) had been guilty of gross misconduct, the respondent's representative objected that CW was a different case and involved a different company. ST stated that he would have needed to have been there and to have had all the facts.

The claimant's representative contended that the dismissal had had serious consequences for the claimant (a South African national) and that the respondent should have taken this into account. ST replied that he had known that the claimant needed a work permit but that he had not known the claimant's financial position.

Giving sworn testimony, the claimant said that he had worked in the industry since 2003 and had not had any previous disciplinary issues or adverse comment about his work. He admitted use of cannabis around the time of a pop concert. He accepted recreational use of cannabis surrounding weekend parties although he said that he had since discontinued it. He was surprised that he failed a drug test but had gone of his own accord and at his own expense to a help centre in Mallow from which he had received a letter saying that he had done their course.

The claimant said that he had never been involved in an accident to himself or to anyone else. He described the chance of injury from a fall as "probably zero".

Under cross-examination, the claimant accepted that he had signed documentation from the respondent which referred to zero tolerance of, among other things, drug use saying that he had not read it all but had read the first page. He was asked to comment on the fact that zero tolerance was mentioned on the first page but he did not do so.

In a closing submission, the respondent's representative said that the nature of the respondent's work (involving overhead power lines admittedly not meant to be live) had to be considered in the context of whether dismissal was reasonable.

The claimant's representative contended that gross misconduct did not always have to lead to dismissal and that both the gravity of the complaint and the effect of dismissal on the employee had to be considered. It was submitted that the respondent had not taken into account that this had been the claimant's first transgression, that the other worker

(CW) had been treated differently, that the respondent had not looked into the effects of cannabis or the effect that dismissal would have on the claimant and that, therefore, the sanction of

dismissal had been unreasonable.

Determination:

The respondent submitted that the claimant had been fairly dismissed (on grounds of gross misconduct) for breach of the respondent's alcohol and drugs procedure and that the penalty of dismissal had been warranted. On 8th December 2009 the claimant was tested under the respondent's random drug and alcohol testing policy and tested positive for the presence of an illegal drug in his system. The claimant admitted taking illegal drugs. The respondent submitted that the claimant had completed an acknowledgement of its random drug and alcohol testing policy which made it clear that contravention of the respondent's rules could result in dismissal.

From the outset the claimant's representative made it clear that the claimant was making no objection to any procedural matters and what the Tribunal had to consider was the proportionality of the sanction.

Section 6 (3) of the Unfair Dismissals Act 1977 as amended by Section 5 (b) (a) of the 1993 Act states that:

"in determining if a dismissal is an unfair dismissal, regard may be had, if the Rights Commissioner, the Tribunal, or the Circuit Court, as the case may considers it appropriate to do so

to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal"

The Tribunal had to consider if the respondent acted fairly and if dismissal was proportionate to the alleged misconduct. Does the punishment fit the crime? In considering this question the fact that the Tribunal itself would have taken a different view in a particular case is not relevant. The task of the Tribunal is not to consider what sanctions the Tribunal might impose but rather whether the reaction of the Respondent and the sanction imposed lay within the range of reasonable responses. The proportionality of the response is key and that even where proper procedures are followed in effecting a dismissal, if the sanction is disproportionate, the dismissal will be rendered unfair.

The Tribunal notes that the claimant was fully aware that there was zero tolerance of drug use and had signed a document where this was clearly set out. The Tribunal also notes that the claimant's duties involved working on overhead power lines. This meant working at significant

heights which was safety critical, even if the lines were not live.

The precise terms of the test to be applied as to whether the sanction was reasonable was set out in **Noritake (Ireland) Limited V Kenna UD88/1983** where the Tribunal considered the matter in the light of three questions:

1. Did the company believe that the employee mis-conducted himself as alleged? If so,

2 Did the company have reasonable grounds to sustain that belief? If so,

3. Was the penalty of dismissal proportionate to the alleged misconduct?

After hearing the totality of the evidence the Tribunal determines that the answer to these three questions is in the affirmative and unanimously finds that the sanction of dismissal for gross misconduct was entirely proportionate having regard to all the circumstances. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

UD1138/2013 June 1, 2015

Nigel Coad
V
Eurobase Limited

Case Details

Body
Employment Appeal Tribunal

Date
June 1, 2015

Hearing Dates
April 16, 2015

Official
Ms D Donovan BL

Legislation
- UNFAIR DISMISSALS ACTS 1977 TO 2007

Members
Mr J. Browne, Ms S. Kelly

County
Waterford

Decision/Case Number(s)
- UD1138/2013

Respondent Representative
Peninsula Business Services (Ireland) Limited, Unit 3 Ground Floor, Block S, East Point Business Park, Dublin 3

Claimant Representative
Ms. Helen Whately B.L. instructed by Mr Sean Ormonde, Sean Ormonde & Co., Solicitors, Suite 9, The Atrium, Canada Street, Waterford

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.

Nigel Coad **-claimant**

UD1138/2013

against

Eurobase Limited **-respondent**

under

UNFAIR DISMISSALS ACTS 1977 TO 2007

I certify that the Tribunal

(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Browne

Ms S. Kelly

heard this claim at Waterford on 16th April 2015

Representation:

Claimant: Ms. Helen Whately B.L. instructed by Mr Sean Ormonde, Sean Ormonde & Co., Solicitors, Suite 9, The Atrium, Canada Street, Waterford

Respondent: Peninsula Business Services (Ireland) Limited, Unit 3

Ground Floor, Block S, East Point Business Park, Dublin 3

Background:

The claimant commenced work with the respondent on 22nd August 2011 as a machine operator. The claimant's employment was terminated by reason of redundancy on 28th June 2013. The claimant's gross weekly salary at the time of dismissal was €380.00. It is accepted that there was a need for redundancy but the claimant alleges he was unfairly selected. The respondent disputes the allegation and said that selection was carried out on a need to retain skills basis.

The Respondent's Case:

NB, Electronics Manager for the respondent told the Tribunal that the respondent company populated printed circuit boards for customers. She gave evidence that due to a loss of a major customer there was a downturn in their business. She said that the loss of this customer affected the surface mount machine area where the claimant worked rather than the soldering area and that in order for an employee to work in the soldering area FÁS certification was needed. This certification involved a ten week training course and was only available to people who had been unemployed for a certain period. She said the claimant did not have this FÁS certification and that he did not do soldering work and worked on the less skilled end of the machine line rather than the end which required setting up the programme. The respondent could not afford the cost of training current employees, such as the claimant, in order to get FÁS soldering certification as the cost was prohibitive and in the order of €60,000.

She said that staff were informed at meetings on 11th and 13th June 2013 of the difficulties. On Friday, 14th June 2013 she wrote to the claimant informing him that due to the downturn in business staff in the surface mount machine area, where the claimant was based, would be reduced. This would be done following assessment by matrix and staff retained would be on a need to retain skills basis. The claimant was informed in this letter that the final selection would not be made until close of business Monday 17th June 2013 and staff selected would be informed on 18th June 2013. The claimant was informed on 19th June 2013 that he was being made redundant as and from 28th June 2013 but the claimant finished work on 21st June 2013 as he was told that he would not be required to work his week's notice.

NB's evidence was that she considered other options such as short time but that this would not work due to skill requirements. Out of the six employees on the machine line two were made redundant. In cross-examination it was put to NB that two employees who had commenced with the respondent on 8th April 2013 were retained over the claimant. NB said that this was because these two employees had FÁS certification for soldering. It was put to her that the claimant could and did do soldering but NB said if he did it was minimal. It was put to her that the claimant could and did work at both ends of the machine line but she said that once the line was set up even if the other person on the more skilled end of the line took a break the line could continue without any input from the claimant.

It was also put to NB that soldering was not in the matrix.

Evidence was also given by JC, Managing Director and founder of the respondent company. She reiterated what NB said and stressed the difficult situation the respondent company found itself in and their strive for the survival of the company.

The Claimant's Case:

The claimant told the Tribunal he was a qualified electrician and had been self-employed running his own business venture prior to commencing work with the respondent. He said he could and did work on both ends of the machine line such as when an operator was on a break or was off for some reason. He said he could solder and did do some soldering in the respondent company.

He disputed that the respondent had considered all options in that some of the people on the machine line could do soldering and could have been moved to the soldering area instead of taking in the two new people on 8th April 2013 and letting two employees go.

The claimant said he wasn't allowed to see the matrix assessment for other employees and that there was no mention of an appeal regarding the decision to make him redundant.

In cross-examination he accepted that the two employees taken on in April had different qualifications and could carry out soldering but he said he could do it too.

It was put to the claimant that he did discuss the decision to make him redundant with JC, the M.D., and that he asked her to let him remain on until he had the two years' service in order to claim redundancy and that this would enable him to get onto the State's back to education allowance scheme. The claimant said he decided to go back to education only because his job was finishing and that he would take a job if one was available.

The claimant gave evidence of his losses and his efforts to mitigate his losses. He said he was back in education since 4th September 2014 studying electrical engineering.

Determination:

Having considered the evidence adduced at the hearing and the submissions the Tribunal finds, and it was accepted by the parties, that the respondent had a need to effect a redundancy due to a downturn in its business. Regarding the selection process the Tribunal finds that because last in first out was not applied the claimant was selected and two employees who had only in or about two months' service as opposed to the almost two years' service of the claimant were retained over the claimant on a need to retain skills basis by virtue of the fact that these two employees had completed a ten week soldering course with FÁS and had received the necessary certification.

The Tribunal finds that the respondent did not adequately or at all consider alternatives to redundancy and further finds that had the respondent moved one or two of the machine line operators with soldering skills to the soldering area instead of retaining the two FÁS trained employees then there would have been no need to make the claimant redundant.

The Tribunal further finds that the procedures used in effecting the redundancies were somewhat rushed. The Tribunal does not believe that the respondent acted in bad faith but rather acted in the immediacy of the situation it found itself in order to try and ensure the survival of the business.

In the circumstances, the Tribunal finds that the claimant was unfairly selected for redundancy and was not afforded adequate procedures. Accordingly, the claimant was unfairly dismissed and the claim under the **Unfair Dismissals Acts 1977-2007** succeeds and the Tribunal awards the claimant compensation in the amount of €4,400.

In calculating the level of compensation the Tribunal took into consideration the efforts of the claimant to mitigate his losses and finds that these efforts do not meet the standard set out by the Tribunal in **Sheehan v Continental Administration Co Ltd** (UD 858/1999) that a "claimant who finds himself out of work should employ a reasonable amount of time each weekday in seeking work. It is not enough to inform agencies that you are available for work nor merely to post an application to various companies seeking work ... The time that a claimant finds on his hands is not his own, unless he chooses it to be, but rather to be profitably employed in seeking to mitigate his loss."

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CASE NO.		CLAIMS OF
492	UD882/92	Dermot Boucher, 179 Glenageary Pk, Dun Laoghaire, Co. Dublin
530	UD969/92	Desmond O'Neill, 6 Tudor Lawns, Foxrock, Co. Dublin
531	UD970/92	Bernard Kelly, 17 Maywood Lawn, Raheny, Dublin 5
50/93	UD1005/92	John A. Harrington, 69 Lr. Beechwood Avenue, Ranelagh, Dublin 6

against the decision of

Irish Productivity Centre, I.P.C. House, Shelbourne Rd, Dublin 4

under

Redundancy Payments Acts, 1967 to 1991
Unfair Dismissals Acts, 1977 and 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Hamilton

Members: Mr. P.D. McCann
Mr. G. Lamon

heard these claims at Dublin on 6th January 1993, 24th February 1993, 11th March 1993, 28th May, 1993 and 31st May, 1993

Representation:

Claimants: Ms. P. King, S.I.P.T.U., 29 Parnell Square, Dublin 1 and Mr. E. Stewart S.C. instructed by Bowler Geraghty & Co., Solicitors, 2 Lower Ormond Quay, Dublin 1 for Dermot Boucher, Desmond O'Neill and Bernard Kelly and Mr. M. Connaughton B.L. instructed by William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2 for John A. Harrington.

Respondent: Mr. T. Mallon B.L. instructed by Arthur Cox, Solicitors, 41-45 St. Stephens Green, Dublin 2

The determination of the Tribunal was as follows:-

The claimants were employed by the respondent until their employment ended by reason for redundancy. The claimants case is that their selection for redundancy was unfair.

Respondents Case:

Mr. Eamonn Cahill, Chief Executive, told the Tribunal that the respondent company provided a consultant service to a range of companies and organisations. He said that the respondent was controlled at Board level by nominees of Irish Business & Employers Confederation and the Irish Congress of Trade Unions. He said that the centre was originally 100% state funded but this changed over the years and, as a result of the cessation of Government funding now earns about 75% of its costs through the market place.

Mr. Cahill said that in early 1991 it was recognised that the centre was not able to generate the sort of funds needed to keep the company viable and it was not possible to pay special pay awards. He said that the employees also accepted salary cuts on a deferral basis.

Mr. Cahill said that a long term plan for the centre was needed and in December, 1991 a plan, which included the redundancy of 16 people, was put to the Board. He said that this plan was accepted by the board but a problem existed as they did not have the money to implement that sort of package. He said that they devised a package to be based on deferred payment of severance pay and this was put to the staff but was rejected. He added that in early 1992 the salaries were restored to their previous level.

Mr. Cahill said on 31st March, 1992, on his advise and that of the auditors, the Board took the view that the centre should be wound up. He said that this was based on the losses of the centre and the possibility that it would be insolvent by the end of April. He said the Board deferred taking a final decision but did issue protective notice to all employees, including himself, to take effect from 30th April, 1992. He added that the only basis for the deferral was to allow the acceptance and implementation of the plan of December, 1991. He said that this was communicated to staff and there were discussions the following day. He said that it was communicated to him that in essence the plan was acceptable but there was no agreement on the method of selection for redundancy. He said that the union sought selection on a last in first out basis but he disagreed and felt that it should be done on a voluntary basis. He also said that there had been no compulsory redundancies in the centre in the past.

Mr. Cahill said that at a meeting on 8th April 1992 the union indicated its acceptance of the plan and at a meeting on 9th April, 1993 the board deferred calling a statutory meeting and set 15th April, 1992 as a deadline for the implementation of the plan. He said that on 10th April, 1992 he informed all staff of details of the severance on offer and volunteers were sought with 13th April 1992 being set as the deadline. He said that it was pointed out to him that all staff were not aware of the terms and he extended the deadline to 14th April, 1992.

Mr. Cahill said that ten redundancies were required from among the professional staff. He said that four professional staff volunteered for redundancy and, as the accounts functions had been contracted out, the position of another person become redundant. He said that he was now in a situation where he had to select five advisory staff for redundancy.

Mr. Cahill explained to the Tribunal that he adopted the selection process of choosing the group of people, (to the limit of the number of persons who could be retained), he felt were most appropriate and suitable for the job on hand and he then ended up with the 5 people to be made redundant. He said that he was therefore selecting the people most suitable to stay rather than selecting people to go. He said that the areas of work requirement were the areas of small business, the area of employee involvement, the area of large company work, the area of European dimension and the worker co-operative area. He said that he had to maintain a balance of skills in these areas and to select consultants with specialised skill as well as people who could conduct a wide range of work. He also said that he considered peoples ability to sell work and to generate new business and the question of the performance of people in their financial

considered. He said that at the time he looked up the figures on each employees financial contribution to the company as he kept a record of information from time sheets. He added that he would have foreseen the use of the services of some of the people who would be made redundant on a contract basis in the future.

Mr. Cahill said that, having selected the people most suitable to stay, based on the criteria he used, he was left with the five people to be made redundant and these included the four claimants. He said that in his view he had selected the best people for the future of the company and if he had to adopt the selection procedure of last in first out it would not allow him to implement the plan as he would have lost a number of the skills he needed to retain.

Mr. Cahill said that on 15th April, 1992 he notified the staff who were not to be retained. He said that the Board met at 1.00p.m. on that day and they were unhappy that the matter had not progressed to the stage where the union had accepted the final decision and they put a deadline of 3.00p.m. the following day for acceptance by the union. Mr. Cahill said that on the 16th April, 1993 he was informed that the union group had noted and accepted the position. He said that he informed the chairman of the acceptance and the Boards decision to close the centre was revoked.

When cross-examined Mr. Cahill said that he did not consult anybody during the selection process and that he did not have interviews with staff members to allow them to show there ability as he knew the staff concerned and was aware of their ability. He also said that he did not make the staff aware of the criteria for selection used by him. He said that he did not discuss with the claimants the decision for their selection as he was faced with tight deadlines at the time.

Mr. Cahill said that, he did not recall saying to Mr. Desmond O'Neill that certain people in the organisation either through political necessity or ignorance offended people outside the organisation and that they would now have to go and it was the price they had to pay. He added that he did not believe that he would make a statement like that. He also disagreed that he used the disguise of redundancy to get rid of people that he did not like.

Mr. Cahill agreed that Mr. Bernard Kelly had been involved in co-operative work, and that a complaint was received from one of their clients concerning an article which appeared in a paper quoting Mr. Kelly as criticizing the client. He said that Mr. Kelly did not work for this client again as they were dissatisfied with him. He said that at the time of the redundancies this incident was in the past and it had no conscious effect on Mr. Kelly's selection.

Mr. Cahill was recalled to give further evidence after the claimants had completed their evidence. He said that people who voluntarily participated in trade union activities were not in difficulty with the respondent organisation. He said he did not recall the conversation with Mr. O'Neill which was stated to have occurred in the last week of March 1992. In relation to the conversation with Mr. Boucher, Mr. Cahill said that out of exasperation he may have said the words attributed to him. He said that his reply to Mr. Boucher was in the context of whether the proposal put forward by Mr. Boucher would realise a financial saving to the respondent organisation.

Mr. Cahill denied the evidence put forward by Mr. Kelly, namely that redundancy was a device to get rid of the claimants. Mr. Cahill

was not the Chief Executive Officer for the length of time that Mr. Kelly had been in the organisation. He did confirm that the co-operative work was taken off Mr. Kelly, and that Mr. Kelly had been unacceptable to FAS.

Mr. Cahill confirmed that the decision on who was selected for redundancy was his decision and he added that he was not subjected to any outside influence. He said the criteria he used was (i) Revenue generating ability and (ii) Product development - relevant mixture of skills looking at the overall organisation structure.

When cross-examined by counsel for Mr. Kelly, Mr. Cahill said that FAS was the only client to find Mr. Kelly unacceptable. He accepted that Mr. Kelly could generate £40,000 to £45,000 revenue in a year.

Mr. Cahill said it was possible the claimants could do some of the £400,000 sub-contract work that was available. He confirmed that since their dismissal they had not been given sub-contract work.

Claimants Case:

Mr. John Harrington gave evidence that he commenced employment with the respondent during January 1980. He said his initial work areas were related to productivity and market surveys. He added that from 1986 onward he was involved in the areas of job evaluation and grading, and limited market surveys.

Mr. Harrington stated that he was dismissed from his employment during April 1992. Prior to that he said he was not specifically told that his job was in jeopardy. He said that he personally had no fear of being made redundant as a result of the organisational changes because of his track record, which he submitted matched the performance of anybody else. He said that in common with all employees (except one) he received protective notice on the 1st April 1992 and subsequently on the 14th April 1992 Mr. Cahill informed him that he had been selected for redundancy. He continued that the discussion with Mr. Cahill was brief and he was not given any reasons why he was selected for redundancy. He said he was not told that the criteria for retaining individuals was based on their previous financial performance and their range of skills.

Mr. Harrington added that he didn't know why he was dismissed, and that in view of Mr. Cahill's evidence given to the Tribunal he believed that he was "good enough" to be retained in the organisation. He said that his financial performance would have placed him in the upper half of the revenue generation table in comparison the other employees. He said that he was capable of doing any range of duties assigned having regard to his previous work experience.

When cross-examined Mr. Harrington said that he was a member of S.I.P.T.U., when employed by the respondent organisation. He said that he was aware that the organisation was in financial difficulty throughout the period of his employment. He said that during 1991, salaries in the organisation were cut by 20% as a cost saving measure and he agreed that a high proportion of the organisation's costs related to staff but he added staff also generated revenue. He agreed that the respondent organisation had to take some action to rectify its difficulties but he said various options should have been considered.

Mr. Harrington estimated that during 1991 he generated business for the organisation to the value of £54,000. In the period May 1991 to April 1992, Mr. Harrington said that leaving aside existing contracts he generated £800 worth of completely new business. He added that his primary function was not to generate new contracts but to service existing contracts. He accepted that of the £54,000 of business generated during 1991, one contract had been subsequently revalued downwards by £5,000.

Mr. Harrington repeated that his redundancy was not justified and added that he believed that no redundancy in the organisation was necessary.

Mr. Dermot Boucher, gave evidence that he qualified as a chartered accountant in 1965 and that he joined the respondent organisation in 1969. He said that during his career he acted as an accessor for the Labour Court and subsequently was involved in training with AnCO and its successor FAS. He stated that in the late 1980's he was involved in overseas work for the EC and the World bank. He then went on a career break from 1987 to 1990.

Mr. Boucher stated that he was a founder member of the F.W.U.I branch in the Irish Productivity Centre in the early 1970's and acted as a voluntary official on a consistent basis throughout the following 20 years. He said that he acted as shop steward on several occasions. He said that Mr. O'Neill and Mr. Kelly were also active in the union and that Mr. Harrington had acted as chairman of the section for one year. He added that that fifth person who was made compulsorily redundant was also involved in the union.

Mr. Boucher said that the redundancies and his own redundancy were not necessary. He said in the month of March 1992, he had obtained leave of absence to go abroad and work for the Asian Development Bank. Therefore he would be off the payroll for six months and was agreeable in April 1992 to extend that period to two years leave of absence but the Chief Executive Officer rejected the proposal. He said he was informed that two other individuals had not been considered for redundancy because they had been on leave of absence. He said he was due to go on leave of absence on the day he had been made redundant.

In 1992, Mr. Boucher described himself as a generalist in the respondent organisation. He said that being a "jack of all trades" meant that he was capable of doing the work for which the other employees had been retained to do in the organisation or any of the work that was to be given on a sub-contract basis. He said the Chief Executive Officer, Mr. Cahill intended to sub-contract work to the value of £400,000, which it was submitted could have provided permanent work for Mr. Boucher and the other claimants or at least on a sub-contract basis. Mr. Boucher continued that when the claims for unfair dismissal were lodged with the Tribunal, the C.E.O., had said that he would not give sub-contract work to any of the claimants, however, following union pressure that decision was reversed.

Mr. Boucher said that he could only speculate on the motivation behind his dismissal. He believed that it occurred because elements in management or the council of the organisation disapproved of his trade union activity or that there was a political dimension to the dismissal. He said that he had once been a candidate for Dail Eireann, which had been frowned upon. He stated that he had never been told of any complaints about his professional conduct.

Mr. Boucher stated that a week before he was notified of his dismissal on grounds of redundancy, he had been speaking with the C.E.O. and was not informed that his redundancy was being contemplated. He said that he had academic qualifications allied to his 23 years of experience and was worthy to have been retained in the organisation. He said he was never informed of the reason for his dismissal at the time of his dismissal.

When cross-examined Mr. Boucher confirmed that he was suggesting that his dismissal was because of his trade union activity. He said that Mr. Cahill made it difficult for employees to engage in voluntary trade union activity. When pressed to provide substantiation for his allegation he said that the C.E.O informed him that finance was not the reason for his selection for redundancy and that he therefore had to speculate on the motivation behind his dismissal.

Mr. Boucher said that he was aware of the precarious financial situation of the respondent organisation and that drastic action was warranted but would not accept that redundancies were justified. He accepted that reducing staff would reduce costs but it would also affect revenue potential. He suggested a possible option to redundancy was a further pay cut of 10% for 1992.

Mr. Boucher said that during April 1992 the concept of compulsory redundancies was accepted subject to the normal union position. He said that that union position was not contained in a written agreement with the respondent organisation and the respondent organisation did not ultimately reach an agreement with the union. He said therefore Mr. Cahill's proposal was implemented. He added that this was the first occasion that full-time employees were made redundant from the respondent organisation.

Mr. Brian Kelly gave evidence that he joined the respondent organisation on the 1st May 1979. He outlined his academic qualifications which included a Bachelor of Commerce degree and a Masters in Organisational Psychology. He also outlined his career within the organisation which included work in the business advisory service and then in labour management services. He stated that in the mid 1980's he moved to more commercial work, which by 1989 he had earned £100,000 for the organisation from the development of his co-operative programme. In the period 1989 to 1992, he said that he worked on a team building module, which again had been a success. In summary, Mr. Kelly said that he had worked in various areas within the respondent organisation.

Mr. Kelly said that when he joined the respondent organisation he also joined the union. He said that he was on the section and branch committee for three or four years. He said that Mr. O'Neill, Mr. Boucher and himself had all served on the branch committee of the union. He added that Mr. Harrington had been Chairman of the section committee. He therefore submitted that all four claimant's had a higher profile in terms of trade union activity than other employees who were also in the union.

Mr. Kelly said that in 1980 he had been involved in the development of worker participation. He stated that the C.E.O., complained to him that employers didn't like the fact that joint employer/employee seminars were being held around the country. He was then advised by the C.E.O. to discontinue the seminars he had been arranging and so Mr. Kelly desisted.

Mr. Kelly stated that during 1981 he wrote a book about preventing absenteeism in the work place. The emphasis in his book was that the onus was on both management and employees to prevent absenteeism. Subsequently he said that the respondent organisation secured a contract in the area of absenteeism and despite his role in securing the contract, the work was assigned to another officer within the organisation. Mr. Kelly said that he complained about the situation and was informed that employers didn't like the preventative approach that he had adopted.

In relation to his work on the co-operative programme, Mr. Kelly said that Mr. O'Neill informed him (the claimant) that the C.E.O., had told him that the co-operative programme was a project that he did not want to be closely associated with. According to Mr. Kelly, co-operatives make a political statement and a short time later in 1990 he was suddenly moved from his work on co-operatives. He went on to say that his transfer from his work on co-operatives followed an article in the Irish language paper 'Anois'. He stated that he was never given any revenue credit for his work on co-operatives.

During 1991, Mr. Kelly said he identified a potential revenue earning project in the area of stress management. He said he approached Mr. Cahill, in his role as Chief Executive Officer to promote the product. While Mr. Cahill had given a favourable response to the project, the project never went ahead. Mr. Kelly said that this was the "last straw" for him, and he believed that there was another agenda to starve him of work because of his political philosophy as displayed in his work on worker co-operatives and worker participation.

Mr. Kelly said that at the time of his redundancy he was engaged on a revenue earning project with Mr. O'Neill. He said that Mr. O'Neill was informed to hand the work over to another employee who already had another project to work on. He submitted that there is sufficient work available within the respondent organisation to justify his continued employment.

Mr. Kelly stated that when Mr. Cahill informed him of his redundancy Mr. Cahill specified the reasons for the redundancy as being (a) not earning revenue, (b) couldn't organise a range of projects and (c) unacceptable to clients. Mr. Kelly was adamant that he was capable of earning revenue for the respondent organisation.

During cross-examination Mr. Kelly said that from his recollection the union did not accept the need for compulsory redundancies. He said that he was aware the respondent organisation was in financial difficulty. He said he believed that other options such as wage cuts should have been considered in preference to redundancies.

Mr. Kelly said that his redundancy from the organisation was a device to get rid of him.

In response to questions from the Tribunal, Mr. Kelly said that it was clear from Mr. Attley's evidence given to the Tribunal, that he (Mr. Kelly) had not got "offside" with FAS.

Mr. Des O'Neill gave evidence that he concurred with the evidence of his colleagues. He added that towards the end of March 1992, Mr. Cahill told him that certain persons in the organisation through political ignorance or naivety had offended people outside the organisation and would have to pay the price of redundancy. 1950

In common with his colleagues Mr. O'Neill said that he believed he was unfairly dismissed.

Determination

The Tribunal determines from the evidence that the dismissal of each of the claimants was made in the context of a genuine redundancy situation applying within the company which resulted in the reduction of the workforce by five persons including the four claimants.

The Tribunal determines from the evidence that section 6(3)(b) did not apply to these dismissals by reason of the fact that there was no history of compulsory redundancy in this employment and therefore no custom or practice governing a redundancy situation and similarly that there were no union/management agreement or contractual provisions involving any agreed method of selection for redundancy.

The Tribunal accepts that in this case the Employer/Respondent had to select for redundancy five persons from amongst a group of individuals which had different backgrounds, skills and contributions to the company and that the Respondent wished to ensure that after the redundancies there would remain a core of skills sufficient to the maintenance of service and the survival of the Company.

In these circumstances and in the absence of any guidelines or precedent the employer is obliged to act fairly in relation to the criteria applicable in selecting who is to go and who is to stay and to apply such criteria fairly to each individual in order to bring about a fair assessment and decision. The assessment is to apply to all in the group and not just to some.

It has been submitted that in the absence of section 6(3)(b) applying that when the reason for dismissal is found to be wholly or mainly by reason of redundancy that Section 6(4)(c) of the Unfair Dismissals Acts applies to act as an absolute defence to a claim of Unfair Dismissal and that the Employment Appeals Tribunal cannot enquire further into the their basis for the selection of those to be made redundant.

The Tribunal was referred to the cases of Susan Roche and others - v - Sealink Stena Line Ltd, (UD187/92, UD212/92, UD239/92, UD555/92 & UD274/92) and Loftus and Healy - v - An Bord Telecom (D5648 & D5649).

At the time of writing this determination it is understood that the Tribunal determination in the case of Susan Roche & others -V- Sealink Stena Line Ltd has been appealed to the Circuit Court and the issues have been compromised by the parties without order of the court. However in the context of the Determination it may be noted that the unfair dismissal case arose out of the alleged redundancy of Susan Roche and Four other claimants and the Tribunal have found that no agreement or custom or practice existed relating to selection for redundancy. The Tribunal determined -
"With regard to the use of assessments in the selection process, the Tribunal finds that Section 6(3)(b) of the Act is the only Section which deals with the question of selection and there is no provision in this Section which allows the Tribunal to consider the fairness of the assessments used". The Tribunal in this case determined that the dismissal of the claimants was by reason of redundancy and that there was no

Section (6)(1) states that:

> "Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal".

The Tribunal considers that the onus of proof is on the employer to establish that he acted fairly in relation to the dismissal of each of the claimants. It is not sufficient to establish an overall umbrella context such as "Redundancy", within which the decision was made. It is necessary for him to establish that he acted fairly in the selection of each individual employee for redundancy and that where assessments are clearly involved and used as a means for selection that reasonable criteria are applied to all the employees concerned and that any selection for Redundancy of the individual employee in the context of such criteria are fairly made. This legislation establishes the right of each individual employee to be fairly-treated and particularly so on matters greatly affecting his welfare such as the loss of his employment would be.

Section 6(3)(b) provides that a dismissal in breach of that subsection is unfair.

In this case Section 6(3)(b) did not apply, therefore consideration of the fairness or otherwise of the dismissal in the case must have regard to Section 6(1) and Section 6(6) which places the onus on the employer to establish that there were substantial grounds justifying the dismissal.

In Section 6(6) where, because of a redundancy situation, all employees are being dismissed then the redundancy is clearly the reason for the dismissal and establishes a defence under Section 6(4)(c) to a claim of Unfair Dismissal. Where selection is involved and Section 6(3)(b) does not apply then the dismissal results from the selection for redundancy and such selection may be reviewed under Section 6(1).

The Tribunal determines

(A) the onus is on the employer to justify the selection of the claimants and each of them for redundancy and

(B) that in the absence of Section 6(3)(b) applying that the dismissals must be considered under Section 6(1) and

(C) that the general redundancy situation in the absence of Section 6(3)(b) applying does not deny the individual employee the right to be fairly assessed for selection. If it was otherwise then an employer could use the umbrella of redundancy to apply unfair criteria in the selection process or to act unfairly or even select for reasons other than the declared criteria and use the redundancy umbrella to cloak his unfairness.

The dismissals in this case had their roots in a redundancy situation. The selection of the individuals for redundancy purported to result from a fair selection procedure.

The Tribunal therefore determines that it is empowered to review the dismissals under the Unfair Dismissals Acts, 1977 and 1991.

This case has given the Tribunal much concern in that it is clear that Mr. Cahill, Manager of the respondent company was under considerable pressure to achieve redundancies within a short time.

He sought to do so by canvassing for voluntary redundancies and achieved some success in this regard, but there remained the need to dismiss a further five employees by reason of redundancy. After the volunteers were identified there were twenty employees remaining of which five would have to be made redundant.

As previously stated there was no procedure agreed or existing by custom and practice to guide Mr. Cahill in his task of selecting the five who were to go. In addition he had comparatively little time in which to make his decision as he was required to report to his Council on the day following the establishment of the redundancy "volunteers."

The Tribunal has determined in this case that in this situation there remains on the employer the obligation to act fairly and reasonably towards his employee and each of them when selecting for dismissal by reason of redundancy.

The Tribunal considers that the persons continuing employment or not is of fundamental importance to that person, hence the statutory obligation on the employer to strive to achieve fairness in considering whether such employee should be dismissed for any reason and in this context by reason of redundancy.

The Tribunal is also conscious of the many different circumstances in which employers find themselves.

The Tribunal therefore in this case, as in all other cases applies a standard of fairness against which the employer's decisions are judged but such standards are not to be so stringent as of themselves to be unfair and unreasonable.

This Tribunal as in previous cases has applied a standard of fairness documented in the determinations of Bunyon -v- United Dominions Trust (Ireland) Ltd. (UD66/1980) and N.C. Watling & Co. Ltd. -v- Richardson [1978] ICR 1049.

This standard to be imposed on the employer is well expressed in the Decision in N C Watling & Co. Ltd. -v- Richardson [1978] ICR 1049 as follows:-

> "the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business (and at that time*) would have behaved."
>
> * inserted by this Tribunal

It is against this standard of fairness that the procedural and substantive aspect of the respondent's decision has been judged by this Tribunal. The onus is on the employer to justify the dismissal to establish that there were substantial grounds for same.

The respondent sought to justify the dismissal of each of the five claimants by reference to figures which purported to indicate that 1953

aim of Mr. Cahill as Manager in this difficult situation was to retain a hard core of employees whose contribution was valued and whose flexibility and experience would continue to be of the greatest advantage to the company as it might continue or redevelop.

The aim as expressed was not criticised and the claim arises in the context of the application of the respondent in the selecting of five employees whose employment was to end.

Mr. Cahill made it clear in his examination and particularly in his cross examination by Ms. King that he was aware of the merits and value of each employee because of his experience and familiarity with all the employees over a number of years and that his method of selection was on the basis of who should be retained. He stated in his evidence that he did not consider or assess the five employees who were to be dismissed (including the five claimants) but that he arrived at them by a process of elimination, having decided on the employees whom he wished to retain and whom he felt would be of long term benefit to the company.

The respondent placed much emphasis on the pressure imposed on Mr. Cahill to achieve the redundancies and have them implemented on or before the 14th or 15th of April 1992. It is accepted that the list of volunteers had to be completed by Tuesday the 14th of April, 1992. The Tribunal was told that on the morning of the 15th that the staff not being retained were notified and that there was a Council meeting scheduled for 1 p.m. on the 15th. In evidence Mr. Cahill was uncertain if this notification to the staff not being retained was notified on the 14th or the 15th and stated that it could be the 14th.

In any event on the 15th of April the Council met to consider the redundancies and the implementation of same but were unhappy, it appears, that the final position was not accepted at that time by the Union and the meeting was adjourned until the next day (the 16th) to achieve such acceptance which was duly notified at 3.10 p.m. on April the 16th. In the light of such acceptance the Council decision to cease the operations of the company was revoked.

It is indicative of the seriousness of the situation that without the redundancies being affected and accepted by the Union concerned that the Council had decided to close down the operations of the respondent. It is also clear that whilst a very short deadline was imposed on Mr. Cahill to achieve the redundancies by voluntary or compulsory means that when it was in the Council's interest a further day was available to be allowed to achieve acceptance of the final situation by the Union. The Tribunal does not consider that acceptance by the Union of the final situation in any way establishes the fairness of the respondent's method of selection for which it remains accountable to each employee concerned.

The evidence offered by the respondent to justify the selection of the five employees was not conclusive and was opposed in material respects by each of the claimants in evidence.

In a situation where selection, which involves such variables such as income earned, credit for research time, versatility and so forth it would appear to the Tribunal that when such selection is being made then at least those threatened with dismissal, or in the group likely to be dismissed, should be made aware that, what for some could be a

final assessment was being made and their views and contributions, in support of their case for remaining, canvassed, valued and considered in a full and bona fide way.

The Tribunal considers that this procedure could have been followed by Mr. Cahill even within the short time allowed to him and certainly it could have been undertaken in the extended time available to the Council as evidenced by their deferral of decision for twenty-four hours in the context of Union acceptance of the final position.

Mr. Cahill stated that he identified the various areas covered by the activities of the respondent and stated that he wanted people to remain to service those areas even on a reduced capacity so as to be able to build on that service as the need increased in time. Each of the claimants stated in their evidence that they had contributed in substantial ways in revenue earned and research and in contacts and in service to the respondent and that they were also able to be flexible and had undertaken tasks in areas outside their speciality.

The claimants were not given an opportunity to deal with concerns which Mr. Cahill might have as to their usefulness in this difficult context and their only opportunity to do so was at the hearing of their claims by this Tribunal.

Without giving a definitive record of the proceedings of the Tribunal the matters raised by the claimants in objection to the assessment being made against them were as follows:-

(i) their capability to earn revenue for the organisation,

(ii) their capability to do work done by employees who were retained,

(iii) their track record matched the performance of other employees,

(iv) their capability of performing a wide range of functions within the organisation, and

(v) the length of their service.

In view of the foregoing it is clear that the claimants had a constructive contribution to make to the respondent in the context of their possible selection for redundancy. Any fair assessment of them would have the characteristics of any inquiry with the right to the threatened person to make a contribution in defence of any allegation against him or in this case any unfair or unbalanced view being held by the respondent.

No such opportunity was given to the claimants or any of them to make an input into this inquiry/assessment which concerned a matter of vital interest to them namely their continued employment or otherwise. It is not for this Tribunal to judge whether or not such input would have made any difference, but its denial is a denial of the natural and constitutional right to defend yourself which is not at the gift of the employer or of this Tribunal but is vested in each and every citizen no less in any inquiry affecting their continued employment, than when the inquiry might affect their liberty.

The Tribunal is satisfied that there was an opportunity for Mr. Cahill to conduct his assessment in a manner which had regard to the rights of the employees to contribute to that assessment and that the denial of such right constituted a breach of natural justice which renders their and each of their dismissals unfair.

The Tribunal has also considered the question as to whether the respondent has discharged the onus to justify the dismissal of each individual claimant herein.

The Tribunal has considered the evidence given on behalf of the respondent in respect of each of the claimants and has considered the evidence of each of the claimants in response to same. The Tribunal considers that in the light of the totality of the evidence that the respondent has not established that there were fair and reasonable grounds for selecting the claimants or any of them for redundancy.

In arriving at this decision we have regard to the evidence of each of the claimants in defence of their own position and opposing the statements and conclusions of Mr. Cahill as to their contribution to the company, including their versatility.

The Tribunal notes from the evidence that at the time of the selection of the claimants for redundancy Mr. Cahill did not make the criteria for selection used by him known to the claimants and subsequently did not state the criteria for selection at a Rights Commissioner's hearing. The first occasion that the claimants became aware of the criteria was at the Tribunal hearing of 6th January, 1993.

We determine therefore that the onus on the employer to establish substantial grounds that the claimants were fairly dismissed by virtue of their fair selection for redundancy has not been discharged and that the claimants and each of them were accordingly unfairly dismissed.

The Tribunal notes that each of the claimants claimed that he was a trade union activist and that this contributed to his selection for redundancy, however, the Tribunal wishes to emphasise that it is not satisfied from the evidence that this was in whole or part the reason for the dismissals and merely records the claimants' claim in recognition of the weight of the argument which was offered to the Tribunal at the hearing.

We determine that the claimants and each of them was unfairly dismissed both on the procedural and substantive grounds as stated. Accordingly the claims under the Unfair Dismissals Acts, 1977 and 1991 are allowed.

In considering the remedies available under Section 7 of the Unfair Dismissals Acts, 1977 and 1991 the Tribunal considered the re-instatement of each of the claimants individually but considered compensation to be the most appropriate form of redress in the circumstances as re-instatement would put the claimants at a disadvantage for future selection for redundancy, should it arise, due to the fact that they were absent from the work environment for a period approaching two years. The Tribunal therefore awards the claimants the following sums under Section 7(1)(c) of the Unfair Dismissals Acts, 1977 and 1991.

Mr. Dermot Boucher:-

Loss to Date of Hearing on Remedy (i.e. 26th June, 1992 to 9th December, 1993)

£403.00 X 75.8 weeks	=	£30,547.40
Less amounts received in period (see below)	=	£24,155.20
Total	=	£ 6,392.20

Amounts Received:

£18,000.00	-	Employment to mid-December 1992
£ 3,000.00	-	Social Welfare
£ 3,155.20	-	Employment for the period 7th September, 1993 to 9th December, 1993 (13.6 weeks at £232.00 per week)
£24,155.20		

Loss of Pension Rights to 9th December, 1993

£60 per week X 75.8 weeks	=	£4,548

Total Loss to 9/12/93	-	£6,392.20
		4,548.00
		£10,940.20

1 Year's Future Loss

£20,956.00	nett salary
£ 3,120.00	plus future loss of pension rights (£60 X 52 weeks)
£24,076.00	
£12,060.00	less projected earnings
£12,016.00	

Total Tribunal Award	£10,940.20	-	loss to 9/12/93
	£12,016.00	-	future loss
Total	£22,956.20		

All the calculations are based on nett figures.

Mr. Desmond O'Neill:-

Loss to Date of Hearing on Remedy (i.e. 26th June, 1992 to 9th December, 1993)

£312.00 X 75.8 weeks	=	£23,649.60
Less amounts received in period (see below)	=	£20,595.64
Total	=	£ 3,053.96

Amounts Received:

£ 1,000.00	-	Casual work
£14,977.08	-	New Employment for period 4/1/93 to 30/11/93
£ 3,034.56	-	Tax rebate
£ 1,584.00	-	Social Welfare
£20,595.64		

Loss of Pension Rights to 9th December, 1993

£60 per week X 75.8 weeks	=	£4,548

Total Loss to 9/12/93	-	£3,053.96
		4,548.00
		£ 7,601.96

1 Year's Future Loss

£16,224.00	nett salary
£ 3,120.00	plus future loss of pension rights (£60 X 52 weeks)
£19,344.00	
£12,047.18	less projected (estimated) earnings for 1 year period based on nett average weekly job earnings and Social Welfare in the period from 26/6/92 to 9/12/93
£ 7,296.82	

Total Tribunal Award	£ 7,601.96	-	loss to 9/12/93
	7,296.82	-	future loss
Total	£14,898.78		

All the calculations are based on nett figures.

Mr. Bernard Kelly:-

Loss to Date of Hearing on Remedy (i.e. 26th June, 1992 to 9th December, 1993)

£312.00 X 75.8 weeks	=	£23,649.60
Less amounts received in period (see below)	=	£14,255.66
Total	=	£ 9,393.94

Amounts Received:

£ 6,200.00	-	Earnings 30 weeks
£ 4,000.00	-	Other Earnings
£ 4,055.66	-	Social Welfare
£14,255.66		

Loss of Pension Rights to 9th December, 1993

£60 per week X 75.8 weeks	=	£4,548

Total Loss to 9/12/93	-	£9,393.94
		4,548.00
		£13,941.94

1.5 Year's Future Loss

£24,336.00	nett salary
£ 4,680.00	plus future loss of pension rights (£60 X 78 weeks)
£29,016.00	
£14,669.41	less projected (estimated) earnings for 1.5 year period based on nett average weekly job earnings and Social Welfare in the period from 26/6/92 to 9/12/93
£14,349.59	

Total Tribunal Award	£13,941.94	-	loss to 9/12/93
	14,349.59	-	future loss
Total	£28,291.53		

All the calculations are based on nett figures.

Mr. John A. Harrington:-

Loss to Date of Hearing on Remedy (i.e. 26th June, 1992 to 9th December, 1993)

£310.00 X 75.8 weeks	=	£23,498
Less amounts received in period (see below)	=	£ 9,410
Total	=	£14,088

Amounts Received:

£ 5,000.00	-	Job Earnings
£ 3,640.00	-	Social Welfare to August 1993
£ 770.00	-	FAS Course
£ 9,410.00		

Loss of Pension Rights to 9th December, 1993

£60 per week X 75.8 weeks	=	£4,548

Total Loss to 9/12/93	-	£14,088.00
		£ 4,548.00
		£18,636.00

1.5 Year's Future Loss

£16,120 X 1.5	=	£24,180.00
Future loss of pension rights	=	£ 4,680.00
£60 X 78 weeks	=	£28,860.00
Less projected (estimated) earnings for 1.5 year period based on nett average weekly job earnings and Social Welfare in the period 26/6/92 to 9/12/93		£ 9,683.11
Total		£19,176.89

Total Tribunal Award	£18,636.00	-	loss to 9/12/93
	£19,176.89	-	future loss
Total	£37,812.89		

All the calculations are based on nett figures.

In projecting the future loss of the claimants the Tribunal awards 1.5 years future loss to Mr. B. Kelly and Mr. J. Harrington as they were least successful in mitigating their loss. The Tribunal projects 1 year's future loss in the case of Mr. D. Boucher and D. O'Neill.

In assessing the loss of the claimants' pension rights the Tribunal based it's decision on the evidence of Mr. Boucher being the only evidence available to it and assessed the respondent's weekly contribution at £60.00. The Tribunal's findings are also based on the assumption that the claimants' accrued pension rights, up to the time of their dismissal, are still available to them and are transferrable to new employment.

Payments made to the claimants on the termination of their employment (except minimum notice) have not been deducted by the Tribunal in calculating the overall awards to the claimants as these payments were based on the claimants' statutory and contractual rights. Even though the Tribunal is aware of and is concerned about the respondent's ability to pay the awards made we feel it our duty to base our findings on the loss suffered by the claimants and we have made our best efforts to establish the loss sustained by the claimants resulting from the dismissals.

The claims under the Redundancy Payments Acts, 1967 to 1991 do not apply in this case. Accordingly the claims fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This 3rd day of March 1994,

(Sgd.) _____
(CHAIRMAN)

jk/tos

Sullivan (claimant) v Department of Education (respondent): Employment Appeals PW 2/97 (Cork, 31 July 1997)

Payment of Wages – Secondary schoolteacher – Whether Department of Education employer – Classification of single honours degree at pass level for purposes of qualification allowance – Whether classification resulted in unlawful deduction – Payment of Wages Act 1991 (No. 25), sections 5(5) and 7

Payment of wages – Definition of 'deduction' – Whether non-payment of proper entitlements from commencement of employment constituted a deduction – Payment of Wages Act 1991 (No. 25), sections 5(5) and 7

Facts The applicant graduated from University College Cork in 1989 with a BA single honours degree in French and English. The following year she obtained her Higher Diploma in Education and commenced work as a teacher. Her salary was made up of a basic rate and two qualification allowances. One such qualification allowance was a degree allowance. The rate of payment of this allowance varied depending on whether the recipient held an honours or a pass degree. The claimant was paid at the lower level equivalent to the pass degree qualification allowance. She claimed that the status of her degree was equivalent to an honours degree and that therefore she was entitled to the higher level of allowance and that the denial to her of the higher level allowance amounted to an unlawful deduction within the meaning of the Payment of Wages Act 1991. The respondent contended that since part of the applicant's degree was taken at pass level, it did not meet the criteria set out by the department for payment at the higher level. It also submitted that the matter had already been voted on by the teachers' unions in the context of the revised proposals for the programme for competitiveness and work. Finally, it claimed that the department was not the employer of the applicant, merely the paying agent. The matter came before a Rights Commissioner (pursuant to section 7 of the 1991 Act) who decided in favour of the respondent. The claimant then appealed to the Employment Appeals Tribunal.

Determined

(1) There are sufficiently close ties and controls exercised by the Department of Education in relation to individual teachers and that therefore

the department is the employer for the purposes of the Payment of Wages Act 1991.

(2) Whilst there is no specific definition of 'deduction' in the Payment of Wages Act, guidance can be taken from the definition of 'wages' which includes all sums to which an employee is properly entitled. If an employee does not receive what is properly payable to him or her from the outset, then this can amount to a deduction within the meaning of the 1991 Act.

(3) The primary degree (first or second honours) allowance was properly allowable to the claimant and the single honours programme was in all respects an honours degree programme.

(4) The non-payment of the qualification allowance appropriate to primary degree (first or second honours) for a single honours degree was an unlawful deduction within the meaning of the Payment of Wages Act 1991.

Full text of the Tribunal's determination

Background

This claim comes before this division of the Employment Appeals Tribunal by way of appeal from a decision of a Rights Commissioner pursuant to section 7 of the Payment of Wages Act 1991.

The claimant's claim is that she has been paid an incorrect rate of degree allowance in respect of her pay as a secondary school teacher since she commenced work as a secondary school teacher and that due recognition has not been given to the status of her degree and by reason of the alleged incorrect rate of degree allowance granted by the Department of Education ('the Department') that this amounts to an unlawful deduction within the meaning of the Payment of Wages Act 1991.

Ms Sullivan graduated from University College Cork (UCC) in 1989 having achieved a BA single honours degree and her BA degree subjects were French and English. She got her Higher Diploma in Education in 1990. She commenced employment in September 1991 at St. Mary's Secondary School, Buttevant, Co. Cork for 15 hours per week and for the following two academic years *i.e.* 1992 to 1994 she worked at Mount St. Michael Secondary School, Roscarbery, Co. Cork in a temporary whole-time position for 22 hours per week and since 1994 has been employed at Sacred Heart College, Carrignavar, Co. Cork where she is paid an incremental salary by the Department. Her salary consists of a basic salary, derived from the basic scale and, in addition, two qualification allowances. One of these is a degree allowance. Ms Sullivan's degree allowance is paid at the pass degree level the current rate for which is £812 per annum and she argues that the appropriate rate in her case should be that in respect of primary degree (1st and 2nd honours) which amounts to £2,167 per annum. She therefore claims the dif-

ferential between these rates since she commenced work in 1991. Two points are to be noted in this regard. Firstly, in respect of her 1991 post from 1 September 1991 until 31 August 1992 her position was officially that of eligible part-time teacher with less than a minimum 18 hours per week and therefore any allowance she qualified for was to be paid on a pro-rata basis which in her case in respect of that particular year would be calculated with reference to 15/22 parts of the full allowance payable.

Secondly in respect of the full claim since 1991 the Department argues that agreement has been reached in the context of the 'Revised Teachers' PCW Proposals' which have recently been concluded in the context of the Programme for Competitiveness and Work (PCW) and part of which proposals consists of the agreement that a teacher with the same qualifications as Ms Sullivan will be paid from now on at the primary degree (1st and 2nd class honours) allowance level and back-dated to 1 July 1994 and the Department argues that this, together with the rest of the proposals is the subject matter of a ballot by all of the teachers' union including the Association of Secondary Teachers Ireland (ASTI) and has been accepted by that union. Ms Sullivan says she voted against this proposal and in any event, seeing that the Department is prepared to pay full rate back to 1 July 1994 this disposes of that particular period but that she continues to pursue her claim in respect of the period from which she commenced work and became eligible for a qualification allowance to 1 July 1994.

In essence, therefore, Ms Sullivan insists that an unlawful deduction continues in respect of the period from which she commenced work until, at least, 1994 and the Department contests that. That is the period we are concerned with and we have to consider the matter in that light.

Evidence/submissions from both sides

Mr Tadgh O'Ruairc, assistant principal officer with the Department of Education, outlined the background to the setting up of the system of qualification allowances for teachers in 1969 and the history of the matter since then. He also outlined the policy decision taken at Department level in relation to the course which was taken by Ms Sullivan in UCC namely the BA (single honours) course and he outlined how the Department, when considering the appropriate level of qualification allowance to apply in that particular case, had regard to the fact as far as it was concerned there was a pass element involved and that the course was one whereby part of the course was taken at honours level and part was taken at pass level and in that respect did not meet the criteria operated by the Department on foot of the policy decision (for qualifications for the higher qualification allowance) namely all subjects be taken to honours level in the final examinations. Mr O'Ruairc conceded that reliance was placed on the college calendar of 1980/1981 which contained a description of the course and conceded that up to 1990 at least, no other contact had been made directly with the college and since 1990 he says there was correspondence with the UCC authority regarding the status of the course. He stressed that the Department of Education was not disputing the academic value of the qualification which had been achieved by Ms Sullivan but that it had

made a decision as to the circumstances within which a primary degree (1st or 2nd honours) allowance would be granted and Ms Sullivan did not come within those circumstances.

Mr O'Ruairc relied on the agreed scheme of conciliation open to arbitration for teachers and in particular clauses 8, 18(a), 18(b) and 20(4) all of which he said indicate that matters such as those raised by Ms Sullivan in these proceedings were intended to be dealt with by way of the arbitration/conciliation provided for in the conciliation agreement as a scheme of conciliation and arbitration agreed upon by the Minister for Finance, the Minister for Education, the Irish National Teachers' Organisation, the ASTI, and managerial authorities of secondary schools amongst others. He placed further reliance on the agreed December 1996 revised teachers' PCW proposals in relation to the pay and conditions of teachers where provision was made for, amongst other things, agreement on disputed qualification allowances. Mr O'Ruairc dealt at length with the question as to whether the Department of Education could be considered to be the employer and he contended that it could not and argued that effectively the Department is simply the paying agent and the Board of Management should properly be considered to be the employer in the case of a teacher in that it is the Board of Management and not the Department which exercises real control in most areas of a teacher's work and it was due to the unique set-up of the system of education in Ireland that the Department (as agent of the State) has a role in terms of providing the remuneration of teachers and he explained how the system operated in terms of grants payable when making teachers' incremental salary allowances etc.

He further contended that the alleged differential between the primary degree (pass) allowance which is what Ms Sullivan was allowed and the higher allowance could not be considered to be a deduction within the meaning of the Payment of Wages Act 1991. Since the commencement of her work as a teacher she was always been paid the appropriate rate of incremental salary and always the same allowance from the outset and there has been no change in that. In those circumstances one is not dealing with a-deduction in the sense that she is now receiving less than she did at a previous point in time in her relationship with the Department.

The Tribunal heard detailed submissions from Marie Mulcahy of the ASTI on behalf of Ms Sullivan. She contends that there was ample scope for considering the Department to be the employer in the particular case and referred to various ways in which she contended the Department exercised such controls over pay scales, a role in the pension scheme, setting the entry requirements relating to acceptable qualifications for teachers and the Department's power in relation to maintaining appropriate pupil/teacher ratio and in the context of the redeployment of teachers.

She placed reliance on section 5(1) of the Payment of Wages Act 1991. In reply to Mr O'Ruairc's contention that there was no deduction within the meaning of the 1991 Act, Ms Mulcahy argued that there was a deduction from the outset. She said the conciliation process could not be construed as disentitling Ms Sullivan to make her claim privately under the Payment of Wages Act 1991. She said the

Act does not exclude matters which can also be the subject matter of conciliation. Ms Sullivan herself made a submission to the Tribunal and took the Tribunal through the history of her dealings with the Department which she conceded that like it or not the situation is now going to be corrected as far as the period from 1 July 1994 to date is concerned but she wants further backdating. The Tribunal heard from Aine Hyland, Professor of Education at UCC who explained the set up of the BA (Honours) Degree Programme and the two recognised routes to that degree namely the joint honours and single honours. She explained how the Department of Education and the college authority and the National University of Ireland (NUI) would consider that there is no reason for making a distinction between an honours degree obtained by either route, how the single honours involved specialisation in one subject with less weight being given to the second subject, the minor subject, whereas the joint honours programme involves two subjects both of which are given equal weight.

Correspondence between the Department and UCC going back over the previous few years was relied upon in this respect, and Ms Hyland's view is that effectively the Department got it wrong and made a mistake when drawing a distinction between joint honours and single honours for the purpose of awarding qualification allowances to teachers. In the view of the college authority what Ms Sullivan had done in gaining her single honours degree was taking English, her major subject, to honours level and her minor subject, French was also taken at honours level and was taken indeed in common with the other honour students in French. In those circumstances there was no logical reason why the Department should award the qualification allowance appropriate to a primary degree (pass) qualification. Ms Sullivan herself felt that if the Department had made appropriate enquiries as to the status of the course it would have been satisfied that it was in essence an honours degree programme and in all respects she felt she was not treated fairly by the Department. Ms Sullivan cited the example of a foreign person who teaches in this jurisdiction and in respect of whom the Department comes to consider the question of qualification allowances: that enquiry is made in the case of such person as to the precise status of overseas qualifications whereas this is not so in the case of persons in Ms Sullivan's position.

Ms Sullivan felt that when she achieved her BA (single honours) degree and thereafter achieved employment as a secondary school teacher in a state school that she had a legitimate expectation to expect that she would be paid the qualification allowance appropriate to primary degree (1st or 2nd honours).

Ms Sullivan in her final year achieved 2nd class honours in her major subject. Ms Hyland confirmed that in her view there was no doubt that this was an honours degree. Ms Sullivan's qualifications, in the view of Ms Hyland, therefore are those of BA degree with 2nd class honours, grade 2.

Determination

The Tribunal has carefully considered all the submissions made and all the evidence and all the documents submitted to it.

The Tribunal unanimously allows the appeal of Ms Sullivan. 1966

The Tribunal does not accept that the Department is not the employer. The board of management or other managing authority of a school may well have a role in the day to day running of the school and indeed in engaging teachers, interviewing etc. The reality is that such boards of management or other managing authority in relation to state schools have little or no role when it comes to the question of remuneration of teachers which is a most important element and aspect of the relationship between teachers and their employers. The Tribunal considers that the role of the Department of Education goes beyond that of 'paying agent'. The Department is empowered to negotiate teachers' salaries and qualification allowances and makes policy decisions in relation to the type of degree which Ms Sullivan and other teachers have studied for in relation to the status of such degree as regards qualification allowances. The Department has a role in the whole area of maintaining appropriate pupil/teacher ratio indirectly and regulates the number of teachers in any particular school as in the scheme of redeployment. If ultimately redeployment in the case of any particular teacher cannot be settled by agreement, the Minister is empowered to withhold the grant of the sum of money which would go towards paying that particular teacher's salary and effectively has the power to deprive a particular teacher of his or her salary.

In all of those circumstances the Tribunal does not accept that the Department is simply a 'paying agent' which simply pays out the money at the request of the state school concerned. In relation to the question of the hours worked for which a teacher qualifies for his or her monthly salary, the school principal has a role in terms of certifying the hours worked. However in respect of all teachers, when it comes to the question of qualification allowances, these aspects of a teacher's salary involve no role for the school and are something which go to the teacher's particular qualification and are a constant. In fact the school principal describes him or herself as 'employer' on the monthly certification form but the form is not conclusive.

Furthermore because of the minimal role which the board of management or other managerial authority exercises in relation to the whole question of teachers' remuneration especially in the case of a full-time teacher it follows that where a teacher has a complaint/query in relation to his or her salary or takes issue with it the teacher in question is likely to end up dealing with the Department and not the school. When it comes to the question of remuneration, for the Department to say that it is not the employer would effectively mean that as far as the question of remuneration would go the teacher would have no employer which is inconceivable. If a deduction is made from a teacher's salary the school is likely to say that it, having no role in the question of payment of remuneration, cannot be considered to have made such deduction and the Department may say that it is not the employer for the purposes of any aspect of the teacher's employment. It is inconceivable that all of the teachers in the country should not have the benefit of the Payment of Wages Act 1991. It is difficult to see how the board of management could, short of ordering the Department to make a deduction, actually make a deduction from any particular teacher's remuneration.

In all the circumstances we are satisfied there are sufficiently close ties and

controls exercised by the Department in relation to individual teachers. We are satisfied that the Department is the employer for the purposes of the Payment of Wages Act 1991.

The Tribunal considers that the non-payment of the qualification allowance appropriate to primary degree (1st or 2nd honours) was an unlawful deduction within the meaning of the 1991 Act.

There is no specific definition of a deduction in the Act; guidance can be taken from the definition of 'wages' in section 1 of the Act:

> Any sums payable to the employee by the employer in connection with his employment, including: . . . .

We consider the word 'payable' to be significant. Whereas Mr O'Ruairc contended that there is no deduction where an employee continues to receive the same amount(and the same composition)of wages from the outset, the Tribunal considers that if an employee does not receive what is properly payable to him or her from the outset then this can amount to a deduction within the meaning of the 1991 Act. We take 'payable' to mean properly payable. The definition of 'wages' goes on to give examples of types of payments which can amount to 'wages' and states that the payments can amount to wages 'whether payable under [his] contract of employment or otherwise. . . .' Although in our view it is not simply a matter of what may have been agreed or arranged or indeed paid from the outset but, in the view of the Tribunal, all sums to which an employee is properly entitled.

An employee may not be aware of his or her full entitlements and an employer may have a greater awareness of the employees entitlements in terms of pay etc. and it would be highly unjust for an employee to lose a claim under the Payment of Wages Act 1991 for an unlawful deduction simply because an employer, being aware of the employee's proper entitlement, chose, unknown to the employee, to pay less than that from the outset.

As to whether the primary degree (1st or 2nd honours) allowance was properly payable to Ms Sullivan we find that in all the circumstances it was. We are satisfied that the BA (single honours) programme was in all respects an honours degree programme and could not in any respect be considered to be a pass degree programme. We are satisfied that this is what was envisaged for that degree programme, that such was set up by the college authorities and indeed the Senate of the NUI through the normal evaluation process for university courses.

We are satisfied there was no justification for the Department to have applied, from 1991 in Ms Sullivan's case, the qualification allowance appropriate to the primary degree (pass). If indeed a policy decision was taken whereby Ms Sullivan's degree was considered to be more appropriate to primary degree (pass) qualification allowance then the decision was wholly unreasonable and illogical. In respect of the rate from 1 July 1994 to date and for the future the Department has agreed through the PCW negotiations with the ASTI to pay the higher qualification allowance in respect of degrees such as Ms Sullivan obtained and in respect

of the period prior to that since Ms Sullivan commenced employment. We find that Ms Sullivan is entitled to compensation calculated by reference to the differential amounts between primary degree (pass) qualification allowance amount and primary degree (1st and 2nd honours) amount for the relevant period with the appropriate adjustment being made to take account of the fact that in respect of the academic year, August 1991 to July 1992, Ms Sullivan worked 15 hours per week.

For the claimant: *Marie Mulcahy of the Association of Secondary Teachers Ireland*
For the respondent: *Tadhg O'Ruairc of the Department of Education*

Division of the Tribunal: *C. Linehan BL (Chairperson), P. Harrington, A. McCormack*

Cathrina Keville
Barrister

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Ms Elizabeth Tierney, Sheeaun, Kilmaley, Ennis, Co. Clare

CASE NO.
UD886/1999

against

DER Ireland Ltd., I.D.A. Business Park, Newcastle,
Galway

under

UNFAIR DISMISSALS ACTS, 1977 TO 1993

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. R. O'Connell

Members: Mr. B. O'Carroll
Mr. A. Mc Cormack

heard this claim at Galway on 19th January 2000
and at Dublin on 27th June 2000

Representation:
Claimant(s) :
Ms. Marguerite Bolger B.L instructed by W.& E. Bradshaw, Solicitors, 79 Merrion Square, Dublin 2.

Respondent(s) :
Mr Paul O' Neill B.L instructed by Mr. Arthur Cox, Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:-

The case for the claimant :
Ms Elizabeth Tierney the claimant, commenced employment with the respondent, a German tour operator company DER Ireland Ltd. in November 1997 on a part time basis -four days per week .Her duties as an accounts executive included organising package tours, dealing with world-wide accounts and paying hotel invoices by computer. She worked on an hourly basis and initially did not have a contract of employment. She was treated well by management and in June 1998, because she wanted to remain in the company, she signed a contract.

In April 1999 "everything changed for her" she said. She was approached by both her supervisors and asked to work on Wednesdays, her free day. Ms Lenihan told her that because there was a lot to be done it would be appreciated if she would work, the claimant said that it was awkward but that she could work " the odd day". Ms. Tierney stated that she was engaged in a private counselling practice on Wednesdays.

On her return from two weeks holiday Ms Tierney said she noticed some abusive and bullying behaviour towards her. Ms Lenihan, she said, would be friendly and speak to her and then for a week or two she would not even say good morning to her. Ms Tierney also gave evidence of further altercations between herself and Aisling her other supervisor, regarding annual leave and criticisms of the standard of her work. The claimant asked to speak to Ms Lenihan and Aisling in an effort " to clear the air". At the meeting, Ms. Lenihan laughed and Aisling was aggressive towards her.She felt there was no positive outcome to the meeting.

Things deteriorated from then, the claimant felt that she was being watched each time she took a break, remarks were made about her work, she was cold-shouldered. She did not feel comfortable, she was being intimidated by them. Ms Tierney spoke to Mr. Keogh about her concerns and they met for an hour on 10 June 1999 to discuss matters. He told her that some of the comments which she was making for example with regard to her supervisors competence, he had heard before. He seemed to listen, he wanted facts and proof of what she was telling him. Mr. Keogh asked her to write down her complaints and told her that he would speak to Ms Lenihan and Aisling and asked her to report back to him in two weeks to see if there was any improvement in their behaviour towards her. The claimant felt , however, that things got worse after the meeting, there was no improvement in the atmosphere she said.

The company moved offices shortly after and Ms Tierney applied for and was granted four days leave at the time. She returned to the new building and neither Ms Lenihan nor Aisling greeted her. She had to ask where the computer was, was told she wouldn't be getting a swipe card. She needed a swipe card to gain access to the building and to clock in. She was told to write down her start/finishing times and break times. She was told by Ms Linehan that she did not officially exist, that " Germany" did not want her there.

Ms Lenihan enquired a week later while checking invoices, if she(the claimant) was finding the drive too long to the new building. The claimant said no, that it took an extra ten minutes only. Ms Linehan again mentioned that the claimant was not wanted in the office and the only reason she was there was because "Kevin wanted her not Franco in Germany".

Lorraine, another fellow employee , was doing similar work to the claimant. The claimant had no problems with her initially but noticed that certainly she had become "a little disrespectful" as time progressed. Ms Tierney felt that Ms Linehan "was bringing Lorraine into it more often". An altercation occurred between the claimant and Lorraine on 15 July while

the claimant would " take to heart " . The Tribunal was told that Ms Mary Lenihan, the supervisor felt her relationship with the claimant was based on trust and respect and a lot of the staff looked to Liz for advice on personal matters as well as work related issues. Ms Lenihan felt that the claimant had over reacted to the remark and that one incident like that could not result in Reactive Anxiety Disorder.
Mr. Kevin Keogh, General Manager, said in evidence that he valued the claimants contribution to the company and told her when she rang that he did not want to lose her and that " She could not throw away her livelihood over one sentence " The Tribunal was told that the claimant felt she could not return to work and Mr. Keogh asked her to take the next day off and come in on Monday when she had relaxed and thought things through. As the claimant could not be persuaded he asked her to send in a written statement describing the whole incident and her resignation if that was what she was intent in doing.
The supervisor and the General Manager were both surprised to receive a sick note on the following Wednesday.

Determination:
The Tribunal is unanimous in its finding that the claimant has not succeeded in discharging the onus placed upon her under the Unfair Dismissals Acts 1977 to 1993 to prove her claim that she was constructively dismissed.

This is a difficult burden to discharge, and the claimant must show that it was reasonable for her to consider herself dismissed, owing to the conduct of her employer. Central to this is that she shows that she has pursued to a reasonable extent all internal avenues of appeal without a satisfactory or reasonable outcome having been achieved.

The Tribunal finds that in this case the claimant has not succeeded in establishing this. The Tribunal finds that the respondent company acted, overall, in a fair and reasonable manner.

While the Tribunal acknowledges that the incident involving Ms. Tierneys co-worker Lorraine amounted to unacceptable behaviour in the workplace, we find that the company equally acknowledges this to be the case.

The claimant was urged by the company to withdraw her resignation and give the matter some further thought. We find that she did not take advantage of this opportunity. We find that her subsequent submission of a sick certificate to the company, several days after the deadline allowed to her for reconsideration had lapsed, without prior or simultaneous added communication to the company that she did not consider her employment with them terminated, was not reasonable on her part. When the claimant did not return to the workplace on the Monday, her employer was entitled to consider that her resignation was confirmed. We have noted the case of Keane -v- Western Health Board UD940/1988 cited by Counsel for the claimant. We find this to be not persuasive in the present case as in Keane the resignation was sought to be withdrawn before it became effective, and the request was most specific and unambiguous and made in written form.

sorting out invoices. Lorraine used abusive language to the claimant, all workers laughed and one or two were surprised and told Lorraine to apologise. She apologised to them and eventually to the claimant. The claimant was totally humiliated by the laughter. Aisling came and asked what had happened and the language was repeated. The claimant finished what she was doing and returned to her desk. She was shaking and could not continue working, she felt quite ill. She could not concentrate on her work and decided to go home. She asked a colleague to inform Aisling and Ms Lenihan that she had gone home.

She phoned Mr. Keogh in Germany and told him what had occurred, how events had escalated and deteriorated since their meeting. He told her he would ring her on the following morning 16 July 1999 between 8:30.a.m and 9:30.a.m. to discuss the matter. He contacted her at 5:15 p.m. . The claimant was upset, told him how intimidated she felt because of her supervisors attitude and behaviour. Mr. Keogh, while he did not suggest anything,said that maybe they would find a way through the difficulties. The claimant told Mr. Keogh that she felt at that stage that all she could do was to resign, She could not work there anymore. He asked her to submit her resignation and furnish the information which he had requested on 10 June 1999 by the time that he returned to Galway.(Ms Tierney had not given a written account of events to Mr. Keogh as she had been asked to do at the meeting of 10 June1999).

She went to her doctor on Monday 19 July 1999 because she could not sleep or eat for a number of weeks beforehand. He gave her a medical certificate. She submitted the medical certificate to Mr Keogh.
Correspondence between the claimant and Mr. Keogh ensued resulting in differences in their interpretations of what the claimant meant when she told Mr. Keogh on the phone that she would resign and the subsequent submission of the medical certificate.

During cross examination the claimant acknowledged that the company had facilitated her by allowing her to work a four day week and that from "Germanys'" point of view she was a somewhat " unofficial" person in the scheme.

Ms. Tierney told the Tribunal that she did not recall Mr. Keogh telling her she was a good worker and asking her to stay on when she rang him on 15 July 1999. All he had said was that "maybe we'll find a way through this ". He did not ask her "to sleep on it" she said.

She could not revert to Mr. Keogh within two weeks from 10 June 1999 because the company were moving office. She did not think that he would be interested while the move was taking place, she said.

The case for the Respondent:
Ms Laura Curley and Ms. Marie Fahy, co-workers of the claimant who were in the vicinity when the remark was made said, in evidence, that Lorraine apologised immediately albeit in a general way and they did not feel the remark was something

We note the claimant's evidence that the company made no specific proposals as to changes in the workplace prior to her return; however we do not find that we are in a position to assume that some mutually acceptable changes would not have been forthcoming had she returned.

The claimants claim under the Unfair Dismissals Acts is disallowed.

Sealed with the Seal of the

Employment Appeals Tribunal

This 11th day of September 2000

(Sgd.) _____
(CHAIRMAN)

cor/bs

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE,	UD206/2011

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. F. Moloney
Ms. P. Ni Shéaghdha

heard this claim in Dublin on 22nd June 2012

Representation:

_____

Claimant(s):

Respondent(s):

The determination of the Tribunal was as follows:-

An unfair dismissal claim was lodged in respect of an employment which commenced in April 2005 and ended in late June 2010.

Grounds of Claim

In the grounds of claim it was stated that the claimant had commenced in the role of Environmental Compliance Officer but that the role had evolved through promotion to include, at various times, management of Civic Amenity Sites, Contract and Site Management, Facility Manager for Ballymount, transport co-ordination, environmental management on all Dublin sites and the Midlands Region and commercial tendering. The claimant's job title/role at the date of the termination of employment was Regional Environmental Manager.

On 28 April 2010 the claimant was informed by her line manager that he had been informed by

the General Manager of the Respondent company that the Compliance department had been targeted for redundancies, that both he and she were in danger of being made redundant and that the General Manager and the Human Resource Manager would be requesting a meeting with her later that day.

On 29 April 2010, during the course of a meeting with the General Manager and the Human Resource Manager the claimant was informed that the Compliance structure was being flattened and that her role would cease to exist.

On 26 May 2010 the claimant was furnished with a formal notice of redundancy and a form RP50.

GK [former managing director] gave evidence that the company decided at the meeting in a hotel in county Louth on the 23rd April 2010 that the decision was taken to dismiss the claimant and another employee by reason of redundancy. GK said he was sure of this and that "the decision was made at the [named hotel]. Their names were on the board"

Further or in the alternative, the claimant believed that she had been unfairly selected for redundancy and that fair procedures had not been applied.

In those circumstances the claimant believed that the termination of her employment constituted an unfair dismissal and she sought reinstatement.

Grounds of Defence

It was contended that on 26 June 2010 the claimant had been made redundant by the respondent from her employment as part of a company restructuring which justified the termination of her contract such that she had no claim against the respondent under unfair dismissal legislation.

It was accepted that the claimant had commenced employment with the respondent in the position of Regional Environment Manager. Following an extensive review of the business, the decision was made, at a meeting in a hotel in County Louth on the 23rd April 2010, to restructure the Compliance Department due to a decline in turnover and ongoing losses coupled with a reduction in waste tonnage processed due to the loss of contracts. As a result, the company proposed to implement a new structure which would affect the Compliance function in that a number of roles including the role of Regional Environmental Manager would cease to exist.

The claimant was the only person who worked in the role of Regional Environment Manager and, following her departure, the role ceased to exist.

The claimant was formally notified of the potential redundancy on 29 April 2010 and, following a lengthy consultation process which involved several meetings, she was advised on 26 May (2010) that her position was being made redundant and she was given notice that this would come into effect on 26 June 2010. The respondent gave evidence that the claimant did not appeal the decision.

Determination:

Having considered the totality of the evidence the Tribunal is not satisfied that the respondent acted fairly and reasonably when addressing the need to reduce the number of employees. When an employer is making an employee redundant, while retaining other employees, the selection criteria being used should be objectively applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria adopted will come under close scrutiny if an employee claims that he/she was unfairly selected for redundancy. The employer must follow the agreed procedure when making the selection. Where there is no agreed procedure in relation to selection for redundancy, as in this case, then the employer must act fairly and reasonably.

The Tribunal noted that the respondent kept taking away parts of the claimant's job and that interviewing had taken place on 12 May 2010 for an alternative position within the company for which a job specification was not formulated until 14 May 2010. The Tribunal finds this most surprising. The Tribunal also takes the view that the claimant could have done a health-and-safety manager job which ultimately took on a construction-related title given that she had no construction-related qualification. The respondent had tried to row back and disadvantage the claimant.

The Tribunal does not accept that the Respondent acted fairly and reasonably in this case for the following reasons:

1. the decision to make the claimant redundant was taken at a meeting in a hotel in County Louth on the 23rd April 2010. The chairman of the company (SD) attended this meeting;
2. there was no serious or worthwhile consultation with the claimant prior to making her redundant. The consultation should be real and substantial. The decision to make the claimant's position redundant was taken before the consultation process commenced;
3. no suitable or substantial consideration was given to alternatives to dismissing the claimant by reason of redundancy;
4. there was no worthwhile discussion in relation to the criteria used for selecting the claimant. The selection criteria should apply to all employees working in the same area as the claimant but should also consider other positions which the claimant is capable of doing.

The Tribunal finds that the claimant was unfairly selected for redundancy and is satisfied that the respondent has contravened Section 6 (3) of the Unfair Dismissals Act 1977 which states:

'Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either—

(a) the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or

(b) he was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union, or an excepted body under the Trade Union Acts, 1941 and 1971, representing him or

has been established by the custom and practice of the employment concerned) relating to redundancy and there were no special reasons justifying a departure from that procedure,

then the dismissal shall be deemed, for the purposes of this Act, to be an unfair dismissal.'

Employers must act reasonably in taking a decision to dismiss an employee on the grounds of redundancy. Indeed, Section 5 of the Unfair Dismissals (Amendment) Act, 1993, provides that the reasonableness of the employer's conduct is now an essential factor to be considered in the context of all dismissals. Section 5, inter alia, stipulates that:

".....in determining if a dismissal is an unfair dismissal, regard may be had……to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal"

The fact that the claimant did not appeal the dismissal was considered by the Tribunal but the Tribunal notes that the appeal would have to be made to SD, the chairman of the Company. The Tribunal further notes that SD was at the meeting which took the decision to dismiss the claimant. Therefore, it would be entirely inappropriate, and contrary to fair procedures, that he should hear the appeal.

The Tribunal is unanimous in finding, under the Unfair Dismissals Acts, 1977 to 2007, that the claimant was unfairly dismissed because she was unfairly selected for redundancy. The Tribunal deems compensation to be the most appropriate remedy and awards the claimant fifty thousand euro (€50,000.00) under the said legislation. For the avoidance of doubt this award is in addition to all payments already received by her in connection with the termination of her employment including a redundancy payment of €10,014.00 paid to the claimant under the Redundancy Payments Acts, 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Mark Harrold, 3 Castle Terrace, Malahide, County Dublin

CASE NO.
UD1123/2004

against

St Michael's House, Registered Office, Willowfield Park, Goatstown, Dublin 14

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr C. Guiney B.L.

Members: Mr C. McHugh
Ms M. Maher

heard this claim at Dublin on 19th July 2005
and 16th January 2006
and 17th January 2006
and 18th January 2006
and 19th January 2006
and 20th January 2006
and 9th June 2006
and 12th June 2006
and 13th June 2006
and 14th June 2006
and 29th November 2006

Representation:

Claimant(s): Mr. Michael Howard S.C, and Mr. Gordon Duffy BL instructed by Ken Smyth & Co., Solicitors, Suite One, Merrion House, Lower Fitzwilliam Street, Dublin 2

Respondent(s): Mr. Tom Mallon BL instructed by Ms. Helen Gore Grimes, Solicitor
Gore & Grimes, Solicitors, Cavendish House, Smithfield, Dublin 7

The determination of the Tribunal was as follows:-

Background

Counsel for the claimant in an opening statement told the Tribunal that there was a culture of bullying and harassment in the respondent company in circumstances in which it related to the claimant's ability to carry out his job. He outlined to the Tribunal that eight witnesses would give evidence on behalf of the claimant: a senior social worker, a care worker, a general practitioner, a

step brother of a former patient in the respondent, a former relative who was also a social worker with the respondent and a character witness. The claimant had a good working relationship with the respondent until around the year 2001. The claimant communicated with the Minister for Health regarding a draft report, which was prepared around 2003. He highlighted what he thought were the deficiencies in relation to the content of the report.

Claimant's Case

The claimant told the Tribunal that he graduated with a BA Honours in Psychology from UCD in 1983. He had a Masters in Clinical Psychology from UCD in 1984, a Masters from Southern Illinois University, USA in 1987. He obtained a PhD in June 1990 from the California School of Professional Psychology Los Angeles. He commenced employment with the respondent on 5th March 1991. During his tenure with the respondent he co-wrote a staff-training programme on challenging behaviour and how to deal with difficult behaviour of individuals with learning disabilities. Prior to that he had been involved in a research project, which was assessing the nature of challenging behaviour, on which he had written numerous articles.

One of the most enjoyable aspects of his job was supervising a one-week holiday camp in Brittas Bay, which was a very different aspect to his work but he thoroughly enjoyed it and it grounded him in the kind of work that he was involved in. For many years he was the nominated disc jockey at the holiday camp. That was a highly enjoyable experience for him and completely different from the more formal or academic background that he had. He endeavoured to strike a balance between looking at the broader picture and the human side of the service that the respondent was supposed to provide.

The claimant stated that he experienced difficulties around 2001. He wrote to the Chairperson of the Board, as he was horrified at the circumstances of the death of a client of the respondent Mr. P McK. He wrote a letter to the board in which he expressed concern about the culture of bullying within the organisation. There had been some instances and one in particular where a long-standing staff member of twenty-three years he believed was treated in a very unfair fashion, which ended up with him leaving the organisation. The claimant personally expressed his concern about this to the CEO of the organisation on a number of occasions. A patient Mr. PMcK was sent to a nursing home against his family's wishes. There had been a catalogue of complaints about the nursing home prior to the client being sent there. The family of Mr. PMcK was brought to the High Court compelling them to send him to the nursing home. The High Court was informed by a number of senior people from the respondent that there had never been any complaint about the nursing home. He was not aware of the full circumstances of the death of the client at the time. He wrote an article in a national newspaper in which he used the words, "we dump them into nursing homes". Following that the family of Mr. McK contacted him and it was at this point that the claimant said he was no longer prepared to work in an organisation that treated a family in this fashion and that he was going to do anything that he possibly could to address or redress this situation as a professional. The claimant highlighted his concerns; he had done this on a number of occasions about the use of nursing homes as being very inappropriate places for people with learning disabilities. The CEO Mr. PL asked him to give him an alternative and the claimant told Mr. PL that using a gym in the local school with twenty beds would be better than sending them to a nursing home because they would at least have the respondent's staff.

The claimant was unhappy that a man, in relation to a long-standing staff member, for twenty-three years a very dedicated member of staff, was embroiled in what the claimant subsequently realised was a fairly standard procedure. The claimant raised this matter with the CEO on the

administrative level. His immediate manager was Mr. MM and the claimant spoke to him. Mr.M M was sympathetic to his concerns but he did not seem to be in a position to do anything substantial about it. The claimant wrote to the board on 3rd September 2001 outlining his concerns. The chairperson of the Board Ms. S replied to him and informed him that he needed in the first instance to engage in the internal grievance procedures within the respondent. Three individuals were nominated to the internal grievance procedure. The claimant maintained that two of these gentlemen had been involved in the bullying of the staff member who had left, the one that he was particularly concerned about. The claimant replied that while he maintained that he would still be willing to engage with the process he would not engage in the process with those two individuals. The people that were investigating his legitimate complaint would need to be independent. That form of internal grievance was not proceeded with. It became clear to the claimant at that point that perhaps it was not appropriate to engage in an internal grievance procedure because he did not have a personal grievance. He wrote to the Board initially about the culture of bullying. He commented in his original letter to the Board that he had spoken up and he realised he was now likely to become a target of this bullying.

During that time he was threatened with disciplinary action if he did not co-operate with the internal grievance procedure. He received a letter from the CEO. Mr. PL and the claimant's recollection of the letter was that if he did not co-operate with the legitimate internal grievance procedure of the respondent and if he took his grievance outside of the respondent's remit without engaging in that first then he would be subjected to disciplinary action. Even though his request was not a standard grievance procedure, he highlighted issues not to do with him but issues to do with the direction that the respondent was taking and he highlighted the fact that this process did not seem to be appropriate to address those concerns that he had sent to the board.

He then received a letter from the respondent solicitors in which they outlined that they were now going to formulate an investigative sub committee of the Board. The claimant's response to this was that he felt that the presence of Mr. R on that committee would not render it objective. His reason for stating that was that Mr. R had business ties with the respondent. Mr. R's company supplied various domestic supplies to the respondent and the claimant was aware that Mr. R was a friend of the CEO Mr. L. Again the claimant highlighted the fact that these issues were too serious to be treated in a manner where he would not get an objective investigation.

He was not sure if the Board wrote to him in December 2002 or January 2003 informing him that because he had not co-operated with either of the procedures within the respondent the case was now concluded. The claimant responded that the case was not concluded and that he would now have to deal with the matter outside the respondent. He wrote to the Board and told them that the matter was definitely not concluded and that he would take it outside of the respondent and that prompted him in June 2003 to write to the Minister for Health highlighting his concerns and he enclosed his original letter to the Board. The claimant received a reply stating the matter was being passed over to the ERHA for them to set up an investigation. He was subsequently informed that Mr. MH was investigating his complaints and Mr. MH wrote to the claimant. The claimant met with Mr. MH on 24th September in an off site location for an initial meeting. At this meeting he highlighted his concerns to Mr. MH. The claimant and Mr. MH arranged to meet so that the claimant could give Mr. MH a formal response on 10th October. The claimant asked him before the meeting commenced if he had met the family of Mr. PMcK who had died and he responded no. The claimant asked him if he would be meeting with the family of Mr. PMcK and Mr. MH responded no. The claimant told Mr. MH that he would have nothing more to say to him because it was not an objective investigation. Mr. MH subsequently prepared a document, which was furnished to the claimant in October 2003. Mr. MH told the claimant that he had not co-operated

with the procedure. The claimant wrote to either the Minister or the CEO Mr. L, who sent him the report of the ERHA, at the time highlighting the deficiencies in Mr. MH's report, primarily the fact that he did not interview the family of Mr. PMcK. Mr. MH did not report his contacts with the staff member who the claimant had highlighted in his original letter to the Board; he did not interview key clinicians who had difficulties with the treatment of Mr. PMcK at the time he was sent to the nursing home.

The claimant received a letter from the respondent on 17th July 2003 approximately one month after he had written to the Minister for Health, informing him that there were a number of concerns in relation to his performance and conduct. Eight allegations were levelled against the claimant. One was that the claimant was a member of St. Joseph's Parents and Friends Association of St. Ita's. St. It's had no connection with the respondent. The claimant participated in that committee in his own time because he was extremely concerned about the incarceration of vulnerable people in the most appalling circumstances and he highlighted this on numerous occasions. He was on the Parents and Friends Committee of St. Joseph's, which was the learning disability section of St. Ita's. The allegations that the respondent made was that he was the parent representative to the committee, which he was not. The claimant read out the entire letter dated the 17th July 2003 as follows:

"As you have been advised by Lucy Walsh, Acting Head of the Psychology Department, I wish to meet with yourself and Lucy on Friday morning in my office to discuss with you a number of serious concerns in relation to your conduct and performance. These concerns relate to the following incidents: Your election campaign in early 2002: your withdrawal from the St. Michael's House Challenging Behaviour Programme and your subsequent memo dated November 5th 2002; the implications of your expert witness role in relation to Cregg House, June 2002; the implications of your role as a parent nominee on the visiting Committee to St. Ita's.

Issues arising from your meeting with a client's sister with Dr. McDonald on March 19th. Glenamoy, referring to your memo of April 7th 2003 to Mr. John Birthistle.

Your memo May 5th 2003 to Mr. Birthistle issues arising in relation to another client's sister and Raheny respite on April 4th 2003. At the meeting on Friday I intend to outline the issues of concern in relation to each of these matters in detail. I invite you to bring along your representative to this meeting."

The claimant's understanding after he sent a letter to the Minister for Health was that a campaign was going to be waged to damage his reputation to put stress on him that ultimately he may or may not be able to endure. Of the eight matters listed in that letter there were no indication that there was likely to be complaints arising in relation to these issues prior to 17th July.

The claimant was appointed as a committee member of the visiting committee of St. Ita's probably around 2002. He acted as an advocate and as somebody who was seriously concerned and as a psychologist who had a certain prominence within the learning disability field he felt a certain obligation to advocate on behalf of people being ill-treated, the most vulnerable people in society who have nobody to advocate for them. He could not describe the stress of being presented with this as an offence or a serious concern, the fact that he would spend his free time working on a voluntary basis with a group of elderly parents who were trying to make conditions better for their children.

The claimant stood as an independent candidate in the general election in 2002 in Dublin North East at the request of a parents' group in Limerick. They were setting up an alliance of eight candidates and they asked the claimant if he would consider standing in the election. His election manager was a parent of a child with a learning disability. The claimant asked permission to use the picture of the man who was on the election poster, and his parents were delighted to grant permission. The person on the poster was delighted and he subsequently had the poster in his bedroom. This was construed that the claimant violated the respondent's policy on media, that he did not get permission from the Chairman of the respondent to use this man's picture on his election material. It was also described as unprofessional, a breach of his profession to do that. The night before the election the CEO Mr. PL telephoned him at home to wish him well and he has numerous witnesses to that.

The Challenging Behaviour programme was a four-day training programme for staff that had to deal with people with learning disability. It taught them strategies to prevent difficult behaviour and how to subsequently manage them should they happen. It was a very preventative model.

The claimant contacted the training department at 4 o'clock on 4th November to establish if the material was ready for the course. At that time he was informed that there were going to be six members of St. Ita's staff in attendance at the course. He had not been consulted about this and this was the first time he heard about this. This was in 2002 and eight months prior to these serious concerns, it was discussed at the Psychology Department about the inappropriateness of including these individuals at a training programme, the disruptive effect that they had on the training programme and the necessity to plan for these individuals, if they were coming on board to the respondent.

The claimant in a letter addressed to the head of training Ms. B dated 5th November 2003 outlined his dissatisfaction. as follows:

"At a minimum this demonstrates a lack of courtesy on your part. The reality is that it is extremely shoddy practice and one in which I refuse to participate in. For the record no consultation has taken place with the Psychology Department regarding the inclusion of participants from outside the organisation on challenging behaviour. No consultation has taken place with the Psychology Department regarding the appropriateness of combining staff of an institutional setting with St. Michael's House staff on the course. Had such consultation happened you would have learned about how disruptive such a mix can be and has been in the past. No information was made available to the trainers of today's course regarding the altered make up of the group attending the course. With 76 of St. Michael's House staff on a waiting list to attend the Challenging Behaviour course it is incomprehensible and regrettable that external participants are given priority for attendance on this course."

The next concern that the claimant had was the implications of his expert witness role in relation to Cregg House in June 2002. A family from the North West contacted him to establish if he would do an assessment on the plight of their son, a 19-year-old man with autism, because they were dissatisfied with the circumstances in which he was being held at Cregg House. Cregg House did not have any connection with the respondent that he was aware of. Cregg House was a service for people with learning disabilities in the Sligo region. As far as he was aware it did not have any connection with the respondent. This case was scheduled for the High Court or one of the courts. He did an assessment on the circumstances of where the man was living and a Court case was then scheduled. The case was settled before it commenced.

The next issue arose as a result of the claimant meeting with a client's sister and a professional colleague on March 19th 2003. This was a situation in which both Dr. McD and the claimant were involved in treating a client. The claimant had never once received a set of minutes from Dr. McD in the way they were presented to him. He had never seen these minutes and what was cited to him by Ms. PD. Ms. PD outlined that it was unacceptable and unprofessional for conflicting messages to be given to a family at a meeting with two professionals; this was disturbing for the family and potentially undermined their confidence in the service. The nub of the issue was that the claimant had requested two family members to hold off on a sale of a family home to allow a client from the respondent an appropriate period of time to get over the death of a relative. Dr. McD did not express an opinion in relation to this matter to the claimant. The outcome was the family were sorry that the house had gone. The respondent told him that it would not be very satisfactory where the client was going to be accommodated but it was up to the respondent to work with him in the matter. The claimant stated that Ms. PD used the term "righteous advocate" in a disparaging way and she described the claimant as a righteous advocate in how he operated in these situations. Ms. PD indicated that a consistent pattern of the claimant adopting his righteous advocate role, which she believed, impacted on the claimant's contractual obligation with the respondent. It was referred to further in her notes that it was in conflict with the claimant's contractual obligation to be a righteous advocate. The claimant was proud of the term righteous advocate if it was genuinely meant but he believed that in the context the term righteous advocate was used to undermine him.

The claimant's understanding of concern number six related to the placement of a twenty one year old man with Down's Syndrome who had a mild learning disability, he was verbal, he was ambulant and he was placed in a residential home where there were five individuals with profound challenging behaviours, all of them non verbal: some autistic behaviour, some with behavioural problems such as banging their heads off walls, walking around the house naked and self induced fits. They had the catalogue of challenging behaviours. He felt that it was entirely inappropriate to place a verbal, mildly disabled young man, who had some challenging behaviours into such a setting. Glenamoy was a complex of houses on the respondent campus, where generally they are campus based, and most of the individuals there have some level of serious challenging behaviour combined with more moderate or severe learning disabilities. He had been involved in four of these houses (the Glens) because challenging behaviour was his specialty and he enjoyed his work there. He enjoyed working with individuals with challenging behaviour. The claimant was the actual psychologist to this house and he found out it that was this man was being moved to the house when he told him in the canteen. The claimant did not say that this was an aspect of the bullying that was going on in the respondent but it was totally inappropriate. A consultation did not take place in relation to this matter with Ms. PD. The claimant was invited to one meeting, which was a general meeting. The claimant expressed his clear dissatisfaction before this man was placed in this house.

Item number seven in the letter related to a named client. The issue was that the claimant had attended a staff meeting where a number of staff were crying. It was one of the residential houses in the Glens complex. The meeting was about the care and lack of resources for a six foot five adult, a fully ambulant, physically strong autistic adult. The staff cried over the lack of resources, their inability to manage and the fact that they felt endangered in the situation. He highlighted the issues around May 5th 2003. He was extremely concerned that staff were getting hurt. One of the difficulties when staff were not being sufficiently supported in the situation was there was a high rate of staff turnover. The last thing that people who had a propensity for challenging behaviour need was change because they do not deal with change very well. In the course of six months the staff in this house had virtually changed 100%. The claimant dealt with inexperienced staff who

were crying. As a clinician the claimant worked with what facilities are there and he advocated for resources to be provided, particularly in situations where he had an extremely difficult resident.

The concern that was listed as number eight in the letter was an issue, which arose in relation to a named client's sister and Raheny Respite in April 4th 2003. Ms. PD circulated a copy of a note from Mr. DD a middle manager to Mr. ND who was a senior manager with the respondent on 14 April 2003. Ms. PD advised that it was completely unacceptable for the claimant to actively encourage this divisiveness between family and the staff at a local level. It was an inappropriate forum in which to deal with these issues and it was an unprofessional intervention. Ms. PD said that she believed that the issues questioned the claimant's full understanding and acceptance of the limitations under which the respondent operated. The claimant read the letter dated the 4th April 2003, which is as follows:

"On the afternoon of 4th April a service user from Kilmore Road local centre was admitted to Raheny Respite unit, he had sustained a fracture and was in a splint so there was some concern about the managing of his care. Kim Flood, Head of the Unit, Raheny Respite, advised me the client's sister came to the Unit that afternoon and spoke to Kim. She said that she wished Brian to remain in Raheny until such time as a residential place was found for him. Kim advised that she could not make that decision. Una stated that she had been advised by Mark Harrold that 'he who shouts the loudest will get a service' and as Brian was on the waiting list so long he should get a place. Una seemed well versed in 'how to work the system. Kim referred back to the claimant in relation to the longer term plight of this man."

The claimant stated that he never said, "he who shouts the loudest will get a service". A meeting took place on 24th September. Present at the meeting were Ms. PD, Ms. LW, Ms. SB and Mr. RY from Impact. At that meeting the claimant responded to the eight serious concerns as described in their minutes and he very clearly outlined how each of those issues were completely spurious. He rejected every single one of them and he presented the arguments that he had presented to the Tribunal in the morning. He felt it was a calculated attempt to undermine his integrity, to place an unreasonable amount of stress on him and ultimately he supposed to leave the respondent. Ms. PD felt that the claimant was over elaborating in his dissatisfaction and he was seriously dissatisfied with the tactics that were being adopted to undermine him. Ms. PD left the room at one point and she came back and the claimant softened his statement. The claimant's concerns about this process did not alter at all and he was most dissatisfied by it. He felt that each of these issues was manufactured and designed to undermine him. His concern was about the culture of bullying in the respondent dated back to the CEO and his manner of doing business, it was similar to the previous case that he talked about, the trumped up allegations and then waiting it out until the persona finally broke.

Portion of a letter written by the claimant on 6th November stated as follows:

"I would suggest that in order to limit any further damage to the Organisation the following actions be taken by you. An unconditional withdrawal in writing of the eight allegations levelled at me, as outlined by you at the meeting of 22nd July. A written assurance that there will be no repeat of this type of harassment of me at any time in the future. A commitment by you to investigate Mr. Birthistle's actions in relation to the Glenamoy incident with a view to ensuring that there is no repeat of this type of dismissive treatment of me or any other psychologist in the Organisation. An assurance in writing that I will be accorded the courtesy of being informed on a timely basis by the Training Department of any changes in circumstances regarding the course I am giving, such as the inclusion of people from outside of St. Michael's House. You will note that I am not seeking an

apology for any of this debacle, as that would be of limited value, however I will be reserving judgment on your bullying practice for a considerable time to come. The wider issues of concern in this organisation are being addressed in a different forum, I have kept the subject matter of this letter to the issues you raised in such a regrettable manner on 22nd July 2003. Should you choose to ignore this letter or to proceed with your allegations on what you describe as a disciplinary footing I will welcome the opportunity to highlight your actions and those of your cohorts in a much more public forum."

The claimant did not receive a reply to that letter. The claimant did not receive any communication from anyone in management as to the status or outcome of these concerns. The claimant stated that there was some other issue about a locked door in one of the residential units that emerged in the course of another investigation, and this was one of the houses to which he was attached, and a process was commenced along these lines which was investigating why the door was locked for this client. It appeared by the time he had left that they were trying to narrow this down to being his responsibility. He viewed it as a further attempt to put undue pressure on him, which it did. This was around January, February, March 2004 and the person responsible for conducting that enquiry was Ms. PD.

The reason that he submitted his resignation was that there was nothing happening on his concerns. The claimant was supposed to continue working as a clinician in circumstances where he felt no matter what he did somebody somewhere would try and construct a case against him. The claimant at this stage had exhausted all of his sources or avenues of communication because it was clear the CEO did not have the capacity to take a broader view and a responsible view of the issues that he had raised initially. He did not see that there was anywhere else he could go with this issue. The claimant resigned in March 2004 and left in April. The claimant is currently employed. He works for the Health Service Executive in the North East region and is based in Dundalk and Drogheda. He is working as a half time senior clinical psychologist. He commenced employment on 26th April 2004. He earns a salary of between €35,000 and €40,000.

The claimant gave further direct evidence to the Tribunal on 16th January 2006. The claimant said he was satisfied in relation to the family of Mr. PMcK and that he had investigated thoroughly the circumstances of his death. It was the catalyst for him saying that he was not going to see further families being hurt in this way so that is why it was a very significant case and relevant to his case. He regretted that Mr. MH did not do a similarly thorough investigation of the culture of bullying that was such a feature of the respondent and continues to be. When he wrote to the Department of Health in June 2003 it was a month later when they levelled these eight other allegations, which were not specific to Mr. FS. Because he had been trying to get some independent investigation or something done about both a valued colleague and also a family who were availing of the services of the respondent. The lead up to his constructive dismissal was from 2001 when he had written to the board. The campaign against him started in July 22 when Ms. PD invited him to a meeting. In 2003 the respondent claimed that it had 129 clinicians and the number of clinicians that left was three. He could name five people on the investigations that he had completed and they were very limited investigations. He stated that a figure of 129 clinicians was preposterous. There were at most 45 clinicians within the organisation. There was a significant change in the attitude of Mr. MH from his report as presented in October 2003 to that which was presented in 2005. Mr. MH met with the family and that was the material difference. Mr. MH obtained further information as to what had happened. Up to that Mr. MH had only been acting on the information he had received from the respondent, which was why he would have viewed it as a pointless exercise to contribute to his investigation in the absence of meeting with the family of Mr. PMcK.

In cross-examination when asked by counsel for the respondent when did he make the decision to resign he responded that his personal circumstances had changed. His wife had just had their first child and he was not prepared to put his wife through the stress involved. He decided early in 2004 that he had enough He tendered his resignation in March 2004 and he probably made the decision in March. The claimant had attended for interview in March 2003 and he was offered the job in January 2004. He accepted his current job shortly before he resigned from the respondent. The reason that the decided to change from full time to half time was that he wanted to spend time with his son. He did some writing and had just launched a book. He was in the process of completing a book on parent training.

The claimant wrote to the Minister for Health in June The matter was referred to the Eastern Regional Health Authority who then appointed Mr. MH to conduct an enquiry into his complaints.

A letter addressed to regional chief executive (Mr. H) of the Eastern Regional Health Authority stated as follows: -

"Dear Mr. Hynes,

I refer to your request of 25th August to carry out an independent assessment of the above matter. I have carried out a detailed assessment of the issues involved in accordance with the terms of reference outlined by you. I attach my report and the outcome of my enquiries. I can confirm that I have received full co-operation from St. Michael's House and relevant staff in the ERHA. I regret the delay in submitting the final report, some of the people that I needed to speak to were on leave at various times and this led to the delay in completing the report. I have examined the original complaints and spoken to the person who made them. The person who made the complaints did not give me any details to support his case despite being given ample time and opportunity to do so. I have examined in some detail his complaints in respect of the client and the staff member and I am satisfied that while both are sad cases the complaints made in respect of St. Michael's House are unfounded. If the person who made the complaint had some unique insight not apparent to others in St. Michael's House or to myself he ought to have shared that with the management or the Board of St. Michael's House. I am satisfied that the process of enquiries undertaken by St. Michael's House were undertaken in a fair and appropriate manner. Please feel free to contact me if you require clarification." Then he wrote that he would forward a note on his fee under a separate covering.

The claimant accepted that Mr. MH referred to his report as a final report. The claimant stated that all of the relevant parties were not interviewed. It was not accurate to state that part of the reason that he resigned was the manner in which the respondent dealt with the transfer of the late Mr. McK who had died. It was the manner in which they went after the claimant when he tried to do something about the circumstances that he was removed to that place. When asked if he accepted that in dealings with organisations like the respondent have with the vulnerable in society that they have to take advice from psychologists, psychiatrists, medical doctors he responded the he was one himself. The claimant accepted that occasionally clinicians and other experts would disagree. Mr. MH did not interview the immediate clinicians who dealt with Mr. PMcK. When asked if he had the consent of the staff member to incorporate his name in the original letter of complaint before he delivered the letter he responded that he did not recall seeking formal consent. At this time the claimant stated that he was not claiming that he was bullied at that time at all. The claimant did not believe that his concern about the culture of bullying in the respondent was a typical grievance because it was not even about him. The claimant had no difficulty with a member of the board personally who was a businessman and tendered competitively for business with the

respondent. But if this man was investigating serious concerns that the claimant as a senior clinical professional had highlighted his relationship with the CEO and his business interests rendered him not an objective member of an investigating committee.

When asked that three out of the four years the turnover in clinical staff was about half the turnover in general staff he responded that he did not know how these statistics were derived and the claimant certainly debated them with Mr. MH. The claimant did not have any statistics to indicate otherwise. When asked that the key element of the reorganisation was relocation of the regional offices of a number of clinical staff and that psychologists alone among the clinical departments did not accept the reporting lines the clinic manager proposed in the restructuring plan of the clinic he responded the social work department objected also. When asked that on 13th March the arbitrator stated that he was satisfied that the reporting relationship to the clinic manager was appropriate and should be accepted by psychologists in the respondent the claimant stated that he recalled that decision and he recalled being very unhappy about it. When asked that he continued to complain about it years later he responded that you had to accept it. The claimant disagreed that there was a diminution of the clinical role and there was an undermining of the reputation of those who established the reputation. The claimant had expressed concern that the organisation needed outside people. All of the appointments were internal, and he did not think that was healthy for an Organisation. He disagreed that his complaint was dealt with in a fair and appropriate manner. The claimant acted out of professional concern. He did not gain anything out of writing to the Board. The only thing he knew that he would probably gain was where he has ended up. The claimant accepted that there was no reference to the report dated 23rd October 2003 being in draft.

When asked to summarise briefly how his employer bullied and harassed him in relation to Mr. P McK the claimant responded that he was not claiming any bullying or harassment in relation to Mr. PMcK. He would never have made the claims until these eight allegations were introduced a month after he wrote to the Minister for Health. His bullying and harassment claims centred on the eight allegations.

In cross-examination on 16th January 2006 the claimant stated that he was still employed in a part time job with the health board. It was his own decision to continue to work part time. His wife has had a baby. He assessed his situation and his commitment ultimately to his wife and family and that is why he continued to work part time. The claimant agreed that he had never sat down with anybody, be it in the internal three person committee, the subcommittee of the board or Mr. M.H and set out in detail his submissions justifying his allegations of bullying.

All social workers were classified as clinicians. He accepted that not all of them left the respondent because of the culture of bullying. When asked what he meant by the word "haemorrhage" he responded he was concerned about the turnover of staff. He was aware that there was continual disillusionment and the psychological department had an investigation, with the union where they complained about the undermining of the clinical role. He could not remember exactly the time of that. The psychological department lost that investigation but his observation remained valid. As part of a regionalisation structure administrative managers were going to have more input in how psychologists or clinicians actually worked. It was called a matrix system and an arbitrator was appointed. The arbitration took place in March 2003 and was concerned with the reporting relationships of psychologists within the new regionalised structure of the respondent. It was fully part of the collective negotiations between the trade union who represented the claimant and his colleagues. There was disquiet among the Psychology Department because they would not have gone that far if there had not been. There was significant disquiet about the

undermining of the clinical role at the time The claimant agreed that the arbitrator held that there was no undermining.

Mr. PL (CEO) wrote the claimant on 1st October advising him that he proposed to appoint three senior managers, Mr. K, Mr. M and Mr. R. The claimant objected to the appointment of Mr. K and Mr. R. The claimant did not have a personal grievance at that time. He had a serious concern about the treatment of a longstanding staff member and also the treatment of a family who had been sent to LC Nursing home. He did not think it was a standard grievance procedure. The one Board member that Mr. PL appointed to represent the respondent to investigate his complaints had a major business contract with the respondent. He supplied all of the respondent's medical supplies and all of their domestic supplies. The claimant received a letter from the person that he objected to in which he outlined to the claimant that he had an involvement in the respondent for the past twenty-six years. He was currently acting as Chairman of the Policy and Planning Committee and recently completed the five-year plan for the respondent for 2002-2007. He also outlined to the claimant that he had never received benefit of any kind. His only business interest was that a company which provided a service to the respondent employed him. It was the claimant's understanding that it was his own company.

The claimant did not have any personal complaint in October 2002. The claimant stated that the first time bullying started was the day that Ms. PD called him to a meeting to outline the eight allegations against him. When asked if any of these resulted in any imposition of any sanction on him he responded that he was only learning about them for the very first time at the meeting. The claimant stated that there was no procedure. The claimant attended a meeting in July and in attendance were his union representative, Ms PD (the deputy CEO) Ms. B from HR and Ms. LW who was the acting head of psychology at the time. The claimant agreed that his union representative accepted that the claimant was at the meeting to listen. Conclusions were made about the claimant's lack of professionalism and poor conduct. Before any discussion had taken place Ms. PD had made up her mind about how the claimant was supposed to be conducting himself.

It was agreed that the next meeting would take place on 25th September and the purpose of that meeting was for the claimant to respond to the eight issues. The claimant set out his responses to each of the eight issues. The claimant stated he could not comment on the use of a client's photograph on a political poster. The poster that the claimant used was to highlight the issue. The poster was a picture of a man with Down's Syndrome an elderly person and a hospital bed. Due to the fact that it was different and the claimant was standing as an independent candidate to try and raise the profile of rights for disabled people. He was not aware of a letter dated 23rd October which Ms. B wrote on behalf of the respondent to the claimant's union representative. It was the first time that he had seen it The claimant wrote to Ms. PD in November about the eight issues as he had not heard anything The claimant had not seen the letter dated 5th December from Ms. PD to the claimant's union representative. He may have looked at it at some point but he certainly did not get to see it before he left. He did not speak to the union representative or have any contact. The only contact he had with him was subsequent to September 25 was approximately December 17 when he called him to tell him that the psychology department wanted to write a letter of support because of his circumstances and he felt that it was not a good idea. He took another call in the middle of that and he did not hear from him subsequently. He did not accept that these were important letters because he understood that at that time his union representative had a close bereavement and he assumed that he was not responding. The claimant was awaiting a response from Ms. PD that he never received.

When asked that in 2001 108 full time clinicians or the equivalent were employed he responded that counsel for the respondent seemed to be harping on an observation that he had made and were getting into a technicality regarding the definition of a clinician. When asked what he defined as a clinician he responded people who operated from the clinic, which included a psychiatrist, physiologist, social worker, physiotherapist and speech, language and occupational therapist.

In answer to questions from the Tribunal when asked when did he go to his union for help, he responded when the eight allegations were listed. When asked why he dispensed with his union and chose the solicitors he responded that he did not dispense with his union, he engaged the solicitor formally when the board of the respondent contacted him through its solicitor. He had not engaged a solicitor at that point. That was probably during 2002. He did not have his union representative there until June or July 2003.

On re-examination by his counsel he stated that he had a vague familiarity with counselling at pre disciplinary stage a verbal warning and stage two written warning When asked if he was ever approached by anyone in the respondent in relation to this counselling he responded that no unless he wanted to interpret Mr. PL's meeting earlier on. He did not receive a verbal warning. He was employed for thirteen years with the respondent and was 100% fully committed to the organisation. There was nothing brought to his attention in those years. His immediate supervisor was Mr. MM. He had regular supervision with Mr. MM and they discussed his work but he never approached the claimant about complaints regarding his conduct. In regard to the election poster he said he was not exploiting anyone he was trying to forward a cause. He did not accept that he acted in breach of guidelines. No one complained to him about his visits to Cregg House. The claimant caused none of the delays and he did not know what was happening and that is what prompted the claimant to write to Ms. PD.

An issue arose in relation to evidence that a witness Mr. M on behalf of the claimant was going to give. The Tribunal adjourned to discussed the matter. On reconvening the Chairman of the Tribunal Division stated that the Tribunal had to decide the issue of the admissibility of the evidence of Mr. M and the Tribunal has considered the submissions made by Counsel for the claimant and the respondent. The Employment Appeals Tribunal dealt with labour disputes and the Tribunal has to focus on this labour dispute. The claimant feels very strongly about these issues and he was given, the Tribunal considers, a full opportunity to ventilate his feelings and to give his evidence. However the Tribunal have to apply in this Tribunal the test of relevance and have decided that the evidence of Mr. M was not relevant to the hearing of a labour dispute for two reasons: the first reasons was what Mr. M's evidence would corroborate was alleged bullying of family but the case was about the claimant's relationship with his employer and the alleged bullying of him. The Tribunal considered that Mr. M's evidence was not relevant and the claimant would have an opportunity to prove his allegations.

The first witness on behalf of the claimant Ms. DK told the Tribunal that her role in the respondent would have been assistant house parent employed for twenty-two years from 1980 to 2002. She worked in Gleneally, which was one of the houses in Ballymun, the claimant was the senior psychologist and she would have worked extensively with clients through the claimant. She would have held the claimant's opinion in very high esteem. They worked as part of a team and the nature of the clients they worked with in particular would be of varying levels of ability and challenging behaviour. Her experience of bullying in the respondent went back to May 2000. She would have attended staff meetings on a regular basis and would have brought up what she thought was a very reasonable question about taking annual leave on a bank holiday. At the meeting there would have been her head of unit and two other members of staff. She was openly accused of

undermining her head of unit's role as manager. She actually could not understand why she was made to feel so intimidated. When asked who made this accusation against her she responded Ms. AG. Her shifts were constantly changing. She had a difficulty in that if she wanted to take a day off on Monday who did she ask. She wanted the simple clarity as to who provided the cover on Monday. It ensued with four meetings with management and the resident manager Mr. PC asked her to retract her comments about Ms. AG displaying elements of bullying. She could not understand why a local issue had to be brought over to headquarters to be addressed. She was asked to retract her comments and she felt that the Head of Unit Ms. AG had displayed elements of bullying. She became aware that Mr. PC had attended a meeting with Ms. O'D a psychologist and they discussed this issue. The second incident of bullying was she felt referred to Mr. PMcK. Both Mr. PMcK and another client lived in the house that she worked in for seven years. Mr. McK had moved and then subsequently moved to a nursing home. Mr. McK died in October and soon after the senior psychologist Ms. B approached them and offered debriefing sessions to the staff and clients. They were pleased to have this input from Ms. B. At the second debriefing session she felt that she picked up a certain amount of disharmony and disquiet. The debriefing came about due to the sad loss of two clients within a week of each other. It was a house of five clients and a team of six staff and a head of unit. Ms. K felt that a lot of questions were unanswered and these were all in connection with the death of Mr. McK. She felt that, as there was a sense of anger that it would be advisable for staff to put their questions on paper and that management would address these issues. They would meet in an open format as a group setting. She had no problem doing this and within a short period of time the claimant and her colleague Mr Mc who is still employed by the respondent compiled up to twenty-three questions and presented them to management. She and her colleague were informed that there would not be a third debriefing session as initially promised and that they would meet individually with management. Two members of management Mr. JB residential manager and Mr. PC who was over their particular house would meet with them. They sought advice on this from their union who informed them that not to meet individually under any circumstances. They then met with Mr. JB and they were advised not to take notes.

The questions that she wrote down were as follows:

"What were the criteria for selecting nursing homes for people with learning disability and Alzheimer's?

Why was Leas Cross-selected? Was Leas Cross Nursing Home registered with the Eastern Health Board? Had St. Michael's house management ever visited the premises prior, to and after Mr. P McK was admitted. Did a client from the respondent ever die in Leas Cross nursing home or was admitted from the nursing home to hospital in a critical condition before. If so was the respondent satisfied that Leas Cross management had acted professionally and in a caring manner on both occasions. If a client had been admitted to hospital from Leas Cross before was the respondent management aware as to whether the client travelled alone, by ambulance or was accompanied in the ambulance by nursing home staff."

She did not receive answers to those questions directly. No one question was picked out, they were more or less set down and Mr. B spoke in a roundabout way. They were led to believe that Leas Cross was a reputable place and they were happy with what they had heard about the conditions. The second incident occurred in February 2001. The third incident was in May 2001 again by chance she mentioned Mr. PMcD because he had appeared in all these three incidents. He was part of it, which was quite extraordinary. Mr. PMcD was in the staff room and came across a manual. There was nothing private or confidential written on this folder. He just went

through it and he found a chart that was a competency chart that apparently the respondent was using as part of a training programme. On that chart there were various skills, which listed workability, teamwork, managerial, work on competency with clients. Different sections were labelled and underneath there was a scoring square and if the square was completely darkened you were considered fully competent. When PMcD found this chart the other four members of staff had mostly blackened squares, which meant they were highly competent. Both PMcD and Ms DK had 13 and 12 respectively. The chart did not have a date on it but the folder was dated May 2001. It was not signed but the writing was very evident. It was the head of their unit Ms. A. G. When they discovered this chart they approached their unions. Ms. K mentioned to Mr. PC that she was very unhappy with this and asked what was the format or why was this set up. They raised the matter with Human Resources and through their unions. She raised the matter with Ms SB in HR and she did not know whether she is still in HR or not. They received a letter from Ms. AG apologising. She apologised more that they found the chart. She received a letter it was not signed by Ms. AG and it was PP Ms. S B. The letter dated 22nd August 2002 stated as follows:

"With reference to the complaint made regarding my assistant house parent competency chart, I understand that while reading my coaching and mentoring skills file you became aware of the assessment of competency of staff members in Warren House Road, as recorded by me as part of a training exercise.

It has been brought to my attention that you have taken offence at my assessment of your individual competency relating to aspects of your job. Firstly, I must apologise for any insult, which may have resulted from my assessment. I assure you that it was never my intention for to offend you in any way. I had not intended for this document to be seen by staff and apologise to you both that you became aware of it in this manner.

You correctly pointed out that I had not discussed these areas with yourselves. Regrettably, as we have no formal appraisal system agreed with the unions, it was not possible for me to do so. Instead my intention had been to informally coach each individual on the job. Please be assured that no malice was intended, and I apologise for any hurt that this may have caused.

Yours sincerely

PP Sarah Bars".

Mr. J B met with the staff and as two of the respondent's clients had died. The beds were used as respite but the house was closed and the staff would now go elsewhere. They had a choice as to where they could work. They documented their requests on paper and when she indicated her choices to Mr. B he told her that she had no choice whatsoever. At this stage she just felt her position in the respondent was untenable and that really there was little left for her. She had very little option but to leave. She felt that her choices were not being addressed. She went and viewed the house in Raheny and she did not feel that she was being listened to. She was excluded from staff meetings.

She was excluded from one particular client meeting; she was a key worker to a client for the last seven years and worked extensively with her. She felt that she had built up a good rapport and suddenly this meeting took place. She was employed in this house and she was left sitting there. The house closed in March 2002 and it was near the autumn of 2001 that the incident happened about not being asked to attend the meeting.

In cross-examination Ms. DK accepted that she did not agree with Ms. AG's managerial practices. Debriefing sessions were counselling sessions provided to support the staff. She did not attend the meeting that the employer had suggested. She believed that a document was used for the purposes of internal training of staff. She did not accept that it was not set up for any other purpose. She believed it was left out purposely for staff to find, she believed it was left out to undermine her credibility and she believed that it was a defamation of character. Ms. DK stated that she was offered a position in Raheny. She declined that position. She obtained alternative employment in Bray.

The second witness on behalf of the claimant Ms. UO' R told the Tribunal that her brother who was 47 was a client of the respondent for forty years. He had lived at home with his parents all of that time and in that time probably had about five respites. His name was on the waiting list for residential care. Her brother would be considered severely handicapped by the respondent's standards. Her brother developed pneumonia and for the eight weeks he was at home with her mother and the respondent did not contact them with an offer of help. Things went downhill after her mother was admitted to hospital at the beginning of 2003. Ms. UO' R had a four-month-old baby at the time and was unable to mind her brother and he was taken in as an emergency case. Because he had lived at home with his parents for so long he was used to a routine. Within the eight weeks he was moved between 22 and 24 times. Every week he was moved two to three times. She was basically handling her brother's care at the time because her mother was in hospital and unable to help at all. She wrote five letters to the respondent and did not receive a reply to any of them.

She met the claimant, as he was the psychologist for her brother in the day centre. Within three weeks of her brother being taken into full time care he had started to soil himself and he developed an ulcer. During that time he also broke his kneecap. He was still being constantly moved so the claimant would have been talking to him and trying to give advice. She met the claimant on a few occasions in the respondent's day centre and explained to him the situation and he was aware of her brother's situation. Ms. UO'R denied that the claimant said that he who shouts the loudest gets a service.

When her brother was discharged from hospital Ms. UO' R spoke to the house manager, Ms. KF., in Raheny at the time. She explained the situation to Ms. KF and she brought her brother out to Raheny. She told K F that she had been waiting ten years for her brother to get a place and Ms.KF told her that she would have to wait. At this time she had met the claimant on three occasions. She spoke to the claimant about her brother and her mother. The claimant visited her mother and he was the only person from the respondent who took the time to appraise the situation. The only dealings that she had with the claimant were in relation to her brother's situation.

In cross-examination when asked where her brother was now she responded that he was in a rented house in Swords, which was part of the respondent company. The care that he received on a day-to-day basis was very good.

The third witness on behalf of the claimant Dr. PH told the Tribunal that he qualified as a doctor in 1983. He did five years training as a GP and he has been working in that area since then. About ten years ago he became interested in the connection between health and work and he gained further qualifications in family therapy or systems therapy, which was trying to use language to look at solutions to try and understand problems within the context of families. He gained further qualifications in executive and business coaching on how to help individuals and businesses to look at a positive outcome. It was a two-year postgraduate family therapy degree in Australia.

The claimant went to him at the end of 2004 and he met the claimant on two occasions. He did not go through a formal medical examination with the claimant but it was obvious that the claimant was upset. This was having an effect on the claimant's psychological, personal and his family life. The claimant felt that there was still work to be done on behalf of his patients in terms of getting a sense of fair play or getting a voice for what happened.

He contacted the respondent and he spoke to Mr. PL the CEO. Dr. PH told him he had some concerns about bullying in the organisation. He outlined some of his experience to the CEO and that he might be of some help. He was interested in working with the respondent in order to facilitate some sort of solution. He felt if it came from the top that there was a sense that they might be able to work together. The effect of the response was that he did not contact the respondent again. He really felt that after the telephone call that he was not dealing with someone who was going to engage with him in the claimant's case.

In cross-examination when asked when he spoke to the CEO that he was offering his services to the respondent he responded that he was. He spoke to the CEO three months after he met with the claimant in early 2005.

In answer to questions from the Tribunal when asked if he carried out a diagnosis of the claimant he responded that he had two roles, one as a doctor and one as a life coach working on bullying. He did not have a sense that the claimant needed his medical help.

The fourth witness on behalf of the claimant Mr. CR told the Tribunal that he had a certificate and diploma in social work. He was a qualified psychiatric nurse, a qualified nurse for the mentally handicapped and he had a diploma in public administration from UCD and a certificate in health economics from UCD as well. He commenced employment with the respondent in June 1997. He was employed on a three-year contract. His contract terminated on 2nd June 2000. He was working half time. He was working on the south side of Dublin, which was a much smaller team than the one in the North side. He was part of an Early Services team, which was linked, with new referrals of children who had learning disabilities. He met with parents in the early stages and as part of the team developed supports for them. He was also providing support to a number of units of children who had quite severe levels of handicap who were in day services and he was supporting both the unit and the parents whose children were attending the unit. He never felt that he was bulled on a personal level. On 16th May when he was informed that his contract was terminated he felt that something was awry. He was quite shocked when his contract was terminated because it had never occurred to him at any point that his contract had been terminated. The week before that a colleague who was doing some intensive difficult work with him made a comment to him that he was working so many hours and that he should apply to the respondent for an increase in his wages and he laughed at her and he told her that organisations did not work like that. He was informed that his contract was terminated with no warning and no discussion He had never raised the issue of his contact being renewed either because it had never occurred to him that anything but a continuation of it would be happening.

The fifth witness on behalf of the claimant Mr. FF told the Tribunal that he had contact with the claimant in or about 1992 and the claimant was the most committed professional he has every worked with in this field. Mr. FF stated that there were many fine people who worked in this field of intellectual disability. It was a difficult field to work in with a lot of very challenging behaviours, challenging work and nobody had given more of himself than the claimant had. The claimant had a twenty-four hour day seven days a week commitment to people with intellectual

disability at the very highest level. He did not know of anyone in the country who was more committed than the claimant was. The claimant had never been involved in the care of his daughter so he had no direct experience on that on a one to one basis. The claimant was someone who had advised organisations, helped them to learn, to confront behaviours and to determine what the priorities were in terms of the services that were needed and the claimant has been completely invaluable. Mr. FF had never known anybody to second guess his judgment on any of these matters and he had never known him to withhold a judgment or to withhold time and effort. The claimant in his view had striven to ensure that the highest standards were met by the various organisations that Mr. FF was involved in.

Mr. FF talked with Ms. DK and Mr. PMcD. In the course of that lengthy meeting they both confirmed to him their belief and experience of a very difficult and oppressive culture within the respondent. He could not put his hand on his heart and say that they used the phrase "culture of bullying" but everything they described would be certainly tantamount to a culture of bullying in his view. His interest in talking to them was twofold. One was related to the facts of Mr. P McK and the way in which the respondent had reacted to them in respect of the concerns that they had raised about Mr. PMcK.

The sixth witness on behalf of the claimant Ms. AO'N told the Tribunal that she had a primary degree in social science and a Masters in social work. She received her primary degree from 1983 to 1986 in UCD. She completed her Masters from 1993 to 1995. The bulk of her work during those years between the time she finished her degree to the time she did her Masters was primarily in the area of care work It was two settings, one was a long term hospital unit for elderly people in St. James's hospital and the other was the national MS care centre in Rathgar. She felt she had experience of two settings with very different standards of care provided in each. She was very lucky to be involved in the setting up and opening of the MS care centre, which was recognised as a centre of excellence and was set up as direct response to the lack of appropriate respite places for people with physical or neurological disabilities. Following her Masters she worked for two years in child protection in the Health Board and she had the opportunity then to travel for a number of months and she lived in Mayo and she took up a locum position in Cerebral Palsy Ireland, which is now Enable Ireland in the Child Development and Assessment Centre in Galway. She started work with the respondent in May 1988 initially on a six-month contract. The initial vacancy arose because one of the social workers had been released to undertake another piece of work within the organisation. That took longer than the six months that was allowed, so she was there on a temporary basis for approximately eighteen months. She was interviewed for a permanent post in December 1990 and she was successful at the interview. The head of her department told her that she believed that she had issues with management and that those issues would need to be resolved during her probation period. When she commenced work with the respondent she became aware that there was a huge level of discontent within the department and she described it as a sort of climate of fear. She was referring to staff with fifteen or twenty years experience feeling such a level of intimidation that they could not express their opinions even at a social work meeting She was taken aback by that. She felt that she was in a luckier position in that she did not have historical experience in the organisation and she felt she was able to voice her opinions more freely than other people. There was definitely a type of atmosphere that people were afraid to speak.

She voiced her concerns about the delivery of services in terms of specific issues but she would have tried to have discussions about how people felt they were being managed as a department. People made an effort, which ultimately led to a facilitation process. Staff would have initially started to try and raise those issues themselves. Her issues with management had to be addressed during her probation. She stated that between February to April 2000 supervision session took

place. The supervision session would take place between a basic grade social worker and their senior social worker. There were different elements to it; one was to show that you were completing your work satisfactorily; to be able to discuss issues of difficulty and cases that you were struggling with. There was also a large element that was supposed to be a support system including professional development. That was the context and without any sort of advanced warning in her supervision session it was raised by her manager that over the following months of her probation that she needed to basically work on her attitude. If she was not engaged in that process of working on her attitude that she would not be able to pass her probation. They discussed her attitude to management. She asked if there was any difficulty with her work and with her practice. There was no issue around her work and her practice but she needed to look at her attitude. It got to a point where she felt that she was up against a brick wall. They kept harping on about her attitude and it resulted in her breaking down and bursting into tears, which was not something that she was prone to doing. She was devastated after it and she felt that the whole thing was being personalised. She was aware of the fact that her head of the department and her manager had discussed this with the HR manager Mr. NR so she requested a meeting with him. She was then summoned to a meeting with her head of department and her manager. She did not know what to make of this. She was given no information about the content of the meeting.

There was a bit of a time lapse and they came back and she was told there was no difficulty. It was a very brief meeting and she did not need to bring anyone with her. She went along to the meeting having been advised by the union that if anything was raised that she could withdraw from the meeting. She went to the meeting and she was informed that she was permanent and everything was dropped.

She felt it was inappropriate to use a nursing home in terms of staffing levels, training of staff, policies, guidelines and she was not sure that they were all appropriately in place. The training in the respondent was of a very high standard to ensure that. She felt that there was no adequate way of monitoring the standard of care in places external to the organisation. She just felt that the level of care could not be guaranteed. In May 2000 the difficulties within the department were addressed through a facilitation day, which in itself she thought was a very traumatic experience for a lot of people. She personally felt very demoralised. She had never experienced in her previous places of employment the number of people that left the respondent in unhappy circumstances. She found that the number of situations that involved an element of somebody being very dissatisfied alarming. Staff were dissatisfied with they way they were managed. She left the organisation in July 2005. The main reason she left was she felt she did not want to work within the environment of a similar sort of management experience as she had previously experienced. She was a senior practitioner with the respondent and she went to a basic grade post. Part of her reason for taking up the new post was that she had some inside knowledge that there was a certain style of management. Her new post also had a lesser salary.

In cross examination when asked that the respondent informed her that she was good at her job she responded that she would not say that the respondent let her know she was good at her job. When asked that she was promoted she responded that she was. She obtained the senior practitioner post in 2002. When she took up her new job she was near to her home. She felt that there were issues around the management to her department who were Ms. ME, Ms. VB and Ms. JK. She found it difficult to work with the regional director and the clinic manager. Prior to her leaving the respondent she stated that she applied for a senior post with the respondent but it was not within social work, it was in relation to integration of children attending mainstream schools. It was an area that she had a particular interest in. She thought that another candidate was successful. When asked if she were successful at the interview that she would still be employed with the respondent

she said that she would. It was an area that she was very committed to in terms of integration and inclusion for people with learning disabilities in mainstream services.

When asked why her union had never made a complaint on her behalf regarding alleged bullying she responded that it was dropped. She had never written a complaint indicating that she was bullied but if it had continued she would have had to do it. When asked if she used the word bullying she responded that she did not know if she did. She could have used the term bullying behaviour.

The seventh witness on behalf of the claimant Ms. EL told the Tribunal that she has an arts degree in English and Sociology, which she received in Maynooth in 1991. She then did a diploma in social policy in UCD. Following on from that she worked in 1991/1992 with homeless families. She went to Chicago to work in a residential facility for people with learning disabilities for a year. She returned to Ireland in 1994 and she completed a Masters in Social Work in UCD. She worked for three years on the soup run with the Simon Community from 1990 to 1993. She worked from 1992 to 1993 with Focus Point. From 1996 to 1997 she was involved in child protection cases with the community care area in the Eastern Health Board. She applied for a job in the respondent and took up employment in May 1997 and she worked there until May 2004. She moved to the Doorstsep Charity on the Navan Road where she was a principal social worker. She was recently appointed senior social work practitioner in the respondent shortly before she chose to leave. When the principal post came up in another organisation she applied for it and is now a principal social worker. When she started working with the respondent she was employed as a basic grade social worker and she had more or less the same caseload for the seven years that she was there. She worked with children with a moderate to severe level of learning disability from the age of 3 up to the age of 18. She also worked in a special national school for children with moderate learning disability and in the last couple of years she worked in the Cara Unit, which was the respondent's facility for people with learning disability and dementia. When she joined in 1997 she would have been aware of an atmosphere historically within the social work department and that people said be careful what you say, be careful in social work meetings.

She observed for a short period before participating fully in social work meetings that strong opinions that were contrary to the decisions made by management would not have been received very well. Staff were not asked for comments and it was an unfortunate period in the social work department, particularly the years 1998, 1999 and 2000 where comments would have been made about consultation being only a matter of courtesy. She felt that there was a certain management style within the organisation, which was to deliver decisions without having any discussion. It was unfortunate that statements would have been made by Monica like, "I don't want to be threatening about this, but she said she would come on the heavy if you cannot reach a resolution". The witness found these statements very out of line with the organisation, which she had signed up to work with.

She raised issues in the early stages of bullying in her supervisory meetings. The meetings took place about once a month. She recalled that in 2000 she telephoned HR to enquire if there was any anti-bullying training available. The person that she sought advice from told her that a proposal had been put to Mr. N R. HR manager from some of the members in human resource and he had adamantly responded no. When asked if the respondent did not direct her to the booklet on anti bullying policies and procedures she responded that she had obtained her own information from the union. She was not aware that an anti bullying training or a workshop was in place in the respondent. She felt that it would be in everyone's interest to have very clear and transparent policies and procedures, an employee manual and a manager's manual. She stated within the

department, staff felt bullied and they tried to address it. When they felt they were not getting anywhere they went to Mr. DK. She could not remember what Mr. DK's role was at the time and she thought it was clinic manager. She would have felt that it was the correct avenue to pursue. She had gone to Mr. DK firstly about Ms. AO'N, a colleague of hers who had gone for permanency and was informed that the probation period would be a time when issues around her style of management would need to be looked at. She would have gone to Mr. NR who had recently joined the company and told him that she was unhappy with what had been said to AO'N about her permanency. Mr. NK made a remark what is going on in this organisation. She would have been party to a lot of the department meetings with Mr. NK. She was shocked when Mr. CR's contract was not continued.

The first document she saw concerning restructuring and reorganisation would have been in 1999. She knew the organisation would have concerns about the regionalisation process and some meetings would have taken place were staff were initially asked for input around 1997/1998 when the organisation was starting to restructure. Staff would have had huge concerns about the process. They would have liked the union to be involved as a social partner in that process.

Across the department there was collective concern about the use of nursing homes to varying degrees. There were a large number of users who felt it was wrong and that facilities were inappropriate. She could not say how supervision procedures could be put in place.

She had mixed reasons for leaving the organisation. She had worked in the respondent for seven years and she was very committed to her work. She had the opportunity for career advancement and she applied for a post. She had returned from a period of maternity leave in 2003. After having had a baby she did not want to return to the atmosphere in the respondent, which she had found very difficult up to the period she had left for a number of reasons. She was part of discussions from 1999 to 2003 that were quite difficult negotiations, including the facilitation process and the regionalisation process and she felt very tired after the process because she felt that in becoming part of those negotiations she had to fight to have her voice heard.

In cross examination she stated that she submitted a letter of resignation on 14th April 2004 in which she informed Ms. EL that she had been offered the post of principal social worker. In this letter she thanked Ms. EL for all her kindness, support and flexibility over the last seven years.

The eighth witness on behalf of the claimant Ms. JK told the Tribunal that she originally came from the teaching profession but she moved into third level education in the late 80's early 90's. She returned to education and completed two Postgraduate Diplomas in Management and Leadership in Trinity College and subsequently Master of studies in Workplace Bullying. She completed her masters in 1998 but was awarded her Masters Degree in 1999 at Trinity College. She lectures part time in Trinity College on contemporary issues in Management and a great part of that was on the subject of workplace bullying, awareness and prevention. She worked with companies both in the public and private sector around creating awareness on the whole area of the importance of a healthy psychological work environment and the prevention of bullying in the workplace. She would look at companies' current policies and advise on what best practice would be from around the world in terms of improving or changing them. She kept herself informed of all the literature and research on the subject both nationally and internationally. She advised universities, Institutes of Technology and schools. She also advised Health Boards, Hospitals and Government Departments. In the private areas clients ranged from banks to pharmaceutical companies and computer companies. She was asked quite frequently to address seminars and conferences on the

subject of workplace bullying and the area of positive work environment and appropriate management.

Ms. JK stated that a written document was one small element in the whole anti-bullying programme. The main thing would be to look at the culture and the climate of the organisation to establish whether it was bullying promoting or bullying preventing. The anti-bullying policy would be part of that programme but it would have to incorporate certain elements for to be effective. Certain organisations would put in place a policy but it would merely be a paper exercise, it would not reflect what was going on in the organisation. Even the expression of intolerance would not reflect a genuine tolerance but that was not in all organisations. If the genuine desire was not there but simply the paper it was absolutely ineffective and as well as being ineffective it was deeply frustrating for the people who work in the organisation because they see it as being window dressing or a smokescreen. To ensure that employees received a copy of the Anti-bullying policy was good practice in terms of formulating an Anti- bullying policy. It should be done in consultation with all the interested parties. Then it should be communicated to every staff member through whatever means possible. It could not be ensured that everyone received it but it would be the intention that everyone would receive a copy. It was recognised that there was a need to provide the widest range of options for resolution. It would not just be about the formal, the investigative, it would be the widest range of options to incorporate informal opportunities for resolution. That took account of the fact that the research would show that for in excess of 90% of people who made claims of bullying, their main aim was to have it resolved. There would be put in place in organisations specialist people in specialist roles that would act to support and outline these options. The informed choice that the majority of people made in the context of the range of options would be to opt for the informal route. One of the most important elements of the prevention of the bullying would be the adequate training of everybody who was put into a position of supervising or managing. That would be considered a very important part of the anti-bullying programme. The literature would suggest that the most prevalent type of bullying would be the systematic undermining of a person's capacity to contribute to the organisation. It would be a discrediting of their previously good reputation, of their relationships, of their record of work. It would be a systematic discrediting so that they would be excluded and isolated within the organisation. It would be frequently conducted with a view to actually reducing them to such a state of self-doubt and lack of confidence that they might leave of their own accord. There was a very recognised method and it was very prevalent in bullying situations and bullying cases described as the "the trawl" or "the hunt". It occurred where someone was perceived as a threat, or someone whose competence undermined or highlighted the lack of competence of someone else, someone who resisted becoming a yes person, and someone who was intolerant of hypocrisy or bad practice and voiced that intolerance. In order to discredit that person a trawl would be done through their work, their relationships and their record in order to find incidents that could be accumulated to reflect badly on them.

The ninth witness on behalf of the claimant Ms. MP told the Tribunal that the first job that she had was in Scotland as a Court assistant. She then spent the next four years in East Africa. She worked there for the diocese of Eldret, which is an area the size of Munster. She was responsible for administrating the entire area and she spent four years there. She returned to Ireland to train as a nurse. While she was in Africa she discovered that there was a dearth of opportunities for people with disability so she thought if she came back and trained she could return with that particular skill. She met her husband during her training and she did not return. She had worked then for the John of God's services for a number of years and then she applied for a post in the respondent in 1980. She was head of respite. As far as her memory served her it was the first respite house in Ireland that was community based. She was responsible for that unit for the following five years

until the birth of her daughter. After the birth of her daughter she took two years leave of absence and then she decided that she did not want to return full time. She enjoyed being at home and she did various part time jobs for a number of years within the Respondent. Then her son was born and she eventually took up a part time position in Aylesbury Respite in 1990. She has continued to work in that position since 1990. She was never subject to a complaint and she was in the fortunate position in that her work environment was challenging. She was asked to get involved in training. She had a particular interest in training and in working with groups of people. She helped people to manage diabetes in the community and was involved in first aid training. She stated that things changed dramatically in 2005.

She submitted a complaint in April 2005. It was the first time she had ever written anything of that nature because up to then she would have tried to deal with issues locally. Before she did that she had given it a great deal of thought. What happened subsequent to that has been a nightmare. She was deputy manager in the house when she made the complaint. She was suspended on 22nd December 2005 on full pay and in mid January 2006 she was suspended without pay. She was told she had failed to cooperate with the respondent investigations, and she admitted that she had failed to co-operate. She was told that an investigation team would be established. She had put in her complaint under bullying and harassment. In the initial correspondence this was never referred to, it was always referred to as grievances. She had an issue with the composition of the committee who were going to undertake an investigation because she felt it was not independent. She wanted her complaint to be dealt with in accordance with the protocols relating to bullying and harassment. She felt that they were breached at every level. The respondent breached it in terms of the time that it kept the complaint before it was dealt with, in terms of the composition of the investigation team, and it was not independent. She objected as she felt that the investigating team should be agreed by both parties where possible. The chairperson of the team was an administrative manager in Goatstown and would have managed the person that she complained about for a short period. The second member was a colleague of the person she complained about at one time and the third person was new to the organisation and was in the HR department.

With the protocols that were in place the complaint would be addressed by Mr. D, the regional manager and then he would allocate a team. She wrote to Mr. D and outlined to him her frustration at how the process had been handled. In the letter she indicated that her role was being deconstructed. There was an exchange of letters between Mr. D and the witness in December. Mr. D undertook an investigation regardless of her concerns and he had the report and that was all he needed. She was going to be disciplined for not cooperating with the investigating team. She told her colleagues at this stage and she mentioned to them that she was sure she would be without a job by Christmas. She received a letter at 11.30 on Thursday morning asking her to confirm with management by 10.00 that morning if she could attend a meeting at 4p.m. that afternoon. She responded immediately and she felt it was a form of pressure. She indicated that she would report for duty on Friday. She was informed not to report for duty on Friday, as it was unwarranted and illegal. She did not know what she was going to face. She got a couriered letter delivered to her home saying that it was rescinding the suspension but she was due to go to a meeting on the Monday to be censured. She went in to work on the Friday and she was ill by Sunday. She had a blood pressure problem from the previous August. She telephoned a colleague to see if she could replace her. Then the following Wednesday she received a letter suspending her on the Thursday before Christmas.

Respondent's Case

The deputy chief executive Ms. PD told the Tribunal that she joined the respondent twenty-nine years ago. She started as a social worker when she finished college. She was responsible for the administrative aspects of the organisation, the finance, human resources, training, research, property, maintenance, transport, and information technology. Mr. K dealt with the services. When she joined in 1977 it was a relatively small organisation. It was beginning to have difficulties in relation to residential care provision. It was started as a day service and it was not until the late 1970's that the organisation actually had to face the issue of whether or not it would develop residential services. The residential services that it provided was small houses in the community. It attempted to develop homes for people with disabilities. A huge expansion occurred in 2000, 2001 and 2002. It developed seventy individual home places for people. They were individual places where the individual need of each client was taken into account. The homes were located in the community. The respondent was a very flexible organisation and the goal was to ensure that the individual needs of people with disability were met. The organisation had grown in line with the identified needs of people with disability. It had respite services, home teaching services and schools. It had developed centres for children who were more profoundly handicapped and had greater needs. It had vocational training centres. It had independent work options where people were supported to go out and work in ordinary jobs. It had integrated education services where children were supported to belong in ordinary schools and in the community. It had recreational services and it had services to support independent living. It had part-time residential services and it had the complete range of options that would be needed by an individual at any stage in their lives.

The respondent was in serious difficulty in the early 90's in relation to residential care provision because it had a limited residential provision and the needs of parents were growing. At that point parents were getting older and some had died. This caused difficulties for the respondent. The catchment area of the respondent had the greatest level of need in all of Ireland. A database was developed for the whole country to show the needs for services and the term that was used in the Health Board to define the respondent catchment areas was the black hole. It had a priority listing of the greatest need. At any time it had the top ten priorities. In the top ten priority of the list of 300 was that both parents had to be dead which was a dreadful situation to be in. The respondent currently had a staff of approximately 1,500.

Between 2000 and 2003 the respondent developed 180 residential places, which was phenomenal growth and development by anyone's standards. It was an amazing step forward for the organisation and it did actually have a significant impact on the waiting list. At that time they were opening a new house every seven weeks. In order to achieve that level of development you need to have maximum co-operation from all areas in your organisation. There was absolutely not a climate or atmosphere of bullying in the respondent. The organisation was restructured between 2001 and 2003 in order to cope with the very significant expansion it was undergoing and also the fact that it knew it had to expand further. The union became involved and represented staff over ten months. The co-operation agreement was finalised in January 2003. As part of that process, which was minuted by the union, the minutes were all agreed by the staff, union and the respondent. Meetings were held every month between April 2002 and January 2003 and the unions at the start of the process asked all of the staff to put forward every single issue of concern they had. Everything was to be put on the table and there was a list compiled at the start of the process.

Halfway through the process the union said that it would do a second analysis and any other issues that needed to be addressed could be compiled.

Ms. PD stated that never in that ten month period was the issue of a culture of bullying and intimidation in the respondent raised by the staff representative or the unions. The organisation needed to scale down and it was divided into three regions. In each region it reorganised the service delivery model. Prior to restructuring it delivered its services in divisions. It had a residential division and an employment and training division. When it regionalised the organisation regrouped the model into service clusters and each service cluster grouped together 150 people with learning disabilities with the same needs less than one team. The process that had been adopted with the unions allowed ultimately for arbitration on the issue, which it did and it was resolved.

At the hearing on 18th January 2006 Ms. PD told the Tribunal that she wrote to the claimant on 17th July. The meeting that she invited him to was not a disciplinary meeting; it was an informal meeting to raise issues of concern with the claimant. The Board concluded its business with the claimant in December 2002. They were now getting back to the normal work of the organisation. The senior management team was precluded from raising any issues of concern with the claimant. In January they had discussions as a number of issues had arisen. At that point the claimant's direct boss Mr. MM his professional superior was absent on sick leave in January It took a number of months to replace Mr. MM and a new acting head of the department was not formally agreed until 29th May. As soon as the agreement was in place on 29th May Ms. LW took up the role as acting head of department and as soon as the negotiations regarding pay and conditions were concluded with her she notified Ms. LW that there were issues that she needed to discuss with her in relation to the claimant. She relayed all of the issues to Ms. LW and she told her that she wanted her to discuss the issues with the claimant. Ms. LW came back to Ms. PD and informed her that she did not feel that she should do it. Ms. LW told Ms. PD that it would be very difficult for her to undertake this work with the claimant because she was the claimant's work colleague. She was only in a temporary appointment and it was not clear when Mr. MM was going to return to work. The second reason she gave Ms. PD was that she felt the issues were such that the claimant needed to be heard at a more senior level than her. Those were the two points that she remembered Ms. L.W making to her. Ms. PD was clearly engaged in the process before receiving the claimant's letter. The HR function reported to her and she was very clear when she engaged in an informal process. The informal process was whereby she stated her position and her understanding of events was that she allowed the other person to state their position.

Ms. PD stated that the respondent explained to employees what constituted gross misconduct. One of the breaches that it regarded as gross misconduct was leaving the job without authorisation. At the first meeting the claimant and his union representative listened to what Ms. PD had to say. It was agreed that there would be a further meeting. The majority of the response was delivered by the claimant. At the end of the meeting there was a two-way discussion between the claimant and Ms. PD. It was an informal process and it was the first time that they had engaged in dialogue. The claimant's union representative suggested that the meeting be adjourned and reconvene at a future date. It was clear to Ms. PD that she had obtained additional information around the actual issues. She needed to reflect on those and reverted to the claimant. It was only the start of the process. She had laid out all the information she had to the claimant. The claimant had come back and he had responded on every issue that she had raised and they were at a point where they began to dialogue together so that they could deal constructively with the matters. At no time at the end of the second meeting or at any time during either of the meetings did she determine that the claimant should be subjected to some disciplinary sanctions. She did not have enough information. The next thing that occurred in relation to the matter was on 23rd October when Ms. B wrote to the

claimant's union representative. The letter was signed by Ms. B and was sent on the instructions of Ms. PD. Ms. PD then received a seven-page letter on 6th November from the claimant in which he reiterated much of what he had said at the meetings. Ms. PD replied directly to the claimant's union representative on 5th December. During this time Ms. PD met with Ms. LW and she advised Ms. PD that the claimant was getting impatient with the time lapse and that he was going to write to her. Ms. PD asked Ms. LW to ask the claimant not to write to her. Ms. PD asked Ms. LW to tell the claimant to contact his union official and ask him to get the matter back into the process. The letter arrived and she thought that it was best to write to the claimant's union representative and ask him to deal with the matter. Ms. PD again wrote to the claimant's union representative on 23rd January in which she restated that the respondent's intention in the process, which was to resolve all of the issues as amicably and as fairly as possible and to move into a more constructive working relationship with the claimant.

Ms. PD was not informed at any time between September and the end of January by either the claimant or his union representative that the union representative was no longer acting or advising the claimant. No one advised Ms. PD that it was inappropriate that the correspondence should be going to the claimant's union. At this time the claimant had not at any time in this period invited her to communicate with the solicitors or with anyone else in relation to this. Three collective agreements were in place with three trade unions, Impact, SIPTU and INO. It was the normal practice to engage in relation to individual employees through the trade union. No further meetings ever took place and the process never concluded.

The second witness on behalf of the respondent Dr. JL told the Tribunal that she qualified from the Royal College of Surgeons in 1981. She has an honours medical degree and a licentiate of the College of Physicians and Surgeons. She obtained her membership of the Royal College of Physicians in 1985. She was awarded her fellowship from the Royal College of Physicians in 1998. She also obtained her Diploma in Child Health in 1984. She was awarded and completed a higher diploma in medicine dermatology in 1998. She completed her general medical training and she undertook two years of research. She then went into the medicine of learning disability for adults with learning disabilities. Prior to that it would have been paediatricians who would look after the medical problems of people with learning disabilities but as they were living longer it was apparent that these people had more medical problems. There are currently more people now specialising in medicine for adults with learning disabilities.

She joined the respondent in 1987 and she left in 2004. She is currently employed by another service provider in a similar area. When she started working with the respondent she was a senior physician. The witness and another paediatrician undertook work and she built up a medical department, which provided a comprehensive specialised medical service for the adults and the children. This was a specialised service. She was not a GP or a hospital consultant; it was an intermediary between the two. They built up a large medical department and when she left there were three full time physicians and a half time adult post. There was also a paediatrician post that was job shared and there was a visiting consultant paediatrician, visiting eye specialist and it had consultant sessions from Beaumont in Ear, Nose and Throat.

In 2000 she was appointed the senior physician specialist in learning disability. This post was equivalent to a specialist in public health. She was involved in senior management as a representative of the medical department. The respondent did not want to send clients to nursing homes. She had worked in two learning disability services. She stated that no money could buy the commitment, care, love and attention that you will get in a learning disability service. The respondent had no option but to send people to nursing homes. Dr. JL was frustrated about this

and there were occasions that she wished that she could obtain about five ambulances and wheel those people into the Minister for Health or the Health Board to see what was happening in people's homes trying to look after someone in their 40's, 50's or 60's She was there for seventeen years and it was not like being in a hospital. She had built up a relationship with families. Some of her colleagues in the social work department as well as the claimant voiced objections regarding the use of nursing homes. The preferred option would be to remain with the respondent. There were people that the respondent could not provide services for.

Dr. JL was involved in the decision to transfer Mr. PMcK. The claimant had no involvement in that decision. The claimant was not Mr. PMcK's psychologist. Mr. PMcK was in a situation that the respondent could not look after him. He was in a temporary bed in a residential house in the Beeches. The bed was in a sitting room that was used by other clients in the Beeches and a number of these clients had fairly specific challenging behaviour. The only Alzheimer service that Dr. JL was aware of was the Highfield Hospital. That was a private facility but it did not take the respondent's patients. Nursing homes were being used by hospitals to transfer people with dementia. People go to nursing homes to either recover from surgery or they go to be nursed until they die.

Dr. JL loved her work, it was dynamic and people worked hard. People were there because they genuinely loved it.

The third witness on behalf of the respondent Mr. DK told the Tribunal that he was Human Resources Manager in the respondent between 1995 and the end of 1999. He was now the HR Manager with Failte Ireland. When he joined in February 1995 staff levels were approximately 400 to 420. When he left in 1999 the staffing levels would have been approximately 900. He had a role in updating the personnel manual. An extensive consultation process was put in place. An advisory group was established to advise the HR department on the implementation of the HR policy and procedures throughout the respondent. It consulted with the trade union representatives at the time and with the heads of department. He lived in Stillorgan and Head Office relocated to Ballymun. He was employed for five years with the respondent and he felt it was time for a new challenge. During his time with the respondent he was not aware of any complaints of bullying.

In cross examination by counsel for the claimant Mr. DK stated that at the outset he had pointed out that the respondent had engaged in a process over two years where it had formulated policies and drafted policies. It met with the advisory committee and the trade unions so there was a process in place. Prior to November 1999 there was no policy in place in the company.

The fourth witness on behalf of the respondent Dr. D told the Tribunal that he was a consultant psychiatrist. The respondent currently employed him. He completed his higher training in general psychiatry and also in psychiatry of learning disability. As part of that training he completed two years in the psychiatry of learning disability and between 2002 and 2003 he was employed as a Senior Registrar in the respondent half time and a Senior Registrar half time in the Daughters of Charity service. He completed a further year in general psychiatry and on 1st July 2005 he started as a locum consultant in the respondent and on 19th December 2005 he was appointed a permanent consultant psychiatrist. During the period 2002 to 2003 he did not observe any atmosphere of bullying or any atmosphere of harassment or abuse of staff. He did not observe any unacceptable atmosphere in the workplace.

The fifth witness on behalf of the respondent Ms. GB told the Tribunal that she qualified as a social worker in 1985 from Trinity College, Dublin with a degree and professional certificate. In 2002

she completed a Masters in Management specialising in Training and Education Management at Dublin City University. The respondent provided extensive training in relation to bullying in the work place. She did a review of the training since 2000 both on positive HR practice, dignity at work and anti-bullying practices. The respondent had spent a total of €16,700 on seminars and education events. She had been employed with the respondent for eighteen years as training and development manager. She held two leadership positions within the respondent. One was at service manager level, which was middle management. She joined the respondent on an eleven-month contract. She was employed as a special project worker developing a new innovative service. The respondent provided two challenging behaviour programmes. The first was the foundation level programme, which was a four-day programme that was run by the psychology team. All psychologists in the team run the programme. The second programme was a course entitled "Managing Assaultive Behaviour". The respondent contracted the services of a UK company that specialised in a particular approach, which had a positive effect on behaviour that may be threatening or assaultive.

The respondent had a four-day in-house programme, which was copyright to the respondent's training department. The programme was developed by two psychologists and it was one of the first jobs that Ms. GB was commissioned to do when she started as training manager. The two psychologists were Mr. MM. who was senior psychologist and the claimant. They both brought their expertise to develop a four-day programme and were freed up for an eight-week period to develop the programme. They then rolled out the programme to all front line staff, care assistants, social care workers and nursing staff and other clinical staff also availed of that programme.

In 2001 the CEO announced that the respondent was to receive a total of €154,000 to provide training places for two services in the North Dublin area, which was the main catchment area. These two services were St. Ita's and Prosper Fingal. Prosper Fingal was a similar organisation to the respondent in that it had a community ethos. In 2001 the CEO was facing considerable cutbacks in that year and the respondent was grateful to receive additional funding of €154,000. The respondent was asked to provide a limited number of places for both Prosper Fingal and St. Ita's. The €154,000 meant that an above average number of unqualified staff could attend the Open Training College and commence their professional training to degree or diploma level. She was grateful for that funding as unqualified staff could complete their professional training. Thirteen staff from St. Ita's attended three programmes within the respondent. The first was in April 2002, the second in November 2002 and the final three St. Ita's staff attended a programme run in February 2003.

Prior to this staff attended challenging behaviour training, and attended a total of thirteen courses run by clinical colleagues from the physio department, the occupational therapy department, speech and language therapists some of her own staff and a health and safety trainer. There was only one complaint about the St. Ita's staff involvement, which came from the claimant. The claimant did not deliver all of the courses. Three staff were present at the course in April 2002 and there were no complaints arising from their attendance.

Ms. GB first became aware of the claimant's complaint about the presence of St. Ita's staff the evening prior to the four-day programme at 4.50p.m. The claimant informed Ms. GB's. administrator that his objections were so grave that he could not proceed with being the lead trainer the next morning. The claimant was due to be assisted by a trainee psychologist Ms. NH Nineteen staff were due to attend. The crisis created by the claimant's action was entirely unnecessary in her view. This situation had never occurred prior to or after this.

Ms. GB was satisfied that consultation had taken place and there was no evidence to suggest that combining staff from St. Ita's with staff from the respondent produced a disruptive effect. It was unfair to the three St. Ita's staff who attended in April 2002 to describe them as disruptive when the claimant did not run that course or was not in attendance at it. There was only one occasion in the past when St. Ita's staff were present and that was in April of the same year. At the November meeting of the steering group it was minuted that Ms. CD and Mr. MM assessed that mixing staff from St. Ita's and staff from the respondent had a very positive effect. The respondent's staff learned about the way services were provided in a different type of setting and St. Ita's staff who worked in a large institution learned about managing challenging behaviour in a community setting. The psychologist's review of that, at the meeting, that she was involved in, was very positive.

She worked with the respondent for eighteen years. She had three managers in that period who were currently members of the executive team. She had never experienced bullying and she stated that she would not remain in the employment of an organisation that had that culture. She was involved in regionalisation. The training department regionalised and she undertook that in consultation with the training team. The training team consisted of a team of five and a half posts and also in consultation with Ms. PD. The regionalisation structure that ultimately was implemented was not imposed on her. It arose from the consultation process.

Determination

The Tribunal has considered the evidence adduced by the claimant and the respondent. The Tribunal has also considered the submissions made on behalf of the claimant and the respondent.

In the course of the hearing there were many references to the sad events at Leas Cross Nursing Home. This Tribunal has the utmost sympathy for the family of the late Mr. PMcK. It must be clearly stated however that the events at Leas Cross Nursing Home were never matters for this Tribunal to adjudicate on. The High Court and the reports of Mr. MH made the decisions and investigations in these matters as it was rightly within their respective competencies to do so.

This Tribunal's proper function was to adjudicate and determine a matter pertaining to the relationship between an employer and employee and in particular whether the claimant was constructively dismissed by the respondent. A key aspect of the constructive dismissal claim is that it was caused by "persistent and sustained bullying and harassment".

The legal context is not in dispute namely (a) the onus is on the claimant to prove his case; (b) the definition in law of bullying contained in S.I. 17/2002 which states as follows: "Workplace Bullying is repeated inappropriate behaviour, direct or indirect whether verbal, physical or otherwise conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individuals right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work, but as a once off, the incident is not considered to be bullying" and (c) the test for the claimant is whether it was reasonable for him to terminate his contract as applied in Liz Allen (claimant) .v. Independent Newspapers (Ireland) Ltd (respondent) UD641/2000.

The task therefore for the Tribunal is to evaluate the evidence heard by it to ascertain whether the claimant had established a factual situation sufficient to bring him within the aforesaid legal parameters. Furthermore the necessary source of evidence in this matter is that produced by the claimant and his fellow employees supplemented where relevant to this employer/employee dispute by other relevant witnesses outside the employment nexus.

Ms. DK a former employee of the respondent, itemised in her evidence five instances of alleged bullying by the respondent, an intimidatory response to her questions about holidays, a similar attitude by the respondent to her questions about its use of nursing homes, the inappropriate use by the respondent of an employee assessment folder, her exclusion from a key client of the respondent in the Autumn of 2001 and the closing of a residential home. Ms. DK left the employment of the respondent in April 2002.

The Tribunal is satisfied that the matters recited by Ms. K are such as arise in the normal functioning of a work organisation, particularly one like the respondent, which was growing rapidly at this time. This evidence as to these items does not individually or collectively amount to evidence of bullying.

Dr. H is a general practitioner. He had two consultations with the claimant after he had terminated his employment with the respondent. Dr. H did not make any formal diagnosis as to the claimant's condition. This witness did not produce any adequate evidence of bullying by the respondent.

Mr. C.R. another former employee of the respondent was upset that his fixed term contract with the respondent was not renewed. He said in his evidence that he was not bullied.

Mr. F.F gave hearsay evidence to the Tribunal about complaints made to him by employees of the respondent about bullying. These complaints were made by Ms. K and a Mr. PMcD. The Tribunal has already evaluated the evidence of Ms. DK. Mr. FF did not provide any specific detail of the alleged bullying of Mr. McD.

Ms. AO'N another former employee of the respondent, gave evidence about what she considered was an atmosphere of intimidation within the respondent's organisation during her employment there. She was particularly aggrieved that after eighteen months employment with the respondent she was expected to work a probation term with the respondent to secure further employment with the respondent.

Ms. AO'N gave evidence that a couple of months before she left the respondent's employment she applied for a senior position within the organisation. The Tribunal considers it a reasonable inference on its part that this job application by Ms. O'N indicated that for her the working environment was satisfactory and was not one where bullying occurred.

Ms. E.L another former employee of the respondent gave evidence of what she considered an intimidatory style of management in the organisation. When giving details of this she cited the case of A'O'N and Mr. CR. This evidence has already been evaluated by the Tribunal.

Ms. MP gave evidence of making a complaint about bullying by a work colleague. This event occurred in September 2004 which post dated the claimant's resignation from the organisation. Ms MP did not participate in the enquiry mechanism into her complaint as she deemed it unsatisfactory. She was suspended from work on 22nd of December 2005 on full pay and in the middle of January 2006 she was suspended without pay. She admitted in her evidence that the reason for her suspension was her failure to cooperate with the enquiry mechanism. The Tribunal considers that this witness's evidence did not establish the existence of bullying within the respondent.

Ms. JK was called by the claimant as an expert in bullying. Ms. K in her evidence did not refer to S.I. 17/2002. The Tribunal considers it appropriate to focus on this statutory instrument, which was of course endorsed in the legal submissions to the Tribunal.

The Tribunal therefore considers that the totality of the foregoing evidence does not establish the existence of bullying within the respondent's organisation. It should also be borne in mind that at this period the respondent employed in the region of one thousand persons.

It finally falls to the Tribunal to consider the claimant's evidence. This can conveniently be divided into two time periods, 3rd September 2001 to 16th July 2003 and 17th July 2003 to 6th April 2004.

In the first time period the claimant wrote to the respondent's board expressing grievances about the policy of the respondent and about the alleged bullying of another employee. In response to this the respondent offered an enquiry composed of three managers within the organisation, as specified in the respondent's grievance procedures. The claimant would have a right of appeal to a Rights Commissioner or the Labour Relations Commission. The claimant objected to the composition of this enquiry panel.

Subsequently, the respondent offered a three person sub committee of the Board to consider the claimant's grievances. The claimant refused to participate in this enquiry because he stated one member of the sub committee had a significant business relationship with the respondent.

The Tribunal considers that the claimant did not act reasonably in refusing to engage with the two processes made available to him by the respondent. It was open to him, if he considered the outcome of the internal managerial enquiry unsatisfactory to appeal to independent agencies outside the respondent's organisation. Again, with reference to the Board's sub-committee the claimant never suggested that the Board member to whom he objected had failed to make any declaration of interest required by him by law. This Board member had a close relative who was a client of the respondent. The Tribunal considers it a reasonable inference on its part that this Board member had a similar concern as the claimant in the welfare of the respondent organisation.

The Tribunal also considers it significant that the claimant produced no evidence to the Tribunal as to the alleged bullying of an employee of the organisation, which was contained in his letter to the Board of the respondent dated 3rd September 2001.

The second time period relating to the claimant's evidence begins when he received a letter from Ms. PD dated 17th July 2003. In his evidence the claimant stated that it was only from this time that he felt personally bullied inasmuch as the issues raised by Ms. PD in her letter were being used to intimidate him. Subsequent to this letter a meeting was convened which was attended by among others, Ms. PD and the claimant with his union representative. The meeting was reconvened on 25th September 2003 when the claimant in the presence of his union representative responded to the issues Ms. PD had raised in her letter dated 17th July 2003.

After this meeting Ms. PD wrote on a number of occasions to the claimant's union representative and also to the claimant's solicitor in order to progress the matter. The Tribunal considers this was a reasonable course for Ms. PD to take given her evidence to the Tribunal as to why she took this course.

There was certain vagueness in the claimant's evidence as to why the claimant's union representative did not engage with the respondent after the meeting of 23rd September 2003. The Tribunal considers it a reasonable inference on its part that sometime after 23rd September 2003 the claimant had decided to pursue his issues with the respondent outside any forum provided by the respondent and by way of the statutory legal process open to him.

The Tribunal notes that it was suggested that Ms. PD had departed from her course of dealing with the claimant's union representative when she wrote a letter to the claimant on 14th January 2004. The Tribunal accepts the evidence of the respondent that this letter related to the investigation relating to client care and not to any employer/employee dispute. Ms. PD's evidence that twenty-two other people were interviewed about this matter was uncontested at the tribunal.

The Tribunal finds that the claimant's behaviour subsequent to 23rd September 2003 again exhibits a lack of engagement by him with the processes available to him within the respondent's organisation to deal with his complaints

In her book "Dismissal Law in Ireland " (2002) Ms. Redmond states at paragraph 19.18 "there is something of a mirror image between ordinary dismissal and constructive dismissal. Just as an employer for reasons of fairness and natural justice must go through disciplinary procedures before dismissing, so too an employee should invoke the employer's grievance procedures in an effort to resolve his grievance. The duty is an imperative in employee resignations".

The Tribunal finds that there has been a consistent pattern of lack of engagement by the claimant with the respondent's grievance procedures. The Tribunal consequently finds that the claimant acted unreasonably in terminating his employment contract with the respondent. The claim for constructive dismissal by the claimant under the Unfair Dismissals Acts, 1977 to 2001 therefore fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This 29th January 2007

(Sgd.) Con Gurney
(CHAIRMAN)

Steffan Chmiel, Dariusz Szewczyk, Krzystof Gogolok against the recommendation of the Rights Commissioner in the case of: Concast Precast Limited

Case Details

Body
Employment Appeal Tribunal

Date
May 1, 2014

Hearing Dates
January 14, 2014

Official
Niamh O'Carroll Kelly BL

Legislation
- PAYMENT OF WAGES ACT, 1991
- TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

Members
Mr. J. Horan, Mr. P. Woods

County
Dublin 2

Decision/Case Number(s)
- PW725/2012
- TE253/2012
- PW726/2012
- TE254/2012
- PW727/2012
- TE255/2012

Respondent Representative
Mr. John Maguire, Irish Concrete Federation, 8 Newlands Business Park, Naas Road, Clondalkin, Dublin 22

Claimant Representative
Mr. Richard Grogan, Richard Grogan & Associates, Solicitors, 16 & 17 College Green, Dublin 2

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
Steffan Chmiel,	
- **appellant 1**	PW725/2012
	TE253/2012
Dariusz Szewczyk,	
– **appellant 2**	PW726/2012
	TE254/2012
Krzystof Gogolok,	
- **appellant 3**	PW727/2012
	TE255/2012

against the recommendation of the Rights Commissioner in the case of:

Concast Precast Limited

- **respondent**

Under

PAYMENT OF WAGES ACT, 1991

TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

I certify that the Tribunal

(Division of Tribunal)

Chairman: Ms Niamh O'Carroll Kelly BL

Members: Mr. J. Horan

Mr. P. Woods

heard this appeal at Davitt House on 14th January, 2014

Representation:

Appellant(s): Mr. Richard Grogan, Richard Grogan & Associates, Solicitors,

16 & 17 College Green, Dublin 2

Respondent(s): Mr. John Maguire, Irish Concrete Federation,

8 Newlands Business Park, Naas Road, Clondalkin, Dublin 22

This case came before the Tribunal by way of the employees appealing the decision of the Rights Commissioner (Ref – R-097647-TE-10/EOS) under the Terms of Employment (Information) Acts, 1994 to 2001 and (Ref – R-097651-PW-10/EOS) under the Payment of Wages Act 1991.

Determination:

The Tribunal has carefully considered this matter. The issue the Tribunal has to decide on is whether or not the appellants are entitled to be paid during the period of lay - off. The respondent company is in the business of providing concrete and other by-products to the construction, building and maintenance industries. Whilst it is not a construction company, its business is inextricably linked to the construction industry.

The appellants were members of SIPTU. Evidence was given, that SIPTU, on behalf of its members entered into a very lengthy and comprehensive consultation process with the respondent. That process began in 2003 and continued for several years. The appellants were given a contract of employment together with the company handbook both of which were produced following agreements reached during the consultation process. The contract of employment and the company handbook where produced in English and in Polish. The contract is signed and dated. The company handbook at 2.3.2 states:

"The company reserves the right to lay you off from work or reduce your working hours where due to circumstances, beyond it's control, it is unable to keep you in full time employment. You shall receive as much notice of such lay-off or short time as is reasonably possible to give"

Whilst neither the contract nor the company handbook specifically state that employees will not be paid during the period of lay – off, it is clear that it was agreed between the parties. Evidence in the form of a letter was produced stating that it had been agreed between SIPTU and the respondent that in an attempt to save the company and jobs that employees would not be paid during the period of lay-off. The members of SIPTU, of which the appellants were, had a ballot on the issue. The claimant stated, through his Solicitor that he voted against the ballot. However, it is noted that once the ballot was passed he did not raise a grievance nor did he surrender his membership of SIPTU. He remained silent on the issue until the hearing of these proceedings.

Evidence was given by JM that as the company secretary of the Irish Concrete Federation (an organisation that he founded) that he personally was involved in the consultation process with SIPTU in relation to the issue of pay during lay –off. He stated that the custom and practise since the last recession in the 1980's was that nobody in the industry was paid during the period of lay - off. He gave evidence of five other companies in the industry that had layed off employees during this recession and stated that it was within his personal knowledge that none of those individuals had been paid during that period.

Appellant 1 and appellant 3 were laid-off in August 2010 for a period of four weeks and appellant 3 was on lay-off for a period of four months and then made redundant. They were not in receipt of any remuneration from the employer, during this period of lay-off. The appellants were in receipt of Social Welfare during the period of lay- off.

The appellants brought a claim under the Payment of Wages Act, 1991 stating that they were entitled to be fully remunerated for the periods of lay-off. The claim was initially heard before the Rights Commissioner who by determination issuing on the 21st September, 2012 found that the respondent had not contravened it's obligation under Section 5 of the Payment of Wages Act 1991 which said section generally prohibits employers from making deductions in wages save in circumstances specifically provided for and regulated for in Section 5. It is noted that the respondent/employer was present at the hearing before the Rights Commissioner and the employer asserted that it had been the custom and practice of the company never to pay wages during lay off periods, a view not shared by the appellants.

The Payment of Wages Act, 1991 prohibits the employer from deducting the wages of an employee unless specifically provided for by Statute (e.g. for Income Tax purposes) or where there has been prior agreement of the parties.

Lay-off is defined in Irish Law in the Redundancy Payments Act of 1967 at section 11 (1) as follows:

"Where after the commencement of this Act an employee's employment ceases by reason of his employer being unable to provide the work for which the employee was employed to do, and

1. **It is reasonable in the circumstances for that employer to believe that the cessation of employment will not be permanent, and**
2. **The employer gives notice to that effect to the employee prior to the cessation,**

that cessation of employment shall be regarded for the purposes of this Act as a lay-off.

It is certain that the Employer must therefore establish two things before a lay-off as defined can have any relevance and/or application in the particular workplace. Firstly, the employer must give notice of an upcoming cessation of employment. Secondly, the employer must reasonably believe that the said cessation will not be permanent.

The Tribunal is satisfied that the employer gave notice. That notice was produced at the hearing. The letter is dated the 17th June, 2010 and states "**We regret to advise you that due to the completion of a number of ongoing projects, and the unavailability of alternative work it is necessary to place you on temporary lay-off. The Temporary lay –off will start week commencing Friday 25 June, 2010. We are monitoring the situation and will update you at the earliest opportunity."** The Tribunal is also satisfied that the company's genuine belief, at the material time, that the lay -off would not be permanent was in fact correct. Appellant 1 and appellant 3 returned to work following the period of lay off and to date is still working for the respondent.

No evidence was adduced by the appellants as to what their belief was at the material time. The Tribunal note that whilst it is the employer's belief that is relevant, the appellants' views on the matter, if backed up with relevant facts, can have a persuasive value.

At common law there is no general right to lay-off without pay. However, it has always been accepted that there are some limited circumstances wherein there will be such a right. This right can be implied so that for example in the UK case of **Browning and Others v Crumlin Valley Collieries (1926) 1 KB 698** the Court found the there was an implied term that a mine owner could lay off miners without pay while repairs are effected through no fault of the mine owners.

In the matter at hearing the situation is much stronger than in the Browning case in that the terms during that period of lay-off where specifically agreed between the union and the respondent. Even in circumstances where the agreement between the parties was found to be void or unenforceable, it is well established at common law that lay-off without pay may be operable where an employer can demonstrate it has been the custom and practice of the trade and/or workplace and that the custom must be reasonable, certain and notorious. This concept is referred to by **Mr. Justice Jelp in Devonald and Rosser (1906) 2 KB 728** wherein he affirms (a previous finding of Lord Denman in R v Stoke upon Trent):

"A custom so universal that no workman could be supposed to have entered into this service without looking to it as part of the Contract"

It is worth noting that the line of legal authority which highlights the need for a custom which allows for lay-off without pay to be a certain and notorious custom, has generally been considered in cases where the contract of employment has been silent on the issue of lay-off. The circumstances which currently present themselves are distinguishable insofar as there is a very clear provision in the contract of employment and in the company handbook for the appellants lay-off and there is an agreement in relation to the non payment of wages during that period. If there wasn't such an agreement or if that agreement, as stated earlier was held to be unenforceable then the Tribunal must therefore decide whether a contractual right to lay-off gives a further implied right to withhold pay.

In the Irish case of **John Lawe -v- Irish Country Meats Limited 1998 ELR p266** wherein the issues of an employer's right to lay-off without pay and the issue of the recognised custom and practise applicable in the workplace were considered by the learned Judge White in the Circuit Court. The Judge accepted that there is no inherent right to lay-off without pay at common law though he further recognised that there are certain limited circumstances which give rise to the right to lay-off without pay. This included a situation where an employer is able to establish that the entitlement arises out of well-established custom and practise. In the **Lawe** case a lay-off without pay was affected and whilst there was a recognised custom and practice which allowed for lay-off in certain circumstances none of these circumstances had applied here, and the employer had in fact used the lay-off process as a preliminary step to redundancy. The lay off in **Lawe** further lacked the reasonable belief that the cessation in employment would not be permanent as is required under the section 11 definition.

Judge White said (at page 271):-

"If the Lay-Off was intended to be temporary and the custom and practise…applied…and notice was given that the lay-off would be temporary, the company was entitled to lay-off without pay"

The Tribunal must ask itself, therefore, if the reasonable implication of this observation of the learned Judge is that he accepted that a lay-off when correctly and honestly utilised carries an implication that there will be no pay for the duration of lay-off.

In the case of **Industrial Yarns -v- Greene (1984) ILRM 15** to the Tribunal. In that case, Costello J considered the nature of the Contract of Employment once the Lay-off (as envisaged in sections 11 through 13 of the 1967 Act) has come into operation. The Honourable Judge found that where such a person is laid off on foot of a notice and where there is a reasonable belief that the cessation of work will not be permanent the contract of employment is not rescinded or at an end. The appellants makes the case that if the contract of employment subsists after the fact of lay off then the rights and obligations flowing from same must also subsist and that must include the right to be fully paid. The Tribunal cannot accept that this is a logical extension of what Costello J said. In the context of the Judgement the Judge was dealing with the employer's erroneous use of Section 11 as a vehicle for forcing employees to seek redundancy and forgo their entitlement to Minimum Notice. The Judge recognises that Lay-off under Section 11 is supposed to provide an interim measure of relief without having an overall negative effect on the Contract of Employment. The Judge recognises that a fundamental aspect of any contract of employment is being put to one side (i.e. the right to be provided with work) and that this is possible to do without necessarily terminating the contract and without impacting negatively on other reliefs, benefits and obligations so that for example – service still continues to accrue. It is noted by the Tribunal that Judge Costello was not asked to consider the issue of the right to lay-off with or without pay.

The Tribunal notes that wages are defined in the Payment of Wages Act 1991 as:-

"wages", in relation to an employee, means any sum payable to the employee by the employer in connection with his employment, including-

1. **any fee, bonus or commission or any holiday, sick or maternity pay or any other emolument referable to his employment whether payable under his contract of employment or otherwise,…..**

Therefore in reconciling the definitions which the Tribunal must give consideration to, it is noted that "wages" arise in "connection with employment", and "lay-off" arises for periods of "cessation of employment". It is not absurd to suggest that a lay off which gives rise to a cessation of work must by implication also give rise to a cessation of wages.

Having considered the law in the area and the able arguments presented by the appellants representation, the Tribunal cannot agree that the appellants were entitled to be fully remunerated during the course of their lay-off.

The Tribunal is satisfied that the contract of employment specifically allowed for and recognised the periodic need to operate a scheme of lay off. The Tribunal is satisfied that the appellants union agreed on behalf of its members that there would be no pay during the period of lay off. The Tribunal is satisfied, and based on the evidence of JM, that the well established custom and practice in the industry is not to pay employees during periods of lay-off. The Tribunal is satisfied that the employer reasonably believed that the lay-off would not be permanent and that an appropriate notice to that effect was delivered thereby satisfying the requirements as defined in the Redundancy Payments Act, 1967. The Tribunal accepts that whilst the contract does not specify that there will be no wages payable during lay-off, there is a letter setting out the agreement reached between SIPTU and the respondent to that effect. Even in the absence of that agreement any other interpretation would be nonsense. The Tribunal would go so far as to say that the cessation of pay during periods of lay-off is self-evident. There would be no logic to the practise of lay off otherwise. Lay-off allows an employer to buy time to generate work, secure contracts and/or get over lull (sometimes seasonal) periods. The expectation is that normality will resume and an employer wants to avoid shedding an experienced workforce on a permanent basis.

At a national level it is noted that persons who are temporarily laid off are allowed to collect social welfare for such periods of lay-off, as the appellants did. It would defy logic if such a person found to be so entitled to social welfare would also be entitled to be fully remunerated for the same period. That would be contrary to the very well established principle in relation to double

The Tribunal heard undisputed evidence on technical breaches of the Terms of Employment (Information) Act 1994 and 2001. In circumstances where the appellants did receive contracts of employment and were not prejudiced by the breach of Section 3 referred to by the appellants representative the Tribunal uphold the decision of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee - *claimant* UD1106/2008

Against

Employer - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Taaffe

Members: Mr. D. Moore
Ms. E. Brezina

heard this claim at Dublin on 26th January 2009

Representation:

Claimant: In person

Respondent: In person

The determination of the Tribunal was as follows: -

Claimant's Case

She worked on a number of sites for the respondent. In February 08 she was moved to her last position. Almost immediately she had problems with her line manager. He humiliated her and ignored everything she said. The line manager also told her that women should not be managers or directors. He never clearly explained to her what she was expected to do at work.

The claimant wrote to the respondent on 8 September 08 complaining about her line manager. The director came to see her at work on 9 September 08 and she explained her issues to him. The director promised to investigate.

On 17 September 08 the director came to see her again. He had found no proof of wrong doing by the line manager. He told her she had 2 options, move to another location and accept a pay cut or stay where she was with her line manager.

The claimant felt she had no option but to leave. Verbally she gave one weeks notice and worked her notice. Later she faxed the director asking for a written report of his investigation. She did not get it. The claimant thought that the director did not investigate properly.

Respondent's Case

The director gave evidence. On 8 September 08 a client phoned the director. The claimant had sent an email to the client raising two issues. One issue was the claimant's trouble with the line manager. The director was disappointed that the matters were raised first with the client.

The director spoke to the staff. Nobody knew about the claimant's complaint. He also spoke to the line manager, who told him he was happy with the claimant's work.

At the second meeting with the claimant the director told her he could find no evidence to substantiate her complaint. He could not believe either the line manager or her.

The director never discussed a reduction of salary with the claimant. Had she decided she wanted to work at another location he would have had to move someone to make room for her. He hoped to sit down with the claimant and the line manager and work out the issue. Then the claimant could stay on site.

The claimant was adamant she could not stay. The director was at the site three days before the 8 September 08. She spoke to the claimant that day and she did not raise any issue with him.

Determination

For a claim for constructive dismissal to succeed the claimant needs to satisfy the Tribunal that her working conditions were such that she had no choice but to resign. The Tribunal is satisfied that the claimant had difficulties with her line manager. However for a period of six months she did not attempt to resolve the issue.

When the director learned of the claimant's difficulty he made efforts to resolve the issue. The Tribunal is satisfied that the claimant did not exhaust the grievance procedure before she resigned. Accordingly the Tribunal finds that the claimant was not constructively dismissed. The claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

UD1227/2014 February 1, 2016

Nuala Burke
V
Superior Express Limited

Case Details

Body
Employment Appeal Tribunal

Date
February 1, 2016

Hearing Dates
December 22, 2015

Official
Niamh O'Carroll Kelly BL

Legislation
- UNFAIR DISMISSALS ACTS 1977 TO 2007

Members
Mr C. McHugh, Ms M. Mulcahy

County
Dublin 2

Decision/Case Number(s)
- UD1227/2014

Respondent Representative
Mr Stephen O'Sullivan BL instructed by Mr Enda Moran of Enda P. Moran Solicitors, Main Street, Celbridge, Co. Kildare

Claimant Representative
Mr David Quinn BL instructed by Mr John Nelson of Nelson & Co Solicitors, Templeogue Village, Templeogue, Dublin 6W

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Nuala Burke – **claimant** UD1227/2014

against

Superior Express Limited – **respondent**

under

UNFAIR DISMISSALS ACTS 1977 TO 2007

I certify that the Tribunal

(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr C. McHugh

Ms M. Mulcahy

heard this claim at Dublin on 29th October and 22nd December 2015

Representation

Claimant: Mr David Quinn BL instructed by Mr John Nelson of

Nelson & Co Solicitors, Templeogue Village, Templeogue, Dublin 6W

Respondent: Mr Stephen O'Sullivan BL instructed by Mr Enda Moran of

Enda P. Moran Solicitors, Main Street, Celbridge, Co. Kildare

The determination of the Tribunal is as follows:

The fact of dismissal was not in dispute.

Background

The respondent is a transport and courier service provider. The respondent has two computer systems that are not connected to each other. The transport system is used to record work contracted for and the resulting deliveries made. The accounting system is used to record and monitor the respondent's financial transactions. A small proportion of the respondent's business is COD.

The COD procedure was outlined for the Tribunal. When a retailer wants a COD done it emails the respondent. The job is entered on the transport system and the job is dispatched. When the goods are delivered the base controller closes it on the transport system.

Later that day or the next day the driver comes to reception with the money, typically €18.50. The amount is marked paid on the transport system. The money is put into an envelope and the driver's work number, the date and the amount are written on the outside. Several days' worth of payments could be put into a single envelope. It was the claimant's responsibility to take payments from drivers and put them in an envelope. If a job remains marked unpaid on the transport system the amount is deducted from the driver's pay. When an envelope comes to the credit controller she enters the details on the accounting system and lodges the money.

At that time the transport system was not checked against the accounting system for discrepancies. A number of drivers complained that their pay had been incorrectly deducted for money that they had paid to the claimant. When the credit controller investigated she found a number of instances where jobs were marked paid on the transport system but no corresponding envelopes arrived to her, and as a result jobs were marked paid on the transport system but remained marked unpaid on the accounting system.

Determination

The claimant commenced employment with the respondent company on the 7th February 2000. Up until January/February 2014 there was no issue with her employment. She was described as an excellent trustworthy employee. In late 2013 early 2014 an issue arose in relation to the logging in of jobs on the transport system. Essentially what it amounts to is, money went missing. The Tribunal's role is not to assess the guilt or innocence of the claimant. The Tribunal's role is to assess the fairness of the dismissal.

The claimant was singled out as the person responsible for the misappropriation of monies. An investigation of sorts was embarked upon. Statements were taken however these statements could not and were not given to the claimant as they were taken after her dismissal. The MD took notes from interviews which he kept in his diary. They were not given to the claimant. The letter dated 31 March 2014 lacks specific allegations against the claimant. The meeting letter dated 9 April 2014 suggests a predetermined conclusion concerning the missing money "The time frame allowed between meetings should give you the opportunity to provide evidence as to the whereabouts of the missing CODs".

No forensic IT analysis was done to determine who manipulated/altered the data input/output. The notes of the meeting did not accurately reflect even the MD's evidence of what was said. The claimant was not given a copy of the meeting notes to agree. Until this Hearing she didn't have sight of them. She was not given the right of appeal.

It is for the reasons set out above that the Tribunal finds that the claimant was unfairly dismissed. The claim under the Unfair Dismissals Acts 1977 to 2007 succeeds.

The claimant has a legal obligation to mitigate her loss. The onus on the claimant in this regard is a high one. Evidence was introduced in relation to jobs the claimant applied for. The job applications made were confined to between January 2015 and June 2015. Over a 1 year and 7 month period the Tribunal would expect to see more applications spread out over that time period.

The Tribunal awards the claimant the sum of €20,000.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE UD1832/2010

WT819/2010

MN1784/2010

against
EMPLOYER

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan
Members: Mr. R. Prole
Mr. J. Dorney

heard this claim at Dublin on 26th January 2012
and 29th March 2012

Representation:

Claimant:
Kelly & Griffin, Solicitors, 77 Terenure Road North, Terenure, Dublin 6w

Respondent(s) :
Mr. Ken Stafford, Management Consultancy Services,
7 Castletown Court, Celbridge, Co Kildare

Claimant's case

The claimant brought this case for unfair dismissal to the Tribunal on the basis that he had no alternative but to resign and therefore was constructively dismissed from his employment.

The claimant commenced employment with the respondent on 16th August 1993. Initially he was a skipper on board a Trawler owned by the respondent and then he became a lorry driver. In 2001 the claimant became Assistant Manager in the respondent's shellfish processing plant and in 2002 he took over as Manager when the previous Manager left. The claimant did not receive any formal training but learned on the job.

The claimant gave evidence of certain practices which he was forced to participate in during the

course of his employment. Some of these were:

- Ensure that sodium hydro chlorine [a bleaching agent] was put on the tables where the samples were to be taken for testing by the Sea Fisheries Board;

- To pack any product that fell on the floor or was otherwise damaged, failing which he was told to get out the door in vulgar language;

- Product returned was to be re-packaged and distributed again once all traceability had been removed;

- Illegally dumping contaminated product at night, in different harbours. This was done because, even though the respondent had a dumping permit, it was cheaper to do it this way;

- Instructed to dip shellfish in Sodium Metabisulfite to extend its shelf life;

- The claimant's son when working there was told to forge signatures on certain documents.

The claimant was belittled in front of staff and so called management meetings were used by the respondent MD to roar, shout and generally badger staff including the claimant.

In June 2009 the claimant was told that his salary was being reduced to €40,000.00 per annum. This was a cut of €10,000.00 per annum and he was told that this was to be given to the MD's son who was going to be the General Manager. This announcement was made in front of staff in the canteen. The claimant was also demoted to Assistant Manager. The claimant did not agree to this demotion or reduction in pay and thought the pay reduction had been decided against until it actually occurred in Dec 2009. At this point the claimant approached the respondent and asked why his pay had been cut and was told that it had been discussed in June and that if he did not like it he was told in unacceptable language that 'he knew where the door was'. During the period from June to December 2009 the claimant felt that his management position was being undermined and that he had been reduced to a "General Dogs Body". He was now being instructed to carry out tasks such as repairing a gate and collecting product in the lorry from various harbours. The claimant was also told that a new Production Manager was going to be appointed and if that person did not like the claimant he would fire him. He requested a Contract of Employment but was not given one even though other staff were.
The claimant never received any verbal or written warning in relation to his work.

The Claimant went on sick leave in January 2010 due to work related stress. There was no written agreement in relation to pay while on sick leave but there had been precedence in relation to this whereby staff were paid while on sick leave. However the claimant's pay was stopped as soon as he went out sick.

While the claimant was on sick leave he heard that the respondent was advertising for someone to replace him. The claimant engaged a solicitor who corresponded with the respondent's representative on a number of occasions between 28th January 2010 and 17th June 2010. This correspondence culminated in the decision by the claimant that he had no choice but to resign from his employment with the respondent. The claimant resigned by letter dated 25th June 2010.

Copies of all written correspondence between the representatives were submitted to the Tribunal.

A former work colleague of the claimant gave evidence that during her time working with the respondent it was common to peel off labels from returned product and re-distribute it. Furthermore she often had to wash prawns in fairy liquid to 'give them a better look'.

The claimant's son gave evidence that he was asked by the respondent to forge certain documents and re-label and re-package stock.

Respondent's case

The Respondent MD confirmed the claimant's dates of employment and the fact that he was promoted to Production Manager in 2002. The claimant was Assistant Manager for a year previous to that and when he took over the role of Production Manager the respondent asked him if he was confident to do so and was told yes.

However as the plant began to increase output it became clear that the claimant was not up to the task of Production Manager. Therefore in or around June 2009 the respondent informed the claimant that he was to be demoted to Assistant Manager and that the owner's son was to take on more responsibility. Along with this demotion there was to be a €10,000.00 decrease in pay per annum. The claimant verbally agreed to this pay cut and demotion. Although the pay cut was agreed in June it was not put in place until December 2009.

The respondent denied that there was ever such a post as General Manager and that the claimant was a Production Manager before being demoted to Assistant Manager. It was also denied that the respondent advertised for a replacement for the claimant while the claimant was on sick leave or that he told the claimant they were going to hire a new Production Manager who would sack the claimant if he did not like him.

The MD disputed the evidence of the claimant in relation to dubious work practices and that he was never prosecuted and had a good relationship with the Department of the Marine. While he agreed that he did dump waste at sea he also sold waste to customers in France.

He agreed that he used bad language to the claimant but it was not personal.

In relation to the correspondence entered into after the claimant went on sick leave he gave evidence that the first letter from his solicitor was sent without his permission.

Determination

The claimant gave evidence of an employment history where, at least from early June 2009 onwards, he was subjected to bullying, harassment, subjected to foul and abusive language, belittled, criticised in front of staff, forced to engage in dubious and appalling work practices, demoted from manager to assistant manager, and having his salary cut by €10,000 per annum. The respondent MD gave evidence that he did demote the claimant, reduce his salary by €10,000 and used bad language to the claimant but disputed the remainder of the claimant's evidence. The claimant tried to engage the respondent in relation to his grievances but the respondent refused to enter discussions with him. The claimant was stressed as a result of the way he was treated and went on certified sick leave in January 2010.

He instructed his solicitorto write to the respondent to try and resolve the differences. The respondent engaged a solicitorto reply to the initial letter written by the claimant's solicitor. However at the Tribunal hearingthe MD gave evidence that the solicitor engaged by him did not have authority to write in theterms in which he did. This seems strange to the Tribunal because it is difficult to imagine asolicitor writing a letter without the instructions of his client. The Tribunal wonders how wouldthe solicitor know what to write in such circumstances? In any case the respondent engagedanother representative to respond to the letters from the claimant's solicitor. Presumably therespondent's new representative was writing having taken instructions from the respondent. TheTribunal is satisfied that the correspondence exchanged demonstrated an un-willingness on thepart of the respondent to engage in a meaningful way to resolve the claimant's legitimategrievances. Having failed to resolve his grievances the claimant resigned by letter dated the25th June 2010 and claimed constructive dismissal.

A constructive dismissal will occur when an employee terminates his Contract of Employment where, because of the employer's conduct, the employee was entitled to terminate his Contract without notice or where it was reasonable for him to do so. It has been well established that a question of constructive dismissal must be considered under two headings – entitlement and reasonableness. An employee must act reasonably in terminating his Contract of Employment. Resignation must not be the first option taken by an employee and all other reasonable options, including following the grievance procedure, must be explored. An employee must pursue his grievance through the procedures laid down before taking the drastic step of resigning. Unfortunately there was no Grievance Procedure that the claimant could invoke. Indeed the claimant did not even have a contract of employment despite having requested one. Where there is no Grievance Procedure, as in the claimant's case, the claimant must act reasonably.

The Tribunal has to decide whether the Claimant was constructively dismissed. It is clear that the Claimant resigned from his employment on the 25th June 2010. The Claimant is claiming that he was dismissed by construction as envisaged by Section 1of the Unfair Dismissals Act 1977 (the Act).

Although the term "Constructive Dismissal" is not specifically mentioned in the Act, it is the term commonly understood to refer to that part of the Definition Section of the Act, which states: "dismissal in relation to an employee means the termination by the employee of his contract of employment with his employer whether prior notice of determination was or was not given to the employer, in circumstances in which, because of the conduct of the employer the employee was or would have been entitled or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employee".

The Tribunal must consider whether because of the Employer's conduct the Claimant was entitled to terminate his contract or it was reasonable for him to do so.

An employee is entitled to terminate the contract only when the employer is guilty of conduct which amounts to a significant breach going to the root of the contract or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. In the case of Brady v Newman UD 330/1979 the Tribunal stated

> "….. An employer is entitled to expect his employee to behave in a manner which will preserve his employer's reasonable trust and confidence in him so also must the

employer behave".

Having considered all the evidence carefully the Tribunal determines that the claimant was constructively dismissed and that the Employer was guilty of conduct which amounted to a significant breach of the contract and that he failed utterly to engage with the claimant to resolve the claimant's grievances. The Tribunal further determines that compensation is the most appropriate remedy under the Unfair Dismissals Acts 1977 to 2001 and awards the Claimant €30,000.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

No evidence was adduced in respect of the claim under the Organisation of Working Time Act, 1997 and therefore that claim is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

OFFICE OF THE DIRECTOR OF EQUALITY INVESTIGATIONS

EMPLOYMENT EQUALITY ACT, 1998

EQUALITY OFFICER'S DECISION DEC-E2002-050

PARTIES

Margetts
(Represented by Mandate)

AND

Graham Anthony & Co, Ltd
(Represented by Denis McSweeney, Solicitors)

File reference: EE/2001/046
Date of issue: 27 November 2002

TABLE OF CONTENTS

1. DISPUTE

1.1 This dispute concerns a claim by Ms Mary Margetts that she was discriminated against by Graham Anthony & Co Ltd on the grounds of marital status, family status and age contrary to the provisions of the Employment Equality Act, 1998 when she was offered part-time employment instead of the full-time employment she had sought.

1.2 On behalf of the complainant, Mandate Trade Union referred a claim to the Director of Equality Investigations on 27 February 2001 under the Employment Equality Act, 1998. In accordance with her powers under section 75 of that Act, the Director then delegated the case on 8 March 2001 to Anne-Marie Lynch, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act. Submissions were sought from both parties and a joint hearing was held on 3 May 2002. Subsequent correspondence with the parties concluded on 3 July 2002.

2. SUMMARY OF THE COMPLAINANT'S CASE

2.1 The complainant is separated with two teenage children. She was a qualified beauty therapist, and had operated her own beauty salon for five years between 1993 and 1998. In early September 2000, the complainant said she replied to the respondent's advertisement for counter staff for a range of skin care products being launched in a Galway department store. She was invited for interview on 8 September, which she attended in a hotel together with two other applicants.

2.2 The complainant said that she had told the interviewer that she was looking for full-time work, but agreed she would accept part-time on the basis that it may subsequently lead to full-time employment. She said the interviewer asked her if she was married and also asked if she had children. The complainant was offered a twelve-hour week, and she said the two other interviewees were offered full-time employment, one being given a thirty-hour week and the second being offered the position of counter manager and a thirty-nine hour week. Both of these interviewees were single, did not

have family responsibilities as defined in the 1998 Act, and both were younger than the complainant.

2.3 The complainant started work on 16 September. She did not receive a contract, and was never advised of any probationary period. On 4 December she was dismissed by her employer, which dismissal was referred to the Labour Court under the terms of the 1998 Act.

2.4 The complainant said her claim was based on the fact that there was no justifiable reason why she should be asked questions at an interview about her marital and family status. She claimed that the offer of part-time employment constituted less favourable treatment by the employer because of her family status, marital status and age, contrary to her statutory rights under the 1998 Act.

3. SUMMARY OF THE RESPONDENT'S CASE

3.1 The Managing Director of the respondent company said that it was a wholesale distribution company for beauty products. In September 2000, it was intended to launch a new skincare range in a department store and the Managing Director was asked to recruit staff for the product. It was decided that the necessary staff complement was three persons: one to work thirty-nine hours per week and act as the counter manager, a second to work a twenty-hour week and a third to work a twelve-hour week. An advertisement was inserted in a local newspaper, which stated:

"Counter staff required for exciting skin care line launching in [department store] in September. Beauty therapist experience an advantage, excellent package on offer for suitable candidate. Please forward CV to..."

3.2 The respondent said that approximately eleven or twelve applications were received and six or seven people were invited for interview on 8 September 2000. These interviews were carried out by the Managing Director alone. He said that the key to his selection of particular interviewees was their experience. The candidate chosen for the counter manager position, Ms B, had had extensive experience in cosmetics and in managing staff. Ms C, who was offered a twenty-hour week, was currently working in

another store doing similar work, and had extensive experience in make-up and consultation. The complainant's experience was mostly in beauty therapy and professional treatments. Her background was less strong in retail experience and she had been out of the workplace for some time. As the candidate with less experience, she was offered shorter hours.

3.3 The respondent said that the gap in the complainant's curriculum vitae was the reason why the issue of her marital and family status arose, and said she had volunteered the information. The Managing Director had known her professionally some years before, when she operated her own salon, and he had asked her why her business had ceased. According to him, the complainant said that she had separated and was raising her two children.

3.4 The respondent denied that it had discriminated against the complainant on any of the three grounds cited, or at all.

4. INVESTIGATION AND CONCLUSIONS OF THE EQUALITY OFFICER

4.1 In reaching my conclusions in this case I have taken into account all of the submissions, both oral and written, made to me by the parties.

4.2 The complainant alleged that the respondent discriminated against her on the grounds of marital status, family status and age contrary to the provisions of the Employment Equality Act, 1998. Section 6 of the Act provides that discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated, on one of the discriminatory grounds, which include marital status, family status and age. Section 8 provides that

(1)In relation to-

(a) access to employment...

(b) conditions of employment...

an employer shall not discriminate against an employee or prospective employee...

(6) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or prospective employee in relation to conditions of employment if, on any of the discriminatory grounds, the employer does not offer or afford to that employee or prospective employee or to a class of persons of whom he or she is one-

(a) the same terms of employment (other than remuneration or pension rights),

(b) the same working conditions, and

(c) the same treatment in relation to overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures,

as the employer offers or affords to another person or class of persons, where the circumstances in which both such persons or classes are or would be employed are not materially different.

4.3 It will be noted that there were certain facts which were in dispute between the parties. The complainant asserted that there were only three candidates for interview, while the respondent said that six or seven candidates were interviewed. The complainant also asserted that Ms C was offered employment of thirty hours per week, while the respondent said she was offered twenty. The parties were not asked to provide evidence of their respective claims, as I concluded that these discrepancies were not of material relevance. The complainant claimed discrimination by comparison with the two other candidates actually offered employment, and Ms C was offered longer hours than the complainant, whether the total was twenty hours or thirty hours.

Burden of proof

4.4 The traditional approach taken to complaints of discrimination on the original ground of sex in the case law of the European Court of Justice, and sex and marital status in the caselaw of the Labour Court and Equality Officers, has been that once a complainant establishes a *prima facie* case of discrimination, the onus then moves to the respondent to rebut the presumption of discrimination. This common law approach has become the statutory requirement in complaints of gender discrimination in employment following the transposition of Council Directive 97/80/EC into Irish law on 18 July 2001

by means of the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations, 2001 (SI 337 of 2001). The Regulations provide that

> [w]*here in any proceedings facts are established by or on behalf of a person from which it may be presumed that there has been direct or indirect discrimination in relation to him or her, it shall be for the other party concerned to prove the contrary.*

4.5 The Employment Equality Act, 1998 introduced seven new grounds of discrimination, not drawn directly from European Union Directives or European Court of Justice case law. The Council Directive and the Regulations mentioned above are not directly applicable to grounds other than gender, but this approach appears to me to be fully consistent with the development of discrimination case law. It has become the standard approach of Equality Officers in deciding cases under the 1998 Act, such as on the disability ground in *Harrington v East Coast Area Health Board* (DEC-E2002-001) and on the race ground in *Eng v St James's Hospital* (DEC-E2001-041), and I intend to apply it to this complaint on the marital status, family status and age grounds.

4.6 The first requirement, therefore, is for the complainant to establish facts from which it may be presumed that the principle of equal treatment has not been applied to him or her. In the case of *Teresa Mitchell v Southern Health Board (Cork University Hospital)* (AEE/99/8), the Labour Court said "...this approach means that the appellant must first prove as a fact one or more of the assertions on which her complaint of discrimination is based. A *prima facie* case of discrimination can only arise if the appellant succeeds in discharging this evidential burden. If she does, the respondent must prove she was not discriminated against on grounds of her gender. If she does not, her case cannot succeed."

Complaint of discrimination on the marital status and family status grounds

4.7 The complainant asserted that she was asked if she was married and whether she had children, and that there was no justifiable reason for this. The respondent, on the other hand, stated that the complainant volunteered this information when asked about the closure of her former business.

4.8 It is feasible that an employer may need to know an employee's marital or family status for pension purposes for example, but it is difficult to imagine a reason why such a question could be relevant at the interview stage. The 1998 Act prohibits discrimination on nine grounds, and to ask a question relating to one of these grounds at interview would at least suggest that the ground is a factor in the selection process. If there were a genuine link between the ground and the job requirements it would be covered by the occupational qualification exemptions provided for in the Act.

4.9 In this case, no evidence can be adduced by either party to support its version of events. However, I note that the complainant's curriculum vitae demonstrated that she had a gap of almost two years in her employment history, and I consider it reasonable for a prospective interviewer to question a candidate about such a gap. I note further that reference was made in her curriculum vitae to her two children. Therefore, on balance, I must consider it unlikely that the respondent asked her the question in the manner she suggested. As it must be a matter for the complainant to demonstrate the facts on which she bases her complaint, I cannot find that the respondent discriminated against her in relation to her marital status or her family status.

Complaint of discrimination on the age ground

4.10 The posts being filled were in for the promotion of beauty products in a department store. The advertisement said that beauty therapy experience would be an advantage, although it was not an essential requirement. The complainant had the beauty therapy experience, in the sense of providing professional treatments such as facials, but did not the retail experience, in the sense of promoting products. Neither of the other two candidates were beauty therapists, but they had extensive retail experience, as well as make up and beauty consultancy qualifications. In addition, Ms B had staff management experience. The complainant pointed out that Ms B and Ms C were in their mid-twenties, whereas she was in her forties. There was an obvious age disparity. However, I am satisfied on the evidence I obtained in the course of my investigation that she was not better qualified than the other two candidates taking into account the requirements of the job.

4.11 It is not enough just to demonstrate a difference upon which one can ground a complaint under the 1998 Act, such as the fact that there is a difference in marital status,

sexual orientation or age between the successful candidates and the complainant. The law relating to the issue of a presumption of discrimination or the drawing of an inference of discrimination was considered by Quirke J in *Davis v Dublin Institute of Technology* (High Court, 2000, unreported). That case was an appeal to the High Court on a point of law from a Labour Court determination of a complaint of sex discrimination taken under the Employment Equality Act, 1977. The judge concluded

"In cases where discrimination on grounds of sex is alleged to have occurred contrary to the provisions of section 2 (a) of the 1977 Act the fact that there is a gender difference between the successful and unsuccessful applicants for a post or for promotion does not, by itself, require tribunals such as the Labour Court to look to an employer for an explanation...A primary finding of fact by such a tribunal of discrimination or of a significant difference between the qualifications of the candidates "*together with*" a gender difference may give rise to such a requirement..."

Since no evidence was provided which would lead to a finding of fact that the complainant was the best qualified candidate, I cannot find that she has established a *prima facie* case of discrimination.

4.12 In *Dublin Institute of Technology and a Worker* (DEE994), the Labour Court said "It is not the responsibility of the Equality Officer or this court to decide who is the most meritorious candidate for a position. The function of the Court is to determine whether the sex or marital status of the complainant or the appointee influenced the decision of the Board." In this case, the candidates chosen by the respondent to work the longer hours had significant and relevant experience. I cannot find that her marital status, family status or age were factors in the decision to offer her shorter hours.

5. DECISION

5.1 Based on the foregoing, I find that Graham Anthony & Co Ltd did not discriminate against Mary Margetts on the grounds of marital status, family status and/or age, contrary to the provisions of the Employment Equality Act, 1998, when she was offered part-time employment.

_____
Anne-Marie Lynch
Equality Officer

27 November 2002

Mr. Tom Barrett
-v-
Department of Defence

Case Details

Body
Equality Tribunal

Date
March 27, 2015

Official
Peter Healy

Legislation
- EMPLOYMENT EQUALITY ACTS

Decision/Case Number(s)
- DEC-E2015-017

THE EQUALITY TRIBUNAL
EMPLOYMENT EQUALITY ACTS
Decision DEC-E2015-017
PARTIES
Mr. Tom Barrett
and
Department of Defence
(represented by Ms Cathy Smith B.L.,
instructed by the Chief State Solicitor)
File Reference: EE/2005/289
Date of Issue: 27 March 2015

1 Claim

1.1 The case concerns a claim by Mr Tom Barrett (hereinafter referred to as "the complainant") that the Department of Defence (hereinafter referred to as "the respondent") subjected him to victimisation contrary to Section 74(2) of the Employment Equality Acts 1998 to 2008.

1.2 The complainant referred a complaint under the Employment Equality Acts (hereinafter referred to as "The Acts") to the Director of the Equality Tribunal on 28 April 2011. On 21 June 2013, in accordance with his powers under S. 75 of the Acts, the Director delegated the case to me, Peter Healy, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Acts. On this date my investigation commenced. As required by Section 79(1) of the Acts and as part of my investigation, a hearing was held on 2 October 2013 and final submissions received from the complainant on the 23 October 2013.

1.3 The complainant has previously submitted complaints against the respondent under the Acts (most recent being DEC-E2009 -053) and submits that he had been subject to victimisation since 8 November 2010 following a Labour Court appeal process in regards to the decision.

2. Summary of the Complainant's Submission

2.1 The complainant was employed in the position of Assistant Principal Officer (APO) in the Department of Defence based in a Galway office. The complainant submits that he was "having idleness forced upon him" by the respondent in their failure to provide him with meaningful work.

2.2 The complainant submits that his victimisation primarily relates to the fact that he was not appointed to what he submits was a suitable position (in the pay-roll area). Instead another APO was appointed to that post. The complainant submits that he knows of no reasons for victimisation in this manner other than that he had previously taken a case against the respondent.

2.3 The complainant submits that the respondent generally excluded him from normal work matters and gave the following specific examples.

- • He was not introduced to the minister on the occasion of a Ministerial visit.
- • Not included in the circulation list for a specific E-Mail sent to all other managers.

2.4 The complainant submits that the victimisation was extremely detrimental to his personal wellbeing.

3. Summary of the Respondent's Submission

3.1 The respondent rejects all aspects of the complaint.

3.2 The respondent submits that the complainant has instituted proceedings against an individual who is not his employer and therefore his claim must fail.

3.3 The respondent submits that the complainant is estopped from instituting this complaint as they relate to the same circumstances and same cause of action as already adjudicated on in the previous proceedings. In this regard the respondent relies on the doctrine of **res judicata.**

3.4 The respondent submits that nothing in the complainants written submissions establish that he has suffered from adverse treatment as the respondent submits that the complainants position had remained unchanged since previous proceedings.

4. Decision

4.1 The complainant originally named the Secretary General of the Department of Defence as the respondent however in his written submission it is clear that the complainant had previously named the Department of Defence as his employer. I find the Department of Defence to be the correct respondent and this was agreed by the complainant in his final submission.

4.2 The complainant states that his victimisation began following the publication of Labour Court recommendation EDA 1017 on the 30th September 2010 and specifically from on the 8th November 2010 onwards and I must therefore consider if events from that date onwards constitute victimisation under the Acts.

4.3 Section 74 (2) of the Employment Equality Acts states:

> **"For the purposes of this Part victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to a complaint of discrimination made by the employee to the employer."**

As stated in by the Labour Court in EDA 1312, Frances Donnelly v National Gallery of Ireland:

"This section of the Acts is based on Article 11 of Directive 2000/78/EC on Equal Treatment in Employment and Education (The Framework Directive). Both the Acts and the Directive provide that victimisation occurs where a detriment is imposed on a worker 'as a reaction to' a complaint or other protected act. The use of the expression 'as a reaction to' connotes that the making of a complaint, or other protected act, must be an influencing factor in the decision to impose the impugned detriment although it need not be the only or indeed the principal reason for the decision."

4.4 Section 85A (1) of the Employment Equality Acts, states: **"Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary."** This means that the complainant must establish primary facts upon which the claim of discrimination is grounded and then the burden of proof passes to the respondent.

4.5 It is agreed by both parties that the complainants working conditions were unchanged before and after the 8th November 2010 up to early 2012 when the complainant was assigned to a new role. I must consider if efforts to find another role for the complainant were not facilitated by the respondent due to previous complaints taken under the Acts and I have considered all evidence put forward by both parties in this regard.

4.6 The complainant has submitted that he was victimised as he was not placed in a number of available roles. At the hearing the complainant gave direct evidence that it was his practice to reject roles that he felt would not suit his abilities. I am satisfied the complainants practice in this regard is not usual and would have made accommodating his requirements difficult for the respondent. At the hearing the complainant stated that he was currently fully occupied in a role that he enjoyed and was making an active contribution to his Department. It was agreed at the hearing, that this new role had been moved to Galway from another regional office solely for the complainants benefit. I accept that this required some organisational reorganisation by the respondent and needed to be arranged over an extended period of time. I accept that the respondent acted in a strategic manner to accommodate the complainant. I find that the there is no evidence of victimisation in regards to the filling of suitable vacancies but rather evidence of more favourable treatment for the complainant in the efforts made by the respondent to provide a post which the complainant considered satisfactory.

4.7 In his short written submission and in his evidence at the hearing the complainant based the majority of his case of victimisation on the fact that he had not been appointed to and APO role in the pay-roll division in late 2010. I accept the respondent's submission that it is not normal practice for APOs in the civil service to decide what role they wish to fill and then automatically be appointed to that post. I find that the appointment of another APO to the pay-role post is not evidence of less favourable treatment.

4.8 In addition to the issue of appointment to a suitable role, I have examined all evidence put forward by the complainant of less favourable treatment and find the following in relation to the specific examples provided,

- · In regards to the complainant not being introduced to the Minister. I find that this can only be speculation on the part of the complainant as he can not give evidence that all APOs had been introduced.
- · In regards to a number of E-Mails that were not circulated to the complainant, I have examined the E-mails in question and accept the respondents submission that they were simply not relevant to the complainant.

I therefore find that the complainant's allegations in regard to his isolation by the respondent is mere assertion unsupported by any evidence that demonstrates that actions by the respondent were a reaction to any complaint under the Acts.

4.9 At the hearing the complainant submitted that he would still be idle if he had not made his previous complaints under the Acts. This submission by the complainant is entirely contrary to the case of victimisation being made. I am satisfied that the complainant believes that his position has improved due to the lodgement of previous complaints and therefore I can find no detriment to the complainant as a result of taking any complaint under the Acts.

5. DECISION OF THE EQUALITY OFFICER.

I have concluded my investigation of this complaint and hereby make the following decision in accordance with Section 79(6) of the Employment Equality Acts that:

The complainant has failed to establish a prima facie case of victimisation.

_____

Peter Healy

Equality Officer

27 March 2015

McCarthy
-v-
Cork City Council

Case Details

Body
Equality Tribunal

Date
April 23, 2008

Official
Mary Rogerson

Legislation
- Employment Equality Acts 1998-2007

Decision/Case Number(s)
- DEC-E2008-016

The Employment Equality Acts 1998-2007

Decision No:

DEC-E2008- 016

Mc Carthy
(represented by Barry Sheehan Solicitors)
-v-
Cork City Council

1. CLAIM

1.1 The case concerns a claim by Mr. Kieran Mc Carthy that Cork City Council discriminated against him on the age ground in terms of section 6(2)(f) of the Employment Equality Acts 1998 and 2004 in contravention of section 8 of the Act in relation to appointment to the post of Heritage Officer.

2. BACKGROUND

2.1 The complainant applied for the position of Heritage Officer and he was unsuccessful in his interview. He submits that he had vast experience and extensive qualifications and that the respondent believed he was too young to hold the position. The successful candidate was older. He alleges that he was discriminated against on the age ground. The respondent denies the allegation of discrimination and submits that the appointment to the post was made on merit alone and not on any discriminatory ground whatsoever.

2.2 The complainant referred a complaint under the Employment Equality Acts 1998 and 2004 to the Director of the Equality Tribunal on 5 September 2005. On 16 March 2007, in accordance with her powers under section 75 of that Act, the Director delegated the case to Mary Rogerson, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act. A submission was received from the complainant on 7 February 2007 and from the respondent on 21 March 2007. A joint hearing of the claim was held on 8 October 2007. An application to extend the time limit for referring a complaint was submitted and a Direction to extend time was issued on 21 November 2007. Final material requested from the respondent was received on 14 March 2008.

3. SUMMARY OF THE COMPLAINANT'S SUBMISSION

3.1 The complainant applied for the post of Heritage Officer in December 2004. On 26 January 2005, the Recruitment Officer (Mr. B) for the respondent wrote to the complainant informing him that his written application had been unsuccessful and that he would not be called to attend for interview. On 3 February 2005, the complainant wrote to Mr. B expressing his dissatisfaction with the decision and asking him to specify the precise grounds upon which the selection board had elected not to proceed with his application to interview stage. Mr. B replied stating that although the selection board had deemed him to be qualified, it found his postgraduate experienced "**did not demonstrate relevant heritage experience of sufficient calibre at an appropriate senior level**."

3.2 Mr. B subsequently advised the complainant of the availability of an internal appeal of the decision not to call him to interview. On 24 February 2005, the complainant appealed the earlier decision of the selection board. By letter dated 28 February, the Personnel Officer, Mr. O' H responded that the appeal had been successful and that the complainant should attend for interview on 4 March 2005. The complainant attended for interview and was rigorously examined on the various duties of the post as detailed in the particulars of the post furnished by the personnel department of the respondent. During the course of approximately 35 minutes interview, each of the three interview board members took notes of the complainant's responses to the various questions put to him.

3.3 On 9 March 2005, Mr. B wrote to the complainant advising him that his interview had been unsuccessful. The complainant was subsequently provided with the interview results and the interview board comment sheet. The complainant submits that the marks awarded for performance at interview bear no resemblance to what actually took place and the complainant subsequently raised the matter with the Minister for the Environment, Heritage and Local Government. He subsequently advised that he had no jurisdiction to hear an appeal against the decision of the interview board.

3.4 The complainant contends that he was unfairly discriminated against by the respondent on the grounds of age contrary to section 6(2)(f) of the Employment Equality Acts 1998 and 2004 on two occasions. The first such occasion occurred on 26 January 2005 when the decision not to call the complainant to interview was communicated to him and the second occurred on 9 March 2005 when he was advised that his interview was unsuccessful. On both these occasions, the respondent sought to justify its decision on the sole basis that the complainant did not possess sufficient heritage experience. This apparent justification is without foundation and has been offered merely in an effort to disguise the real reason behind the decision not to award the post to the complainant. The complainant submits that the respondent believes that irrespective of his vast experience and extensive qualifications, his client is too young to hold such a position.

4. SUMMARY OF THE RESPONDENT'S SUBMISSION

4.1 The respondent rejects that any of its actions in the matter of the complainant's application related to his age. Indeed, the respondent was never aware of the precise age of any candidate as such information was not sought on the application form. The complainant in his statement produces absolutely no evidence whatsoever to suggest that age was a factor in any decision of the respondent.

4.2 Whilst the complainant alleges that the respondent discriminated against him on the grounds of age on two occasions, the first such allegation refers to the original decision not to call him for interview. The complainant was originally not short listed based on the information submitted on his application form. When he queried the matter, he was advised that the reason for this was that he "**did not demonstrate relevant heritage experience of sufficient calibre at an appropriate senior level**." In submitting his appeal against that decision, the complainant made absolutely no reference whatsoever to his age nor did he even suggest that his age might have been a factor in the decision not to call him for interview.

4.3 The decision to allow the complainant's appeal was based on the complainant's submission and the question of his age was never referred to by him nor was it ever considered by Mr. O' H, the Personnel Officer on appeal. Mr. O' H submits that he had no reason to do so and he is still uncertain as to the complainant's precise age and he never had any reason to ascertain it.

4.4 At interview stage, the board comment sheet stated that the complainant "**would benefit from relevant experience in the heritage area**" and this was based on the panel's assessment of the candidate on foot of his interview and the evidence submitted to the panel in his application form. The interview panel was unaware of the complainant's age and never sought that information nor considered it as a factor. The complainant's complaint does not indicate in what way the respondent allegedly discriminated against him on the age ground and the Tribunal is requested to dismiss the claim.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 In this case, the complainant alleges that the respondent directly discriminated against him on the age ground in relation to appointment to the post of Heritage Officer. I will consider whether the respondent directly discriminated against the complainant on the age ground in terms of section 6(2)(f) of the Employment Equality Acts 1998 and 2004 in contravention of section 8 of the Act. In making my Decision in this case, I have taken into account all of the evidence, both written and oral, submitted to me by the parties. An issue arose at the hearing of this matter as to whether the complaint was referred in time and the complainant subsequently sought an extension of time. A Direction (DIR-E2007-014) to extend the time limit for referring the claim was granted on 21 November 2007 on the basis that reasonable cause had been shown as to why the complaint was not referred in time. The respondent did not appeal the Direction within the forty two days for appeal. Material in relation to the competition was provided by the respondent on 14 March 2008.

5.2 Section 6(1) of the Employment Equality Acts 1998 and 2004 provides that:

…… d**iscrimination shall be taken to occur where-**

a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds mentioned in subsection (2) (in this Act referred to as 'the discriminatory grounds'

Section 6(2) provides that as between any two persons, the discriminatory grounds are, inter alia:

(a) that they are of different ages, but subject to subsection (3) (in this Act referred to as "the age ground"),

Caselaw on establishing a prima facie case of discrimination

5.3 The Labour Court in the case of Flexo Computer Stationery Limited v. Coulter[1] stated:

"**It is now established in the jurisprudence of this court that in all cases of alleged discrimination a procedural rule for the shifting of the probative burden similar to that contained in the European Communities (Burden of Proof in Gender Discrimination Cases) Regulations 2001 (S.I. No 337 of 2001) should be applied. The test for determining when the burden of proof shifts is that formulated by the Court in Mitchell v Southern Health [2001] ELR 201. This places the evidential burden on the complainant to establish the primary facts on which they rely and to satisfy the Court that those facts are of sufficient significance to raise an inference of discrimination. If those two limbs of the test are satisfied the onus shifts to the respondent to prove that the principle of equal treatment was not infringed**."

The Labour Court subsequently stated in DPP v. Sheehan[2]:

"**What the complainant must establish is a factual matrix from which the Court may properly draw an inference that discrimination has occurred. There is no exhaustive list of factors which can be regarded as indicative of discrimination in the filling of employment vacancies. However, an inference of discrimination can arise where, for example, a less qualified man is appointed in preference to a more qualified woman (Wallace v. South Eastern Education and Library Board [1980] IRLR 193). It can also arise from an unexplained procedural unfairness in the selection process**."

Shortlisting process

5.4 The complainant submits he was 28 at the time of the competition and that the successful candidate was between 5 and 10 years older than him. The complainant claims that he was discriminated against initially in relation to the shortlisting process when he was advised that he would not be called to interview. Candidates were shortlisted by reference to three criteria which were (i) qualifications, (ii) whether they had 3 years post graduate experience and (iii) relevant experience. The shortlisting process was undertaken by Mr. S who was a member of the Heritage Council and Ms. B, Senior Planner and the person to whom the Heritage Officer reports. Mr. H subsequently sat on the interview board. According to the shortlisting summary sheet, after the shortlisting process was concluded, nine people were called for interview. The complainant was advised by letter dated 26 January 2005 that his application would not be taken to the interview stage. No reason was given in that letter for the decision not to shortlist him.

5.5 The complainant subsequently sought the precise reasons upon which the respondent elected not to proceed with his application to interview stage. He was subsequently advised by letter dated 14 February 2005 that the shortlisting process consisted of a review by a selection board of each candidate's application. He was advised that applicants were shortlisted on the basis of both qualifications and experience and that in relation to qualifications, he was deemed qualified but that in relation to post graduate experience, his application form did not demonstrate relevant heritage experience of sufficient calibre at an appropriate senior level. The shortlisting summary sheet indicates by means of ticking a box under each criterion that the complainant met the required standard in relation to qualifications and post graduate experience but that he had insufficient relevant experience. There is no further comment on the shortlisting summary sheet in relation to the reasons why candidates were shortlisted/not shortlisted as the case may be. The information in the letter dated 14 February 2005 appears to have been communicated to the complainant following discussion with the shortlisting board members and this may account for the discrepancy between what is recorded on the summary sheet and the contents of the letter dated 14 February 2005 to the complainant. In a case concerning a claim of discrimination on the gender and age grounds in a shortlisting process, the Labour Court has held that **" .... in absence of unfairness in the selection process, or manifest irrationality in the result, it will not seek to undertake its own assessment of candidates or substitute its views on their relative merits for those arrived at by the designated selectors....**"[3] In this case, candidates were shortlisted according to three pre-determined criteria and in the absence of unfairness or manifest irrationality in the result of the shortlisting process, I will not proceed to undertake my own assessment of candidates. On the balance of probabilities, I find that the complainant has failed to establish a **prima facie** case of discrimination on the age ground in relation to the shortlisting process for the post of Heritage Officer.

Interview process

5.6 The complainant was subsequently called to interview after he appealed the outcome of the shortlisting process. The interview board consisted of three persons, one of whom had previously sat on the shortlisting board. The respondent stated at the hearing that the decision to shortlist the complainant and call him for interview was based on administrative practicality in that an interview could be accommodated by the Board. This decision to progress the complainant's application to the interview stage appears to have been made without reference to the merits of the complainant's application. The person specification in relation to the post of Heritage Officer stated that candidates shall possess a relevant third level degree qualification and have a minimum of three years post graduate experience in a high level heritage related field. It gives examples of a degree in archaeology, earth/natural sciences, genealogy, planning and architecture as being relevant degrees. It also states that candidates shall possess good communication skills, good organisational and management skills, be enterprising, innovative and capable of working on his/her own initiative. It also states that knowledge of local authority structures would be an advantage.

5.7 I note that the successful candidate does not state the years that she completed her secondary education and it is therefore not possible to try to determine her age from her CV. I note also that the person who was placed number 2 on the panel completed his/her Leaving Certificate in 1994 whereas the complainant completed his Leaving Certificate in 1996. It is likely that the person who was placed second on the panel was one/two years older than the complainant. The respondent subsequently confirmed that the successful candidate was 33 years old at the relevant time. The complainant's CV indicates that at the time of the selection process in 2005, he was a candidate with considerable research experience and was well published. He was also an experienced lecturer. The successful candidate's CV indicates that at the time of the selection process in 2005, she had experience as a Zookeeper, a Technical Development Officer with a wind energy development and consultancy company and experience as an Environmental Development Executive with a community based rural development company. The complainant submitted that he is at a loss to understand how the successful candidate could be perceived as demonstrating relevant heritage experience of sufficient calibre at an appropriate senior level superior to that of his own. In this regard, I note that it is submitted on the successful candidate's CV that the company with which she was employed at the time of the competition was involved in a number of heritage projects and produced an award winning heritage brochure.

5.8 At the interview stage, candidates were marked according to seven criteria. These were qualifications, relevant technical experience, communications/interpersonal skills, organisation and management skills, initiative, knowledge of role of the heritage officer and knowledge of local government. Six of the criteria are in line with the person specification for the post. The criterion of '**Knowledge of the role of Heritage Officer**' was an additional criterion added and most marks were available for this particular criterion. The respondent submitted that the marking sheet was based on the standard marking sheet used in Local Government for professional grades level. It submitted that the interview board members deliberated amongst themselves after each candidate was interviewed. The complainant received a total of 335 marks out of 700 at the interview stage. The successful candidate received a total mark of 475. The selection criteria appear objective and seem to have been honestly applied in practice.

5.9 In this case whilst the complainant was 5 years younger than the successful candidate, the Labour Court has stated that "**The existence of a difference on the grounds of age, marital status or family status between the two candidates does not of itself establish a prima facie case of discrimination**."[4] Whilst it may have been more prudent for the person who sat on the shortlisting board to reconsider his position on the interview board given that the complainant's application was being progressed to the interview stage following the intervention of Human Resources Division, this factor in itself does not give rise to a presumption of discrimination on the age ground. In relation to the addition of the criterion of '**Knowledge of the role of Heritage Officer**', I consider that it would not be unusual to expect interviewees to have a good knowledge of the role in respect of which they are applying and I note that background information on the post and the duties of the post are detailed in the '**Particulars of the Post'** document prepared by the respondent in advance of the selection process. It is also the case that such a criterion might benefit someone in the role of Heritage Officer more than other candidates but it is not the case that the successful candidate was in such a role at the time of the competition. The Labour Court has stated **"……. it is for the Court to decide in every case if the factual basis disclosed on the evidence is sufficient to raise an inference of discrimination**."[5] I have considered the documentation provided by the respondent in respect of the interview process including the interview notes recorded by the two of the interview board members in respect of the complainant and having done so, I am not satisfied that the complainant has established a **prima facie** case of discrimination on the age ground. In the circumstances and based on the foregoing, I find that the complainant has failed to establish a **prima facie** case of discrimination in relation to the selection process for appointment to the post of Heritage Officer. His claim cannot therefore succeed.

6. DECISION

6.1 On the basis of the foregoing, I find that the complainant has failed to establish a **prima facie** case of discrimination on the age ground in terms of section 6(2)(f) of the Employment Equality Acts 1998 and 2004 contrary to sections 8 of the Act in relation to appointment to the post of Heritage Officer.

Mary Rogerson

Equality Officer

23 April 2008

[1]Determination No. EED0313 9 October 2003

[2]Determination No. EDA0416 14 December 2004

[3]Concern v. Martin ADE/05/51 Determination No. 0518

[4]Superquinn v. Freeman AEE/02/8 Determination No.0211

[5]Daughters of Charity v. Mc Ginn ADE/03/3 Determination No. EDA039

DEC-E2012-086 June 27, 2012

Paul Doyle
V
ESB International Limited

Case Details

Body
Equality Tribunal

Date
June 27, 2012

Official
Tara Coogan

Legislation
- Employment Equality Acts 2000 to 2008

Decision/Case Number(s)
- DEC-E2012-086

Keywords
- Employment Equality Acts - Discriminatory treatment - Age - Retirement - Prima Facie Case

Employment Equality Acts 2000 to 2008

DECISION NO: DEC-E2012-086

Paul Doyle(Represented by Mr. Cathal Murphy BL on the instructions of Gallagher Shatter Solicitors

V

ESB International Limited(Represented by Ms. Cliona Kimber BL on the instructions of in-house legal services)

File No. EE/2008/385

Date of Issue: 27 June 2012

Keywords:Employment Equality Acts - Discriminatory treatment - Age - Retirement - Prima Facie Case

1. Dispute and delegation

1.1 This dispute concerns a claim by Mr. Paul Doyle (hereafter "the complainant") that he was subjected to discriminatory treatment in relation to a compulsory retirement age in ESBI (hereafter "the respondent") on the grounds of his age. The complainant was compulsorily retired on 22 February 2008 two weeks after his sixty-fifth birthday.

1.2 The complainant referred a claim of discrimination to the Director of the Equality Tribunal on 11 June 2008 under the Employment Equality Acts. On 6 December 2011, in accordance with his powers under section 75 of the Acts, the Director then delegated the case to Tara Coogan- an Equality Officer - for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Acts on which date my investigation commenced. As required by Section 79(1) and as part of my investigation, I proceeded to hearing on 27 January 2012. Final materials relevant to the investigation were received by me on 18 February 2012.

2. Case for the complainant

2.1. The complainant is a graphic designer. He worked with the respondent from 1995 to 2008. The complainant, having reached the age of 65, was retired from his role. Shortly before his birthday, on 23 January 2008, an email from a facilities manager was circulated to the complainant's colleagues announcing his retirement and inviting them to drinks to mark his departure.

2.2. The complainant subsequently wrote to the respondent's HR manager stating his belief that the provisions of his contract did not require for him to retire on his 65th birthday. In reply, the complainant was informed that he must retire at the age of 65. He was also informed that in order for the complainant to engage in a contract work with the respondent after reaching 65 years of age a "break of employment would be required post retirement".

2.3. It is the complainant's case that he was forced to retire and dismissed at the age of 65 in breach of both the Employment Equality Acts 1998-2008 and the provisions of Council Directive 2004/78/EC of November 2000 establishing a general framework for equal treatment in employment and occupation.

2.4. It is the complainant's case that he was compulsorily retired on the ground of his age. It was submitted that this constitutes direct discrimination and is contrary to the Acts. The entire reason for the retirement was the complainant's age. The complainant relied on McCarthy v Calor Teoranta in which the Labour Court stated that:"The Court of Justice appears to have held that a Member State cannot introduce a mandatory retirement age unless there is objective and reasonable justification in so doing. It would appear axiomatic that an individual employer would be similarly circumscribed in applying a contractual retirement age."

2.5. There is no contractual retirement age in the complainant's contract of employment. Ireland does not have a mandatory age for retirement in its national legislation. Therefore, the respondent is in breach of the Community law of non-discrimination on the ground of age. It was submitted that the derogation in the Directive from the right to non-discrimination is directed at Member States as opposed to individuals. It was submitted that in the absence of a written retirement policy, it was impossible for such a policy to be properly policed by the Equality Tribunal. The complainant submitted that none of the documents provided by the respondent to the investigation is evidence of a written retirement policy having been generated by the respondent. Therefore, it is impossible for the Tribunal to satisfy itself that the respondent's retirement policy pursues the aims asserted by the respondent and whether the means adopted to pursue such aims are appropriate and necessary.

2.6. In accordance with section 6(1) of the above Acts, the complainant has clearly suffered less favourable treatment than those of a younger age by being forced to retire at the age of 65.

2.7. The complainant refuted that the respondent had fixed a retirement age in accordance with section 34(4). Instead the respondent is seeking to rely upon the claimant's right to a pension at 65 under the terms of a pension scheme of which he is member. It was submitted that it is well established in both Community and Irish law that a pension entitlement does not necessitate retirement.

2.8. It was submitted that the decision in Case 144/04 Mangold v Rüdiger Helm held non-discrimination on the ground of age to be general principle of Community law. That is, non-discrimination is mandated by the Treaties. Therefore there can be no doubt as to the principle having direct horizontal effect as between private actors. At paragraph 77 of its judgment, the Court stated:"it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of the community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that effect, Case 106/77 Simmenthal [1978] ECR 629, paragraph 21, and Case C-347/96 Solred [1998] ECR I-937, paragraph 30)."

2.9. It was submitted that it is therefore necessary for this Tribunal to ensure individual compliance with the principle and with the Directive.

2.10. The derogation within the Directive is directed only at national measures with legitimate aims. In Case 411/05 Felix Palacious de La Villa v Cortefiel Servicios SA, the then European Court of Justice held that a state could set a mandatory retirement age of 65 as it had the legitimate aim as part of national employment policy to promote employment for under 65s. The mandatory retirement age was used to absorb high unemployment and to promote better distribution of work between generations. The measure was found to be less favourable treatment but was objectively and reasonably justified in the context of national law by a legitimate aim relating to employee policy and the labour market. It was submitted that the less favourable treatment that the complainant has experienced cannot be justified as there is no national legislation in place to facilitate it. The justification provided for in the directive is clearly not directed at the respondent. In the recent opinion of Advocate General Mazak in Case-C388/07 Incorporated Trustees of the National Council on Ageing (Age Concern of Ireland) v. Secretary of State for Business, Enterprise and Regulatory Reform, Unreported 23 September 2008:"targets national measures, which reflect social and employment policy choices and not individual decisions of employers"

3. Case for the respondent

3.1. The respondent is a wholly owned subsidiary of Ireland's Electricity Supply Board (ESB), a vertically integrated utility that has a number of ring fenced divisions operating independently in the Single Electricity Market. The respondent employs over 1200 staff across four distinct businesses.

3.2. The respondent rejects the validity of the complainant's case for the following reasons: 1. It is clear that the respondent has fixed its retirement age. Such a policy has operated since its inception and that the retirement age of 65 is a clear term and condition of the contract of employment of employees and a long-standing custom and practise of the respondent. It was submitted that the complainant by his own actions has demonstrated that he knew of the retirement age of 65. The respondent wishes to rely on McCarthy v HSE that held that an employer can establish that there is a fixed retirement age by reference to custom and practice and to a company pension scheme even in circumstances where a pension age is not set out in a contract of employment. Hedigan J went on to state that Council Directive 2000/78 did not prohibit the State from maintaining a retirement age of 65. A similar conclusion was reached by the EAT in Molloy v Connacht Gold.

2. The complainant had requested the right to remain with the respondent for an additional year. The request was referred to human resources but as there were no exceptional circumstances no offer of a fixed term contract could be made. The complainant was therefore treated in the same manner as any other person seeking to stay on beyond the retirement age.

3. The respondent has never represented to the complainant that he could work past 65 or offered any inducements or warranties to that effect.

4. The respondent operates an award winning pension scheme that allows employees to retire between the ages of 50 and 65. The retirement age is included in the pension scheme of which the complainant is a member.

3.3. As the Employment Equality Acts do not provide for a definition for 'fix' the word must be given its ordinary meaning. The exception in the Acts must therefore be interpreted as applying to arrangements, agreements or decisions on retirement ages. There is no requirement that the arrangement be in writing. It can only be interpreted as meaning that the age must be clearly arranged, agreed or decided upon.

3.4. It was further submitted that while section 34(4) does not require the respondent to show that the fixing of the retirement age is objectively justified, the respondent's reason for fixing a retirement age are justifiable in national and European law. The respondent submitted that it must be able to provide for promotion opportunities and career pathways in order to retain younger employees. It was submitted that the respondent allocates extensive resources (approximately €45000) in training its employees. The respondent employees are therefore well trained and very mobile and if these employees cannot progress within the respondent employ they will go elsewhere. Staff retention is therefore a crucial consideration for the viability of the respondent business. Failure to hold to its most valuable resource would deprive the respondent of a valuable skill set and the loss of money spent on training. Such a notion of sharing employment between generations has been found to be objectively justifiable by the Court of Justice .

3.6. Furthermore it was submitted that the majority of the respondent's staff deal with electricity. It was submitted that increasing the retirement age would necessitate - for health and safety reasons- physical examinations that might cause embarrassment and humiliation to employers. The fixed retirement age has the advantage of not requiring the respondent on dismissing employees on the grounds that they are no longer capable of working.

3.7. It was submitted that this Tribunal does not have jurisdiction to set aside a provision of a statute as has been requested by the complainant. The respondent relied on Minister for Justice, Equality and Law Reform and Commissioner of An Garda Siochana v Director of the Equality Tribunal and Ors to this effect.

4. Conclusion of the equality officer

4.1. In evaluating the evidence before me, I must first consider whether the complainant has established a prima facie case pursuant to Section 85A of the Employment Equality Acts 1998 to 2008. The Labour Court has held consistently that the facts from which the occurrence of discrimination may be inferred must be of 'sufficient significance' before a prima facie case is established and the burden of proof shifts to the respondent. The Labour Court elaborated on the interpretation of section 85A in Melbury v. Valpeters EDA0917 where it stated that section 85A: "places the burden of establishing the primary facts fairly and squarely on the Complainant and the language of this provision admits of no exceptions to that evidential rule".

4.2. It is clear that a decision to retire a person at a given is age is a decision that is influenced by that person's age. A number of Court of Justice decisions have identified such decisions as direct discrimination. Such discrimination however can be rebutted by objectively justifying such treatment and the Court has provided a non-exhaustive list of such justifications. It is clear that direct discrimination is also prohibited under the Acts. However, I find that section 34(4) provides for an exemption in circumstances where retirement on the ground of a person's age is 'fixed'.

4.3. Extensive submissions and arguments where put before this Tribunal as to what its jurisdiction is in relation to the interpretation of EU law and whether it is entitled to make decisions concerning European jurisprudence and applicability to Irish law. It was suggested that the case be adjourned to determine whether the Tribunal had jurisdiction to proceed with the complex facts before it. The complainant objected to such an approach on the grounds that the complaint had been with this Tribunal for over three years and that the complainant wished to proceed with this claim without further delay. The complainant was not challenging the provisions of the Employment Equality Acts.

4.4. In relation to my jurisdiction. It is clear that this Tribunal is the court of first instance in matters relating to discrimination in the workplace. I find that this Tribunal must work on a presumption that the legislation governing it has correctly and properly implemented the Council Directives that it purports to give effect to. It is clear that this Tribunal has no jurisdiction to consider whether correct implementation has occurred in the member state. Nor does it have jurisdiction to set aside a provision that is contained in a statute. That said, I am satisfied that I do have an obligation to interpret these Acts in a manner that is harmonious 'in the light of' directives in so far as such an approach does not lead to absurdity or to a interpretation that is contra legem. Approval of such an approach was confirmed by the Supreme Court in Nathan v Bailey Gibson Limited.

4.5. I find that much of the national case law cited to for the purposes of this investigation turn on their facts. I note that cases successful cases for the complainants have included circumstances where a respondent has not been able to establish a retirement age whereas I note that the ability to prove facts supporting a custom and practice have not resulted in a finding of unfair dismissal . Other cases have included an employee's legitimate expectation arising from a contractual situation . None of these cases have considered section 34(4) of the above Acts. Equally, no consideration has been given to Council Directive.

4.6. In McCarthy v Calor Teoranta, the Labour Court went on to hold that the complainant in that case was given a warranty by the respondent that if he took the option of redundancy and re-employment at lower pay he could work until the age of 65. Accordingly, when the respondent terminated the complainant's employment, it did so on the basis of his age and thus treated him differently than a person in a comparable situation who had not attained the age of 60. I find that facts of the current case are clearly distinguishable from those set out in McCarthy. The Labour Court did, however, make an observation that other facts may have supported a case that may have highlighted an incompatibility between section 34(4) of the Acts and the proper transposition of Article 6 of the Directive. While the court did not elaborate what such an incompatibility in its view may be it, it is clear that the Labour Court was speculating that a reliance on a fixed retirement age, based on contract, may not be compatible with test set out in the Council Directive.

4.7. Retirement ages have also been considered by the High Court. It is clear that McKechnie J. in the Donnellan case carefully examined the facts of that case in relation to the Council Directive only. In doing so, he adopted the objective justification test. In McCarthy v HSE , Hedigan J. in an obiter comment suggested that there is nothing in the Council Directive prohibiting the State from maintaining a retirement age of 65 and was satisfied that such a matter could be determined on implied contract term. Citing Palacios de la Villa the learned judge found that a retirement age of 65, resulting in retirement (that is a situation where a person is in receipt of a pension), could not be discriminatory. Neither case considered section 34(4) of the above Acts or the question whether the directive has been properly transposed into national law. It is clear that the learned judge in Donnellan accepted that the objective justification test was required when the plaintiff was asserting his rights under the Directive.

4.8. It is clear that I have no function to make a legally binding decision as to a party's retirement age as per contract per se. In order to address the issue of section 34(4) I must make a finding of fact in relation to the complainant's retirement age. In this case, it a common fact that the respondent has a maximum retirement age of 65 and that the complainant was on notice of this retirement age. While it was argued that the term 'fixed' in section 34(4) ought to be given it ordinary meaning, that being arranged or agreed upon, I am not satisfied that a reliance on an arranged or agreed upon retirement age based on contract terms alone is sufficient to rebut the inference of age discrimination. A harmonious interpretation of section 34(4) in conjunction with Article 6(1) implies that for a retirement age to be 'fixed' by a respondent evidence of a planned and systematic approach to retirement ages is required. Such evidence is set out in the objective justification test.

4.9. I note that it was argued by the complainant that any reliance of Article 6(1) was only available for state bodies. I find that the Employment Equality Acts clearly extends the principle of the derogation to private actors also.

4.10. I note that The Court of Justice in Case C-388/07 The Queen, on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform stated at paragraph 3:"Article 6(1) of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are 'objectively and reasonably' justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary". I am therefore satisfied that any exemption allowing for direct discrimination on the grounds of age must be objectively and reasonably justified by a legitimate aim and that the means of achieving such an aim must be appropriate and necessary. In order to give section 34(4) a harmonious interpretation, it is clear that 'fixed' must be understood in a manner that supports the objective justification test set out in Article 6(1). It is clear that such a justification test cannot be directed at the circumstances of the individual complainant - the respondent was not relying on the personal characteristics or any poor performance of the complainant - but must be based on comprehensive policy grounds.

4.11. I note that the respondent does not have a written employment policy per se. I am however satisfied on the full facts of this case that the respondent has a well established practice of compulsorily retiring its employees to a pension when they reach the age of 65 (employees can also elect to retire earlier). There was no evidence to support that this practice has been varied in any circumstances. It is clear that the respondent will, in certain exceptional circumstances, re-engage over 65s on fixed term contracts for project purposes. I am satisfied that the respondent had considered the availability of such an extension for the complainant on his request. The request was turned down because there were no exceptional circumstances that would have justified such an extension. I find that the fact that the respondent has a policy that enables over 65s to remain in certain circumstances clearly tempers the existence of an absolute retirement age.

4.12. I am also satisfied that the respondent has carefully considered the reasons as to why the retirement age is capped at 65 and that there is a clear employment policy supporting such a cap. The logic for such an exemption in my view is that age is different from other protected grounds. Age is not binary in the sense that a person is a man or a woman, a Traveller or a non-Traveller, a heterosexual or a homosexual, etc. Every person has an age, which as a continuum, changes over time. A young person in the respondent organisation will eventually benefit from the protections that an older person has enjoyed and, in turn, an older person will already have benefitted from a provision that has favoured young people.

4.13. I note that the respondent's main aim is to build and maintain electricity infrastructures domestically and internationally. I accept that work involving electricity is of such nature that legitimate health and safety concerns relating to a genuine occupational requirement with older staff may arise. I also accept that the carrying out of compulsory medical examinations could cause embarrassment to some employees. While I do note that such 'genuine occupational requirement' does not apply to the complainant whose occupation was that of a graphic designer I do find that a legitimate employment policy means that a respondent is entitled to maintain a retirement age that ensures cohesion among all of its employees. Having different rules of retirement for different employees may threaten the respondent employees' cohesion and open up other areas of discrimination that may not be subject to an objective justification test. Furthermore, the size of the respondent organisation also means that carrying out individual assessments may be impractical and I find that a use of an age-proxy (65) in the circumstances of this case is a proportional tool.

4.14. Furthermore, I am satisfied that the respondent spends extensive resources and time in training its new employees. I am satisfied that in order to achieve this aim the respondent must ensure that it can offer career pathways to such employees and ensure vacancies for upward post become available. This is a necessity to ensure retention, motivation and dynamism among the respondent staff. I am satisfied that the respondent wishes to establish an age structure among its younger and older employees in order to encourage the recruitment and promotion of young people and to facilitate good personnel management. I am therefore satisfied that the respondent has an established a legitimate employment policy with a legitimate aim for the reason why, at the latest, employees with the respondent must retire at 65 years of age.

4.15. I find that in the full circumstances of this case that 65 is an appropriate and proportionate measure for the purposes of the legitimate aim of the respondent.

5. Decision

5.1. Having investigated the above complaint, I hereby make the following decision in accordance with section 79(6) of the Employment Equality Acts:

5.2. I find that the complainant has established a prima facie case of discriminatory treatment on the age ground. The respondent has successfully rebutted this inference. Therefore, the complaint fails.

_____ **Tara CooganEquality Officer27 June 2012**

DEC-E2016-045 March 9, 2016

Slywia Wach
-V-
Smorgs ROI Management Limited t/a Travelodge Waterford

Case Details

Body
Equality Tribunal

Date
March 9, 2016

Official
Enda Murphy

Legislation
- EMPLOYMENT EQUALITY ACTS 1998-2011

Decision/Case Number(s)
- DEC-E2016-045

EMPLOYMENT EQUALITY ACTS 1998-2011

Decision - DEC–E2016-045

PARTIES

Slywia Wach

(represented by SIPTU)

and

Smorgs ROI Management Limited

t/a Travelodge Waterford

(represented by Mr. Conor Bowman B.L. instructed by

McCartan & Burke Solicitors)

File References: et-152606-ee-14

Date of Issue: 9th March, 2016

1. Dispute

1.1 This case concerns a complaint by the complainant that she was discriminated against by the respondent on the grounds of gender, family status and race contrary to sections 6(2)(a), (c) and (h) of the Employment Equality Acts, 1998 to 2011 in relation to her conditions of employment. The complainant also claims that she was subjected to harassment contrary to section 14A of the Acts and victimisation contrary to section 74 of the Acts.

2. Background

2.1 The complainant referred a complaint under the Employment Equality Acts, 1998 to 2011 to the Director of the Equality Tribunal on 17th December, 2014. In accordance with his powers under section 75 of the Employment Equality Acts, the Director General delegated the case on 30th October, 2015 to me, Enda Murphy, an Adjudication Officer/Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions under Part VII of the Employment Equality Acts, 1998 to 2011. This is the date I commenced my investigation. A written submission was received from the complainant on 21st May, 2015 and from the respondent on 29th July, 2015. As required by section 79(1) of the Acts and as part of my investigation, I proceeded to hearing on 9th December, 2015.

2.2 This decision is issued by me following the establishment of the Workplace Relations Commission on 1 October 2015, as an Adjudication Officer who was an Equality Officer prior to 1 October 2015, in accordance with section 83(3) of the Workplace Relations Act 2015.

3. Jurisdictional Issue in relation to Time Limits

3.1 The respondent has submitted that the present complaint is out of time and does not comply with the required time limits for the referral of a complaint within the meaning of section 77 of the Employment Equality Acts. Therefore, before making a decision on the substantive issue I must be satisfied that the complaint is properly and validly before the Tribunal.

Summary of Complainant's Case on Jurisdictional Issue

3.2 The complainant accepts that the present claim was not referred within the prescribed time limits provided for in section 77(5) of the Acts. However, it is the complainant's position that the delay in referring the complaint within the prescribed time limits was due to a misrepresentation by the respondent within the meaning of section 77(6) of the Acts. The complainant initially referred a complaint to the Director of the Equality Tribunal under the Employment Equality Acts on 1st March, 2012 against Travelodge Management Limited t/a Travelodge Waterford. However, it subsequently transpired that the incorrect respondent was named in these proceedings and the complainant contends that this error arose as a result of the respondent having misrepresented its true identity.

3.3 The complainant's submissions on the jurisdictional issue can be summarised as follows:

· Over the course of the complainant's employment she has been issued with employment related documentation (including a Statement of her Terms and Conditions of Employment, payslips, P60's and Income Levy Certificates) which identified her employer as "Travelodge" or "Travel Lodge". When the initial complaint was being referred to the Equality Tribunal in 2012 all of these documents were considered and following a search of the Companies Registration Office website the complainant's representative identified a company named Travelodge Management Limited which she assumed was the correct legal identity of the respondent.

· A colleague of the complainant, in the same employment, initiated proceedings against Travelodge Management Limited t/a Travelodge Waterford under the Organisation of Working Time Act 1997 and the named respondent engaged with the Rights Commissioner Service and attended a hearing in that complaint without objection. The matter was subsequently settled between the named respondent and the complainant in those proceedings.

· The complainant initiated proceedings against Travelodge Management Limited t/a Travelodge Waterford under the Maternity Protection Act 1994 and the Organisation of Working Time Act 1997. The respondent in those proceedings was professionally represented and the representative engaged with the complainant's representative, the Rights Commissioner Service and on behalf of the respondent without objection. A settlement was reached in these cases and the written settlement agreement between the parties in this matter was headed "Settlement Agreement between Travelodge Management Limited and Slywia Wach". The terms of this agreement went on to record that Travelodge Management Limited agreed to pay the complainant a sum of money in compensation for not having received a premium for Sunday working and that the complainant agreed to withdraw her claim under the 1997 Act.

· The complainant's employer has consistently held itself out as "Travelodge Management Limited", and accordingly, it is the complainant's employer that has caused the confusion surrounding the correct legal identity of the respondent by issuing legal documents that do not state the correct legal entity.

· In summary, the complainant submitted that the complainant's employer was fully aware of the aforementioned complaints against Travelodge Management Limited and misrepresented itself as that entity during proceedings before the Rights Commissioner Service and during proceedings which the complainant had initially referred to the Equality Tribunal. It was submitted that had the complainant's employer not misrepresented its correct legal identity the complainant would have been in a position to refer the initial complaint against the correct respondent.

3.4 The complainant claims that the correct legal identity of her employer only came to light on or about 25th June, 2014. The complainant submitted that the date of occurrence of the discrimination or the date of its most recent occurrence for the purposes of the present complaint is 25th June, 2014 (i.e. the date upon which the misrepresentation came to the complainant's notice) thereby bringing the present complaint within the required time limits as provided for in section 77(6) of the Acts.

Summary of Respondent's Case on Jurisdictional Issue

3.5 The respondent submitted that the complainant was employed by a company called Smorgs (Ireland) Limited during the period of time relevant to the present complaint. The business of Smorgs (Ireland) Limited was transferred to Smorgs (ROI) Management Limited in 2014 and the complainant's employment transferred to that company pursuant to the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. The complainant worked in the Respondent's hotel in Waterford, which operates under the trading name of "Travelodge" owned by Smorgs (ROI) Management Limited and previously designated to Smorgs (Ireland) Limited on 1st January, 2003.

3.6 The respondent's submissions on the jurisdictional issue can be summarised as follows:

· Any search of the Companies Registration Office will show Smorgs (ROI) Management Limited to be the owner of the registered business name "Travelodge". Similarly, a search of the Business Names Register will reveal "Travelodge" to be a trading name of Smorgs (ROI) Management Limited. The onus on any complainant or moving party in proceedings, and indeed on their representatives, is to take ordinary and reasonable steps to ascertain the correct description and identity of the party against whom it is intended to claim. The failure of the complainant's representative to establish the correct name of the Respondent cannot be said to be the fault of the Respondent in circumstances where an admitted search of the CRO was carried out but where the search was less than complete.

· The complainant was issued with documentation such as P60's which included the company registration number of the respondent and had the Complainant's representative carried out a proper search in the CRO using this information prior to referring the initial complaint she would have been in a position to identify the correct name of her employer.

· The complainant could have sought clarification from her employer regarding the correct legal identity of the Respondent prior to referring the present complaint. Such an enquiry could have taken the form of a letter from the Complainant or her representative simply seeking clarification as the appropriate entity to be named. The failure of the Complainant or her representative to take the said step of making an enquiry cannot be blamed upon the Respondent itself, who never received any correspondence or enquiry whatsoever from the Complainant's representative. The suggestion by the Complainant's representative that they are entitled to rely upon other cases involving completely different parties as a defence to their won negligence is without basis in fact or in law.

· The purpose of the Employment Equality Acts and the provisions contained therein for the extension of time within which to make a claim expressly require an animus or intention on the part of the Respondent to misrepresent the situation for the time to be extended. It is submitted that no such misrepresentation on the part of the Respondent could possibly exist in circumstances where the Respondent was never contacted by the Complainant or her representatives at any time following the incidents giving rise to the complaint. In essence, what the complainant's representative seeks to rely on is their own mistake rather than the Respondent's misrepresentation.

· The respondent disputes the complainant's contention that she did not become aware until June, 2014 that Smorgs (ROI) Management and submits that she was in possession of a letter from the respondent dated 22nd December, 2011 (prior to the referral of the initial complaint to the Tribunal) which correctly identified her employer as Smorgs (Ireland) Limited. The respondent submitted that the complainant received correspondence from her employer in December, 2011 relating to an internal appeal hearing connected to the grievances giving rise to the present complaint which clearly indicated that "Travelodge" was a trading name of "Smorgs Ireland Limited".

4. Conclusions of the Equality Officer on Jurisdictional Issue

4.1 It is common case that the alleged incidents of discrimination and/or victimisation which gave rise to the present complaint occurred during the period from September, 2011 to January, 2012. The complainant referred an initial complaint to the Director of the Equality Tribunal on 1st March, 2012 arising from these incidents against an entity named Travelodge Management Limited t/a Travelodge Waterford. It was not in dispute between the parties that this company was not the complainant's employer at any time material to this complaint. The complainant claims that the error in relation to naming the incorrect employer in the initial complaint arose as a result of the respondent having misrepresented its true identity. The complainant submitted that that the correct legal identity of her employer, namely Smorgs ROI Management Limited, only came to light on 25th June, 2014. The complainant subsequently referred a new complaint to the Director of the Equality Tribunal against the aforementioned company on 17th December, 2014.

4.2 Having regard to the foregoing, it is clear that the present complaint has been referred outside of the time limits prescribed at section 77(5) of the Acts. Therefore, the only avenue left open to her, in terms of the Commission having jurisdiction to investigate her complaint, is to avail of section 77(6) of the Acts. This provision provides as follows:

"Where a delay by a complainant in referring a case under this section is due to any misrepresentation by the respondent, subsection 5(a) shall be construed as if the reference to the date of occurrence of the discrimination or victimisation were references to the date on which the misrepresentation came to the complainant's notice."

The effect of the provision is that the time-limit for referring a complaint to the Commission, in circumstances where the respondent has engaged in any misrepresentation, only commences when the complainant becomes aware of that misrepresentation. In order to avail of the provision the complainant must prove, as a matter of probability, that there was misrepresentation by the respondent and that the delay in referring his complaint is due to this misrepresentation.

4.3 The respondent has argued that the error in naming the correct respondent was wholly attributable to the complainant and/or her representative and it submits that this error could have been avoided if they had undertaken a proper search of the CRO website or sought clarification regarding the correct legal identify of her employer prior to referring the initial complaint to the Equality Tribunal. The respondent has strenuously argued that this mistake and the subsequent delay in referring the complaint against the correct legal entity were occasioned due to any misrepresentation on the respondent's part.

4.4 In considering this issue, I note that the term "misrepresentation" is defined in Osborn's Concise Law Dictionary as **"A statement or conduct which conveys a false or wrong impression. A false or fraudulent misrepresentation is one made with knowledge of its falsehood, and intended to deceive. A negligent misrepresentation is one made with no reasonable grounds for believing it to be true"**. I have had regard to the jurisprudence from the Irish High Court, the Labour Court and the Court of Justice of the European Union on the issue of misrepresentation and, in particular, I have taken note of the following case law. The Labour Court held in the case of the HSE –v- Tom Whelehan[1] that **"The Court next considered the Complainant's submissions regarding the applicability of s.77(6) of the Act. It appears to the Court that a misrepresentation, for the purpose of the subsection, can only occur where an employer makes some false representation to an employee concerning a material fact".**The Labour Court also held in the case of A Company –v- A Worker[2] that **"In order to avail of the provision the complainant must satisfy the Court, as a matter of probability, that there was misrepresentation by the respondent and that the delay in referring his complaint is "due" to the "misrepresentation by the respondent.".**

4.5 In the case of Stafford –v- Mahony, Smith and Palmer [1980] ILRM 53, Doyle J laid down the criteria for the action of negligent misrepresentation as follows: **"In order to establish the liability for negligent or non-fraudulent misrepresentation giving rise to action there must first of all be a person conveying the information or the representation relied upon; secondly, that there must be a person to whom that information is intended to be conveyed or to whom it might reasonably be expected that the information would be conveyed; thirdly, that the person must act upon such information or representation to his detriment so as to show that he is entitled to damages.**

4.6 The issue of misrepresentation was also dealt with by the Court of Justice of the European Union in the case of B.S. Levez –v- T.H. Jennings (Harlow Pools) Limited[3] where it was held that **"Community law precludes the application of a rule of national law which limits an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted, there being no possibility of extending that period, where the delay in bringing a claim is attributable to the fact that the employer deliberately misrepresented to the employee the level of remuneration received by persons of the opposite sex performing like work.".**

4.7 In considering the alleged misrepresentation in the present case, I note that all of the employment related documentation (including the Statement of her Terms and Conditions of Employment, P.60's, Payslips, and Income Levy Certificates etc.) provided by the respondent to the complainant prior to the referral of the initial complaint to the Equality Tribunal identified the name of her employer as either "Travelodge" of "Travel Lodge" (with the exception of the letter referred to above from the respondent to the complainant dated 21st December, 2011). In this regard, it is clear that an employer has a statutory obligation under Section 3(1)(a) of the Terms of Employment (Information) Act 1994 to provide its employees with the "full name and address" of their employer. However, in the complainant's case, the respondent failed to include details of the correct legal identity of her employer in the Statement of Terms and Conditions of Employment issued to her following the commencement of her employment and instead included the trading name of the business. The respondent failed to provide any credible explanation regarding the reasons why the above-mentioned documents did not include the full and complete identity of the complainant's employer. I have taken note of the evidence adduced by the complainant to the effect that the respondent has included the full and complete identity of her employer on payslips since October, 2014.

4.8 In the circumstances of the present case, I am satisfied that it is not unreasonable to conclude that the respondent was liable for negligent misrepresentation in terms of the information conveyed by it, and the representations it made to the complainant regarding the identity of her employer during the period of her employment prior to the referral of the initial complaint to the Equality Tribunal in March, 2012. I find that this misrepresentation by the respondent of its full legal identity contributed significantly to the error in naming the incorrect legal entity as her employer (i.e. Travelodge Management Limited t/a Travelodge Waterford) in the initial complaint referred to the Equality Tribunal. I am of the view that the respondent had ample opportunity following the referral of the initial complaint to inform both the Equality Tribunal and the complainant that the proceedings had been initiated against the incorrect legal entity. However, the respondent accepted these proceedings and continued to engage with the Equality Tribunal and the complainant without demur in relation to the initial complaint of discrimination for a period in excess of two years following the referral of that complaint and also in relation to separate complaints which the complainant had referred to the Rights Commissioner Service under the Maternity Protection Act 1994 and the Organisation of Working Time Act 1997. It is also noteworthy that a settlement was agreed between the parties in relation to the latter complaint and the settlement agreement recorded that it was an agreement between the complainant and "Travelodge Management Limited".

4.9 In coming to this conclusion, I note that the complainant's representative submitted a request for information (on the Form EE2) to the company on 30th June, 2014 relating to the initial complaint to the Equality Tribunal prior to the scheduled hearing of that complaint. The covering letter sent by the complainant's representative clearly adverted to the fact that the hearing of the complaint was scheduled for 11th July, 2014. The complainant adduced evidence to confirm that this correspondence (which was sent by registered post) was received by the respondent and that a letter of reply was subsequently issued to her by the respondent's General Manager on 25th July, 2014. In the circumstances, I am satisfied that this clearly implies the respondent was fully aware of the hearing date of the initial complaint. I note that this is totally inconsistent with the respondent's stated position (at the oral hearing of the present complaint) that the reason it failed to appear at the initial hearing was because it had been unaware of arrangements for the hearing. Having regard to the foregoing, it is clear that the respondent had a further opportunity prior to the hearing of the initial complaint to signal the fact that the wrong legal entity had been identified as the respondent in those proceedings. However, the respondent failed to avail of this opportunity and in doing so it continued to hold itself out as the complainant's correct employer. I am satisfied that the respondent's actions in this regard clearly amounted to a misrepresentation of its identity within the meaning of section 77(6) of the Acts.

4.10 However, in order for the complainant to avail of the provisions of section 77(6) she must also be able to demonstrate that the present complaint was referred within the period of six months from the date that this misrepresentation came to her notice. In considering this issue, I accept the complainant's evidence that she only became aware of the correct legal identity of her employer on 25th June, 2014 after information had been imparted to her in the workplace to the effect that there had been a transfer of undertakings relating to her employment. This information prompted the complainant's representative to carry out further enquiries regarding the identity of her employer which resulted in it being established on the aforementioned date that she was employed by an entity called "Smorgs (Ireland) Limited". Accordingly, I find that the complainant has established that the delay in referring the present complaint was due to misrepresentation by the respondent within the meaning of section 77(6) of the Acts and that she is entitled to delay the start of the time limit for the purpose of the referral of the present complaint until 25th June, 2014. Having regard to the fact that the present complaint was referred to the Equality Tribunal on 17th December, 2014, it is clearly within the prescribed time limit in section 77 and I therefore find that I have jurisdiction to investigate the complaint.

5. Summary of Complainant's Case on Substantive Issue

5.1 The complainant submitted that she is a Polish national and commenced employment with the respondent as an Accommodation Assistant on 4th August, 2007. In September, 2008 the complainant secured a position on Reception which resulted in an increase in her hours. The complainant submitted that throughout 2009, 2010 and 2011 prior to maternity leave she worked shifts on Monday and Tuesday from 11 pm to 7 am, in addition to three day shifts with varying hours usually from 7 am to 3 pm, averaging 42.9 hours per week.

5.2 The complainant submitted that she commenced a period of maternity leave on 23rd March, 2011 and returned to work on 21st September, 2011. She submitted that her hours of work were reduced from an average of 42.9 hours per week to an average of 23.5 hours per week upon her return from maternity leave. The complainant acknowledged that her contract of employment stated that her normal hours of work were 24 hours per week. However, she claims that following a verbal agreement with the previous Manager it was agreed that she would be allocated "full-time hours" each week. The complainant submitted that she worked three day shifts per week prior to maternity leave whereas upon her return to work she was not allocated any day shifts (and this situation was not rectified until a new Manager commenced in April, 2013). The complainant also submitted that the respondent employed a new staff member from Cork to cover another employee on maternity leave when she was available to cover these shifts.

5.3 The complainant submitted that she raised concerns regarding these issues with the respondent's HR Manager by way of e-mail on 29th September, 2011. The complainant had a meeting with her new Manager, Mr. A, on 3rd October, 2011 and he expressed annoyance at her for raising these issues with the HR Manager. The complainant submitted that Mr. A produced her contract and indicated that it specified her normal hours were 24 hours per week and stated that "this is all I have to give you". The complainant replied that the 24 hours were the minimum hours and informed him that she had a verbal agreement with the previous Manager to work full-time hours during the three year period prior to her maternity leave. The complainant submitted that during this meeting Mr. A stated that "her English was not good enough to work days" to which she replied that she had been "working for three years and there was never a complaint". The complainant also claims that Mr. A also stated that she had "been off for the last six months with your baby speaking Polish at home" and that she would need to spend more time with her baby. The complainant replied that she could speak both Polish and English and that her partner was looking after the baby. The complainant submitted that the latter remarks amounted to discriminatory treatment on the grounds of her family status and race.

5.4 The complainant submitted that she sent a letter to the HR Manager on 27th October, 2011 raising a formal grievance against Mr. A arising from the aforementioned issues. She claims that after making this complaint Mr. A came into work on his day off and was hostile towards her and indicated that he would be watching her on CCTV with a view to initiating disciplinary procedures against her. The complainant submitted that she attended a meeting with a representative from the company's HR Department on 17th November, 2011 to discuss the grievances that she had previously raised in her formal complaint. The complainant received a written response to these grievances from the company on 29th November, 2011. The complainant submitted that she was not satisfied with response from the company and she wrote to the HR Manager on 19th December, 2011 to request an appeal in relation to her grievances. In this appeal letter the complainant again referred to the reduction in her weekly hours following her return from maternity leave, the unfavourable distribution of the more desirable shifts and the discriminatory comments which her Manager, Mr. A, had made during the course of their meeting on 3rd October, 2011 which she felt had not been addressed by the company. The complainant also informed the respondent in this letter that she felt she was being subjected to victimisation by Mr. A for raising these grievances.

5.5 The complainant submitted that this appeal was heard by the HR Manager on 10th January, 2012 and that she outlined and elaborated upon the issues raised in her grievance complaint at this hearing. The complainant explained to the HR Manager that she felt victimised by Mr. A since she had raised these grievances and referred to the fact that he had threatened her with using CCTV for disciplinary purposes. The complainant submitted that she subsequently received a letter from the HR Manager on 30th January, 2012 which confirmed that her appeal had been rejected and that her grievances had not been upheld.

5.6 The complainant submitted that she was called to a disciplinary meeting with her Manager, Mr. A and the HR Manager on the same day as the appeal hearing (i.e. 10th January, 2015) where it was alleged she had sold alcohol to non-residents. She claims that this arose as a result of Mr. A having trawled through CCTV footage and identifying a person getting out of a car in the hotel's carpark and purchasing alcohol at the reception. The complainant submitted that disciplinary action was not taken against her in relation to this incident because she was able to prove that the person in question was a resident and that she had not breached the hotel's procedures in relation to the sale of alcohol. The complainant submitted that this incident amounted to victimisation by Mr. A against her as he had previously threatened that he would be using CCTV footage for disciplinary purposes. The complainant submitted that the company raised a further issue with her at this disciplinary meeting on 10th January, 2012 in relation to her alleged failure to comply with new fire safety procedures. The complainant claims that she attempted to explain her concerns in relation to the new procedures but the respondent was dismissive of her explanation and she was subsequently issued with an informal warning letter by Mr. A in relation to this issue.

5.7 The complainant submitted that in January, 2012 the company advertised externally for a part-time worker to cover another employee on maternity leave and that this had been done when the complainant was in dispute with her employer over not getting her legal entitlement to have the same hours and shifts after returning from maternity leave in September, 2011. The complainant submitted that the company's failure to respond to or carry out an adequate investigation of her complaints of discrimination and victimisation all adversely affected her dignity and she claims that this amounted to victimisation and harassment within the meaning of the Employment Equality Acts.

6. Summary of Respondent's Case on Substantive Issue

6.1 The respondent submitted that it employs 160 people in its group of hotels in the Republic of Ireland with more than half of these employees being non-Irish nationals. The respondent submitted that the complainant was employed as a Receptionist on 4th August, 2007 and her contract of employment clearly stated that her normal hours of work were 24 hour per week. The respondent did not dispute that the complainant worked additional hours each week during the three year period prior to her maternity leave which commenced in March, 2011. However, the respondent submitted that the arrangement to work the additional hours over and above her normal contractual allocation had been agreed with her sister who was the Hotel Manager during that period of her employment. The respondent denies that the complainant was subjected to discrimination on the grounds of gender in relation to the number of weekly hours and type of shifts allocated to her following her return from maternity leave. The respondent submitted that she was always allocated at least 24 hours per week in accordance with the terms of her contract and additional hours were allocated to her depending on the business requirements of the hotel. The respondent also refutes the suggestion that a staff member was taken on to cover her during maternity leave and kept on after her return this reducing her working hours.

6.2 The respondent submitted that during the summer of 2011 a new manager, Mr. A, took over at the hotel where the complainant was employed. Mr. A was not present as an employee or manager when the complainant went on maternity leave earlier that year and only became familiar with her when she returned from maternity leave in late 2011. The respondent submitted that it was at a disadvantage in defending the present complaints in that Mr. A no longer works for the company and has since relocated to the United States. The respondent submitted it was aware that a history of animosity existed between Mr. A and the complainant as a consequence of the dismissal from his employment with the hotel of the complainant's partner sometime earlier than the present complaint relate to.

6.3 The respondent submitted that it is appalled at the allegations and suggestions that any one of its employees would be the subject of comments about their proficiency or otherwise in the English language. The respondent accepts unreservedly that the complainant was working at the front office prior to her maternity leave and that there had never been an issue with her competency in English or her ability to communicate with customers at any time. The respondent submitted that it absolutely and unreservedly regrets any inferences which may have been drawn by the complainant from comments made to her by Mr. A and does not stand over his behaviour in this regard if the Adjudication Officer finds that she was indeed the subject of a comment or commentary of the nature alleged by the complainant.

6.4 The respondent denies that the complainant was subjected to victimisation or harassment by the company in relation to her having made a complaint against her Manager, Mr. A, regarding her hours of work after returning from maternity leave. The respondent submitted that the hotel is routinely requested by An Garda Siochana to review CCTV footage and, in fact, does so of its own accord on a regular basis. The respondent submitted that a circular was sent to members of staff in respect of the allegations that some staff members had been selling alcohol on an off-licence basis to persons who were not residents of the hotel. The hotel does not have an off-licence and therefore anybody to whom alcohol is sold must only and always be a person who is at that time staying in the hotel. The respondent contends that any steps taken to enquire into the selling of alcohol to non-residents was thoroughly warranted and arose out of legitimate concern in the hotel that the complainant and others may have been inadvertently selling alcohol to persons who were not residents. The respondent submitted that the matter involving the complainant was investigated and no further action was taken against her when it was established that the hotel's policy on the sale of alcohol had not been breached.

6.5 The respondent submitted that a thorough investigation was carried out by its HR Manager in relation to all of the grievances raised by the complainant and it was established there was no evidence to suggest that she had been subjected to the discrimination, harassment or victimisation as alleged. The respondent strenuously denies that the complainant has been subjected to discrimination, harassment or victimisation within the meaning of the Employment Equality Acts.

7. Conclusions of the Equality Officer on Substantive Issues

7.1 The substantive issues for decision by me are as follows: (i) whether or not the respondent discriminated against the complainant on the grounds of gender, family status and race, in terms of section 6(2) of the Employment Equality Acts and contrary to section 8 of those Acts in terms of her conditions of employment following her return to work from maternity leave in September, 2011, (ii) whether or not the respondent victimised the complainant in terms of section 74(2) of the Employment Equality Acts and (iii) whether or not the respondent subjected the complainant to harassment contrary to section 14A of the Employment Equality Acts. In reaching my decision, I have taken into account all of the submissions, written and oral, made to me by the parties.

7.2 Section 85A of the Employment Equality Acts sets out the burden of proof which applies in a claim of discrimination. It requires the complainant to establish, in the first instance, facts from which it may be presumed that there has been discrimination in relation to her. If she succeeds in doing so, then, and only then, is it for the respondent to prove the contrary. The Labour Court has held consistently that the facts from which the occurrence of discrimination may be inferred must be of **"sufficient significance"** before a prima facie case is established and the burden of proof shifts to the respondent. In deciding on this complaint, therefore, I must first consider whether the existence of a prima facie case has been established by the complainant. It is only where such a prima facie case has been established that the burden of proving there was no infringement of the principle of equal treatment passes to the respondent.

7.3 *Section 6(1) of the Employment Equality Acts, 1998 to 2011 provides that discrimination shall be taken to occur where "a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2).....". Section 6(2)(a) of the Acts defines the discriminatory ground of gender as follows – "as between any 2 persons, ... that one is a woman and the other is a man". Section 6(2)(c) of the Acts defines the discriminatory ground of family status as follows – "as between any 2 persons, ... that one has family status and the other does not" and Section 6(2)(h) of the Acts defines the discriminatory ground of race as follows– "as between any 2 persons, ... that they are of different race, colour, nationality or ethnic or national origins".*

Complaint of discriminatory treatment on grounds of Gender

7.4 The first issue that I must decide relates to the complainant's claim that she was subjected to discrimination by the respondent in relation to her conditions of employment following her return to work after maternity leave in September, 2011. The case-law of the European Court of Justice makes it clear that any unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of gender and this is incorporated into Irish law at section 6(2)(A) of the Employment Equality Acts, 1998 - 2008. **Article 15 of the EU Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)[4] states that "a woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her....".** It follows therefore that any departure from this entitlement constitutes direct discrimination of the woman concerned on grounds of gender.

7.5 In the present case the complainant has claimed that her hours of work were reduced and that she was allocated a less favourable shift pattern after her return to work in September, 2011 following a period of maternity leave. The complainant claims that she had been working an average of 42 hours per week over five shifts during the three year period prior to her maternity leave which commenced in March, 2011. The complainant accepts that the contract of employment which she signed following the commencement of her employment in August, 2007 indicated that her normal working hours were 24 hours per week. However, she claims that she had entered into a verbal agreement with her previous Manager which resulted in her being allocated the additional hours on a consistent and ongoing basis during the period from 2009 to 2011 prior to her maternity leave. The complainant contends that her working hours were significantly reduced and that she was not allocated any day shifts upon her return to work following maternity leave.

7.6 The respondent does not dispute that the complainant was allocated additional hours and shifts during this period but submitted that under the terms of her contract the company was only obliged to allocate her 24 hours per week. The respondent contends that the arrangement to work additional hours was put in place between the complainant and her sister who was the Hotel Manager at that juncture. The respondent submitted that the terms of the complainant's contract were adhered to in full following her return from maternity leave and that she was allocated thereafter a minimum of 24 hours and up to 32 hours per week depending on the business requirements of the hotel.

7.7 In considering this issue, I am satisfied that the complainant gave extensive and credible evidence that her working hours were significantly reduced and that she was allocated a less favourable shift pattern following her return to work from maternity leave in September, 2011. The complainant's oral evidence on this issue was corroborated with documentary evidence in relation to the number of hours and shift patterns that she was allocated both before and after this period of maternity leave. I note that the complainant's contract of employment (which she signed in August, 2007) stated that her normal weekly hours were 24 hours per week. However, it is clear from the evidence adduced that the complainant had been working on average 42 hours per week (over two night and three day shifts) by arrangement with the hotel's management during the three year period prior to her maternity leave. The respondent in its evidence adverted to the fact that this arrangement was made with the complainant's sister who was the Hotel Manager during the period in question. However, the respondent has not adduced any evidence to suggest that this was an illicit arrangement or that the Manager, notwithstanding the fact she was the complainant's sister, had been acting improperly in allocating these additional hours to the complainant.

7.8 The complainant also gave credible evidence that a person who commenced work as a Receptionist during her maternity leave was also retained in that role following her return from maternity leave. I am of the view that it was not unreasonable for the complainant to expect that she would return from maternity leave to the same number of working hours and shift pattern, which had become the norm through custom and practice, during the three year period prior to her absence. The respondent did not adduce any credible evidence to suggest that the reduction in the complainant's hours was necessary for economic or business related reasons. Indeed, the only explanation proffered by the respondent for the reduction in the complainant's hours following her return from maternity leave was the argument that it was only contractually bound to allocate her 24 hours per week. In light of the foregoing, I find that the complainant has established a prima facie case of discrimination on the grounds of gender and that the respondent has failed to rebut that inference. It follows therefore that the complainant is entitled to succeed in relation to this element of her complaint.

Complaint of discriminatory treatment on grounds of Race

7.9 The next element of the complainant's complaint relates to a claim of discriminatory treatment on the grounds of race in relation to an incident at a meeting with her Manager, Mr. A, on 3rd October, 2011. The complainant has claimed that Mr. A expressed annoyance at her during this meeting for raising concerns over her allocation of hours and shifts following her return from maternity leave. The complainant claimed that Mr. A stated that her **"English was not good enough to work days"** and that she had **"been off for the last six months with your baby speaking Polish at home".** The complainant claims that she was not allocated any day shifts for a period of eighteen months following this incident with her Manager. The respondent was not in a position to contradict the complainant's account of her interaction with Mr. A at this meeting. The respondent confirmed that Mr. A no longer works for the company and is currently resident in the United States and therefore, he did not attend the hearing to give oral evidence on the matter. However, the respondent denies that the allocation of shifts to the complainant following her return to work from maternity leave was in any way influenced by her race.

7.10 In considering this issue, I wish to note that I am satisfied from the manner in which the complainant gave her oral evidence at the hearing that she has an excellent command of the English language. It is clear from the evidence adduced that the complainant had competently performed the role of Receptionist on day shifts for three years prior to her maternity leave. I note that the respondent acknowledged in evidence that there had been no issues with the complainant's competency in the English language or her ability to communicate with customers. Having regard to the evidence adduced, it is clear that the complainant encountered a difficult working relationship with her new Manager, Mr. A, following her return from maternity leave in September, 2011 and that he took exception to her having raised concerns with senior management regarding the reduction in her working hours following her return from maternity leave. I have found the complainant to be a very credible and convincing witness and I accept her evidence that Mr. A, made the alleged remarks regarding her proficiency in the English language during the course of this meeting. In the circumstances, I find that the complainant was afforded less favourable treatment by her Manager, Mr. A, in relation to the allocation of shifts on grounds related to her race following her return from maternity leave. Accordingly, I find that the complainant has established a prima facie case of discrimination on the grounds of race and that the respondent has failed to rebut that inference. It follows therefore that the complainant is entitled to succeed in relation to this element of her complaint.

Complaint of discriminatory treatment on grounds of Family Status

7.11 The next element of the complaint that I must consider relates to the complainant's claim of discriminatory treatment on the ground of family status which she claims also arose during the course of her meeting with meeting with her Manager, Mr. A, on 3rd October, 2011. The complainant claims that Mr. A said to her that **"you will need to spend more time to mind the baby"** and this was said in the context of justifying the reduction in her hours following her return from maternity leave. As I have stated, I have found the complainant to be a credible and convincing witness and I accept her uncontested evidence in relation to the conversation which took place with Mr. A on this occasion.

7.12 In **A Government Department v An Employee** (Ms. B)[5] the Labour Court took account of the decision in **Nagarajan v London Regional Transport[6]** in holding **"that the proscribed ground need not be the sole or even principal reason for the conduct impugned; it is enough that it is a contributing cause in the sense of being a significant factor".**Having regard to the evidence adduced, I am satisfied that the fact that the complainant was returning from maternity leave and now had a young child significantly influenced Mr. A's decision to reduce the number of hours which she had become accustomed to working prior to her absence. Accordingly, I find that the complainant has established a prima facie case of discrimination on the grounds of family status and that the respondent has failed to rebut that inference. It follows therefore that the complainant is entitled to succeed in relation to this element of her complaint.

Victimisation

7.13 *The next element of the claim that I must decide relates to the complainant's claim that she was subjected to victimisation contrary to the Employment Equality Acts following her return to work after a period of maternity leave. "Victimisation" is defined at section 74(2) of the Acts as "For the purposes of this Part victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to –*

(a) a complaint of discrimination made by the employee to the employer,

(b) any proceedings by a complainant,

(c) an employee having represented or otherwise supported a complainant,

(d) the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act,

(e) an employee having been a witness is any proceedings under this Act or the Equal Status Act, 2000 or any such repealed enactment,

(f) an employee having opposed by lawful means an act which is unlawful under this Acts or the said Act of 2000 or which was unlawful under any such repealed enactment, or

(g) an employee having given notice of an intention to take any of the actions mentioned in the preceding paragraphs".

7.14 The Labour Court has held in the case of the Department of Foreign Affairs –v- Patricia Cullen[7] that **"This definition is expressed in terms of there being both a cause and an effect in the sense that there must be a detrimental effect on the Complainant which is caused by him or her having undertaken a protected act of a type referred to at paragraphs (a) to (g) of subsection (2). If either the cause or the effect is missing there can be no finding of victimisation within the statutory meaning".**Therefore, in order for the complainant to establish that she was victimised she has to establish that the adverse treatment she alleges occurred was a reaction to any one of the matters specified from (a) to (g) of section 74(2) of the Acts cited above. In the present case, it was not in dispute that the complainant raised a formal grievance with the respondent on 27th October, 2011 claiming that she had been subjected to discriminatory treatment by her Manager, Mr. A, in relation to her conditions of employment following her return to work and also signaling her intention to refer a complaint to the Equality Tribunal if the matter was not addressed. I am satisfied that these facts constitute a protected act within the meaning of Section 74(2) of the Acts.

7.15 The next issue I must consider is whether or not the treatment alleged by the complainant constitutes "adverse treatment" in terms of section 74(2) and if so, whether such adverse treatment was in reaction to having taken the protected act. The adverse treatment or detriment contended by the complainant are the alleged threats by Mr. A after she had raised these grievances with management that he would be watching her on CCTV with a view to initiating disciplinary procedures against her. The complainant contends that Mr. A not only made this threat but he also actually carried it out and brought the complainant to a disciplinary investigation meeting alleging she had sold alcohol to non-residents. As I have previously stated, I have found the complainant to be a reliable and credible witness and I accept her uncontested evidence that she was in fact subjected to these alleged threats by Mr. A during the course of their meeting after she had referred a formal grievance against him with the respondent.

7.16 I have also taken cognisance of the fact that the complainant raised concerns with the respondent that she was being victimised by Mr. A after she had raised a formal grievance against him on 27th October, 2011. In this regard, I note that the complainant raised this issue in an e-mail to the HR Manager on 19th November, 2011 (i.e. the e-mail requesting an appeal in relation to the respondent's findings on her initial grievances) and again during the appeal hearing relating to her grievances on 10th January, 2012. Whilst I accept that the respondent carried out an investigation in relation to the alleged discriminatory treatment raised by the complainant regarding her conditions of employment, I am not satisfied that the respondent conducted any meaningful investigation into the complainant's allegations of victimisation.

7.17 It was not in dispute that the complainant was called to a disciplinary investigation meeting by the respondent on 10th January, 2012 in relation to an incident where she was alleged to have sold alcohol to a non-resident. This disciplinary investigation was instigated by the respondent after Mr. A had identified the complainant, using CCTV footage, selling alcohol to a person who had driven into the hotel's car park and purchased alcohol at the reception. I fully accept that the respondent is entitled to investigate any suspected breaches of its alcohol policy and I am very cognisant of the severe consequences that any breaches of this policy may have for the business. However, having regard to the evidence adduced, I am satisfied the investigation into this incident was initiated at the behest of Mr. A in response to the formal grievance which the complainant had made against him. In doing so, it is clear that Mr. A acted upon his threat to scrutinise CCTV footage with a view to initiating disciplinary action against the complainant. It subsequently transpired that Mr. A's allegation was unfounded after the complainant established at the disciplinary investigation meeting o 10th January, 2012 that the person seen on the CCTV footage purchasing alcohol was a resident of the hotel. I am satisfied that the requirement for a formal disciplinary investigation into this matter could have been averted by the respondent in this instance if Mr. A had taken the opportunity to consult with the complainant to clarify the matter in the first instance rather than acting upon his threat to use the CCTV footage to initiate disciplinary proceedings against the complainant.

7.18 In the circumstances, I find that Mr. A's behaviour amounted to adverse treatment of the complainant in terms of section 74(2) of the Acts and this adverse treatment was in reaction to the complainant having raised a formal grievance alleging discriminatory treatment. Accordingly, I find that the complainant has has established a prima facie case of victimisation and that the respondent has failed to rebut that inference. It follows therefore that the complainant is entitled to succeed in relation to this element of her complaint.

Harassment

7.19 The final element of the complainant's claim that I must consider relates to her claim that she was subjected to harassment by the respondent. Having regard to the evidence adduced, I am satisfied that the complainant has not presented any evidence from which I could reasonably conclude that she was subjected to harassment contrary to Section 14A of the Acts. Accordingly, I find that the complainant has failed to establish a prima facie case of harassment within the meaning of Section 14A of the Acts.

8. Decision

8.1 Having investigated the above complaint, I hereby make the following decision in accordance with section 79(6) of the Employment Equality Acts. I find that:

(i) The complainant has established that the delay in referring the present complaint was due to misrepresentation by the respondent within the meaning of section 77(6) of the Acts, and accordingly, that I have jurisdiction to investigate the complaint;

(ii) The respondent discriminated against the complainant in relation to her conditions of employment contrary to Section 8 of the Acts, on the grounds of gender, family status and race;

(iii) The respondent subjected the complainant to victimisation contrary section 74(2) of the Acts;

(iv) The respondent did not subject the complainant to harassment contrary to section 14A of the Acts.

8.2 It is well established that the redress ordered must be effective, proportionate and dissuasive. I therefore order, in accordance with my powers under section 82 of the Employment Equality Acts that the respondent pays the complainant:

(i) the sum of €21,000 being the equivalent of one year's salary by way of compensation for the distress suffered and the effects of the discrimination, and;

(ii) the sum of €21,000 being the equivalent of one year's salary in compensation for the effects of the victimisation.

This compensation does not contain any element of remuneration and is therefore not subject to PAYE/PRSI.

_____

Enda Murphy

Equality Officer/Adjudication Officer

9th March, 2016

Footnotes

[1] EDA0923

[2] EDA1027

[3] Case C-326/96

[4] Directive 2006/54/EC of 5 July, 2006

[5] EDA061

[6] [1998] IRLR 73

[7] EDA116

JUDGMENT OF THE COURT (Fifth Chamber)

21 February 2018 (*)

(Reference for a preliminary ruling — Directive 2003/88/EC — Protection of the safety and health of workers — Organisation of working time — Article 2 — Concepts of 'working time' and 'rest periods' — Article 17 — Derogations — Firefighters — Stand-by times — Stand-by times at home)

In Case C−518/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour du travail de Bruxelles (Higher Labour Court, Brussels, Belgium), made by decision of 14 September 2015, received at the Court on 28 September 2015, in the proceedings

Ville de Nivelles

v

Rudy Matzak,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits (Rapporteur), A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: E. Sharpston,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 15 December 2016,

after considering the observations submitted on behalf of:

– the Ville de Nivelles, by L. Markey, avocate,

– Mr Matzak, by P. Joassart, A. Percy and P. Knaepen, avocats,

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and by F. Baert and J. Clesse, avocats,

– the French Government, by D. Colas and R. Coesme, acting as Agents,

– the Netherlands Government, by M.K. Bulterman, M. Noort and J. Langer, acting as Agents,

– the United Kingdom Government, by G. Brown, S. Simmons and D. Robertson, acting as Agents, and by R. Hill and B. Lask, Barristers,

– the European Commission, by D. Martin and J. Tomkin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2 and Article 17(3)(c)(iii) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The request has been made in proceedings between the ville de Nivelles (town of Nivelles), (Belgium) and Mr Rudy Matzak concerning the remuneration of services performed within the fire service in that town.

Legal context

EU law

3 Article 1 of Directive 2003/88 provides:

‘1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of [Council] Directive 89/391/EEC [of 12 June 1989 on the introduction of measures to encourage improvements in

the safety and health of workers at work (OJ 1989 L 183, p. 1)], without prejudice to Articles 14, 17, 18 and 19 of this Directive.

…

4. The provisions of Directive 89/391 … are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.'

4 Article 2 of Directive 2003/88, entitled 'Definitions', provides in paragraphs 1 and 2:

'For the purposes of this Directive, the following definitions shall apply:

1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. "rest period" means any period which is not working time.'

5 Article 15 of the directive, entitled 'More favourable provisions', is worded as follows:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

6 Article 17 of Directive 2003/88, entitled 'Derogations', states:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 …

…

3. In accordance with paragraph 2 of this article derogations may be made from Articles 3, 4, 5, 8 and 16:

…

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(c) in the case of activities involving the need for continuity of service or production, particularly:

…

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

…'

Belgian law

7 The Loi du 14 décembre 2000 fixant certains aspects de l'aménagement du temps de travail dans le secteur public (Law of 14 December 2000 laying down certain aspects of the organisation of working time in the public sector) (*Moniteur belge* of 5 January 2001, p. 212) transposed Directive 2003/88 for the public sector.

8 Article 3 provides:

'For the application of the present law, the following definitions shall apply:

1 workers: persons who, under a legal or contractual relationship, including trainees and temporary workers, carry out work under the direction of another person;

2 employers: persons who employ the persons referred to in No 1.'

9 Article 8 of that law defines working time as 'time during which the worker is at the disposal of the employer'.

10 Article 186 of the Loi du 30 décembre 2009 portant des dispositions diverses (Law of 30 December 2009 covering miscellaneous provisions) (*Moniteur belge* of 31 December 2009, p. 82925) provides:

'Article 3 of the Law of 14 December 2000 on certain aspects of the organisation of working time in the public sector shall be interpreted in the sense that volunteers in the public fire services and the rescue zones as provided for in the Law of 15 May 2007 on civil security and volunteers in operational civil protection units do not fall under the definition of workers.'

11 The règlement organique du service d'incendie de la ville de Nivelles (Regulation governing the Nivelles fire service) adopted by the arrêté royal du 6 mai 1971 fixant les types de règlements communaux relatifs à l'organisation des services communaux d'incendie (Royal Decree of 6 May 1971 laying down the types of municipal regulations relating to the organisation of

municipal firefighting services, *Moniteur belge* of 19 June 1971, p. 7891), regulates matters relating to staff in that service.

12 That regulation contains provisions specific to the professional staff and the volunteer staff. As regards recruitment, the conditions of which are the same for both groups, Article 11a(1) of that regulation provides:

'At the end of the first year of the probation period, the trainee volunteer … shall meet the following residence requirement:

1. for staff assigned to the Nivelles fire station:

be domiciled or reside in a place so as not to exceed a maximum of 8 minutes to reach the Nivelles fire station when traffic is running normally and complying with the Highway Code.

During periods of stand-by duty, every member of the volunteer fire service serving in the Nivelles fire station must:

- remain at all times within a distance of the fire station such that the period necessary to reach it when traffic is running normally does not exceed a maximum of 8 minutes;

- be particularly vigilant so as to remain within range of various technical means used to call staff and to leave immediately, by the most appropriate means, when staff on stand-by duty are called.'

13 As regards the remuneration and compensation of staff, Article 39 of the règlement organique du service d'incendie de la ville de Nivelles (Regulation governing the Nivelles fire service) provides that professional staff is remunerated in accordance with the conditions laid down by the financial rules governing the staff of the town of Nivelles.

14 Volunteer staff receive the allowances set out in Article 40 of that regulation. They are calculated pro-rata on the hours worked. As regards the 'stand-by time' of officers, an annual allowance is determined. That allowance corresponds to that of the professional staff.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 The Nivelles fire service groups together professional firefighters and volunteer firefighters.

16 Volunteer firefighters are involved in the operations. Among other tasks devolved to them, they are, in particular, on stand-by and on duty at the fire

station, for which a roster is established at the beginning of the year.

17 Mr Matzak entered the service of the town of Nivelles on 1 August 1980 and acquired the status of volunteer firefighter one year later. He is also employed in a private company.

18 On 16 December 2009, Mr Matzak brought judicial proceedings seeking an order that the town of Nivelles pay him a provisional sum of one euro by way of damages and interest for failure to pay remuneration for his services as a volunteer firefighter during his years of service, particularly for his stand-by services.

19 By judgment of 22 March 2012, the tribunal du travail de Nivelles (Nivelles Labour Court, Belgium) upheld Mr Matzak's action to a large extent.

20 The town of Nivelles appealed against the judgment in the cour du travail de Bruxelles (Brussels Higher Labour Court, Belgium).

21 By judgment of 14 September 2015, the referring court partially upheld the appeal. As regards the remuneration claimed for stand-by services which, according to Mr Matzak, must be categorised as working time, the referring court is uncertain whether such services may be considered to fall within the definition of working time, within the meaning of Directive 2003/88.

22 In those circumstances, the cour du travail de Bruxelles (Higher Labour Court, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 17(3)(c)(iii) of Directive 2003/88 … be interpreted as enabling Member States to exclude certain categories of firefighters recruited by the public fire services from all the provisions transposing that Directive, including the provision that defines working time and rest periods?

(2) Inasmuch as Directive … 2003/88 … provides for only minimum requirements, must it be interpreted as not preventing the national legislature from retaining or adopting a less restrictive definition of working time?

(3) Taking account of Article 153[5] TFEU and of the objectives of Directive 2003/88 …, must Article 2 of that directive, in so far as it defines the principal concepts used in the directive, in particular those of working time and rest periods, be interpreted to the effect that it is not applicable to the concept of working time which serves to determine the remuneration owed in the case of home-based on-call time?

(4) Does Directive 2003/88 … prevent home-based on-call time from being

regarded as working time when, although the on-call time is undertaken at the home of the worker, the constraints on him during the on-call time (such as the duty to respond to calls from his employer within 8 minutes) very significantly restrict the opportunities to undertake other activities?'

Consideration of the questions referred

Preliminary observations

23 At the outset, it should be pointed out, first, that both the town of Nivelles and the European Commission claim that the questions referred for a preliminary ruling are inadmissible as regards the concept of remuneration. By virtue of Article 153(5) TFEU, Directive 2003/88, which is based on Article 153(2) TFEU, does not apply to the question of remuneration of workers falling within its field of application. They submit that the subject matter of the main proceedings is to resolve the question of Mr Matzak's remuneration for stand-by services carried out as a volunteer firefighter with the town of Nivelles.

24 In that regard, it must be observed that, save in the special case envisaged by Article 7(1) of Directive 2003/88 concerning annual paid holidays, that directive is limited to regulating certain aspects of the organisation of working time in order to protect the safety and health of workers so that, in principle, it does not apply to the remuneration of workers (judgment of 26 July 2017, *Hälvä and Others,* C−175/16, EU:C:2017:617, paragraph 25 and the case-law cited).

25 However, that finding does not mean that there is no need to reply to the questions referred to the Court for a preliminary ruling in this case.

26 As the Advocate General stated in point 20 of her Opinion, it appears from the order for reference that the referring court seeks to establish the interpretation of Article 2 and Article 17(3)(c)(iii) of Directive 2003/88, which that court considers necessary in order to be able to resolve the dispute pending before it. The fact that the dispute ultimately concerns a question of remuneration is irrelevant, in that context, since it is for the referring court and not for the Court of Justice to resolve that question in the context of the main proceedings.

27 Second, the Court has held that Directive 2003/88 is to apply to the activities of the fire service, even when they are carried out by operational forces on the ground and it does not matter whether the object of those activities is to fight a fire or to provide help in another way, so long as they are carried out under normal circumstances, consistent with the task allocated to the service concerned, and even though the actions which those activities may entail are inherently unforeseeable and liable to expose the workers carrying them out to certain safety and/or health risks (order of 14 July 2005, *Personalrat der*

Feuerwehr Hamburg, C−52/04, EU:C:2005:467, paragraph 52).

28 Third, as regards Mr Matzak's classification as 'worker', it should be noted that, for the purposes of applying Directive 2003/88, that concept may not be interpreted differently according to the law of the Member States but has an autonomous meaning specific to EU law (judgment of 14 October 2010, *Union syndicale Solidaires Isère,* C−428/09, EU:C:2010:612, paragraph 28). In accordance with settled case-law on the matter, any person who pursues real, genuine activities — with the exception of activities on such a small scale as to be regarded as purely marginal and ancillary — must be regarded as a 'worker'. The defining feature of an employment relationship resides in the fact that for a certain period of time a person performs for and under the direction of another person services in return for which he receives remuneration (judgment of 26 March 2015, *Fenoll*, C−316/13, EU:C:2015:200, paragraph 27 and the case-law cited).

29 The Court has also held that the legal nature of an employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of EU law (judgment of 20 September 2007, *Kiiski*, C−116/06, EU:C:2007:536, paragraph 26 and the case-law cited).

30 Thus, as regards the case in the main proceedings, the fact that under national law Mr Matzak does not have the status of a professional firefighter, but that of a volunteer firefighter, is irrelevant for his classification as 'worker', within the meaning of Directive 2003/88.

31 Having regard to the foregoing, it must be held that a person in Mr Matzak's circumstances must be classified as a 'worker', within the meaning of Directive 2003/88, in so far as it appears from the information available to the Court that he was integrated into the Nivelles fire service where he pursued real, genuine activities under the direction of another person for which he received remuneration; it is for the referring court to verify whether that is the case.

32 Fourth, as Articles 1 to 8 of Directive 2003/88 are drafted in terms which are in substance identical to those of Articles 1 to 8 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ 2000 L 195, p. 41), the Court's interpretation of the latter is transposable to the abovementioned articles of Directive 2003/88 (order of 4 March 2011, *Grigore*, C−258/10, not published, EU:C:2011:122, paragraph 39 and the case-law cited).

The first question

33 By its first question the referring court asks, in essence, whether Article 17(3)(c)(iii) of Directive 2003/88 must be interpreted as meaning that the Member States may derogate, with regard to certain categories of firefighters recruited by the public fire services, from all the obligations arising from the provisions of that directive, including Article 2 thereof, which defines, in particular, the concepts of 'working time' and 'rest periods'.

34 In that regard, the Court has held that Article 2 of Directive 2003/88 is not one of the provisions from which the directive allows derogations (order of 4 March 2011, *Grigore*,C−258/10, not published, EU:C:2011:122, paragraph 45).

35 According to the wording of Article 17(1) of Directive 2003/88, Member States may derogate from Articles 3 to 6, 8 and 16 of this directive, and Article 17(3) states that for services listed therein, including those of firefighters, derogations may be made from Articles 3, 4, 5, 8 and 16 of that directive.

36 Thus, the very wording of Article 17 of Directive 2003/88 does not allow a derogation from Article 2, which defines the main concepts contained in the directive.

37 Furthermore, as the Advocate General observed in point 27 of her Opinion, there is no scope for adopting a broad interpretation of Article 17 of the directive which might go beyond the express wording of the derogations which are authorised there.

38 It is clear from the Court's case-law that, as regards permitted derogations provided for by Directive 2003/88, in particular in Article 17, as exceptions to the European Union system for the organisation of working time put in place by that directive, those derogations must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected (see, to that effect, judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C−428/09, EU:C:2010:612, paragraphs 39 and 40).

39 In view of the foregoing, the answer to the first question is that Article 17(3)(c)(iii) of Directive 2003/88 must be interpreted as meaning that the Member States may not derogate, with regard to certain categories of firefighters recruited by the public fire services, from all the obligations arising from the provisions of that directive, including Article 2 thereof, which defines, in particular, the concepts of 'working time' and 'rest periods'.

The second question

40 By its second question, the referring court asks, in essence, whether Article 15

of Directive 2003/88 must be interpreted as meaning that it permits Member States to maintain or adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of that directive.

41 To answer that question, it is necessary to examine the wording of Article 15 of Directive 2003/88, having regard to the scheme established by the directive and its purpose.

42 According to the wording of Article 15 of Directive 2003/88, Member States may apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers. It follows from this article that the national provisions to which it refers are those which may be compared with those laid down by Directive 2003/88 for the protection of the safety and health of workers.

43 The latter provisions can only be those which, by virtue of their function and purpose, are designed to set a minimum level of protection of the safety and health of workers. This is the case for the provisions of Chapters 2 and 3 of the directive. By contrast, the provisions of Chapter 1 of that directive, which includes Articles 1 and 2 thereof, are different in nature. Those provisions do not set minimum rest periods or concern other aspects of the organisation of working time, but establish the necessary definitions to define the subject matter of Directive 2003/88 and its field of application.

44 Consequently, it follows from the wording of Article 15 of Directive 2003/88, read in the light of the scheme established by that directive, that the power provided for by that article does not apply to the definition of the concept of 'working time' set out in Article 2 of the directive.

45 That finding is borne out by the purpose of Directive 2003/88. As the Advocate General observed in point 33 of her Opinion, that directive seeks to ensure, in its field of application, a minimum protection applicable to all workers of the Union. For that purpose, and in order to ensure that the directive is fully effective, the definitions provided for in Article 2 thereof may not be interpreted differently according to the law of Member States but have an autonomous meaning specific to EU law as regards the concept of 'worker', as has been stated in paragraph 28 of the present judgment (see, to that effect, judgment of 1 December 2005, *Dellas and Others*, C−14/04, EU:C:2005:728, paragraph 44 and the case-law cited).

46 In that context, it should nevertheless be noted that while Member States are not entitled to alter the definition of 'working time', within the meaning of Article 2 of Directive 2003/88, they remain, as has been recalled in paragraph 42 of the present judgment, free to adopt in their national legislation provisions providing for periods of working time and rest periods which are more favourable to workers than those laid down in that directive.

47 Having regard to the foregoing, the answer to the second question is that Article 15 of Directive 2003/88 must be interpreted as not permitting Member States to maintain or adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of that directive.

The third question

48 By its third question, the referring court asks, in essence, whether Article 2 of Directive 2003/88 must be interpreted as meaning that it requires Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the classification of those periods as 'working time' and 'rest period'.

49 In that regard, it should be noted, as pointed out by the referring court, that it is common ground that Directive 2003/88 does not govern the question of workers' remuneration, as that aspect falls outside the scope of the European Union's competence by virtue of Article 153(5) TFEU.

50 Therefore, although Member States are entitled to determine the remuneration of workers falling within the field of application of Directive 2003/88, according to the definition of 'working time' and 'rest period' in Article 2 of that directive, they are not obliged to do so.

51 Thus, Member States may lay down in their national law that the remuneration of a worker in 'working time' differs from that of a worker in a 'rest period', and even to the point of not granting any remuneration during the latter type of period.

52 Having regard to the foregoing, the answer to the third question is that Article 2 of Directive 2003/88 must be interpreted as not requiring Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the classification of those periods as 'working time' or 'rest period'.

The fourth question

53 By its fourth question, the referring court asks, in essence, whether Article 2 of Directive 2003/88 must be interpreted as not meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities to have other activities, must be regarded as 'working time'.

54 In that regard, it should be recalled that the Court has already had occasion to give a ruling on the question of the classification of stand-by time as 'working time' or 'rest period' in respect of workers falling within the scope of Directive 2003/88.

55 In that context, the Court has specified, first of all, that the concepts of 'working time' and of 'rest period' are mutually exclusive (see, to that effect, judgments of 3 October 2000, *Simap*, C−303/98, EU:C:2000:528, paragraph 47, and of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C−266/14, EU:C:2015:578, paragraph 26 and the case-law cited). Thus, it must be observed that, as EU law currently stands, the stand-by time spent by a worker in the course of his activities carried out for his employer must be classified either as 'working time' or 'rest period'.

56 Moreover, the intensity of the work by the employee and his output are not among the characteristic elements of the concept of 'working time', within the meaning of Article 2 of Directive 2003/88 (judgment of 1 December 2005, *Dellas and Others*, C−14/04, EU:C:2005:728, paragraph 43).

57 It has also been held that the physical presence and availability of the worker at the place of work during the stand-by period with a view to providing his professional services must be regarded as carrying out his duties, even if the activity actually performed varies according to the circumstances (see, to that effect, judgment of 3 October 2000, *Simap*, C−303/98, EU:C:2000:528, paragraph 48).

58 If the stand-by period in the form of physical presence at the place of work were excluded from the concept of 'working time', that would seriously undermine the objective of Directive 2003/88, which is to ensure the safety and health of workers by granting them adequate rest periods and breaks (see, to that effect, judgment of 3 October 2000, *Simap*, C−303/98, EU:C:2000:528, paragraph 49).

59 Furthermore, it is apparent from the case-law of the Court that the determining factor for the classification of 'working time', within the meaning of Directive 2003/88, is the requirement that the worker be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need. In fact, those obligations, which make it impossible for the workers concerned to choose the place where they stay during stand-by periods, must be regarded as coming within the ambit of the performance of their duties (see, to that effect, judgment of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraph 63, and order of 4 March 2011, *Grigore*, C−258/10, not published, EU:C:2011:122, paragraph 53 and the case-law cited).

60 Finally, it must be observed that the situation is different where the worker performs a stand-by duty according to a stand-by system which requires that the worker be permanently accessible without being required to be present at the place of work. Even if he is at the disposal of his employer, since it must be possible to contact him, in that situation the worker may manage his time with

fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as 'working time', within the meaning of Directive 2003/88 (see, to that effect, judgment of 9 September 2003, *Jaeger*, C−151/02, EU:C:2003:437, paragraph 65 and the case-law cited).

61 In the case in the main proceedings, according to the information available to the Court, which it is for the referring court to verify, Mr Matzak was not only to be contactable during his stand-by time. He was, on the one hand, obliged to respond to calls from his employer within 8 minutes and, on the other hand, required to be physically present at the place determined by the employer. However, that place was Mr Matzak's home and not, as in the cases which gave rise to the case-law cited in paragraphs 57 to 59 of the present judgment, his place of work.

62 In that regard, it should be pointed out that, according to the Court's case-law, the concepts of 'working time' and 'rest period', within the meaning of Directive 2003/88, constitute concepts of EU law which must be defined in accordance with objective characteristics, by reference to the scheme and purpose of that directive, which is intended to improve workers' living and working conditions (judgment of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C−266/14, EU:C:2015:578, paragraph 27).

63 The obligation to remain physically present at the place determined by the employer and the geographical and temporal constraints resulting from the requirement to reach his place of work within 8 minutes are such as to objectively limit the opportunities which a worker in Mr Matzak's circumstances has to devote himself to his personal and social interests.

64 In the light of those constraints, Mr Matzak's situation differs from that of a worker who, during his stand-by duty, must simply be at his employer's disposal inasmuch as it must be possible to contact him.

65 In those circumstances, it is necessary to interpret the concept of 'working time' provided for in Article 2 of Directive 2003/88 as applying to a situation in which a worker is obliged to spend stand-by time at his home, to be available there to his employer and to be able to reach his place of work within 8 minutes.

66 It follows from all the foregoing that the answer to the fourth question is that Article 2 of Directive 2003/88 must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 17(3)(c)(iii) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as meaning that the Member States may not derogate, with regard to certain categories of firefighters recruited by the public fire services, from all the obligations arising from the provisions of that directive, including Article 2 thereof, which defines, in particular, the concepts of 'working time' and 'rest periods'.**

2. **Article 15 of Directive 2003/88 must be interpreted as not permitting Member States to maintain or adopt a less restrictive definition of the concept of 'working time' than that laid down in Article 2 of that directive.**

3. **Article 2 of Directive 2003/88 must be interpreted as not requiring Member States to determine the remuneration of periods of stand-by time such as those at issue in the main proceedings according to the prior classification of those periods as 'working time' or 'rest period'.**

4. **Article 2 of Directive 2003/88 must be interpreted as meaning that stand-by time which a worker spends at home with the duty to respond to calls from his employer within 8 minutes, very significantly restricting the opportunities for other activities, must be regarded as 'working time'.**

[Signatures]

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* Language of the case: French.

JUDGMENT OF THE COURT (Fifth Chamber)
18 March 1986 *

In Case 24/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden [Supreme Court of the Netherlands] for a preliminary ruling in the proceedings pending before that court between

Jozef Maria Antonius Spijkers

and

(1) Gebroeders Benedik Abattoir CV,

(2) Alfred Benedik en Zonen BV

on the interpretation of Council Directive No 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Official Journal 1977, L 61, p. 26),

THE COURT (Fifth Chamber)

composed of: U. Everling, President of Chamber, R. Joliet, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Jozef Maria Antonius Spijkers, by J. Groen and J. A. Van Veen, Advocaten at The Hague,

* Language of the Case: Dutch.

the Netherlands Government, by I. Verkade, Secretary-General at the Ministry of Foreign Affairs,

The United Kingdom, by S. J. Hay, of the Treasury Solicitor's Department, and by C. Symons, Barrister,

The Commission of the European Communities, by T. van Rijn and F. Grondman, members of its Legal Department,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 January 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By a judgment of 18 January 1985, which was received at the Court on 25 January 1985, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions concerning the interpretation of Article 1 (1) of Council Directive No 77/187 of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

2 Those questions were raised in the course of proceedings brought by Jozef Maria Antonius Spijkers against Gebroeders Benedik Abattoir CV (hereinafter referred to as 'Benedik Abattoir') and Alfred Benedik en Zonen BV (hereinafter referred to as 'Alfred Benedik').

3 The Hoge Raad found that Mr Spijkers was employed as an assistant manager by Gebroeders Colaris Abattoir BV (hereinafter referred to as 'Colaris') at Ubach over Worms (The Netherlands), a company whose business consisted in the operation of a slaughter-house. The Hoge Raad also found that on 27 December 1982, by which date the business activities of Colaris 'had entirely ceased and there was no longer any goodwill in the business', the entire slaughter-house, with various rooms and offices, the land and certain specified goods, were purchased by Benedik Abattoir. 'Since that date, although in fact only since 7 February 1983', Benedik Abattoir has operated a slaughter-house for the joint account of Alfred Benedik and itself. All the employees of Colaris were taken over by Benedik Abattoir, apart from Mr Spijkers and one other employee. The Hoge Raad also states that the business activity which Benedik Abattoir carries on in the buildings is of the same kind as the activity previously carried on by Colaris and that the transfer of the business assets enabled Benedik Abattoir to continue the activities of Colaris, although Benedik Abattoir did not take over Colaris's customers.

4 By a judgment of the Rechtbank [District Court], Maastricht, of 3 March 1983, Colaris was declared insolvent. By a writ of 9 March 1983 Mr Spijkers summoned Benedik Abattoir and Alfred Benedik to appear in proceedings for interim relief before the President of the Rechtbank, Maastricht, and sought an order that they should pay him his salary from 27 December 1982, or at least from such date as the President thought fit, and should provide him with work within two days of the order. In support of his claims he contended that there had been a transfer of an undertaking within the meaning of the Netherlands legislation enacted in order to implement Directive No 77/187 and that this entailed, by operation of law, a transfer to Benedik Abattoir of the rights and obligations arising from his contract of employment with Colaris.

5 The application for interim relief was dismissed by the President of the Rechtbank, Maastricht, whose decision was confirmed on appeal by the Gerechtshof [Regional Court of Appeal], 's-Hertogenbosch. Mr Spijkers then appealed in cassation to the Hoge Raad der Nederlanden, which stayed the proceedings and referred the following questions to the Court of Justice:

'(1) Is there a transfer within the meaning of Article 1 (1) of Council Directive No 77/187 where buildings and stock are taken over and the transferee is thereby enabled to continue the business activities of the transferor and does in fact subsequently carry on business activities of the same kind in the buildings in question?

(2) Does the fact that at the time when the buildings and stock were sold the business activities of the vendor had entirely ceased and that in particular there was no longer any goodwill in the business prevent there being a "transfer" as defined in Question 1?

(3) Does the fact that the circle of customers is not taken over prevent there being such a transfer?'

6 In order to understand the purpose of those questions, it is necessary to consider them in the light of Directive No 77/187. That directive, which was adopted on the basis, *inter alia*, of Article 100 of the Treaty, is intended, according to the terms of its preamble, 'to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'. For that purpose Article 3 (1) of the directive provides for the transfer of the transferor's rights and obligations arising from a contract of employment or from an employment relationship, and Article 4 (1) provides for the protection of the workers concerned against dismissal by the transferor or the transferee solely by reason of the transfer. Article 1 (1), which the Court has been requested to interpret in this case, defines the scope of the directive; it provides that the directive 'shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

7 It therefore appears that by its questions the Hoge Raad seeks a ruling on the scope of and the criteria for applying the expression 'transfer of an undertaking, business or part of a business to another employer' in Article 1 (1) of the directive in relation to a case such as that described in the Hoge Raad's judgment. The questions must therefore be considered together.

8 Mr Spijkers maintains that there is a transfer of an undertaking within the meaning of Article 1 (1) where the undertaking's assets and business are transferred as a unit from one employer to another; it is immaterial whether at the time of the transfer the business activities of the transferor have ceased and the goodwill has already disappeared.

9 The Netherlands and United Kingdom Governments and the Commission, on the other hand, consider that the question whether there is a transfer of an undertaking for the purposes of Article 1 (1) must be considered in the light of all the circumstances characterizing the transaction, such as whether or not the tangible assets (buildings, movable property and stocks) and the intangible assets (know-how and goodwill) were transferred, the nature of the activities engaged in and whether or not those activities had ceased at the time of the transfer. However, none of those factors is in itself decisive.

10 The United Kingdom Government and the Commission suggest that the essential criterion is whether the transferee is put in possession of a going concern and is able to continue its activities or at least activities of the same kind. The Netherlands Government emphasizes that, having regard to the social objective of the directive, it is clear that the term 'transfer' implies that the transferee actually carries on the activities of the transferor as part of the same business.

11 That view must be accepted. It is clear from the scheme of Directive No 77/187 and from the terms of Article 1 (1) thereof that the directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity.

12 Consequently, a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, whether the business was disposed of as a going concern, as would be indicated, *inter alia*, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.

13 In order to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the

new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation.

14 It is for the national court to make the necessary factual appraisal, in the light of the criteria for interpretation set out above, in order to establish whether or not there is a transfer in the sense indicated above.

15 Consequently, in reply to the questions submitted it must be held that Article 1 (1) of Directive No 77/187 of 14 February 1977 must be interpreted as meaning that the expression 'transfer of an undertaking, business or part of a business to another employer' envisages the case in which the business in question retains its identity. In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterizing the transaction, the business was disposed of as a going concern, as would be indicated *inter alia* by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities.

Costs

16 The costs incurred by the Netherlands and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by a judgment dated 18 January 1985, hereby rules:

Article 1 (1) of Directive No 77/187 of 14 February 1977 must be interpreted to the effect that the expression 'transfer of an undertaking, business or part of a business to another employer' envisages the case in which the business in question retains its identity. In order to establish whether or not such a transfer has taken place in a case such as that before the national court, it is necessary to consider whether, having regard to all the facts characterizing the transaction, the business was disposed of as a going concern, as would be indicated *inter alia by the fact that* its operation was actually continued or resumed by the new employer, with the same or similar activities.

Everling Joliet

Due Galmot Kakouris

Delivered in open court in Luxembourg on 18 March 1986.

P. Heim
Registrar

U. Everling
President of the Fifth Chamber

JUDGMENT OF THE COURT

9 September 2003 *

In Case C-151/02,

REFERENCE to the Court under Article 234 EC by the Landesarbeitsgericht Schleswig-Holstein (Germany) for a preliminary ruling in the proceedings pending before that court between

Landeshauptstadt Kiel

and

Norbert Jaeger,

on the interpretation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) and, in particular, Articles 2(1) and (3) thereof,

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, M. Wathelet, R. Schintgen (Rapporteur) and C.W.A. Timmermans, Presidents of Chambers, C. Gulmann, D.A.O. Edward, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Landeshauptstadt Kiel, by W. Weißleder, Rechtsanwalt,

— Mr Jaeger, by F. Schramm, Rechtsanwalt,

— the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,

— the Danish Government, by J. Molde, acting as Agent,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the United Kingdom Government, by P. Ormond, acting as Agent, assisted by K. Smith, Barrister,

— Commission of the European Communities, by A. Aresu and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Landeshauptstadt Kiel, represented by W. Weißleder, M. Bechtold and D. Seckler, Rechtsanwälte, of Mr Jaeger, represented by F. Schramm, of the German Government, represented by W.-D. Plessing, of the French Government, represented by C. Lemaire, acting as Agent, of the Netherlands Government, represented by N.A.J. Bel, acting as Agent, of the United Kingdom Government, represented by P. Ormond, and K. Smith, and of the Commission, represented by H. Kreppel and F. Hoffmeister, acting as Agent, at the hearing on 25 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 8 April 2003,

gives the following

Judgment

1 By an order of 12 March 2002, and an amended order of 25 March 2002, which were received at the Court on 26 April 2002, the Landesarbeitsgericht (Higher Labour Court) Schleswig-Holstein referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) and, in particular, Articles 2(1) and (3) thereof.

2 Those questions were raised in proceedings between Landeshauptstadt Kiel (hereinafter 'the City of Kiel') and Mr Jaeger concerning the definition of the concepts of 'working time' and 'rest period' within the meaning of Directive 93/104 in the context of the on-call service ('Bereitschaftsdienst') provided by doctors in hospitals.

Legal background

Community legislation

3 Article 1 of Directive 93/104 lays down minimum health and safety requirements concerning the organisation of working time and applies to all sectors of activity,

both public and private, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

4 Under the heading 'Definitions' Article 2 of Directive 93/104 provides:

'For the purposes of this Directive, the following definitions shall apply:

1. working time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. rest period shall mean any period which is not working time;

...'.

5 Section II of Directive 93/104 lays down the measures which the Member States are required to adopt in order to enable every worker to benefit, *inter alia*, from minimum daily rest periods and weekly rest and it also regulates the maximum weekly duration of work.

6 Under Article 3 of that directive, entitled 'daily rest':

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

7 As regards maximum weekly working time Article 6 of Directive 93/104 provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

...

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

8 Article 15 of Directive 93/104 provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the

safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

9 Article 16 of Directive 93/104 is worded as follows:

'Member States may lay down:

...

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

...'

10 Directive 93/104 also sets out a series of derogations from several of its basic rules, regard being had to the specific nature of certain activities and subject to fulfilment of certain conditions. In that regard Article 17 provides:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3, 4, 5, 6, 8 and 16

when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1. from Articles 3, 4, 5, 8 and 16:

...

(c) in the case of activities involving the need for continuity of service or production, particularly:

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

...

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

...

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

...

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

...'

11 Article 18 of Directive 93/104 is worded as follows:

'1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

— no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

— no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

— the employer keeps up-to-date records of all workers who carry out such work,

— the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

— the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

....'

National legislation

12 German labour law distinguishes between readiness for work ('Arbeitsbereitschaft'), on-call service ('Bereitschaftsdienst') and stand-by ('Rufbereitschaft').

13 Those three concepts are not defined in the national legislation at issue but stem from case-law.

14 Readiness for work ('Arbeitsbereitschaft') covers the situation in which the worker must make himself available to his employer at the place of employment and is, moreover, obliged to remain continuously attentive in order to be able to intervene immediately in case of need.

15 While an employee is on call ('Bereitschaftsdienst') he is obliged to be present at a place determined by the employer, on or outside the latter's premises, and to keep himself available to answer his employer's call, but he is authorised to rest or to occupy himself as he sees fit as long as his services are not required.

16 The stand-by service ('Rufbereitschaft') is characterised by the fact that the employee is not obliged to remain waiting in a place designated by the employer but it is sufficient for him to be reachable at any time so that he may be called upon at short notice to perform his professional tasks.

17 Under German law only readiness for work ('Arbeitsbereitschaft') is as a general rule deemed to constitute full working time. Conversely, both on-call service ('Bereitschaftsdienst') and stand-by ('Rufbereitschaft') are categorised as rest time, save for the part of the service during which the employee has in fact performed his professional tasks.

18 In Germany the legislation on working time and rest periods is contained in the Arbeitszeitgesetz (Law on working time) of 6 June 1994 (BGBl. 1994 I, p. 1170, hereinafter the 'ArbZG'), which was enacted to transpose Directive 93/104.

19 Paragraph 2(1) of the ArbZG defines working time as the period between the beginning and end of work, with the exception of breaks.

20 Under Paragraph 3 of the ArbZG:

'Employees' daily working time must not exceed eight hours. It may be increased to a maximum of 10 hours only on condition that an average eight-hour working day is not exceeded over six calendar months or 24 weeks.'

21 Under Paragraph 5 of the ArbZG:

'(1) Employees must have a minimum rest time of 11 consecutive hours after their daily working time comes to an end.

(2) The length of rest time referred to in paragraph 1 above may be reduced by a maximum of one hour in hospitals and other establishments for the treatment, care and supervision of persons, hotels, restaurants and other establishments providing hospitality and accommodation, the transport industry, broadcasting, and agriculture and husbandry provided that each reduction in rest time is made up by an increase in other rest time to at least 12 hours within any calendar month or period of four weeks.

(3) By way of derogation from paragraph 1, reductions in rest time owing to an intervention during time spent on call ("Bereitschaftsdienst") or on stand-by ("Rufbereitschaft") may, in hospitals and other establishments for the treatment, care and supervision of persons, be made up at other times, where those interventions do not exceed one half of the rest time.

...'

22 Paragraph 7 of the ArbZG is worded as follows:

'(1) Under a collective agreement or a works agreement based on a collective agreement, provision may be made:

1. by way of derogation from Paragraph 3,

   (a) to extend working time beyond 10 hours per day even without offset where working time regularly and appreciably includes periods of readiness for work ("Arbeitsbereitschaft"),

   (b) to determine a different period of offset,

(c) to extend working time until 10 hours per day without offset for a maximum period of 60 days per year,

...

(2) Provided that the health of employees is safeguarded by an equivalent period of compensatory rest, it is permissible to make provision in a collective agreement or a works agreement based on a collective agreement:

1. notwithstanding paragraph 5(1), for rest times where time is spent on call ("Bereitschaftsdienst") and stand-by ("Rufbereitschaft") to be adapted to the special circumstances of such duties, including, in particular, reductions in rest time due to work actually being carried out, with these periods of duty being made up at other times,

...

3. where persons are provided with treatment, care and supervision, for the rules in paragraphs 3, 4, 5(1) and 6(2) to be adapted in line with the particular features of that activity and the well-being of those persons;

4. in the case of Federal, State and municipal administrative authorities and other public corporations, institutions and foundations and in the case of other employers who are bound by collective agreements governing the public service or collective agreements with essentially the same content, for the rules in

Paragraphs 3, 4, 5(1) and 6(2) to be adapted to the particular features of the activity at those locations;

...'.

23 Paragraph 25 of the ArbZG provides:

'Where, on the date of entry into force hereof, an existing collective agreement or one continuing to produce effects after that date, contains derogating rules under Paragraph 7(1) or (2)..., which exceed the maximum limits laid down in the provisions cited, those rules shall not be affected. Works agreements based on collective agreements shall be deemed equivalent to collective agreements such as those mentioned in the first sentence...'.

24 The Bundesangestelltentarifvertrag (collective agreement for public sector employees in Germany, hereinafter 'the BAT') specifically provides:

'Paragraph 15 Normal working time

(1) Normal working time shall comprise on average 38 and a half hours per week (excluding breaks). As a general rule average normal weekly working time shall be calculated over a period of 8 weeks....

(2) Normal working time may be extended

(a) to 10 hours per day (49 hours per week on average) if it regularly includes readiness for work ("Arbeitsbereitschaft") of at least two hours per day on average,

(b) to 11 hours per day (54 hours per week on average) if it regularly includes readiness for work ("Arbeitsbereitschaft") of at least three hours per day on average,

(c) to 12 hours per day (60 hours per week on average) if the employee merely has to be present at the place of work in order in case of need to perform the work required.

...

(6a) The employee shall be required, on the instructions of his employer, to keep himself available outside normal working time at a certain place determined by the employer where he can be called upon to work if need be (on call ("Bereitschaftsdienst")). The employer may require an employee to be on call ("Bereitschaftsdienst") only where a certain workload may be expected but experience has shown that the length of time during which no work will be required is likely to be longer than that during which work will be required.

In order to calculate remuneration presence on call ("Bereitschaftsdienst") including interventions shall be converted into hours worked on the basis of the

percentage representing in practice the average duration of work required; working hours so determined shall be paid as overtime....

In lieu of payment, working hours calculated in such circumstances may, before the end of the third calendar month, be offset by the grant of an equivalent period of free time (compensatory rest)...'.

25 In tandem with Paragraph 15(6a) of the BAT, the social partners have agreed special provisions (Sonderregelungen) for the staff of hospitals and medical centres, care-home and maternity establishments and other homes and medical establishments ('SR 2a'). The specific provisions for doctors and dental surgeons employed by the centres and establishments referred to in SR 2a ('SR 2c') are worded as follows:

'No 8

With regard to Paragraph 15(6a)

On call ("Bereitschaftsdienst") and stand-by ("Rufbereitschaft")

...

(2) in order to calculate remuneration, presence on call ("Bereitschaftsdienst"), including interventions, shall be converted as follows into hours of service:

(a) presence on call ("Bereitschaftsdienst"), including interventions, shall be converted as follows into working hours on the basis of the average duration of work actually required to be performed:

Category	Work required during on-call service ("Bereitschaftsdienst"	Conversion to working time
A	From 0 to 10%	15%
B	More than 10% to 25%	25%
C	More than 25% to 40%	40%
D	More than 40% to 49%	55%

On-call service ("Bereitschaftsdienst") under Category A shall be reclassified in Category B if experience proves that whilst on call the person concerned is required to intervene more than three times on average between 22.00 hrs and 06.00 hrs.

(b) the duration of presence on call ("Bereitschaftsdienst") required on each occasion shall be converted as follows in accordance with the number of on-call periods performed by the person concerned during the calendar month:

Number of on-call periods ("Bereitschaftsdienst") during the calendar month	Conversion into working time
1 to 8 on-call periods	25%
9 to 12 on-call periods	35%
13 on-call periods or more	45%

...

(7) In one calendar month

no more than seven on-call periods ('Bereitschaftsdienste') may be required in Categories A and B,

no more than six on-call periods ("Bereitschaftsdienste") in Categories C and D.

Those figures may be temporarily exceeded if to observe them would result in care of patients not being guaranteed....

...'

Main proceedings and questions referred

26 It is apparent from the order for reference that the parties to the main proceedings are at variance concerning the question whether time spent in the provision of the on-call service ('Bereitschaftsdienst') organised by the city of Kiel in the hospital operated by it must be deemed to be working time or a rest period. The dispute before the referring court solely concerns aspects of labour law in connection with on-call periods and not the conditions under which those periods are remunerated.

27 Mr Jaeger has worked as a doctor in the surgical department of a hospital in Kiel since 1 May 1992. He spends three quarters of his normal working hours on call (that is to say 28.875 hours). Under an ancillary arrangement, he is also required to carry out on-call duty under scale D in No 8(2) of SR 2c. In the contract of employment the parties to the main proceedings agreed that the BAT applies.

28 Generally, Mr Jaeger carries out six periods of on-call duty each month, offset in part by the grant of free time and in part by the payment of supplementary remuneration.

29 On-call duty begins at the end of a normal working day and the length of each period is 16 hours in the week, 25 hours on Saturdays (from 08.30 hrs to 09.30 hrs on Sunday morning), and 22 hours 45 minutes on Sundays (from 08.30 hrs to 07.15 hrs on Monday morning).

30 On-call duty is organised in the following manner. Mr Jaeger stays at the clinic and is called upon to carry out his professional duties as the need arises. He is allocated a room with a bed in the hospital, where he may sleep when his services are not required. The appropriateness of that accommodation is in dispute. However, it is common ground that the average time during which Mr Jaeger is called upon to carry out a professional task does not exceed 49% of the time spent on call.

31 Mr Jaeger is of the view that the on-call duty performed by him as a junior or emergency doctor in the context of the emergency service must in its entirety be deemed to constitute working time within the meaning of the ArbZG owing to the direct application of Directive 93/104. The interpretation by the Court of the concept of working time in its judgment in Case C-303/98 *Simap* [2000] ECR I-7963 may be transposed to the present case which concerns an essentially similar situation. In particular, the constraints of the on-call service in Spain, which were at issue in the case which gave rise to the judgment in *Simap*, are comparable to those to which he is subject. Consequently, Paragraph 5(3) of the ArbZG runs counter to Directive 93/104 and is therefore inapplicable. Mr Jaeger adds that the city of Kiel is not entitled to rely on the derogating provisions of Article 17 of that directive, which provides for exceptions concerning only the duration of rest periods, independently of the concept of work.

32 Conversely, the city of Kiel contends that, according to the consistent interpretation of the national courts and of the majority of academic writers, periods of inactivity during on-call duty must be regarded as rest periods and not as working time. Any other interpretation would render Paragraphs 5(3) and 7(2) of

the ArbZG meaningless. Moreover, the judgment in *Simap* cannot be transposed to the present case. In fact, the Spanish doctors in question were engaged full-time in the provision of primary-care services, whereas the German doctors are called upon to perform professional tasks at most during 49% on average of the period of on-call duty. Finally, the national legislation introducing derogations from the duration of working time is covered by Article 17(2) of Directive 93/104 and the Member States have an extensive margin of discretion in the matter. It would have been superfluous to cite expressly Article 2 of the directive in Article 17 thereof since Article 2 contains definitions only.

33 At first instance the Arbeitsgericht (Labour Court) Kiel (Germany) by judgment of 8 November 2001 upheld Mr Jaeger's claim, taking the view that the on-call duty which he is required to perform at Kiel Hospital must be reckoned in its totality as working time within the meaning of Paragraph 2 of the ArbZG.

34 The city of Kiel thereupon brought the dispute before the Landesarbeitsgericht Schleswig-Holstein.

35 That court points out that the concept of on-call duty ('Bereitschaftsdienst') is not expressly defined in the ArbZG. It concerns the obligation to be present in a place determined by the employer and to hold oneself in readiness to perform professional tasks without delay in case of need. 'Active attention' ('wache Achtsamkeit') is not required and, outside periods of actual activity, the employee may rest or occupy himself in any way. During on-call duty the employee does not have to provide his professional services on his own initiative but only on the instructions of his employer.

36 According to the Landesarbeitsgericht, Mr Jaeger is performing such on-call duty which under German law is reckoned as a rest period and not as working time, apart from that portion of such duty during which the employee actually carries on his professional activities. That conception follows from Paragraphs 5(3) and 7(2) of the ArbZG. Indeed the fact that the reduction in rest periods owing to performance of his tasks during the period of on-call duty may be offset at other times demonstrates that the on-call period counts as a rest period as long as the person concerned is not actually called upon to provide professional services. Such was the intention of the national legislature since it is plain from the preparatory documents to the ArbZG that periods of on-call duty may be followed by periods of working.

37 In the present case the referring court considers that it is important to determine whether periods of on-call duty must be deemed in their totality to constitute working time, even if the person concerned does not actually perform his professional tasks but, on the contrary, is permitted to sleep during those periods. That question was not raised and, consequently, the Court did not answer it in the *Simap* judgment, cited above.

38 In the event that it is not possible to provide a clear answer to that question, resolution of the dispute depends on whether Paragraph 5(3) of the ArbZG is contrary to Article 2(1) and (2) of Directive 93/104.

39 Finally, in view of the ancillary application (for a declaration that Mr Jaeger is not required, in the context of the obligations laid down in his contract, to work in the ordinary course and in the context of his on-call duty, including overtime, for more than 10 hours per day and more than 48 hours on average per week) and since in that regard the city of Kiel relies on Paragraphs 5(3) and 7(2) of the ArbZG, it is necessary to decide whether those provisions are within the margin of discretion conferred by Directive 93/104 on the Member States and the social partners.

40 In fact, if periods of on-call duty should in their entirety be deemed to constitute working time and the organisation at national level of those services were adjudged to be contrary to Article 3 of Directive 93/104 owing to the fact that the rest period of 11 consecutive hours could be not only reduced but also interrupted, the German legislation could none the less be covered by Article 17(2) of that directive.

41 If national legislation or the applicable collective agreement secured for employees an adequate period of rest — notwithstanding the fact that the period of on-call duty is regarded by them as a rest period — it would be possible for the objectives of Directive 93/104, that is to say to ensure the safety and health of employees in the Community, to be safeguarded.

42 Taking the view that, under those circumstances, resolution of the dispute before it required an interpretation of Community law, the Landesarbeitsgericht Schleswig-Holstein decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does time spent on call ("Bereitschaftsdienst") by an employee in a hospital, in general, constitute working time within the meaning of Article 2(1) of Directive 93/104... even where the employee is permitted to sleep at times when he is not required to work?

2. Is it in breach of Article 3 of Directive 93/104/EC for a rule of national law to classify time spent on call ("Bereitschaftsdienst") as a rest period unless work is actually carried out, where the employee stays in a room provided in a hospital and works as and when required to do so?

3. Is it in breach of Directive 93/104/EC for a rule of national law to permit a reduction in the daily rest period of 11 hours in hospitals and other establishments for the treatment, care and supervision of persons, where the amount of time actually worked during time spent on call ("Bereitschaftsdienst") or stand-by ("Rufbereitschaft"), not exceeding one half of the rest period, is compensated for at other times?

4. Is it in breach of Directive 93/104/EC for a rule of national law to permit a collective agreement or a works agreement based on a collective agreement to allow rest periods, where time is spent on call ("Bereitschaftsdienst") and stand-by ("Rufbereitschaft"), to be adapted to the special circumstances of such duties, including in particular reductions in rest periods as a result of work actually being carried out, with these periods of duty being compensated for at other times?'

The questions referred

43 It must be borne in mind at the outset that, although it is not for the Court, under Article 234 EC, to rule upon the compatibility of a provision of domestic law with Community law or interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, for example, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 27).

First and second questions

44 In light of the matters pointed out in the preceding paragraph, the first two questions, which it is appropriate to examine together, must be understood as essentially asking whether Directive 93/104 must be interpreted as meaning that a period of duty spent by a doctor on call ('Bereitschaftsdienst'), where presence in the hospital is required, must be regarded as constituting in its entirety working time for the purposes of that directive, even though the person concerned is permitted to rest at his place of work during the periods when his services are not required, with the result that that directive precludes a Member State's legislation which classifies as a rest period an employee's periods of inactivity in the context of such on-call duty.

45 In replying to those questions as reformulated, it should be stated at the outset that it is clear both from Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), which is the legal basis of Directive 93/104, and from the first, fourth, seventh and eighth recitals in its preamble as well as the wording of Article 1(1) itself, that the purpose of the directive is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time (Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 37).

46 According to those same provisions, such harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods — particularly daily and weekly — and adequate breaks and by providing for a ceiling on the duration of the working week (see judgments in *Simap*, paragraph 49, and *BECTU*, paragraph 38).

47 In that context it is clear from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, and in particular points 8 and 19, first subparagraph, thereof, which are referred to in the fourth recital in the preamble to Directive 93/104, that every worker in the European Community must enjoy satisfactory health and safety conditions in his working environment and must have a right, *inter alia*, to a weekly rest period, the duration of which in the Member States must be progressively harmonised in accordance with national practices.

48 With regard more specifically to the concept of 'working time' for the purposes of Directive 93/104, it is important to point out that at paragraph 47 of the judgment in *Simap*, the Court noted that the directive defines that concept as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive.

49 At paragraph 48 of the judgment in *Simap* the Court held that the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams in Valencia (Spain) where their presence at the health centre is required. The Court found, in the case which resulted in that judgment, that it was not disputed that during periods of duty on call under those rules, the first two conditions set out in the definition of the concept of working time were fulfilled and, further, that, even if the activity actually performed varied according to the circumstances, the fact that such doctors were obliged to be present and available at the workplace with a view to providing their professional services had to be regarded as coming within the ambit of the performance of their duties.

50 The Court added, at paragraph 49 of the judgment in *Simap*, that that interpretation was in conformity with the objective of Directive 93/104, which is

to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks, whereas to exclude duty on call from 'working time' within the meaning of the directive if physical presence is required would seriously undermine that objective.

51 At paragraph 50 of the judgment in *Simap*, the Court went on to state that the situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. In fact, even if they are at the disposal of their employer, in that it must be possible to contact them, the fact remains that in that situation doctors may manage their time with fewer constraints and pursue their own interests, so that only time linked to the actual provision of primary care services must be regarded as 'working time' within the meaning of Directive 93/104.

52 After pointing out at paragraph 51 of the judgment in *Simap* that overtime comes within the concept of 'working time' for the purposes of Directive 93/104, the Court concluded at paragraph 52 thereof that time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of the directive if they are required to be present at the health centre, whereas if they must merely be contactable at all times when on call, only time linked to the actual provision of primary care services must be regarded as working time (see to the same effect the order in Case C-241/99 *CIG* [2001] ECR I-5139, paragraphs 33 and 34).

53 First, it is not disputed that a doctor performing duties such as those at issue in the main proceedings performs his on-call duty under a regime requiring presence in the health centre.

54 Secondly, neither the context nor the nature of the activities of such a doctor are materially different from those in the case which gave rise to the judgment in *Simap* in such a way as to call in question the Court's interpretation of Directive 93/104 in that judgment.

55 In that regard those activities cannot be validly distinguished on the basis that in the case which gave rise to the judgment in *Simap* the doctors assigned to a primary care team were subject to uninterrupted working time which could extend for up to 31 hours without night rest, whereas in the case of on-call duty such as that at issue in the main proceedings, the relevant national legislation ensures that the periods during which the person concerned may be called upon to perform a professional task do not exceed 49% of the totality of the period of on-call duty with the result that he could be inactive during more than half of that period.

56 In fact, as the Advocate General pointed out in footnote 3 of his Opinion, it is not apparent from the Spanish legislation at issue in the case which resulted in the *Simap* judgment that the doctors performing on-call duty at the hospital must remain alert and active for the whole duration of such period. The same conclusion may also be drawn from paragraphs 15, 31 and 33 of the Advocate General's Opinion in that case.

57 Moreover, even though the figure of 49% appearing in the national legislation at issue in the main proceedings relates to the average time calculated over a certain period linked to the actual performance of services during the period of on-call duty, it is none the less the case that, during that period, a doctor may be required to provide his services as often and as long as proves to be necessary without there being any limitation in that regard under the legislation.

58 In any event the concepts of 'working time' and 'rest period' within the meaning of Directive 93/104 may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive, as the Court did at paragraphs 48 to 50 of the judgment in *Simap*. Only such an autonomous interpretation is capable of securing for that directive full efficacy and uniform application of those concepts in all the Member States.

59 Accordingly, the fact that the definition of the concept of working time refers to 'national law and/or practice' does not mean that the Member States may unilaterally determine the scope of that concept. Thus, those States may not make subject to any condition the right of employees to have working periods and corresponding rest periods duly taken into account since that right stems directly from the provisions of that directive. Any other interpretation would frustrate the objective of Directive 93/104 of harmonising the protection of the safety and health of workers by means of minimum requirements (see Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraphs 45 and 75).

60 The fact that in the *Simap* judgment the Court did not expressly rule on the fact that doctors performing on-call duty where they are required to be present in the hospital can rest or sleep during the periods when their services are not required is in no way material in that connection.

61 Thus, such periods of professional inactivity are inherent in on-call duty performed by doctors where they are required to be present in the hospital given that, unlike during normal working hours, the need for urgent interventions depends on the circumstances and cannot be planned in advance.

62 Thus, in the last sentence of paragraph 48 of the judgment in *Simap*, the Court expressly referred to that characteristic from which it necessarily follows that it proceeded on the basis that doctors on call at the hospital do not actually perform their professional duties uninterruptedly during the whole period of on-call duty.

63 According to the Court, the decisive factor in considering that the characteristic features of the concept of 'working time' within the meaning of Directive 93/104 are present in the case of time spent on call by doctors in the hospital itself is that they are required to be present at the place determined by the employer and to be available to the employer in order to be able to provide their services immediately in case of need. In fact, as may be inferred from paragraph 48 of the judgment in *Simap*, those obligations, which make it impossible for the doctors concerned to choose the place where they stay during waiting periods, must be regarded as coming within the ambit of the performance of their duties.

64 That conclusion is not altered by the mere fact that the employer makes available to the doctor a rest room in which he can stay for as long as his professional services are not required.

65 It should be added that, as the Court already held at paragraph 50 of the judgment in *Simap*, in contrast to a doctor on stand-by, where the doctor is required to be permanently accessible but not present in the health centre, a doctor who is required to keep himself available to his employer at the place determined by him for the whole duration of periods of on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his

professional services are not required. Under those conditions an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity.

66 That interpretation cannot be called in question by the objections based on economic and organisational consequences which, according to the five Member States which submitted observations under Article 20 of the EC Statute of the Court of Justice, would result from the extension to a case such as that in the main proceedings of the solution adopted in the *Simap* judgment.

67 Moreover, it is clear from the fifth recital in the preamble to Directive 93/104 that 'the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.'

68 It follows from all the foregoing that the conclusion reached by the Court in the *Simap* judgment, according to which time spent on call by doctors in primary health care teams, where they are required to be physically present in the health centre, must be regarded in its entirety as working time within the meaning of Directive 93/104, irrespective of the work actually performed by the persons concerned, must also apply in regard to on-call duty performed under the same regime by a doctor such as Mr Jaeger in the hospital where he is employed.

69 Under those circumstances Directive 93/104 precludes national legislation such as that at issue in the main proceedings, which treats as periods of rest periods of on-call duty during which the doctor is not actually required to perform any professional task and may rest but must be present and remain available at the place determined by the employer with a view to performance of those services if need be or when he is requested to intervene.

70 In fact that is the only interpretation which accords with the objective of Directive 93/104 which is to secure effective protection of the safety and health of employees by allowing them to enjoy minimum periods of rest. That interpretation is all the more cogent in the case of doctors performing on-call duty in health centres, given that the periods during which their services are not required in order to cope with emergencies may, depending on the case, be of short duration and/or subject to frequent interruptions and where, moreover, it cannot be ruled out that the persons concerned may be prompted to intervene, apart from in emergencies, to monitor the condition of patients placed under their care or to perform tasks of an administrative nature.

71 In light of all the foregoing considerations the reply to the first and second questions must be that Directive 93/104 must be interpreted as meaning that on-call duty ('Bereitschaftsdienst') performed by a doctor where he is required to be physically present in the hospital must be regarded as constituting in its totality working time for the purposes of that directive even where the person concerned is permitted to rest at his place of work during the periods when his services are not required with the result that that directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty.

The third and fourth questions

72 By its third and fourth questions, which must be examined together, the referring court is essentially asking whether Directive 93/104 must be interpreted as precluding legislation of a Member State which, in the case of on-call duty where physical presence in the hospital is required, has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, a reduction in the daily rest periods of 11 hours subject to offset 'at other times during the periods worked during on-call duty.'

73 It appears from the context in which the third and fourth questions were raised that the referring court is questioning the compatibility with the requirements of Directive 93/104 of the matters prescribed in Paragraph 5(3) and the first subparagraph of Paragraph 7(2) of the ArbZG.

74 In that connection it appears at the outset that national provisions such as those alluded to by the referring court make a distinction according to whether the employee is or is not called upon actually to perform work during on-call duty since only the periods of actual activity during on-call duty may be offset whereas the periods of on-call duty during which the employee is not active are regarded as rest periods.

75 However, as may be inferred from the reply to the first two questions, on-call duty performed by a doctor in the hospital employing him must be regarded in its entirety as constituting work time, irrespective of the fact that, during that period of on-call duty, the employee is not continuously carrying on any activity. Consequently, Directive 93/104 precludes legislation of a Member State which treats as rest periods under that directive the employee's periods of inactivity whilst on call in the health centre and which thus provides only for periods during which the person concerned has actually performed any professional activity to be offset.

76 In order to give a useful reply to the referring court, it is also appropriate to state the requirements of Directive 93/104 in regard to rest periods and in particular to examine whether and, if so, to what extent national provisions such as Paragraph 5(3) and the first subparagraph of Paragraph 7(2) of the ArbZG may come within the possibilities for derogation under that directive.

77 In that context Article 3 of Directive 93/104 enshrines the right of every employee to benefit during each 24-hour period from a minimum rest period of 11 consecutive hours.

78 As to Article 6 of that directive it requires the Member States to adopt the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers, the average working time for each seven-day period, including overtime, does not exceed 48 hours.

79 However, it is clear from the very wording of the two abovementioned provisions that they preclude in principle national legislation, such as that in issue in the main proceedings, which permits periods of work which may last for around 30 hours at a stretch where a period of on-call duty precedes or immediately follows a period of normal service, or more than 50 hours per week, including periods of on-call duty. It would be otherwise only if that legislation came within the possibilities for derogation provided for in Directive 93/104.

80 In that regard it follows from the system established by that directive that, although Article 15 allows generally for the application or introduction of national provisions more favourable to the protection of the safety and health of employees, the directive conversely provides in Article 17 that only certain of its provisions exhaustively enumerated may form the subject-matter of derogations provided for by the Member States or social partners.

81 However, first, it is significant that Article 2 of Directive 93/104 is not amongst the provisions in respect of which the directive expressly permits derogations.

82 That fact is such as to reinforce the finding at paragraphs 58 and 59 hereof according to which the definitions in Article 2 cannot be freely interpreted by the Member States.

83 Secondly, Article 6 of Directive 93/104 is mentioned only in Article 17(1) although it is undisputed that the latter provision covers activities which bear no relationship to those performed by a doctor during periods of on-call duty performed where physical presence in the hospital is required.

84 It is true that Article 18(1)(b)(i) of Directive 93/104 provides that the Member States have the right not to apply Article 6 provided that they observe the general principles of protection of safety and health of workers and that they satisfy a certain number of conditions set out cumulatively in that provision.

85 None the less, as the German Government expressly confirmed at the hearing, it is undisputed that the Federal Republic of Germany has not availed itself of that possibility of derogation.

86 Thirdly, Article 3 of Directive 93/104, on the other hand, is mentioned in several of the subparagraphs of Article 17 of that directive and in particular in

Article 17(2), subparagraph 2.1, a provision that is relevant to the main proceedings since it refers, in subsubparagraph (c)(i), to 'activities involving the need for continuity of service..., particularly... services relating to the reception, treatment and/or care provided by hospitals or similar establishments...'.

87 The particular characteristics of the organisation of teams of on-call services in hospitals and similar establishments are therefore recognised by Directive 93/104 inasmuch as it provides in Article 17 for possibilities of derogation in connection with them.

88 Thus the Court considered at paragraph 45 of the judgment in *Simap* that the activity of doctors in primary care teams may come within the derogations provided for in that article provided that the conditions laid down in that provision are satisfied (see order in *CIG*, cited above, paragraph 31).

89 In that regard it should be pointed out that, since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the derogations provided for in Article 17 must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which those derogations enable to be protected.

90 Moreover, under the terms of Article 17(2) of Directive 93/104, the implementation of such a derogation, with particular regard to the duration of the daily rest provided for in Article 3, is expressly subject to the condition that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such

equivalent periods of compensatory rest, those workers are afforded appropriate protection. Under Article 17(3) the same conditions are applicable in the case of derogation from Article 3 by collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

91 However, on the one hand, as has already been noted at paragraph 81 hereof, Article 17 of Directive 93/104 does not allow derogations from the definitions of the concepts of 'working time' and 'rest period' in Article 2 of the directive by counting as rest periods the periods during which a doctor who is required to perform his on-call duty at the hospital itself is not active, whereas such periods must be regarded as forming an integral part of working time for the purposes of the directive.

92 Secondly, it should be pointed out that the purpose of Directive 93/104 is effectively to protect the safety and health of workers. In light of that essential objective each employee must in particular enjoy adequate rest periods which must not only be effective in enabling the persons concerned to recover from the fatigue engendered by their work but are also preventive in nature so as to reduce as much as possible the risk of affecting the safety or health of employees which successive periods of work without the necessary rest are likely to produce.

93 In that regard it is clear from paragraph 15 of the judgment in *United Kingdom* v *Council* that the concepts of 'safety' and 'health' as used in Article 118a of the Treaty, on which Directive 93/104 is based, should be interpreted widely as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time. At the same paragraph of that

judgment the Court further noted that such an interpretation derives support in particular from the preamble to the Constitution of the World Health Organisation to which all the Member States belong. Health is there defined as a state of complete physical, mental and social well-being that does not consist only in the absence of illness or infirmity.

94 It follows from the foregoing that 'equivalent compensating rest periods' within the meaning of Article 17(2) and (3) of Directive 93/104 must, in order to comply with both those qualifications and the objective of the directive as described at paragraph 92 of this judgment, be characterised by the fact that during such periods the worker is not subject to any obligation *vis-à-vis* his employer which may prevent him from pursuing freely and without interruption his own interests in order to neutralise the effects of work on his safety or health. Such rest periods must therefore follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work.

95 In order to ensure the effective protection of the safety and health of the worker provision must as a general rule be made for a period of work regularly to alternate with a rest period. In order to be able to rest effectively, the worker must be able to remove himself from his working environment for a specific number of hours which must not only be consecutive but must also directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties. That requirement appears all the more necessary where, by way of exception to the general rule, normal daily working time is extended by completion of a period of on-call duty.

96 Conversely, a series of periods of work completed without the interpolation of the necessary rest time may, in a given case, cause damage to the worker or at the

very least threaten to overtax his physical capacities, thus endangering his health and safety with the result that a rest period granted subsequent to those periods is not such as correctly to ensure the protection of the interests at issue. As has been established at paragraph 70 hereof, that risk is yet more real in regard to on-call duty performed by a doctor in a health centre, *a fortiori* where that duty is additional to normal working time.

97 Under those circumstances the increase in daily working time which the Member States or social partners may effect under Article 17 of Directive 93/104 by reducing the rest period accorded to the worker during the course of a given working day, in particular in hospitals and similar establishments, must in principle be offset by the grant of equivalent periods of compensatory rest made up of a number of consecutive hours corresponding to the reduction applied and from which the worker must benefit before commencing the following period of work. As a general rule, to accord such periods of rest only 'at other times' not directly linked with the period of work extended owing to the completion of overtime does not adequately take into account the need to observe the general principles of protection of the safety and health of workers which constitute the foundation of the Community regime for organisation of working time.

98 In fact it is only in entirely exceptional circumstances that Article 17 enables 'appropriate protection' to be accorded to the worker where the grant of equivalent periods of compensatory rest is not possible on objective grounds.

99 However, in the present case, it is in no way argued or even alleged that legislation such as that at issue in the main proceedings may come within such a situation.

100 Furthermore, in no circumstances may a reduction in the daily rest period of 11 consecutive hours, as authorised by Directive 93/104 in certain circumstances and subject to compliance with various conditions, lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded such that a worker is required to perform his activities for more than an average of 48 hours, including overtime, in any period of seven days, even if such time includes periods on call during which the employee, although available at his place of work, is not actually engaged in professional activities.

101 As was noted at paragraph 83 hereof, Article 17 does not permit derogation from Article 6 for activities such as those at issue in the main proceedings.

102 In view of the considerations set out herein, it must be concluded that national provisions such as those laid down in Paragraph 5(3) and the first subparagraph of Paragraph 7(2) of the ArbZG are not such as to come within the possible derogations provided for in Directive 93/104.

103 In those circumstances the reply to be given to the third and fourth questions is that Directive 93/104 must be interpreted as meaning that:

— in circumstances such as those in the main proceedings, that directive precludes legislation of a Member State which, in the case of on-call duty

where physical presence in the hospital is required, has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, an offset only in respect of periods of on-call duty during which the worker has actually been engaged in professional activities;

— in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest periods of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked;

— furthermore, in no circumstances may such a reduction in the daily rest period lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded.

Costs

104 The costs incurred by the German, Danish, French, Netherlands and United Kingdom Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landesarbeitsgericht Schleswig-Holstein by order of 12 March 2002, amended by order of 25 March 2002, hereby rules:

1. Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be interpreted as meaning that on-call duty ('Bereitschaftsdienst') performed by a doctor where he is required to be physically present in the hospital must be regarded as constituting in its totality working time for the purposes of that directive even where the person concerned is permitted to rest at his place of work during the periods when his services are not required with the result that that directive precludes legislation of a Member State which classifies as rest periods an employee's periods of inactivity in the context of such on-call duty.

2. Directive 93/104 must also be interpreted as meaning that:

— in circumstances such as those in the main proceedings, that directive precludes legislation of a Member State which, in the case of on-call duty

where physical presence in the hospital is required, has the effect of enabling, in an appropriate case by means of a collective agreement or a works agreement based on a collective agreement, an offset only in respect of periods of on-call duty during which the worker has actually been engaged in professional activities;

— in order to come within the derogating provisions set out in Article 17(2), subparagraph 2.1(c)(i) of the directive, a reduction in the daily rest period of 11 consecutive hours by a period of on-call duty performed in addition to normal working time is subject to the condition that equivalent compensating rest periods be accorded to the workers concerned at times immediately following the corresponding periods worked;

— furthermore, in no circumstances may such a reduction in the daily rest period lead to the maximum weekly working time laid down in Article 6 of the directive being exceeded.

Rodríguez Iglesias Wathelet Schintgen

Timmermans Gulmann Edward

Jann Skouris Macken

Colneric von Bahr

Cunha Rodrigues Rosas

Delivered in open court in Luxembourg on 9 September 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President

JUDGMENT OF THE COURT
11 March 1997 *

In Case C-13/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Arbeitsgericht, Bonn, for a preliminary ruling in the proceedings pending before that court between

Ayse Süzen

and

Zehnacker Gebäudereinigung GmbH Krankenhausservice,

Lefarth GmbH, party joined

on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26),

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: A. La Pergola,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Zehnacker Gebäudereinigung GmbH Krankenhausservice, by Christof Bröße, Rechtsanwalt, Villingen,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Gereon Thiele, Assessor in the same ministry, acting as Agents,

— the Belgian Government, by Jan Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, acting as Agent,

— the French Government, by Edwige Belliard, Assistant Director, Directorate of Legal Affairs in the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same directorate, acting as Agents,

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt QC,

— the Commission of the European Communities, by Christopher Docksey, of its Legal Service, and Horstpeter Kreppel, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Süzen, represented by Christoph Krämer, Rechtanswalt, Bonn; Zehnacker Gebäudereinigung GmbH Krankenhausservice, represented by Christof Bröße; Lefarth GmbH, represented by Nikolaus Christ, Rechtsanwalt, Rösrath; the German Government, represented by Ernst Röder; the French Government, represented by Anne de Bourgoing; the United Kingdom Government, represented by Derrick Wyatt; and the Commission of the European Communities, represented by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, at the hearing on 18 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 15 October 1996,

gives the following

Judgment

1 By order of 30 November 1994, received at the Court Registry on 18 January 1995, the Arbeitsgericht (Labour Court), Bonn, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26, hereinafter 'the directive').

2 Those questions were raised in proceedings brought by Mrs Süzen against Zehnacker Gebäudereinigung GmbH Krankenhausservice (hereinafter 'Zehnacker').

3 Mrs Süzen was employed by Zehnacker, which assigned her to cleaning operations in the premises of the Aloisiuskolleg, a secondary school in Bonn-Bad-Godesberg, Germany, under a cleaning contract concluded between that school and Zehnacker. Zehnacker dismissed Mrs Süzen, together with seven other employees who, like her, worked as cleaners at the school, by reason of the fact that the Aloisiuskolleg terminated the contract between it and Zehnacker with effect from 30 June 1994.

4 The Aloisiuskolleg then contracted the cleaning of its premises to Lefarth GmbH (hereinafter 'Lefarth'), the party joined in the main proceedings, with effect from 1 August 1994. The order for reference does not state whether Lefarth offered to re-engage the employees dismissed by Zehnacker.

5 Mrs Süzen instituted proceedings before the Arbeitsgericht, Bonn, for a declaration that the notice of dismissal served on her by Zehnacker had not brought to an end her employment relationship with the latter.

6 Considering that the decision to be given depended on an interpretation of the directive, the Arbeitsgericht stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. On the basis of the judgments of the Court of Justice of 14 April 1994 in Case C-392/92 *Schmidt* [1994] ECR I-1311 and of 19 May 1992 in Case C-29/91 *Redmond Stichting* [1992] ECR I-3189, is Directive 77/187/EEC applicable if an undertaking terminates a contract with an outside undertaking in order then to transfer it to another outside undertaking?

2. Is there a legal transfer within the meaning of the directive in the case of the operation described in Question 1 even if no tangible or intangible business assets are transferred?'

7 Article 1(1) of the directive provides: 'This directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

8 In *Schmidt*, cited above, the Court held that that provision must be interpreted as covering a situation, such as that outlined in the order for reference, in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee. Earlier, in *Redmond Stichting*, cited above, the Court took the view in particular that the term 'legal transfer' covers a situation in which a public authority decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim.

9 By its two questions, which it is appropriate to consider together, the national court asks whether the directive also applies to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking without any concomitant transfer of tangible or intangible business assets from one undertaking to the other.

10 The aim of the directive is to ensure continuity of employment relationships within an economic entity, irrespective of any change of ownership. The decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity, as indicated *inter alia*

by the fact that its operation is actually continued or resumed (Case 24/85 *Spijkers* [1986] ECR 1119, paragraphs 11 and 12, and, most recently, Joined Cases C-171/94 and C-172/94 *Merckx and Neuhuys* [1996] ECR I-1253, paragraph 16; see also the advisory opinion of the Court of the European Free Trade Association of 19 December 1996 in Case E-2/96 *Ulstein and Røiseng*, not yet reported, paragraph 27).

11 Whilst the lack of any contractual link between the transferor and the transferee or, as in this case, between the two undertakings successively entrusted with the cleaning of a school, may point to the absence of a transfer within the meaning of the directive, it is certainly not conclusive.

12 As has been held — most recently in *Merckx and Neuhuys* (paragraph 28) — the directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking. Thus, there is no need, in order for the directive to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may also take place in two stages, through the intermediary of a third party such as the owner or the person putting up the capital.

13 For the directive to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract (Case C-48/94 *Rygaard* [1995] ECR I-2745, paragraph 20). The term entity thus refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.

14 In order to determine whether the conditions for the transfer of an entity are met, it is necessary to consider all the facts characterizing the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of

its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, *Spijkers* and *Redmond Stichting*, paragraphs 13 and 24 respectively).

15 As observed by most of the parties who commented on this point, the mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it.

16 The mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.

17 It must also be noted that, although the transfer of assets is one of the criteria to be taken into account by the national court in deciding whether an undertaking has in fact been transferred, the absence of such assets does not necessarily preclude the existence of such a transfer (*Schmidt* and *Merckx*, cited above, paragraphs 16 and 21 respectively).

18 As pointed out in paragraph 14 of this judgment, the national court, in assessing the facts characterizing the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets.

19 The United Kingdom Government and the Commission have argued that, for the entity previously entrusted with a service contract to have been the subject of a transfer within the meaning of the directive, it may be sufficient in certain circumstances for the new awardee of the contract to have voluntarily taken over the majority of the employees specially assigned by his predecessor to the performance of the contract.

20 In that regard, it should be borne in mind that the factual circumstances to be taken into account in determining whether the conditions for a transfer are met include in particular, in addition to the degree of similarity of the activity carried on before and after the transfer and the type of undertaking or business concerned, the question whether or not the majority of the employees were taken over by the new employer (*Spijkers*, cited above, paragraph 13).

21 Since in certain labour-intensive sectors a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, it must be recognized that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, as stated in paragraph 21 of *Rygaard*, cited above, the new employer takes

over a body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis.

22 It is for the national court to establish, in the light of the foregoing interpretative guidance, whether a transfer has occurred in this case.

23 The answer to the questions from the national court must therefore be that Article 1(1) of the directive is to be interpreted as meaning that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.

Costs

24 The costs incurred by the Belgian, French, German and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arbeitsgericht, Bonn, by order of 30 November 1994, hereby rules:

Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as meaning that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the workforce, in terms of their numbers and skills, assigned by his predecessor to the performance of the contract.

Rodríguez Iglesias Moitinho de Almeida Murray

Sevón Kapteyn Gulmann

Edward Puissochet Hirsch

Jann Ragnemalm

Delivered in open court in Luxembourg on 11 March 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President

JUDGMENT OF THE COURT

3 October 2000 *

In Case C-303/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal Superior de Justicia de la Comunidad Valenciana, Spain, for a preliminary ruling in the proceedings pending before that court between

Sindicato de Médicos de Asistencia Pública (Simap)

and

Conselleria de Sanidad y Consumo de la Generalidad Valenciana,

on the interpretation of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) and Council Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18),

* Language of the case: Spanish.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: A. Saggio,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Sindicato de Médicos de Asistencia Pública (Simap), by D. Rivera Auñón, Abogado,

— the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, by J. Pla Gimeno, of the Legal Service of the Generalidad Valenciana, acting as Agent,

— the Spanish Government, by M. López-Monís Gallego, Abogado del Estado, acting as Agent,

— the Finnish Government, by T. Pynnä, Valtionasiamies, acting as Agent,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and D. Anderson, Barrister,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and I. Martínez del Peral, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Sindicato de Médicos de Asistencia Pública (Simap), represented by D. Rivera Auñón, of the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, represented by J. Pla Gimeno, of the Spanish Government, represented by N. Díaz Abad, Abogado del Estado, acting as Agent, of the Finnish Government, represented by T. Pynnä, and of the Commission, represented by D. Gouloussis and I. Martínez del Peral, at the hearing on 28 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1999,

gives the following

Judgment

1 By order of 10 July 1998, received at the Court on 3 August 1998, the Tribunal Superior de Justicia de la Comunidad Valenciana (High Court of Justice of the Valencia Autonomous Community) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) five questions on the interpretation of Council Directive 89/391/EEC of 12 June 1989 on the

introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1, hereinafter 'the basic Directive') and Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2 Those questions were raised in proceedings between the Sindicato de Médicos de Sanidad de Asistencia Pública (Union of Doctors in the Public Health Service, hereinafter 'Simap') and the Conselleria de Sanidad y Consumo de la Generalidad Valenciana (Ministry of Health of the Valencia Region), Simap having brought a collective action against the latter on behalf of medical staff providing primary care at health centres in that region.

Legal background

The Community legislation

The basic Directive

3 The basic Directive provides the background to this case. It lays down general principles which have been developed by a series of specific directives, including Directive 93/104.

4 Article 2 of the basic Directive defines its scope in the following terms:

'1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.'

Directive 93/104

5 Directive 93/104 seeks to encourage improvements in the safety and health of workers at work. It was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

6 The first two articles of Directive 93/104 define its purpose and ambit and the scope and meaning of the terms used in it.

7 Article 1 of that directive, entitled 'Purpose and scope', states:

'1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland

waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training.

4. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.'

8 Under the heading 'Definitions', Article 2 of that directive provides:

'For the purposes of this Directive, the following definitions shall apply:

1. *working time* shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. *rest period* shall mean any period which is not working time;

3. *night time* shall mean any period of not less than seven hours, as defined by national law, and which must include in any case the period between midnight and 5 a.m.;

4. *night worker* shall mean:

(a) on the one hand, any worker who, during night time, works at least three hours of his daily working time as a normal course; and

(b) on the other hand, any worker who is likely during night time to work a certain proportion of his annual working time, as defined at the choice of the Member State concerned:

(i) by national legislation, following consultation with the two sides of industry; or

(ii) by collective agreements or agreements concluded between the two sides of industry at national or regional level;

5. *shift work* shall mean any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern, including a rotating pattern, and which may be continuous or

discontinuous, entailing the need for workers to work at different times over a given period of days or weeks;

6. *shift worker* shall mean any worker whose work schedule is part of shift work.'

9 Directive 93/104 lays down a set of rules concerning the maximum duration of the working week, minimum daily and weekly rest periods, annual leave and the duration and conditions of night work and shift work.

10 With regard to maximum weekly working time, Article 6 provides:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

1. the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

2. the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

11 With regard to the length of night work, Article 8 provides:

'Member States shall take the measures necessary to ensure that:

1. normal hours of work for night workers do not exceed an average of eight hours in any 24-hour period;

2. night workers whose work involves special hazards or heavy physical or mental strain do not work more than eight hours in any period of 24 hours during which they perform night work.

For the purposes of the aforementioned, work involving special hazards or heavy physical or mental strain shall be defined by national legislation and/or practice or by collective agreements or agreements concluded between the two sides of industry, taking account of the specific effects and hazards of night work.'

12 Article 15 provides:

'This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

13 Article 16 lays down the reference periods to be taken into account for application of the rules mentioned in paragraphs 9 to 12 of this judgment. It states:

'Member States may lay down:

1. for the application of Article 5 (weekly rest period), a reference period not exceeding 14 days;

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

The periods of paid annual leave, granted in accordance with Article 7, and the periods of sick leave shall not be included or shall be neutral in the calculation of the average.

3. for the application of Article 8 (length of night work), a reference period defined after consultation of the two sides of industry or by collective agreements or agreements concluded between the two sides of industry at national or regional level.

If the minimum weekly rest period of 24 hours required by Article 5 falls within that reference period, it shall not be included in the calculation of the average.'

14 Directive 93/104 also provides for a number of derogations from its basic rules, having regard to particular features of certain activities, and imposes certain conditions. Thus, Article 17 provides:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a) managing executives or other persons with autonomous decision-taking powers;

(b) family workers; or

(c) workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent

periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1. from Articles 3, 4, 5, 8 and 16:

(a) in the case of activities where the worker's place of work and his place of residence are distant from one another or where the worker's different places of work are distant from one another;

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(c) in the case of activities involving the need for continuity of service or production, particularly:

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

...

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

...

4. The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1. and 2.2. and in paragraph 3 of this article, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

...'

15 Article 18 of Directive 93/104 provides:

'1. (a)Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to

take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

— no employer requires a worker to work more than 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

— no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

— the employer keeps up-to-date records of all workers who carry out such work,

— the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

— the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

...'

The national legislation

16 Under the heading 'Working time', Article 6 of Royal Decree No 137/84 of 11 January 1984 (BOE No 27 of 1 February 1984, p. 2627) provides:

'1. The working time of staff forming part of primary care teams shall be 40 hours a week, without prejudice to work which they may be required to undertake as a result of being on call, such staff being obliged to respond to requests for home visits and urgent requests, in accordance with the provisions of the statutory staff regulations applicable to medical and auxiliary health staff employed by the social security authorities and the rules for the implementation thereof ...

2. In rural districts, care shall be provided for specified periods in the morning and afternoon at the health centre, local surgeries and at home, whether on an ordinary basis or by way of emergency.

Shift-work arrangements shall be made between members of teams in order to provide urgent assistance on a rotational basis, the services being centralised at the health centre every day of the week.'

17 By decision of 20 November 1992, published as an annex to the Resolution of 15 January 1993 (BOE No 28 of 2 February 1993, p. 2864), the Council of Ministers approved the agreement concluded on 3 July 1992 between the State health administration and the most representative trade-union organisations in the primary health care sector in Spain. The annex to that decision concerning agreements relating to primary care provides, under the heading 'B. Duty on call':

'... In general, the maximum number of hours of duty on call shall be 425 per year. In the case of primary care teams in rural districts, which are inevitably on call in excess of the limit of 425 hours per year laid down as a general rule, the maximum shall be 850 hours per year, the aim being progressively to reduce the number of hours of duty on call ...'

18 For the Valencia Autonomous Community, an agreement was also concluded on 7 May 1993 between the most representative trade unions and the regional administration in terms similar to those set out in the foregoing paragraph. That agreement provides *inter alia* as follows:

'... The staff shall be on call for a maximum of 425 hours per year. For primary care teams in rural districts, which are inevitably on call in excess of the 425 hours per year laid down as a general rule, it is agreed, with a view to progressively reducing the number of hours of duty on call, to apply a ceiling of 850 hours per year and to that end to engage additional doctors and specialised health assistants, at the same time complying with the budgetary limit imposed ...'

19 A regulation governing the organisation and operation of the primary care teams in the Valencia Autonomous Community (hereinafter 'the Regulation') was adopted by decision of 20 November 1991 of the Conselleria de Sanidad y Consumo de la Generalidad Valenciana. Article 17(3) of the Regulation reproduces Article 6 of Royal Decree No 137/84.

20 By judgment of 15 December 1993, the Administrative Chamber of the Tribunal Superior de Justicia of the Comunidad Valenciana annulled the decision approving the Regulation.

21 On 21 September 1995, Royal Decree No 1561/95 concerning the duration of special work was adopted (BOE No 230 of 26 September 1995, p. 28606). Its scope is limited to ordinary employment relationships governed by private law and it contains no provision concerning the health sector.

The main proceedings and the questions referred to the Court

22 By a collective action brought against the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, Simap sought a declaration that all doctors working in primary care teams in the Valencia region enjoy the following rights:

— Article 17(3) of the regulations should be interpreted in the light of Articles 6, 8, 15 and 17 of Directive 93/104;

— their working time should not exceed 40 hours, including overtime, in any period of seven days (over a total of four months) and night work should not exceed eight hours in any period of 24 hours or, if that limit is exceeded, equivalent compensatory rest periods should be granted to them;

— or, in the alternative, their working time should not exceed 48 hours, including overtime, in any period of seven days (over a total of four months) and night work should not exceed eight hours in any period of 24 hours or, if that limit is exceeded, equivalent compensatory rest periods should be granted to them;

— their status as night workers and shift workers should be recognised and, accordingly, the special protection measures provided for in Articles 9 to 13 of Directive 93/104 should be implemented before they are required to undertake such work and periodically thereafter.

23 According to the national court, the action is based on the allegation that under Article 17(3) of the Regulation, which reproduces Article 6 of Royal Decree No 137/84, doctors who work in primary care teams are required to work without the benefit of any time-limit and without the duration of their work being subject to any daily, weekly, monthly or annual limits; moreover, the normal working period is followed by a period of duty on call, followed, in turn, by the normal working period for the next day, and that work pattern is applied in the manner required by the Conselleria de Sanidad y Consumo de la Generalidad Valenciana, on the basis of requirements which are determined unilaterally. Simap also contends that 'in fact, a doctor in a primary care team is obliged to work for an uninterrupted period of 31 hours, without night rest, whenever the programme for the week or the month so provides, sometimes at

the rate of one day in every two; he must make his own eating arrangements; he must go out on house calls during the night, when there is no public transport, alone and without any security arrangements, travelling as best he can'.

24 The national court states that doctors in primary care teams at Puerto de Sagunto and Burjassot work from 8 a.m. to 3 p.m., to which period is added, every 11 days, a period of duty on call extending from the end of the working day until 8 o'clock the following morning, subject to exceptional unforeseen requirements, such as, in particular, standing in for colleagues who are ill. The weekly working time of the doctors concerned is 40 hours, to which must be added, where appropriate, duty on call, which forms part of the legal working time according to national practice in interpreting their staff regulations and the applicable internal rules.

25 The national court also observes that, in accordance with national practice for doctors whose links with the administration are governed by staff regulations, time on call has a special status, not qualifying as overtime, and is paid on a flat-rate basis, without the actual work performed being taken into consideration.

26 Moreover, where duty on call or stand-by duty is worked under the regime which requires the doctor to be contactable, only actual working hours have to be taken into account in determining the maximum working time. According to the national court, service on call in health establishments is never permitted to be regarded as overtime; overtime constitutes an extension of the normal working hours, with the same workload, whereas duty on call is carried out under conditions different from those under which work within the normal working hours is performed.

27 The national court also states that Directive 93/104 was not correctly transposed into Spanish law. Royal Decree No 1561/95 was the only measure adopted, its

scope being limited to ordinary employment relationships governed by private law, and no provision of that decree is concerned with the health sector.

28 It was in those circumstances that the Tribunal Superior de Justicia de la Comunidad Valenciana decided to stay proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Questions on the general application of the Directive:

(a) In view of Article 118a of the EC Treaty and the reference in Article 1(3) of the Directive to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, which states that it is not applicable "where characteristics peculiar to certain specific public service activities ... inevitably conflict with it", must it be understood that the work of the doctors in the Equipos de Atención Primaria (Primary Health Care Teams) affected by the dispute is covered by the exception referred to?

(b) Article 1(3) of the Directive also refers to Article 17, using the phrase "without prejudice". Despite the fact that, as stated above, no harmonising legislation has been adopted by the State or the Autonomous Regions, must this silence be taken as a derogation from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined?

(c) Does the exemption, in Article 1(3) *in fine* of the Directive, in respect of "the activities of doctors in training" lead, rather, to the conclusion that the activities of other doctors are in fact covered by the Directive?

(d) Does the reference to the fact that the provisions of Directive 89/391/EEC are "fully" applicable to the matters referred to in paragraph 2 have any particular implications with regard to reliance being placed upon it and its application?

2. Questions on working time

(a) Article 2(1) of the Directive defines working time as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice". In view of the national practice referred to above at paragraph 8 of this order and in view of the absence of harmonising legislation, must the national practice of excluding from the 40 hours per week the time spent on call continue to be applied, or must the general and specific provisions of Spanish legislation on working time relating to private law employment relationships be applied by analogy?

(b) Where the doctors concerned are on call without having to be present at the Centre, must the whole of that time be regarded as working time or only such time as is actually spent in carrying out the activity for which they are called out, as is the national practice referred to at paragraph 8 of the facts (in the order for reference)?

(c) Where the doctors concerned are on call at the Centre, must the whole of that time be regarded as ordinary working time or unsocial hours, according to the national practice referred to at paragraph 8 of the facts?

3. Average working time

(a) Must the working time spent on call be included when determining the average working time for each seven-day period, pursuant to Article 6(2) of the Directive?

(b) Must the time spent on call be regarded as overtime?

(c) Despite the absence of harmonising legislation, can the reference period mentioned in Article 16(2) of the Directive be understood to be applicable, including, if so, the derogations therefrom laid down in Article 17(2) and (3) in conjunction with paragraph (4)?

(d) If, as a result of the option provided for in Article 18(1)(b), Article 6 of the Directive is not applied, and despite the absence of harmonising legislation, may Article 6 be considered inapplicable on the ground that the worker's agreement to perform such work has been obtained? Is the agreement of the two sides of industry as expressed in a collective agreement or agreement between them tantamount to the worker's agreement in this respect?

4. Night work

(a) In view of the fact that normal working time is not at night, since only part of the time to be spent periodically on call by some of the doctors concerned is at night, and in the absence of harmonising legislation, are those doctors to be regarded as night workers pursuant to Article 2(4)(b) of the Directive?

(b) For the purposes of the option provided for in Article 2(4)(b)(i) of the Directive, could national legislation on night work by workers subject to private law be applied to the doctors concerned whose employment relationship is governed by public law?

(c) Do the "normal" hours of work referred to in Article 8(1) of the Directive also include time on call, whether or not their physical presence is required?

5. Shift work and shift workers

In view of the fact that the working time at issue is shift work only in relation to time on call, and in the absence of harmonising legislation, can the work of the doctors concerned be regarded as shift work and must they be regarded as shift workers in accordance with the definition contained in Article 2(5) and (6) of the Directive?'

The questions referred to the Court for a preliminary ruling

The scope of Directive 93/104 (Questions 1(a), (c) and (d))

29 By Questions 1(a), (c) and (d) the national court seeks essentially to ascertain whether the activity of doctors in primary health care teams comes within the scope of the basic Directive and Directive 93/104.

30 Article 1(3) of Directive 93/104 defines its scope first by referring expressly to Article 2 of the basic Directive and, second, by providing for a number of exceptions in relation to certain specified activities.

31 Accordingly, in order to determine whether an activity such as that of doctors in primary care teams falls within the scope of Directive 93/104, it is necessary first to consider whether that activity comes within the scope of the basic Directive.

32 By virtue of Article 2(1) thereof, the basic Directive applies to all sectors of activity, both public and private, including industrial, agricultural, commercial, administrative, service, educational, cultural and leisure activities. However, by virtue of Article 2(2), the basic Directive is not to apply where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

33 Since doctors in primary care teams perform their activities in a context which links them to the public sector, it is necessary to consider whether such activities come within the scope of the exclusion mentioned in the foregoing paragraph.

34 It is important to note, first, that it is clear both from the object of the basic Directive, namely to encourage improvement in the safety and health of workers at work, and from the wording of Article 2(1) thereof, that it must necessarily be broad in scope.

35 It follows that the exceptions to the scope of the basic Directive, including that provided for in Article 2(2), must be interpreted restrictively.

36 In addition, Article 2(2) of the basic Directive refers to certain specific public service activities intended to uphold public order and security, which are essential for the proper functioning of society.

37 It is clear that, under normal circumstances, the activity of primary care teams cannot be assimilated to such activities.

38 The activity of primary care teams falls therefore within the scope of the basic Directive.

39 Accordingly, it is necessary to consider whether such an activity comes within the scope of any of the exceptions provided for in Article 1(3) of Directive 93/104.

40 It does not. According to that provision, only the activities of doctors in training come within the exceptions to the scope of that directive.

41 Accordingly, the answer to Questions 1(a), (c) and (d) is that an activity such as that of doctors in primary health care teams falls within the scope of the basic Directive and of Directive 93/104.

The application of Article 17 of Directive 93/104 (Question 1(b))

42 The essential aim of Question 1(b) is to ascertain whether the national court may, in the absence of express measures transposing Directive 93/104, apply its domestic law to the extent to which, having regard to the features of the activity of doctors in primary care teams, such activity falls within the derogations mentioned in Article 17 of that directive.

43 Article 17 of Directive 93/104 permits derogations from Articles 3, 4, 5, 6, 8 and 16 by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry, provided that certain conditions are met. In the case of derogations provided for in Article 17(1), only laws, regulations or administrative provisions are permitted.

44 It follows that, provided that, even in the absence of express measures transposing Directive 93/104, the national law applicable to a given activity observes the conditions laid down in Article 17 thereof, that law conforms to the directive and there is nothing to prevent national courts from applying it.

45 Consequently, the answer to Question 1(b) is that the national court may, in the absence of express measures transposing Directive 93/104, apply its domestic law to the extent to which, having regard to the characteristics of the activity of doctors in primary health care teams, that law meets the conditions laid down in Article 17 of that directive.

The concept of working time (Questions 2(a) to 2(c), 3(a), 3(b) and 4(c))

46 By Questions 2(a) to 2(c), 3(a), 3(b) and 4(c), which it is appropriate to consider together, the national court seeks essentially to determine whether time spent on call by doctors in primary care teams, whether they are required to be present in the health centre or merely contactable, must be regarded as working time or as overtime within the meaning of Directive 93/104.

47 It must be borne in mind that that directive defines working time as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice. Moreover, in the scheme of the directive, it is placed in opposition to rest periods, the two being mutually exclusive.

48 In the main proceedings, the characteristic features of working time are present in the case of time spent on call by doctors in primary care teams where their presence at the health centre is required. It is not disputed that during periods of duty on call under those rules, the first two conditions are fulfilled. Moreover, even if the activity actually performed varies according to the circumstances, the fact that such doctors are obliged to be present and available at the workplace with a view to providing their professional services means that they are carrying out their duties in that instance.

49 That interpretation is also in conformity with the objective of Directive 93/104, which is to ensure the safety and health of workers by granting them minimum periods of rest and adequate breaks (eighth recital in the preamble to the directive). It is clear, as the Advocate General emphasises in point 35 of his Opinion, that to exclude duty on call from working time if physical presence is required would seriously undermine that objective.

50 As the Advocate General also states in point 37 of his Opinion, the situation is different where doctors in primary care teams are on call by being contactable at all times without having to be at the health centre. Even if they are at the disposal of their employer, in that it must be possible to contact them, in that situation doctors may manage their time with fewer constraints and pursue their own interests. In those circumstances, only time linked to the actual provision of primary care services must be regarded as working time within the meaning of Directive 93/104.

51 As regards the question whether time spent on call may be regarded as overtime, although Directive 93/104 does not define overtime, which is mentioned only in Article 6, relating to the maximum length of the working week, the fact remains that overtime falls within the concept of working time for the purposes of the directive, which draws no distinction according to whether or not such time is spent within normal hours of work.

52 The answer to Questions 2(a) to 2(c), 3(a), 3(b) and 4(c) is therefore that time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104 if they are required to be present at the health centre. If they

must merely be contactable at all times when on call, only time linked to the actual provision of primary care services must be regarded as working time.

Whether the work is night work (Questions 4(a) and 4(b))

53 By Questions 4(a) and 4(b) the national court seeks essentially to ascertain whether certain doctors who are regularly on call at night are to be regarded as night workers within the meaning of Article 2(4)(b) of Directive 93/104 and whether, for the purposes of the choice left to the Member State by that provision, the national legislation applicable to employment relationships governed by private law may be applied to doctors whose employment is governed by public law.

54 It appears from the order for reference that doctors in primary care teams at Puerto de Sagunto and Burjassot provide their services from 8 a.m. to 3 p.m., to which period is added, every 11 days, duty on call extending from the end of the working day until 8 o'clock the following morning, subject to exceptional unforeseen requirements such as, in particular, the need to replace colleagues who are ill. The working time of other primary care teams in the Valencia Region is not indicated in the file, but the national court starts from the premiss that in those cases duty on call occurs only periodically.

55 It must be borne in mind that Article 2(4)(a) of Directive 93/104 defines a night worker as 'any worker who, during night time, works at least three hours of his

daily working time as a normal course'. Article 2(4)(b) also permits the national legislature or, at the option of the Member State concerned, the two sides of industry at national or regional level to treat as night workers other workers who work during night time a certain proportion of their annual working time.

56 Since no measure has been adopted by the Kingdom of Spain under Article 2(4)(b) of the directive regarding workers whose employment is governed by public law, doctors in primary care teams who are regularly on call at night may not be regarded as night workers by virtue of that provision alone.

57 Whether national legislation on night work by workers whose employment is governed by private law may be applied to doctors in primary care teams whose employment is governed by public law, for the purposes of the choice referred to in Article 2(4)(b)(i) of the said directive, is a question which the national court must resolve in accordance with domestic law.

58 The answer to Questions 4(a) and 4(b) is therefore that doctors in primary health care teams who are regularly on call at night may not be regarded as night workers by virtue of Article 2(4)(b) of the directive alone. Whether national legislation on night work by workers whose employment is governed by private law may be applied to doctors in primary health care teams, whose employment is governed by public law, is a question to be resolved by the national court in accordance with its domestic law.

Shift work and shift workers (Question 5)

59 By Question 5, the national court seeks essentially to ascertain whether the work performed by doctors in primary care teams whilst on call constitutes shift work and whether such doctors are shift workers within the meaning of Directive 93/104.

60 Doctors in primary care teams in Puerto de Sagunto and Burjassot provide their services from 8 a.m. to 3 p.m., to which period is added, every 11 days, a period of duty on call extending from the end of the working day until 8 o'clock the next morning, subject to unforeseen exceptional requirements; as regards the working time of other primary care teams in the Valencia Region, the national court starts from the premiss that such duty occurs only periodically.

61 Working time spent both on call where doctors in primary care teams are required to be present at health centres and on the actual provision of primary care services when doctors are on call by having merely to be contactable at all times fulfils all the requirements of the definition of shift work in Article 2(5).

62 The work of doctors in primary care teams is organised in such a way that workers are assigned successively to the same work posts on a rotational basis, which makes it necessary for them to perform work at different hours over a given period of days or weeks.

63 As regards the latter condition in particular, it must be noted that, notwithstanding the fact that duty on call is performed at regular intervals, the doctors concerned are called upon to perform their work at different times over a given period of days or weeks.

64 The answer to the fifth question is therefore that work performed by doctors in primary health care teams whilst on call constitutes shift work and that such doctors are shift workers within the meaning of Article 2(5) and (6) of Directive 93/104.

The applicability of the derogations provided for in Article 17(2), (3) and (4) of Directive 93/104 (Question 3(c))

65 By Question 3(c), the national court seeks essentially to ascertain whether, in the absence of national provisions transposing Article 16(2) of Directive 93/104 or, as the case may be, expressly adopting one of the derogations provided for in Article 17(2), (3) and (4) thereof, those provisions can be interpreted as having direct effect.

66 Article 16(2) of that directive allows the Member States to lay down, for the application of Article 6, which is concerned with maximum weekly working time, a reference period not exceeding four months.

67 However, Article 17(2), point 2.1(c)(i), of Directive 93/104 provides that the Member States may derogate from Article 16(2) thereof in the case of activities

involving the need for continuity of service or production, particularly services relating to the reception, treatment and/or care provided by hospitals or similar establishments.

68 Even if those provisions of Directive 93/104 leave the Member States a degree of latitude regarding the reference period to be fixed for the purposes of applying Article 6 of that directive, that does not alter the precise and unconditional nature of the provisions of the directive at issue in the main proceedings. The latitude allowed does not make it impossible to determine minimum rights (see, to that effect, Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 17).

69 It is clear from the terms of Article 17(4) of that directive that the reference period may in no circumstances exceed 12 months. It is therefore possible to determine the minimum protection which must be provided in any event.

70 Consequently, the answer to Question 3(c) is that in the absence of national provisions transposing Article 16(2) of Directive 93/104 or, as the case may be, expressly adopting one of the derogations provided for in Article 17(2), (3) and (4) thereof, those provisions may be interpreted as having direct effect, and therefore they confer on individuals a right whereby the reference period for the implementation of the maximum duration of their weekly working time must not exceed 12 months.

The applicability of Article 18(1)(b) of Directive 93/104 (Question 3(d))

71 By Question 3(d) the national court seeks essentially to ascertain whether consent given by the trade-union representatives in the context of a collective or other agreement is equivalent to that given by a worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

72 That provision allows the Member States not to apply Article 6 of that directive, relating to maximum weekly working time, whilst ensuring that the general principles relating to the protection of the safety and health of workers are observed, provided that the working time does not exceed 48 hours over a seven-day period, calculated as an average for the reference period referred to in point 2 of Article 16. A worker may, however, agree to work for a longer period.

73 It is clear from its wording that the first indent of Article 18(1)(b)(i) requires the consent of the individual worker. Moreover, as has been rightly pointed out by the United Kingdom Government, if the intention of the Community legislature had been to allow the worker's consent to be replaced by that of a trade union in the context of a collective or other agreement, Article 6 of that directive would have been included in the list in Article 17(3) of the directive of those from which derogations may be made by a collective agreement or agreement between the two sides of industry.

74 Consequently, the answer to Question 3(d) is that the consent given by trade-union representatives in the context of a collective or other agreement is not

equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

Costs

75 The costs incurred by the Spanish, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Superior de Justicia de la Comunidad Valenciana by order of 10 July 1998, hereby rules:

1. **An activity such as that of doctors in primary health care teams falls within the scope of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and**

health of workers at work and Council Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of working time.

2. The national court may, in the absence of express measures transposing Directive 93/104, apply its domestic law to the extent to which, having regard to the characteristics of the activity of doctors in primary health care teams, that law meets the conditions laid down in Article 17 of that directive.

3. Time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, and where appropriate as overtime, within the meaning of Directive 93/104 if they are required to be at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary health care services must be regarded as working time.

4. Doctors in primary health care teams who are regularly on call at night may not be regarded as night workers by virtue of Article 2(4)(b) of Directive 93/104 alone. Whether national legislation on night work by workers whose employment is governed by private law may be applied to doctors in primary health care teams, whose employment is governed by public law, is a question to be resolved by the national court in accordance with its domestic law.

5. Work performed by doctors in primary health care teams whilst on call constitutes shift work and such doctors are shift workers within the meaning of Article 2(5) and (6) of Directive 93/104.

6. In the absence of national provisions transposing Article 16(2) of Directive 93/104 or, as the case may be, expressly adopting one of the derogations provided for in Article 17(2), (3) and (4) thereof, those provisions may be interpreted as having direct effect, and therefore they confer on individuals a right whereby the reference period for the implementation of the maximum duration of their weekly working time must not exceed 12 months.

7. The consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

Rodríguez Iglesias Moitinho de Almeida Edward

Sevón Schintgen Kapteyn Gulmann

Puissochet Jann Ragnemalm Wathelet

Delivered in open court in Luxembourg on 3 October 2000.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President

JUDGMENT OF THE COURT
13 May 1986 *

In Case 170/84

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the Bundesarbeitsgericht [Federal Labour Court] for a preliminary ruling in the proceedings pending before that court between

Bilka-Kaufhaus GmbH

and

Karin Weber von Hartz

on the interpretation of Article 119 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

Bilka-Kaufhaus GmbH, the appellant in the main proceedings, by K. H. Koch, J. Burkardt and G. Haberer, Rechtsanwälte, Frankfurt am Main,

Mrs Weber von Hartz, the respondent in the main proceedings, by H. Thon, Rechtsanwalt, Frankfurt am Main,

the United Kingdom, by S. H. Hay, of the Treasury Solicitor's Department, acting as Agent,

* Language of the Case: German.

the Commission of the European Communities, by J. Pipkorn and M. Beschel, members of its Legal Department, acting as Agents,

after hearing the Opinion of the Advocate General delivered at the sitting on 15 October 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 5 June 1984, which was received at the Court on 2 July 1984, the Bundesarbeitsgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 119 of that Treaty.

2 Those questions arose in the course of proceedings between Bilka-Kaufhaus GmbH and its former employee Karin Weber von Hartz concerning the payment to Mrs Weber von Hartz of a retirement pension from a supplementary pension scheme established by Bilka for its employees.

3 It appears from the documents before the Court that for several years Bilka, which belongs to a group of department stores in the Federal Republic of Germany employing several thousand persons, has had a supplementary (occupational) pension scheme for its employees. This scheme, which has been modified on several occasions, is regarded as an integral part of the contracts of employment between Bilka and its employees.

4 According to the version in force since 26 October 1973, part-time employees may obtain pensions under the scheme only if they have worked full time for at least 15 years over a total period of 20 years.

5 Mrs Weber was employed by Bilka as a sales assistant from 1961 to 1976. After initially working full time, she chose to work part time from 1 October 1972 until her employment came to an end. Since she had not worked full time for the minimum period of 15 years, Bilka refused to pay her an occupational pension under its scheme.

6 Mrs Weber brought proceedings before the German labour courts challenging the legality of Bilka's refusal to pay her a pension. She argued *inter alia* that the occupational pension scheme was contrary to the principle of equal pay for men and women laid down in Article 119 of the EEC Treaty. She asserted that the requirement of a minimum period of full-time employment for the payment of an occupational pension placed women workers at a disadvantage, since they were more likely than their male colleagues to take part-time work so as to be able to care for their family and children.

7 Bilka, on the other hand, argued that it was not guilty of any breach of the principle of equal pay since there were objectively justified economic grounds for its decision to exclude part-time employees from the occupational pension scheme. It emphasized in that regard that in comparison with the employment of part-time workers the employment of full-time workers entails lower ancillary costs and permits the use of staff throughout opening hours. Relying on statistics concerning the group to which it belongs, Bilka stated that up to 1980 81.3% of all occupational pensions were paid to women, although only 72% of employees were women. Those figures, it said, showed that the scheme in question does not entail discrimination on the basis of sex.

8 On appeal the proceedings between Mrs Weber and Bilka came before the Bundesarbeitsgericht; that court decided to stay the proceedings and refer the following questions to the Court:

(1) May there be an infringement of Article 119 of the EEC Treaty in the form of 'indirect discrimination' where a department store which employs predominantly women excludes part-time employees from benefits under its occupational pension scheme although such exclusion affects disproportionately more women than men?

(2) If so:

(a) Can the undertaking justify that disadvantage on the ground that its objective is to employ as few part-time workers as possible even though in the department store sector there are no reasons of commercial expediency which necessitate such a staff policy?

(b) Is the undertaking under a duty to structure its pension scheme in such a way that appropriate account is taken of the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension?

9 In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Bilka, Mrs Weber von Hartz, the United Kingdom and the Commission of the European Communities.

The applicability of Article 119

10 The United Kingdom puts forward the preliminary argument that the conditions placed by an employer on the admission of its employees to an occupational pension scheme such as that described by the national court do not fall within the scope of Article 119 of the Treaty.

11 In support of that argument it refers to the judgment of 15 June 1978 (Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365), in which the Court held that Article 119 concerns only pay discrimination between men and women workers and its scope cannot be extended to other elements of the employment relationship, even where such elements may have financial consequences for the persons concerned.

12 The United Kingdom cites further the judgment of 16 February 1982 (Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555) where the Court held that alleged discrimination resulting from a difference in the ages of eligibility set for men and women for payment under a voluntary redundancy scheme was covered not by Article 119 but by Council Directive 76/207 of 9 February 1976 on the

implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40).

13 At the hearing the United Kingdom also referred to the proposal for a Council directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes submitted by the Commission on 5 May 1983 (Official Journal 1983, C 134, p. 7). According to the United Kingdom, the fact that the Commission considered it necessary to submit such a proposal shows that occupational pension schemes such as that described by the national court are covered not by Article 119 but by Articles 117 and 118, so that the application of the principle of equal treatment for men and women in that area requires the adoption of special provisions by the Community institutions.

14 The Commission, on the other hand, has argued that the occupational pension scheme described by the national court falls within the concept of pay for the purposes of the second paragraph of Article 119. In support of its view it refers to the judgment of 11 March 1981 (Case 69/80 *Worringham and Humphreys* v *Lloyds Bank* [1981] ECR 767).

15 In order to resolve the problem of interpretation raised by the United Kingdom it must be recalled that under the first paragraph of Article 119 the Member States must ensure the application of the principle that men and women should receive equal pay for equal work. The second paragraph of Article 119 defines 'pay' as 'the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer'.

16 In its judgment of 25 May 1971 (Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445), the Court examined the question whether a retirement pension paid under a statutory social security scheme constitutes consideration received by the worker indirectly from the employer in respect of his employment, within the meaning of the second paragraph of Article 119.

17 The Court replied in the negative, taking the view that, although pay within the meaning of Article 119 could in principle include social security benefits, it did not include social security schemes or benefits, in particular retirement pensions, directly governed by legislation which do not involve any element of agreement within the undertaking or trade concerned and are compulsory for general categories of workers.

18 In that regard the Court pointed out that social security schemes guarantee workers the benefit of a statutory scheme to which workers, employers and in some cases the authorities contribute financially to an extent determined less by the employment relationship between the employer and the worker than by considerations of social policy, so that the employer's contribution cannot be regarded as a direct or indirect payment to the worker for the purposes of the second paragraph of Article 119.

19 The question therefore arises whether the conclusion reached by the Court in that judgment is also applicable to the case before the national court.

20 It should be noted that according to the documents before the Court the occupational pension scheme at issue in the main proceedings, although adopted in accordance with the provisions laid down by German legislation for such schemes, is based on an agreement between Bilka and the staff committee representing its employees and has the effect of supplementing the social benefits paid under national legislation of general application with benefits financed entirely by the employer.

21 The contractual rather than statutory nature of the scheme in question is confirmed by the fact that, as has been pointed out above, the scheme and the rules governing it are regarded as an integral part of the contracts of employment between Bilka and its employees.

22 It must therefore be concluded that the scheme does not constitute a social security scheme governed directly by statute and thus outside the scope of Article 119. Benefits paid to employees under the scheme therefore constitute consideration received by the worker from the employer in respect of his employment, as referred to in the second paragraph of Article 119.

23 The case before the national court therefore falls within the scope of Article 119.

The first question

24 In the first of its questions the national court asks whether a staff policy pursued by a department store company excluding part-time employees from an occupational pension scheme constitutes discrimination contrary to Article 119 where that exclusion affects a far greater number of women than men.

25 In order to reply to that question reference must be made to the judgment of 31 March 1981 (Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911).

26 In that judgment the Court considered the question whether the payment of a lower hourly rate for part-time work than for full-time work was compatible with Article 119.

27 Such a practice is comparable to that at issue before the national court in this case: Bilka does not pay different hourly rates to part-time and full-time workers, but it grants only full-time workers an occupational pension. Since, as was stated above, such a pension falls within the concept of pay for the purposes of the second paragraph of Article 119 it follows that, hour for hour, the total remuneration paid by Bilka to full-time workers is higher than that paid to part-time workers.

28 The conclusion reached by the Court in its judgment of 31 March 1981 is therefore equally valid in the context of this case.

29 If, therefore, it should be found that a much lower proportion of women than of men work full time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex.

30 However, if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of Article 119.

31 The answer to the first question referred by the national court must therefore be that Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

Question 2 (a)

32 In its second question the national court seeks in essence to know whether the reasons put forward by Bilka to explain its pay policy may be regarded as 'objectively justified economic grounds', as referred to in the judgment of 31 March 1981, where the interests of undertakings in the department store sector do not require such a policy.

33 In its observations Bilka argues that the exclusion of part-time workers from the occupational pension scheme is intended solely to discourage part-time work, since in general part-time workers refuse to work in the late afternoon and on Saturdays. In order to ensure the presence of an adequate workforce during those

periods it was therefore necessary to make full-time work more attractive than part-time work, by making the occupational pension scheme open only to full-time workers. Bilka concludes that on the basis of the judgment of 31 March 1981 it cannot be accused of having infringed Article 119.

34 In reply to the reasons put forward to justify the exclusion of part-time workers Mrs Weber von Hartz points out that Bilka is in no way obliged to employ part-time workers and that if it decides to do so it may not subsequently restrict the pension rights of such workers, which are already reduced by reason of the fact that they work fewer hours.

35 According to the Commission, in order to establish that there has been no breach of Article 119 it is not sufficient to show that in adopting a pay practice which in fact discriminates against women workers the employer sought to achieve objectives other than discrimination against women. The Commission considers that in order to justify such a pay practice from the point of view of Article 119 the employer must, as the Court held in its judgment of 31 March 1981, put forward objective economic grounds relating to the management of the undertaking. It is also necessary to ascertain whether the pay practice in question is necessary and in proportion to the objectives pursued by the employer.

36 It is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds. If the national court finds that the measures chosen by Bilka correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of Article 119.

37 The answer to question 2 (a) must therefore be that under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is

found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.

Question 2 (b)

38 Finally, in Question 2 (b), the national court asks whether an employer is obliged under Article 119 of the Treaty to organize its occupational pension scheme in such a manner as to take into account the fact that family responsibilities prevent women workers from fulfilling the requirements for such a pension.

39 In her observations Mrs Weber von Hartz argues that the answer to that question should be in the affirmative. She argues that the disadvantages suffered by women because of the exclusion of part-time workers from the occupational pension scheme must at least be mitigated by requiring the employer to regard periods during which women workers have had to meet family responsibilities as periods of full-time work.

40 According to the Commission, on the other hand, the principle laid down in Article 119 does not require employers, in establishing occupational pension schemes, to take into account their employees' family responsibilities. In the Commission's view, that objective must be pursued by means of measures adopted under Article 117. It refers in that regard to its proposal for a Council directive on voluntary part-time work submitted on 4 January 1982 (Official Journal 1982, C 62, p. 7) and amended on 5 January 1983 (Official Journal 1983, C 18, p. 5), which has not yet been adopted.

41 It must be pointed out that, as was stated in the judgment of 15 June 1978, the scope of Article 119 is restricted to the question of pay discrimination between men and women workers. Problems related to other conditions of work and employment, on the other hand, are covered generally by other provisions of Community law, in particular Articles 117 and 118 of the Treaty, with a view to the harmonization of the social systems of Member States and the approximation of their legislation in that area.

42 The imposition of an obligation such as that envisaged by the national court in its question goes beyond the scope of Article 119 and has no other basis in Community law as it now stands.

43 The answer to Question 2 (b) must therefore be that Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension.

Costs

44 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Bundesarbeitsgericht by order of 5 June 1984, hereby rules:

(1) Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

(2) Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pension scheme on the ground that it seeks to employ as few part-time workers as possible, where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.

(3) Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension.

Mackenzie Stuart Koopmans Everling Bahlmann

Joliet Bosco Due Galmot Kakouris

Delivered in open court in Luxembourg on 13 May 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President

JUDGMENT OF THE COURT
8 November 1990 *

In Case C-177/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Elisabeth Johanna Pacifica Dekker

and

Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus

on the interpretation of Articles 2 and 3 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976 L 39, p. 40),

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris and F. Grévisse, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator,

after considering the observations submitted on behalf of

Mrs Dekker, the plaintiff in the main proceedings, by T. E. Van Dijk, of the Hague Bar,

* Language of the case: Dutch.

the VJV, the defendant in the main proceedings, by J. L. de Wijkerslooth, of the Hague Bar,

the United Kingdom, by J. A. Gensmantel, of the Treasury Solicitor's Department, acting as Agent,

the Netherlands Government, by E. F. Jacobs, General Secretary of the Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by K. Banks and B. J. Drijber, members of its Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral submissions of Mrs E. J. P. Dekker, the VJV-Centrum, represented by S. M. Evers, of the Hague Bar, the Netherlands Government, represented by J. W. de Zwaan, acting as Agent, the United Kingdom, represented by D. Pannick, acting as Agent, and the Commission at the hearing on 3 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 November 1989,

gives the following

Judgment

1 By judgment of 24 June 1988, which was received at the Court on 30 June 1988, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 2 and 3 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976 L 39, p. 40; hereinafter referred to as 'the Directive').

2 Those questions arose in the context of a dispute between Mrs Dekker and the Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus (hereinafter: 'the VJV'). In June 1981 Mrs Dekker applied for the post of instructor at the training centre for young adults run by the VJV. On 15 June 1981 she informed the committee dealing with the applications that she was three months' pregnant. The committee none the less put her name forward to the board of management of the VJV as the most suitable candidate for the job. By letter of 10 July 1981, however, the VJV informed Mrs Dekker that she would not be appointed.

3 In the letter the VJV explained that the reason for the decision was that Mrs Dekker was already pregnant at the time of lodging her application and that, according to the information it had obtained, the consequence would be that, if the VJV were to employ her, its insurer, the Risicofonds Sociale Voorzieningen Bijzonder Onderwijs (Assurance Fund for the provision of social benefits in special education; hereinafter referred to as 'the Risicofonds') would not reimburse the daily benefits that the VJV would be obliged to pay her during her maternity leave. As a result, the VJV would be financially unable to employ a replacement during Mrs Dekker's absence and would thus be short-staffed.

4 It is apparent from the documents before the Court that under Article 6 of the Ziekengeldreglement (the internal rules of the Risicofonds governing daily sickness benefits) the board of management of the Risicofonds is empowered to refuse to reimburse to a member (the employer) all or part of the daily benefits in the event that an insured person (the employee) becomes unable to perform his or her duties within six months of commencement of the insurance if, at the time when that insurance took effect, it was to be anticipated from the state of health of the person concerned that such incapacity would supervene within that period. Unlike Article 44(1)(b) of the Ziektewet (the Netherlands Law on sickness insurance), which lays down the insurance scheme generally applicable to private-sector employees, the Ziekengeldreglement, which alone applies to Mrs Dekker, contains no derogation for pregnancy from the rule permitting reimbursement of the daily benefits to be refused in cases of 'foreseeable sickness'.

5 The Arrondissementsrechtbank (District Court) Haarlem and the Gerechtshof (Regional Court of Appeal), in turn, dismissed Mrs Dekker's applications for an order requiring the VJV to pay her damages for her financial loss, whereupon she appealed to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

6 Taking the view that the appeal raised problems as to the interpretation of Council Directive 76/207, the Hoge Raad der Nederlanden decided to refer the following questions to the Court for a preliminary ruling:

'(1) Is an employer directly or indirectly in breach of the principle of equal treatment laid down in Articles 2(1) and 3(1) of the Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions) if he refuses to enter into a contract of employment with a candidate, found by him to be suitable, because of the adverse consequences for him which are to be anticipated owing to the fact that the candidate was pregnant when she applied for the post, in conjunction with rules concerning unfitness for work laid down by a public authority under which inability to work in connection with pregnancy and confinement is assimilated to inability to work on account of sickness?

(2) Does it make any difference that there were no male candidates?

(3) Is it compatible with Articles 2 and 3 that:

(a) if a breach of the principle that the rejected candidate must be accorded equal treatment is established, fault on the part of the employer is also required before a claim based on that breach such as the present can be upheld;

(b) if such a breach is established, the employer for his part can still plead justification, even if none of the cases provided for in Article 2(2) to (4) applies?

(4) If fault as referred to in Question 3 above may be required or grounds of justification may be pleaded, is it then sufficient, in order for there to be absence of fault or for a ground of justification to exist, that the employer runs the risk referred to in the summary of the facts, or must Articles 2 and 3

be interpreted as meaning that he must bear those risks, unless he has satisfied himself beyond all doubt that the benefit on account of unfitness for work will be refused or that posts will be lost, and he has done everything possible to prevent that from happening?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

8 It should be noted at the outset that the purpose of the Directive, according to Article 1(1), is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

9 Article 2(1) of the Directive provides that '... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. Under Article 3(1) 'application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts ... '.

10 Consideration must be given to the question whether a refusal of employment in the circumstances to which the national court has referred may be regarded as direct discrimination on grounds of sex for the purposes of the Directive. The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.

11 The reason given by the employer for refusing to appoint Mrs Dekker is basically that it could not have obtained reimbursement from the Risicofonds of the daily benefits which it would have had to pay her for the duration of her absence due to pregnancy, and yet at the same time it would have been obliged to employ a replacement. That situation arises because, on the one hand, the national scheme in question assimilates pregnancy to sickness and, on the other, the Ziekengeldreglement contains no provision excluding pregnancy from the cases in which the Risicofonds is entitled to refuse reimbursement of the daily benefits.

12 In that regard it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.

13 In any event, the fact that pregnancy is assimilated to sickness and that the respective provisions of the Ziektewet and the Ziekengeldreglement governing reimbursement of the daily benefits payable in connection with pregnancy are not the same cannot be regarded as evidence of discrimination on grounds of sex within the meaning of the Directive. Lastly, in so far as as an employer's refusal of employment based on the financial consequences of absence due to pregnancy constitutes direct discrimination, it is not necessary to consider whether national provisions such as those mentioned above exert such pressure on the employer that they prompt him to refuse to appoint a pregnant woman, thereby leading to discrimination within the meaning of the Directive.

14 It follows from the foregoing that the answer to be given to the first question is that an employer is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(1) of Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions if he refuses to enter into a contract of employment with a

female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness.

Second question

15 In its second question the Hoge Raad asks whether the fact that there was no male candidate for the job is liable to alter the answer to the first question.

16 The VJV contends that the second question must be answered in the affirmative, because what is involved is not the discriminatory effect of an abstract measure but a concrete decision by an employer not to engage a specific candidate. When an employer chooses from among exclusively female candidates, his choice cannot be attributable to discrimination on grounds of sex, because in such a case the employer is guided by other considerations of a financial or administrative nature.

17 It should be stressed that the reply to the question whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for that refusal. If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate. In those circumstances the absence of male candidates cannot affect the answer to the first question.

18 The answer to be given to the second question must therefore be that the fact that no man applied for the job does not alter the answer to the first question.

Third question

19 The third question relates to whether it is contrary to Articles 2 and 3 of the Directive for a legal action in damages based on breach of the principle of equal treatment to be capable of succeeding only if it is also proved that the employer is at fault and cannot avail himself of any ground exempting him from liability.

20 Mrs Dekker, the Netherlands Government and the United Kingdom all take the view that, once an infringement of the principle of equal treatment is established, that infringement must be sufficient to make the employer liable.

21 For its part, the VJV notes that the distinction drawn in the two limbs of the third question between fault attributable to the employer and the possible absence of any ground exempting him from liability is partly linked to the national law applicable to the main proceedings, which provides different legal consequences, according to the case. The VJV claims that the Directive allows an answer to be given only to the question whether an infringement of the principle of equal treatment may be justified in any given case.

22 It must be observed in this regard that Article 2(2), (3) and (4) of the Directive provide for exceptions to the principle of equal treatment set out in Article 2(1), but that the Directive does not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground discharging such liability.

23 Article 6 of the Directive recognizes the existence of rights vesting in the victims of discrimination which can be pleaded in legal proceedings. Although full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective protection (judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 23). It must, furthermore, have a real deterrent effect on the employer.

24 It must be observed that, if the employer's liability for infringement of the principle of equal treatment were made subject to proof of a fault attributable to him and also to there being no ground of exemption recognized by the applicable national law, the practical effect of those principles would be weakened considerably.

25 It follows that when the sanction chosen by the Member State is contained within the rules governing an employer's civil liability, any breach of the prohibition of discrimination must, in itself, be sufficient to make the employer liable, without there being any possibility of invoking the grounds of exemption provided by national law.

26 Accordingly, the answer must be that, although Directive 76/207 gives the Member States, in penalizing infringement of the prohibition of discrimination, freedom to choose between the various solutions appropriate for achieving its purpose, it nevertheless requires that, where a Member State opts for a sanction forming part of the rules on civil liability, any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law.

Fourth question

27 In view of the answer to the third question, there is no need to give a ruling on the fourth question.

Costs

28 The costs incurred by the Netherlands Government, the United Kingdom and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 28 June 1988, hereby rules as follows:

(1) An employer is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities, which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness.

(2) The fact that no man applied for the job does not alter the answer to the first question.

(3) Although Directive 76/207 gives the Member States, in penalizing infringement of the prohibition of discrimination, freedom to choose between the various solutions appropriate for achieving its purpose, it nevertheless requires that, where a Member State opts for a sanction forming part of the rules on civil liability, any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law.

Due Moitinho de Almeida Rodríguez Iglesias

Díez de Velasco Slynn Kakouris Grévisse

Delivered in open court in Luxembourg on 8 November 1990.

J.-G. Giraud
Registrar

O. Due
President

Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

19 July 2012*

(Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Jurisdiction over individual contracts of employment — Contract with an embassy of a third State — Immunity of the employing State — Concept of branch, agency or other establishment within the meaning of Article 18(2) — Compatibility with Article 21 of an agreement conferring jurisdiction on the courts of the third State)

In Case C-154/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Landesarbeitsgericht Berlin-Brandenburg (Germany), made by decision of 23 March 2011, received at the Court on 29 March 2011, in the proceedings

Ahmed Mahamdia

v

People's Democratic Republic of Algeria,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, K. Lenaerts, J.-C. Bonichot, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, E. Levits, A. Ó Caoimh, L. Bay Larsen, T. von Danwitz, A. Arabadjiev, C. Toader (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

— the People's Democratic Republic of Algeria, by B. Blankenhorn, Rechtsanwalt,

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

— the European Commission, by M. Wilderspin and A.-M. Rouchaud-Joët, acting as Agents,

— the Swiss Confederation, by D. Klingele, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2012,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 18(2) and 21 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference has been made in proceedings between Mr Mahamdia, an employee at the embassy of the People's Democratic Republic of Algeria in Berlin (Germany), and his employer.

Legal context

International law

The Vienna Convention

3 Under Article 3(1) of the Vienna Convention on Diplomatic Relations, concluded in Vienna on 18 April 1961:

'1. The functions of a diplomatic mission consist, inter alia, in:

(a) Representing the sending State in the receiving State;

(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.'

European Union law

Regulation No 44/2001

4 Recital 2 in the preamble to Regulation No 44/2001 states:

'Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters … are essential.'

5 Recitals 8 and 9 in the preamble to that regulation, which concern the provisions on defendants domiciled in a third State, read as follows:

'(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the [Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 1), as amended by the successive conventions on the accession of the new Member States to that Convention ("the Brussels Convention")].'

6 Recital 13 in the preamble, which concerns inter alia the rules on jurisdiction over individual contracts of employment, states:

'In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.'

7 Article 1(1) of Regulation No 44/2001 defines the material scope of the regulation as follows:

'This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

8 With respect to actions brought against persons domiciled in a third State, Article 4(1) of that regulation provides:

'If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.'

9 Article 5(5) of that regulation provides that a person domiciled in a Member State may be sued in another Member State 'as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated'.

10 Section 5 of Chapter II of the regulation, which comprises Articles 18 to 21, sets out the rules of jurisdiction over disputes concerning individual contracts of employment.

11 Article 18 of the regulation reads as follows:

'1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.'

12 Article 19 of the regulation provides:

'An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.'

13 Article 21 of the regulation reads as follows:

'The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.'

German law

14 Article 25 of the Basic Law of the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) provides:

'The general rules of international law are part of federal law. They take precedence over laws and create rights and obligations directly for the inhabitants of federal territory.'

15 Paragraph 18 of the Law on the judicial system (Gerichtsverfassungsgesetz), in the version published on 9 May 1975, provides:

'The members of the diplomatic missions established in the territory in which this Law applies, the members of their families and their private servants are exempt from German jurisdiction in accordance with the Vienna Convention on Diplomatic Relations of 18 April 1961…'

16 Paragraph 20 of the Law on the judicial system reads as follows:

'1. German jurisdiction also does not extend to representatives of other States and persons accompanying them who stay in the territory in which this Law applies on the official invitation of the Federal Republic of Germany.

2. Furthermore, German jurisdiction also does not extend to persons other than those mentioned in subparagraph 1 and in paragraphs 18 and 19 in so far as they are exempt therefrom under the general rules of international law or on the basis of international agreements or other legislation.'

17 Paragraph 38 of the German Code of Civil Procedure (Zivilprozessordnung), in the version published on 5 December 2005, 'Permitted agreement on jurisdiction', provides in subparagraph 2:

'The jurisdiction of a court of first instance can also be agreed if for at least one of the contractual parties there is no general jurisdiction in Germany. The agreement must be concluded in writing or, if it is made orally, be confirmed in writing… .'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Mr Mahamdia, who has Algerian and German nationality, lives in Germany. On 1 September 2002 he concluded with the Ministry of Foreign Affairs of the People's Democratic Republic of Algeria a contract of employment for a renewable period of one year, for work as a driver at the Algerian Embassy in Berlin.

19 The contract, which was in French, contained an agreement on jurisdiction which read as follows:

'VI. Settlement of disputes

In the event of differences of opinion or disputes arising from this contract, the Algerian courts alone shall have jurisdiction.'

20 According to the order for reference, in the exercise of his duties Mr Mahamdia had to drive guests and colleagues and, as a replacement driver, also the ambassador. In addition, he delivered embassy correspondence to entities in Germany and to the post office. Diplomatic post was received or passed on by a colleague at the embassy who for his part was driven by Mr Mahamdia. The order for reference states that the parties disagree, however, on whether he also provided interpreting services.

21 On 9 August 2007 Mr Mahamdia brought proceedings against the People's Democratic Republic of Algeria in the Arbeitsgericht Berlin (Labour Court, Berlin), seeking to be paid for overtime he claimed to have worked in the years 2005 to 2007.

22 On 29 August 2007, by letter from the embassy's chargé d'affaires, Mr Mahamdia was dismissed as from 30 September 2007.

23 Mr Mahamdia thereupon added to his principal claim before the Arbeitsgericht Berlin a claim for a declaration that the termination of his employment contract had been unlawful and for him to be paid compensation for non-acceptance and to have his employment continued until the end of the dispute.

24 In the proceedings concerning the dismissal, the People's Democratic Republic of Algeria raised the objection that the German courts had no jurisdiction, relying both on international rules on immunity from jurisdiction and on the agreement on jurisdiction in the employment contract.

25 By judgment of 2 July 2008, the Arbeitsgericht Berlin allowed that objection, and consequently dismissed Mr Mahamdia's claim. It took the view that, in accordance with the rules of international law, States enjoy immunity from jurisdiction in the exercise of their sovereign powers and the applicant's activities, which were functionally connected to the diplomatic activities of the embassy, were outside the jurisdiction of the German courts.

26 The applicant in the main proceedings appealed against that judgment to the Landesarbeitsgericht Berlin-Brandenburg (Higher Labour Court, Berlin and Brandenburg), which by judgment of 14 January 2009 quashed in part the judgment of the Arbeitsgericht Berlin.

27 It observed that, since the applicant was a driver at the embassy, his activities did not form part of the exercise of public powers by the defendant State, but constituted an activity that was ancillary to that State's exercise of sovereignty. The People's Democratic Republic of Algeria therefore did not enjoy immunity in this case. Moreover, it considered that the German courts had jurisdiction to hear the case, since the embassy was an 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001. Consequently, the rules set out in Article 19 of the regulation applied. It pointed out that, while an 'establishment' is indeed normally a place where commercial activities are carried on, Article 18(2) of Regulation No 44/2001 is applicable to an embassy since, first, that regulation does not contain any provision under which the diplomatic representations of States are excluded from its scope and, secondly, an embassy has its own management which concludes contracts independently, including contracts in civil matters such as employment contracts.

28 The Landesarbeitsgericht Berlin-Brandenburg also rejected the agreement on jurisdiction in the employment contract in question. It considered that the agreement did not satisfy the conditions laid down in Article 21 of Regulation No 44/2001, as it had been concluded before the dispute arose and referred the employee to the Algerian courts exclusively.

29 The People's Democratic Republic of Algeria appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court), relying both on the immunity from jurisdiction it should enjoy and on the agreement on jurisdiction.

30 By judgment of 1 July 2010, the Bundesarbeitsgericht set aside the judgment appealed against and remitted the case to the Landesarbeitsgericht Berlin-Brandenburg. It ordered the Landesarbeitsgericht inter alia, on the basis of the evidence before it, to assess the activities of Mr Mahamdia, in particular those relating to interpreting, in order to establish whether they could be regarded as sovereign functions of the defendant State. In addition, should it emerge from the examination that that State did not enjoy immunity from jurisdiction, it instructed the Landesarbeitsgericht to determine the court with jurisdiction to hear the main proceedings, taking account inter alia of Article 18(2) of Regulation No 44/2001 and Article 7 of the European Convention on State Immunity, drawn up within the Council of Europe and opened to signature by the States in Basle on 16 May 1972.

31 As regards the law applicable to the contract at issue in the main proceedings, the Bundesarbeitsgericht ruled that the Landesarbeitsgericht should examine whether, in the absence of an express choice by the parties, they had impliedly decided on Algerian law as the law of the contract. Factors such as the language of the contract, the origin of the applicant or the nature of his activities could be indications.

32 In its order for reference the Landesarbeitsgericht Berlin-Brandenburg considers that, in accordance with Article 25 of the Basic Law of the Federal Republic of Germany, States can plead immunity from jurisdiction only in disputes concerning the exercise of their sovereignty. According to the case-law of the Bundesarbeitsgericht, employment law disputes between embassy employees and the State concerned are within the jurisdiction of the German courts where the employee has not carried out, for the State by which he is employed, activities forming part of the sovereign functions of that State.

33 In the present case, the referring court 'presumes' that Mr Mahamdia did not carry out such activities, since the People's Democratic Republic of Algeria has not shown that he took part in those activities.

34 That court further considers that the jurisdiction of the German courts follows from Articles 18 and 19 of Regulation No 44/2001, but that, for the purpose of applying those articles, it must be established whether an embassy is a 'branch, agency or other establishment' within the meaning of Article 18(2) of that regulation. Only if that is the case may the People's Democratic Republic of Algeria be regarded as an employer domiciled in a Member State.

35 Furthermore, in that case, in accordance with Article 21(2) of Regulation No 44/2001, the agreement on jurisdiction in the contract at issue in the main proceedings cannot in principle be applied to oust the jurisdiction of the German courts.

36 On the basis of those considerations, the Landesarbeitsgericht Berlin-Brandenburg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the embassy of a State outside the scope of ... Regulation No 44/2001 ... which is situated in a Member State a branch, agency or other establishment within the meaning of Article 18(2) of Regulation No 44/2001?

2. If the answer to Question 1 is in the affirmative: Can an agreement on jurisdiction, reached before the dispute arises, confer jurisdiction on a court outside the scope of Regulation No 44/2001, if, by virtue of the agreement on jurisdiction, the jurisdiction conferred under Articles 18 and 19 of Regulation No 44/2001 would not apply?'

Consideration of the questions referred

Question 1

37 By its first question, the referring court essentially asks whether Article 18(2) of Regulation No 44/2001 must be interpreted as meaning that an embassy is an 'establishment' within the meaning of that provision and, consequently, whether that regulation is applicable for the purpose of determining the court which has jurisdiction to hear an action brought against a third State by an employee of an embassy of that State in a Member State.

38 It should be noted, to begin with, that Regulation No 44/2001, which lays down the rules for determining the jurisdiction of the courts of the Member States, applies to all disputes in civil and commercial matters with the exception of certain matters expressly mentioned in that regulation. As may be seen from paragraph 10 above, Section 5 of Chapter II of the regulation, which comprises Articles 18 to 21, sets out the rules of jurisdiction for disputes relating to individual contracts of employment.

39 As regards the territorial scope of Regulation No 44/2001, it follows from recital 2 in the preamble to that regulation and from Opinion 1/03 [2006] ECR I-1145, paragraph 143, that the purpose of that regulation is to unify the rules on jurisdiction of the Member States, not only for disputes within the European Union but also for those with an external element, with the objective of eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject.

40 Regulation No 44/2001, in particular Chapter II of which Article 18 forms part, contains a set of rules forming a unified system, which apply not only to relations between different Member States but also to relations between a Member State and a third State (see Opinion 1/03, paragraph 144).

41 In particular, Article 18(2) of the regulation provides that, where an employee concludes a contract of employment with an employer who is domiciled outside the European Union but has a branch, agency or other establishment in a Member State, that employer must be regarded as domiciled in that State for the purpose of determining which court has jurisdiction.

42 To ensure the full effectiveness of that regulation, in particular Article 18, the legal concepts it uses must be given an independent interpretation common to all the States (see, to that effect, concerning the interpretation of the Brussels Convention, inter alia, Case 33/78 *Somafer* [1978] ECR 2183, paragraph 8).

43 In particular, to determine the elements which characterise the concepts of 'branch', 'agency' and 'other establishment' in Article 18(2) of Regulation No 44/2001, in the absence of any indication in the wording of the regulation, the purpose of the provision must be taken into account.

44 For disputes relating to employment contracts, Section 5 of Chapter II of Regulation No 44/2001 lays down a series of rules whose objective, as stated in recital 13 in the preamble to that regulation, is to protect the weaker party to the contract by means of rules of jurisdiction that are more favourable to his interests (see, to that effect, Case C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline* [2008] ECR I-3965, paragraph 17).

45 In particular, they enable an employee to sue his employer before the court which he regards as closest to his interests, by giving him the option of proceeding before a court of the State in which he is domiciled, the State in which he habitually carries out his work, or the State in which his employer's establishment is situated. The provisions of that section also limit the choice of jurisdiction by an employer suing an employee, and the possibility of derogating from the rules of jurisdiction laid down by the regulation.

46 As follows from the Court's case-law on the rules of jurisdiction over contracts of employment in the Brussels Convention (see Case 133/81 *Ivenel* [1982] ECR 1891, paragraph 14; Case C-125/92 *Mulox IBC* [1993] ECR I-4075, paragraph 18; Case C-383/95 *Rutten* [1997] ECR I-57, paragraph 22; and Case C-437/00 *Pugliese* [2003] ECR I-3573, paragraph 18), the provisions of Section 5 of Chapter II of Regulation No 44/2001 must be interpreted with account being taken of the concern to ensure proper protection for the employee as the weaker of the contracting parties.

47 Moreover, to ensure continuity between that regulation and the Brussels Convention, the terms 'branch', 'agency' and 'other establishment' in the regulation must be interpreted in accordance with the criteria set out by the Court in its case-law on Article 5(5) of the Brussels Convention, which contains the same terms and lays down the special rules of jurisdiction for disputes relating to the operation of a secondary establishment of an undertaking. That provision is repeated word for word in Article 5(5) of Regulation No 44/2001.

48 In interpreting those concepts of 'branch', 'agency' and 'other establishment' the Court has identified two criteria which determine whether an action relating to the operations of one of those categories of establishments is linked to a Member State. First, the concept of 'branch', 'agency' or 'other establishment' implies a centre of operations which has the appearance of permanency, such as the extension of a parent body. It must have a management and be materially equipped to negotiate business with third parties, so that they do not have to deal directly with the parent body (see Case 139/80 *Blanckaert & Willems* [1981] ECR 819, paragraph 11). Secondly, the dispute must concern acts relating to the management of those entities or commitments entered into by them on behalf of the parent body, if those commitments are to be performed in the State in which the entities are situated (see, to that effect, *Somafer*, paragraph 13).

49 In the dispute in the main proceedings, it should be recalled that the functions of an embassy, as stated in Article 3 of the Vienna Convention on Diplomatic Relations, consist essentially in representing the sending State, protecting the interests of the sending State, and promoting relations with the receiving State. In the exercise of those functions, the embassy, like any other public entity, can act *iure gestionis* and acquire rights and obligations of a civil nature, in particular as a result of concluding private law contracts. That is the case where it concludes contracts of employment with persons who do not perform functions which fall within the exercise of public powers.

50 As regards the first criterion mentioned in paragraph 48 above, an embassy may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates.

51 As regards the second criterion mentioned in that paragraph, it is clear that the subject-matter of the dispute in the main proceedings, namely a dispute in the field of employment relations, has a sufficient link with the functioning of the embassy in question with respect to the management of its staff.

52 Consequently, as regards contracts of employment concluded by an embassy on behalf of the State, the embassy is an 'establishment' within the meaning of Article 18(2) of Regulation No 44/2001 where the functions of the employees with whom it concludes those contracts are connected with the management activity carried out by the embassy in the receiving State.

53 Before the German courts and in the observations it submitted in the present proceedings for a preliminary ruling, the People's Democratic Republic of Algeria argued that recognising the jurisdiction of a court of the receiving State of an embassy would amount to disregarding the rules of customary international law on immunity from jurisdiction, and that, taking those rules into account, Regulation No 44/2001, in particular Article 18, is not applicable in a dispute such as that in the main proceedings.

54 On this point, it must be observed that under the generally accepted principles of international law concerning immunity from jurisdiction a State cannot be sued before the court of another State in a dispute such as that in the main proceedings. Such immunity of States from jurisdiction is enshrined in international law and is based on the principle *par in parem non habet imperium*, as a State cannot be subjected to the jurisdiction of another State.

55 However, as the Advocate General observes in points 17 to 23 of his Opinion, in the present state of international law, that immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. It may be excluded, by contrast, if the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers.

56 Consequently, in view of the content of that principle of customary international law concerning the immunity of States from jurisdiction, it must be considered that it does not preclude the application of Regulation No 44/2001 in a dispute, such as that in the main proceedings, in which an employee seeks compensation and contests the termination of a contract of employment concluded by him with a State, where the court seised finds that the functions carried out by that employee do not fall within the exercise of public powers or where the proceedings are not likely to interfere with the security interests of the State. On the basis of that finding, the court seised of a dispute such as that in the main proceedings may also consider that that dispute falls within the material scope of Regulation No 44/2001.

57 It follows from the foregoing that the answer to Question 1 is that Article 18(2) of Regulation No 44/2001 must be interpreted as meaning that an embassy of a third State situated in a Member State is an 'establishment' within the meaning of that provision, in a dispute concerning a contract of employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers. It is for the national court seised to determine the precise nature of the functions carried out by the employee.

Question 2

58 By its second question, the referring court essentially asks whether Article 21(2) of Regulation No 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision where the agreement confers exclusive jurisdiction on a court outside the scope of that regulation, ousting the jurisdiction based on the special rules in Articles 18 and 19 of that regulation.

59 The People's Democratic Republic of Algeria considers that Article 21 does not preclude the parties, by means of a term in a contract of employment, from conferring on a court of a third State jurisdiction over disputes relating to that contract. In the present case, that choice entails no disadvantage for the employee and coincides with the wish of the parties to the contract to subject it to the law of that State.

60 As stated in recital 13 in the preamble to Regulation No 44/2001, the objective of the special rules in Section 5 of Chapter II is to ensure proper protection for employees. According to the Court's case-law, recalled in paragraph 46 above, that objective must be taken into account when interpreting those rules.

61 Article 21 of Regulation No 44/2001 restricts the conclusion by the parties to a contract of employment of an agreement on jurisdiction. Such an agreement must thus be concluded after the dispute has arisen or, if it was concluded beforehand, must allow the employee to bring proceedings before courts other than those on which those rules confer jurisdiction.

62 Having regard to the purpose of Article 21 of Regulation No 44/2001, the last mentioned condition must, as the Advocate General observes in points 58 and 59 of his Opinion, be understood as meaning that such an agreement, concluded before the dispute arose, must confer jurisdiction over the action brought by the employee on courts additional to those provided for in Articles 18 and 19 of Regulation No 44/2001. The effect of the agreement is thus not to exclude the jurisdiction of the latter courts but to extend the employee's possibility of choosing between several courts with jurisdiction.

63 Moreover, in accordance with the wording of Article 21 of Regulation No 44/2001, agreements on jurisdiction may 'allow' the employee to bring proceedings in courts other than those indicated in Articles 18 and 19. Consequently, that provision cannot be interpreted as meaning that an agreement on jurisdiction could apply exclusively and thus prohibit the employee from bringing proceedings before the courts which have jurisdiction under Articles 18 and 19.

64 The objective of protecting the employee as the weaker party to the contract, recalled in paragraphs 44 and 46 above, would not be attained if the jurisdiction provided for by Articles 18 and 19 in order to ensure that protection could be ousted by an agreement on jurisdiction concluded before the dispute arose.

65 Furthermore, it does not follow either from the wording or from the purpose of Article 21 of Regulation No 44/2001 that such an agreement may not confer jurisdiction on the courts of a third State, provided that it does not exclude the jurisdiction conferred on the basis of the articles of the regulation.

66 It follows from the foregoing that the answer to Question 2 is that Article 21(2) of Regulation No 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 18(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an embassy of a third State situated in a Member State is an 'establishment' within the meaning of that provision, in a dispute concerning a contract of**

employment concluded by the embassy on behalf of the sending State, where the functions carried out by the employee do not fall within the exercise of public powers. It is for the national court seised to determine the precise nature of the functions carried out by the employee.

2. **Article 21(2) of Regulation No 44/2001 must be interpreted as meaning that an agreement on jurisdiction concluded before a dispute arises falls within that provision in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules in Articles 18 and 19 of that regulation, but also before other courts, which may include courts outside the European Union.**

[Signatures]

JUDGMENT OF THE COURT

30 June 1998 *

In Case C-394/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the House of Lords for a preliminary ruling in the proceedings pending before that court between

Mary Brown

and

Rentokil Initial UK Limited (formerly Rentokil Limited)

on the interpretation of Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

* Language of the case: English.

THE COURT,

composed of: C. Gulmann, President of the Third and Fifth Chambers, acting as President, H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), G. F. Mancini, P. J. G. Kapteyn (Rapporteur), J. L. Murray, D. A. O. Edward, J.-P. Puissochet, P. Jann and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. Von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mrs Brown, by Colin McEachran QC, and Ian Truscott, Advocate, instructed by Mackay Simon, Solicitors,

— Rentokil Initial UK Ltd, by John Hand QC, and Gerard F. McDermott, Barrister, instructed by Gareth T. Brown, Solicitor,

— the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and Dinah Rose, Barrister,

— the Commission of the European Communities, by Pieter Jan Kuyper, Legal Adviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Brown, Rentokil Initial UK Ltd, the United Kingdom Government and the Commission at the hearing on 16 December 1997,

after hearing the Opinion of the Advocate General at the sitting on 5 February 1998,

gives the following

Judgment

1 By order of 28 November 1996, received at the Court Registry on 9 December 1996, the House of Lords referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2 Those questions have been raised in proceedings brought by Mary Brown against Rentokil Initial UK Ltd (hereinafter 'Rentokil') in connection with her dismissal whilst pregnant.

3 According to the order for reference, Mrs Brown was employed by Rentokil as a driver. Her job was mainly to transport and change

'Sanitact' units in shops and other centres. In her view, it was heavy work.

4 In August 1990, Mrs Brown informed Rentokil that she was pregnant. Thereafter she had difficulties associated with the pregnancy. From 16 August 1990 onwards, she submitted a succession of four-week certificates mentioning various pregnancy-related disorders. She did not work again after mid-August 1990.

5 Rentokil's contracts of employment included a clause stipulating that, if an employee was absent because of sickness for more than 26 weeks continuously, he or she would be dismissed.

6 On 9 November 1990, Rentokil's representatives told Mrs Brown that half of the 26-week period had run and that her employment would end on 8 February 1991 if, following an independent medical examination, she had not returned to work by then. A letter to the same effect was sent to her on that date.

7 Mrs Brown did not go back to work following that letter. The parties agree that there was never any question of her being able to return to work before the end of the 26-week period. By letter of 30 January 1991, which took effect on 8 February 1991, she was accordingly dismissed while pregnant. Her child was born on 22 March 1991.

8 At the time when Mrs Brown was dismissed, section 33 of the Employment Protection (Consolidation) Act 1978 provided that an employee who was absent from work wholly or partially because of pregnancy or confinement would, subject to

certain conditions, be entitled to return to work. In particular, the employee had to have been in employment until immediately before the start of the 11th week before the expected date of confinement and, at the beginning of the 11th week, have been continuously employed for a period of not less than two years.

9 According to the order for reference, on the assumption that the date on which Mrs Brown's child was born was also the expected date of delivery, she was not entitled, because she had not been in employment for two years as at 30 December 1990, to absent herself from work from the beginning of the 11th week before delivery pursuant to section 33 of the Employment Protection (Consolidation) Act 1978, or to return to work at any time during the 29 weeks following delivery. She was, however, entitled to statutory maternity pay under sections 46 to 48 of the Social Security Act 1986.

10 By order dated 5 August 1991, the Industrial Tribunal dismissed Mrs Brown's application under the Sex Discrimination Act 1975 concerning her dismissal. The Tribunal held that, where absence through pregnancy-related illness, but which began long before the statutory maternity provisions could apply and subsisted continuously thereafter, is followed by dismissal, that dismissal does not fall into the category of dismissals which must automatically be considered discriminatory because they are due to pregnancy.

11 By order of 23 March 1992, the Employment Appeal Tribunal dismissed Mrs Brown's appeal.

12 By judgment of 18 January 1995, the Extra Division of the Court of Session reached the preliminary conclusion that in this case there was no discrimination within the meaning of the Sex Discrimination Act 1975. It pointed out that, since

the Court of Justice had drawn a clear distinction between pregnancy and illness attributable to pregnancy (Case C-179/88 *Handels-og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* [1990] ECR I-3979 ('*Hertz*')), Mrs Brown, whose absence was due to illness and who had been dismissed on account of that illness, could not succeed.

13 Mrs Brown appealed to the House of Lords, which referred the following questions to the Court for a preliminary ruling:

'1 (a) Is it contrary to Articles 2(1) and 5(1) of Directive 76/207 of the Council of the European Communities ("the Equal Treatment Directive") to dismiss a female employee, at any time during her pregnancy, as a result of absence through illness arising from that pregnancy?

(b) Does it make any difference to the answer given to Question 1(a) that the employee was dismissed in pursuance of a contractual provision entitling the employer to dismiss employees, irrespective of gender, after a stipulated number of weeks of continued absence?

2 (a) Is it contrary to Articles 2(1) and 5(1) of the Equal Treatment Directive to dismiss a female employee as a result of absence through illness arising from pregnancy who does not qualify for the right to absent herself from

work on account of pregnancy or childbirth for the period specified by national law because she has not been employed for the period imposed by national law, where dismissal takes place during that period?

(b) Does it make any difference to the answer given to Question 2(a) that the employee was dismissed in pursuance of a contractual provision entitling the employer to dismiss employees, irrespective of gender, after a stipulated number of weeks of continued absence?'

The first part of the first question

14 It should be noted at the outset that the purpose of Directive 76/207, according to Article 1(1), is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

15 Article 2(1) of the Directive provides that '... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. According to Article 5(1) of the Directive, '[a]pplication of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex'.

16 According to settled case-law of the Court of Justice, the dismissal of a female worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex (see Case C-177/88 *Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, paragraph 12; *Hertz*, cited above, paragraph 13; Case C-421/92 *Habermann-Beltermann* v *Arbeiterwohlfahrt Bezirksverband* [1994] ECR I-1657, paragraph 15; and Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECR I-3567, paragraph 19).

17 As the Court pointed out in paragraph 20 of its judgment in *Webb*, cited above, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.

18 It was precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that the Community legislature, pursuant to Article 10 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive adopted within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), which was to be transposed into the laws of the Member States no later than two years after its adoption, provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. Article 10 of Directive 92/85 provides that there is to be no exception to, or derogation from, the prohibition of dismissal of pregnant women during that period, save in exceptional cases not connected with their condition (see, in this regard, paragraphs 21 and 22 of the judgment in *Webb*, cited above).

19 In replying to the first part of the first question, which concerns Directive 76/207, account must be taken of that general context.

20 At the outset, it is clear from the documents before the Court that the question concerns the dismissal of a female worker during her pregnancy as a result of absences through incapacity for work arising from her pregnant condition. As Rentokil points out, the cause of Mrs Brown's dismissal lies in the fact that she was ill during her pregnancy to such an extent that she was unfit for work for 26 weeks. It is common ground that her illness was attributable to her pregnancy.

21 However, dismissal of a woman during pregnancy cannot be based on her inability, as a result of her condition, to perform the duties which she is contractually bound to carry out. If such an interpretation were adopted, the protection afforded by Community law to a woman during pregnancy would be available only to pregnant women who were able to comply with the conditions of their employment contracts, with the result that the provisions of Directive 76/207 would be rendered ineffective (see *Webb*, cited above, paragraph 26).

22 Although pregnancy is not in any way comparable to a pathological condition (*Webb*, cited above, paragraph 25), the fact remains, as the Advocate General stresses in point 56 of his Opinion, that pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to rest absolutely for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition.

23 In paragraph 15 of its judgment in *Hertz*, cited above, the Court, on the basis of Article 2(3) of Directive 76/207, also pointed out that that directive admits of

national provisions guaranteeing women specific rights on account of pregnancy and maternity. It concluded that, during the maternity leave accorded to her under national law, a woman is protected against dismissal on the grounds of her absence.

24 Although, under Article 2(3) of Directive 76/207, such protection against dismissal must be afforded to women during maternity leave (*Hertz*, cited above, paragraph 15), the principle of non-discrimination, for its part, requires similar protection throughout the period of pregnancy. Finally, as is clear from paragraph 22 of this judgment, dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex.

25 It follows that Articles 2(1) and 5(1) of Directive 76/207 preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy.

26 However, where pathological conditions caused by pregnancy or childbirth arise after the end of maternity leave, they are covered by the general rules applicable in the event of illness (see, to that effect, *Hertz*, cited above, paragraphs 16 and 17). In such circumstances, the sole question is whether a female worker's absences, following maternity leave, caused by her incapacity for work brought on by such disorders, are treated in the same way as a male worker's absences, of the same duration, caused by incapacity for work; if they are, there is no discrimination on grounds of sex.

27 It is also clear from all the foregoing considerations that, contrary to the Court's ruling in Case C-400/95 *Larsson* v *Føtex Supermarked* [1997] ECR I-2757, paragraph 23), where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work.

28 The answer to the first part of the first question must therefore be that Articles 2(1) and 5(1) of Directive 76/207 preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.

The second part of the first question

29 The second part of the first question concerns a contractual term providing that an employer may dismiss workers of either sex after a stipulated number of weeks of continuous absence.

30 It is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, Case C-342/93 *Gillespie and Others* v *Northern Health and Social Services Board and Others* [1996] ECR I-475, paragraph 16).

31 Where it is relied on to dismiss a pregnant worker because of absences due to incapacity for work resulting from her pregnancy, such a contractual term, applying both to men and to women, is applied in the same way to different situations since, as is clear from the answer given to the first part of the first question, the situation of a pregnant worker who is unfit for work as a result of disorders associated with her pregnancy cannot be considered to be the same as that of a male worker who is ill and absent through incapacity for work for the same length of time.

32 Consequently, application of that contractual term in circumstances such as the present constitutes direct discrimination on grounds of sex.

33 The answer to the second part of the first question must therefore be that the fact that a female worker has been dismissed during her pregnancy on the basis of a contractual term providing that the employer may dismiss employees of either sex after a stipulated number of weeks of continuous absence cannot affect the answer given to the first part of the first question.

The second question

34 In view of the answer given to the first question, it is unnecessary to answer the second question.

Costs

35 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords by order of 28 November 1996, hereby rules:

Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.

The fact that a female worker has been dismissed during her pregnancy on the basis of a contractual term providing that the employer may dismiss employees of either sex after a stipulated number of weeks of continuous absence does not affect the answer given.

Gulmann Ragnemalm Wathelet Schintgen

Mancini Kapteyn Murray Edward

Puissochet Jann Sevón

Delivered in open court in Luxembourg on 30 June 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President

JUDGMENT OF THE COURT (Grand Chamber)

16 October 2007 *

In Case C-411/05,

REFERENCE for a preliminary ruling under Article 234 EC, by the Juzgado de lo Social n° 33 de Madrid (Spain), made by decision of 14 November 2005, received at the Court on 22 November 2005, in the proceedings

Félix Palacios de la Villa

v

Cortefiel Servicios SA,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, R. Schintgen (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, M. Ilešič, P. Lindh, J.-C. Bonichot and T. von Danwitz, Judges,

* Language of the case: Spanish.

Advocate General: J. Mazák,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 November 2006,

after considering the observations submitted on behalf of:

— Mr Palacios de la Villa, by P. Bernal de Pablo Blanco, abogado,

— Cortefiel Servicios SA, by D. López González, abogado,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— Ireland, by D.J. O'Hagen, acting as Agent, N. Travers and F. O'Dubhghaill, BL, and M. McLaughlin and N. McCutcheon, solicitors,

— the Netherlands Government, by H.G. Sevenster, M. de Mol and P.P.J. van Ginneken, acting as Agents,

— the United Kingdom Government, by R. Caudwell, acting as Agent, and A. Dashwood, Barrister,

— the Commission of the European Communities, by J. Enegren and R. Vidal Puig, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 13 EC and Articles 2(1) and (6) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The reference was made in the course of proceedings between Mr Palacios de la Villa and his employer, Cortefiel Servicios SA ('Cortefiel'), concerning the automatic termination of his contract of employment by reason of the fact that he had reached the age-limit for compulsory retirement, set at 65 years of age by national law.

Legal background

Community rules

3 Directive 2000/78 was adopted on the basis of Article 13 EC. Recitals 4, 6, 8, 9, 11 to 14, 25 and 36 state:

'(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

...

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

...

(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

...

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. ...

(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

...

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

...

(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.'

4 Article 1 of Directive 2000/78 states: '[t]he purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

5 Article 2 of Directive 2000/78, under the heading 'Concept of discrimination' states, in paragraphs (1) and (2)(a):

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.

6 Article 3(1) of Directive 2000/78, under the heading 'Scope', provides:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals and pay

...'

7 Under Article 6 of Directive 2000/78, under the heading 'Justification of differences of treatment on grounds of age':

'1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

8 Article 8 of Directive 2000/78, under the heading 'Minimum requirements', is worded as follows:

'1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.'

9 Article 16 of Directive 2000/78, under the heading 'Compliance', provides:

'Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.'

10 In accordance with the first paragraph of Article 18 of Directive 2000/78, Member States were to adopt the laws, regulations and administrative provisions necessary to comply with the directive by 2 December 2003 at the latest or could entrust the social partners, at their joint request, with the implementation of the directive as regards provisions concerning collective agreements. In such cases, Member States were to ensure that, no later than 2 December 2003, the social partners introduced the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by that directive. They were forthwith to inform the Commission of the European Communities of those measures.

National law

11 From 1980 until 2001 compulsory retirement of workers who had reached a certain age was used by the Spanish legislature as a mechanism to absorb unemployment.

12 Thus the Fifth Additional Provision of Law 8/1980 on the Workers' Statute (Ley 8/1980 del Estatuto de los Trabajadores) of 10 March 1980 provided:

'The maximum age-limit applicable to capacity to work and the termination of employment contracts shall be set by the Government by reference to the resources of the social security system and the labour market. In any event, the maximum age shall be 69 years, without prejudice to the right to complete qualifying periods for retirement.

Retirement ages may be agreed freely during collective bargaining, without prejudice to the social security provisions in that regard.'

13 Royal Legislative Decree 1/1995 of 24 March 1995 (BOE No 75, of 29 March 1995, p. 9654) approved the consolidated version of Law 8/1980, the Tenth Additional Provision of which ('the Tenth Additional Provision') essentially reproduced the Fifth Additional Provision of Law 8/1980 permitting the use of compulsory retirement as an instrument of employment policy.

14 Decree-Law 5/2001 of 2 March 2001 on emergency measures to reform the labour market in order to increase employment and to improve its quality, ratified by Law 12/2001 of 9 July 2001, repealed the Tenth Additional Provision with effect from 11 July 2001.

15 The national court states in that regard that, on account of the improvement in the economic situation, the Spanish legislature went from regarding compulsory retirement as an instrument favouring employment policy to viewing it as a burden on the social security system, so that it decided to replace the policy of encouraging compulsory retirement with measures intended to promote the implementation of a system of flexible retirement.

16 Articles 4 and 17 of the Law 8/1980, in the amended version resulting from Law 62/2003 of 30 December 2003 laying down fiscal, administrative and social measures (BOE No 313 of 31 December 2003, p. 46874) ('the Workers' Statute'), which is designed to transpose Directive 2000/78 into Spanish law and entered into force on 1 January 2004, deal with the principle of non-discrimination, inter alia, on grounds of age.

17 According to Article 4(2) of the Workers' Statute:

'Workers have the right, in their employment:

...

(c) not to be discriminated against directly or indirectly, when seeking employment or once in employment, on the basis of sex, marital status, age within the limits laid down by this Law, racial or ethnic origin, social status, religion or beliefs, political ideas, sexual orientation, membership or lack of membership of a trade union or on the basis of their language on Spanish territory. Nor may workers be discriminated against on the basis of disability, provided that they are capable of carrying out the work or job in question.

...'

18 Article 17(1) of the Workers' Statute provides:

'Regulatory provisions, clauses in collective agreements, individual agreements, and unilateral decisions by employers, which involve direct or indirect unfavourable discrimination on the basis of age ... shall be deemed to be null and void.'

19 According to the referring court, the repeal of the Tenth Additional Provision of the Workers' Statute has given rise to many disputes regarding the legality of clauses in collective agreements authorising the compulsory retirement of workers.

20 Subsequently, the Spanish legislature adopted Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age (Ley 14/2005 sobre las cláusulas de los convenios colectivos referidas al cumplimiento de la edad ordinaria de jubiliación), of 1 July 2005 (BOE No 157, of 2 July 2005, p. 23634), which entered into force on 3 July 2005.

21 Law 14/2005 reintroduced the mechanism for compulsory retirement, but laid down in that respect different conditions depending on whether the definitive or transitional rules of that law were applicable.

22 Thus, as regards collective agreements concluded after its entry into force, the sole article of Law 14/2005 reinstates the Tenth Additional Provision of the Workers' Statute as follows:

'Collective agreements may contain clauses providing for the termination of a contract of employment on the grounds that a worker has reached the normal retirement age stipulated in social security legislation, provided that the following requirements are satisfied:

(a) such a measure must be linked to objectives which are consistent with employment policy and are set out in the collective agreement, such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment.

(b) a worker whose contract of employment is terminated must have completed the minimum contribution period, or a longer period if a clause to that effect is contained in the collective agreement, and he must have satisfied the conditions laid down in social security legislation for entitlement to a retirement pension under his contribution regime.'

23 However, as regards collective agreements concluded before its entry into force, the single transitional provision of Law 14/2001 ('the single transitional provision'), imposes only the second of the conditions laid down in the sole article of Law 14/2005, excluding any reference to the pursuit of an aim relating to employment policy.

24 The single transitional provision is worded as follows:

'Clauses in collective agreements concluded prior to the entry into force of this Law, which provide for the termination of contracts of employment where workers have reached normal retirement age, shall be lawful provided it is ensured that the workers concerned have completed the minimum period of contributions and satisfy the other requirements laid down in social security legislation for entitlement to a retirement pension under their contribution regime.

The preceding paragraph is not applicable to legal situations which became definitive before the entry into force of this Law.'

25 The relationship between the parties in the main proceedings is governed by the Textile Trade Collective Agreement for the Autonomous Community of Madrid ('the collective agreement').

26 The collective agreement was concluded on 10 March 2005 and published on 26 May 2005. In accordance with Article 3 thereof, it remained in force until 31 December 2005. As the collective agreement preceded the entry into force of Law 14/2005, the single transitional provision is applicable to it.

27 Thus, the third paragraph of Article 19 of the collective agreement provides:

'In the interests of promoting employment, it is agreed that the retirement age will be 65 years unless the worker concerned has not completed the qualifying period required for drawing the retirement pension, in which case the worker may continue in his employment until the completion of that period.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

28 It is clear from the file transmitted to the Court by the referring court that Mr Palacios de la Villa, who was born on 3 February 1940, worked for Cortefiel from 17 August 1981 as organisational manager.

29 By letter of 18 July 2005, Cortefiel notified him of the automatic termination of his contract of employment on the ground that he had reached the compulsory retirement age provided for in the third paragraph of Article 19 of the collective agreement and that, on 2 July 2005, Law 14/2005 had been published, the single transitional provision of which authorises such a measure.

30 It is common ground that, at the date on which his contract of employment with Cortefiel was terminated, Mr Palacios de la Villa had completed the periods of employment necessary to draw a retirement pension under the social security scheme amounting to 100% of his contribution base of EUR 2 347.78, without prejudice to the maximum limits laid down by national legislation.

31 On 9 August 2005, Mr Palacios de la Villa, taking the view that the notification amounted to dismissal, brought an action before the Juzgado de lo Social n° 33 de Madrid. In that action, he requested that the measure taken in his regard be declared null and void on the ground that it was in breach of his fundamental rights and, more particularly, his right not to be discriminated against on the ground of age, since the measure was based solely on the fact that he had reached the age of 65.

32 Cortefiel submitted conversely, that the termination of Mr Palacio de Villa's contract of employment was in accordance with the third paragraph of Article 19 of the collective agreement and the single transitional provision and that, furthermore, it was not incompatible with the requirements of Community law.

33 The referring court expresses serious doubts as to whether the first paragraph of the single transitional provision complies with Community law, inasmuch as it authorises the maintenance of clauses contained in collective agreements existing at the date of the entry into force of Law 14/2005 that provide for the compulsory retirement of workers if they have reached retirement age and satisfy the other conditions imposed by national social security legislation for entitlement to a contributory retirement pension. That provision does not require the termination of the employment relationship on the ground that the worker has reached retirement age to be justified by the employment policy pursued by the Member State concerned, whereas agreements negotiated after the entry into force of Law 14/2005 may contain compulsory retirement clauses only if, in addition to the condition that the workers concerned must be entitled to a pension, that measure pursues objectives set out in the collective agreement relating to national employment policy, such as increased stability in employment, conversion of temporary into permanent contracts, sustaining employment, the recruitment of new workers or the improvement of the quality of employment.

34 In those circumstances, under the same law and in the same economic circumstances, workers who have reached the age of 65 would be treated differently

by reason solely of the fact that the collective agreement applicable to them came into force before or after the date of publication of Law 14/2005, that is, 2 July 2005; if the collective agreement was in force before that date no account would be taken of the requirements of employment policy, even though those requirements are imposed by Directive 2000/78, the time-limit for transposition of which expired on 2 December 2003.

35 It is true that Article 6(1) of Directive 2000/78 authorises an exception to the principle of non-discrimination on the basis of age for the purposes of certain legitimate aims, so long as the means to achieve them are appropriate and necessary. Further, according to the referring court, the definitive rules laid down in the Tenth Additional Provision are undoubtedly covered by Article 6(1), since they require the existence of an actual connection between the compulsory retirement of workers and legitimate employment policy objectives.

36 By contrast, according to the referring court, the first paragraph of the single transitional provision does not require there to be such a connection and, therefore, it does not appear to comply with the conditions laid down in Article 6(1) of Directive 2000/78. Furthermore, from 2001 labour market trends were clearly favourable and the decision of the Spanish legislature to introduce that transitional measure, influenced by the social partners, was aimed at amending the case-law of the Supreme Court. Moreover, the Constitutional Court has never accepted that collective bargaining may in itself constitute an objective and reasonable justification for the compulsory retirement of a worker who has reached a specific age.

37 The referring court adds that Article 13 EC and Article 2(1) of Directive 2000/78 constitute clear and unconditional rules requiring the national court, in accordance

with the principle of the primacy of Community law, to disapply national law which is contrary to it, as in the case of the single transitional provision.

38 Furthermore, in Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47 the Court has already declared a clause in a collective agreement to be contrary to Community law on the ground that it was discriminatory, holding that, without requiring or waiting for that clause to be abolished by collective bargaining or by some other procedure, the national court must therefore apply the same rules to the members of the group disadvantaged by that discrimination as those applicable to other workers.

39 It follows, in the view of the referring court, that, if Community law were to be interpreted as meaning that it in fact precludes the application in the case in the main proceedings of the first paragraph of the single transitional provision, the third paragraph of Article 19 of the collective agreement would have no legal basis and could not therefore apply in the case in the main proceedings.

40 In those circumstances, the Juzgado de lo Social n° 33 de Madrid decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law (specifically, the first paragraph of the single transitional provision ...) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal

retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to a retirement pension under their contribution regime?

In the event that the reply to the first question is in the affirmative:

(2) Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, require this court, as a national court, not to apply to this case the first paragraph of the single transitional provision ...?'

The questions referred for a preliminary ruling

The first question

41 In order to give a useful reply to that question, it is appropriate to determine, first, whether Directive 2000/78 is applicable to a situation such as that in the main proceedings before examining secondly, and if necessary, whether and to what extent the directive precludes legislation such as that referred to by the national court.

Applicability of Directive 2000/78

42 As is clear both from its title and preamble and its content and purpose, Directive 2000/78 is designed to lay down a general framework in order to guarantee equal

treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which includes age.

43 More particularly, it follows from Article 3(1)(c) of Directive 2000/78 that it applies, within the framework of the competence conferred on the Community, 'to all persons ... in relation to employment and working conditions, including dismissals and pay'.

44 It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.

45 The legislation at issue in the main proceedings, which permits the automatic termination of an employment relationship concluded between an employer and a worker once the latter has reached the age of 65, affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force.

46 Consequently, legislation of that kind must be regarded as establishing rules relating to 'employment and working conditions, including dismissals and pay' within the meaning of Article 3(1)(c) of Directive 2000/78.

47 In those circumstances, Directive 2000/78 is applicable to a situation such as that giving rise to the dispute before the national court.

The interpretation of Articles 2 and 6 of Directive 2000/78

48 By its first question, the referring court asks essentially whether the prohibition of any discrimination based on age in employment and occupation must be interpreted as meaning that it precludes national legislation such as that in the main proceedings, pursuant to which compulsory retirement clauses contained in collective agreements are regarded as lawful, where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 years by the national legislation, and must fulfil the other social security conditions for entitlement to draw a contributory retirement pension.

49 In that connection, it should be recalled from the outset that, in accordance with Article 1, the aim of Directive 2000/78 is to combat certain types of discrimination, including discrimination on grounds of age, as regards employment and occupation with a view to putting into effect in the Member States the principle of equal treatment.

50 Under Article 2(1) of Directive 2000/78, for the purposes of the Directive, the 'principle of equal treatment' is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. Article 2(2)(a) states that, for the purposes of paragraph 1, direct discrimination is to be

taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1.

51 National legislation such as that at issue in the main proceedings, according to which the fact that a worker has reached the retirement age laid down by that legislation leads to automatic termination of his employment contract, must be regarded as directly imposing less favourable treatment for workers who have reached that age as compared with all other persons in the labour force. Such legislation therefore establishes a difference in treatment directly based on age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78.

52 Specifically concerning differences of treatment on grounds of age, it is clear from the first subparagraph of Article 6(1) of the directive that such inequalities will not constitute discrimination prohibited under Article 2 'if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'. The second subparagraph of Article 6(1) sets out several examples of differences of treatment having characteristics such as those mentioned in the first subparagraph and, therefore, compatible with the requirements of Community law.

53 In this case, it must be observed, as the Advocate General pointed out in point 71 of his Opinion, that the single transitional provision, which allows the inclusion of compulsory retirement clauses in collective agreements, was adopted, at the instigation of the social partners, as part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations.

54 It is true, as the national court has pointed out, that that provision does not expressly refer to an objective of that kind.

55 However, that fact alone is not decisive.

56 It cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the national legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision.

57 In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that law to be identified for the purposes of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary.

58 In this case, it is clear from the referring court's explanations that, first, the compulsory retirement of workers who have reached a certain age was introduced into Spanish legislation in the course of 1980, against an economic background characterised by high unemployment, in order to create, in the context of national employment policy, opportunities on the labour market for persons seeking employment.

59 Secondly, such an objective was expressly set out in the Tenth Additional Provision.

60 Thirdly, after the repeal, in the course of 2001, of the Tenth Additional Provision, and following signature by the Spanish Government and employers' and trade union organisations of the Declaration for Social Dialogue 2004 relating to competitiveness, stable employment and social cohesion, the Spanish legislature reintroduced the compulsory retirement mechanism by Law 14/2005. The aim of Law 14/2005 itself is to create opportunities in the labour market for persons seeking employment. Its single article thus makes it possible, in collective agreements, to include clauses authorising the termination of an employment contract on the ground that the worker has reached retirement age, provided that that measure is 'linked to objectives which are consistent with employment policy and are set out in the collective agreement', such as 'the conversion of temporary contracts into permanent contracts [or] the recruitment of new workers'.

61 In that context, and given the numerous disputes concerning the repercussions of repeal of the Tenth Additional Provision on compulsory retirement clauses contained in collective agreements concluded under Law 8/1980, both in its original version and that approved by Royal Legislative Decree 1/1995, together with the ensuing legal uncertainty for the social partners, the single transitional provision of Law 14/2005 confirmed that it was possible to set an age-limit for compulsory retirement in accordance with those collective agreements.

62 Thus, placed in its context, the single transitional provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment.

63 That assessment is further reinforced by the fact that, in this case, the third paragraph of Article 19 of the collective agreement expressly mentions the 'interests of promoting employment' as an objective of the measure established by that provision.

64 The legitimacy of such an aim of public interest cannot reasonably be called into question, since employment policy and labour market trends are among the objectives expressly laid down in the first subparagraph of Article 6(1) of Directive 2000/78 and, in accordance with the first indent of the first paragraph of Article 2 EU and Article 2 EC, the promotion of a high level of employment is one of the ends pursued both by the European Union and the European Community.

65 Furthermore, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy (see, in particular, Case C-208/05 *ITC* [2007] ECR I-181, paragraph 39) and that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers.

66 Therefore, an objective such as that referred to by the legislation at issue must, in principle, be regarded as 'objectively and reasonably' justifying 'within the context of national law', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78, a difference in treatment on grounds of age laid down by the Member States.

67 It remains to be determined whether, in accordance with the terms of that provision, the means employed to achieve such a legitimate aim are 'appropriate and necessary'.

68 It should be recalled in this context that, as Community law stands at present, the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see, to that effect, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63).

69 As is already clear from the wording, 'specific provisions which may vary in accordance with the situation in Member States', in recital 25 in the preamble to Directive 2000/78, such is the case as regards the choice which the national authorities concerned may be led to make on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people's working life or, conversely, to provide for early retirement.

70 Furthermore, the competent authorities at national, regional or sectoral level must have the possibility available of altering the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation in the Member State concerned. The fact that the compulsory retirement procedure was reintroduced in Spain after being repealed for several years is accordingly of no relevance.

71 It is, therefore, for the competent authorities of the Member States to find the right balance between the different interests involved. However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the Member State concerned.

72 It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that at issue in the main proceedings may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market.

73 Furthermore, the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which cannot be regarded as unreasonable.

74 Moreover, the relevant national legislation allows the social partners to opt, by way of collective agreements — and therefore with considerable flexibility — for application of the compulsory retirement mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question.

75 In the light of those factors, it cannot reasonably be maintained that national legislation such as that at issue in the main proceedings is incompatible with the requirements of Directive 2000/78.

76 Given the foregoing interpretation of Directive 2000/78, there is no need for the Court to give a ruling in relation to Article 13 EC — also referred to in the first question — on the basis of which that directive was adopted.

77 In the light of all the foregoing considerations, the answer to the first question must be that the prohibition on any discrimination on grounds of age, as implemented by Directive 2000/78, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where

— the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and

— it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose.

The second question

78 In view of the answer in the negative given to the first question of the referring court, it is unnecessary to answer the second question.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The prohibition on any discrimination on grounds of age, as implemented by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding national legislation such as that at issue in the main proceedings, pursuant to which compulsory retirement clauses contained

in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where

— **the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and**

— **the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

21 July 2011 (*)

(Directive 2000/78/EC – Article 6(1) – Prohibition of discrimination on grounds of age – Compulsory retirement of prosecutors on reaching the age of 65 – Legitimate aims justifying a difference of treatment on grounds of age – Coherence of the legislation)

In Joined Cases C−159/10 and C−160/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Frankfurt am Main (Germany), made by decisions of 29 March 2010, received at the Court on 2 April 2010, in the proceedings

Gerhard Fuchs (C−159/10),

Peter Köhler (C−160/10)

v

Land Hessen,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Rosas, U. Lõhmus, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 5 April 2011,

after considering the observations submitted on behalf of:

– the *Land* Hessen, by M. Deutsch, Rechtsanwalt,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– Ireland, by D. O'Hagan and B. Doherty, acting as Agents,

– the European Commission, by V. Kreuschitz and J. Enegren, acting as

Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The references have been made in proceedings between Mr Fuchs and Mr Köhler, respectively, and the *Land* Hessen concerning their retirement at the age of 65.

Legal context

European Union ('EU') law

Directive 2000/78

3 Recitals 8, 9 and 11 in the preamble to Directive 2000/78 provide:

'(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

…

(11) Discrimination based on … age … may undermine the achievement of the objectives of the [EU] Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living

and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.'

4 Recital 25 in Directive 2000/78 states:

'The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.'

5 Article 1 of Directive 2000/78 states that its 'purpose … is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

6 Article 2(1) and (2)(a) of Directive 2000/78 provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.

7 Article 3(1) of Directive 2000/78, headed 'Scope', provides:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

...'.

8 Article 6(1) and (2) of Directive 2000/78 provides:

'1. Notwithstanding Article 2(2), Member States may provide that

differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

National legislation

9 The Federal legislature transposed Directive 2000/78 into German law by the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897), as amended by Paragraph 15(66) of the Law of 5 February 2009 (BGB1. 2009 I, p. 160).

10 The Federal legislature adopted the provisions relating to the retirement of permanent civil servants of the *Länder* and municipalities set out in Paragraph 25 of the Federal Law governing the legal status of civil servants of the *Länder* (Beamtenstatusgesetz) of 17 June 2008 (BGBl. 2008 I, p. 1010), as amended by Paragraph 15(16) of the Law of 5 February 2009 (BGBl. 2009 I, p. 160), in the following terms:

'Permanent civil servants shall retire on reaching the retirement age.'

11 That provision does not itself determine that retirement age, but leaves it to the

Länder to do so.

12 Paragraph 50 of the Law on the civil service of the *Land* Hessen (Hessisches Beamtengesetz), as amended by the Law of 14 December 2009 ('HBG'), sets the compulsory retirement age for civil servants of the *Land* Hessen as follows:

'(1) Permanent civil servants shall retire at the end of the month in which they reach the age of 65 (age limit).

(2) In derogation from subparagraph 1, the following provisions shall apply to the permanent civil servants listed below:

1. Public school teaching staff shall retire at the end of the last month of the school year in which they reach the age of 65;

2. Professors, university or college lecturers, members of the science or arts staff and teaching staff with special responsibilities in higher education establishments of the *Land* shall retire at the end of the last month of the semester in which they reach the age of 65;

(3) If it is in the interests of the service, retirement may, at the request of the civil servant concerned, be postponed beyond the age of 65 for periods of no more than one year, subject to an overall retirement age limit that shall not exceed 68. The decision shall be taken by the highest authority in the hierarchy or by such authority as it shall designate.'

13 The national court states that, until 1992, the continued employment of civil servants beyond retirement age was permitted if it was requested and not precluded by the interests of the service. From 1992, such continued employment was subject to the requirement that it should be in the interests of the service.

14 The HBG includes a special provision concerning the retirement age of civil servants appointed for a fixed term after being directly elected, such as mayors or local councillors. These are to retire on reaching the age of 71 if their term of office has not come to an end by that date.

15 At federal level, until 12 February 2009 the general retirement age applicable to civil servants was fixed at 65 years. Since that date the legislation has provided for that retirement age to be raised gradually to 67 years. At the material time as regards the main proceedings, similar provisions had been adopted in certain *Länder* but not in the *Land* Hessen.

16 Beyond the civil service, since 1 January 2008, Paragraph 35 of Book VI of the Code of social law (Sozialgesetzbuch, sechstes Buch), which applies to employed persons governed by private law, has also provided for the age at which a person is to be entitled to an old-age pension to be raised gradually to

67 years. Under transitional provisions, that age remains fixed at 65 years for persons born before 1 January 1947.

The disputes in the main proceedings and the questions referred for a preliminary ruling

17 The facts of the disputes in the main proceedings are virtually identical and the questions referred by the national court are the same.

18 The applicants in each of the main proceedings, Mr Fuchs and Mr Köhler, both born in 1944, worked as State prosecutors until they reached the age of 65 in 2009, the age at which they should normally have retired pursuant to Paragraph 50(1) of the HBG.

19 The applicants each applied to continue to work for a further year, pursuant to Paragraph 50(3) of the HBG.

20 The Ministry of Justice of the *Land* Hessen having rejected their applications on the grounds that it was not in the interests of the service for them to remain in post; the applicants in the main proceedings lodged an objection at the Ministry of Justice and also made an application for interim measures to the Verwaltungsgericht Frankfurt am Main (Frankfurt am Main Administrative Court) (Germany).

21 That court granted the applications for interim measures thus submitted, and ordered the *Land* Hessen to continue to employ Mr Fuchs and Mr Köhler. The decisions handed down by the Verwaltungsgericht Frankfurt am Main were, however, the subject of an appeal to the Hessischer Verwaltungsgerichtshof (Hessen Administrative Court) (Germany), which set aside the decisions and dismissed the applications for interim measures submitted by the applicants. Since 1 October 2009, the applicants have no longer been able to perform their duties as State prosecutors and have been paid a retirement pension.

22 As their objections were also dismissed by decisions of the Ministry of Justice of the *Land* Hessen, Mr Fuchs and Mr Köhler brought an action before the Verwaltungsgericht Frankfurt am Main against those decisions.

23 The Verwaltungsgericht Frankfurt am Main has doubts as to the compatibility of the retirement age set in respect of the duties of prosecutor with, in particular, Article 6 of Directive 2000/78. In its view, the compulsory retirement at the age of 65 of persons performing those duties constitutes discrimination on grounds of age, contrary to the provisions of Directive 2000/78.

24 The national court explains that the provision at issue was introduced at a time when the view was taken that fitness for work declines after that age. Current

research shows that such fitness varies from one person to another. Furthermore, the increase in life expectancy had led the legislature to raise to 67 – for federal civil servants and private-sector employees – the general age limit for retirement and entitlement to a pension. The HBG provides, moreover, that civil servants appointed following an election may perform their duties until the age of 71.

25 According to the national court, it is apparent from the observations of the *Land* Hessen accompanying the HBG as applicable in 1962 that the HBG was intended to promote the employment of younger people and thus to ensure an appropriate age structure. Such an aim does not, however, according to that court, constitute objective justification, for there is not under national law a sufficiently precise criterion for the definition of an age structure that could be described as favourable or unfavourable. Nor does such an aim serve the public interest; it serves the individual interest of the employer. In any event, the *Land* Hessen has not described what it regards as the appropriate nature of or reasons for the age structure. The figures it has provided establish that a significant proportion of the public ministry's staff already comprises young people. The national court adds that recent studies show that there is no correlation between the compulsory retirement of persons who have reached the age limit and younger persons entering the profession. The national court also queries whether the figures which relate to the *Land* Hessen alone and, within that *Land*, to civil servants governed by public law, who represent only a small fraction of the staff of that *Land* and of the employees of the Member State concerned, are capable of demonstrating the existence of an aim in the public interest, and whether such an aim needs to be placed at a higher level, notably that of all civil servants and staff of the *Land* Hessen, or even of all civil servants and staff of that Member State.

26 The national court adds that the retirement of prosecutors does not always result in a recruitment exercise to fill newly-vacated posts. In this way, it suggests, the *Land* Hessen is endeavouring to make budgetary savings.

27 In addition, certain measures lack coherence. This applies in particular to the possibility of keeping an employee in post until the age of 68 notwithstanding an irrebuttable presumption that he is unfit for service from the age of 65, the restriction of voluntary retirement before the age of 65 and the raising of the retirement age already provided for in certain legislative texts.

28 In those circumstances the national court decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are the rules laid down in the [HBG] on the compulsory retirement age for civil servants based on an aim in the public interest in accordance with standards of [EU] law?

The following main questions arise in this respect:

– What specific requirements in [EU] law should such an aim prescribed in the public interest satisfy? What additional issues relating to the clarification of the facts of the case should the referring court consider?

– Does an interest in saving budgetary resources and labour costs, in the present context by avoiding the recruitment of new staff and so reducing expenditure on personnel, represent a legitimate aim within the meaning of Article 6(1) of Directive 2000/78 …?

– Can an employer's aim of enjoying a degree of planning certainty as regards the retirement of civil servants be recognised as a legitimate aim in the public interest, even if every employer governed by the [HBG] or the [Federal Law on the status of civil servants of the *Länder*] may develop and implement staff management ideas of his own?

– Can an interest in a "favourable age stratification" or "favourable age structure" be recognised as an aim in the public interest, despite the absence of general standards or statutory rules on what constitutes a correct age stratification or age structure?

– Can an interest in creating opportunities for the promotion of civil servants already in place be regarded as a legitimate aim in the public interest within the meaning of Article 6(1) of Directive 2000/78 …?

– Does the adoption of rules on retirement ages to preclude individual legal disputes with older employees over their continued fitness for service constitute the pursuit of a legitimate aim in the public interest?

– Does the reference to the public interest within the meaning of Article 6(1) of Directive 2000/78 … presuppose a labour market policy concept extending beyond individual employers in the area of employment, and if so, how uniform and binding must it be?

– Is it in fact possible for individual employers to pursue aims in the public interest for groups of employees, limited here to civil servants governed by the [HBG], with retirement age rules of such limited scope?

– Under what conditions can the aim, which can be pursued by individual employers, but is not mandatory, of occupying posts

vacated by retired employees with new recruits, where necessary after existing employees have been promoted, be regarded as being in the public interest within the meaning of Article 6(1) of Directive 2000/78 …? Must the reference to the public interest be backed not only by general claims that the rules serve that purpose, but also by statistics or other findings from which it can be inferred that such an aim is sufficiently serious and can actually be achieved?

2. (a) What specific requirements should be satisfied by the reasonableness and suitability of a retirement age arrangement within the meaning of the rules laid down in the [HBG]?

(b) Are more thorough investigations needed to determine the ratio of the – probable – number of civil servants remaining in service voluntarily after retirement age to the number who wish to receive a full pension on reaching retirement age, if not earlier, and therefore certainly want to leave the service? Would it not be appropriate in this respect to give voluntary retirement preference over compulsory retirement, provided that arrangements are made for pensions to be reduced where they are taken before the set retirement age is reached so as to preclude unreasonable pension budget spending and associated labour costs (voluntary departure rather than compulsion as the more appropriate and, in effect, hardly less suitable arrangement)?

(c) Can it be deemed reasonable and necessary to assume it to be irrefutable that all civil servants cease to be fit for service on reaching a given higher age, such as 65 years in this case, and so automatically to terminate their employment as civil servants at that age?

(d) Is it reasonable for the possibility of remaining employed in the civil service at least until the age of 68 years to be entirely dependent on the employer having special interests, but for employment in the civil service to be terminated with no legal possibility of securing reappointment where no such interests exist?

(e) Does a retirement age arrangement which leads to compulsory retirement, rather than being confined to specifying the conditions for entitlement to a full pension, as permitted under Article 6(2) of Directive 2000/78 …, result in an unreasonable devaluation of the interests of older people relative to the fundamentally no more valuable interests of younger people?

(f) If the aim of facilitating recruitment and/or promotion is deemed to

be legitimate, what more precise requirements must actually be satisfied to demonstrate the extent to which such opportunities are actually seized by each employer taking advantage of the retirement age arrangement or by all employers, in and outside the general labour market, to whom the statutory arrangement applies?

(g) In view of the gaps already to be seen in the labour market owing to demographic trends and of the impending need for skilled staff of all kinds, including staff for the public service of the Federal German and *Land* governments, is it reasonable and necessary to force civil servants able and willing to continue working to retire from the civil service at a time when there will soon be a major demand for personnel which the labour market will hardly be able to meet? Will it possibly be necessary in the future to collect sectoral labour market data?

3. (a) What requirements need to be met as regards the coherence of Hessen's and possibly Federal German legislation on retirement ages?

(b) Can the relationship between Paragraph 50(1) and Paragraph 50(3) of the [HBG] be regarded as consistent if the possibility in principle of remaining in employment beyond retirement age depends entirely on the employer's interests?

(c) Should Paragraph 50(3) of the [HBG] possibly be interpreted to mean, in compliance with … Directive [2000/78], that, to preclude unreasonable discrimination on the grounds of age, employment must always continue unless service factors prevent this? What requirements should then be satisfied to prove the existence of any such factors? Must it be assumed in this respect that the interests of the service require continued employment if only because unjustifiable discrimination on the grounds of age would otherwise occur?

(d) How might advantage be taken of such an interpretation of Paragraph 50(3) of the [HBG] for a continuation or resumption of the applicant's employment as a civil servant, even though that employment has meanwhile been terminated? Should, in that case, Paragraph 50(1) of the [HBG] remain inapplicable at least until the age of 68 years?

(e) Is it reasonable and necessary, on the one hand, to impede the taking of voluntary retirement at the age of 60 or 63 years, with a permanent reduction in pension, and, on the other hand, to rule out the voluntary continuation of employment after the age of 65 years

unless the employer has, by way of exception, a special interest in its continuation?

(f) Do the rules on retirement ages laid down in Paragraph 50(1) of the [HBG] cease to be reasonable and necessary as a result of the more favourable rules on part-time work on the grounds of age on the one hand and fixed-term civil servants on the other?

(g) What significance for coherence can be attributed to the various rules laid down in employment (public and private sector) and social insurance law which, first, are seeking permanently to raise the age at which a full pension can be drawn, second, prohibit the termination of employment on the grounds that the age specified for the standard retirement pension has been reached and, third, make it compulsory for employment to terminate when that precise age is reached?

(h) Is it relevant to coherence that the gradual raising of retirement ages in the social insurance and civil service law relating to the Federal German authorities and some *Länder* primarily serves the interests of employees in delaying as long as possible the need to meet the more stringent requirements for a full retirement pension? Are these questions insignificant because retirement ages have not yet been raised for civil servants governed by the [HBG], although this is due to become effective in the near future in the case of employees in employment relationships?'

29 By order of the President of the Court of 6 May 2010, Cases C−159/10 and C−160/10 were joined for the purposes of the written and oral procedures and of the judgment.

Consideration of the questions referred

30 The national court raises numerous queries, essentially grouped together into three questions, some of which relate to the interpretation of national law. In this regard, it must be borne in mind that the Court has no power, within the framework of Article 267 TFEU, to give preliminary rulings on the interpretation of rules pertaining to national law. The jurisdiction of the Court is confined to considering provisions of EU law only (see, in particular, Case C−222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I−289, paragraph 63).

31 The questions raised must therefore be answered in the light of that limitation.

The first question

32 By its first question the national court asks, in essence, whether Directive 2000/78 precludes a law, such as the HBG, which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, subject to the possibility that they may continue to work, if it is in the interests of the service, until the maximum age of 68, if that law has one or more of the following aims: the creation of a 'favourable age structure', planning of staff departures, promotion of civil servants, prevention of disputes or achieving budgetary savings.

33 It is common ground that the termination of contracts of employment of civil servants of the *Land* Hessen, in particular of prosecutors, when they reach the age at which they are entitled to a full pension, namely at the age of 65, constitutes a difference of treatment on grounds of age for the purposes of Article 6(1)(a) of Directive 2000/78.

34 A provision such as Paragraph 50(1) of the HBG affects employment and working conditions, within the meaning of Article 3(1)(c) of Directive 2000/78, by preventing the prosecutors concerned from continuing to work beyond the age of 65. Furthermore, by ensuring that they are treated less favourably than persons who have not reached that age, Paragraph 50(1) of the HBG introduces a difference of treatment directly based on age for the purposes of Article 2(1) of Directive 2000/78.

35 Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

36 In order to answer the question raised, it is necessary, therefore, to determine whether that provision is justified by a legitimate aim and whether the means put in place to achieve it are appropriate and necessary.

Whether there is a legitimate aim

37 The Court must begin by considering the consequences of the absence of any specific mention in the HBG of the aim pursued, the consequences arising from an alteration of that aim and its context, and also whether or not it is possible to rely on several aims.

38 It is apparent from the order for reference, first of all, that the HBG does not clearly state the aim pursued by Paragraph 50(1) of the HBG, which sets the retirement age of civil servants at 65.

39 In that regard, the Court has repeatedly held that it cannot be inferred from

Article 6(1) of Directive 2000/78 that the lack of precision in the legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision. In the absence of such precision, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary (Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraphs 56 and 57; Case C-341/08 *Petersen* [2010] ECR I-0000, paragraph 40; and Case C-45/09 *Rosenbladt* [2010] ECR I-0000, paragraph 58).

40 With regard to the modification of the aim pursued, it is apparent from the order for reference that, originally, Paragraph 50 of the HBG was based on the irrebuttable presumption that a person is unfit to work beyond the age of 65. At the hearing, however, the representatives of the *Land* Hessen and the German Government emphasised that that presumption should no longer be regarded as underpinning the retirement age, and that the legislature had accepted that people can be fit to work beyond that age.

41 It must be concluded, in that regard, that a change in the context of a law leading to an alteration of the aim of that law does not, by itself, preclude that law from pursuing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

42 Circumstances can change and the law may nevertheless be preserved for other reasons.

43 Thus, in the main proceedings in this instance, in addition to the change regarding the perception of fitness to work beyond the age of 65, the aspect referred to by the national court – that the age limit was introduced during a period of full employment and then maintained during a period of unemployment – could indeed have led to an alteration of the aim pursued, without thereby preventing that aim from being legitimate.

44 As regards reliance on several aims at the same time, it may be seen from the case-law that the coexistence of a number of aims does not preclude the existence of a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

45 That was the case in *Rosenbladt*, in which the Court held, in paragraphs 43 and 45 of its judgment, that aims such as those relied on by the German Government could be regarded as being among the aims referred to in Article 6(1) of Directive 2000/78.

46 The aims relied on may be linked to another (see, to that effect, Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-0000, paragraphs 45, 46 and

68) or classed in order of importance as in *Petersen*, in which, as can be seen from paragraphs 41 and 65 of that judgment, the German Government relied principally on one aim and, in the alternative, on another.

The aims relied on by the national court

47 According to the national court, the aim of Paragraph 50(1) of the HBG is, inter alia, the creation of a 'favourable age structure', which is achieved by the simultaneous presence within the profession at issue – that of prosecutors – of young employees at the start of their careers and older employees at a more advanced stage of theirs. The *Land* Hessen and the German Government submit that that is the principal aim of that provision. The obligation to retire at the age of 65 is, in their submission, designed to establish a balance between the generations, in addition to which the national court refers to three further aims: efficient planning of the departure and recruitment of staff, encouraging the recruitment and promotion of young people, and avoiding disputes relating to employees' ability to perform their duties beyond the age of 65.

48 The *Land* Hessen and the German Government maintain that the presence within the relevant civil service of staff of different ages also helps to ensure that the experience of older staff is passed on to younger colleagues and that younger staff share recently acquired knowledge, thus contributing to the provision of a high-quality public justice service.

49 It must be noted that, according to the case-law, encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved (*Georgiev*, paragraph 45). The Court has, moreover, held that the mix of different generations of employees can also contribute to the quality of the activities carried out, inter alia by promoting the exchange of experience (see, to that effect, in relation to teaching staff and researchers, *Georgiev*, paragraph 46).

50 In the same way, it must be concluded that the aim of establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy.

51 The national court is, however, uncertain whether a measure such as Paragraph 50(1) of the HBG does not meet the interests of the employer rather than the public interest. In particular, it raises the issue whether the measures adopted by a single *Land* in respect of some of its staff, in this instance permanent civil servants, including prosecutors, do not cover too limited a

group to constitute a measure pursuing an aim in the public interest.

52 The Court has held that the aims that may be considered 'legitimate' within the meaning of Article 6(1) of Directive 2000/78 are aims having a public interest nature distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers (see, to that effect, Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 46).

53 It must be observed that aims such as those referred to in paragraph 50 of the present judgment, which take into account the interests of all civil servants concerned, in the context of concerns relating to employment and labour market policy, in order to ensure a high-quality public service – in this instance that of justice – may be regarded as aims of public interest.

54 The Court has held, moreover, that it must be possible for the competent authorities at national, regional or sectoral level to alter the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation in the Member State concerned (*Palacios de la Villa*, paragraph 70).

55 Thus, the fact that a provision is adopted at regional level does not prevent its pursuing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. In a State such as the Federal Republic of Germany, the legislature may take the view that, in the interests of all the persons concerned, it is for the *Länder* rather than the Federal authorities to adopt certain legislative measures covered by that provision, such as the retirement age of permanent civil servants.

56 Retirement that is, in principle, compulsory at the age of 65, as laid down in Paragraph 50(1) of the HBG, must nevertheless also be appropriate and necessary.

57 As regards the appropriateness of such a measure, the *Land* Hessen and the German Government submit that the number of posts, particularly prosecutors' posts, available in the civil service is limited, particularly at the most senior levels. In the face of budgetary constraints, the opportunity of creating new posts is limited. They explain that prosecutors, like all civil servants, are appointed permanently and only rarely resign from their posts voluntarily and prematurely. Thus, the setting of a compulsory retirement age for prosecutors is the only means of ensuring that employment is distributed fairly among the generations.

58 The Court has already accepted in connection with professions in which the

number of posts available was limited that retirement at an age laid down by law facilitated access to employment by younger people (see to that effect, in relation to panel dentists, *Petersen*, paragraph 70, and, in relation to university professors, *Georgiev*, paragraph 52).

59 As regards the profession of prosecutor in Germany, it is apparent that access to that profession is limited by the requirement that members should have obtained a special qualification entailing the successful completion of a course of study and a traineeship. In addition, the entry of young people into the profession could be restricted owing to the fact that the civil servants concerned are appointed permanently.

60 That being the case, it does not appear unreasonable for the competent authorities of a Member State to take the view that a measure such as Paragraph 50(1) of the HBG can secure the aim of putting in place a balanced age structure in order to facilitate planning of staff departures, ensure the promotion of civil servants, particularly the younger ones among them, and prevent disputes that might arise on retirement.

61 It must be borne in mind that the Member States enjoy broad discretion in the definition of measures capable of achieving that aim (see, to that effect, *Palacios de la Villa*, paragraph 68).

62 However, the Member States may not frustrate the prohibition of discrimination on grounds of age set out in Directive 2000/78. That prohibition must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union.

63 It follows that particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Keeping older workers in the labour force promotes diversity in the workforce, which is an aim recognised in recital 25 in Directive 2000/78; moreover, it contributes to the realising of their potential and to the quality of life of the workers concerned, in accordance with the concerns of the European Union legislature set out in recitals 8, 9 and 11 in that directive.

64 However, the interest represented by the continued employment of those persons must be taken into account in respecting other, potentially divergent interests. Those who have reached the age at which they are entitled to a retirement pension may wish to avail themselves of it and to leave work with the benefit of that pension, instead of continuing to work. Furthermore, clauses on automatic termination of the employment contracts of employees who reach retirement age could, in the interests of sharing work among the generations, promote the entry of young workers into the labour force.

65 Therefore, in defining their social policy on the basis of political, economic,

social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people's working life or, conversely, to provide for early retirement (see *Palacios de la Villa*, paragraphs 68 and 69). The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they do not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (see, to that effect, *Palacios de la Villa*, paragraphs 69 and 71, and also *Rosenbladt*, paragraph 44).

66 In that regard, the Court has accepted that a measure that allows for the compulsory retirement of workers when they reach the age of 65 can meet the aim of encouraging recruitment and be regarded as not unduly prejudicing the legitimate claims of the workers concerned, if those workers are entitled to a pension the level of which cannot be regarded as unreasonable (see, to that effect, *Palacios de la Villa*, paragraph 73). The Court has also held, in regard to a measure requiring the automatic termination of employment contracts at that age, in a sector in which, according to the national court, that measure was liable to cause significant financial hardship to the worker concerned, that that measure did not go beyond what was necessary to achieve the desired aims, in particular the encouragement of recruitment. The Court took into account the fact that the worker was eligible for payment of a pension while at the same time remaining in the labour market and enjoying protection from discrimination on grounds of age (see, to that effect, *Rosenbladt*, paragraphs 73 to 76).

67 In the present cases in the main proceedings, it is apparent from the documents before the Court that prosecutors retire, as a rule, at the age of 65 on a full pension equivalent to approximately 72% of their final salary. Furthermore, Paragraph 50(3) of the HBG provides for the possibility of prosecutors working for a further three years until the age of 68 if they so request and if it is in the interests of the service. Finally, national law does not prevent prosecutors from exercising another professional activity, such as that of legal adviser, with no age limit.

68 Taking those matters into account, it must be held that a measure which provides for prosecutors to retire when they reach the age of 65, as laid down under Paragraph 50(1) of the HBG, does not go beyond what is necessary to achieve the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age.

69 It must further be noted that the national court also asks the Court of Justice about the legitimacy, in the light of Article 6(1) of Directive 2000/78, of the aim of achieving budgetary savings.

70 The *Land* Hessen and the German Government have stated, however, that in their view Paragraph 50(1) of the HBG does not pursue such an aim. According to the *Land* Hessen, the fact that certain permanent civil servants – in this instance prosecutors – were not replaced is accounted for by the fact that they were appointed in response to an exceptional increase in particular litigation at a particular time. The *Land* Hessen comments that, leaving those cuts aside, the number of prosecutors has increased since 2006.

71 It is for the national court to ascertain whether the aim of achieving budgetary savings is one that is pursued by the HBG.

72 It should be borne in mind that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, in particular, Joined Cases C−188/10 and C−189/10 *Melki and Abdeli* [2010] ECR I−0000, paragraph 27 and the case-law cited). In the present case, since it is not altogether obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, or that the problem is hypothetical, the Court must answer the question put forward.

73 As is apparent from paragraph 65 of the present judgment, in the context of the adoption of measures relating to retirement, EU law does not preclude the Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.

74 In that regard, while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

75 In the light of the foregoing, the answer to the first question is that Directive 2000/78 does not preclude a law, such as the HBG, which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.

The second question

76 By its second question the national court asks, in essence, what information must be produced by the Member State in order to demonstrate the appropriateness and necessity of the measure at issue in the main proceedings and, in particular, whether statistics or precise data with figures must be supplied.

77 It is clear from paragraph 51 of *Age Concern England* that mere generalisations indicating that a measure is likely to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of derogating from the principle of non-discrimination on grounds of age and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are likely to achieve that aim.

78 The Court has also pointed out, in paragraph 67 of that judgment, that Article 6(1) of Directive 2000/78 imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification.

79 According to recital 15 in Directive 2000/78, the appreciation of the facts from which it may be inferred that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means, including on the basis of statistical evidence.

80 In order to assess the degree of accuracy of the evidence required, it must be borne in mind that the Member States enjoy broad discretion in the choice of measure they consider appropriate.

81 That choice may, therefore, be based on economic, social, demographic and/or budgetary considerations, which include existing and verifiable data but also forecasts which, by their nature, may prove to be inaccurate and are thus to some extent inherently uncertain. The measure in question may, moreover, be based on political considerations, which will often involve a compromise between a number of possible solutions and, again, cannot with certainty lead to the expected result.

82 It is for the national court to assess, according to the rules of national law, the probative value of the evidence adduced, which may, inter alia, include statistical evidence.

83 Consequently, the answer to the second question is that, in order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national

court to assess.

The third question

84 By its third question the national court queries the coherence of a law such as the HBG. Specifically, it raises the question, in essence, whether that law is inconsistent in compelling prosecutors to retire on reaching the age of 65, when (i) it allows them to continue to work until the age of 68 if it is in the interests of the service for them to do so; (ii) it seeks to restrict voluntary retirement at the age of 60 or 63 by a reduction in that case of pension rights; and (iii) the laws applicable to the civil service at Federal level and in a number of other *Länder* and also the Code of social law applicable to private sector employees provide for the age at which a person may retire on a full pension to be gradually raised from 65 to 67 years.

85 It must be observed, in accordance with settled case-law, that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C−169/07 *Hartlauer* [2009] ECR I−1721, paragraph 55, and *Petersen*, paragraph 53).

86 Exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law (see, to that effect, *Petersen*, paragraph 61).

87 With regard to the exception relating to the continued employment of a prosecutor until the age of 68, contained in Paragraph 50(3) of the HBG, it must be noted that this applies only if it is in the interests of the service and if the person concerned makes a request to that effect.

88 At the hearing, the *Land* Hessen indicated that that exception is intended to cover cases where a prosecutor reaches the age of 65 but has been allocated a criminal case in which proceedings have not yet been concluded. In order to avoid possible complications arising as a result of the replacement of the person concerned, the HBG provides, by way of exception, for him to be able to continue to perform his duties. The relevant administration might therefore regard it as preferable, in the interests of the service, to keep that prosecutor in post instead of appointing a replacement who would have to take on a case with which he was unfamiliar.

89 It must be held that such an exception is unlikely to undermine the aim pursued, namely that of guaranteeing a balanced age structure for the purposes of ensuring a high-quality service.

90 An exception of this kind can, on the other hand, mitigate the rigidity of a law,

such as the HBG, in the interests of the civil service concerned. While departure and recruitment planning, owing to the automatic retirement of prosecutors when they reach the age of 65, contributes to the proper working of that service, the introduction, in that law, of the exception mentioned in paragraph 88 of the present judgment deals with specific situations in which the prosecutor's departure could be detrimental to the best possible accomplishment of the task conferred on him. In those circumstances, this exception is not incoherent in the light of the law in question.

91 It must be added that other exceptions in the HBG referred to by the national court, such as the continued employment of certain teaching staff for some additional months beyond the age of 65 so as to tie in with the end of a teaching period, or of certain elected persons to tie in with the end of their term of office, are similarly intended to ensure the accomplishment of tasks conferred on the persons concerned and appear no more likely to undermine the aim pursued.

92 According to the national court, another problem in terms of coherence arises from the fact that the HBG seeks to restrict the voluntary retirement of prosecutors who have reached the age of 60 or 63 by means of a provision reducing the amount of the pension granted in such cases, while Paragraph 50(1) of the HBG prevents them from continuing to work beyond the age of 65.

93 It must be observed that the problem of coherence raised by the national court has not been clearly established. A provision such as that referred to by the national court seems, on the contrary, to be the logical consequence of Paragraph 50(1) of the HBG. The implementation of such a provision, which involves planning for staff to retire at the age of 65, actually requires that exceptions to such departures should be limited. A provision reducing the amount of the pension is likely to deter or at least to restrict the early departures of prosecutors. Such a provision thus contributes to the attainment of the aim pursued and does not support the conclusion that the HBG lacks coherence.

94 The national court also refers to the gradual raising from 65 to 67 of the age at which a person may retire on a full pension, both under the law applicable to the civil service at Federal level and under laws adopted by a number of other *Länder* and also the Code of social law applicable to private sector employees. A similar increase was envisaged by the *Land* Hessen at the material time, but had not yet been adopted.

95 In that regard, the mere fact that, at a given point in time, the legislature envisages changing the law to raise the age at which a person may retire on a full pension does not mean that, from that point on, the existing law is unlawful. It must be acknowledged that any transition from one law to another

will not be immediate but will take a certain amount of time.

96 As is apparent from recital 25 in Directive 2000/78, the pace of change can vary from one Member State to another to take account of the particular situation in those States. It can also differ from one region to another, in this instance from one *Land* to another, to take account of particular regional features and to enable the competent authorities to make the necessary adjustments.

97 It follows that the mere fact that a certain period of time may elapse between changes made to the law of one Member State or one *Land* and those made in another State or *Land* for the purpose of raising the age at which a person is entitled to retire on a full pension does not, by itself, mean that the legislation at issue lacks coherence.

98 Consequently, the answer to the third question is that a law such as the HBG, which provides for the compulsory retirement of prosecutors when they reach the age of 65, does not lack coherence merely because it allows them to work until the age of 68 in certain cases or also contains provisions intended to restrict retirement before the age of 65, and other legislation of the Member State concerned provides for certain – particularly elected – civil servants to remain in post beyond that age and also the gradual raising of the retirement age from 65 to 67 years.

Costs

99 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not preclude a law, such as the Law on the civil service of the *Land* Hessen (Hessisches Beamtengesetz), as amended by the Law of 14 December 2009, which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and

thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.

2. **In order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess.**

3. **A law such as the Law on the civil service of the *Land* Hessen, as amended by the Law of 14 December 2009, which provides for the compulsory retirement of prosecutors when they reach the age of 65, does not lack coherence merely because it allows them to work until the age of 68 in certain cases or also contains provisions intended to restrict retirement before the age of 65, and other legislation of the Member State concerned provides for certain – particularly elected – civil servants to remain in post beyond that age and also the gradual raising of the retirement age from 65 to 67 years.**

[Signatures]

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* Language of the case: German.

JUDGMENT OF THE COURT (Sixth Chamber)
19 November 2002 *

In Case C-188/00,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgericht Karlsruhe (Germany) for a preliminary ruling in the proceedings pending before that court between

Bülent Kurz, né Yüce,

and

Land Baden-Württemberg,

on the interpretation of Article 6(1) and the second paragraph of Article 7 of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council established by the Association Agreement between the European Economic Community and Turkey,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: R. Schintgen (Rapporteur), President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann, V. Skouris, F. Macken and N. Colneric, Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mr Kurz, né Yüce, by I. Krebs, Rechtsanwältin,

— Land Baden-Württemberg, by I. Behler, acting as Agent,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Commission of the European Communities, by J. Sack, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kurz, né Yüce, Land Baden-Württemberg and the Commission at the hearing on 21 February 2002,

after hearing the Opinion of the Advocate General at the sitting on 25 April 2002,

gives the following

Judgment

1 By order of 22 March 2000, received at the Court on 22 May 2000, the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 6(1) and the second paragraph of Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association ('Decision No 1/80'). The Association Council was set up by the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey and by the Member States of the EEC and the Community and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1).

2 Those questions were raised in proceedings between Mr Kurz, né Yüce, who is a Turkish national, and Land Baden-Württemberg concerning decisions by the latter rejecting his application for grant of a residence permit in Germany of unlimited duration, refusing to extend his temporary residence authorisation and ordering his expulsion from the territory of that Member State.

Decision No 1/80

3 Articles 6 and 7 of Decision No 1/80 are included in Section 1 ('Questions relating to employment and the free movement of workers') of Chapter II ('Social provisions') of that decision.

4 Article 6(1) is worded as follows:

'Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State:

— shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;

— shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation;

— shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.'

5 The second paragraph of Article 7 provides:

'Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.'

The main proceedings and the questions referred for a preliminary ruling

6 It is apparent from the documents in the main proceedings that Mr Kurz was born in Germany in 1977 as the illegitimate child of a Turkish migrant worker, Mr Yüce, who was legally employed in that Member State from 1969 to 1983.

7 From 1978 to 1984 he was placed in Germany with foster parents, Mr and Mrs Kurz, who were German nationals.

8 In 1984 he returned to Turkey with his natural parents under a repatriation assistance programme.

9 In September 1992 he was authorised to return to Germany in order to undergo vocational training. His entry visa and the successive temporary residence authorisations ('Aufenthaltsbewilligungen') which he obtained until 15 July 1997 stated that they were valid for the purposes of vocational training only.

10 Mr Kurz underwent training as a plumber in the host Member State, the conditions of which were laid down in a contract entered into on 16 November 1992 between him and Herbert Schulz GmbH ('Schulz'), a sanitary and heating equipment company established in Altlußheim (Germany).

11 During that training, which took place from 1 October 1992 to 5 May 1997, he attended theory classes at a vocational training establishment once or twice a week and spent the rest of the time working for Schulz by way of practical training, in return for which Schulz paid him a monthly wage of DEM 780 in the first year and DEM 840, DEM 940 and DEM 1 030 respectively in the following years.

12 On 22 February 1997 Mr Kurz passed the practical part of the final apprenticeship examination and, as agreed, terminated his training on 6 May 1997, without however having passed the theoretical part of that examination.

13 From 1992 he again lived with Mr and Mrs Kurz, who adopted him in May 1998. In accordance with the applicable national law, the adoption conferred on him the surname of his adoptive parents. However, according to the Verwaltungsgericht Karlsruhe, the adoption had the effect of bringing to an end his ties with his family of birth but did not entitle him either to German nationality or to authorisation to reside in Germany permanently.

14 On 7 July 1997 Mr Kurz applied for a residence permit ('Aufenthaltserlaubnis') allowing him to reside in Germany permanently and, in the alternative, for the extension of his temporary residence authorisation or the issue of a residence authorisation for humanitarian reasons ('Aufenthaltsbefugnis').

15 By decision of 18 August 1998, the Landratsamt Rhein-Neckar-Kreis (Rhine-Neckar District Administrator's Office) rejected his application of 7 July 1997 and ordered him to leave Germany within one month following notification of the refusal, stating that he would be deported if he failed to comply.

16 Mr Kurz lodged an administrative appeal against that decision and also requested that his appeal have suspensive effect.

17 That request was rejected on 19 November 1998 and Mr Kurz was deported to Turkey on 20 January 1999.

18 On 16 June 1999 the Regierungspräsidium Karlsruhe dismissed the administrative appeal on the ground that Mr Kurz did not fulfil the conditions laid down in Article 6 and the second paragraph of Article 7 of Decision No 1/80. First, he had not been duly registered as belonging to the labour force of a Member State, within the meaning of Article 6(1), during his vocational training, for which he obtained only a temporary residence authorisation. Second, his adoption by German nationals had taken away his status as child of a Turkish worker, he had not completed his vocational training in the host Member State since he had not passed all the tests in the final examination, and his biological father had left Germany for good at the time when he began his vocational training there.

19 Mr Kurz contended in support of the action challenging that decision which he brought before the Verwaltungsgericht Karlsruhe that Article 6(1) and the second paragraph of Article 7 of Decision No 1/80 entitled him to a residence authorisation in Germany. He also stated that he had been offered a job on 20 November 1998 by a business in Mannheim (Germany) but he had been unable to accept it in the absence of the requisite residence and work permits.

20 On 20 November 1999 Mr Kurz received a journeyman's certificate from the chamber of manual trades in Mannheim after the examining board had travelled to Istanbul to enable him to take the theoretical part of his final apprenticeship examination there.

21 According to the Verwaltungsgericht Karlsruhe, the decision of the Regierungspräsidium Karlsruhe of 16 June 1999 is consistent with the Ausländergesetz

(German Law on Aliens) but it should be established whether Mr Kurz was able to claim a right of residence on the basis of Article 6(1) and the second paragraph of Article 7 of Decision No 1/80.

22 The national court is uncertain whether Mr Kurz meets all the conditions laid down in Article 6(1) or, failing that, in the second paragraph of Article 7.

23 Should Mr Kurz be able to derive rights from Decision No 1/80, it considers that a further problem may arise with regard to Paragraph 8(2) of the Ausländergesetz which provides:

'An alien who has been expelled or deported may not re-enter Germany and reside there. He shall not be issued with a residence authorisation even where the conditions of entitlement under this Law are met. A time-limit shall as a rule, upon application, be placed on the effects referred to in the first and second sentences. The time-limit shall run from the time of leaving the country.'

24 The national court states that it should be decided whether it is compatible with Article 6 and the second paragraph of Article 7 of Decision No 1/80 for issue of a residence authorisation to be precluded by the prohibitive effect of the national provision cited in the preceding paragraph so long as no time-limit has been set with respect to deportation.

25 Since the Verwaltungsgericht took the view that, in those circumstances, an interpretation of Community law was necessary in order to decide the case, it resolved to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a Turkish national who, with the approval of the competent authority for aliens, entered the country with a visa "valid only for the purpose of vocational training" issued by the Consulate General and who subsequently held a temporary residence authorisation restricted to vocational training activity with a specific employer fulfil the requirements of the first, second or third indent of Article 6(1) of Decision No 1/80... if, from 1 October 1992 to 5 May 1997, he was in the training relationship in question and received for that a monthly training remuneration?

(2) Does a Turkish national who is the child by birth of former Turkish workers in the host country fulfil the requirements of the second paragraph of Article 7 of Decision No 1/80... if he was adopted as an adult by German nationals with the effects of adoption of a minor and his kinship with his natural parents has thereby ceased to exist? Is it sufficient in that respect that he was the child of Turkish workers at the time of his parents' legal employment and at the start of his vocational training?

(3) Does a Turkish national fulfil the requirements of the second paragraph of Article 7 of Decision No 1/80... if, eight years after leaving the host country together with his parents who at that time were leaving definitively, he re-entered the country (without his parents) for the purpose of vocational training?

(4) Does a Turkish national fulfil the requirements of the second paragraph of Article 7 of Decision No 1/80... if he did not take the last part of the final examination in the host country, but in his country of origin before the host country's examining board which had travelled there?

(5) Is it compatible with Article 6 or the second paragraph of Article 7 of Decision No 1/80... that, in a case where deportation has taken place, residence authorisation must be refused, by virtue of the prohibitive effect of Paragraph 8(2) of the Ausländergesetz, until a time-limit has, upon application, been placed on the effects of the deportation?'

Question 1

26 The first point to be noted in answering this question is that, since the judgment in Case C-192/89 *Sevince* [1990] ECR I-3461, at paragraph 26, the Court has consistently held that Article 6(1) of Decision No 1/80 has direct effect in the Member States and that Turkish nationals who satisfy its conditions may therefore rely directly on the rights which the three indents of that provision confer on them progressively, according to the duration of their employment in the host Member State (see, in particular, Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 19).

27 Second, it is also settled case-law that the rights which that provision confers on Turkish workers in regard to employment necessarily imply the existence of a corresponding right of residence for the person concerned, since otherwise the right of access to the labour market and the right to work as an employed person would be deprived of all effect (see, *inter alia*, *Birden*, paragraph 20).

28 Third, it is apparent from the very wording of Article 6(1) of Decision No 1/80 that that provision requires the person concerned to be a Turkish worker in a Member State, to be duly registered as belonging to the labour force of the host Member State and to have been in legal employment there for a certain period (*Birden*, paragraph 21).

29 In order to give the national court a helpful answer, those three concepts should be examined in turn.

The concept of worker

30 As regards the first of the concepts, it should be recalled at the outset that the Court has consistently concluded from the wording of Article 12 of the EEC-Turkey Association Agreement of 12 September 1963 and Article 36 of the Additional Protocol, signed on 23 November 1970, annexed to that agreement and concluded by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1973 C 113, p. 18), as well as from the objective of Decision No 1/80, that the principles enshrined in Articles 48 and 49 of the EC Treaty (now, after amendment, Articles 39 EC and 40 EC) and Article 50 of the EC Treaty (now Article 41 EC) must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by Decision No 1/80 (see to that effect, *inter alia*, Case C-434/93 *Bozkurt* [1995] ECR I-1475, paragraphs 14, 19 and 20; Case C-171/95 *Tetik* [1997] ECR I-329, paragraphs 20 and 28; *Birden*, paragraph 23; and Case C-340/97 *Nazli* [2000] ECR I-957, paragraphs 50 to 55).

31 Reference should consequently be made to the interpretation of the concept of worker under Community law for the purposes of determining the scope of the same concept employed in Article 6(1) of Decision No 1/80.

32 In that respect, it is settled case-law that the concept of worker has a specific Community meaning and must not be interpreted narrowly. It must be defined in accordance with objective criteria which distinguish an employment relationship by reference to the rights and duties of the persons concerned. In order to be treated as a worker, a person must pursue an activity which is genuine and effective, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The essential feature of an employment relation-

ship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. By contrast, neither the *sui generis* nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law (see, as regards Article 48 of the Treaty, in particular Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case 197/86 *Brown* [1988] ECR 3205, paragraph 21; Case 344/87 *Bettray* [1989] ECR 1621, paragraphs 15 and 16; Case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 10; and Case C-3/90 *Bernini* [1992] ECR I-1071, paragraphs 14 to 17; and, as regards Article 6(1) of Decision No 1/80, Case C-36/96 *Günaydin* [1997] ECR I-5143, paragraph 31, Case C-98/96 *Ertanir* [1997] ECR I-5179, paragraph 43, and *Birden*, paragraphs 25 and 28).

33 As regards, more specifically, activities which, as in the main proceedings, have been carried out in the course of vocational training, the Court has held that a person who serves periods of apprenticeship in an occupation that may be regarded as practical preparation related to the actual pursuit of the occupation in question must be considered to be a worker, provided that the periods are served under the conditions of genuine and effective activity as an employed person. The Court has stated that that conclusion cannot be invalidated by the fact that the productivity of the person concerned is low, that he does not carry out full duties and that, accordingly, he works only a small number of hours per week and thus receives limited remuneration (see to that effect, in particular, *Lawrie-Blum*, cited above, paragraphs 19, 20 and 21, and *Bernini*, cited above, paragraphs 15 and 16).

34 It follows that any person who, even in the course of vocational training and whatever the legal context of that training, pursues a genuine and effective economic activity for and under the direction of an employer and on that basis receives remuneration which can be perceived as the consideration for that activity must be regarded as a worker for the purposes of Community law.

35 It is apparent from the documents before the Court that, from 1 October 1992 to 5 May 1997, Mr Kurz pursued a genuine and effective economic activity for and under the direction of Schulz, in return for which he received monthly remuneration which increased from DEM 780 in the first year to DEM 1 030 in the fourth year. That progressive increase in remuneration is indeed an indication that the work performed by Mr Kurz was of growing economic value to his employer.

36 Since persons such as Mr Kurz thus satisfy the fundamental criteria of an employment relationship, they must be considered to be workers within the meaning of Article 6(1) of Decision No 1/80.

The concept of being duly registered as belonging to the labour force

37 In order to ascertain whether such a worker is duly registered as belonging to the labour force of a Member State for the purposes of that provision of Decision No 1/80, it is necessary, first, to determine, in accordance with settled case-law (*Bozkurt*, paragraphs 22 and 23, *Günaydin*, paragraph 29, *Ertanir*, paragraph 39, and *Birden*, paragraph 33, all cited above), whether the legal relationship of employment of the person concerned can be located within the territory of a Member State or retains a sufficiently close link with that territory, taking account in particular of the place where the Turkish national was hired, the territory on or from which the paid activity is pursued and the applicable national legislation in the field of labour and social security law.

38 In a situation such as that of the applicant in the main proceedings, that condition is undoubtedly satisfied, since the person concerned has been hired and has pursued, in the course of his apprenticeship, a paid activity on the territory of the host Member State and the employment has been subject to the legislation of that State, *inter alia* its labour and social security law.

39 Second, it is clear from the Court's case-law that the concept of being 'duly registered as belonging to the labour force' ('appartenant au marché régulier' in the French version) referred to in Article 6(1) of Decision No 1/80 must be regarded as referring to all workers who have complied with the conditions laid down by law and regulation in the host Member State governing entry into its territory and employment and are thus entitled to pursue an occupation in that State (*Birden*, paragraph 51, and *Nazli*, paragraph 31).

40 In substantiating the interpretation that the term 'regular' ('régulier') is synonymous with 'legal', the Court has relied not only on an analysis of the various language versions in which Decision No 1/80 was drawn up (see *Birden*, paragraphs 47 to 50) but also on the objective of that decision, whose social provisions constitute a further stage in securing freedom of movement for workers on the basis of Articles 48, 49 and 50 of the Treaty (see *Birden*, paragraph 52). As the Advocate General has observed in points 60 and 61 of his Opinion, the performance of work under legal conditions promotes integration of the Turkish nationals in the host Member State.

41 Entitlement to the rights enshrined in the three indents of Article 6(1) of Decision No 1/80 is therefore subject only to the condition that the Turkish worker has complied with the legislation of the host Member State governing entry into its territory and pursuit of employment (*Nazli*, paragraph 32).

42 There is no doubt that a Turkish worker such as Mr Kurz satisfies that requirement, since it is not disputed that he legally entered the territory of the Member State concerned, that he was authorised there to pursue vocational training and that, in the course of that training, he was in legal employment for more than four years in succession.

43 The Court held in paragraph 51 of the judgment in *Birden* that the concept of being 'duly registered as belonging to the labour force of a Member State' cannot be interpreted as applying to the labour market in general as opposed to a restricted market with a specific objective.

44 It is accordingly not possible to accept the interpretation put forward by Land Baden-Württemberg, the German Government and the Commission that an apprentice is not duly registered as belonging to the labour force on the ground that he pursues an activity of a purely temporary and specific nature in the course of his vocational training, distinct from a normal employment relationship and intended to bring about only his future inclusion in the labour market in general.

45 Such an interpretation is inconsistent with the aim and broad logic of Decision No 1/80, which seek to promote the integration of Turkish workers in the host Member State (see paragraph 40 of the present judgment). An apprentice who, as in the main proceedings, has pursued a genuine and effective economic activity with an employer for more than four years, in return for which he has received remuneration corresponding to the work performed, is just as integrated in the host Member State as a worker who has carried out comparable work for an equivalent period.

46 Furthermore, the interpretation provided by the Court in paragraphs 40 to 45 of the judgment in *Birden*, according to which a Turkish national who has lawfully pursued a genuine and effective economic activity in a Member State under a work permit for an uninterrupted period of more than one year for the same employer, in return for which he received the usual remuneration, is duly registered as belonging to the labour force of the host Member State even if, pursuant to the legislation of that State, the activity in question was financed by public funds and restricted to a limited group of persons, in order to facilitate their integration into working life, must apply just as much — if not more so — with regard to gainful activity pursued in the course of vocational training.

47 Consequently, a Turkish worker such as Mr Kurz must be considered to be duly registered as belonging to the labour force of a Member State for the purposes of Article 6(1) of Decision No 1/80.

The concept of legal employment

48 As regards the question whether such a worker has been in legal employment in the host Member State for the purposes of Article 6(1) of Decision No 1/80, it should be recalled that, according to settled case-law (*Sevince*, cited above, paragraph 30, Case C-237/91 *Kus* [1992] ECR I-6781, paragraphs 12 and 22, *Bozkurt*, paragraph 26, and *Birden*, paragraph 55), legality of employment presupposes a stable and secure situation as a member of the labour force of a Member State and, by virtue of this, implies the existence of an undisputed right of residence.

49 In contrast to the factual and legal circumstances forming the basis of the judgments in *Sevince*, at paragraph 31, *Kus*, at paragraphs 13 and 16, and Case C-285/95 *Kol* [1997] ECR I-3069, at paragraph 27, where the Turkish nationals concerned were not legally entitled to a residence permit in the host Member State, it is clear that in a case such as the main proceedings the Turkish worker's right of residence in the host Member State is not in any way contested and the person concerned was not in a precarious situation that could be called into question at any time.

50 It is apparent from the documents before the Court that Mr Kurz was permitted to enter Germany and reside there in order to pursue vocational training under residence authorisations which were extended until 15 July 1997. It was in the course of that training that, having obtained national authorisations permitting him to work, he was legally engaged without interruption from 1 October 1992

to 5 May 1997, that is to say for more than four years in succession, under an employment relationship involving the pursuit of a genuine and effective economic activity for one employer in return for remuneration which appears to be the consideration for the services performed. It follows that his legal position was regular throughout that period.

51 Such a worker must consequently be regarded as having been in legal employment in the Member State concerned for the purposes of Article 6(1) of Decision No 1/80.

52 Since such a worker thus fulfils all the conditions laid down in the third indent of Article 6(1) of that decision, having been legally employed in a Member State for at least four years without interruption, he may rely directly on the rights conferred by that provision, in particular on the unconditional right to seek and take up any employment freely chosen by him, without being subject to any priority for workers of Member States, and on a corresponding right of residence likewise founded on Community law.

53 The foregoing interpretation cannot be affected by the fact that the authorisations to work and reside obtained by Mr Kurz were limited to temporary employment with a specific employer.

54 First, it is settled case-law that the rights conferred on Turkish workers by Article 6(1) of Decision No 1/80 are accorded irrespective of whether or not the authorities of the host Member State have issued a specific administrative document, such as a work permit or residence permit (see, to that effect, *Bozkurt*, paragraphs 29 and 30, *Günaydin*, paragraph 49, *Ertanir*, paragraph 55, and *Birden*, paragraph 65).

55 Secondly, the Court has repeatedly held that if the temporary nature of the employment contract were sufficient to raise doubts as to whether the employment of the person concerned was in fact 'legal employment', Member States would be able wrongly to deprive Turkish migrant workers whom they permitted to enter their territory, and who have pursued an economic activity there which fulfils the conditions laid down in Article 6(1) of Decision No 1/80, of the progressively more extensive rights on which they are entitled to rely directly under that provision. Any other interpretation would render Decision No 1/80 meaningless and deprive it of any practical effect (see *Günaydin*, paragraphs 36 to 40, and *Birden*, paragraphs 37, 38, 39 and 64).

56 Finally, the Court has held equally consistently that Article 6(1) of Decision No 1/80 does not make recognition of the rights which it confers on Turkish workers subject to any condition connected with the reason for which the right to enter, work or reside was initially granted (see, in particular, *Kus*, paragraphs 21, 22 and 23, *Günaydin*, paragraph 52, and *Birden*, paragraph 67).

57 Land Baden-Württemberg submits, however, that Mr Kurz, who was not employed after his training contract ended, thereby forfeited any rights he may have acquired during his apprenticeship.

58 Suffice it to state in that regard that a Turkish national such as Mr Kurz, who was in legal employment in a Member State for an uninterrupted period of more than four years but who has subsequently been unemployed, does not forfeit, as a result of not working for a certain period, the rights conferred on him directly by the third indent of Article 6(1) of Decision No 1/80.

59 Such a Turkish worker has not left the labour market of the host Member State for good and may claim there an extension of his residence authorisation for the

purposes of continuing to exercise his right of free access to any paid employment of his choice under that provision, not only by responding to job offers actually made but also by seeking a new job over a reasonable period (see, to that effect, *Bozkurt*, paragraphs 38 and 39, *Tetik*, paragraph 46, and *Nazli*, paragraphs 40 and 41).

60 Moreover, it is apparent from the documents before the Court that Mr Kurz had an offer of employment from the firm Messebau Thome in Mannheim, subject however to the condition that he possessed a work permit. Mr Kurz stated in his written observations and at the hearing, without being contradicted in this regard, that since he was unable to obtain the extension of his authorisation to reside in Germany or, consequently, issue of a work permit, he was not in a position to take up the offer of employment made to him.

61 In view of the foregoing considerations, the answer to the first question must be that, on a proper construction of Article 6(1) of Decision No 1/80, a Turkish national:

— who was authorised to enter the territory of a Member State with a visa 'valid only for the purpose of vocational training',

— who subsequently received a temporary residence authorisation restricted to vocational training activity with a specific employer, and

— who, in this context, has lawfully pursued a genuine and effective economic activity for that employer in return for which he has received remuneration corresponding to the work performed,

is a worker duly registered as belonging to the labour force of that Member State and legally employed there for the purposes of the said provision.

Where such a Turkish national has thus worked for that employer for an uninterrupted period of at least four years, he enjoys in the host Member State, in accordance with the third indent of Article 6(1) of Decision No 1/80, the right of free access to any paid employment of his choice and a corresponding right of residence.

Questions 2, 3 and 4

62 It is apparent from the order for reference that the second, third and fourth questions are asked only if the first question is answered in the negative.

63 Since the first question has been answered in the affirmative, it is unnecessary to answer the second, third and fourth questions.

Question 5

64 At the hearing, Land Baden-Württemberg claimed that it was no longer necessary to answer the fifth question since, by decision of 13 November 2000, the competent national authorities had limited to 21 January 2002 the prohibitive

effect of Paragraph 8(2) of the Ausländergesetz, so that there was no longer anything to prevent Mr Kurz from returning to Germany after that date.

65 However, in circumstances such as those of the main proceedings, in which it appears that an expulsion has taken place in breach of employment and residence rights conferred on him by Article 6(1) of Decision No 1/80, the Turkish worker retains an obvious interest in securing the grant by the national courts enjoying jurisdiction of a declaration of illegality, and of relief penalising the illegality, from the time when it was committed, and in obtaining for that purpose an interpretation by the Court of Justice of the relevant Community law.

66 In answering this question concerning the relationship between Decision No 1/80 and national legislation on aliens, it should be remembered that it follows both from the primacy of Community law over Member States' domestic law and from the direct effect of a provision such as Article 6 of Decision No 1/80 that a Member State is not permitted to modify unilaterally the scope of the system of gradually integrating Turkish workers into the host Member State's labour force (see, in particular, *Birden*, paragraph 37, and *Nazli*, paragraph 30).

67 It follows that the Member States cannot adopt legislation concerning the control of aliens or apply a measure relating to residence of a Turkish national on their territory which is liable to impede the exercise of rights expressly granted by Community law to such a national.

68 Where, as in the main proceedings, the Turkish national fulfils the conditions laid down by a provision of Decision No 1/80 and accordingly is already duly

integrated in a Member State, the latter no longer has the power to restrict application of those rights, as otherwise that decision would be rendered redundant (see, in particular, *Birden*, paragraph 37, *Nazli*, paragraph 30, and Case C-65/98 *Eyüp* [2000] ECR I-4747, paragraph 41).

69 Furthermore, every court of a Member State must apply Community law in its entirety and protect the rights which Community law confers directly on individuals, setting aside any provision of national law which may conflict with it (see *Eyüp*, paragraph 42, and, by analogy, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21).

70 In view of the foregoing considerations, the answer to the fifth question must be that, where a Turkish national who fulfils the conditions laid down in a provision of Decision No 1/80 and therefore enjoys the rights which it confers has been expelled, Community law precludes application of national legislation under which issue of a residence authorisation must be refused until a time-limit has been placed on the effects of the expulsion order.

Costs

71 The costs incurred by the German Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Karlsruhe by order of 22 March 2000, hereby rules:

1. On a proper construction of Article 6(1) of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council established by the Association Agreement between the European Economic Community and Turkey, a Turkish national:

— who was authorised to enter the territory of a Member State with a visa 'valid only for the purpose of vocational training',

— who subsequently received a temporary residence authorisation restricted to vocational training activity with a specific employer, and

— who, in this context, has lawfully pursued a genuine and effective economic activity for that employer in return for which he has received remuneration corresponding to the work performed,

is a worker duly registered as belonging to the labour force of that Member State and legally employed there for the purposes of the said provision.

Where such a Turkish national has thus worked for that employer for an uninterrupted period of at least four years, he enjoys in the host Member State, in accordance with the third indent of Article 6(1) of Decision No 1/80, the right of free access to any paid employment of his choice and a corresponding right of residence.

2. Where a Turkish national who fulfils the conditions laid down in a provision of Decision No 1/80 and therefore enjoys the rights which it confers has been expelled, Community law precludes application of national legislation under which issue of a residence authorisation must be refused until a time-limit has been placed on the effects of the expulsion order.

Schintgen Gulmann Skouris

Macken Colneric

Delivered in open court in Luxembourg on 19 November 2002.

R. Grass J.-P. Puissochet

Registrar President of the Sixth Chamber

JUDGMENT OF THE COURT
3 July 1986 *

In Case 66/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht [Federal Administrative Court] for a preliminary ruling in the proceedings pending before that court between

Deborah Lawrie-Blum, residing at Freiburg im Breisgau,

and

Land Baden-Württemberg

on the interpretation of Article 48 of the EEC Treaty and Article 1 of Regulation No 1612/68,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling and K. Bahlmann (Presidents of Chambers), G. Bosco, O. Due and F. Schockweiler, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Deborah Lawrie-Blum, the plaintiff in the main proceedings, by Hans Peter Schmidt, Rechtsanwalt, Freiburg, in the written procedure, and by Siegfried de Witt, Rechtsanwalt, Freiburg, during the oral procedure,

Land Baden-Württemberg, the defendant in the main proceedings, by J. Boulanger, Rechtsanwalt, Mannheim,

* Language of the Case: German.

the United Kingdom, by its Agent, T. J. G. Pratt, represented by David Donaldson QC of Gray's Inn during the oral procedure,

the Commission of the European Communities, by Götz zur Hausen and Julian Currall, members of its Legal Department, in the written procedure and by Mr zur Hausen during the oral procedure,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 April 1986,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By a judgment of 24 January 1985, which was received at the Court on 14 March 1985, the Bundesverwaltungsgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 48 of the EEC Treaty and Article 1 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

The subject-matter of the dispute

2 That question arose in proceedings brought against the *Land* Baden-Württemberg by Deborah Lawrie-Blum, a British national, who, after passing at the University of Freiburg the examination for the profession of teacher at a Gymnasium [secondary school], was refused admission, on the ground of her nationality, by the Oberschulamt Stuttgart [Secondary Education Office, Stuttgart] to the Vorbereitungsdienst, a period of preparatory service leading to the Second State Examination, which qualifies successful candidates for appointment as teachers in a Gymnasium.

3 It appears from the documents and the observations submitted to the Court that in the Federal Republic of Germany teacher training is essentially a matter for the *Länder*. That training consists of university studies, leading to the First State Examination and a period of preparatory service followed by the Second State Examination, the qualifying examination for teachers.

4 At the material time, the period of preparatory service was governed in *Land* Baden-Württemberg by the Verordnung des Ministeriums für Kultus und Sport über den Vorbereitungsdienst und die Pädagogische Prüfung für das Lehramt an Gymnasien [Order of the Ministry of Education and Sport on Preparatory Service and the Examination for the Profession of Teacher at a Gymnasium] of 14 June 1976 (Gesetzblatt Baden-Württemberg, p. 504), which has since been replaced by the Verordnung des Ministeriums für Kultus und Sport über der Vorbereitungsdienst und die zweite Staatsprüfung für die Laufbahn des höheren Schuldienstes an Gymnasien [Order of the Ministry of Education and Sport on Preparatory Service and the Second State Examination for Admission as a Teacher in the Higher Education Service qualified to teach in a Gymnasium] of 31 August 1984 (Gesetzblatt Baden-Württemberg, p. 576).

5 The period of preparatory service, the purpose of which is to introduce the trainee teacher to educational theory and teaching, consists of two stages, each lasting one year. The first stage consists of training at a teachers' training college (Seminar) and at a school, generally a State school, to which the trainee teacher has been attached and the second stage consists in further developing the abilities and skills needed in order to carry out educational and teaching duties in a school. During the latter period, the trainee may be called upon to give lessons for up to 11 hours a week in different classes in the Gymnasium, initially under the direct supervision of an instructor and later, during the last six months, on his own.

6 Completion of the period of preparatory service and possession of the diploma granted for passing the Second State Examination are, *de jure*, essential for admission to the profession of teacher in the State school system and *de facto* necessary for employment in private schools.

7 A candidate admitted to preparatory service is appointed Studienreferendar [trainee teacher] with the status of temporary civil servant [Beamte auf Widerruf] and in that capacity enjoys all the advantages of civil service status. The above-mentioned orders of 1976 and 1984 restrict admission to persons satisfying the personal conditions for appointment to the civil service. Paragraph 6 of the Landesbeamtengesetz für Baden-Württemberg [Law of the *Land* of Baden-Württemberg on the Civil Service], in the version in force since 8 August 1979 (Gesetzblatt, p. 398), requires the possession of German nationality within the

meaning of Article 116 of the Grundgesetz [Constitution], unless an express derogation is granted by the Minister for the Interior on account of the imperative requirements of the service.

8 After being refused admission to preparatory service because she did not have German nationality, Mrs Lawrie-Blum brought an action before the Verwaltungsgericht Freiburg [Administrative Court, Freiburg] for the annulment of the decision of refusal on the ground that it was contrary to the Community rules prohibiting all discrimination on grounds of nationality as regards access to employment. The Verwaltungsgericht Freiburg and the Verwaltungsgerichtshof Baden-Württemberg [Higher Administrative Court for Baden-Württemberg], before which an appeal was brought, dismissed her application on the ground that Article 48 (4) of the EEC Treaty provided that the rules concerning freedom of movement for workers did not apply to employment in the public service. The appeal court also stated that the State school system was excluded from the scope of the Treaty because it did not form part of economic life.

9 Mrs Lawrie-Blum appealed to the Bundesverwaltungsgericht, which decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

'Do the rules of European law on the free movement of persons (Article 48 of the EEC Treaty) and Article 1 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 (Official Journal, English Special Edition 1968 (II), p. 475, later amended) give nationals of a Member State the right to be appointed trainee teachers in the State school system of another Member State under the same conditions as nationals of that Member State, even where such trainee teachers, according to national law, have civil service status (in this case, as temporary civil servants [Beamten auf Widerruf] under German law) and conduct classes independently, and where national law requires that persons appointed to the civil service must in principle be nationals of the Member State concerned?'

10 The national court is essentially asking in the first place whether a trainee teacher undergoing a period of service as preparation for the teaching profession during which he enjoys civil service status and provides services by conducting classes for which he receives remuneration must be regarded as a worker within the meaning of Article 48 of the EEC Treaty and secondly whether such preparatory service must be regarded as employment in the public service within the meaning of Article 48 (4) to which nationals of other Member States may be refused admission.

11 In its carefully reasoned order for reference the Bundesverwaltungsgericht states that, in its view, a trainee teacher appointed as a temporary civil servant may not be regarded as a worker within the meaning of Article 48 of the EEC Treaty and that in any event he comes within the exception in Article 48 (4) since he exercises powers conferred by public law or contributes towards the safeguarding of the general interests of the State.

On the meaning of 'worker' in Article 48 (1)

12 Mrs Lawrie-Blum considers that any paid activity must be regarded as an economic activity and that the sphere in which it is exercised must necessarily be of an economic nature. A restrictive interpretation of Article 48 (1) would reduce freedom of movement to a mere instrument of economic integration, would be contrary to its broader objective of creating an area in which Community citizens enjoy freedom of movement and would deprive the exception in Article 48 (4) of any meaning of its own. The term 'worker' covers any person performing for remuneration work the nature of which is not determined by himself for and under the control of another, regardless of the legal nature of the employment relationship.

13 The *Land* Baden-Württemberg espouses the considerations put forward by the Bundesverwaltungsgericht in its order for reference to the effect that, since a trainee teacher's activity falls under education policy, it is not an economic activity within the meaning of Article 2 of the Treaty. The term 'worker' within the meaning of Article 48 of the Treaty and Regulation No 1612/68 covers only persons whose relationship to their employer is governed by a contract subject to private law and not persons whose employment relationship is subject to public law. The period of preparatory service should be regarded as the last stage of the professional training of future teachers.

14 The United Kingdom considers that a distinction between students and workers must be made on the basis of objective criteria and that the term 'worker' in Article 48 must be given a Community definition. Objectively defined, a 'worker' is a person who is obliged to provide services to another in return for monetary reward and who is subject to the direction or control of the other person as regards the way in which the work is done. In the present case, account must be taken of the fact that a trainee teacher is required, at least towards the end of the period of preparatory service, to conduct lessons and therefore provides an eco-

nomically valuable service for which he receives remuneration which is based on the starting salary of a duly appointed teacher.

15 The Commission takes the view that the criterion for the application of Article 48 is the existence of an employment relationship, regardless of the legal nature of that relationship and its purpose. The fact that the period of preparatory service is a compulsory stage in the preparation for the practice of a profession and that it is spent in the public service is irrelevant if the objective criteria for defining the term 'worker', namely the existence of a relationship of subordination *vis-à-vis* the employer, irrespective of the nature of that relationship, the actual provision of services and the payment of remuneration, are satisfied.

16 Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term 'worker' in Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning. Since it defines the scope of that fundamental freedom, the Community concept of a 'worker' must be interpreted broadly (judgment of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035).

17 That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.

18 In the present case, it is clear that during the entire period of preparatory service the trainee teacher is under the direction and supervision of the school to which he is assigned. It is the school that determines the services to be performed by him and his working hours and it is the school's instructions that he must carry out and its rules that he must observe. During a substantial part of the preparatory service he is required to give lessons to the school's pupils and thus provides a service of some economic value to the school. The amounts which he receives may be regarded as remuneration for the services provided and for the duties involved in completing the period of preparatory service. Consequently, the three criteria for the existence of an employment relationship are fulfilled in this case.

19 The fact that teachers' preparatory service, like apprenticeships in other occupations, may be regarded as practical preparation directly related to the actual pursuit of the occupation in point is not a bar to the application of Article 48 (1) if the service is performed under the conditions of an activity as an employed person.

20 Nor may it be objected that services performed in education do not fall within the scope of the EEC Treaty because they are not of an economic nature. All that is required for the application of Article 48 is that the activity should be in the nature of work performed for remuneration, irrespective of the sphere in which it is carried out (see the judgment of 12 December 1974 in Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405). Nor may the economic nature of those activities be denied on the ground that they are performed by persons whose status is governed by public law since, as the Court pointed out in its judgment of 12 February 1974 in Case 152/73 (*Sotgiu* v *Deutsche Bundespost* [1974] ECR 153), the nature of the legal relationship between employee and employer, whether involving public law status or a private law contract, is immaterial as regards the application of Article 48.

21 The fact that trainee teachers give lessons for only a few hours a week and are paid remuneration below the starting salary of a qualified teacher does not prevent them from being regarded as workers. In its judgment in *Levin*, cited above, the Court held that the expressions 'worker' and 'activity as an employed person' must be understood as including persons who, because they are not employed full time, receive pay lower than that for full-time employment, provided that the activities performed are effective and genuine. The latter requirement is not called into question in this case.

22 Consequently, the reply to the first part of the question must be that a trainee teacher who, under the direction and supervision of the school authorities, is undergoing a period of service in preparation for the teaching profession during which he provides services by giving lessons and receives remuneration must be regarded as a worker within the meaning of Article 48 (1) of the EEC Treaty, irrespective of the legal nature of the employment relationship.

On the meaning of 'employment in the public service' in Article 48 (4)

23 Mrs Lawrie-Blum points out that, according to case-law, a post is covered by the reservation in Article 48 (4) only if it involves the exercise of powers conferred by public law and contributes to safeguarding the general interests of the State. The activities of a teacher and *a fortiori* of a trainee teacher do not, however, involve the exercise of powers conferred by public law.

24 According to the *Land* Baden-Württemberg, which espouses the considerations put forward by the Bundesverwaltungsgericht, a trainee teacher does in fact exercise powers conferred by public law in the course of his activities, inasmuch as he prepares lessons, awards marks to pupils and participates in the decisions on whether they should move to a higher class. In any event, in performing those activities he contributes towards the safeguarding of the general interests of the State, which encompass education; that fact alone justifies the application of Article 48 (4).

25 According to the Commission, the reservation contained in Article 48 (4) is subject to the formal condition that the post concerned should involve the discharge of functions governed by public law and the substantive condition that it should involve the exercise of powers conferred by public law and contribute towards the safeguarding of the general interests of the State, those two criteria being cumulative. The normal activities of a teacher in State schools and, *a fortiori*, in private schools do not, however, meet those conditions.

26 In deciding this question it must be borne in mind that, as a derogation from the fundamental principle that workers in the Community should enjoy freedom of movement and not suffer discrimination, Article 48 (4) must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect. As the Court pointed out in its judgment of 3 June 1986 in Case 307/84 (*Commission* v *France* [1986] ECR 1725), access to certain posts may not be limited by reason of the fact that in a given Member State persons appointed to such posts have the status of civil servants. To make the application of Article 48 (4) dependent on the legal nature of the relationship between the employee and the administration would enable the Member States to determine at will the posts covered by the exception laid down in that provision.

27 As the Court has already stated in its judgment of 17 December 1980 in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881 and of 26 May 1982 in Case 149/79 *Commission* v *Belgium* [1982] ECR 1845, 'employment in the public service' within the meaning of Article 48 (4), which is excluded from the ambit of Article 48 (1), (2) and (3), must be understood as meaning those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality. The posts excluded are confined to those which, having regard to the tasks and responsibilities involved, are apt to display the characteristics of the specific activities of the public service in the spheres described above.

28 Those very strict conditions are not fulfilled in the case of a trainee teacher, even if he does in fact take the decisions described by the *Land* Baden-Württemberg.

29 Consequently, the reply to the second part of the question must be that the period of preparatory service for the teaching profession cannot be regarded as employment in the public service within the meaning of Article 48 (4) to which nationals of other Member States may be denied access.

Costs

30 The costs incurred by the United Kingdom and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Bundesverwaltungsgericht by order of 24 January 1985, hereby rules:

(1) A trainee teacher who, under the direction and supervision of the school authorities, is undergoing a period of service in preparation for the teaching profession during which he provides services by giving lessons and receives remuneration must be regarded as a worker within the meaning of Article 48 (1) of the EEC Treaty, irrespective of the legal nature of the employment relationship.

(2) The period of preparatory service for the teaching profession cannot be regarded as employment in the public service within the meaning of Article 48 (4) to which nationals of other Member States may be denied access.

Mackenzie Stuart Koopmans Everling

Bahlmann Bosco Due Schockweiler

Delivered in open court in Luxembourg on 3 July 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President

JUDGMENT OF THE COURT
19 May 1992 *

In Case C-29/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Kantongerecht (Cantonal Court), Groningen, for a preliminary ruling in the proceedings pending before that court between

Dr Sophie Redmond Stichting

and

Hendrikus Bartol and Others,

on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26),

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler and F. Grévisse, (Presidents of Chambers), J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Diez de Velasco, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— the Dr Sophie Raymond Stichting, by R. Van Asperen, of the Groningen Bar,

— Hendrikus Bartol and others, by T. Y. Miedema and G. W. Brouwer, of the Groningen Bar,

— the Commission of the European Communities, by B. J. Drijber and K. Banks, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Dr Sophie Redmond Stichting at the hearing on 12 February 1992,

after hearing the Opinion of the Advocate General at the sitting on 24 March 1992,

gives the following

Judgment

1 By order of 21 January 1991, received at the Court on 28 January 1991, the Kantongerecht, Groningen, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a series of questions on the interpretation of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (hereinafter referred to as 'the directive').

2 The questions arose in proceedings between, on the one hand, the Dr Sophie Redmond Stichting, a foundation (hereinafter referred to as 'the Redmond Foundation'), and, on the other, Hendrikus Bartol and eight other persons.

3 It appears from the case-file that the plaintiff in the main proceedings is a foundation engaged, *inter alia*, in the provision of assistance to drug addicts from certain groups in Dutch society. The defendants are employees of the foundation bound to it by employment contracts to which the provisions of the Dutch Civil Code apply.

4 The Municipality of Groningen, which used to grant the foundation subsidies which were its sole resources, ceased to do so with effect from 1 January 1991 and transferred them to another foundation engaged in assisting drug addicts, namely the Sigma Foundation.

5 The Redmond Foundation, which was now without any resources, applied to the Kantongerecht, Groningen, under Article 1639w of the Civil Code to set aside its contracts of employment with such members of its staff as were not taken on by the Sigma Foundation.

6 Since some of the defendants in the main proceedings relied upon the provisions of Article 1639aa et seq., which were inserted into the Dutch Civil Court in order to transpose the directive into national law, the Kantongerecht, which is a court of first and last instance, was prompted to consider the interpretation of the directive and decided to stay the proceedings until such time as the Court had given a preliminary ruling on the following questions:

'(a) Does "transfer of an undertaking ... to another employer as a result of a legal transfer or merger" within the meaning of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of

undertakings, businesses or parts of businesses also cover the situation in which the subsidizing body decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and simultaneously to switch it to another legal person with identical or comparable aims and objects, it being intended by and agreed between the two legal persons and the subsidizing body not only that, so far as possible, the clients/patients of the first legal person should be "switched" to the second legal person but also that, thereupon, a lease should be granted to the second legal person of the immovable property leased by the first legal person from the subsidizing body and that, so far as is possible (and desirable), use should be made of the "knowledge and the resources (e. g. staff)" of the first legal person?

(b) For the purpose of answering the foregoing question, does it make any difference that the inventory of the first legal person is not also transferred to the second legal person?

(c) Is it of any significance, for the purpose of answering Question (b), whether the untransferred inventory consists exclusively or well-nigh exclusively of aids for the purposes of the abovementioned social and recreational function?

(d) Can (the transferred part of) the undertaking still be said to retain its identity if the abovementioned social and recreational function of the first legal person is not transferred but the function of providing assistance is?

(e) For the purpose of answering Question (d), does it make any difference whether the social and recreational activities must be regarded as constituting a separate object or solely as an aid for the purposes of an optimum provision of assistance?

(f) For the purposes of answering the above questions, does it, lastly, still make any difference that the (intended) transfer of the activities of the first legal person to the second was not brought about in the first instance by (an) agreement(s) to that end between the subsidizing body and the two legal persons but by a decision, based on a change of policy on the part of the subsidizing public body, to terminate the subsidy paid to the first legal person and to switch it to the second legal person?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 Article 1(1) of the directive provides as follows:

'This directive shall apply to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger'.

9 The six questions submitted by the Kantongerecht are concerned in fact with two separate aspects of the directive's scope, as defined by Article 1. Part of the first question and the sixth question are concerned with the interpretation of the expression 'legal transfer', the other questions with the expression 'transfer of an undertaking, business or part of a business'. In order to answer the national court's questions, it is appropriate to examine successively the possible difficulties of interpretation raised by those two expressions, regard being had to the concerns expressed by that court.

The expression 'legal transfer'

10 In its judgment in Case 135/83 *Abels* v *Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie* [1985] ECR 469, paragraphs 11, 12 and 13, the Court held that the scope of the provision at issue could not be appraised solely on the basis of a textual interpretation on account of the differences between the language versions of the provision and the divergences between the laws of the Member States with regard to the concept of legal transfer.

11 It has therefore given that concept a sufficiently flexible interpretation in keeping with the objective of the directive, which is to safeguard employees in the event of a transfer of their undertaking, and has held that the directive is applicable wherever, in the context of contractual relations, there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking (see, most recently, the judgment in Case 101/87 *Bork International* v *Foreningen af Arbejdsledere i Danmark* [1988] ECR 3057, paragraph 13).

12 The Court has considered in particular that the directive was applicable where premises were leased, the lease was rescinded and the owner took over the operation of the undertaking (judgment in Case 287/86 *Landsorganisationen i Danmark fr Tjenerforbundet i Danmark* v *Ny Mølle Kro* [1987] ECR 5465), in a case where a restaurant was leased, the lease terminated and the business leased to a new lessee who carried on the business (judgment in Case 324/86 *Tellerup* v *Daddy's Dance Hall* [1988] ECR 739) and even where a bar-discothèque was transferred pursuant to a lease-purchase agreement and restored to its owner by a judicial decision (judgment in Joined Cases 144 and 145/87 *Berg* v *Besselsen* [1988] ECR 2559).

13 As the Court observed in its judgment in *Bork International*, cited above, paragraph 14, where, upon the expiry of a lease, the lessee ceases to be the employer and a third party becomes the employer thereafter under a contract of sale concluded with the owner, the resulting operation may fall within the scope of the directive as defined in Article 1(1) thereof. The fact that in such a case the transfer is effected in two stages, inasmuch as the undertaking is first restored by the lessee

to the owner who then transfers it to the new owner, does not prevent the directive from applying.

14 The operation to which the Kantongerecht's questions relate, as described in the order for reference, is comparable in structure. The situation in question is where a municipality which finances, through subsidies, the activities of a foundation engaged in providing assistance for drug addicts decides to discontinue the subsidies, and thus causes the foundation to cease its activities and transfer them to another foundation carrying on the same activities.

15 Admittedly, the national court asks in its sixth question whether the fact that the transfer decision was taken unilaterally by the public authority and was not the result of an agreement concluded by it with the subsidized bodies renders the directive inapplicable in this case.

16 That question must be answered in the negative.

17 In the first place, there is a unilateral decision both where an owner decides to change his lessee and where a public body changes its policy on subsidies. In that connection, it is inappropriate to take account of the nature of the subsidy, which is granted by a unilateral act coupled with certain conditions in some Member States and by subsidy contracts in others. In every case, the change in the recipient of the subsidy is carried out in the context of contractual relations within the meaning of the directive and the relevant case-law (judgments in *Berg*, cited above, paragraph 19, and in *Bork International*, cited above, paragraphs 13 and 14). What is more, although the Redmond Foundation, in its observations to the Court, disputes that any agreements were concluded, the Kantongerecht expressly observes in the grounds of its order that 'both the plaintiff and the Sigma Foundation have declared themselves ready to cooperate actively in the "transfer" of the plaintiff's clients/patients to the Sigma Foundation and a working party for the "Incorporation of the Activities of the Redmond Foundation into the Sigma Foundation" has come into being'.

18 Secondly, as the Commission emphasizes in its observations, moreover, the fact that in this case the origin of the operation lies in the grant of subsidies to foundations or associations whose services are allegedly provided without remuneration does not exclude that operation from the scope of the directive. The directive, as has already been stated, is designed to ensure that employees' rights are safeguarded, and covers all employees who enjoy some, albeit limited, protection against dismissal under national law (judgments in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, paragraph 27, and in Case 237/84 *Commission* v *Belgium* [1986] ECR 1247, paragraph 13). According to the order for reference, the employees concerned are subject to the Dutch Civil Code.

19 At the hearing, counsel for the plaintiff in the main proceedings put forward another argument, based on the fact that the Redmond Foundation is in a situation comparable to insolvency, which is expressly excluded from the scope of the directive by the Court's case-law owing to the serious risk, in the event of the application of the directive to insolvency, of a general deterioration in the working and living conditions of workers, contrary to the social objectives of the Treaty (judgment in *Abels*, cited above, paragraph 23).

20 That new argument, which was not put forward in the written observations submitted to the Court and is not supported by any document in the case-file, cannot be accepted. It appears from the judgment in *Abels*, cited above, that only transfers relating to undertakings declared insolvent are excluded from the scope of the directive. Even on the assumption, which is by no means established, that the Redmond Foundation was experiencing difficulties in honouring its commitments at the date of the transfer, that fact alone would not be sufficient to exclude the said transfer from the scope of the directive (see, in particular, the judgment in *Danmols Inventar*, cited above, paragraphs 9 and 10).

21 Accordingly, the answer to the national court's questions or parts of questions relating to the interpretation of the expression 'legal transfer' within the meaning of Article 1(1) of Directive 77/187 must be that that provision is to be interpreted as meaning that the expression covers a situation in which a public authority

decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim.

The expression 'transfer of an undertaking, business or part of a business'

22 In its judgment in Case 24/85 *Spijkers* v *Benedik* [1986] ECR 1119, the Court specified the conditions under which the factual circumstances capable of being described as a transfer of an undertaking within the meaning of the directive had to be assessed. Three points should be called to mind in that regard.

23 First, the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the entity in question retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed (judgment in *Spijkers*, cited above, paragraphs 11 and 12).

24 Secondly, in order to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (judgment in *Spijkers*, cited above, paragraph 13).

25 Lastly, it is for the national court to make the necessary factual appraisal, in the light of the criteria for interpretation specified by the Court, in order to establish whether or not there is a transfer in the sense indicated (judgment in *Spijkers*, cited above, paragraph 14).

26 In this case, it is stated in the order for reference that the transfer of subsidies from the one foundation to the other has the following characteristics: the Redmond Foundation ceased its activities; the two foundations pursue the same or a similar aim; the Sigma Foundation partially absorbed the Redmond Foundation; the two foundations cooperated in finalizing the transfer operations; it was agreed that the Redmond Foundation's knowledge and resources would be transferred to the Sigma Foundation; the premises rented by the Redmond Foundation were leased to the Sigma Foundation; and the latter offered new employment contracts to some of the Redmond Foundation's former employees.

27 All those facts are essential if not decisive features of a transfer and may be used to interpret and apply Article 1 of the directive.

28 In its second, third, fourth and fifth questions, the Kantongerecht describes the particular circumstances in which certain property is used and certain activities carried on and asks whether they are capable of altering the manner in which the aforesaid factors are to be categorized for the purpose of establishing whether or not there is a transfer.

29 As regards the movables, the fact that they were not transferred does not seem in itself to prevent the directive from applying, and it is for the national court to appraise their importance by incorporating them in the overall assessment which has to be made, as pointed out in paragraph 24.

30 The same observation applies to the social and recreational activities, it being understood that the mere fact that those activities are said to have constituted an independent function is not sufficient to rule out the application of the aforementioned provisions of the directive, which were laid down not only for transfers of undertakings, but also for transfers of businesses or parts of businesses, with which activities of a special nature may be equated.

31 Accordingly, the reply to the national court's questions relating to the interpretation of the expression 'transfer of an undertaking, business or part of a business' within the meaning of Article 1(1) of Directive 77/187 must be that that provision is to be interpreted as meaning that that expression refers to the case in which the entity in question has retained its identity. In order to ascertain whether or not there has been such a transfer in a case such as that which is the subject of the main proceedings, it is necessary to determine, having regard to all the factual circumstances characterizing the operation in question, whether the functions performed are in fact carried out or resumed by the new legal person with the same or similar activities, it being understood that activities of a special nature which constitute independent functions may, where appropriate, be equated with a business or part of a business within the meaning of the directive.

Costs

32 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Kantongerecht, Groningen, by order of 21 January 1991, hereby rules:

1. Article 1(1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as meaning that the expression 'legal transfer' covers a situation in which a public authority decides to terminate the subsidy paid to one legal person, as a result of which the activities of that legal person are fully and definitively terminated, and to transfer it to another legal person with a similar aim.

2. The expression 'transfer of an undertaking, business or part of a business' contained in the same article refers to the case in which the entity in question has retained its identity. In order to ascertain whether or not there has been such a transfer in a case such as that which is the subject of the main proceedings, it is necessary to determine, having regard to all the factual circumstances characterizing the operation in question, whether the functions performed are in fact carried out or resumed by the new legal person with the same or similar activities, it being understood that activities of a special nature which constitute independent functions may, where appropriate, be equated with a business or part of a business within the meaning of the directive.

Due Joliet Schockweiler

Grévisse Moitinho de Almeida Rodríguez Iglesias Diez de Velasco

Delivered in open court in Luxembourg on 19 May 1992.

J.-G. Giraud O. Due

Registrar President

JUDGMENT OF THE COURT (Fifth Chamber)
5 May 1988 *

In Joined Cases 144 and 145/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Harry Berg

and

Ivo Martin Besselsen (Case 144/87)

and

Johannes Theodorus Maria Busschers

and

Ivo Martin Besselsen (Case 145/87)

on the interpretation of Articles 1 (1) and 3 (1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Official Journal 1977, L 61, p. 26),

THE COURT (Fifth Chamber)

composed of: G. Bosco, President of Chamber, U. Everling, Y. Galmot, R. Joliet and F. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

* Language of the Case: Dutch.

after considering the observations submitted on behalf of:

Harry Berg and Johannes Theodorus Maria Busschers by A. H. P. M. van Tielraden, advokaat,

Ivo Martin Besselsen by E. Grabandt, advokaat,

the Netherlands Government, by E. F. Jacobs,

the United Kingdom Government by H. R. L. Purse,

the Portuguese Government by Luís Inêz Fernandes and Lénia Maria de Deabra Real,

the Commission of the European Communities by H. Lima and F. Herbert, avocat,

having regard to the Report for the Hearing and further to the hearing on 9 February 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on the same day,

gives the following

Judgment

1 By judgments of 1 May 1987, which were received at the Court on 11 May 1987, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions, which were identical in the two joined cases, on the interpretation of Articles 1 (1) and 3 (1) of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Official Journal 1977, L 61, p. 26).

2 These questions were raised in the course of two sets of proceedings instituted, on the one hand, by Harry Berg (Case 144/87) and, on the other, by Johannes Theodorus Maria Busschers (Case 145/87), against their former employer, Ivo Martin Besselsen, who operated a bar-discothèque known as 'Besi Mill'.

3 On 15 February 1983 a commercial partnership owned by a Mr Manshanden and a Mr Tweehuijzen took over the operation of the establishment under a lease-purchase agreement within the meaning of Article 1576 of the Netherlands Civil Code. According to this provision 'lease-purchase is a purchase and sale on deferred payment, by which the parties agree that the object sold shall not become the property of the purchaser by mere transfer'. Mr Berg and Mr Busschers continued to work in the establishment following the transfer. By decison of 25 November 1983, on an application by Mr Besselsen, the Kantonrechter, Harderwijk, made a ruling terminating the lease-purchase agreement on the ground of the purchasers' non-performance and ordered that the establishment be restored to Mr Besselsen.

4 By their actions, which came before the Hoge Raad der Nederlanden on appeal, Mr Berg and Mr Busschers seek in substance an order requiring Mr Besselsen to pay them their arrears of salary for the period in which the establishment was managed by Mr Manshanden and Mr Tweehuijzen. In support of these claims, they argue *inter alia* that the transfer of an undertaking cannot have the effect of extinguishing the transferor's liability regarding the obligations deriving from a contract of employment, without the consent of the employees concerned.

5 The Hoge Raad der Nederlanden stayed the proceedings and requested the Court for a preliminary ruling on the following questions:

'1. (a) Must Article 3 (1) of the abovementioned directive be interpreted as meaning that, in so far as it is not otherwise provided in the directive or by the Member States, after the date of transfer the transferor is no longer liable for the obligations arising from the employment contract?

(b) If the answer to that question is in the affirmative: Must that provision therefore be interpreted as meaning that the consent of the employee is required for that legal consequence (that is to say, that the transferor is no longer liable) to take effect?

(c) If not, must that provision be understood as meaning that that legal consequence does not occur where the employee lodges an objection, with the result that he remains in the employ of the transferor?

2. (a) Can a lease-purchase agreement as described above . . . result in the transfer of an undertaking for the purposes of Article 1 (1) of the directive?

(b) Can the termination of a lease-purchase agreement as described above, result in a transfer as referred to above, with the legal consequence that the obligations of the purchaser by lease-purchase arising from the contract of employment existing at the time of the termination are transferred by that transfer to the vendor by way of lease-purchase.'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case in the main proceedings, the provisions of Community law in question, the course of the proceedings and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

7 The first question seeks in substance to ascertain whether Article 3 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that, after the date of the transfer, the transferor is released from his obligations under the contract of employment or the employment relationship solely by reason of the transfer, even where the employees of the undertaking do not consent to that effect or oppose it.

8 According to Mr Berg and Mr Busschers, that question must be answered in the negative because the transferor can be discharged of his liability *vis-à-vis* his employees only with their consent. In their view, this follows, first, from the aim of Directive 77/187/EEC which seeks to ensure that the transfer of undertakings is not effected at the expense of their employees, and, secondly, from the principle of the law of obligations according to which no one may assume the debt of a third party without the creditor's consent.

9 On the other hand, Mr Besselsen, the Netherlands and Portuguese Governments, the United Kingdom and the Commission stress that the transfer of an undertaking entails the automatic transfer of the rights and obligations deriving from the contract of employment. Consequently, the effect which the transfer has of releasing the transferor from liability cannot depend on the will of the employees concerned and the fact that they object to the transfer does not mean that they remain in the transferor's employ.

10 It should be observed that according to the first subparagraph of Article 3 (1) of Directive 77/187/EEC 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer . . . shall, by reason of such transfer, be transferred to the transferee.' The second subparagraph of this provision states however that: 'Member States may provide that, after the date of the transfer . . . and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship'.

11 An analysis of Article 3 (1) and, more particularly, the relationship between the first and second subparagraphs of this paragraph show that the transfer of an undertaking entails the automatic transfer from the transferor to the transferee of the employer's obligations arising from a contract of employment or an employment relationship, subject however to the right of Member States to provide for joint liability of the transferor and transferee following the transfer. It follows that, unless the Member States avail themselves of this possibility, the transferor is released from his obligations as an employer solely by reason of the transfer and that this legal consequence is not conditional on the consent of the employees concerned.

12 Mr Berg and Mr Busschers are mistaken in arguing that this interpretation is not consistent with the aim pursued by Directive 77/187/EEC. As the Court has consistently held, most recently in its judgment of 10 February 1988 in Case 324/86 (*Daddy's Dance Hall* [1981] ECR 739), this directive is intended to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the transferee under the same conditions as those agreed with the transferor. Its purpose is not, however, to ensure that the contract of employment or the employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ.

13 Similarly, the argument based on a principle of the law of obligations which, it is claimed, is generally recognized in the legal systems of the Member States, namely

that a debt may be transferred only with the creditor's consent, cannot be accepted. Without there being any need to assess the effect of that principle, it is sufficient to observe that the rules applicable in the event of a transfer of an undertaking or a business to another employer are intended to safeguard, in the interests of the employees, the existing employment relationships which are part of the economic entity transferred. That is why the directive provides for the automatic transfer of obligations arising from employment contracts to the transferee, thereby overriding the principle relied on by the plaintiff in the main proceedings. Moreover, by giving the Member States the power to provide for joint liability of the transferor and the transferee following the transfer, the second subparagraph of Article 3 (1) of Directive 77/187 enables them to reconcile the rule of automatic transfer with the principles of their domestic legal systems.

14 Accordingly, the reply to the first question must be that Article 3 (1) of Directive 77/187 of 14 February 1977 must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship, even if the workers employed in the undertaking did not consent or if they object, subject however to the power of the Member States to provide for joint liability of the transferor and the transferee after the date of transfer.

The second question

15 The second question seeks in substance to ascertain whether Article 1 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies, on the one hand, to the transfer of an undertaking under a lease-purchase agreement such as that provided for in Netherlands law and, on the other, to the retransfer of that undertaking following the termination of the lease-purchase agreement by judicial decision.

16 It is common ground between all the parties in these proceedings who have submitted observations on this point that the directive applies to the transfer of an undertaking under a lease-purchase agreement. However, they differ with regard to the applicability of the directive to the retransfer of the undertaking following the termination of a lease-purchase agreement by judicial decision. Mr Berg and Mr Busschers, the Netherlands Government, and the United Kingdom, and also the Commission, in its observations at the hearing, consider that the termination,

even by judicial decision, of a contract is so bound to the very existence of the contract that the transfer of an undertaking resulting therefrom must be regarded as equivalent to a transfer resulting from a contract. On the other hand, Mr Besselsen argues that the directive does not cover a transfer resulting from a judicial decision, since such a decision does not constitute an agreement.

17 As the Court has already held, in its judgment of 17 December 1987 in Case 287/86 (*Ny Mølle Kro* [1987] ECR 5465), Directive 77/187 is applicable where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer *vis-à-vis* the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred.

18 It follows that, in so far as the purchaser of an undertaking becomes, by virtue of a lease-purchase agreement, the employer in the sense set out above, the transfer must be regarded as a transfer of an undertaking as a result of a legal transfer within the meaning of Article 1 (1) of the directive, notwithstanding the fact that such a purchaser acquires the ownership of the undertaking only when the totality of the purchase price has been paid.

19 Similar considerations apply where the undertaking transferred in this way is restored to the former employer, following the termination of the lease-purchase agreement, regardless of whether the termination results from an agreement between the contracting parties or a unilateral declaration by one of them or indeed a judicial decision. In all these cases, the transfer of the undertaking occurs on the basis of a contract. Consequently, in so far as the retransfer of the undertaking deprives the purchaser of the status of employer, a status which reverts to the vendor, it must be regarded as a transfer of an undertaking to another employer as a result of a legal transfer within the meaning of Article 1 (1) of the directive.

20 For those reasons the reply to the second question must be that Aritcle 1 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies both to the transfer of an undertaking pursuant to a lease-purchase agreement of the kind available under Netherlands law and to the retransfer of the undertaking upon the termination of the lease-purchase agreement by a judicial decision.

Costs

21 The costs incurred by the Netherlands and Portuguese Governments and by the United Kingdom and those incurred by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds

THE COURT (Fifth Chamber),

in answer to the questions referred to by the judgments of the Hoge Raad der Nederlanden of 1 May 1987, hereby rules:

(1) Article 3 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship, even if the workers employed in the undertaking do not consent or if they object, subject however to the power of the Member States to provide for joint liability of the transferor and the transferee after the date of transfer.

(2) Article 1 (1) of Directive 77/187/EEC of 14 February 1977 must be interpreted as meaning that the directive applies both to the transfer of an undertaking pursuant to a lease-purchase agreement of the kind available under Netherlands law and to the retransfer of the undertaking upon the termination of the lease-purchase agreement by a judicial decision.

Bosco Everling

Galmot Joliet Schockweiler

Delivered in open court in Luxembourg on 5 May 1988.

J.-G. Giraud
Registrar

G. Bosco
President of the Fifth Chamber

JUDGMENT OF THE COURT (Second Chamber)

18 November 2010 (*)

(Directive 2000/78/EC – Article 6(1) – Prohibition of discrimination on grounds of age – University lecturers – National provision providing for the conclusion of fixed-term employment contracts beyond the age of 65 – Compulsory retirement at the age of 68 – Justification for differences in treatment on grounds of age)

In Joined Cases C−250/09 and C−268/09,

REFERENCES for a preliminary ruling under Article 234 EC from the Rayonen sad Plovdiv (Bulgaria), made by decisions of 23 June 2009, received at the Court on 6 and 10 July 2009 respectively, in the proceedings

Vasil Ivanov Georgiev

v

Tehnicheski universitet – Sofia, filial Plovdiv,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr Georgiev, by K. Boncheva and G. Chernicherska, advokati,

– Tehnicheski universitet – Sofia, filial Plovdiv, by K. Iliev, acting as Agent,

– the Bulgarian Government, by T. Ivanov and E. Petranova, acting as Agents,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the Commission of the European Communities, by J. Enegren and N. Nikolova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 September 2010,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The references have been made in proceedings between Mr Georgiev and the Tehnicheski universitet – Sofia, filial Plovdiv (Technical University of Sofia, Plovdiv Branch) ('the university') concerning, first, Mr Georgiev's employment by means of a fixed-term contract to which he has been subject as of the age of 65 and, secondly, his compulsory retirement at the age of 68.

Legal context

European Union law

Directive 2000/78

3 Recital 25 in the preamble to Directive 2000/78 states:

'The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.'

4 Article 1 of Directive 2000/78 states that its 'purpose … is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the

principle of equal treatment'.

5 Article 2(1) and (2)(a) of Directive 2000/78 provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.

6 Article 3 of Directive 2000/78, headed 'Scope', states in paragraph 1(c):

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay'.

7 Article 6(1) of the directive provides:

'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable

period of employment before retirement.'

The framework agreement on fixed-term work

8 Clause 5, point 1, of the framework agreement on fixed-term work concluded on 18 March 1999, which is attached as an Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43), is worded as follows:

'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.'

National legislation

9 Article 68(1)(1) and (4) of the Bulgarian Labour Code (DV No 26 of 1 April 1986), in the amended version published in DV No 105 of 29 December 2005 ('the Labour Code'), provides:

'(1) A fixed-term employment contract shall be concluded:

1. for a fixed period which may not exceed three years, as long as a law or an act of the Council of Ministers does not provide otherwise;

…

(4) As an exception, a fixed-term employment contract pursuant to paragraph (1), subparagraph 1, may be concluded for a period of not less than one year for work or activities that are not of a temporary, seasonal or short-term nature. Such an employment contract may even be concluded for a shorter period upon request in writing by the worker or employee. In such cases the fixed-term employment contract referred to in paragraph (1), subparagraph 1, may be renewed only once for a period of not less than one year with the same worker or employee for the same type of work.'

10 Article 325(3) of the Labour Code provides that an employment contract is to end on expiry of the contractual period without the parties giving prior notice.

11 Article 328 of the Labour Code provides:

'(1) An employer may terminate an employment contract by giving prior written notice to the worker or employee within the periods provided for in Article 326(2) in the following cases:

…

10. When the right to receive a retirement pension has been acquired, and, in the case of professors, lecturers and level I and II assistants, and holders of doctorates in science, when they reach the age of 65;

…'

12 The Law on higher education (DV No 112 of 27 December 1995), in the amended version published in DV No 103 of 23 December 2005, provides in paragraph 11 of the Transitional and final provisions:

'On a proposal from the board of professors and the central and/or branch council, by decision of the academic council, employment contracts with persons qualified to teach may, when those persons reach the age referred to in Article 328(1)(10) of the Labour Code, be extended by periods of one year, up to a total of three years in the case of persons occupying the post of "professor", and up to a total of two years in the case of persons occupying the post of "lecturer".'

13 Article 7(1)(6) of the Law on Protection against Discrimination (DV No 86 of 30 September 2003), in the amended version published in DV No 105 of 29 December 2005, provides that 'the fixing of a maximum age for recruitment, based on the training requirements of the post in question or the need for a reasonable period of employment before retirement, on condition that this is objectively justified for the achievement of a legitimate aim and the means of achieving it do not go beyond what is necessary,' does not constitute discrimination.

The actions in the main proceedings and the questions referred for a preliminary ruling

14 Mr Georgiev began work as a lecturer at the University in 1985.

15 His employment contract was terminated as from 6 February 2006 on the ground that he had reached the retirement age of 65.

16 The academic council of the University, however, authorised Mr Georgiev to continue to work, in accordance with paragraph 11 of the transitional and final provisions of the Law on Higher Education. A new one-year employment contract was therefore concluded for that purpose, specifying that Mr Georgiev would work as a lecturer in the faculty of engineering ('the contract').

17 By a supplementary agreement dated 21 December 2006, the contract was extended for one year.

18 In January 2007, Mr Georgiev was appointed to the post of 'professor'.

19 By a new supplementary agreement dated 18 January 2008, the contract was extended for a further year.

20 In 2009, the year in which Mr Georgiev reached the age of 68, by a decision of the rector of the University, the employment relationship between Mr Georgiev and the University was terminated, in accordance with Article 325(3) of the Labour Code.

21 Mr Georgiev brought two actions before the national court. The first, which forms the basis of Case C-268/09, seeks to establish that the clause in his fixed-term contract, which limited that contract to one year, is null and void and that that contract should be reclassified as a contract of indefinite duration. The second action, which gave rise to Case C-250/09, relates to the decision of the rector of the University terminating Mr Georgiev's employment relationship with the University once he reached the age of 68.

22 That court stated that it had doubts as regards the interpretation of Article 6 of Directive 2000/78 with a view to disposing of the two cases before it.

23 In those circumstances the Rayonen sad Plovdiv (Plovdiv district court) decided to stay the proceedings and to refer the following questions, the first two of which are common to both cases whereas the third is referred only in Case C-268/09, to the Court of Justice for a preliminary ruling:

'1. Do the provisions of [Directive 2000/78] preclude the application of a national law which does not permit the conclusion of employment contracts of indefinite duration with professors who have reached the age of 65? In this context and, more precisely, taking Article 6(1) of the directive into consideration, are the measures in Article 7(1)(6) of the Law on Protection against Discrimination, which introduce age limits for employment in specific posts, objectively and reasonably justified by a legitimate aim, and proportionate, bearing in mind that the directive has been fully transposed into Bulgarian law?

2. Do the provisions of [Directive 2000/78] preclude the application of a

national law under which professors who have reached the age of 68 are compulsorily retired? In view of the foregoing facts and circumstances of the present case, and if it is found that a conflict exists between the provisions of [Directive 2000/78] and the relevant national legislation which transposed the directive, is it possible that the interpretation of the provisions of Community law results in the national legislation not being applied?

3. Does national law establish the reaching of the specified age as the sole condition for the termination of the employment relationship of indefinite duration and for the possibility that the relationship can be continued as a fixed-term employment relationship between the same worker and employer for the same post? Does national law establish a maximum duration and a maximum number of extensions of the fixed-term employment relationship with the same employer after the contract of indefinite duration has been converted into a fixed-term contract, beyond which a continuation of the employment relationship between the parties is not possible?'

24 By order of the President of the Court of 14 September 2009, Cases C−250/09 and C−268/09 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

The first two questions

25 By its first two questions, which should be examined together, the national court asks in essence whether Directive 2000/78, in particular Article 6(1) thereof, precludes national legislation, such as that at issue in the main proceedings, under which university professors who have reached the age of 68 are compulsorily retired and may continue working beyond the age of 65 only by means of fixed−term contracts concluded for a period of one year and renewable at most twice. If so, the national court asks whether such national legislation must be disregarded.

26 It must be pointed out at the outset, as is apparent both from its title and the preamble and from its content and purpose, that Directive 2000/78 seeks to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1 of the directive, which include age.

27 In order to provide an answer to the first two questions, it should be examined whether national legislation such as that at issue in the main proceedings falls

within the scope of Directive 2000/78, whether it introduces a difference of treatment on grounds of age and, if so, whether that directive precludes such a difference of treatment.

28 As regards, first, the question whether national legislation such as that at issue in the main proceedings falls within the scope of Directive 2000/78, it follows from Article 3(1)(c) thereof that the directive applies, within the framework of the areas of competence conferred on the European Union, to all persons in relation to employment and working conditions, including dismissals and pay.

29 The national provision which provides for the compulsory retirement of university professors at the age of 68 affects employment and working conditions within the meaning of Article 3(1)(c) of Directive 2000/78 by prohibiting the persons concerned from working beyond that age.

30 The provision relating to the conclusion of fixed-term contracts affects employment and working conditions within the meaning of Article 3(1)(c) of Directive 2000/78 as it precludes university professors over 65 from working under a contract of indefinite duration.

31 Secondly, as regards whether the national legislation at issue in the main proceedings contains a difference of treatment on grounds of age for the purposes of Article 2(1) of Directive 2000/78, it should be recalled that, under that provision, 'the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1' of that directive. Article 2(2)(a) of that directive states that, for the purposes of applying Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1.

32 The application of a law which provides for the compulsory retirement of university professors who have reached the age of 68 has the consequence that those persons are being treated less favourably than other persons practising the same profession on the ground that they are over the age of 68. Such a provision introduces a difference of treatment directly on grounds of age for the purposes of Article 2(2)(a) of Directive 2000/78 (see, to that effect, Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 51).

33 As regards the national provision relating to the application of fixed-term contracts to professors who have reached the age of 65, it must be pointed out that, in imposing that type of employment contract on them and preventing them from continuing working under contracts of indefinite duration, the national legislation at issue in the main proceedings also involves a difference of treatment with regard to them as opposed to younger professors who are not subject to such a prohibition.

34 The argument of the University and the Bulgarian Government, that such legislation is not unfavourable to the professors concerned because it makes it possible for them, where appropriate, to work for another three years after reaching the age at which they may be made to take retirement with a pension, is not capable of undermining the finding in the preceding paragraph. Such a situation does not prevent the employment conditions of those professors, since they no longer have an employment of indefinite duration, from becoming more precarious than those of professors under 65.

35 Thirdly, it must be examined whether the difference of treatment resulting from the application of the provisions of national law at issue in the main proceedings may be justified under Article 6 of Directive 2000/78.

36 In that regard, it is important to bear in mind that the first subparagraph of Article 6(1) of Directive 2000/78 states that differences of treatment on grounds of age are not to constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. The second subparagraph of Article 6(1) lists a number of examples of differences of treatment of the kind referred to in the first subparagraph of Article 6(1).

37 It must, in that regard, be pointed out that the example in point (c) of the second subparagraph of Article 6(1) of Directive 2000/78, which was transposed into Bulgarian national law by Article 7(1)(6) of the Law on Protection against Discrimination to which the national court expressly refers in its first question, does not appear to be relevant in the present case. The dispute in the main proceedings relates to the application of fixed-term contracts as from the age of 65 and therefore to employment conditions after a certain age, and not to a maximum age for recruitment referred to in that law.

38 It is therefore important to examine the national provisions at issue in the main proceedings in the light of their aims.

39 The order for reference does not contain any information on that point and it is not apparent from the case-file that the national legislation at issue in the main proceedings states the aim it pursues.

40 That situation does not however mean that that legislation does not pursue a legitimate aim. As the Court has previously held, where the national legislation in question does not specify the aim pursued, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary (see *Palacios de la Villa*, paragraph

57; Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 45; and Case C-341/08 *Petersen* [2010] ECR I-0000, paragraph 40).

41 The University and the Bulgarian Government submit that the national legislation at issue in the main proceedings pursues a social policy aim linked to the training and employment of teaching staff and to the application of a specific labour market policy which takes account of the specific situation of the staff in the discipline concerned, the needs of the university establishment under consideration and the professional abilities of the person covered.

42 The other Governments which submitted observations to the Court, namely the German and Slovak Governments, and the Commission of the European Communities take the view that the legitimate aim of national legislation such as that at issue in the main proceedings may be the concern to ensure the quality of teaching and research by renewing the teaching staff through the employment of younger professors and to allocate the posts in the best possible way by establishing a balance between the generations.

43 The University and the Bulgarian Government do not clearly specify the aim of that national legislation and, in essence, merely state that it pursues the type of aim referred to in Article 6(1) of Directive 2000/78. It is nevertheless important, in order to assess the compatibility of such legislation with that directive, to identify precisely the aim which it pursues, a task which it is for the national court to carry out.

44 In order to furnish the national court with a helpful reply, account should be taken of the observations submitted by the University and the Bulgarian Government as regards the aim of the national legislation at issue in the main proceedings and also of the observations submitted on that point by the German Government, the Slovak Government and the Commission.

45 In that regard, the training and employment of teaching staff and the application of a specific labour market policy which takes account of the specific situation of the staff in the discipline concerned, put forward by the University and the Bulgarian Government, may be consonant with the intention of allocating the posts for professors in the best possible way between the generations, in particular by appointing young professors. As regards the latter aim, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy (*Palacios de la Villa*, paragraph 65), in particular when the promotion of access of young people to a profession is involved (see, to that effect, *Petersen*, paragraph 68). Consequently, encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute such a legitimate aim.

46 Furthermore, as the Advocate General pointed out in point 34 of his Opinion,

the mix of different generations of teaching staff and researchers is such as to promote an exchange of experiences and innovation, and thereby the development of the quality of teaching and research at universities.

47 However, the case-file does not permit the finding that the aims mentioned by the German and Slovak Governments and the Commission correspond to those of the Bulgarian legislature. A doubt exists in particular in the light of Mr Georgiev's remarks in his written observations. Mr Georgiev submits that the University and the Bulgarian Government merely make assertions and maintains that the legislation at issue in the main proceedings is not aligned to the reality of the labour market concerned. He submits that the average age of university professors is 58 and that there are not more than 1 000 of them, a situation which is explained by the absence of interest on the part of young people in a career as a professor. The legislation at issue in the main proceedings does not, in his view, therefore encourage the recruitment of young people.

48 In that regard it is for the national court to examine the facts and determine whether the aims asserted by the University and the Bulgarian Government correspond to the facts.

49 It still remains to be examined whether the means implemented to achieve such aims are 'appropriate and necessary' within the meaning of the first subparagraph of Article 6(1) of Directive 2000/78.

50 In that regard, it must be borne in mind that the Member States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 63, and *Palacios de la Villa*, paragraph 68).

51 As regards, first, the setting of an age limit of 68, the Court has held, in paragraph 70 of *Petersen*, that, in view of developments in the employment situation in the sector concerned, it does not appear unreasonable for the authorities of a Member State to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones and that that age is sufficiently high to serve as the endpoint of admission to practise as a panel dentist.

52 Those findings are also relevant as regards engaging in employment such as that of a university professor. In so far as the posts for university professors are, in general, of a limited number and open only to people who have attained the highest qualifications in the field concerned, and since a vacant post has to be available for a professor to be appointed, the Court takes the view that a Member State may consider it appropriate to set an age limit to achieve aims of

employment policy such as those mentioned in paragraphs 45 and 46 of this judgment.

53 It is however for the national court to determine, having regard to the objections submitted by Mr Georgiev and referred to in paragraph 47 of this judgment, whether the situation of university professors in Bulgaria corresponds to the general situation of university professors as described in the preceding paragraph.

54 As for the age limit applied by the national legislation at issue in the main proceedings, namely 68, it is apparent from the case-file that it is five years higher than the statutory age at which men may normally acquire the right to a pension and be made to take retirement in the Member State concerned. It therefore allows university professors, who are offered the opportunity to work until 68, to pursue their careers for a relatively long period. Such a measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings (see, to that effect, *Palacios de la Villa*, paragraph 73).

55 It follows that the setting of an age limit for the termination of a contract of employment does not exceed what is necessary to attain employment policy aims such as those mentioned in paragraphs 45 and 46 of this judgment, provided that that national legislation reflects those aims in a consistent and systematic manner.

56 It is for the national court to ascertain whether such an age limit genuinely reflects a concern to attain the aims pursued in a consistent and systematic manner (see Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55, and *Petersen*, paragraph 53). In particular, it is for that court to examine whether the legislation at issue in the main proceedings distinguishes between, on the one hand, lecturers and university professors and, on the other hand, other university teaching staff by not providing for the compulsory retirement of the latter, as Mr Georgiev claims. It would thus be necessary to ascertain whether such a distinction corresponds to a necessity in the light of the aims pursued and the particular characteristics of the teaching staff at issue or whether, on the contrary, it indicates an inconsistency in the legislation, which does not therefore satisfy the conditions set out in Article 6(1) of Directive 2000/78.

57 Secondly, as regards the appropriate and necessary nature of the conclusion of fixed-term contracts as from the age of 65, the Court has already had occasion to examine the compatibility with Directive 2000/78 of national provisions providing for the application of such contracts as from a certain age.

58 In *Mangold* the Court thus examined national legislation which allows the employers concerned to conclude fixed-term contracts of employment with workers who have reached the age of 52, without distinction, whether or not they were unemployed before the conclusion of the contract, in the light of the objective pursued, namely to promote the integration of unemployed older workers.

59 In that judgment the Court, first, pointed out that such legislation leads to a situation in which the workers concerned may be offered fixed-term contracts which may be renewed an indefinite number of times until the age at which they may claim their entitlement to a retirement pension and are thus in danger, during a substantial part of their working life, of being excluded from the benefit of stable employment which constitutes, according to the Court, a major element in the protection of workers (see *Mangold*, paragraph 64). Secondly, it held that in so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued (*Mangold*, paragraph 65).

60 It must be pointed out that national legislation such as that at issue in the main proceedings is clearly different from that examined in *Mangold* and appears to be capable of being justified within the meaning of Directive 2000/78.

61 First, the application of fixed-term one-year contracts, which are renewable at most twice, may, like the age limit of 68, be capable of reflecting an employment policy which seeks inter alia to encourage the promotion of younger teaching staff to posts as university professors. In so far as the number of those posts is limited, the application to those professors, as from the age of 65, of fixed-term contracts, makes it possible to secure their departure after a relatively brief period and thus to appoint younger professors in their stead. It is however for the national court to ascertain whether that is the position of the university professors covered by the legislation at issue in the main proceedings.

62 Secondly, the application of those contracts is not solely linked to the condition that the worker has reached a certain age.

63 On the contrary, as is apparent from the national legislation referred to in paragraphs 11 and 12 of this judgment, the decisive factor is that the professor has acquired a right to a retirement pension, in addition to the fact that he has reached a certain age, which is moreover much higher than that at issue in

Mangold, namely 65 instead of 52.

64 It follows from such legislation that the professors to whom a fixed-term contract is offered may choose either to retire with a pension or to continue to work beyond the age of 65.

65 In addition, the fixed-term contracts at issue in the main proceedings are limited to a period of one year and renewable at most twice and thus meet the requirements set out in clause 5, point 1, of the framework agreement on fixed-term work with a view to preventing abuse arising from the use of successive fixed-term contracts.

66 In those circumstances, national legislation which provides for the conclusion of fixed-term contracts, such as that at issue in the main proceedings, is capable of reconciling both the needs of the professors concerned and those of universities and may constitute an appropriate and necessary means for the purposes of achieving the aims referred to in paragraphs 45 and 46 of this judgment if that legislation reflects those aims in a consistent and systematic manner.

67 In any event, as was stated in paragraph 56 of this judgment, it is for the national court to determine whether the national legislation at issue in the main proceedings distinguishes between, on the one hand, lecturers and university professors and, on the other hand, the other university teaching staff as regards the application of fixed-term contracts or contracts of indefinite duration as from the time when the person concerned has reached retirement age. It is also for the national court to ascertain, in particular, whether such a distinction corresponds to a necessity in the light of the aims pursued and the particular characteristics of the teaching staff at issue or whether, on the contrary, it indicates an inconsistency in the legislation, which does not therefore satisfy the conditions set out in Article 6(1) of Directive 2000/78.

68 Consequently, the answer to the first two questions is that Directive 2000/78, in particular Article 6(1), must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, under which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that that legislation pursues a legitimate aim linked inter alia to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, and that it makes it possible to achieve that aim by appropriate and necessary means. It is for the national court to determine whether those conditions are satisfied.

69 If those conditions are not satisfied the national court also asks whether the national legislation should be disregarded.

70 In accordance with the settled case-law of the Court, where the necessary conditions for the provisions of a directive to be relied on by individuals before the national courts against the State are satisfied, they may do so regardless of the capacity in which the State is acting, whether as employer or as public authority (see, to that effect, inter alia, Case C-188/89 *Foster and Others* [1990] ECR I−3313, paragraph 17, and Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 23).

71 It is apparent from the case-file that the national court regards it as established that the University is a public institution against which the provisions of a directive capable of having direct effect may be relied on (see, in that regard, inter alia, Case C-180/04 *Vassallo* [2006] ECR I−7251, paragraph 26 and the case-law cited).

72 The Court has already had occasion to state the consequences arising, in a dispute between an individual and such an entity, from an incompatibility of national law with the prohibition, in relation to employment and working conditions, of discrimination on grounds of age, laid down in Articles 2 and 3(1)(c) of Directive 2000/78. It has held that national law which is contrary to that directive must, in such a case, be disapplied (see, to that effect, *Petersen*, paragraph 81).

73 Accordingly, the answer to be given to the referring court is that, since this is a dispute between a public institution and an individual, if national legislation such as that at issue in the main proceedings does not satisfy the conditions set out in Article 6(1) of Directive 2000/78, the national court must decline to apply that legislation.

The third question

74 By its third question the national court requests that the Court interpret the national legislation at issue in the main proceedings.

75 In that regard it is important to bear in mind that, under the procedure laid down in Article 267 TFEU, the Court has no jurisdiction to interpret national law, that being exclusively for the national court (see Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 54).

76 In certain cases the Court has been able to infer from questions which apparently related to national law an issue relating to the interpretation of European Union law, examination of which by the Court could help the national court to resolve the dispute before it.

77 However, in Case C-268/09, in which the third question is referred, it is not possible to identify such an issue which would be distinct from those examined in answer to the first two questions.

78 Consequently, there is no need to answer the third question.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, in particular Article 6(1), must be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, under which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that that legislation pursues a legitimate aim linked inter alia to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, and that it makes it possible to achieve that aim by appropriate and necessary means. It is for the national court to determine whether those conditions are satisfied.

Since this is a dispute between a public institution and an individual, if national legislation such as that at issue in the main proceedings does not satisfy the conditions set out in Article 6(1) of Directive 2000/78, the national court must decline to apply that legislation.

[Signatures]

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* Language of the case: Bulgarian.

JUDGMENT OF THE COURT (Grand Chamber)

20 January 2009 (*)

(Working conditions – Organisation of working time – Directive 2003/88/EC – Right to paid annual leave – Sick leave – Annual leave coinciding with sick leave – Compensation for paid annual leave not taken before the end of the contract because of sickness)

In Joined Cases C−350/06 and C−520/06,

REFERENCES for a preliminary ruling under Article 234 EC from the Landesarbeitsgericht Düsseldorf (Germany) (C-350/06) and the House of Lords (United Kingdom) (C−520/06), made by decisions of 2 August and 13 December 2006, received at the Court on 21 August and 20 December 2006 respectively, in the proceedings

Gerhard Schultz-Hoff (C-350/06)

v

Deutsche Rentenversicherung Bund,

and

Mrs C. Stringer and Others (C-520/06)

v

Her Majesty's Revenue and Customs,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Ó Caoimh, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kūris, E. Juhász, G. Arestis, E. Levits (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: V. Trstenjak,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2007,

after considering the observations submitted on behalf of:

– Deutsche Rentenversicherung Bund, by J. Littig, Rechtsanwalt,

– Mrs Stringer and Others, by C. Jeans QC and M. Ford, Barrister, instructed by V. Phillips, Solicitor,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and T. Ward, Barrister,

– the Belgian Government, by L. Van den Broeck, acting as Agent,

– the Czech Government, by T. Boček, acting as Agent,

– the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

– the Netherlands Government, by C. Wissels, acting as Agent,

– the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

– the Slovene Government, by M. Remic, acting as Agent,

– the Commission of the European Communities, by M. van Beek, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 24 January 2008,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The references were made in two sets of proceedings, the first between Mr Schultz-Hoff and his former employer, Deutsche Rentenversicherung Bund ('DRB'), and the second between a number of employees, some of whom have been dismissed, and their employer or former employer, Her[2350] Majesty's

Revenue and Customs, regarding the questions whether a worker who is absent on sick leave is entitled to take paid annual leave during that period of sick leave and whether, and if so to what extent, a worker absent on sick leave for the whole or part of the leave year and/or of a carry-over period is entitled to an allowance in lieu of paid annual leave not taken by the time the employment relationship is terminated.

Legal framework

3 Article 1 of Directive 2003/88 provides as follows:

'Purpose and scope

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. The Directive applies to:

(a) minimum periods of … annual leave …

…'

4 Article 7 of the directive reads as follows:

'Annual leave

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

5 Article 17 of Directive 2003/88 allows Member States to derogate from certain provisions of the directive. No derogation is allowed with regard to Article 7 of the directive.

The main proceedings and the questions referred for a preliminary ruling

Case C-520/06

6 The appellants in the main proceedings can be divided into two categories.

7 The first category concerns a worker who was absent from work for several

months on indefinite sick leave. In the course of that sick leave, she informed her employer that she wished to take, during the two months following her request, a number of days of paid annual leave.

8 The workers falling into the second category were, before their dismissal, on long-term sick leave. Since they had not taken their paid annual leave during the leave year, the only period during which paid annual leave can be taken under United Kingdom law, they claimed payment in lieu.

9 The workers in those two categories were successful before the Employment Tribunal. The Employment Appeal Tribunal dismissed the employer's appeals but gave permission to appeal to the Court of Appeal (England and Wales) (Civil Division), which allowed the appeals.

10 The appellants in the main proceedings appealed to the House of Lords, which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 7(1) of Directive 2003/88 … mean that a worker on indefinite sick leave is entitled (i) to designate a future period as paid annual leave and (ii) to take paid annual leave, in either case during a period that would otherwise be sick leave?

2. If a Member State exercises its discretion to replace the minimum period of paid annual leave with an allowance in lieu on termination of employment under Article 7(2) of Directive 2003/88 …, in circumstances in which a worker has been absent on sick leave for all or part of the leave year in which the employment relationship is terminated, does Article 7(2) [of that directive] impose any requirements or lay down any criteria as to whether the allowance is to be paid or how it is to be calculated?'

Case C-350/06

11 Mr Schultz-Hoff, the appellant in the main proceedings, had been employed by DRB since 1 April 1971. As of 1995, Mr Schultz-Hoff, who is recognised as having a serious disability, experienced alternate periods of fitness for work and incapacity for work due to illness. In 2004, he was physically fit to work until the beginning of September. Thereafter, he was on continuous sick leave until 30 September 2005, the date on which his employment relationship terminated.

12 By letter of 13 May 2005, Mr Schultz-Hoff requested DRB to authorise him to take, from 1 June 2005, paid annual leave in respect of the calendar year 2004, the leave year. On 25 May 2005, the request was refused on the ground that the competent medical service had first to establish whether he was fit to work. In

September 2005, DRB found that Mr Schultz-Hoff was incapacitated for work and, in its capacity as pensions authority, granted him a permanent pension backdated to 1 March 2005.

13 Mr Schultz-Hoff brought an action before the Arbeitsgericht (Labour Court) Düsseldorf seeking payment of allowances in respect of paid annual leave not taken in the calendar years 2004 and 2005, the leave years.

14 DRB maintains that Mr Schultz-Hoff's incapacity for work continues to the present day, and therefore beyond the carry-over period under Paragraph 7(3) of the Federal law on leave (Bundesurlaubsgesetz) of 8 January 1963, in the version applicable to the main proceedings, granted to a worker who has not been able to take his annual leave during the leave year on imperative operational grounds or for reasons connected to the worker himself. As a result, according to German law, the right to paid annual leave has been extinguished and Mr Schultz−Hoff is not entitled to any allowance in lieu of paid annual leave not taken.

15 The Arbeitsgericht Düsseldorf dismissed Mr Schultz-Hoff's action and he appealed to the Landesarbeitsgericht (Higher Labour Court) Düsseldorf.

16 The national court indicates that according to the relevant provisions of national law, as interpreted by the Bundesarbeitsgericht (Federal Labour Court), a worker's entitlement to an allowance in lieu of paid annual leave not taken is extinguished at the end of the calendar year concerned and at the latest at the end of a carry−over period which, except in the case of a derogation in favour of the worker laid down in a collective agreement, is of three months' duration. If the worker has been incapacitated for work until the end of the carry-over period, compensation by means of an allowance in lieu of the paid annual leave not taken is not permitted on termination of the employment relationship.

17 The Landesarbeitsgericht Düsseldorf, doubting whether that case-law of the Bundesarbeitsgericht is compatible with Article 7 of Directive 2003/88, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 7(1) of Directive 2003/88 … to be understood as meaning that workers must in any event receive minimum annual paid leave of four weeks [and that] in particular leave not taken by a worker because of illness during the leave year must be authorised at a later date, or can national legal provisions and/or national practice stipulate that an entitlement to paid annual leave is extinguished if workers become incapacitated for work during the leave year before leave is authorised and do not recover their capacity for work before the end of the leave year or the carry−over period laid down by statute, collective agreement

or individual agreement?

2. Is Article 7(2) of Directive 2003/88 … to be understood as meaning that at the end of the employment relationship workers have, in any event, a claim to financial compensation in respect of leave accrued, but not taken (an allowance in lieu of leave), or can national legislation and/or national practice stipulate that workers will not receive an allowance in lieu of leave if, up to the end of the leave year or the relevant carry-over period, they are incapacitated for work and/or if after the ending of the employment relationship they draw a disability or invalidity pension?

3. In the event that the Court of Justice answers Questions 1 and 2 in the affirmative:

Is Article 7 of Directive 2003/88 … to be understood as meaning that the entitlement to annual leave or an allowance in lieu requires the worker actually to have worked during the leave year, or does the entitlement arise also in the case of excusable absence (by reason of illness) or inexcusable absence in the same leave year?'

18 Given the connection between the two cases in the main proceedings, confirmed at the hearing, they should be joined for the purposes of the judgment.

Questions referred for a preliminary ruling

19 As a preliminary point, it should be noted that the sick leave at issue in the cases in the main proceedings did not exceed the duration of the leave years applicable, in relation to paid annual leave, under the national law in each of those cases.

The right to take paid annual leave during a period of sick leave

20 By the first question referred in Case C-520/06, the national court asks, essentially, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that a worker on sick leave is not entitled to take paid annual leave during that sick leave.

21 All the governments and the Commission of the European Communities in their observations consider that that question should be answered in the negative.

22 According to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits

expressly laid down by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) itself (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 43; Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29; and Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, paragraph 48).

23 A worker must normally be entitled to actual rest, with a view to ensuring effective protection of his health and safety, since it is only where the employment relationship is terminated that Article 7(2) of Directive 2003/88 permits an allowance to be paid in lieu of paid annual leave (see, to that effect, *BECTU*, paragraph 44, and *Merino Gómez*, paragraph 30).

24 Article 7 of Directive 2003/88 is not, furthermore, one of the provisions from which the directive expressly allows derogation.

25 It is common ground that the purpose of the entitlement to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure. The purpose of the entitlement to sick leave is different. It is given to the worker so that he can recover from being ill.

26 The Court has already held that a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law (see *Merino Gómez*, paragraphs 32 and 33; Case C-519/03 *Commission* v *Luxembourg* [2005] ECR I-3067, paragraph 33; and Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 56). In the case, in particular, of *Merino Gómez*, the Court held that Article 7(1) of Directive 93/104 must be interpreted as meaning that, where the dates of a worker's maternity leave coincide with those of the general annual leave fixed, by a collective agreement, for the entire workforce, the requirements of that directive relating to paid annual leave cannot be regarded as met.

27 However, by contrast with the rights to maternity leave or parental leave at issue in the case-law cited in the previous paragraph, the right to sick leave and the conditions for exercise of that right are not, as Community law now stands, governed by that law. In addition, the interpretation of Article 7(1) of Directive 93/104 in *Merino Gómez* was necessary, in the light of the other Community directives at issue in that case, in order to guarantee observance of the rights connected with the employment contract of a worker in the event of maternity leave.

28 With regard to the right to paid annual leave, as is clear from the terms of Directive 2003/88 and the case-law of the Court, it is for the Member States to lay down, in their domestic legislation, conditions for the exercise and implementation of that right, by prescribing the specific circumstances in which workers may exercise the right, without making the very existence of

that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever (see, to that effect, *BECTU*, paragraph 53).

29 It follows, in those circumstances, on the one hand, that Article 7(1) of Directive 2003/88 does not, as a rule, preclude national legislation or practices according to which a worker on sick leave is not entitled to take paid annual leave during that sick leave, provided however that the worker in question has the opportunity to exercise the right conferred by that directive during another period.

30 According to the case-law of the Court, while the positive effect of paid annual leave for the safety and health of the worker is deployed fully if it is taken in the year prescribed for that purpose, namely the current year, the significance of that rest period in that regard remains if it is taken during a later period (Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, paragraph 30).

31 On the other hand, nor does Directive 2003/88 preclude national legislation or practices which allow a worker on sick leave to take paid annual leave during that sick leave.

32 In the light of the foregoing, the answer to the first question referred in Case C-520/06 is that Article 7(1) of Directive 2003/88 must be interpreted as not precluding national legislation or practices according to which a worker on sick leave is not entitled to take paid annual leave during that sick leave.

The right to paid annual leave in the event of sick leave which lasts for the whole or part of the leave year, where the incapacity for work persists beyond the end of that year and/or of a carry-over period laid down by national law

33 By the first question and, in the alternative, by the third question to the extent that it relates to the right to leave and not to the allowance in lieu of paid annual leave not taken, referred in Case C-350/06, the national court asks, essentially, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practices according to which the entitlement to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work persisted until the end of his employment relationship.

34 As pointed out inter alia by the German Government at the hearing, with reference to paragraph 53 of *BECTU*, it is clear from Article 7(1) of Directive 2003/88 that the conditions for application of the right to paid annual leave in the various Member States are governed by national legislation and/or practice. The German Government thus concludes that the question of carrying over leave and therefore of the specification of a period during which a worker

prevented from taking his paid annual leave during the leave year can still take that leave falls within the conditions for the exercise and implementation of the right to paid annual leave and is therefore governed by national legislation and/or practice.

35 While that conclusion can be accepted as a matter of principle, it is nevertheless subject to certain limits.

36 Accordingly the limits to that principle in the specific circumstances of Case C−350/06 must be examined.

– Sick leave lasting for the whole leave year and persisting beyond the end of that year and/or of a carry-over period

37 As a preliminary point, it should be noted that, according to recital 6 in the preamble, Directive 2003/88 has taken account of the principles of the International Labour Organisation with regard to the organisation of working time.

38 In that regard, under Article 5(4) of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (Revised), '… absence from work for such reasons beyond the control of the employed person concerned as illness, … shall be counted as part of the period of service'.

39 With regard, first, to the provisions concerning minimum rest periods in Chapter 2 of Directive 2003/88, they refer in most cases to 'every worker', as indeed does Article 7(1) of the directive in relation to entitlement to paid annual leave (*BECTU*, paragraph 46).

40 In addition, concerning that entitlement, Directive 2003/88 does not make any distinction between workers who are absent from work on sick leave, whether short-term or long-term, during the leave year and those who have in fact worked in the course of that year.

41 It follows that, with regard to workers on sick leave which has been duly granted, the right to paid annual leave conferred by Directive 2003/88 itself on all workers (*BECTU*, paragraphs 52 and 53) cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during the leave year laid down by that State.

42 A provision of national law setting out a carry-over period for annual leave not taken by the end of the leave year aims, as a rule, to give a worker who has been prevented from taking his annual leave an additional opportunity to benefit from that leave. The laying down of such a period forms part of the conditions for the exercise and implementation of the right to paid annual leave

and therefore falls, as a rule, within the competence of the Member States.

43 It follows that Article 7(1) of Directive 2003/88 does not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the directive, including even the loss of that right at the end of a leave year or of a carry-over period, provided, however, that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred on him by the directive.

44 It must therefore be held that a worker, who, like the appellant in the main proceedings in Case C-350/06 in relation to the year 2005, is on sick leave for the whole leave year and beyond the carry-over period laid down by national law, is denied any period giving the opportunity to benefit from his paid annual leave.

45 To accept that, in the specific circumstances of incapacity for work described in the previous paragraph, the relevant provisions of national law, and in particular those laying down the carry-over period, can provide for the loss of the worker's right to paid annual leave guaranteed by Article 7(1) of Directive 2003/88, without the worker actually having the opportunity to exercise the right conferred on him by that directive, would mean that those provisions undermined the social right directly conferred by Article 7 of the directive on every worker.

46 Thus, although the Court has accepted that Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, it has nevertheless made clear that Member States are not entitled to make the very existence of that right, which derives directly from Directive 93/104, subject to any preconditions whatsoever (see, to that effect, *BECTU*, paragraph 53).

47 According to the same case-law, the Court has stated that the requisite arrangements for implementation and application of the requirements of Directive 93/104 may display certain divergences as regards the conditions for exercising the right to paid annual leave, but that that directive does not allow Member States to exclude the very existence of a right expressly granted to all workers (*BECTU*, paragraph 55).

48 It follows that if, under the case-law cited in the previous paragraphs, the right to paid annual leave guaranteed to the worker by Article 7(1) of Directive 2003/88 may not be undermined by provisions of national law which exclude the creation or existence of that right, a different result cannot be allowed in relation to provisions of national law which provide for the loss of that right, in the case of a worker on sick leave for the whole leave year and/or beyond a carry-over period, such as Mr Schultz-Hoff, who has not been able to exercise

his right to paid annual leave. As in the circumstances in *BECTU*, where the Court held that the Member States could not exclude the existence of the right to paid annual leave, in a situation such as that of Mr Schultz-Hoff the Member States may not provide for the loss of that right.

49 It follows from the above that Article 7(1) of Directive 2003/88 must be interpreted as meaning that it precludes national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole leave year and where his incapacity for work persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave.

– Sick leave for part of the leave year, persisting until the end of that year and/or of a carry-over period

50 In the light of the reasoning set out in paragraphs 37 to 49 above, the conclusion to be drawn in relation to the right to paid annual leave of a worker who has worked, like Mr Schultz-Hoff in respect of 2004, for part of the leave year before being put on sick leave, must be the same as that drawn in paragraph 49 above.

51 Every worker denied the benefit of a period of paid annual leave on account of long-term sick leave is in the same situation as that described in paragraph 44 above, inasmuch as incapacity for work owing to sickness is not foreseeable.

52 In the light of all of the foregoing, the answer to the first and third questions, in so far as the latter relates to the right to leave and not to the allowance in lieu of paid annual leave not taken, referred in Case C−350/06, is that Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that the right to paid annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave.

The right to an allowance in lieu, on termination of the employment relationship, in respect of paid annual leave not taken in the leave year and/or in a carry-over period on account of incapacity for work for the whole or part of the leave year and/or of the carry-over period

53 By the second question and, in the alternative, by the third question to the extent that it relates to the allowance in lieu of paid annual leave not taken, referred in Case C−350/06, and by the second question referred in Case C−520/06, the national courts ask, essentially, whether Article 7(2) of

Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid where the worker has been on sick leave for the whole or part of the leave year and/or of a carry-over period. If that question is answered in the affirmative, the national court in Case C-520/06 would like to know the criteria for the calculation of the allowance in lieu.

54 In that regard, it should be pointed out first that, as is clear from the very wording of Article 7(1) of Directive 2003/88, a provision from which that directive allows no derogation, every worker is entitled to paid annual leave of at least four weeks. That right to paid annual leave, which, according to the case-law referred to in paragraph 22 above, must be regarded as a particularly important principle of Community social law, is therefore granted to every worker, whatever his state of health.

55 Second, as is clear from paragraph 52 above, the right to paid annual leave is not extinguished at the end of the leave year and/or of a carry-over period laid down by national law where the worker was on sick leave for the whole or part of the leave year and has not actually had the opportunity to exercise the right conferred on him by Directive 2003/88.

56 On termination of the employment relationship, it is in fact no longer possible to take paid annual leave. In order to avoid that, as a result, the right in question cannot be enjoyed by the worker, even in pecuniary form, Article 7(2) of Directive 2003/88 provides that the worker is entitled to an allowance in lieu.

57 No provision in Directive 2003/88 expressly lays down the way in which the allowance in lieu of the minimum period or periods of paid annual leave must be calculated where the employment relationship is terminated.

58 However, according to the case-law of the Court, the expression 'paid annual leave' in Article 7(1) of Directive 2003/88 means that, for the duration of annual leave within the meaning of that directive, remuneration must be maintained and that, in other words, workers must receive their normal remuneration for that period of rest (see *Robinson-Steele and Others*, paragraph 50).

59 When determining the allowance in lieu payable to the worker under Article 7(2) of Directive 2003/88, the Member States must ensure that the conditions for application laid down by national law take account of the limits which derive from the directive itself.

60 According to the case-law of the Court, Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single

right. The purpose of the requirement of payment for that leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work (see *Robinson-Steele and Others*, paragraph 58).

61 It follows that, with regard to a worker who has not been able, for reasons beyond his control, to exercise his right to paid annual leave before termination of the employment relationship, the allowance in lieu to which he is entitled must be calculated so that the worker is put in a position comparable to that he would have been in had he exercised that right during his employment relationship. It follows that the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive as regards the calculation of the allowance in lieu of annual leave not taken by the end of the employment relationship.

62 In the light of all of the foregoing, the answer to the second and third questions, in so far as the latter relates to the allowance in lieu of paid annual leave not taken, referred in Case C−350/06, and to the second question referred in Case C−520/06, is that Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave. For the calculation of the allowance in lieu, the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as not precluding national legislation or practices according to which a worker on sick leave is not entitled to take paid annual leave during that sick leave.

2. Article 7(1) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that the right to paid

annual leave is extinguished at the end of the leave year and/or of a carry-over period laid down by national law even where the worker has been on sick leave for the whole or part of the leave year and where his incapacity to work has persisted until the end of his employment relationship, which was the reason why he could not exercise his right to paid annual leave.

3. **Article 7(2) of Directive 2003/88 must be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or of a carry-over period, which was the reason why he could not exercise his right to paid annual leave. For the calculation of the allowance in lieu, the worker's normal remuneration, which is that which must be maintained during the rest period corresponding to the paid annual leave, is also decisive.**

[Signatures]

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* Languages of the case: German and English.

[COURT OF APPEAL]

WESTERN EXCAVATING (E.C.C.) LTD. *v.* SHARP

1977 Nov. 1, 2; 14

Lord Denning M.R., Lawton and Eveleigh L.JJ.

Industrial Relations—Unfair dismissal—Constructive dismissal—Whether test of contract or unreasonable conduct to be applied—Trade Union and Labour Relations Act 1974 (*c.* 52), *Sch.* 1, *para.* 5 (2) (*c*)

An employee was suspended from work for five days without pay because he had taken time off after his employers had refused permission for him to do so. As a result of the suspension he was short of money and sought an advance from the employers of his accrued holiday pay. That having been refused on the ground that it was against company policy to pay holiday money unless a holiday was being taken, the employee asked the employers for a loan to make up his week's wages. When told that he could not have a loan to that extent, the employee, in order to obtain his holiday pay, left his employment. The employee made a complaint of unfair dismissal. The industrial tribunal, by a majority, held that, pursuant to paragraph 5 (2) (*c*) of Schedule 1 to the Trade Union and Labour Relations Act 1974,[1] the employee had been justified by the employers' conduct in terminating his employment and awarded him compensation. The Employment Appeal Tribunal, dismissing an appeal by the employers, refused to interfere with the decision on the ground that it was impossible to say that the industrial tribunal had gone so badly wrong in law or had reached a conclusion to which no reasonable tribunal could have come.

On appeal by the employers:—

Held, allowing the appeal, that whether an employee was entitled to terminate his contract of employment by reason of the employer's conduct and so be treated as having been dismissed, pursuant to paragraph 5 (2) (*c*) of Schedule 1 to the Trade Union and Labour Relations Act 1974, had to be determined in accordance with the law of contract and not by applying a test of unreasonableness to the employer's conduct; and that there had been no breach or repudiation of the contract of employment by the employers and the employee could not be treated as having been dismissed.

Wetherall (Bond St. W1) Ltd. v. *Lynn* [1978] I.C.R. 205, E.A.T. approved.

Scott v. *Aveling Barford Ltd.* [1978] I.C.R. 214, E.A.T. considered.

Dictum of Megaw L.J. in *Turner* v. *London Transport Executive* [1977] I.C.R. 952, 964, C.A. not followed.

Decision of the Employment Appeal Tribunal [1977] I.R.L.R. 25 reversed.

The following cases are referred to in the judgments:

Marriott v. *Oxford and District Co-operative Society Ltd. (No. 2)* [1970] 1 Q.B. 186; [1969] 3 W.L.R. 984; [1969] 3 All E.R. 1126, C.A.

[1] Trade Union and Labour Relations Act 1974, Sch. 1, para. 5 (2) (*c*): see post, p. 225D.

Scott v. *Aveling Barford Ltd.* [1978] I.C.R. 214; [1978] 1 W.L.R. 208, E.A.T.
Turner v. *London Transport Executive* [1977] I.C.R. 952, C.A.
Wetherall (Bond St. W1) Ltd. v. *Lynn* [1978] I.C.R. 205; [1978] 1 W.L.R. 200, E.A.T.

The following additional cases were cited in argument:

Breach v. *Epsylon Industries Ltd.* [1976] I.C.R. 316, E.A.T.
Burroughs Machines Ltd. v. *Tivoli* [1977] I.R.L.R. 404
Chapman v. *Goonvean and Rostowrack China Clay Co. Ltd.* [1973] I.C.R. 310; [1973] 1 W.L.R. 678; [1973] 2 All E.R. 1063, C.A.
Charles v. *Spiralynx Ltd.* (1969) 6 K.I.R. 499; 4 I.T.R. 267, D.C.
G.K.N. (Cwmbran) Ltd. v. *Lloyd* [1972] I.C.R. 214, N.I.R.C.
Gilbert v. *I. Goldstone Ltd.* [1977] I.C.R. 36; [1977] 1 All E.R. 423, E.A.T.
Industrial Rubber Products Ltd. v. *Gillan* [1977] I.R.L.R. 389.
Wimpey (George) & Co. Ltd. v. *Cooper* [1977] I.R.L.R. 205.

APPEAL from Employment Appeal Tribunal.

In March 1976 the employee, Colin John Sharp, made a complaint under the Trade Union and Labour Relations Act 1974 that he had been unfairly dismissed by his employers, Western Excavating (E.C.C.) Ltd. On April 22, 1976, an industrial tribunal at St. Austell by a majority decision found the complaint proved and awarded the employee £658 compensation. The award was upheld by the Employment Appeal Tribunal on November 15, 1976.

The employers appealed, by notice dated December 24, 1976, on the grounds (1) that the Employment Appeal Tribunal erred in holding that there was any or any sufficient evidence on which an industrial tribunal properly directing itself in law could find that the employers had dismissed the employee; (2) that the industrial tribunal and the Employment Appeal Tribunal misdirected themselves as to the meaning of paragraph 5 (2) of Schedule 1 to the Trade Union and Labour Relations Act 1974; (3) that the Employment Appeal Tribunal erred in holding that there was any or any sufficient evidence on which an industrial tribunal properly directing itself in law could find that the employers had repudiated and/or had been in breach of their contract of employment with the employee; (4) that the Employment Appeal Tribunal erred in not holding that the industrial tribunal misdirected itself in law in failing to consider whether the employers repudiated and/or were in breach of their contract of employment with the employee; and (5) that the Employment Appeal Tribunal erred in not holding that the industrial tribunal failed to direct itself properly in law by considering whether there was any term in the contract of employment of which the employers were in breach.

The facts are stated in the judgment of Lord Denning M.R.

Andrew Smith for the employers.
Francis Gilbert for the employee.

Cur. adv. vult.

November 14. The following judgments were read.

LORD DENNING M.R. Mr. Sharp was only employed by the China-Clay Co. for 20 months. He left of his own accord. Yet he has been awarded £658 as compensation for unfair dismissal. There seems something wrong about that award. What is it?

To fill in the details, the employee started work with the company on July 9, 1974. One of the terms was that, if he worked extra time, he could have time off in lieu. One day in February 1976 he wanted to play a card game for a team. He asked the foreman for three hours off. The foreman said that he could not have it that afternoon as there was a lot of work to be done. But the employee took it off and played his game of cards. Next morning—Friday, February 27, 1976—the foreman dismissed him, giving him two weeks' notice for failing to carry out a reasonable order. The employee appealed to a panel set up by the company under its disciplinary procedure. On March 5, 1976, the panel allowed his appeal, saying:

> "Having considered all the evidence presented to us, we are of the unanimous decision that the dismissal be withdrawn, as there was room for confusion the way the situation was left, but having regard to the seriousness of what has happened, we substitute the dismissal with five working days' suspension without pay."

Thus, the employee lost five days' pay. He does not dispute the justice of the panel's decision. But it left him in financial difficulties. He was living with a woman who was, in modern terminology, his "common law wife" and their two children. His take-home pay was £42·40 a week. He had no savings, but he had holiday pay accrued to him of £117·17 net.

As a result of the five days' loss of pay, the employee had no money to pay his household expenses. He went to the social security and was given £6·45. But that was not enough to carry on. So he went to his employers. He asked for an advance on his accrued holiday pay. He was told, quite correctly, that it was against company policy to pay holiday pay unless the holiday was itself actually taken. The employee then asked for a loan. He said he wanted £40. The welfare officer told him that the company could not make him a loan to that extent. The welfare officer suggested that he should see him again to discuss the details. That did not satisfy the employee. He said: "If the company cannot help me, I must sort it out myself. I shall have to obtain my holiday pay." That is just what he did. He went to see the workshop manager, and said: "I don't want to leave, but circumstances force me to do so. I am leaving and want my holiday pay now." So on March 11, 1976, the employee picked up his holiday pay of £117·17, and left. He went straight off to the industrial tribunal and made a complaint of unfair dismissal.

The industrial tribunal were divided in opinion. Two of them thought the employee had been unfairly dismissed and that he should be awarded £658. They said that the company "ought to have leant over backwards" to help him and that the company's conduct "justified the employee in terminating his employment in order to obtain his accrued holiday pay,

and so to meet his commitments." The third member disagreed. He thought that the employee ought to have talked to the welfare officer again. He held:

> ". . . the employee's decision to resign was not caused or originated by any misconduct on the part of the company, but was solely his own personal decision. There has, therefore, been no dismissal, whether constructive or otherwise. . ."

The company appealed to the Employment Appeal Tribunal. They said significantly:

> "If each one of us individually had been sitting on this industrial tribunal, we would have been minded to take the same view as that of the minority member."

But they dismissed the company's appeal because they said they were

> ". . . forced to the conclusion that it is impossible to say that this industrial tribunal went so badly wrong in law, or reached such a conclusion that no reasonable tribunal could have come to it."

So the employee (who left work of his own accord, because he was not granted a loan as to the full amount he asked) was awarded £658 compensation. It does seem strange. Especially as the industrial tribunal said:

> ". . . in finding against the company . . . we imply no criticism of their general treatment of the employee, or of their personnel administration and procedures as a whole. On the contrary, we consider all these aspects to have been quite excellent and the company to have been good, responsible and careful employers. . . We regard the events of March 9 and 10 as something exceptional."

The law

Until recently, an ordinary servant had no security of tenure. He could be dismissed on a month's notice or a month's salary in lieu of notice, although he might have served his master faithfully for years. That was altered by the provisions of the Industrial Relations Act 1971, which have now been re-enacted in Schedule 1 to the Trade Union and Labour Relations Act 1974. Paragraph 4 says: ". . . every employee shall have the right not to be unfairly dismissed by his employer. . ." If he is unfairly dismissed, he can complain to an industrial tribunal. The tribunal may recommend that he be reinstated in his job, if that is practicable. Alternatively, it may award him compensation in such amount as is fair and equitable. It may be as much as £5,200. So, whereas at common law an employer could dismiss a man on a month's notice or a month's wages in lieu, nowadays an employer cannot dismiss a man even on good notice, except at the risk of having to pay him a large sum should the industrial tribunal find that the dismissal was unfair.

These provisions are not confined to cases where the employer himself dismisses the man. They also apply to cases where the man leaves of his own choice, if he can show that it was due to the way the employer treated him. In other words, compensation is payable, not only for

actual dismissal, but also for "constructive dismissal." We have here to consider the doctrine of "constructive dismissal."

The statutory provisions

The circumstances in which an employee qualifies as being "dismissed" by his employer were first set out in the Redundancy Payments Act 1965, section 3 (1), in these words:

> ". . . an employee shall . . . be taken to be dismissed by his employer if, but only if,—(*a*) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or (*b*) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract, or (*c*) the employee terminates that contract without notice in circumstances . . . such that he is entitled so to terminate it by reason of the employer's conduct."

A similar provision was contained in section 23 of the Industrial Relations Act 1971, but with the significant omission of paragraph (*c*).

In paragraph 5 (2) of Schedule 1 to the Trade Union and Labour Relations Act 1974 the original provision was re-enacted, but with paragraph (*c*) restored. But on being restored there was an important amendment. The amended paragraph reads:

> "(*c*) the employee terminates that contract, *with or* without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

The words "with or" were inserted because it was realised that paragraph (*c*) as enacted in 1965 left a gap. A man who was considerate enough to give notice was worse off than one who left without notice.

Paragraph 5 (2) (*c*) has given rise to a vast body of case law as to what comes within it. It is spoken of as "constructive dismissal." It has given rise to a problem upon which there has been a diversity of views among chairmen of industrial tribunals and among the judges of the Employment Appeal Tribunal. On July 28, 1977, the Employment Appeal Tribunal attempted to settle these differences in *Wetherall (Bond St. W1) Ltd.* v. *Lynn* [1978] I.C.R. 205 but they were unsettled again by the discovery of some obiter dicta in the Court of Appeal in *Turner* v. *London Transport Executive* [1977] I.C.R. 952. This led the Employment Appeal Tribunal on October 4, 1977, to think that they ought to follow those obiter dicta and to give guidance accordingly. It is to be found in *Scott* v. *Aveling Barford Ltd.* [1978] I.C.R. 214. But this guidance was expressed to be given as an interim measure pending an authoritative statement of the law by the Court of Appeal or the Court of Session.

It is with diffidence that we approach the task. The rival tests are as follows.

The contract test

On the one hand, it is said that the words of paragraph 5 (2) (*c*) express a legal concept which is already well settled in the books on

contract under the rubric "discharge by breach." If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

The unreasonableness test

On the other hand, it is said that the words of paragraph 5 (2) (*c*) do not express any settled legal concept. They introduce a new concept into contracts of employment. It is that the employer must act reasonably in his treatment of his employees. If he conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, the employee is justified in leaving. He can go, with or without giving notice, and claim compensation for unfair dismissal.

It would seem that this new concept of "unreasonable conduct" is very similar to the concept of "unfairness" as described in paragraph 6 (8) of Schedule 1 to the Act of 1974 which says:

> ". . . the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

Those who adopt the unreasonableness test for dismissal say quite frankly that it is the same as the "unreasonableness" test for fairness. That was the view taken by Megaw L.J. in *Turner's* case [1977] I.C.R. 952, 964. He said:

> "So far as (*c*) is concerned, in my judgment, the wording of this subparagraph is not a wording which involves, or implies, the same concept as the common law concept of fundamental breach of a contract resulting in its unilateral repudiation and acceptance of that unilateral repudiation by the innocent party. The employer's 'conduct' here is employer's conduct to be adjudged by the industrial tribunal by the criteria which they regard as right and fair in respect of a case in which the issue is whether or not there has been 'unfair' dismissal."

Previous cases

The only previous case in the Court of Appeal on the words is *Marriott* v. *Oxford and District Co-operative Society Ltd. (No. 2)* [1970] 1 Q.B. 186. It was under the Redundancy Payments Act 1965. Section 3 (1) (*c*) did not apply because it only applied where the employee terminated his contract *without* notice, whereas Marriott had terminated it *with* notice. So the court put it on section 3 (1) (*a*). But since the amendment to the wording of paragraph (*c*), it would have been more properly brought under paragraph (*c*). It was not really an (*a*) case: but we had to stretch it a bit. It was not the employer who terminated the employment. It was the employee: and he was entitled to do so by reason of the employer's conduct.

All the other cases are in the Employment Appeal Tribunal. We have studied them all, but I hope I will be excused from going through them.

The result

In my opinion, the contract test is the right test. My reasons are as follows. (i) The statute itself draws a distinction between "dismissal" in paragraph 5 (2) (*c*) and "unfairness" in paragraph 6 (8). If Parliament intended that same test to apply, it would have said so. (ii) "Dismissal" in paragraph 5 (2) goes back to "dismissal" in the Redundancy Payments Act 1965. Its interpretation should not be influenced by paragraph 6 (8) which was introduced first in 1971 in the Industrial Relations Act 1971. (iii) Paragraph 5 (2) (*c*) uses words which have a legal connotation, especially the words "entitled" and "without notice." If a non-legal connotation were intended, it would have added "justified in leaving at once" or some such non-legal phrase. (iv) Paragraph 5 (2) (*a*) and (*c*) deal with different situations. Paragraph 5 (2) (*a*) deals with cases where the employer himself terminates the contract by dismissing the man with or without notice. That is, when the employer says to the man: "You must go." Paragraph 5 (2) (*c*) deals with the cases where the employee himself terminates the contract by saying: "I can't stand it any longer. I want my cards." (v) The new test of "unreasonable conduct" of the employer is too indefinite by far. It has led to acute difference of opinion between the members of tribunals. Often there are majority opinions. It has led to findings of "constructive dismissal" on the most whimsical grounds. The Employment Appeal Tribunal tells us so. It is better to have the contract test of the common law. It is more certain: as it can well be understood by intelligent laymen under the direction of a legal chairman. (vi) I would adopt the reasoning of the considered judgment of the Employment Appeal Tribunal in *Wetherall (Bond St. W1) Ltd.* v. *Lynn* [1978] I.C.R. 205, 211:

> "Parliament might well have said, in relation to whether the employer's conduct had been reasonable having regard to equity and the substantial merits of the case, but it neither laid down that special statutory criterion or any other. So, in our judgment, the answer can only be, entitled according to law, and it is to the law of contract that you have to look."

(vii) The test of unreasonableness gives no effect to the words "without notice." They impose a legal test which no test of "unreasonableness" can do.

Conclusion

The present case is a good illustration of a "whimsical decision." Applying the test of "unreasonable conduct," the industrial tribunal decided by a majority of two to one in favour of the employee. All three members of the Employment Appeal Tribunal would have decided in favour of the employers, but felt that it was a matter of fact on which they could not reverse the industrial tribunal. So, counting heads, it was four to two in favour of the employers, but yet the case was decided against them—because of the test of "unreasonable conduct."

If the contract test had been applied, the result would have been plain. There was no dismissal, constructive or otherwise, by the employers. The employers were not in breach at all. Nor had they repudiated the contract at all. The employee left of his own accord without anything wrong done by the employers. His claim should have been rejected. The decision against the employers was most unjust to them. I would allow the appeal, accordingly.

LAWTON L.J. Two questions require to be answered in this appeal. First, did the industrial tribunal at St. Austell which adjudicated upon the employee's claim for compensation for unfair dismissal direct itself correctly in law when purporting to apply to the evidence in the case paragraph 5 (2) (*c*) of Schedule 1 to the Trade Union and Labour Relations Act 1974. Secondly, even if it did, could it reasonably have decided as it did on the evidence before it? In my judgment, the answer to each of these questions is "no."

The answer to the first question turns upon the construction of paragraph 5. It has a legislative history going back to the Redundancy Payments Act 1965; but, for my part, I prefer to get the meaning out of paragraph 5 (2) (*c*) from the enacted words and the context in which they were used. Paragraph 4 established an employee's right not to be dismissed unfairly. What meaning was to be applied to dismissal? What to unfair? There could be no unfairness until there had been a dismissal. The word "dismissal" is a noun connoting a state of affairs—the condition of being sent away. That state of affairs either exists or it does not. The word is positive and definitive. The adjective "unfair" qualifies the state of affairs which amounts to a dismissal. Paragraphs 5 (2) (*c*) and 6 reflect the difference between the noun and the adjective. The former states what in law constitutes the state of affairs which is to be considered as a dismissal. Paragraph 6 deals with fairness. From the concept which is inherent in the word "dismissal" the state of affairs amounting to a dismissal must be clearly identifiable. Paragraph 5 (2) (*a*) defines one state of affairs amounting to dismissal by reference to the termination of *the contract* of employment. This necessarily involves the tribunal in considering the ending of contractual rights. Sub-sub-paragraph (*a*) does not apply at all unless the employee's

contractual rights have been terminated. Contractual rights have to be considered again under sub-sub-paragraph (*b*). It would be odd if they did not have to be considered under sub-sub-paragraph (*c*) which sets out the circumstances in which an employee can terminate his contract of employment. When he does so, he purports to release himself from his contractual obligations; but he can only do so in the circumstances specified which must be "such that he is entitled to (do so) without notice by reason of the employer's conduct." The word "entitled" in this context connoted the existence of a right. The only right which the employee can have to terminate his contract of employment is that which the law gives him. His right is of a specified kind. It is a right to terminate "*without notice* by reason of the employer's conduct." In my judgment, this is the language of contract; language which has a significant meaning in law in that it confers a right on an employee to be released from his contract and extinguishes the right of the employer to hold the employee to it. Any other construction would produce an odd result. As Mr. Smith pointed out in argument, if sub-sub-paragraph (*c*) did not bring the contract to an end altogether the nonsensical position would arise that the employee could terminate it but the employer could sue him for damages for doing so without notice. In my judgment, contracts can only be brought to an end in ways known to the law.

For the purpose of this judgment, I do not find it either necessary or advisable to express any opinion as to what principles of law operate to bring a contract of employment to an end by reason of an employer's conduct. Sensible persons have no difficulty in recognising such conduct when they hear about it. Persistent and unwanted amorous advances by an employer to a female member of his staff would, for example, clearly be such conduct; and for a chairman of an industrial tribunal in such a case to discuss with his lay members whether there had been a repudiation or a breach of a fundamental term by the employer would be for most lay members a waste of legal learning. There may occasionally be border-line cases which would require a chairman to analyse the legal principles applicable for the benefit of the lay members; but when such cases do occur he should try to do so in the kind of language which 19th century judges used when directing juries about the law applicable to contracts of employment, rather than the language which nowadays would be understood and appreciated by academic lawyers. I appreciate that the principles of law applicable to the termination by an employee of a contract of employment because of his employer's conduct are difficult to put concisely in the language judges use in court. Lay members of industrial tribunals, however, do not spend all their time in court and when out of court they may use, and certainly will hear, short words and terse phrases which describe clearly the kind of employer of whom an employee is entitled without notice to rid himself. This is what paragraph 5 (2) (*c*) is all about; and what is required for the application of this provision is a large measure of common sense.

This it did not get from the industrial tribunal at St. Austell. The employee did not suggest, nor could he have done so, that the employers

had been in breach of their contract with him. He had been guilty of misconduct at work and had been dismissed. Under a procedure between the employers and the unions represented in their undertaking he had successfully appealed against his dismissal, which was varied to a five days' suspension without pay. He had no right to be given any money other than that which he had earned; and at the material time because of his own acts he had earned hardly any. To suggest, as the majority of the tribunal did, that in these circumstances the employers should

> ". . . have leant over backwards to ensure that the same result as the discredited dismissal was not to be achieved through administrative blockage or any over rigid adherence to criteria or procedures not designed for this abnormal situation"

is to cut adrift from common sense and reason and to decide cases on the kind of whimsical grounds to which Phillips J. referred and disapproved of in *Scott* v. *Aveling Barford Ltd.* [1978] I.C.R. 214, 220.

The statutory provisions which have been under consideration in this case have brought social justice into labour relations; but this new and desirable factor must be based on justice, not on whimsy or sentimentality. No justice was shown to the employers in this case. In blunt legal terms, this was a perverse decision.

Lord Denning M.R. has reviewed the case law relevant to this appeal. I agree with what he has said about it and have nothing to add.

I too would allow the appeal.

EVELEIGH L.J. I agree with both judgments and have nothing to add.

Appeal allowed with costs.
Order for costs not to be enforced without leave.
Leave to appeal refused.

Solicitors: *Stollard & Limbrey for Stephens & Scown, St. Austell; Rooks, Rider & Co. for Whitford & Sons, St. Columb.*

C. N.

Case No: A2/2010/2967/EATRF

Neutral Citation Number: [2011] EWCA Civ 1061

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HONOURABLE LADY SMITH sitting with two Lay Members
UKEAT/013/10/SM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/09/2011

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE THOMAS
and
LORD JUSTICE ELIAS

- -

Between :

HUGHES	**Appellant**
- and -	
THE CORPS OF COMMISSIONAIRES MANAGEMENT LTD	**Respondent**

- -
- -

Mr David Gray-Jones (instructed by **Thomas Mansfield LLP**) for the **Appellant**
Mr Caspar Glyn (instructed by **Messrs Simons, Muirhead & Burton**) for the **Respondent**

Hearing date : 20 July 2010

- -

Judgment

Lord Justice Elias :

This is the judgment of the court

1. This appeal raises issues of construction relating to regulation 24 of the Working Time Regulations 1998.

2. The appellant is a security guard who works for the respondent employer. His employer provides security guarding services for various clients. The appellant was assigned to a site at Croydon owned by Orange, the telecommunications company, where the respondent was providing twenty four hour security coverage. The appellant guarded the site together with two other security officers. It was a single manned site so that on any one day one security guard worked a day shift, another worked a night shift, and the third had a rest day. This apparently is a typical arrangement for single manned sites.

3. This appeal raises the question whether the appellant was given an appropriate rest break during his shift as required by the Regulations. Unlike most workers, he was not able to take uninterrupted rest breaks. His job duties required him to be continuously available to supervise and monitor access to the Croydon site. He was provided with a kitchen area where breaks could be taken but he had to remain on call during these periods. He was permitted to leave a message on the reception desk where the monitoring and security equipment was placed saying that he was on his break and leaving a contact number. This meant, however, that his break might be interrupted by visitors to the site. If his break was interrupted then he was permitted to start it again. Sometimes, particularly at night, he would in fact have a complete uninterrupted break although he could never be sure in advance that that would be the position.

4. The appellant complained that this arrangement did not comply with the employer's obligations to provide him with a break under the Working Time Regulations.

The relevant law.

5. The Working Time Regulations give effect to Council Directive 93/04EC, known as the Working Time Directive. (This was subsequently amended by Directive 2003/88/EEC but not in any material way.) The Directive lays down minimum health and safety requirements for the organisation of working time. The Directive stipulates maximum hours in the working week and seeks to ensure that workers receive adequate periods of rest between periods of work, and also have proper breaks during the course of their working hours.

6. The following Recitals of the Directive identify its fundamental underlying purposes. They demonstrate that whilst the purpose is the protection of the health and safety of workers, some flexibility in applying the standards may be justified to take into account unusual or particular working arrangements where strict compliance would cause operational difficulties.

> "Whereas….
>
> (2) Article 137 of the Treaty provides that the Community is to support and complement the activities of the Member States

with a view to improving the working environment to protect workers' health and safety. Directives adopted on the basis of that Article are to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

(4) The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.

(5) All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, ie in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours.

……

(16) It is necessary to provide that certain provisions may be subject to derogation implemented, according to the case, by the Member States or the two sides of industry. As a general rule, in the event of a derogation, the workers concerned must be given equivalent compensation rest periods."

7. These principles are then reflected in the detailed rights conferred by the Articles of the Directive. Article 2 sets out the definitions. It defines both working time and rest periods as follows:

> "working time" means any period which the worker is working, at the employer's disposal and carrying out his activities and duties, in accordance with national laws and/or practice."
>
> "rest period" means any period which is not working time."

8. Chapter 2 is headed "Minimum rest periods - other aspects of the organisation of working time". Article 3 deals with daily rests and provides that workers should receive a minimum of 11 consecutive hours per 24 hour period; Article 4 with breaks; Article 5 with weekly rest periods, entitling a worker to a minimum of uninterrupted 24 hours in a seven day period; Article 6 provides for a maximum weekly working time of 48 hours; and Article 7 provides that workers should have at least four weeks' paid annual leave.

9. Article 4 is directly in issue in this case. It is as follows:

> "Breaks
>
> Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including the duration and the terms on which it is granted, shall be laid

down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation."

10. Article 17 then identifies a number of areas where derogation from the rights conferred by the Directive is permitted. Article 17(2) is as follows:

> "2. Derogations provided for in paragraphs 3, 4 and 5 may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection."

11. Paragraph 3 of that Article then identifies particular kinds of work activities where derogations from some of the Articles, including the right to a break conferred by Article 4, may be permitted. They include "security and surveillance activities requiring a permanent presence." The appellant has conceded that the exception applies to him and his colleagues providing security work at the Croydon site, although for reasons we give later, we do not think that this concession was consistent with the arguments advanced before the Employment Tribunal.

12. The Working Time Regulations give effect to the Directive, frequently by adopting virtually the same language. The material provisions are as follows:

> "2 Interpretation
>
> (1) In these Regulations -
>
> ……
>
> 'rest period' in relation to a worker, means a period which is not working time, other than a rest break or leave to which the worker is entitled under these Regulations;
>
> ……..
>
> 'working time', in relation to a worker, means –
>
> (a) any period during which he is working, at his employer's disposal and carrying out his activity or duties….
>
> and 'work' shall be construed accordingly;"

13. Regulation 12 provides that there must be certain rest breaks in the course of a worker's working time.

> "12) Rest Breaks

> (1) Where a worker's daily working time is more than six hours, he is entitled to a rest break."

The regulation then specifies that the details of the entitlement, including the duration of the break and the terms on which it is granted, should be in accordance with any relevant collective agreement. Absent any such agreement, the default position is set out in regulation 12(3) as follows:

> "(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one…"

14. The Government chose to take advantage of the right to create derogations conferred by Article 17 of the Directive. Part III of the Regulations sets out various provisions where the regulations have either been excluded altogether or have been modified in certain respects. Certain sectors of activity are excluded by regulation 18; domestic service by regulation 19; those working unmeasured working time by regulation 20; there is then a category defined as "other special cases" in regulation 21 with respect to whom certain of the rights are excluded including the right to a break under regulation 12; and regulation 23 empowers collective parties to modify or exclude certain rights again including regulation 12 rights.

15. For the most part the exceptions are defined by reference to the activities in which a worker is engaged. The relevant exception here is regulation 21(b) which provides:

> "Subject to regulation 24, regulations ….12(1) do not apply in relation to a worker…
>
> … (b) where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers of security firms …"

16. The fact that exclusions or exceptions have been made with respect to certain workers does not mean that they are left without any rights under these Regulations. This is made clear by regulation 24 which is cast in the same language as Article 17.2 of the Directive:

> "Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break –
>
> (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and

> (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety."

The scope of regulation 21and its relationship to regulation 24.

17. In our judgment, an issue of some importance in this case is whether regulation 21 requires the court to focus on the activities carried out by the employer or those carried out by the worker. The language of the regulation, and indeed of the Directive which it implements, is somewhat opaque about this. The security activities referred to in paragraph 21(b) do not require the worker's permanent presence; obviously no activities could. Rather they require that the employer ensures that a worker is permanently present on site. If the intention were that paragraph (b) would apply whenever that situation arises, this would mean that all employees employed in that activity would be deprived of their rights under regulation 12. That would be so even if the employer could readily organise the work so as to secure breaks for them which are identical in every way to a regulation 12 break. If, however, the proper construction is that the paragraph applies only when the nature of the activity requires the particular worker to be permanently present throughout their shift, the derogation will be much narrower. It will apply only to those workers whose own work pattern satisfies the relevant conditions.

18. This question was considered by the Court of Appeal in *Gallagher v Alpha Catering Services Ltd* [2005] ICR 673. That case concerned regulation 21(c) rather than 21(b) but in our view it raises precisely the same issue of construction. Regulation 21(c) permits derogation where a worker's activities "involve the need for continuity of service or production as the case may be" in relation to various activities, one of which is work at docks or airports.

19. The appellant in *Gallagher* was employed by a company which provided food and drink to airlines operating out of Gatwick Airport. They had to load and unload aeroplanes very speedily. In between those bursts of activity they were entitled to "downtime" when they were not actually doing anything but had to remain in their vehicles so that they could be called upon by the employer as and when required. The employees alleged that they were not being given their regulation 12 work breaks. The company relied upon regulation 21(c) claiming that they required continuity of service for their operations so that regulation 12 was disapplied. In the alternative, they submitted that downtime of at least twenty minutes duration constituted a rest break within the meaning of regulation 12.

20. The Employment Tribunal held that the workers did fall within the scope of regulation 21(c) because the employer's activities required continuity of service. The EAT upheld the employees' appeals on the grounds that the Employment Tribunal had wrongly focused on the employer's activities, whereas in fact they should have

concentrated on the activity of the particular workers. It appears to have been accepted that had they done so, the regulation would not have been applicable because the staff rotas could have been so arranged as to secure an appropriate regulation 12 break for those concerned. Accordingly, the continuous presence throughout the shift of any particular worker was not required and so regulation 21(b) was not engaged.

21. The Court of Appeal dismissed the employer's appeal. Peter Gibson LJ, with whose judgment Buxton and Jacob LJJ agreed, observed that whilst the Directive was not as clear on this point as it might have been, it was tolerably plain that the intention was to focus on the activities of the worker. The judge concluded (para 37):

> "… No doubt the activities of the worker are the activities of the employer in law, but the focus is on the activities of the worker rather than the employer, which activities involve the requisite need for continuity of service or production."

22. In this case it has always been conceded that regulation 21(b) applied although as we shall explain, that appears to have been because it was thought that the appropriate test was what the activities of the employer required.

23. The construction of regulation 21 in turn influences the correct interpretation of regulation 24. If when determining whether regulation 21 applied, the relevant activities to consider were those of the employer and not the worker, the right to a regulation 12 work break would be excluded in a significant number of cases where the employer could in fact readily organise the work so as to secure to the staff full regulation 12 breaks. They would not be regulation 12 breaks because that regulation would have been disapplied; they would necessarily constitute "equivalent periods of compensatory rest" under regulation 24(a) even though in every sense identical to regulation 12 breaks. It would then be necessary for the tribunal to ask, in the context of applying regulation 24, whether there were objective reasons why the working arrangements could not be arranged so as to secure a full break. However, since the focus is on the worker's activities, that question has to be considered at the prior stage of determining whether regulation 21 is engaged at all. It follows that the concept of an equivalent period of compensatory rest under regulation 24(a) cannot be a period identical to a regulation 12 break. It is something given in place of that break. Precisely what form any alternative arrangement can make whilst still falling within the scope of regulation 24(a) is an issue arising in this appeal.

24. In *Gallagher*, once the court had determined that regulation 21 did not dis-apply regulation 12, the issue was whether the break afforded to the workers complied with the requirements of that provision. The Court of Appeal had regard to two decisions of the ECJ, *SIMAP v Conselleria de Sandidad* [2000] IRLR 845 and *Landeschauptstadt Kiel v Jaeger* [2003] IRLR 804, which establish that when a worker is required to be on call at his place of work so that he can resume duties when required by his employer, that will still count as working time even if the worker is entitled to sleep whilst awaiting the employer's summons. It was argued for the employer that working time and rest breaks were not mutually exclusive, but Peter Gibson LJ, by implication at least, rejected that submission. He held that the characteristics of the break granted in that case did not amount to a regulation 12 rest break, and that was so even if in fact the employee had an uninterrupted twenty minute period of downtime (para 50):

> "… a period of downtime cannot retrospectively become a rest break only because it can be seen after it is over that it was an uninterrupted period of at least 20 minutes. The worker is entitled …to a rest break if his working time exceeds six hours, and he must know at the start of the break that it is such. To my mind a rest break is an uninterrupted period of at least 20 minutes which the worker can use as he pleases."

It follows that the break afforded to the appellant in this case would not satisfy the regulation 12 definition of a rest break because it was subject to possible interruption.

The history of the litigation.

25. The litigation in this case has had a somewhat chequered history. The original claim to the Employment Tribunal was lodged over 4 years ago in June 2007. Initially the appellant claimed that he was entitled to a break under regulation 12, or alternatively under regulation 24. However, he did not pursue the regulation 12 argument before the Tribunal because it was accepted that the appellant was covered by the exception in regulation 21(b). Accordingly, the arguments below were advanced on the premise that the rights conferred by regulation 12 were inapplicable and that the source of any rights was therefore regulation 24.

26. The argument before the first Employment Tribunal took on a very different hue from that now relied upon. The parties were agreed that the only relevant provision was regulation 24(a) and that paragraph (b) was not in issue. The employers contended that they had provided equivalent compensatory rest by allowing the appellant his full rest after his shift had ended, that is during the daily rest periods available to him. Not surprisingly the Tribunal rejected that submission, holding that if possible any compensatory rest had to be taken during working time. The Tribunal re-listed the case for a hearing to determine whether the claimant had been afforded where possible an equivalent period of compensatory rest during his working time and if not, to consider what, if any, compensation was payable.

27. The employer appealed to the EAT. Although they succeeded in aspects of their appeal, they again failed in their argument that the compensatory break could be given during the rest period immediately following the completion of the shift. In the course of his judgment in the EAT, Silber J (presiding) set out the way in which tribunals ought to approach regulation 24 (para. 31):

> "When considering regulation 24, the Employment Tribunal has a two-stage approach in which it has first to be decided if the claimant's case was such that it was not "possible for objective reasons [to] grant such [an equivalent period of compensatory] rest". If the answer was in the affirmative in the sense that it was possible, the claimant would be entitled to an equivalent period of compensatory rest but if the answer was in the negative in the sense that it was not possible, then pursuant to regulation 24(b), the respondent will have to "afford the claimant such protection as may be appropriate in order to safeguard the [claimant]".

28. The EAT then formulated four issues to be considered by the Tribunal on remission. The first two essentially reflected the two stage test which the Tribunal had identified:

> (a) whenever the claimant works for more than 6 hours if it was not possible for the respondent to grant the claimant an equivalent period of uninterrupted 20 minutes compensatory leave which he can use as he pleases and which falls within his shift;
>
> (b) if it was not possible for objective reasons to grant such a period of rest how the respondent can afford the claimant such protection as may be adequate to safeguard him.

29. In fact, the first issue as originally formulated by the first EAT said "falls outside his shifts" rather than "within his shift". The EAT on the second appeal pointed out that this was not apparently what had been intended. There is no doubt that this was an error by the first EAT, as everyone accepts, and that the issue as reformulated by the second EAT - which is how we have set out the issue above - is the correct one and it is how the issue was understood by the second Employment Tribunal on remission.

30. There were two more issues also identified by the first EAT which were considered by the Employment Tribunal on remission. They both went to the assessment of compensation payable if a breach were established. However since no breach was established in either the Employment Tribunal or the EAT, the issue of compensation did not strictly arise.

31. We agree with the EAT's approach to regulation 24 as set out above. However, the EAT wrongly focused on the employer's activities when determining whether regulation 21 applied (no doubt because it does not appear to have been referred to *Gallagher* on this point). It directed the Tribunal to consider in the context of determining whether regulation 24(b) applied whether the employer could organise the work shifts so as to allow a full *Gallagher* break. For reasons we have given above, in our judgment that is a false analysis. If working arrangements can be made so as to enable the worker to carry out his duties without his permanent presence being required throughout his shift, regulation 21(b) is not engaged. That issue ought not to be considered in the context of regulation 24.

The conclusions of the Employment Tribunal on remission.

32. As to the first issue, the argument before the Tribunal was largely directed to the question whether there were objective reasons which made it not possible for a *Gallagher* break to be given during the shift. The implicit assumption was that since regulation 12 had been disapplied, this would amount to an equivalent period of compensatory rest. The Tribunal considered various possible ways in which such a rest period that might in theory have been provided. These included employing a mobile guard who could provide cover across various single manned sites when a break was necessary; twinning or pairing guards so that one would always be available when another took a break; and by the client, Orange, providing the necessary cover from its own employees.

33. The Tribunal rejected each of these, not merely on the grounds that they were unduly costly, but also because they would impose administrative and logistical difficulties

for the employers. Any of these arrangements could potentially jeopardise the employer's ability to undertake the contract which could in turn threaten the appellant's job. The Tribunal rejected in terms a submission from the appellant that the employers were in reality relying solely on financial considerations, which the Directive, in Recital 4, states is not a legitimate factor. It said this (para 41):

> "The claimant argued the reasons put forward by the respondents were all based upon cost. However, the Tribunal considered that it is safe to conclude that significant decisions made by the majority of limited companies operating in a free market economy could be and usually are ultimately quantifiable in financial terms. However, the Directive is specific that the considerations must not be "purely" financial and the Tribunal accepts the Respondent's evidence that its reasons were not solely financial. The Tribunal also confirmed that financial factors were not determinative when reaching its own conclusions."

34. The Tribunal also considered a suggestion from the appellant that he should be given time off in lieu after the shift had ended. Ironically, this submission reflected the argument unsuccessfully advanced by the employer at the first Employment Tribunal save that the appellant was seeking to be paid for the break. The Tribunal did not consider that this was an appropriate solution. It was inconsistent with the objectives of the Directive since it was not an arrangement designed to protect the health and safety of the worker concerned. Effectively it was simply buying out the employee's right.

35. In reaching its conclusion that there were objective reasons for not providing a *Gallagher* break, the Tribunal made reference a decision of the ECJ, *Adeneler v Ellinikos Organismos Galkatos* [2006] IRLR 716, where the concept of objective reasons had been discussed. That case was concerned with a different Directive, the Fixed Term Work Directive. The ECJ observed that the concept of objective reasons had to be considered in the light of the objective of the relevant legislation. Having regard to that principle, the Tribunal considered that in determining whether the equivalent period of rest was "not possible" in regulation 24, it should have regard to all the objectives of the Directive. In that context it said this (para 38):

> "… a step which provides compensatory rest for workers that is financially and/or logistically crippling for a small or medium sized employer that is neither immediately terminal to the business nor wholly impossible generally, is unlikely to be envisaged under the Directive as falling outside the exemption of being "not possible objective reasons", particularly having regard to the Recitals to the Directive".

36. Having concluded that there were objective reasons why the full *Gallagher* break could not be afforded to the appellant, the Tribunal went on to consider the second issue, namely whether the employer had complied with paragraph (b) and had afforded such protection as may be adequate to safeguard the health and safety of the

appellant. It concluded without difficulty that the employers had satisfied that test. It identified the characteristics of the arrangement in place and noted that there were times when there was in fact a complete 20 minute break without interruption. It observed that whilst it was only possible to say with hindsight that it was in fact uninterrupted, nonetheless this provided appropriate protection, particularly when the arrangement permitted any interrupted break to be resumed.

The appeal to the EAT.

37. The employee then appealed to the Employment Appeal Tribunal (The Honourable Lady Smith presiding). On this occasion the employers cross-appealed and contended for the first time that the arrangements which had been put in place, and which the Employment Tribunal had found satisfied the provisions of regulation 24(b), in fact fell within regulation 24(a) itself. This was not a possibility that had been considered by the Employment Tribunal since the case had been argued before them on the basis that this was a regulation 24(b) case once it had been established that a full *Gallagher* break was not possible. The EAT allowed this argument to be advanced and were persuaded by it. They gave their reasons as follows (para 13):

> "In a special case, such as the present one, the worker is not entitled to a "Gallagher " rest break. The employer is, however, obliged "wherever possible" to allow the worker to take "an equivalent period of compensatory rest". It is plain that this is not the same as a "Gallagher" rest break. Certainly, the objective is to provide the worker with some break from his duties but the language of equivalence and compensation shows that it is something which is not identical to a "Gallagher" break. It can denote something which makes up for the fact that the worker does not receive such a break, by providing a break that is as near in character, quality, and value to a "Gallagher" rest break as possible. The precise elements of that equivalent period of compensatory rest will obviously vary according to the facts and circumstances of the individual case. In some cases, it may be possible for the employer to provide a break that very nearly meets the "Gallagher" criteria – circumstances where the worker is technically "on call" during the 20 minute break, but is, in practice, never called on, for example. In others, it may be that less freedom is able to be afforded to the worker during his break but he does get one or it may be that no break at all can possibly be given during the shift of each cycle, but that is compensated for by the worker being given a double break of 40 minutes in the second shift he works in the cycle. There are, no doubt, many other possible scenarios.
>
> It seems to us that that approach to the interpretation of paragraph 24(a) properly reflects the aims and objects of the Working Time Directive in accordance with the obligation to interpret domestic law in conformity with the relevant Directive (see e.g.: *Adeneler & Ors v Ellinikos Organismos Galkatos* [2006] IRLR 716."

38. The EAT limited the scope of regulation 24(b) to cases where no paragraph 24(a) rest could possibly be provided during the shift. In those circumstances the employer would have to afford such protection as was appropriate to safeguard health and welfare. The EAT gave by way of example structuring the way in which the work is organised during the shift and providing health checks for workers.

39. The EAT concluded that the findings of the Tribunal properly demonstrated that it was not on the facts possible for the work to be arranged so as to allow a full *Gallagher* rest break during the shifts. Although the arrangements fell marginally short of that, because it was not known in advance whether the rest break would be interrupted, nevertheless the EAT was fully satisfied that it was an equivalent period of compensatory rest falling within regulation 24(a). The arrangements put in place met the criteria of equivalence and compensation:

> "We are readily satisfied that the rest actually afforded to the Claimant amounted to an "equivalent period of compensatory rest". He was freed of all aspects of his work apart from the need to remain on the premises (which can be a feature of a "Gallagher" rest break) and to be on call. The latter, we accept, cannot be a feature of a "Gallagher" rest break (although, interestingly, it may not be working time, depending on the circumstances). He was, in principle, allowed a 20 minute break. He was compensated for the fact that he could not know in advance whether he would be interrupted and for the risk of actual interruption by being allowed to choose when to have his break and, if interruption occurred, to start his break again. These facts amply satisfy, in our view, the requirements of equivalence and compensation."

40. The EAT went on to find that, if it was wrong about the break falling within regulation 24(a), it in any event satisfied the requirements in paragraph 24(b). In that context the EAT considered a submission from the appellant which had not, in terms, been addressed by the Employment Tribunal, namely that the arrangements could not satisfy paragraph (b) unless there has been a risk assessment under paragraph 3 of the Management of Health and Safety at Work Regulations 1999. This provision requires employers to carry out risk assessments for each of their workers. It was not disputed that such an assessment had been carried out in respect of the appellant, but the argument addressed to the EAT, and repeated before us, is that there should have been a specific assessment of the risks to health and safety resulting from the fact that the period of rest afforded to the appellant might be interrupted.

41. The EAT rejected that submission on the grounds that whilst an employer might choose to include a risk assessment of that nature, there was no obligation for him to do so under the Regulations. So it found that even if contrary to its preferred view the arrangement for a break did not fall within regulation 24(a), the Employment Tribunal had been entitled to find that it satisfied the requirements in regulation 24(b).

The grounds of appeal.

42. The grounds of appeal can usefully be analysed in three categories. First, it is submitted that for both procedural and substantive reasons the EAT was wrong to find

that the breaks afforded to this appellant fell within the terms of regulation 24(a). Second, it is alleged that the Employment Tribunal was wrong to find that there were objective factors justifying the failure to provide the appellant with his full *Gallagher* rest break. Third, so far as regulation 24(b) is concerned, the appellant submitted that the arrangements could not be justified under that provision both because this was not an exceptional case as that provision requires, and also because the arrangements put in place could not be said to have afforded appropriate health and safety protection.

43. For reasons we have already given, the submissions falling into the second category, which are designed to show that there was no good reason why the appellant should not have been given a regulation 12 break, are not material to the regulation 24 issues. They go to the question whether regulation 21 was engaged at all, and it was conceded that it did. It seems that the concession was made on the false premise that regulation 21(b) applied because the employer's activities required a permanent presence. However, we shall consider the points as if the complaint had been that regulation 21 was not engaged, and therefore regulation 12 was not disapplied, because it was not necessary for the employer to require the appellant to be on duty throughout his shift.

44. The grounds advanced in the third category do not arise at all if the EAT was correct to conclude that the arrangements fell under paragraph (a) and not paragraph (b).

45. We will now consider the various grounds in turn.

Did the breaks fall within regulation 24(a)?

46. The first point arising in the appeal is whether the EAT was entitled to conclude that these arrangements were capable of falling within regulation 24(a). Mr Gray-Jones, who represented the appellant, submitted as a preliminary point that the EAT ought not to have allowed this point to be advanced at all since it had been conceded in the Employment Tribunal that the arrangements actually put in place could only be lawful if they fell within paragraph (b). He relied upon the decision of the Court of Appeal in *Jones v Governing Body of Burdetts School* [1999] ICR 38 where Robert Walker LJ, as he then was, said this, after referring to a number of authorities (p.44A):

> "…These authorities show that, although the appeal tribunal has a discretion to allow a new point of law to be raised or a conceded point to be re-opened, the discretion should be exercised only in exceptional circumstances, especially if the result would be to open up fresh issues of fact which, because the point was not in issue, were not sufficiently investigated before the industrial tribunal."

47. In granting permission for the point to be argued, the EAT noted that it was a point of some general significance, that there was no prejudice to the appellant (and in that context it needs to be noted that no new findings of fact were required), and that it could not have been argued before the Employment Tribunal since that body was in any event bound by the terms of the remission from the EAT.

48. Whether or not it was appropriate to allow this new point to be argued was a matter for the EAT. It cannot in our judgment seriously be said that this was an improper exercise of the EAT's discretion. Indeed, in our view it was plainly sensible to allow

the point to be argued, essentially for the reasons which the EAT gave. We therefore reject this ground.

49. The second and substantive point was that the EAT erred in law in finding that the arrangement fell within regulation 24(a). Mr Gray-Jones submitted that any period of compensatory rest had to be a "rest period" as defined in the Directive and therefore had to be outside working time. Since the appellant had to remain in the workplace and was on call, this break was taken within working time as defined in the Directive and therefore could not as a matter of law amount to "compensatory rest".

50. Mr Glyn disputed that it was necessary for a rest break to be outside working hours under the Directive. He conceded that this was true of a *Gallagher* rest break but argued that it was not a necessary requirement for all such breaks. For example, he suggested that collectively agreed arrangements could provide for breaks in working time.

51. We do not accept that a rest break can occur within working hours. Under the Directive a rest period is defined as period which is not working time, and we see no basis for saying that a rest break is somehow different to other rest periods, as Mr Glyn contends. Moreover, as we read his judgment, that was the view expressed by Peter Gibson LJ in the *Gallagher* case. Accordingly, if the period of compensatory rest has itself to be a rest break as defined before it can qualify as a relevant rest period in regulation 24(a), the break afforded to this appellant did not satisfy that requirement.

52. However, the premise of the second EAT analysis was that an equivalent period of compensatory rest need not be a rest break as defined. The EAT held that there may be a period of rest within the meaning of regulation 24(a) - in the sense at least of a period when the appellant is discharged from his obligation to perform work unless actively called upon to do so - notwithstanding that it falls within the concept of working hours. That fact does not of itself preclude it from being treated as a period of compensatory rest.

53. Was that premise correct? We confess that we have not found this an entirely easy point. The natural meaning of "equivalent period of compensatory leave" is that a break of the same length and the same nature should be provided, although at some alternative time, to make up for the right lost. But adopting that construction could frustrate the health and safety objective which the legislation is designed to achieve. Take this case: in practice the period of rest, in the sense of freedom from work activities, could be very significant since the break starts again if the rest is subject to interruption. This is far preferable to an arrangement whereby the appellant were given an additional *Gallagher* break on a later shift, even if that were otherwise possible. Yet if the arrangements fall under paragraph (b) rather than (a), the employer would be obliged to provide the break in the later shift unless there were objective reasons for not doing so. That would be a curious result which in our view cannot have been intended. In our view, therefore, the EAT was right in its analysis.

54. We would accept that if a period is properly to be described as an equivalent period of compensatory rest, it must have the characteristics of a rest in the sense of a break from work. Furthermore, it must so far as possible ensure that the period which is free from work is at least 20 minutes. If the break does not display those characteristics

then we do not think it would meet the criteria of equivalence and compensation. In this case the arrangements plainly did meet those criteria, as the EAT found. Indeed, since the rest break begins again following any interruption, many would say that this was more beneficial than a regulation 12 *Gallagher* break would be.

55. We would add that we do not think that it is likely to matter in practical terms which paragraph is applicable, at least in circumstances where the employer is unable to offer a *Gallagher* rest break but adopts arrangements which come as close as possible to replicating that break. Even if such an arrangement does not fall within paragraph (a), we would have thought that it is bound to fall within paragraph (b).

Could full Gallagher breaks have been afforded to the appellant?

56. We turn to the second ground which, as we have said, really embraces submissions why the Employment Tribunal ought to have found that regulation 21(b) was not engaged at all. Mr Gray-Jones advances this aspect of his case on a number of fronts. Because it was argued in the context of regulation 24 he focused on the issue whether there were objective reasons why a full *Gallagher* break could not have been provided, but we would accept that in principle this is what the employer would have to show in order to demonstrate that regulation 21 applied.

57. There were three interrelated aspects to this ground. First, it is said that notwithstanding that the Tribunal stated in terms that it was not influenced solely by economic factors, nonetheless that was in substance the reason why it was considered that it was impossible for the employers to provide appropriate cover. If the employers had been prepared to pay for another security guard, the full rest break could have been provided.

58. Second, the Tribunal was wrong to have regard to the meaning of objective grounds as set out by the ECJ in *Adeneler*, because that case was concerned with fixed term contracts whereas this case concerned a different Directive whose object was to protect health and safety.

59. Third, it was alleged that the Tribunal ought to have particularised in more detail precisely why it was so difficult for the employers to arrange matters so as to ensure an appropriate rest break. This was in substance a reasons challenge. It was suggested, for example, that the tribunal ought not to have found in the employer's favour without evidence as to the costs of providing extra cover.

60. We would reject each of these grounds. As to the first, this was not a case where the only reason for failing to provide the requisite cover was to maximise profits. Any significant additional cost could have undermined the ability of the employers to secure the contract at all and would have threatened the jobs of the security officers or their pay. As the Tribunal pointed out, it will always be possible to provide the requisite rest breaks if money is no object. However, the recitals emphasise that imposing administrative, financial and legal constraints may hold back the creation and development of small and medium-sized undertakings. In our judgment, the Tribunal was fully alive to that consideration, and properly allowed it to enter the equation whether the reasons were objectively justified or not. The appellant's argument ignores it. In addition, the Tribunal found in terms that there were logistical and administrative problems which would arise if additional staff had to be employed.

That is a finding of fact, sustainable on the evidence, and there is no basis for going behind it.

61. We do not accept either that the Tribunal erred in citing, and placing some reliance on, the *Adeneler* decision. This is one of the few ECJ cases where the concept of objective grounds found in various EU Directives has been discussed. The Tribunal recognised in terms that the meaning of objective reasons had to be informed by the objective pursued by the Directive and by the context of Article 17(2), and it specifically had regard to the recitals of the Directive when assessing its objective. It did not make the error attributed to it of simply lifting the language in *Adelener* without any consideration of the very different statutory context.

62. In our judgment, the reasons challenge also fails. The Tribunal explained fully and cogently why it reached the decision it did. It was not necessary for it to have extensive and detailed information about the costs of employing extra staff. It was obvious that this would inevitably add considerably to the overall costs of the contract and in a competitive market would be bound to jeopardise the employer's ability to perform it.

63. It follows that in our judgment even if these arguments had been advanced in the context of a submission that the Employment Tribunal ought to have found that regulation 21(b) was not engaged, they would have failed.

Was the Tribunal entitled to find that the criteria in regulation 24(b) were satisfied?

64. As we have said, this ground is immaterial given that the arrangements in fact fall under regulation 24(a). However, we will briefly deal with them in case we are wrong and the arrangements fall under paragraph (b).

65. The appellant raises two issues. First, and fundamentally, he submits that it is only if there are exceptional circumstances that paragraph (b) arises. These are not exceptional circumstances since there will frequently be single manned security arrangements. Therefore it is immaterial whether there are objective factors justifying the failure to provide compensatory rest. A condition precedent to the application of paragraph (b) has not been met.

66. We reject that submission. In our view paragraph (b) merely requires that there should be objective reasons why an equivalent period of compensatory rest cannot be provided. Cases where the employer can provide neither a *Gallagher* rest break nor a compensatory alternative will perforce be exceptional. The reference to exceptional circumstances, as the Tribunal observed, confirms the fact that the derogation is narrow and should be restrictively applied. But we do not accept that the provision sets two hurdles of exceptional circumstances and objective reasons; the presence of the latter establishes the former.

67. The second ground under this head repeats the submission, rejected by the EAT, that the arrangements could not properly be considered to be appropriate within the meaning of regulation 24(b) without the employers first conducting a specific health and safety assessment as to the specific risks arising from the fact that there was the potential for the rest break to be interrupted.

68. Like the EAT, we are wholly unpersuaded by this submission. There is nothing in the Directive which requires this. Moreover, it is fanciful to think that there will be significant additional health risks resulting from the fact that the break is not guaranteed to be uninterrupted. This is particularly so where on the arrangement adopted the appellant may end up with a break which is in fact significantly longer than the twenty minutes typically allowed under regulation 12. In our judgment, the Tribunal was plainly entitled to conclude that the breaks provided gave appropriate protection even without any risk assessment of the kind suggested.

Disposal

69. For these various reasons, we would dismiss this appeal.

27.2.70 and Mr Land's acceptance dated 2 March. Under that contract Mr Land was engaged as a whole-time fireman at Morley Fire Station as from 23 March, 1970. Some two and a half years later he was offered, and accepted, the obligations of a retained fireman at Batley Fire Station. His obligation to act as a retained fireman related only to his off-duty periods. It related only to his free time when he had no duties whatever to perform at Morley. It may be noted – although it has no direct relevance – that this arrangement was flexible to the extent that Mr Land could notify the officer in charge of Batley if he should cease to be available for duty in any off-duty period, and he was to inform the officer in charge when he again became available. I shall, again for simplicity, ignore the fact that later on Batley became Mr Land's full-time station and Morley his off-duty station.

28 It has been expressed as common ground between the parties in this court that the Morley engagement and the Batley engagement constituted a single contract; and that, I think, was so found by the Tribunal. In a sense it is true. It was obviously not intended, for instance, that Mr Land should be entitled to give notice to terminate his full-time engagement at Morley while continuing his off-duty engagement at Batley. But does the reverse apply?

29 The case was argued in the lower courts and has been argued in this court on the basis that Mr Land was not entitled to give notice terminating his off-duty engagement at Batley without at the same time throwing up his full-time engagement at Morley. If he were so entitled, quite clearly the county council would have the reciprocal right to terminate his off-duty engagement at Batley without interfering with his full-time engagement at Morley.

30 It is that underlying assumption which I think needs to be critically examined. Although it may be true to say that the Morley engagement and the Batley engagement were comprised in a single contract of employment, the Batley offer and acceptance made in 1972 were in no sense whatever a variation of the Morley contract constituted by the letters written in 1970. The Batley engagement left the Morley engagement wholly unchanged. Mr Land's hours of work, his pay, his duty, and all his other conditions of service at Morley remained precisely the same, unaltered in any respect. The Batley engagement did not impinge in any way whatever upon the Morley engagement. His Morley contract was not varied in any real sense.

31 If an employee voluntarily accepts duties in his spare time for his employer at a different place of work and the arrangement says nothing about the duration of his extra duty, is it to be said that the employee is unable to withdraw from this voluntary spare-time work at a different location without giving up his whole-time job with which, *ex hypothesi*, his spare-time job has no connection? Take this case: suppose that Mr Land and his neighbour entered into full-time employment as firemen at Morley. Suppose that each was asked whether he would be willing to work in his spare time at Batley. Suppose that Mr Land accepted, but his neighbour declined. Suppose that Mr Land worked in his spare time at Batley for five years. Then suppose that his circumstances changed. Perhaps his wife becomes an invalid and he needs his spare time to care for her. Is it to be said that he has no legal right under his contract to give up his spare-time work at Batley unless he also gives notice to terminate his work at Morley? Why should he be penalised in this way and be placed in a worse position than his neighbour just because he volunteered to work
221 elsewhere in his spare time? I would find such a legal
224 result fantastic. I cannot believe it to be correct. I would not hesitate to imply a provision in the Batley engagement to the effect that the spare-time work, voluntarily assumed, can be given up on reasonable notice. If that is correct for the fireman, it must also be correct for the employer. There can be no question in the present case that the notice given was not reasonable in relation to the spare-time work.

32 I appreciate that this point was not taken in the court below, if I have understood the position correctly. But I decline to deal with a case on a false premise, whatever concessions or assumptions may have been made by counsel in the course of arguing the case below, if I am satisfied that the premise is false. The approach which I think is the right one seems to me to be logical and to lead to a wholly equitable result with which no one, having appreciated the point, could possibly quarrel. On that basis, it is unnecessary for me to express one view on the questions debated before us concerning the incorporation of collective agreements in individual contracts, repudiatory breaches of contract, and the like. No question of compensation for unfair dismissal arises because only the supplemental part of the contract of employment has been determined. I would hold that there has been no breach of contract on the part of the council and no termination of the applicant's employment, and I would deal with the appeal on that basis.

33 SIR GEORGE BAKER: I agree, and there is nothing I can usefully add.

34 Order: Appeal allowed on issue of dismissal. No order as to costs save legal aid taxation of Mr Land's costs.

BRITISH LEYLAND UK LTD (appellants) v. SWIFT (respondent)

irlr **100** *Contracts of employment*
134 *Duty of mutual trust and confidence*
200 *Unfair dismissal*
234.61 *Reason for dismissal – conduct – alleged or proven criminal acts – theft*
253.3 *Sufficiency of reason for dismissal – reasonableness in the circumstances: conduct and capability – penalty related to offence*
253.53 *Sufficiency of reason for dismissal – reasonableness in the circumstances: conduct and capability – summary dismissal – dishonesty*
253.54 *Sufficiency of reason for dismissal – reasonableness in the circumstances: conduct and capability – summary dismissal – theft*

Employment Protection (Consolidation) Act 1978 section: 57(3)

The facts:
Mr Swift was dismissed after 18 years' service with the appellants after a road fund licence belonging to a company Land Rover was found on Mr Swift's own vehicle. When asked by the police about the matter, Mr Swift said that he had found the tax disc outside the factory. He was charged with theft of a road fund licence or alternatively with fraudulent use of a road fund licence. Before the Magistrates he pleaded not guilty to theft but guilty to fraudulently using the licence. He was convicted and fined a total of £30.

When Mr Swift's conviction came to the knowledge of the company an investigation was carried out. Mr Swift then maintained that he had lent his Land Rover to a friend on the understanding that the friend would have the vehicle taxed and tested before he used it. When the vehicle was returned to him, the tax disc was in position and he had no idea that it was false. Following the investigation, Mr Swift was dismissed. He claimed that this dismissal was unfair.

An Industrial Tribunal held that "there was abundant evidence available on which any reasonable employer would have come to the conclusion that the applicant had been guilty of gross misconduct". However, they went on to find that the dismissal was unfair. According to the Tribunal, given Mr Swift's previous good work record, dismissal was too severe a penalty for what they saw as a relatively minor offence which had already been

dealt with by the Magistrates. And, they pointed out, Mr Swift was not employed in a fiduciary capacity. Compensation was reduced by 75% on the grounds of contributory fault.

This decision was upheld on appeal on a majority decision by the Employment Appeal Tribunal.

The Court of Appeal (The Master of the Rolls [Lord Denning], Lord Justice Ackner, Lord Justice Griffiths) on 17.10.80 allowed the appeal and substituted a finding that the dismissal was fair.

The Court of Appeal held:

irlr 253.3 253.53 253.54 **The Industrial Tribunal had erred in holding that the appellants had acted unreasonably in dismissing the respondent employee after he had been found guilty in the Magistrates Court of fraudulently using a road fund licence belonging to a company vehicle on his own vehicle.**

The Industrial Tribunal had wrongly applied a test of whether a reasonable employer would have considered that a lesser penalty than dismissal was appropriate. The correct test is was it reasonable of the employer to dismiss the employee? If no reasonable employer would have dismissed him, then the dismissal is unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal is fair. There is a band of reasonableness within which one employer might reasonably dismiss the employee whilst another would quite reasonably keep him on. It depends entirely on the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose. If it was reasonable to dismiss, the dismissal must be upheld as fair even though some other employers might not have dismissed.

The Industrial Tribunal had also erred in failing to take into account the fact that the respondent when challenged had persistently lied about the incident. The conduct of an employee after an offence was discovered is a relevant consideration for an employer to take into account in deciding whether it is reasonable to dismiss. If an employee persistently lies about the matter, that is a breach of trust which would influence any reasonable employer to dismiss him.

In the present case, therefore, it could not be said that no reasonable employer would have dismissed the respondent who was not only guilty of an act of gross misconduct but who had persistently put forward a wholly untruthful account of the incident. The appeal would therefore be allowed and the dismissal held fair.

per Lord Denning MR:

The inference in the Industrial Tribunal's decision that the employee had paid the penalty for the offence after being fined in the Magistrates Court and ought not to be penalised for it any further indicated a wrong approach. If a man is convicted and fined, it is a ground for dismissing him, not for keeping him on.

Appearances:
For the Appellants:
Mr P NAUGHTEN, instructed by R P A Coles
For the Respondent:
Mr D GRANT, instructed by Messrs Collyer Bristow, London agents for Messrs Band Hatton & Co

THE MASTER OF THE ROLLS: This is a troublesome case. Mr Swift had been employed by British Leyland at their works in Coventry for some 18 years. In October 1977 he was working near a car park where there was a Land Rover. It was the company's vehicle. Its registration number was GRW 110L. In October 1977 the tax disc (that is, the road fund licence) was found to be missing from that Land Rover. The company reported it as missing: and got a duplicate from Swansea. 1

About six or seven months later, in April or May 1978, Mr Swift was driving a Land Rover. Something was wrong with the tail light. The police stopped his Land Rover: and asked him to show his road fund licence. Lo and behold – it was the very same tax disc which someone had taken from the works in October 1977. The police asked Mr Swift about it. He said that he had 'found' it outside the factory. He was then charged with the theft of a road fund licence or alternatively with the fraudulent use of a road licence. The matter came before the magistrates. He pleaded not guilty to theft: but guilty of fraudulent use of the licence. He was fined £15 for fraudulent use; £10 for having no excise licence; and £5 for having no test certificate. 2

Mr Swift's conviction came to the knowledge of the company. The company held some inquiries. 3

Firstly, there was an inquiry by the machine shop superintendent. Before him Mr Swift told a different story from that which he told the police. He said that he had lent his Land Rover to a friend on the understanding that his friend would have it taxed and tested before using it. When the vehicle was returned to him, the tax disc was in position and he had no idea that it was false. So he blamed his friend. The machine shop superintendent was not satisfied with Mr Swift's explanation. He suspended him without pay pending further inquiries. But he told Mr Swift that he had a right of appeal. 4

Secondly, there was an internal appeal before the area manager. Both the management and the union were represented. Mr Swift told the same story about a friend. He said that the friend was named Rawlins. Mr Rawlins was not present on that occasion. Another hearing was later held when he was present. After listening to all the evidence, the area manager dismissed Mr Swift's appeal. As a result, he was dismissed. On a further inquiry, the dismissal was upheld. 5

Mr Swift took the case before the Industrial Tribunal. He complained that he had been unfairly dismissed. In answer, the company said: 6

> 'It was discovered that the applicant had been convicted for fraudulent use of a road fund licence belonging to the company. Following an investigation into the matter, the company decided that it was reasonable in all the circumstances to treat the applicant's conduct as sufficient reason for his dismissal. This decision was upheld following an appeal hearing.'

The Industrial Tribunal had the circumstances before them. They inquired very closely into the matter. They said: 7

> 'It is our unanimous view that there was abundant evidence available on which any reasonable employer would have come to the conclusion that the applicant' – Mr Swift – 'had been guilty of gross misconduct.'

They added later:

> '. . . there is in our view abundant evidence as already stated on which the employers reasonably formed the view that the applicant had been guilty of gross dishonesty.'

8 Strangely enough, the Industrial Tribunal went on to find that there had been an unfair dismissal. I will read the whole of paragraph 12 in which the Tribunal set out their reasons:

> 'The employers have to satisfy the additional onus under para.6(8) and we are of the view that they failed to do so. The applicant is a man of long service with a good work record. We were told that there was only one warning recorded in relation to something quite different from this matter. It is conceded by the respondents that that played no part in their decision to dismiss. It is said on their behalf that the reason for the dismissal is that the fundamental confidence between employer and employee has been destroyed. The offence was a relatively minor one for which he has already been dealt with in the Magistrates Courts so far as the criminal aspect is concerned. Mr Swift is not employed in a fiduciary capacity. There is no evidence that they have suffered in any way as a result of this lapse in the interval between the conviction and it being brought to their notice. The penalty should obviously be related to the offence and we consider that the employers have over-reacted. They have chosen the ultimate penalty of dismissal when a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate. Therefore we find that the dismissal was unfair and the application succeeds.'

9 But the Industrial Tribunal did say that Mr Swift was three-quarters to blame. So they would reduce the compensation. Nevertheless they found that it was an unfair dismissal.

10 There was an appeal to the Employment Appeal Tribunal. They by a majority of two to one affirmed that decision. Now there is an appeal to this court.

11 The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said: '. . . a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate'. I do not think that that is 253.3 the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

12 But there is a further point. It is whether the Industrial Tribunal took into account all relevant considerations. It seems to me that they failed to take into account the conduct of Mr Swift after the offence was discovered. He did not come forward and say, 'I am sorry; I made a mistake. I ought not to have done it. It will not do anything of the kind again'. He did not even tell the same story he told to the police officer. He put forward a 'cock and bull' story about his having lent his Land Rover to another man: and the other man had got the tax disc: and it was the other man's fault: and so forth. As to that, the Industrial Tribunal were quite outspoken. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. So there it is. Mr Swift did not 'come clean' when he was found out. He put forward a wholly untruthful account. That seems to me to be a most relevant consideration for 253.53 the employers to take into account in deciding whether it 253.54 was reasonable to dismiss him or not. But there is not a word about it in paragraph 12 when they set out their reasons. On the contrary, the offence was mentioned as being 'a relatively minor one'. They refer to it almost as if he had paid the penalty and ought not to be penalised for it any more. That was the wrong approach. If a man is convicted and fined, it is a ground for dismissing him, not for keeping him on.

13 The Employment Appeal Tribunal were very troubled about the case. They said:

> 'We have thought, all of us, deeply, carefully and long over this case, which must come very near the borderline. Had we been the Industrial Tribunal who had to exercise the function which it exercised in this case, it seems highly likely that we would have decided the case in the opposite sense. One of our number is wholly convinced by the reasoing which is put forward on behalf of the employers, that this is a perverse decision; that an employer, in particular a motor manufacturer, faced with these circumstances, must, in view of the finding of gross misconduct or gross dishonesty, have had available to him, while acting reasonably, at any rate an available option of dismissal. The other two of us, while far from being convinced by the reasoning of the Tribunal, have not found it possible to come to the conclusion that the Tribunal acted perversely . . .'

14 Now it comes to us. It is my opinion that the Industrial Tribunal failed to take into account the conduct of Mr Swift when he was tackled with this offence. That is a very relevant consideration, which would influence any reasonable employer. I am not prepared to say that no reasonable employer would have dismissed him in the circumstances. On the contrary, it seems to me that many a reasonable employer in the circumstances would have thought it right to dismiss him.

15 I would therefore allow the appeal and hold that the dismissal was fair and not unfair.

16 LORD JUSTICE ACKNER: Where an employee is guilty of gross dishonesty, as the respondent was so held to have been, there is generally speaking available to the employer a number of options which he can reasonably take. It depends entirely on the circumstances of the case whether dismissal is one of the penalties which a reasonable employer would impose.

17 As has been frequently said in these cases, there may well be circumstances in which reasonable employers might react differently. An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve 253.3 dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case.

18 As my Lord the Master of the Rolls has pointed out, the basis of the plea by the respondent before the Magistrates' Court to the fraudulent use of the road fund licence was that he had found that licence and had merely put it on his vehicle. But when the question of his future employment came to be considered, an entirely new story was provided. He said that he had been approached by a friend, who at that time was employed by the company, for the loan of his Land Rover, which was untaxed and without an MOT certificate. He agreed to lend it to this person on the condition that the latter would have it taxed and tested before it was used. When the vehicle was returned to him, the tax disc was in position, and he had no idea that it was false. That would have been, of course, a complete defence in the Magistrates' Court, but he chose not to tell it.

19 The employers concluded that there was a chain of circumstances which were too incredible to believe. Firstly, Mr Rawlins just happened to find a tax disc which happened to be appropriate for a Land Rover; secondly, the tax happened to be valid when he needed to borrow Mr Swift's Land Rover; thirdly, Mr Swift happened not to notice that the tax ran out in April, whereas if Mr Rawlins had taxed the vehicle, as suggested, the tax would not have expired until at least the end of June; fourthly, that

after Mr Swift had helped Mr Rawlins by lending him his Land Rover, it would be highly unlikely that he would cover up for him and face a possible sentence of imprisonment for what is an offence of some seriousness; fifthly, that he made a false statement under caution to the police; and, lastly, the coincidence that the company Land Rover was usually parked very near where Mr Swift worked.

20 As a result of considering the material before it, the Tribunal said that it was their unanimous view that there was abundant evidence on which any reasonable employer would have come to the conclusion that the applicant had been guilty of gross misconduct. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. They said that in their view there was abundant evidence on which the employers reasonably formed the view that the applicant had been guilty of gross dishonesty.

21 What then accounts for this surprising decision – to put it bluntly – that no reasonable employer would have dismissed a person not only guilty of gross dishonesty, but a person who persistently and unrepentently sought to lie his way out of that offence? The explanation is to be found in one paragraph, paragraph 12, where the Tribunal say:

> 'The offence was a relatively minor one for which he has already been dealt with in the Magistrates Courts so far as the criminal aspect is concerned. Mr Swift is not employed in a fiduciary capacity. There is no evidence that they have suffered in any way as a result of this lapse in the interval between the conviction and it being brought to their notice. The penalty should obviously be related to the offence and we consider that the employers have over-reacted.'

22 It seems to me quite clear that in justifying their surprising conclusion, to which I have referred, they have confined their attention to the offence, and they have not done that wholly accurately; because the offence, which they say was dealt with by the magistrates, was an offence based upon an assertion of fact which neither the employers nor the Tribunal accepted as being correct. He knew that it was the company's disc, and that was not put before the magistrates. But what is much more important is that they leave out of account his subsequent behaviour. The apparent justification for leaving that out seems to be found in the phrase, 'Mr Swift is not employed in a fiduciary capacity'. But it is a truism that trust is one of the important foundations of the relationship between master and servant; and, in my judgment, to have confined their attention to the offence, and not to his conduct subsequent to the offence, was a misdirection. It is clear that the Tribunal itself thought that the matter was close to the borderline because they concluded that the applicant was largely responsible for his own downfall, and that was why they reduced his compensation by 75%. If they had taken into account the subsequent conduct, I feel sure they would have reached another conclusion – a conclusion that a reasonable employer had at least the option to dismiss an employee in these circumstances, if the employer were so minded.

253.53 253.54

23 I also agree that the appeal should be allowed.

24 LORD JUSTICE GRIFFITHS: There have been a number of reported decisions of this court, of the Court of Session, of the Employment Appeal Tribunal and of Industrial Tribunals in which it has been held that, where employees have stolen from their employers, their subsequent dismissal was not unfair. I find nothing surprising in that. But here we have a case in which a man is dismissed for gross dishonesty because his employers reasonably believe that he either stole from them or, alternatively, he used their property knowing that it had been stolen; and, when challenged about it, he concocted and persisted in a lying explanation. Yet it is held by the Industrial Tribunal that his dismissal is unfair. This I do find surprising.

25 The Employment Appeal Tribunal also found that it was surprising. Two of their members thought it highly likely that they would have considered that the employers had not acted unfairly. One of their members was convinced that the employers had not acted unfairly. Yet the Employment Appeal Tribunal felt powerless to intervene because they considered that they could not go so far as to say that the finding of the Industrial Tribunal was perverse.

26 Finding that a Tribunal is perverse only arises when they have arrived at a conclusion having considered all relevant factors and applied their minds properly; and, standing back from it, one can say, 'That is an utterly unreasonable conclusion'. That is a very strong finding.

27 Unwilling to think that an Industrial Tribunal would be perverse, I ask myself, how did they come to this rather astonishing conclusion? For myself, I agree, for the reasons given by my Lord the Master of the Rolls and Lord Justice Ackner, that the answer is to be found in the fact that, when they came to consider the fairness or otherwise of the dismissal, they appear to have concentrated exclusively on the mitigating factors affecting the employee, and entirely disregarded the very serious breakdown in trust which must have arisen from this employee persisting in a lying explanation of his conduct.

253.53 253.54

28 Accordingly I agree that this Industrial Tribunal did not direct its mind to all the matters it should have taken into account; and I am convinced that, had they had those factors in mind, they could not have concluded that an employer who had the option of dismissal open to him acted unfairly in the circumstances of this case. Accordingly I too think that this appeal should be allowed.

29 Order: Appeal allowed. No order as to costs. Cross-appeal dismissed.

A Court of Appeal

Gallagher and others *v* Alpha Catering Services Ltd (trading as Alpha Flight Services)

[2004] EWCA Civ 1559

B 2004 Nov 8 Peter Gibson, Buxton and Jacob LJJ

Employment — Working time provisions — Excluded sectors — Activities connected with provision of meals to aircraft between flights — Whether involving "need for continuity of service" — Whether routine increase in activity "surge of activity" — Whether rest break provision excluded — Whether period when employees not doing work but at employer's disposal "rest break" — Working
C *Time Regulations 1998 (SI 1998/1833), regs 12(1)(3), 21(c)(d)*

The applicants were employed by the respondent employer in delivering meals and other necessaries to, and removing catering equipment from, aircraft. Their working time included periods of "down time", when those with no immediate duties were at the employer's disposal, waiting to resume work if required. The applicants complained to an employment tribunal that the employer had unlawfully
D denied them rest breaks to which they were entitled under regulation 12(1) of the Working Time Regulations 1998[1]. At a preliminary hearing the tribunal ruled that, because of time pressures and consequential financial penalties on the employer if an aircraft was delayed, the applicants' duties involved the need for "continuity of service" and they were therefore deprived of the protection of regulation 12(1) by regulation 21(c); but that a routine increase or decrease of activity occurring naturally in the daily or weekly cycle was not a "surge of activity" within the
E meaning of regulation 21(d) and so did not exclude the protection of regulation 12(1); and that down time could not amount to a "rest break" within the meaning of regulation 12(3). The Employment Appeal Tribunal allowed an appeal by the applicants against the finding of continuity of service and dismissed a cross-appeal by the employer against the other findings.

On the employer's appeal and application for permission to appeal—

Held, (1) dismissing the appeal, that the focus in regulation 21 of the Working
F Time Regulations 1998 was on the activities of the worker, rather than the employer, and the evidence did not establish that the activities of the applicants, as distinct from those of their employer, involved "the need for continuity of service" within the meaning of regulation 21(c); and that, therefore, regulation 21(c) did not exclude the applicants' right to rest breaks under regulation 12(1) (post, paras 26, 33, 37, 40, 53, 54).

(2) Refusing permission to appeal in relation to regulation 21(d), that a "surge of
G activity" within the meaning of regulation 21(d) only occurred when there was an exceptional level of activity, beyond the fluctuation experienced within the working day and working week, and the evidence had not disclosed such a surge (post, paras 45, 53, 54).

(3) Refusing permission to appeal in relation to "down time", that a rest break was an uninterrupted period of at least 20 minutes which was neither a rest period nor working time and which the worker could use as he pleased, and a period of
H down time could not retrospectively become a "rest break" for the purposes of regulation 12(1) only because it could be seen after it was over that it was an uninterrupted period of at least 20 minutes (post, paras 50, 53, 54).

[1] Working Time Regulations 1998, reg 12: see post, para 11.
Reg 21: see post, paras 13, 14.

Sindicato Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana (Case C-303/98) [2001] ICR 1116, ECJ considered.

Decision of the Employment Appeal Tribunal [2004] ICR 1489 affirmed.

The following cases are referred to in the judgment of Peter Gibson LJ:

Bowden v Tuffnells Parcels Express Ltd (Case C-133/00) [2001] ECR I-7031, ECJ

Landeshaupstadt Kiel v Jaeger (Case C-151/02) [2004] ICR 1528, ECJ

Sindicato Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana (Case C-303/98) [2001] ICR 1116; [2001] All ER (EC) 609, ECJ

No additional cases were cited in argument.

APPEAL from the Employment Appeal Tribunal

By an order of 17 March 2004 the Employment Appeal Tribunal (Judge McMullen QC, Ms K Bilgan and Miss D Whittingham) allowed an appeal by the applicants, Mr J P Gallagher and 27 other employees of Alpha Catering Services Ltd (trading as Alpha Flight Services), from a decision of an employment tribunal, sitting at London South, that the applicants were excluded by regulation 21(c) of the Working Time Regulations 1998 from the right to rest breaks under regulation 12(1) of the Regulations.

The employer appealed and also applied for permission to appeal on other issues also decided in favour of the employees.

The facts are stated in the judgment of Peter Gibson LJ.

Peter Oldham for the employer.

Andrew Hogarth QC for the applicant employees.

PETER GIBSON LJ

1 This is an appeal by Alpha Catering Services Ltd, trading as Alpha Flight Services ("Alpha"), from the order made by the Employment Appeal Tribunal on 17 March 2004 [2004] ICR 1489 whereby it allowed the appeal of Mr J P Gallagher and 27 other employees of Alpha (together "the employees") from the decision of an employment tribunal sitting at London South. By that decision, sent to the parties on 7 October 2003, the employment tribunal determined that the employees were excluded by regulation 21(c) of the Working Time Regulations 1998 from the right under regulation 12 to rest breaks. Accordingly, the employment tribunal dismissed the employees' originating applications. On certain other points in dispute the employment tribunal decided in favour of the employees and the Employment Appeal Tribunal upheld the employment tribunal's decision on those points.

2 Alpha applied for permission to appeal against the appeal tribunal's decision on the regulation 21(c) point and the appeal tribunal granted such permission. Alpha sought but was refused permission to appeal against the appeal tribunal's affirmation of the employment tribunal's decision on the other points.

3 By its appellant's notice Alpha sought such permission from this court. At the hearing of the appeal we heard Alpha's application for permission to appeal on three points. I will deal with that application after I consider Alpha's application on the regulation 21(c) point.

A *The Working Time Regulations 1998*

4 The Regulations are derived from Council Directive 93/104/EC of 23 November 1993 (OJ 1993 L307, p 18), commonly known as the Working Time Directive. The Directive lays down, as is stated in article 1(1), minimum safety and health requirements for the organisation of working time. Article 1(2) provides that the Directive applies to minimum periods of
B daily rest, weekly rest and annual leave, to breaks and maximum weekly working time. By article 2(1) various definitions are given. Relevant to this appeal are the definitions of "working time" as meaning "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national law and/or practice" and "rest period" as meaning "any period which is not working time".

5 Article 3 provides for daily rest. Article 4 relates to breaks and is in
C this form:

> "Member states shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national
D legislation."

6 Article 5 relates to a weekly rest period, article 6 to maximum weekly working time and article 7 to annual leave.

7 The Directive provides by article 15 that member states are entitled to apply or introduce provisions more favourable to the protection of the safety and health of workers than is provided by the Directive.

E **8** Certain derogations are permitted in article 17(2):

> "Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to
F grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection . . ."

9 Paragraph 2.1 then proceeds, so far as relevant, in this way: "from [article 4] . . . (c) in the case of activities involving the need for continuity of service or production, particularly"—I break off at this point to say that there then follow eight numbered sub-paragraphs, of which six specify
G activities or industries and two specify particular types of workers. Sub-paragraph (ii) refers to "dock or airport workers". Sub-paragraph (viii) refers to "workers concerned with the carriage of passengers on regular urban transport services". A further derogation from article 4 is permitted by article 17.2.1(d): "where there is a foreseeable surge of activity, particularly in—(i) agriculture; (ii) tourism; (iii) postal services".

10 The 1998 Regulations were intended to implement Directive 93/104.
H For the most part they follow the language of the Directive, although there are some, in my view minor, differences. Regulation 2 contains definitions of "rest period" and "working time" which accord with the Directive's definitions. As in the Directive, there is no definition in the Regulations of a break or a rest break.

11 Regulation 12(1) sets out the basic entitlement of a worker to a rest break where his daily working time is more than six hours. By paragraph (2) [as substituted by the Working Time (Amendment) Regulations 2003 (SI 2003/3128)]:

> "The details of the rest break to which a worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement."

There is no relevant collective agreement or workforce agreement. By paragraph (3):

> "Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one."

The employment tribunal found that the employees had no workstation.

12 Regulation 18 provides for regulation 12(1) not to apply, inter alia, to certain sectors of activity, including air transport, or to the activities of doctors in training.

13 Derogations from regulation 12(1) include the following in regulation 21 (headed "Other special cases"). By regulation 21(c), subject to regulation 24, regulation 12(1) does not apply in relation to a worker "where the worker's activities involve the need for continuity of service or production, as may be the case in relation to— . . . (ii) work at docks or airports".

14 By regulation 21(d), subject again to regulation 24, regulation 12(1) does not apply in relation to a worker "where there is a foreseeable surge of activity, as may be the case in relation to—(i) agriculture; (ii) tourism; and (iii) postal services".

15 Regulation 24 entitles a worker to compensatory rest in these terms:

> "Where the application of any provision of these Regulations is excluded by regulation 21 . . . and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break—(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety."

The facts

16 Alpha is a large company in the airline catering business. A substantial part of its work consists of the delivery to and loading onto aircraft of airline meals, drinks and sundry items, and what is known as the "de-catering" of aircraft which have arrived, that is to say the unloading of catering material from such aircraft.

17 Alpha services airlines which use Gatwick Airport. It has premises near to the airport. There food is prepared and packed, and drinks and other items stored. Among its 400 employees at Gatwick are those in the service

delivery department, numbering between 150 and 170 persons. They have duties connected with the transportation of food and other items to and from the airport. They include drivers, designated FEH1s; loaders, FEH2s; and service team representatives, STRs. The applicant employees are FEH1s or FEH2s or STRs.

18 The employment tribunal made the following findings of fact at para 6.

"(4) FEH1s and FEH2s work together on shifts as teams of two. Their working days start and finish at [Alpha's] premises. Their main function is to load their heavy goods vehicle, drive it to the airport, deliver food and equipment to the aircraft and/or 'de-cater' them and return whatever has been removed to [Alpha's] premises. The round-trip (including stops to collect drinks from the nearby bonded warehouse) is typically 6 to 7 miles in total. It seems that, generally speaking, a team will complete two round trips per shift.

"(5) Very often there are intervals when FEH1s and FEH2s are at the airport but have no duties to undertake immediately. Such time is usually referred to as 'down time'. During down time the driver/loader team must maintain radio contact with [Alpha]. A hand-held radio is provided and one member of the team must have it in his possession at all times. The FEH1s and FEH2s do not have access to the airport facilities. Unlike the STRs, they are not provided with passes enabling them to enter the airport buildings. There is a toilet which they can use and a designated 'smoking shed'. Many take refreshments with them and consume them during down time. During down time drivers and loaders will ordinarily remain in their vehicles or very close by. They are not permitted to sleep during down time and it is understood that they are at their employer's disposal.

"(6) STRs discharge supervisory roles, ensuring that vehicles are duly loaded and sealed at the depots and that the loading and 'de-catering' operations at the airport run smoothly. They are required to hold a driver's licence and are provided with a van. They have an airside pass giving them access to certain parts of the airport. Like the drivers and loaders, they have down time on occasions. They are obliged to maintain radio contact with [Alpha] and may take refreshment within the airport building if time and circumstances permit.

"(7) [Alpha's] work is time-critical. The 'window' for loading and (where necessary) unloading is typically 35 minutes in the case of a short-haul flight and 70 minutes where international flights are concerned. The time pressure is increased by the fact that other service providers (such as cleaners) must also have access to the aircraft during the turnaround period. [Alpha] is liable to financial penalties where an aircraft is delayed owing to their failure to complete their duties within the prescribed time. Those penalties are payable under the terms of their contracts with the airlines they serve.

"(8) Not surprisingly, there are fluctuations in the amount of work which [Alpha] must carry out. Most weekdays are busy in the mornings and quieter in the afternoons. In the weekly cycle Fridays and Sundays are busier than other days. Self-evidently, during holiday times traffic volumes increase. Ms Nicol [a witness for Alpha] told us, and we accept,

that during a morning shift on a Monday there may be 25 flights leaving Gatwick for which [Alpha is] responsible, and that during the corresponding shift on a Saturday the number may be no more than ten. We accept her evidence that in a busy week [Alpha] may service 1,100 aircraft, whereas in a quiet week the figure may be as low as 800.

"(9) Fluctuations in activity may arise not only from predictable cyclical causes but also as a result of unforeseeable events. For example, fog may cause long delays before aircraft are permitted to land. Once the fog lifts there is likely to be particularly heavy demand upon [Alpha's] services for a limited period of time."

The proceedings before the employment tribunal

19 The employees presented originating applications, by which they complained that Alpha unlawfully denied them rest breaks to which they were entitled under regulation 12(1). Mr Gallagher's originating application referred to seven specific recent occasions when Alpha had required that he work for more than six hours without a rest break.

20 In its notice of appearance Alpha disputed the jurisdiction of the employment tribunal on the ground that the employees had no right under the 1998 Regulations to take rest breaks. Among the provisions on which it relied were regulation 21(c) and (d). It also claimed that down time (that is to say time during which the employee is not actually doing work, but is waiting for the next loading or de-catering assignment), when of not less than 20 minutes of uninterrupted duration, qualified as a rest break. It gave factual statistics which showed that the days to which Mr Gallagher referred were days on which he had substantial amounts of down time.

21 At a case management hearing on 14 March 2003 the employment tribunal directed a preliminary hearing to determine whether and to what extent the employees' claims were sustainable in law. Certain issues were identified and they, together with a further issue on which the employment tribunal was invited to rule, were the issues decided by the employment tribunal at a hearing on 9 July 2003.

22 The issues which the employment tribunal decided relevant to this appeal and to the application for permission to appeal and the conclusions which the employment tribunal reached on those issues were the following. (1) Are the employees (or any of them) deprived of the protection of regulation 12(1) by operation of regulation 21(c), on the ground that their activities involve the need for continuity of service or production? The employment tribunal held that the activities of each category of the employees involved the need for continuity of service or production, and so the protection of regulation 12 was excluded for all the employees. (2) Are the employees excluded from the protection of regulation 12(1) by operation of regulation 21(d) where there is a foreseeable surge of activity? The employment tribunal held that routine increases and decreases of activity occurring naturally in the daily and weekly cycle were not surges of activity within the meaning of the regulation, and so did not exclude the protection of regulation 12(1). However, the employment tribunal said that it would be a matter for evidence whether regulation 12(d) was brought into operation as a consequence of foreseeable increases in activity during particularly busy periods of the year. (3) Does down time of not less than 20 minutes' uninterrupted duration qualify for the purposes of

A regulation 12(3) as a rest break? The employment tribunal held that periods of down time did not amount to rest breaks within the meaning of regulation 12(3).

23 The employment tribunal accordingly dismissed all the originating applications for want of jurisdiction.

B *The appeal to the Employment Appeal Tribunal*

24 The employees appealed against the employment tribunal's decision on issue (1). Alpha cross-appealed on the tribunal's decision on three issues, but only proceeded on its appeal against the decision on issues (2) and (3).

25 The Employment Appeal Tribunal [2004] ICR 1489 allowed the employees' appeal and dismissed Alpha's cross-appeal. The appeal tribunal directed itself by reference to the following, amongst other, legal principles.
C (1) The three elements in the definition of working time in regulation 2(1), that is to say any period during which the worker is working, at his employer's disposal and carrying out his activity or duties, are to be construed conjunctively. (2) It is relevant to look at the relationship between the definition of working time and other times since there is no definition of rest break. (3) Derogations from Directive 93/104, and thus the exclusion of
D workers from protection under a health and safety measure, should be construed strictly.

26 The appeal tribunal found that it was the worker's activities which by regulation 21(c) required continuity rather than the activities of the employer. It held that as a matter of construction regulation 21(c) excludes a worker's right to rest breaks where his or her activities involve the need for continuity of service, rather than when his or her employer's activities
E involve that need. If wrong on that, it said that it would nevertheless uphold the employees' contention that the employment tribunal had yet to deal with a claim under regulation 24 for compensatory rest breaks, and that it would allow the appeal on that ground.

27 On regulation 21(d) the appeal tribunal accepted the approach of the employment tribunal to the concept of a surge. It held that the employment
F tribunal was entitled to find that the relatively modest fluctuations which Alpha experienced over the working day and week could not be described as surges. On down time the appeal tribunal said that the employment tribunal made a factual determination about what the workers were required to do in their down time, and that the appeal tribunal should not disturb the tribunal's judgment on that point.

G *The appeal to this court*

28 In addition to appealing to this court on the regulation 21(c) point, Alpha seeks permission to appeal on the regulation 21(d) point, the down time point and the ground which the appeal tribunal said that, if wrong on the regulation 21(c) point, it would have allowed the appeal, that is to say, regulation 24.

H

(1) Regulation 21(c)

29 On Alpha's appeal Mr Oldham, for Alpha, submits that the employment tribunal was right and the appeal tribunal was wrong on regulation 21(c). He points out, by reference to para 6(7) of the employment

tribunal's decision, that Alpha's work was time-critical, that there was a short window for loading and unloading, and that that time pressure was increased by the need for other service providers to have access to the aircraft during the turnaround period, and that Alpha was liable to financial penalties if there were delays due to its failure to complete its duties within the time available.

30 Mr Oldham further points out that in para 12 the employment tribunal found that the activities undertaken by FEH1s, FEH2s and STRs clearly involved the need for continuity of service or production. He says that the employment tribunal looked at the employees' activities collectively, and so in effect looked at Alpha's business. He also drew attention to the fact that the employment tribunal accepted that derogations from rights provided by EU legislation should be narrowly construed, that the employment tribunal noted that both the Regulations and the Directive envisage the derogation applying in respect of work at airports and that employees who could not rely on regulation 21 could, where appropriate, rely on regulation 24 to have compensatory rest breaks.

31 Mr Oldham criticised the appeal tribunal for accepting the contention of the employees that regulation 21(c) focuses upon the workers' activities and not that of the employer. That, he says, was not consistent with the Directive, in accordance with which the Regulations fell to be construed.

32 In para 12 of its decision, the employment tribunal expressed its brief reasoning on the regulation 21(c) point. It started by saying that it appeared to it on the face of it that the activities undertaken by each category of the employees clearly involved the need for continuity of service or production. It added that the reference to work at docks or airports reinforced what it called "this initial view". It then accepted the argument of Mr Hogarth, for the employees, that it was a central principle of Community jurisprudence that derogations from a right prescribed by a Directive had to be narrowly construed. It referred to the purpose of the Directive as being to ensure that health and safety rights should be made available to the greater part of the workforce within the Community. It then continued:

> "The difficulty, however, is that the exclusion itself is unqualified. Moreover, it seems to us that the Directive, and the Regulations, clearly envisage the sort of activities undertaken by the [employees] as falling within the exception, since they give work at docks or airports as a particular instance of the kind of activity in which the need for continuity of service or production is acknowledged as arising. The time pressures under which onboard catering services must be completed, and the potential consequences, in terms not only of financial penalties upon [Alpha] but also disruption of a fundamental public service, are, to our minds, telling factors."

33 In the passage cited, the employment tribunal plainly focuses on the employer's activities and to my mind that throws light on its "initial view" which it asserted without explanation in the first sentence of para 12, that the activities of the employees involved the need for continuity of service or production. The statistics in para 6(7) of the decision do not support the view that the activities of the employees, as distinct from their employer, involve the need for continuity of service or production. It is not explained

why the employees, operating as they do in small units, cannot have their working time so organised as to have rest breaks within each six-hour period of working time. No doubt the working time of Alpha's employees would need to be carefully organised so that there would be an adequate number of workers available while others are taking a 20-minute rest break. But it has not been explained why the employees' activities involve the need for continuity of service or production. In truth it is the employer's activities or need to which the employment tribunal must be referring in the first sentence of para 12, and that is made express in the passage which I have cited from the latter part of para 12. The question therefore is whether the employment tribunal was right to focus on the employer's activities and need, or whether it should have concentrated on those of the worker. That turns on the true construction of regulation 21(c), as read in the light of article 17.2.1(c) of the Directive.

34 Mr Oldham points to the fact that article 17.2.1(c) is worded "in the case of activities involving the need for continuity of service or production". That, he says, is apt to describe, not what the worker is doing, but what the employer's function is. However, that is an incomplete citation from article 17.2.1(c), which continues, so far as relevant: "particularly: . . . to dock or airport workers."

35 The Directive is not very happily worded. Some preposition or prepositional phrase linking the activities with the workers is missing. However, to my mind it is tolerably clear that the "dock or airport workers" are intended to be related to the relevant activities, and that relationship I would understand to be that the activities are those of the dock or airport workers.

36 Mr Oldham suggests that because others of the numbered paragraphs in article 17.2.1(c) refer to industries like agriculture, the reference to dock or airport workers can be construed as a reference to their employer's business. He poses the question: why, if the employees' contentions are correct, are the exceptions in the numbered sub-paragraphs, both of article 17.2.1(c) and regulation 21(c), stated so generally in terms of whole industries? He suggests that both the Directive and the Regulations were directed to the way employers in particular industries operate.

37 I am not able to agree with this submission. In article 17.2.1(c) the numbered sub-paragraphs sometimes refer to specific activities or industries and sometimes to categories of workers. In regulation 21(c) the numbered sub-paragraphs set out which activities of the worker may involve the need for continuity of service or production in relation to particular services, activities or industries. In neither the Directive nor the Regulations is there any reference to the employer. No doubt the activities of the worker are the activities of the employer in law, but the focus is on the activities of the worker rather than the employer, which activities involve the requisite need for continuity of service or production. The employment tribunal, in my judgment, erred in looking to the activities of the employer.

38 Mr Oldham asserts that the economic consequences of the employees' interpretation would be devastating. That assertion is not backed by a finding of the employment tribunal, and I am not persuaded that so apocalyptic a consequence would flow if the employees are right. No doubt health and safety requirements do add to the economic burdens of an

employer, but that fact cannot justify an interpretation which the Directive and the Regulations would otherwise not allow.

39 The appeal tribunal found support for its view on this issue in what Advocate General Tizzano said in his opinion in *Bowden v Tuffnells Parcels Express Ltd* (Case C-133/00) [2001] ECR I-7031, para 40. Mr Oldham submits that para 40 sets out the reasoning of the appellants in *Bowden*, and that such reasoning was rejected by the Advocate General in para 21. I agree. The *Bowden* case was concerned with a different point. The appeal tribunal also refers to passages in the judgment of the European Court of Justice, but in my judgment they do not assist on this particular point.

40 However, for the reasons which I have already given, the conclusion reached by the appeal tribunal was in my judgment correct. As Mr Hogarth observed in his skeleton argument, any other interpretation would allow an employer to avoid the duty imposed by the Regulations by the simple expedient of not employing enough staff to cover for rest breaks.

41 I would dismiss Alpha's appeal on this point.

(2) Regulation 21(d)

42 Alpha seeks permission to appeal from the Employment Appeal Tribunal's affirmation of the employment tribunal's decision that Alpha had not demonstrated that there were foreseeable surges in activities. The employment tribunal expressed its view on the meaning of surge thus, in para 14:

> "the concept of a 'surge' is intended to refer to something much more extreme than the natural fluctuations in activity which most workers in most industries experience. The examples under paragraph (d) (again, taken from the Directive) point, we think, to exceptional levels of activity arising seasonally or on special days or during particular periods of the year, and not to routine increases and decreases in activity occurring naturally in the daily and weekly cycle."

43 The employment tribunal found that the relatively modest fluctuations which Alpha experienced within the working day and working week were not capable of amounting to surges within the meaning of regulation 21(d).

44 Mr Oldham submits that there is no difference in principle between variations occurring daily or weekly, on the one hand, and variations occurring seasonally or on special days or during particular periods. He says that the variations faced by Alpha occurred just as naturally as those faced by other industries of different cycles, and he instances that it is just as predictable that Monday morning would see a surge of activity for Alpha as that Christmas would be busy for the Post Office, or that harvest time would be busy for farmers. On the facts found Mr Oldham points to the finding in para 6(8) of the employment tribunal's decision that Monday mornings might see activity two and a half times as great as on a Saturday morning.

45 I would refuse Alpha permission to appeal on this point, as I do not think Alpha had a reasonable prospect of success on it. The employment tribunal was concerned with the meaning of an ordinary word, "surge", which was undefined and which it had to construe in the context of the Regulations, and in particular having regard to the heading of regulation 21 that such surges would only occur "in special cases". In my

A view, it was correct in taking a restrictive view of this derogation and in holding that a surge only occurred when there is an exceptional level of activity, beyond the fluctuations experienced within the working day and working week, and that the evidence had not disclosed any such surge. I would not interfere with the employment tribunal's assessment and finding. Accordingly, I would dismiss the application on this point.

B **46** For the sake of completeness, I would add that it is not obvious that the reference to tourism in regulation 21(d) causes the derogation to be applicable, or might cause the derogation to be applicable, to the circumstances of the employees. But it is unnecessary to decide that point in view of the conclusion which I have reached on the meaning of surge.

(3) Down time

C **47** Alpha seeks permission to appeal from the appeal tribunal's affirmation of the employment tribunal's decision that there was no rest break in the employees' down time. The employment tribunal in its consideration of this point said that it is of the essence of a rest break that the period of rest is the employee's own, and that an employee who is on call and may be summoned at any moment is not enjoying a rest break. It added in

D para 20 of its decision:

> "It does not (retrospectively) become a rest break because, fortuitously, 20 minutes have passed without the employee being interrupted. The essence of the entitlement under regulation 12(1) is that the employee knows when his break begins that his time is his own until the period of the break has expired."

E **48** Mr Oldham submits that the 1998 Regulations impose no qualification on what a rest break may consist of, and no restriction on its scope is to be implied by reference to Directive 93/104. All that is required for a rest break, he says, is that there is an uninterrupted period of at least 20 minutes which can be taken away from the workstation. By article 4 the details of the rest break to which every worker is entitled where the working

F day is longer than six hours are to be laid down in collective agreements or agreements between the two sides of industry or in national legislation. Nothing is specified in the Regulations and, as I have already said, there is no relevant collective agreement or agreement between the two sides of industry.

49 Mr Oldham acknowledges that he is in difficulty if the meaning of "working time" is relevant to the meaning of rest break, because the

G authorities show that a period when a worker is required to be on call at the place of work so as to resume the performance of his duties immediately he is required to do so by his employer is working time, even if the worker is asleep during that period (see *Sindicato Médicos de Asistencia Pública (SIMAP) v Conselleria de Sanidad y Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (Case C-303/98) [2001] ICR 1116 and

H *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2004] ICR 1528). But he submits before us today, contrary to what he had argued in his skeleton argument for this court, that working time and rest breaks are not mutually exclusive.

50 I would refuse permission on this point also, as in my view it is not a point on which Alpha had any real prospect of success. Whilst I accept on

the authority of *SIMAP* [2001] ICR 1116 (see para 50 of the judgment of the European Court of Justice) that a period in which the worker is on call is not in itself sufficient to make that period working time, it seems plain to me that down time in the present case, the incidents of which are stated by the employment tribunal in para 6(5), cannot be a rest break, and a fortiori a period of down time cannot retrospectively become a rest break only because it can be seen after it is over that it was an uninterrupted period of at least 20 minutes. The worker is entitled under regulation 12(1) to a rest break if his working time exceeds six hours, and he must know at the start of a rest break that it is such. To my mind a rest break is an uninterrupted period of at least 20 minutes which is neither a rest period nor working time and which the worker can use as he pleases.

(4) Regulation 24

51 The appeal tribunal said that, even if wrong on regulation 21(c), the originating applications should not have been dismissed by the employment tribunal because there remained the question of whether the employees were entitled to compensatory rest breaks under regulation 24. Alpha submits that this was incorrect for several reasons. It is unnecessary to go into those reasons, and we have heard no argument on this point, in view of the conclusion which I have reached on the other points.

52 In the result, I would dismiss this appeal.

BUXTON LJ

53 I agree and there is nothing I wish to add.

JACOB LJ

54 I also agree.

Appeal dismissed with costs.
Case remitted.

Solicitors: Berwin Leighton Paisner; O H Parsons and Partners.

B O A

[COURT OF APPEAL]

FOLEY v. POST OFFICE

HSBC BANK PLC. (FORMERLY MIDLAND BANK PLC.) v. MADDEN

2000 July 25, 26; 31

Nourse, Mummery and Rix L.JJ.

Employment—Unfair dismissal—Reasonableness of dismissal—Misconduct—Dismissal for reason relating to employee's conduct—Employer's investigation into alleged misconduct—Whether permissible for tribunal to substitute its own view—Whether band of reasonable responses appropriate test of fairness—Employment Rights Act 1996 (c. 18), s. 98(1)(2)(4)

In the first case the applicant employee when working on a late shift one night had been allowed by his manager to leave early following a telephone request from his wife that her state of health required his attention at home. The employee was seen shortly after leaving work by another manager at a nearby public house. Following a disciplinary hearing the employee, who had a clean conduct record, was dismissed for unauthorised absence from duty. The employee's claim that, pursuant to section 98 of the Employment Rights Act 1996,[1] his dismissal was unfair was rejected by an employment tribunal, which held that the employer, having carried out as much investigation into the matter as was reasonable in all the circumstances of the case, had established reasonable grounds for believing that the employee was guilty of misconduct and that the employer's decision to dismiss though harsh was reasonable. The Employment Appeal Tribunal allowed an appeal by the employee.

In the second case the applicant employee was suspected by his employer, a bank, of involvement in the misappropriation and fraudulent use of customers' debit cards. Following a disciplinary hearing he was summarily dismissed for gross misconduct. On his complaint of unfair dismissal, an employment tribunal considering the fairness of the dismissal under section 98 of the Act of 1996 concluded that those carrying out the investigation on behalf of the employer had closed their minds to any possibility other than that of the employee's guilt, that the employer had accordingly failed to carry out a sufficient investigation and that the dismissal was unfair. An appeal by the employer was dismissed by the Employment Appeal Tribunal on the ground that no substantial reason had been shown for the dismissal within the intendment of section 98(1)(2) of the Act of 1996.

On appeals by the employers:—

Held, (1) that the correct approach for employment tribunals when applying section 98(1)(2) and (4) of the Employment Rights

[1] Employment Rights Act 1996, s. 98: "(1) In determining . . . whether the dismissal of an employee is fair or unfair, it is for the employer to show—(*a*) the reason (or, if more than one, the principal reason) for the dismissal, and (*b*) either that it is either a reason falling within subsection (2) . . . (2) A reason falls within this subsection if it— . . . (*b*) relates to the conduct of the employee . . . (4) . . . the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (*b*) shall be determined in accordance with equity and the substantial merits of the case."

Act 1996 was to give to those provisions the same interpretation as had for many years been placed by the courts on the equivalent provisions in section 57(1)(2) and (3) of the Employment Protection (Consolidation) Act 1978 and thus, for all practical purposes, to consider whether the employer's decision to dismiss fell within the band of reasonable responses to the employee's conduct which a reasonable employer could adopt and to apply the tripartite approach to the reason for, and the reasonableness of, a dismissal for a reason relating to the conduct of an employee; and that that approach required the employer to establish the fact of his belief in the employee's misconduct, that he had reasonable grounds on which to sustain that belief and that, at the stage at which he formed the belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances of the case (post, pp. 1287C-1288A, 1296C-D).

Iceland Frozen Foods Ltd. v. Jones [1983] I.C.R. 17, E.A.T.; *Neale v. Hereford and Worcester County Council* [1986] I.C.R. 471, C.A.; dictum of Arnold J. in *British Home Stores Ltd. v. Burchell (Note)* [1980] I.C.R. 303, 304, E.A.T. and *W. Weddel & Co. Ltd. v. Tepper* [1980] I.C.R. 286, C.A. applied.

Haddon v. Van den Bergh Foods Ltd. [1999] I.C.R. 1150, E.A.T. overruled.

(2) Allowing the first appeal, that the employment tribunal, having considered that the employer had established reasonable grounds for its belief that the employee was guilty of misconduct and that it had carried out as much investigation as was reasonable, had concluded that the employer acted reasonably in treating that as a sufficient reason for dismissing him; and that there was no error of law in its approach or its conclusion and, accordingly, no ground on which an appellate tribunal could interfere with its decision (post, pp. 1290C-D, 1291A-C).

(3) Allowing the second appeal, that the employer, not the tribunal, was the proper person to conduct the investigation into the alleged misconduct; that the function of the tribunal was to decide whether the investigation was reasonable in the circumstances and whether the decision to dismiss, in the light of the results of that investigation, was a reasonable response; that the employment tribunal had erred in impermissibly substituting itself as employer in place of the bank in assessing the quality and weight of the evidence before the investigator; and that no reasonable tribunal properly directed could have concluded either that the bank had failed to conduct a reasonable investigation or that the dismissal was outside the range of reasonable responses (post, p. 1295D-H).

Decisions of Employment Appeal Tribunal reversed.

The following cases are referred to in the judgments:

Beedell v. West Ferry Printers Ltd. [2000] I.C.R. 1263, E.A.T.
British Home Stores Ltd. v. Burchell (Note) [1980] I.C.R. 303, E.A.T.
Campion v. Hamworthy Engineering Ltd. [1987] I.C.R. 966, C.A.
Clark v. Civil Aviation Authority [1999] I.R.L.R. 412, E.A.T.
Devis (W.) & Sons Ltd. v. Atkins [1977] I.C.R. 662; [1977] A.C. 931; [1977] 3 W.L.R. 214; [1977] 3 All E.R. 40, H.L.(E.)
Gilham v. Kent County Council (No. 2) [1985] I.C.R. 233, C.A.
Haddon v. Van den Bergh Foods Ltd. [1999] I.C.R. 1150, E.A.T.
Iceland Frozen Foods Ltd. v. Jones [1983] I.C.R. 17, E.A.T.

Inco Europe Ltd. v. First Choice Distribution [2000] 1 W.L.R. 586; [2000] 2 All E.R. 109, H.L.(E.)
Morgan v. Electrolux Ltd. [1991] I.C.R. 369, C.A.
Neale v. Hereford and Worcester County Council [1986] I.C.R. 471, C.A.
Weddel (W.) & Co. Ltd. v. Tepper [1980] I.C.R. 286, C.A.
Whitbread & Co. Plc. v. Mills [1988] I.C.R. 776, E.A.T.
Wilson v. Ethicon Ltd. [2000] I.R.L.R. 4, E.A.T.(Sc.)

The following additional cases were cited in argument:

Abernethy v. Mott, Hay and Anderson [1974] I.C.R. 323, C.A.
Boys and Girls Welfare Society v. McDonald [1997] I.C.R. 693, E.A.T.
British Leyland U.K. Ltd. v. Swift [1981] I.R.L.R. 91, C.A.
Conlin v. United Distillers [1994] I.R.L.R. 169, Ct. of Sess.
Dobie v. Burns International Security Services (U.K.) Ltd. [1984] I.C.R. 812; [1985] 1 W.L.R. 43; [1984] 3 All E.R. 333, C.A.
Gair v. Bevan Harris Ltd. [1983] I.R.L.R. 368, Ct. of Sess.
Laws v. London Chronicle (Indicator Newspapers) Ltd. [1959] 1 W.L.R. 698; [1959] 2 All E.R. 285, C.A.
Lock v. Cardiff Railway Co. Ltd. [1998] I.R.L.R. 358, E.A.T.
Polkey v. A. E. Dayton Services Ltd. [1987] I.C.R. 142; [1988] A.C. 344; [1987] 3 W.L.R. 1153; [1987] 3 All E.R. 974, H.L.(E.)
Vickers Ltd. v. Smith [1977] I.R.L.R. 11, E.A.T.
Watling (N.C.) & Co. Ltd. v. Richardson [1978] I.C.R. 1049, E.A.T
West Midlands Co-operative Society Ltd. v. Tipton [1986] I.C.R. 192; [1986] A.C. 536; [1986] 2 W.L.R. 306; [1986] 1 All E.R. 513, H.L.(E.)
Yates v. British Leyland (UK) Ltd. [1974] I.R.L.R. 367

APPEALS from the Employment Appeal Tribunal.

FOLEY v. POST OFFICE

By an originating application dated 17 October 1997 the applicant, John Foley, sought compensation for unfair dismissal from the respondent employer, The Post Office. On 16 April 1998 an industrial tribunal sitting at London (North) dismissed the application, finding the dismissal to have been fair. On 31 March 1999 the Employment Appeal Tribunal (Holland J., Mr. K. M. Hack and Ms D. Warwick) allowed an appeal by the applicant and substituted a finding that the applicant had been unfairly dismissed.

Pursuant to leave granted by Peter Gibson L.J. on 15 July 1999, the employer appealed on, inter alia, the following grounds. (1) The conduct for which the applicant was dismissed was clearly within a band which a reasonable employer could conclude to be gross misconduct. (2) The appeal tribunal relied on two matters on which no reasonable tribunal would have relied, namely, (a) that the conduct complained of did not fit within the categories listed in the employer's disciplinary procedure as typical of gross misconduct, whereas such misconduct merely needed to be such as to show disregard for the essentials of the contract of employment, and (b) the employer's decision to dismiss with notice for its finding that it never regarded the applicant's conduct as being gross misconduct. (3) In any event, even if a finding of gross misconduct was made by the employer, the employer had a duty to consider whether

dismissal or some other penalty was the appropriate one, and the finding by the appeal tribunal that both the employer and the industrial tribunal had failed to consider whether the applicant's dismissal fell within the band of reasonable responses was perverse and wrong in law. (4) The appeal tribunal erred in law in substituting its view, that the applicant's dismissal was not within the band of reasonable responses open to the employer given the employee's misconduct, for that of the industrial tribunal that dismissal for such misconduct was within the band of reasonable responses.

The facts are stated in the judgment of Mummery L.J.

HSBC BANK PLC. (FORMERLY MIDLAND BANK PLC.) v. MADDEN

By an originating application dated 21 January 1998, the applicant, John Madden, made a complaint of unfair dismissal against the respondent employer, Midland Bank Plc. (now HSBC Bank Plc.). On 17 July 1998 an industrial tribunal sitting at London (North) upheld the complaint. On 7 March 2000 the employer's appeal was dismissed by the Employment Appeal Tribunal (Lindsay J., Mr. P. M. Smith and Mr. P. D. Wickens).

Pursuant to permission granted on 9 May 2000 by Lindsay J. the employer appealed on, inter alia, the following grounds. (1) The industrial tribunal had substituted its own view for that of the employer, and the Employment Appeal Tribunal, having correctly decided that it was not open to any court short of the Court of Appeal to deny reference to the band of reasonable responses as a determinative test, thereafter erred by failing to uphold the test in unqualified terms and wrongly held that an employment tribunal was entitled to substitute its view, for that of the employer. (2) The appeal tribunal failed to recognise that the industrial tribunal had impermissibly substituted its views for those of the employer, applied too high a standard of proof for the employer's belief when dismissing and, when dealing with the adequacy of the investigation, assessed the quality of the evidence for the purposes of deciding whether the applicant should be dismissed rather than any particular shortcoming in the investigation.

The facts are stated in the judgment of Mummery L.J.

David Bean Q.C. and *Robin White* for The Post Office, the employer in the first appeal.

David Reade for Mr. Foley, the applicant employee in the first appeal.

Peter McMaster for HSBC Bank Plc., the employer in the second appeal.

Manjit S. Gill Q.C. and *Edward Fitzpatrick* for Mr. Madden, the applicant employee in the second appeal.

Cur. adv. vult.

31 July. NOURSE L.J. Mummery L.J. will deliver the first judgment on these appeals.

A MUMMERY L.J. The court expedited the hearing of these two appeals in view of the current state of uncertainty in the employment tribunals on some fundamental aspects of the law of unfair dismissal following two recent decisions of the Employment Appeal Tribunal: *Haddon v. Van den Bergh Foods Ltd.* [1999] I.C.R. 1150 which has been followed in *Wilson v. Ethicon Ltd.* [2000] I.R.L.R. 4, but was settled while under appeal to this court, and *Midland Bank Plc. v. Madden* [2000] I.R.L.R. 288, from which B we have heard the appeal, along with the appeal in *Post Office v. Foley*, an unreported case decided by the Employment Appeal Tribunal before *Haddon* and *Madden* were decided. The judgments in both *Haddon* and *Madden* are analysed in detail, in the context of both the legislative history of unfair dismissal and the development of judicial interpretation, in yet another recent decision of the Employment Appeal Tribunal, *Beedell v.* C *West Ferry Printers Ltd.* [2000] I.C.R. 1263, in which judgment on behalf of the appeal tribunal was given by Judge Peter Clark.

General introduction

Since employment tribunals throughout Great Britain decide thousands of unfair dismissal cases every month, it is crucial that D uncertainty about the law to be applied by them should be dispelled as soon as possible.

In my judgment, the employment tribunals should continue to apply the law enacted in section 98(1), (2) and (4) of the Employment Rights Act 1996 giving to those subsections the same interpretation as was placed for many years by this court and the Employment Appeal Tribunal on the equivalent provisions in section 57(1), (2) and (3) of the Employment E Protection (Consolidation) Act 1978. This means that for all practical purposes:

(1) "The band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal, as expounded by Browne-Wilkinson J. in *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17, 24F–25D and as approved and applied by this court (see *Gilham v. Kent* F *County Council (No. 2)* [1985] I.C.R. 233; *Neale v. Hereford and Worcester County Council* [1986] I.C.R. 471; *Campion v. Hamworthy Engineering Ltd.* [1987] I.C.R. 966 and *Morgan v. Electrolux Ltd.* [1991] I.C.R. 369), remains binding on this court, as well as on the employment tribunals and the Employment Appeal Tribunal. The disapproval of that approach in *Haddon v. Van den Bergh Foods Ltd.* [1999] I.C.R. 1150, 1160E–F, on the basis that (a) the expression was a "mantra" which led employment G tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness as it stands, and that (b) it prevented members of employment tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would have done had they been the employers, is an unwarranted departure from binding authority.

H (2) The tripartite approach to (a) the reason for, and (b) the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee, as expounded by Arnold J. in *British Home Stores Ltd. v. Burchell (Note)* [1980] I.C.R. 303, 304 and 308G–H, and as

approved and applied by this court in *W. Weddel & Co. Ltd. v. Tepper* [1980] I.C.R. 286, remains binding on this court, as well as on employment tribunals and the Employment Appeal Tribunal. Any departure from that approach indicated in *Madden* (for example, by suggesting that reasonable grounds for belief in the employee's misconduct and the carrying out of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than to the reasonableness of the dismissal) is inconsistent with binding authority.

Unless and until the statutory provisions are differently interpreted by the House of Lords or are amended by an Act of Parliament, that is the law which should continue to be applied to claims for unfair dismissal. In so holding I am aware that there is a body of informed opinion which is critical of this interpretation of the Act of 1996. Those views have been comprehensively debated in the able arguments advanced on these appeals by Mr. Bean, Mr. Reade, Mr. McMaster and Mr. Gill.

A reminder of the fundamental constitutional difference between the interpretation of legislation, which is a judicial function, and the enactment and amendment of legislation, which is a parliamentary function, is required in view of the number of occasions on which reference was made in the submissions to a "judicial gloss" on the legislation. As Lord Nicholls of Birkenhead said in *Inco Europe Ltd. v. First Choice Distribution* [2000] 1 W.L.R. 586, 592E–F:

> "The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature."

In this case the interpretation placed by the tribunals and courts, including this court, on the provisions of the Act of 1978 in *Iceland Frozen Foods Ltd.* [1983] I.C.R. 17 and *British Home Stores Ltd. v. Burchell* has not led Parliament to amend the relevant provisions, even though Parliament has from time to time made other amendments to the law of unfair dismissal since those authoritative rulings on interpretation were first made. So those rulings, which have been followed almost every day in almost every employment tribunal and on appeals for nearly 20 years, remain binding.

They should be applied to the two cases under appeal with the result that both appeals should be allowed and both claims for unfair dismissal fail.

A *The Post Office appeal*

Mr. Foley was employed by The Post Office as a postal worker from 18 September 1989 until 19 June 1997, when he was dismissed for a reason relating to his conduct. On 3 November 1997 he presented a complaint of unfair dismissal to the employment tribunal which held, as explained in the extended reasons sent to the parties on 16 April 1998, that he was not unfairly dismissed. His appeal against that decision was allowed by the Employment Appeal Tribunal on 30 March 1999 and the case was

A remitted to the employment tribunal for a remedies hearing. The Post Office appeals with the permission of Peter Gibson L.J.

The decision of the employment tribunal

The tribunal found that the reason for Mr. Foley's dismissal was "unauthorised absence for part or whole of a duty on 16 May 1997," that that was a reason relating to conduct within section 98(2)(*b*) of the Act of B 1996, and that the decision to dismiss him for the conduct alleged, though "harsh," was reasonable pursuant to section 98(4) of the Act. It was fair. The tribunal was "mindful that we must not impose our decision upon that of a reasoned on the spot management decision." The dismissal was "within the range of reasonable responses."

C *The facts*

That conclusion was based on the following findings of fact.

(1) Mr. Foley was on a late shift on Friday, 16 May 1997 at the Princess Royal Distribution Centre, Stonebridge Park, London NW10. The shift was due to finish at 11.00 p.m. His wife telephoned him at 7.30 p.m. from home at Portland Road, London W11, saying she was in a D bad state of nerves and required his attention. His immediate line manager, Mr. Joyce, gave him permission to leave work early. He left between 7.30 and 7.45 p.m. (2) At about 8.47 p.m. another manager, Mr. Kowalski, who was off duty, reported that he saw Mr. Foley at the Innisfree Public House in Harrow Road, Wembley, which was about 12 minutes away from the depot, and notified Mr. Joyce on his mobile phone. The late shift manager, Ms Johnson, sent two managers (the E indoor patrol) to the pub, but Mr. Foley could not be seen. (3) On 20 May Ms Johnson instructed Mr. Kowalski to conduct a fact-finding interview. He then passed the papers to Ms Johnson, who sent a charge letter to Mr. Foley on 3 June 1997. (4) On 11 and 12 June a disciplinary hearing was conducted by Ms Johnson. Mr. Foley was accompanied by his trade union representative. There was a dispute about the timing of the events F on 16 May. Mr. Foley's case was that he was not in the pub at the time when Mr. Kowalski said he had seen him. He had gone into the pub at about 8.00 p.m. to phone for a taxi as he wished to get home early and the bus would not arrive for another 18 minutes. The taxi came at 8.20 p.m. According to Mrs. Foley, he arrived home at 8.40 p.m. (5) Ms Johnson dismissed Mr. Foley, who had a clean conduct record, for the alleged misconduct. The hearing was not, however, "conducted as fairly as it G might have been." Ms Johnson had not followed up lines of inquiry with the licensee of the pub, Mr. Mulvaney, who supplied a letter saying that he had called a minicab for Mr. Foley at 8.00 p.m. and that it had arrived at 8.20 p.m., nor with the minicab company, which supplied a document from driver number 98 indicating a time of 8.00 p.m.

(6) Mr. Foley appealed. His appeal, at which he was accompanied by H his trade union representative, was heard by the appeals manager, Miss Susan Little, on 19 August 1997. Miss Little "considered the issues with great care and in great depth" and investigated the documentation in relation to the licensee of the pub and the minicab company. She could see

no reason for disbelieving Mr. Kowalski and concluded that Mr. Foley was in the pub after 8.20 p.m. She attempted unsuccessfully to obtain more information from the minicab company about the time of the pick-up. There was uncontradicted evidence in the chairman's notes of evidence that, like Ms Johnson, she considered the range of responses to the conduct of Mr. Foley before concluding that dismissal was the appropriate remedy. It was a permissible option in The Post Office conduct code, which provided in section 12.5 (by way of a general guide) that the possible penalties ("not automatic") for "unauthorised absence for all or part of duty" were "warning or dismissal." Her "careful conduct of the appeal hearing rectified an otherwise unfair dismissal." Mr. Foley was informed on 3 October 1997 of the decision to uphold the dismissal.

The legal position

An appeal from the employment tribunal only lies on a question of law. In my judgment, there was no error of law in the extended reasons for dismissing Mr. Foley's claim. The Employment Appeal Tribunal was not entitled to reverse its decision.

The legal position is as follows.

(1) *Reason for dismissal*

Why did The Post Office dismiss Mr. Foley?

The Post Office established to the satisfaction of the employment tribunal that the reason for the dismissal of Mr. Foley related to his conduct within the meaning of section 98(2)(*b*) of the Act of 1996, i.e., unauthorised absence from duty for part of a duty on 16 May 1997. That was the reason for dismissal in the accepted sense that it was a set of facts known to the Post Office, or a set of beliefs held by it, which caused it to dismiss Mr. Foley: *W. Devis & Sons Ltd. v. Atkins* [1977] I.C.R. 662, 678A. There is no appeal against that finding of fact. I should, however, add that, although there was some argument about the tribunal's reference (in paragraph 25 of the extended reasons) to the faith that The Post Office must have in the employee giving the "real reason" for a request to be absent from work, it is clear that the tribunal proceeded on the basis that Mr. Foley had given the "real reason" in stating that Mrs. Foley had phoned at 7.30 p.m. requiring his attention to her at home and that had led him to seek and obtain permission to go home. There is no suggestion in the facts found by the tribunal that Mr. Foley had obtained permission to go home by giving a false reason to obtain permission to leave early.

This paragraph is directed not so much to the particular facts surrounding the reason for dismissal in this case as to a more general explanation of the importance of the employer's trust and confidence in his employee and to the future effect on that trust and confidence if an employee does not use his absence from duty for the purpose for which he has obtained it.

A (2) *Reasonableness of dismissal*

In the circumstances did The Post Office act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing Mr. Foley?

The argument on this appeal has focused on the tribunal's conclusion that The Post Office acted reasonably in treating that as a sufficient reason for dismissing Mr. Foley. I am unable to find any error of law in that B conclusion or in the reasoning process by which the tribunal arrived at it. In accordance with section 98(4) the tribunal considered all the relevant circumstances and determined the question whether the dismissal was fair or unfair in accordance with the equity and substantial merits of the case. In particular, in accordance with the approach in *British Home Stores Ltd. v. Burchell (Note)* [1980] I.C.R. 303, the tribunal considered whether C The Post Office had established reasonable grounds for its belief that Mr. Foley was guilty of misconduct and whether it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Appeal rehearing point

D Although the tribunal found that the disciplinary hearing by Ms Johnson was not conducted as fairly as it might have been, because she had not followed up lines of inquiry with the minicab company and the licensee of the pub, this deficiency was remedied on the appeal.

There is no error of law in that approach. The appeal was a rehearing and not merely a review of the unsatisfactory initial disciplinary hearing by Ms Johnson. The appeal was properly regarded as part of the overall E process of terminating Mr. Foley's employment: *Whitbread & Co. Plc. v. Mills* [1988] I.C.R. 776, 792G–795C; *Clark v. Civil Aviation Authority* [1991] I.R.L.R. 412, 415, 416, paras. 22, 25 and 26. That process constituted an investigation which was reasonable in all the circumstances. The rehearing was conducted thoroughly by Miss Little. She investigated the documentation with the minicab company and the licensee of the Innisfree F public house and weighed that against the evidence of Mr. Kowalski, whom she had no reason to disbelieve.

Range of reasonable responses approach

The employment tribunal then followed, as it was bound by authority to do, the approach in *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17 and held that, although it was of the view that the decision to G dismiss was "harsh," it was not entitled to substitute itself for the employer and impose its "decision upon that of a reasoned on the spot management decision" (paragraph 23). Instead it asked, as required by authority, whether the dismissal was "within the range of reasonable responses for this employer to have dismissed this employee." It found that it was. That finding is not erroneous in law, unless it can be characterised by an H appellate body as one which no reasonable tribunal could have reached. That is not, however, the basis on which Mr. Reade, on behalf of Mr. Foley, attacked the decision of the tribunal. His submission, based on *Haddon v. Van den Bergh Foods Ltd.* [1999] I.C.R. 1150, was that the

tribunal ought to have started from the position of considering what it would do in the circumstances and then consider on the objective test in section 98(4) whether the decision to dismiss was reasonable or unreasonable. It should not simply have applied what was described in *Haddon* as the "mantra" (i.e., the band of reasonable responses and the warning against substituting its own judgment for that of the employer) which drove employment tribunals to subvert the provisions of section 98 and in effect apply a more extreme perversity test. If the tribunal had taken the approach in *Haddon* it would have given effect to its express view that the decision to dismiss was "harsh" and it would have concluded that the dismissal of Mr. Foley, who had a clean record, for an offence which was not gross misconduct, was manifestly unreasonable.

I would reject these submissions on the perversity point and on the substitution point as contrary to authority binding on this court.

Perversity point

It was made clear in *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17, 25B–D, that the provisions of section 57(3) of the Employment Protection (Consolidation) Act 1978 (which were re-enacted in section 98(4) of the Employment Rights Act 1996) did not require "such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section." The tribunals were advised to follow the formulation of the band of reasonable responses approach instead. If an employment tribunal in any particular case misinterprets or misapplies that approach, so as to amount to a requirement of a perverse decision to dismiss, that would be an error of law with which an appellate body could interfere.

The range of reasonable responses approach does not, however, become one of perversity nor is it rendered "unhelpful" by the fact that there may be extremes and that (as observed in *Haddon v. Van den Bergh Foods Ltd.* [1999] I.C.R. 1150, 1160D) "Dismissal is the ultimate sanction." Further, that approach is not in practice required in every case. There will be cases in which there is no band or range to consider. If, for example, an employee, without good cause, deliberately sets fire to his employer's factory and it is burnt to the ground, dismissal is the only reasonable response. If an employee is dismissed for politely saying "Good morning" to his line manager, that would be an unreasonable response. But in between those extreme cases there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or an unreasonable response. In those cases it is helpful for the tribunal to consider "the range of reasonable responses."

Substitution point

It was also made clear in *Iceland Frozen Foods Ltd.*, at pp. 24G–25B, that the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to

dismiss the employee fell within the band of reasonable responses "which a reasonable employer might have adopted."

In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances. In other words, although the members of the tribunal can substitute their *decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer, which they were not.

B *The Madden appeal*

Mr. Madden was employed by the Midland Bank Plc. (now HSBC Bank Plc.) from September 1986. He was a lending officer (grade 4) at the date when he was summarily dismissed on 24 October 1997 for a reason relating to his conduct. He presented a complaint of unfair dismissal to the employment tribunal on 21 January 1998. The tribunal unanimously held that he was unfairly dismissed for the reasons set out in the extended reasons sent to the parties on 17 July 1998. The Employment Appeal Tribunal dismissed the bank's appeal on 7 March 2000. The employment tribunal held that a sufficient investigation into the alleged misconduct of Mr. Madden was not carried out in all the circumstances before the decision was made to dismiss him, that more inquiries and investigations should have been made and that the decision to dismiss was not taken on reasonable grounds and was therefore unfair.

The facts

The conclusions of the tribunal were based on the following findings of fact.

(1) Mr. Madden was regarded as a good and trustworthy employee at the Enfield Town branch of the bank. In June 1996 he was transferred from that branch to the Palmers Green branch, but continued to work one Saturday in four at Enfield Town. He had an unblemished record.

(2) In June and July 1997 three customers of the bank had their debit cards misappropriated when they were despatched for collection by them at their branches. The cards were used to obtain goods by deception. Two of the customers, Mr. Wood and Mr. Clark, expected to collect their cards at the Enfield Town branch and the third, Mr. Porter, expected to collect his card at the Palmers Green branch.

(3) In July 1997 a bank employee made unauthorised inquiries through the bank's internal Nixdorf computer system about the status of each of the three customers' accounts to which the debit cards related. The inquiries coincided with the fraudulent use of the cards.

(4) Mr. Madden was in the relevant branches when the cards might have been misappropriated and he was the only member of the staff who

was at the respective branches when all three inquiries were made by accessing the internal Nixdorf computer.

(5) On 1 September 1997 Mr. Madden was arrested. He was later released without charge. He was suspended on full pay pending further investigations.

(6) On 7 October 1997 an investigation report was made by Mr. Murphy, an investigating officer with the bank's security. He reported that the evidence indicated that Mr. Madden may have had an involvement in the thefts, although he consistently denied taking the cards or making unauthorised computer inquiries on the customers' accounts.

(7) On 24 October 1997 a disciplinary hearing was held by the area manager, Mr. Brian Fielder. Mr. Madden was represented by a BIFU official. At the end of the hearing he was summarily dismissed on the ground that the bank had a reasonable belief that he had been involved in the misappropriation of the cards which had been used fraudulently and that trust had irretrievably broken down.

(8) Mr. Madden exercised his right of appeal, but did not proceed with it. His appeal was dismissed in his absence.

The legal position

In my judgment there was an error of law in the extended reasons given by the employment tribunal for concluding that Mr. Madden was unfairly dismissed. The Employment Appeal Tribunal ought to have allowed the appeal and dismissed Mr. Madden's claim.

In view of the earlier discussion of the relevant statutory provisions and case law the legal position can be briefly stated as follows.

(1) *Reason for dismissal*

Why did the bank dismiss Mr. Madden?

There was no dispute that the reason for the dismissal of Mr. Madden related to his conduct within the meaning of section 98(2)(*b*) of the Employment Rights Act 1996, i.e., the bank's reasonable belief that he had been involved in the misappropriation of the three debit cards which were subsequently used fraudulently and that that led to an irretrievable breakdown in trust between the bank and Mr. Madden.

(2) *Reasonableness of the dismissal*

In the circumstances did the bank act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing Mr. Madden?

In holding that the dismissal of Mr. Madden for that reason was unreasonable the employment tribunal erred in law. It did not correctly apply the law as laid down in the authorities already discussed in the Post Office case. It impermissibly substituted itself as employer in place of the bank in assessing the quality and weight of the evidence before Mr. Fielder, principally in the form of the investigating officer's report. Instead, it should have asked whether, by the standards of the reasonable employer, the bank had established reasonable grounds for its belief that Mr. Madden was guilty of misconduct and whether the bank's investigation into the matter was reasonable in the circumstances.

A The extent of the tribunal's substitution of itself as employer in place of the bank, rather than taking a view of the matter from the standpoint of the reasonable employer, is evident from the tenor of the views expressed by the tribunal on the quality and weight of the available evidence against Mr. Madden. I refer to the tribunal's cumulative critical comments on the bank's internal investigation by Mr. Murphy, on the disciplinary hearing by Mr. Fielder and on the probative value of the B material on which Mr. Fielder based the summary dismissal: that "there was no clear culprit for the misappropriation of the cards;" that there was "no firm evidence of the precise dates on which the cards were taken;" that there was "no direct evidence that Mr. Madden had accessed the Nixdorf system;" that there was no investigation of the "personal or financial affairs" of other members of the staff; that no account was taken of the C nature of the goods bought with the stolen cards; that Mr. Fielder failed to take account of the fact that a man in Mr. Madden's financial and career position would not have jeopardised all for such a "relatively paltry theft;" that "the facts of the case should have produced more than reasonable doubt in Mr. Fielder's mind;" that the investigators had closed their minds to any possibility other than the guilt of Mr. Madden; that Mr. Fielder "came to a hasty conclusion that Mr. Madden was probably D guilty" and was content to accept the report of the investigators too readily and uncritically; and that Mr. Fielder's decision to dismiss Mr. Madden, who had a stainless record of 11 years' service, would effectively ruin his career and was not taken on reasonable grounds.

In my judgment no reasonable tribunal, properly applying the approach in *British Home Stores Ltd. v. Burchell (Note)* [1980] I.C.R. 303 and *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17 to the facts, could E have concluded either (a) that the bank had failed to conduct such investigation into the matter as was reasonable in all the circumstances or (b) that dismissal for that reason was outside the range of reasonable responses. Instead of determining whether the bank had made reasonable investigations into the matter and whether it had acted within the range of responses of a reasonable employer, the tribunal in effect decided that, had F it been the employer, it would not have been satisfied by the evidence that Mr. Madden was involved in the misappropriation of the debit cards or their fraudulent use and would not have dismissed him. The tribunal focused on the insufficiency of the evidence to prove to its satisfaction that Mr. Madden was guilty of misconduct rather than on whether the bank's investigation into his alleged misconduct was a reasonable investigation.

This case illustrates the dangers of encouraging an approach to unfair G dismissal cases which leads an employment tribunal to substitute itself for the employer or to act as if it were conducting a rehearing of, or an appeal against, the merits of the employer's decision to dismiss. The employer, not the tribunal, is the proper person to conduct the investigation into the alleged misconduct. The function of the tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision H to dismiss, in the light of the results of that investigation, is a reasonable response.

I would accordingly allow both appeals and dismiss the complaints of unfair dismissal.

RIX L.J. I agree with the judgment of Mummery L.J. which I have had the advantage of reading in draft, and only wish to add a few words on what has been call the "substitution" point.

The possibility of an employment tribunal or of the Employment Appeal Tribunal substituting its own view for that of the employer in question could, in theory, arise in at least three different situations:

(1) Either tribunal may be tempted to substitute its own views as to the correct conclusion to be arrived at as to the employee's responsibility for the misconduct complained of.

(2) The employment tribunal is charged under section 98(4) of the Act of 1996 with the determination of the question whether the dismissal is fair or unfair and, in so doing, has to decide whether the employer acted reasonably or unreasonably in treating the section 98(2) reason as a sufficient reason for dismissing the employee.

(3) The Employment Appeal Tribunal may be tempted to substitute its own views as to the section 98(4) question of reasonableness or unreasonableness.

In my judgment only the second of those three alternatives is legitimate. As a matter of authority binding in this court, that determination required by statute is to be answered by the employment tribunal with the assistance of the "band of reasonable responses" approach set out in the judgment of Browne-Wilkinson J. in *Iceland Frozen Foods Ltd. v. Jones* [1983] I.C.R. 17.

The first and third of those three alternatives are illegitimate. The reason why the first alternative is illegitimate was well explained by Arnold J. in *British Home Stores Ltd. v. Burchell (Note)* [1980] I.C.R. 303, 304. The reason why the third alternative is illegitimate is because the Employment Appeal Tribunal is only entitled to differ from the employment tribunal on a question of law. Therefore, it is only in a very exceptional case, where an employment tribunal can be said to have come to a perverse conclusion, that the Employment Appeal Tribunal can interfere in the employment tribunal's determination as to the section 98(4) test, a determination which is essentially a question of fact. That is authoritatively stated in *Gilham v. Kent County Council (No. 2)* [1985] I.C.R. 233 and in *Neale v. Hereford and Worcester County Council* [1986] I.C.R. 471.

NOURSE L.J. I have had the advantage of reading in draft the judgment of Mummery L.J. I agree with it and would allow both appeals accordingly.

Appeals allowed with costs.
Permission to appeal refused.

Solicitors: Solicitor to The Post Office, Croydon; Simpson Millar; Addleshaw Booth & Co., Leeds; Procaccini Farrell & Co.

H. D.

A

Court of Appeal

Madarassy *v* Nomura International plc

[2007] EWCA Civ 33

2006 Oct 31; Nov 1, 2;
B 2007 Jan 26

Mummery, Laws and Maurice Kay LJJ

Discrimination — Sex — Burden of proof — Employee made redundant after return from maternity leave — Whether tribunal adopting proper approach to shifting burden of proof — Whether comparison with hypothetical male comparator appropriate — Whether employer under duty to carry out health and safety
C *risk assessment — Sex Discrimination Act 1975, s 63A (as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660), reg 5) — Management of Health and Safety at Work Regulations 1999 (SI 1999/3242), reg 16*

The claimant, who was employed as a senior banker in the employer's equity capital markets department, informed her line manager in November 2000 that she
D was pregnant. While she was away on maternity leave between March and July 2001, there were significant redundancies in the department following deteriorating market conditions, and after her return the claimant was informed that she was at risk of redundancy. She received the lowest score in a redundancy selection process compared with two male colleagues and was made redundant in November 2001. On her complaint of discrimination contrary to the Sex Discrimination Act 1975[1], the employment tribunal directed itself on the burden of proof under section 63A(2), holding that it had to consider whether the claimant was treated any
E less favourably than a hypothetical male comparator would have been treated in the same circumstances, and, if so, whether it was on the ground of her sex or her pregnancy, and, if she had been so treated, whether the employer had proved that it did not commit the act of unlawful discrimination. The tribunal dismissed various allegations of sex discrimination but found that the employer had failed to carry out a health and safety risk assessment in connection with her pregnancy, pursuant to regulation 16 of the Management of Health and Safety at Work Regulations 1999[2].
F On appeal by the claimant, the Employment Appeal Tribunal allowed the appeal in respect of two allegations of sex discrimination, which it remitted to the tribunal for review, and dismissed the appeal in respect of the other allegations. It allowed the employer's cross-appeal in respect of the health and safety risk assessment and remitted that matter to the same tribunal for review.

On the claimant's appeal—

Held, dismissing the appeal, (1) that on a complaint under the Sex Discrimination
G Act 1975 the complainant had to prove, pursuant to section 63A(2), facts from which an employment tribunal "could" properly conclude that the respondent had committed an unlawful act of discrimination; that the section did not prevent the tribunal at that stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complaint; that, once a prima facie case was established, the burden of proof moved to the respondent to prove that it had not committed any act of unlawful discrimination, but it did not shift simply
H on the complainant establishing the facts of a difference in status and a difference in treatment; that it was only once the burden had shifted that the absence of an adequate explanation for the differential treatment became relevant; and that the

[1] Sex Discrimination Act 1975, s 63A(2), as inserted: see post, para 3.
[2] Management of Health and Safety at Work Regulations 1999, reg 16: see post, para 131.

employment tribunal had not erred in following the two-stage approach, considering at the first stage whether the claimant was treated less favourably than a hypothetical male comparator in the same circumstances and whether it was on the grounds of her sex or pregnancy, and, where the burden shifted, dealing at the second stage with the adequacy of the explanation provided by the employer for its alleged less favourable treatment of the claimant (post, paras 52–54, 56, 60, 69, 71, 77, 84, 172–174).

Igen Ltd (formerly Leeds Careers Guidance) v Wong [2005] ICR 931, CA applied.

Laing v Manchester City Council [2006] ICR 1519, EAT approved.

(2) That, although there was no place for a hypothetical male comparator in the case of the dismissal of a female employee for being pregnant, it did not follow that it was wrong for an employment tribunal to make such a comparison in order to determine whether pregnancy or some other reason was the ground for the particular treatment of a pregnant female employee; and that, accordingly, the tribunal did not err in law in comparing the claimant's treatment with that of a hypothetical male comparator (post, paras 118–119).

(3) That the appeal tribunal was right to find that the employment tribunal had erred in law in upholding the claimant's complaint that the employer was in breach of regulation 16 of the Management of Health and Safety at Work Regulations 1999; that a finding that the claimant's work involved potential risk to the health and safety of the claimant or her baby was necessary before there was an obligation on the employer under regulation 16 to carry out a risk assessment; and that the tribunal had made no express finding of a risk to health and safety and there was no evidence on which it could have made such a finding (post, para 138).

(4) That the appeal tribunal's decision to remit three of the numerous allegations of sex discrimination to the same tribunal was a proportionate and appropriate response in terms of cost, time and efficiency without any real possibility of a risk of apparent bias; and that the appeal tribunal clearly had power to remit those matters for review rather than for rehearing in the exercise of its discretion, and it did not err in exercising that discretion (post, paras 145, 148, 149).

Per curiam. Where the complainant is seeking to compare her treatment with that of a hypothetical comparator, though it would often be desirable for a tribunal to go through the two stages suggested in *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931, it would not necessarily be an error of law to fail to do so, acting on the assumption that the burden of proof may have shifted to the respondent and then considering the explanation put forward by the respondent. In such a case the complainant cannot usually complain, as she would not be prejudiced by the decision to move straight to the second stage and to place the burden of proof on the respondent (post, paras 81–82).

Decision of the Employment Appeal Tribunal affirmed.

The following cases are referred to in the judgment of Mummery LJ:

Amec Capital Projects Ltd v Whitefriars City Estates Ltd [2004] EWCA Civ 1418; [2005] 1 All ER 723, CA

Appiah v Governing Body of Bishop Douglass Roman Catholic High School (Note) [2007] EWCA Civ 10; [2007] ICR 897, CA

Bahl v The Law Society [2004] EWCA Civ 1070; [2004] IRLR 799, CA

Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT

Brown v Croydon London Borough Council (Note) (unreported) 20 February 2006, EAT; [2007] EWCA Civ 32; [2007] ICR 909, CA

Comr of Police of the Metropolis v Hendricks [2003] EWCA Civ 1686; [2003] ICR 530; [2003] 1 All ER 654, CA

Fernandez v Parliamentary Comr for Administration and the Health Service Comrs (unreported) 28 July 2006, EAT

Fox v Rangecroft [2006] EWCA Civ 1112, CA

A *Glasgow City Council v Zafar* [1998] ICR 120; [1997] 1 WLR 1659; [1998] 2 All ER 953, HL(Sc)
Hardman v Mallon (trading as Orchard Lodge Nursing Home) [2002] IRLR 516, EAT
Igen Ltd (formerly Leeds Careers Guidance) v Wong [2005] EWCA Civ 142; [2005] ICR 931; [2005] 3 All ER 812, CA
King v Great Britain-China Centre [1992] ICR 516, CA
B *Laing v Manchester City Council* [2006] ICR 1519, EAT
Li v Atkins & Gregory Ltd (unreported) 5 July 2006, EAT
National Union of Teachers v Watson (unreported) 13 June 2006, EAT
Network Rail Infrastructure Ltd v Griffiths-Henry [2006] IRLR 865, EAT
Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337; [2003] 2 All ER 26, HL(NI)
Sinclair Roche & Temperley v Heard [2004] IRLR 763, EAT
C *Webb v Emo Air Cargo (UK) Ltd (No 2)* [1995] ICR 1021; [1995] 1 WLR 1454; [1995] 4 All ER 577, HL(E)

The following additional cases were cited in argument:

Day v T Pickles Farms Ltd [1999] IRLR 217, EAT
Henry v Newham London Borough Council [2004] EWCA Civ 377, CA

D **APPEAL** from the Employment Appeal Tribunal

By an application to the employment tribunal dated 14 December 2001 the claimant, Ms Andrea Madarassy, complained of sex discrimination, victimisation and unfair dismissal while she was employed by the respondent, Nomura International plc, from 17 January 2000 to 22 November 2001. The tribunal at London Central on 18 February 2003 dismissed the claims of sex discrimination, save for one, namely the E employer's failure to carry out a health and safety risk assessment in connection with the claimant's pregnancy, and the claim for victimisation and found that the claimant had been fairly dismissed by reason of redundancy. The Employment Appeal Tribunal (Nelson J, Mr D Bleiman and Mr J Mallender) on 16 December 2004 dismissed the claimant's appeal, save for two allegations, namely the employer's failure to set objectives for the claimant in the fiscal year 2001 whilst they were set for male colleagues F and the failure to supply her with information about the broad redundancy exercise carried out while she was on maternity leave, and the appeal tribunal remitted those matters to the same tribunal for review. The appeal tribunal allowed the employer's cross-appeal in respect of the discrimination complaint on the health and safety risk assessment for the tribunal's lack of adequate findings and remitted that matter to the same tribunal for review. G The appeal tribunal on 16 June 2005 ordered the claimant to pay £2,000 costs on the basis of her unreasonable conduct on the appeal while acting in person in making allegations of bias, false evidence, misrepresentation and perversity which she later withdrew.

By a notice of appeal filed on 22 April 2005 the claimant appealed on the following grounds. (1) The employment tribunal and the appeal tribunal H erred in law in their approach to the incidence of the burden of proof under section 63A of the Sex Discrimination Act 1975. (2) The employment tribunal erred in its approach to evidence, for example in requiring corroborative evidence of any incident before holding that it might be proved, and in finding that there was no evidence on which an allegation could be found proved when the claimant had herself given evidence on the

matter in question. (3) The employment tribunal erred in requiring a male comparator in relation to the claimant's complaints regarding her pregnancy and maternity-related treatment and in failing to examine whether that treatment was for a reason connected to pregnancy, and the appeal tribunal erred in failing to remit all complaints regarding the same for rehearing. (4) The employment tribunal erred in its approach to limitation issues in that it determined issues relating to "just and equitable" and "continuing act" before reaching a conclusion on the facts and complaints; in addition it erred in considering the issue of "continuing act" in a compartmentalised fashion without considering the similarity of the acts complained of in separate allegations, and so deprived itself of the benefit of making a judgment having regard to the totality of the evidence and its findings. (5) The employment tribunal and the appeal tribunal erred in their approach to the complaint relating to the failure to carry out a risk assessment by concluding that there was no obligation to carry out a risk assessment in respect of new or expectant mothers unless it was proven as a matter of fact that the work was of a kind which could involve risk and/or that there was some evidence that the work was of a kind which could involve risk. (6) The appeal tribunal erred in remitting certain complaints to the same tribunal when, in the circumstances, there was a clear risk of the perception of bias in the remittance of matters to that same tribunal. (7) The appeal tribunal erred in directing the tribunal to review the matters in relation to which it considered the tribunal had erred rather than directing that there should be a rehearing, since the tribunal's power of review was available only in limited circumstances either on the application of a party or of its own motion.

At the hearing of the appeal on 31 October 2006 the claimant sought permission to appeal against the costs order of 16 June 2005.

The facts are stated in the judgment of Mummery LJ.

Robin Allen QC and *Jonathan Cohen* for the claimant.
Paul Goulding QC and *Claire Weir* for the employer.

Cur adv vult

26 January 2007. The following judgments were handed down.

MUMMERY LJ

General introduction

1 This adjourned sex discrimination appeal was heard immediately before two race discrimination appeals, *Brown v Croydon London Borough Council (Note)* [2007] ICR 909 and *Appiah v Governing Body of Bishop Douglass Roman Catholic High School (Note)* [2007] ICR 897. *Brown*, like *Madarassy*, is an employment case. *Appiah* is an appeal from the county court in a school exclusion case.

2 Although we are handing down separate judgments on each appeal, they cross-refer to one another, as all of them cover a common question—the burden of proof in discrimination cases. The appeals were listed for hearing together because the grounds of appeal in each case included complaints that, at first instance, the burden of proof had been misunderstood or misapplied and that this error had resulted in the unjustified rejection of well-founded discrimination claims. In each appeal it

A was argued by the complainants that, as the decisions were flawed by error of law, the cases should be remitted for rehearing, in the cases of *Madarassy* and *Brown* by a differently constituted employment tribunal, and in the case of *Appiah* by a different county court judge.

3 In *Madarassy*, which has been informally treated as the lead case, the appeal on the burden of proof point turns on the construction and application of section 63A(2) of the Sex Discrimination Act 1975. The 1975 B Act was amended with effect from 12 October 2001 in order to implement the Burden of Proof Directive (Council Directive 97/80/EC (OJ 1998 L14, p 6)) and to provide:

> "Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—(a) has C committed an act of discrimination against the complainant which is unlawful by virtue of Part 2, or (b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act."

D

4 The appeals on the burden of proof point in *Brown* and *Appiah* turn on sections 54A(2) and 57ZA(2) respectively of the Race Relations Act 1976 (as inserted by regulations 41 and 43 of the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626)), which contain similar provisions for the hearing of race discrimination complaints.

5 We were informed that, as evidenced by this clutch of appeals and by E appeals pending in other cases, employment tribunals are experiencing difficulty with the burden of proof in sex and race discrimination cases. This is surprising as the Court of Appeal analysed the law in depth and gave clear and sound detailed guidance in *Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931. At the end of the judgment of the court an Annex set out guidance in 13 short and logically arranged numbered paragraphs. The judicial guidelines were framed with expert assistance from the F Commissions for Equal Opportunities, Racial Equality and Disability Rights which, with the permission of the court, intervened in *Igen Ltd v Wong* and made submissions through leading counsel (Mr Robin Allen QC). None of the parties in these appeals challenges the correctness of *Igen Ltd v Wong*.

6 Some of the difficulties with the new burden of proof are attributable to the process of adapting to change. It takes time for everyone to get used to G a new law. Over the years tribunals were guided by Neill LJ's lucid explanation of the burden of proof in discrimination cases. For over a decade the passage in his judgment in *King v Great Britain-China Centre* [1992] ICR 516, 528–529 became one of the most frequently cited in all discrimination law. It clarified and settled the law. It worked well in practice.

H **7** Now tribunals and courts are faced with amended statutory provisions, which changed the law but do not explain how it actually works. The difficulty is in knowing how much difference the amendments should make in practice. Although *Igen Ltd v Wong* is authoritative on the construction of the statutory provisions and helpful in its guidance, it seems that tribunals are now faced, as was this court on these appeals, with

contradictory arguments by the parties about the effect of *Igen Ltd v Wong*. As Elias J (President) observed in one of the more recent cases, *Laing v Manchester City Council* [2006] ICR 1519, para 71: "There still seems to be much confusion created by the decision in *Igen* [2005] ICR 931." A

8 Some submissions in these appeals prompt me to alert practitioners to what *Igen Ltd v Wong* did not decide.

9 First, it did not decide that judicial guidance is a substitute for section 63A(2) (or section 57ZA(2)). On the contrary, the Court of Appeal went out of its way to say that its guidance was not a substitute for statute: para 16. Courts do not supplant statutes. Judicial guidance is only guidance. B

10 Secondly, *Igen Ltd v Wong* did not decide that a tribunal commits an error of law by omitting to repeat the judicial guidance in its decision or by failing to work through the guidance paragraph by paragraph. The Court of Appeal expressly warned against this possible misuse of the guidance: see para 16. Omitting to refer to guidance or to apply it may increase the risk of errors of law in a decision, but such an omission is not in itself an error of law on which to found a successful appeal. C

11 Having said what *Igen Ltd v Wong* did not decide, I should add that there really is no need, at this level of decision, for another judgment giving general guidance. Repetition is superfluous, qualification is unnecessary and contradiction is confusing. D

12 I do not underestimate the significance of the burden of proof in discrimination cases. There is probably no other area of the civil law in which the burden of proof plays a larger part than in discrimination cases. Arguments on the burden of proof surface in almost every case. The factual content of the cases does not simply involve testing the credibility of witnesses on contested issues of fact. Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in *Igen Ltd v Wong* meets these criteria. It does not need to be amended to make it work better. E

13 The only possible value of this judgment and of the judgments in *Brown* and *Appiah* is in showing how the burden of proof should work. Problems arise when the parties are in dispute about the application of the relevant law to the facts of their particular case. F

14 Other decisions in the Court of Appeal and in the Employment Appeal Tribunal, both before and after *Igen Ltd v Wong*, were cited. The discussions in them clarify law and practice and assist in their development. They iron out some of the misunderstandings evident from the legal submissions to the tribunal. They illustrate the implications of the amended legislation as it is worked through in practice, case by case: see *Bahl v The Law Society* [2004] IRLR 799 (Court of Appeal, pre-section 63A(2) applying *King v Great Britain-China Centre* [1992] ICR 516, 528–529 and *Glasgow City Council v Zafar* [1998] ICR 120, 125–126); *Brown v Croydon London Borough Council* (unreported) 20 February 2006, EAT, Elias J presiding (one of the appeals heard along with this case); *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 (EAT, Elias J presiding); *National Union of Teachers v Watson* (unreported) 13 June 2006 (EAT, Elias J presiding); *Li v Atkins & Gregory Ltd* (unreported) 5 July 2006 G H

A (EAT, Elias J presiding); *Fox v Rangecroft* [2006] EWCA Civ 1112; *Fernandez v Parliamentary Comr for Administration and the Health Service Comrs* (unreported) 28 July 2006 (EAT, Bean J presiding) and *Laing v Manchester City Council* [2006] ICR 1519.

The proceedings

B **15** On 14 December 2001 Ms Andrea Madarassy, the appellant, presented an originating application to the employment tribunal complaining of sex discrimination, victimisation and unfair dismissal. She subsequently served particulars specifying 33 separate allegations of sex discrimination spanning the whole of the period from 17 January 2000 to 22 November 2001 during which she was employed by the respondent, Nomura International plc ("Nomura"), a multi-service financial institution C transacting business on a global basis.

16 At a hearing lasting 21 days in November and December 2002 the tribunal heard 38 witnesses. Thirty-two of them attended for cross-examination. Ms Madarassy gave evidence for seven days. Mr Michael Boardman, who was her line manager at Nomura, was cross-examined for four days. There were 21 lever arch files of documents. Litigation on this D scale is now typical of the increasing numbers of sex and race discrimination claims by senior members of staff against financial institutions, professional firms and public authorities.

17 In extended reasons (76 pages, 437 paragraphs) sent to the parties on 18 February 2003 the employment tribunal made findings on 33 allegations of sex discrimination. It found that only one allegation was well-founded E (allegation 1.12—failure to carry out a health and safety risk assessment in connection with Ms Madarassy's pregnancy). It dismissed all the other claims, including a complaint of victimisation.

18 As for the unfair dismissal claim, the tribunal found that the reason for her dismissal was redundancy following a diminution of her work and a fair selection procedure. The tribunal rejected the claim that she was dismissed for a reason connected with her pregnancy, with childbirth or with F her taking maternity leave.

19 Following a preliminary hearing her substantive appeal in the Employment Appeal Tribunal was confined to the sex discrimination claims. After a four-day hearing in July 2004 the appeal tribunal, for reasons given in the judgment (90 pages, 237 paragraphs) prepared by Nelson J and handed down on 16 December 2004, dismissed the appeal on all save two G claims which had been dismissed by the employment tribunal (allegation 1.15—the failure to set objectives for her in the fiscal year 2001, whereas they were set for male colleagues; and allegation 1.18—the failure to supply information to her about the "broad redundancy exercise" carried out while she was on maternity leave). It remitted the two matters to the same tribunal for review in the light of its judgment. Nomura does not appeal against the order of the appeal tribunal remitting these two allegations. Ms Madarassy H objects to the form of the order in several respects.

20 The appeal tribunal allowed Nomura's cross-appeal against the decision of the employment tribunal against it on the complaint of discrimination in respect of the health and safety risk assessment (allegation 1.12).

21 The appeal tribunal order under appeal was entered on 8 April 2005 following further submissions.

22 On 16 June 2005 the Employment Appeal Tribunal, after considering written submissions from the parties, made an order for costs against Ms Madarassy under rule 34(1) of the Employment Appeal Tribunal Rules 1993 (SI 1993/2854). She was ordered to pay £2,000 towards Nomura's costs on the ground of her unreasonable conduct on the appeal (while she was acting in person) in making allegations of bias, false evidence, misrepresentation and perversity, which she later withdrew. A warning as to the costs of the appeal had been given by the Employment Appeal Tribunal (Judge Peter Clark) on 9 May 2003.

23 Permission to appeal against the substantive judgment was granted by this court, subject to limitations, at an adjourned application on 31 August 2005. There is also before this court an application by Ms Madarassy for permission to appeal against the costs order. The application was adjourned to be heard by the full court at the same time as the substantive appeal.

24 The hearing of this appeal began on 22 February 2006, but it had to be adjourned in the extraordinary circumstances described in the judgment handed down by the court on 4 April 2006: see [2006] EWCA Civ 371 and [2006] EWHC 748 (QB) (Bean J). It is unnecessary to say any more about this aspect of the appeal. Directions were given by this court for the future conduct of the appeal.

Outline facts

25 As appears from the 45 paragraphs in Ms Madarassy's "Schedule of inaccurate assertions as to the facts in the respondent's skeleton" factual disagreements between the parties abound. There are now disagreements about the proceedings themselves in addition to the disputed facts leading up to the proceedings. In an appellate judgment, which can only properly address points of law, I do not propose to examine the factual points in the schedule in any detail.

26 Ms Madarassy was born in 1964. She is a Hungarian-born British citizen. She was employed by Nomura for less than two years until her employment was terminated on 22 November 2001. In January 2000 she had been appointed at a basic salary of £70,000 pa (plus a discretionary bonus) as a "senior banker" on the basis of a six-month probationary period. She was assigned to "equity corporate finance", joining Nomura's equity capital markets ("ECM") team. She specialised in originating and executing ECM transactions in emerging markets, particularly Hungary and Turkey. Mr Michael Boardman was a senior executive in ECM and her line manager. She had limited experience in these matters.

27 In mid-June 2000 Ms Madarassy became pregnant. Nobody at Nomura was aware of this until early to mid-November 2000.

28 After the probationary period her appointment was confirmed on 4 September 2000 by Mr Boardman, who supplied her with a list of objectives. Although he had concerns about her performance, he thought that the weaknesses could be overcome with hard work.

29 On or around 7 November 2000 Ms Madarassy informed Mr Boardman that she was pregnant.

A 30 On 14 February 2001 there was a first performance appraisal meeting, followed by a second performance appraisal meeting on 26 February 2001. Mr Boardman assessed her performance as not being up to the Nomura standard.

31 On 27 February 2001 Mr Sumino, the head of ECM, conducted a performance appraisal meeting and Ms Madarassy signed the performance
B appraisal form.

32 From 3 March 2001 to 8 July 2001 Ms Madarassy was away on pregnancy and maternity leave. Her daughter was born on 18 March 2001.

33 After her return from maternity leave a meeting was held with Mr Boardman, Mr Sumino and human resources personnel on 16 August 2001 to consider potential redundancies in ECM. Nomura said that its revenues were down on the previous year and that the market was poor.
C There had been a significant number of redundancies in Nomura in June and July 2001 as a result of restructuring. This was consequent on deteriorating market conditions.

34 On 7 September 2001 Ms Madarassy was informed that she was at risk of redundancy. Redundancy consultations took place. Her consultation period for redundancy was extended on 12 October and again on
D 16 October. It expired on 22 November 2001. In the redundancy selection process Ms Madarassy scored worst, as compared with a Mr Salim Salam and a Mr Adams. No suitable alternative employment could be found for her.

35 She had indicated that she might wish to invoke the grievance procedure on 3 October 2001. She submitted a written grievance on 16 November. Nomura proceeded to terminate her employment on grounds
E of redundancy on 22 November 2001. She received pay in lieu of notice.

Grounds of appeal

36 Nine grounds of appeal were argued: (A) Burden of proof. (B) Tribunal's approach to evidence. (C) Pregnancy and hypothetical male comparator. (D) Time limits. (E) Health and safety risk assessment.
F (F) Remission to same or different tribunal. (G) Review or re-hearing. (H) Bonus issue. (I) Costs order.

(A) Burden of proof

Self-direction on law

37 This is the main ground of appeal. It was contended by Mr Allen,
G who appeared on behalf of Ms Madarassy in this court (though not in the employment tribunal or in the Employment Appeal Tribunal), that the employment tribunal misdirected itself in law on the burden of proof. In particular, there was an erroneous self-direction of law in para 175 of the decision. Mr Allen submitted that this error infected the conclusions of the tribunal on the numerous individual allegations of sex discrimination reached in other parts of the decision.
H

38 An unfortunate feature of the case is that the employment tribunal did not have the benefit of the appellate rulings on the construction of the amended legislation. They came later: first, in the Employment Appeal Tribunal in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205 and then in the Court of Appeal in *Igen Ltd v Wong* [2005]

ICR 931. Without help from the judicial rulings and guidance the employment tribunal set out its own self-direction on the burden of proof in general terms:

> "175. . . . We have then considered whether Ms Madarassy was treated any less favourably than a hypothetical male comparator would have been treated in the same circumstances and, if so, whether it was on the grounds of her sex or pregnancy. If so, the tribunal has to consider whether the respondent has proved that it did not commit the act in question pursuant to section 63A(2) of the Sex Discrimination Act 1975."

39 Mr Allen contended that this was a complete misdirection in law and that the tribunal repeated the error in many paragraphs of its decision. The error was in failing to place on Nomura the burden of proving that it did not commit the alleged acts of unlawful discrimination against Ms Madarassy. On the contrary (and quite wrongly) the tribunal had placed the burden on Ms Madarassy of proving all the elements of her discrimination claims. The tribunal then dismissed her complaints because she had not proved that she was treated less favourably on the ground of her sex or pregnancy.

40 Mr Allen argued that this direction on the burden of proof was completely inconsistent with the purpose of the Directive, which was intended to guarantee the effectiveness of the principle of equal treatment. It was also inconsistent with the proper construction of section 63A(2) and with the ruling and guidance in *Igen Ltd v Wong*. The error deprived Ms Madarassy of the benefit of the statutory reversal of the burden of proof. The tribunal had scrutinised her case and rejected it. It should have scrutinised Nomura's case and rejected the adequacy of Nomura's explanation for its discriminatory treatment of her.

41 This serious error of law was apparent, Mr Allen said, from many paragraphs of the tribunal's decision dealing with the individual allegations of sex and pregnancy discrimination. He criticised paras 203, 204, 206, 209, 216, 218, 225, 228, 267, 282, 323, 350 and 365 of the decision on this ground. I shall return to these paragraphs later and I shall examine them in the light of Mr Allen's general criticism.

42 The appeal tribunal dismissed Ms Madarassy's appeal on this point. It failed, Mr Allen said, to recognise and correct the errors of law, which undermined all the conclusions of the employment tribunal. Nothing short of a complete rehearing of the case by a different tribunal could correct the errors.

43 Mr Allen had other more detailed points on the burden of proof. I shall deal with them later in this judgment. For the moment I shall concentrate on the general point on the erroneous displacement of the burden of proof.

Discussion and conclusion on burden of proof direction

44 The relevant passages of the tribunal's decision, in particular para 175, must be set in context. Earlier paragraphs of the decision set out the text of section 63A(2) (see para 162), which had come into effect before the tribunal hearing in November and December 2001 (12 October 2001). The appellate rulings on the construction of section 63A(2) and the judicial guidance could not be cited by the tribunal in its decision, because they were

A given after this tribunal had heard the case and reached its decision. The unavailability of the rulings and guidance does not, of course, necessarily mean that the tribunal's self-direction was erroneous. The tribunal may have correctly anticipated the later appellate rulings.

45 The tribunal had also quoted in its decision, at para 161, and referred to, at para 167, section 5(3) of the 1975 Act. This is an important provision which requires that a comparison of cases of persons of different
B sex must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

46 The general point on the burden of proof and the detailed points which I shall deal with later must also be viewed from the larger perspective of the issue for the employment tribunal and the issue for this court.

47 The issue for the employment tribunal was whether Nomura had
C committed acts of discrimination against Ms Madarassy which were unlawful by virtue of Part 2 of the 1975 Act. The issue for this court is whether a question of law arises from the decision of or the proceedings in the employment tribunal. These reminders are advisable in case immersion in the detail obscures the overall object of the exercise.

D *Paragraph 175*

48 The tribunal, in this section of its decision, had referred to authorities which were decided before section 63A(2) was enacted. In para 175 of the decision the tribunal stated that it considered whether Ms Madarassy was treated any less favourably than a hypothetical male comparator would have been treated in the same circumstances and, if so, whether it was on the grounds of her sex or her pregnancy. If the tribunal
E considered that Ms Madarassy had been treated in that way (a second "if so"), it had to consider whether Nomura had proved that it did not commit the act of unlawful discrimination in question.

49 As I read para 175 the tribunal dealt with the burden of proof in two stages. It placed the burden of proof on Nomura at the second stage. It did not place the burden of proof on Nomura at the first stage. The Employment
F Appeal Tribunal took a similar view of para 175: see para 193 of its judgment. Mr Goulding, who appeared for Nomura, submitted that there was no misdirection of law in para 175. It correctly anticipated and accorded with the substance of the two-stage analysis in *Igen Ltd v Wong* [2005] ICR 931 on the construction of section 63A(2) and the annexed guidance.

50 Mr Allen disagreed. He contended that the direction in para 175
G was legally flawed. It wrongly put all the burden on Ms Madarassy to prove sex and pregnancy discrimination before Nomura was required to prove anything.

51 According to Mr Allen the correct approach was that, as Ms Madarassy had established two fundamental facts, namely, a difference in status (e g sex) and a difference in treatment, section 63A(2) required the
H tribunal (as distinct from entitling it, as under the pre-amendment ruling by the Court of Appeal in *King v Great Britain-China Centre* [1992] ICR 516, approved by the House of Lords in *Glasgow City Council v Zafar* [1998] ICR 120) to draw an inference of unlawful discrimination by Nomura. The burden shifted to Nomura to prove that it had not committed an act of discrimination which was unlawful. It could discharge this burden of proof

by providing to the tribunal an adequate and acceptable non-discriminatory explanation of its treatment of Ms Madarassy. If Nomura's explanation did not survive the scrutiny of the tribunal at the second stage, the tribunal must ("shall") uphold Ms Madarassy's complaints of discrimination.

52 Much of what Mr Allen said about the effect of reversing the burden of proof is correct. Mr Allen is obviously right in saying that the subsection does not require Ms Madarassy to prove a "conclusive case" of unlawful discrimination. She only has to prove facts from which the tribunal "could" conclude that there had been unlawful discrimination by Nomura, in other words she has to set up a "prima facie" case.

53 I do not, however, read para 175 (or any of the other paragraphs of the tribunal's decision) as requiring Ms Madarassy to prove a "conclusive case". If the tribunal were saying that she had to do that, the latter part of its direction in para 175 following the second "if so" would have been superfluous.

54 I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by *Igen Ltd v Wong* [2005] ICR 931 nor by any of the later cases in this court and in the Employment Appeal Tribunal. It was not accepted by the appeal tribunal in the above-mentioned cases of *Network Rail Infrastructure* [2006] IRLR 865, para 15 and *Fernandez* (paras 23 and 24) and by the Court of Appeal in *Fox* [2006] EWCA Civ 1112, paras 9–18.

55 In my judgment, the correct legal position is made plain in paras 28 and 29 of the judgment in *Igen Ltd v Wong*:

> "28. . . . The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the respondent 'could have committed' such act.
>
> "29. The relevant act is, in a race discrimination case . . . that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities."

(The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.)

56 The court in *Igen Ltd v Wong* [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which

A a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57 "Could . . . conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a B difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove C less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

58 The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie D case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.

E 59 Mr Allen submitted that the tribunal had applied the wrong law. It had cited and applied the law as laid down in the *Great Britain-China Centre* case [1992] ICR 516, instead of the amended law contained in section 63A(2) as construed in *Igen Ltd v Wong* [2005] ICR 931. He added that, if this court rejects his criticisms of para 175, it will be holding that the burden of proof has not been reversed, that section 63A(2) does F not give effect to the Directive and that no material change in the law has been made.

60 I do not accept these submissions. The amendments changed the law. They did so by stating the circumstances in which the burden of proof moves from the complainant to the respondent. If and when this happens, the tribunal has to decide whether or not the respondent has proved that he G has not committed an unlawful act of discrimination. If the tribunal accepts the respondent's evidence of a non-discriminatory reason for his treatment of the complainant as an adequate explanation, the respondent will have discharged the burden of proof. If the respondent does not discharge the burden of proof, the complainant "shall" succeed. This was not the law as laid down in the *Great Britain-China Centre* case [1992] ICR 516 and the *Zafar* case [1998] ICR 120 and applied by the tribunals before 12 October H 2001, according to which the tribunals "may", not "must", infer unlawful discrimination from the absence of an adequate explanation for discriminatory treatment.

61 I would reject Mr Allen's contention that the tribunal erred in law in para 175.

62 I shall now deal with two related points on the burden of proof, which are relevant to the decision of the tribunal on the individual allegations.

"In the absence of an adequate explanation"

63 There was substantial argument (supplemented by written submissions after the hearing) on the construction of the expression "in the absence of an adequate explanation" in the opening part of section 63A(2) and its implications for the evidence which the tribunal could consider at the first stage.

64 *Igen Ltd v Wong* [2005] ICR 931, para 22, held that this expression indicates that, in considering what inferences or conclusions could be drawn from the primary facts (stage 1), the employment tribunal is required to make an assumption:

> "which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage, so that unless the respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage."

65 There has been a debate in the cases and on this appeal as to what evidence from the respondent is relevant at the first stage. It was observed in *Igen Ltd v Wong*, para 24, that the language of section 63A(2) points to the complainant having to prove facts, but there is no mention of evidence from the respondent. The court added that it would be unreal if the employment tribunal could not take account of evidence from the respondent, if such evidence assisted the employment tribunal to conclude that, in the absence of an adequate explanation, unlawful discrimination by the respondent on a proscribed ground would have been established. The court referred to the examples given in *Barton* [2003] ICR 1205 of unsatisfactory conduct of the respondent being relevant to the drawing of inferences at the first stage: for example an unsatisfactory response to the statutory questionnaire or a breach of the code of practice by the respondent.

66 We should take this opportunity to consider the relevance of the respondent's evidence at the first stage. This point has been contentious in the appeal and is of practical importance.

67 As Elias J pointed out in *Laing v Manchester City Council* [2006] ICR 1519, the evidence from the respondent at the first stage goes wider than the particular examples given in *Igen Ltd v Wong*, para 24. It was argued in *Laing v Manchester City Council*, para 56, that the only material that the tribunal can consider at the first stage is the evidence adduced by the complainant together with any evidence adduced by the respondent which assists the tribunal in reaching the conclusion that a prima facie case has been made out. It was argued that the tribunal must not consider, however, any other evidence, such as evidence from the respondent pointing the other way and tending to undermine the complainant's case.

68 In *Laing*, for example, the key factor which caused the complainant to fail at the first stage was the respondent's evidence that the complainant was indiscriminately treated by the alleged discriminator in the same way as all subordinate employees. (This point was also made by Nomura in its evidence to the tribunal in response to many of Ms Madarassy's individual

A allegations of discrimination.) In *Laing* the complainant objected that this was part of the respondent's "explanation" which, in accordance with section 63A(2), had to be ignored at the first stage.

69 The Employment Appeal Tribunal (Elias J (President) presiding) in *Laing* rightly rejected the complainant's submission. It accepted the respondent's submission that, at the first stage, the tribunal should have regard to all the evidence, whether it was given on behalf of the complainant B or on behalf of the respondent, in order to see what inferences "could" properly be drawn from the evidence. The treatment (or mistreatment) of others by the alleged discriminator was plainly a highly material fact. All the evidence has to be considered in deciding whether "a prima facie case exists sufficient to require an explanation": para 59. The only factor which section 63A(2) stipulates shall not form part of the material from which C inferences may be drawn at the first stage is "the absence of an adequate explanation" from the respondent.

70 Although no doubt logical, there is an air of unreality about all of this. From a practical point of view it should be noted that, although section 63A(2) involves a two-stage analysis of the evidence, the tribunal does not in practice hear the evidence and the argument in two stages. The D employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof.

71 Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the E complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on F the ground of her sex or pregnancy.

72 Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in *Laing v Manchester City Council* G [2006] ICR 1519, para 64, it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all.

73 Mr Allen disputed the correctness of the judgment of the Employment Appeal Tribunal in *Laing* on this point. Mr Allen took up rather an extreme position on the construction of "in the absence of an adequate explanation". H

74 Mr Goulding's position was that the effect of the expression was that at the first stage the tribunal must disregard altogether (or "put on one side") any possible explanation by the respondent.

75 Mr Allen's position, on the other hand, was that under section 63A(2) it must be presumed at the first stage that the respondent had

no adequate explanation. This presumption then assisted the complainant in securing the reversal of the burden of proof. He relied on *Igen Ltd v Wong* [2005] ICR 931, paras 21 and 22, to support this submission.

76 In my view, Mr Allen's submission goes further than *Igen Ltd v Wong* warrants. He argued for a presumed lack of an adequate explanation providing "a material premise" for the reversal of the burden of proof. The "absence of an adequate explanation" may, he said, be the only basis on which the tribunal could infer that a significant ground for the treatment of the complainant was a proscribed one.

77 In my judgment, it is unhelpful to introduce words like "presume" into the first stage of establishing a prima facie case. Section 63A(2) makes no mention of any presumption. In the relevant passage in *Igen Ltd v Wong*, which is probably more favourable to Mr Allen than to Mr Goulding, the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination. In *Igen Ltd v Wong* the court did not go so far as to say that there was a "statutory presumption that there was no adequate explanation" for the respondent's treatment of the complainant and that there was therefore discrimination on a proscribed ground and that this presumption alone caused the burden of proof to move to the respondent.

78 I would add that I do not think that there is much to be gained in this context by invoking or analysing possible distinctions between "explanations", "reasons" and "facts" that were debated in argument and have featured in some of the recent authorities.

79 I do not accept Mr Allen's submission on the construction of the expression "in the absence of an adequate explanation" or his criticisms of Elias J in *Laing* [2006] ICR 1519. It seems to me that the approach of Elias J is sound in principle and workable in practice. This court should approve it. No alteration to the guidelines in *Igen Ltd v Wong* is necessary.

Hypothetical comparators and the two stages

80 Mr Allen made an alternative submission that this case was distinguishable from *Barton* [2003] ICR 1205 and *Igen Ltd v Wong* [2005] ICR 931 as there is no actual comparator. If the comparator is hypothetical, he argued, it is unnecessary for the complainant to prove more than a difference in status and a difference in treatment in order to shift the burden of proof to the respondent. Those facts are sufficient to establish less favourable treatment for the purpose of stage 1, so that there is something to be explained by the respondent as to the reason for the treatment. The employment tribunal erred in law in not proceeding directly to the second stage and placing the burden of proof on Nomura to provide an explanation for its treatment of Ms Madarassy without requiring Ms Madarassy to prove less favourable treatment. He cited Lord Nicholls of Birkenhead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, paras 10–12, for the proposition that, in the case of less favourable treatment than a hypothetical comparator, tribunals could concentrate primarily on the reason why the complainant was treated as she was: was it

A on the proscribed ground which is the foundation of the application, or was it for some other reason?

81 Elias J clarified this point in *Laing v Manchester City Council* [2006] ICR 1519, para 74, in his valuable discussion of cases in which "it might be sensible for a tribunal to go straight to the second stage". He gave as an example the case where the complainant is seeking to compare his treatment with that of a hypothetical comparator. He said that, as Lord Nicholls B pointed out in *Shamoon*, the question whether there is a hypothetical comparator is often inextricably linked to the issue of the explanation for the treatment. He added that "it must surely not be inappropriate for a tribunal in such cases to go straight to the second stage". While it would often be desirable for a tribunal to go through the two stages suggested in *Igen Ltd v Wong* [2005] ICR 931, it would not necessarily be an error of law to fail to C do so acting on the assumption that the burden may have shifted to the respondent and then considering the explanation put forward by the respondent.

82 This particular aspect of the hypothetical comparator point arose in and is dealt with in our judgments on the *Brown* appeal [2007] ICR 909. In such a case the complainant cannot usually complain of any error of law, as he would not be prejudiced by the tribunal's decision to move straight to D the second stage and the placing of the burden of proof on the respondent. The possible prejudice in passing over the first stage is to the respondent, if the burden of proof ought not to have moved to him in the first place.

83 Mr Allen sought to develop this aspect of the case of the hypothetical comparator by constructing a different proposition, namely that there is an error of law in a tribunal in such a case, if it does not move straight to the E second stage. Such a proposition cannot, in my view, be derived from section 63A(2) itself or from *Shamoon* [2003] ICR 337 or *Igen Ltd v Wong*. In *Shamoon*, para 12, Lord Nicholls made it clear that:

> "The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case."

F **84** In my judgment, there was no error of law by the employment tribunal dealing with Ms Madarassy's allegations by following the conventional two-stage approach of first requiring facts to be established from which the tribunal could infer sex discrimination before placing the burden on Nomura to provide an explanation for its treatment of Ms Madarassy. As we shall see, the tribunal in fact dealt, when appropriate, G with the adequacy of the explanation provided by Nomura for its alleged less favourable treatment of Ms Madarassy.

Application of burden of proof to particular allegations of discrimination

85 I will now consider Mr Allen's criticisms of the tribunal's treatment of the individual allegations of sex discrimination in particular paragraphs in the decision.

H **86** Having set out in para 175 its general direction on section 63A(2), the tribunal applied the burden of proof to the numerous individual allegations of sex discrimination. At the first stage the tribunal considered the evidence relevant to whether Ms Madarassy, as she claimed, had been treated less favourably on the grounds of her sex or pregnancy. It should be

noted that no mention was made in para 175 of Ms Madarassy having to prove that Nomura had committed an unlawful act of sex discrimination. All that this employment tribunal did at the first stage was to consider whether Ms Madarassy was treated any less favourably than a hypothetical male comparator in the same circumstances and whether it was on the grounds of her sex or pregnancy.

87 Although the tribunal did not in every case spell out the process of making inferences, it was well aware of the familiar process of drawing appropriate inferences from primary facts: see paras 163, 164, 167 and 169(4) of its decision. The tribunal's approach was that, if it considered that there were no relevant facts from which inferences could be drawn supporting her allegations of sex discrimination, then it was entitled to dismiss her claim without shifting the burden of proof to Nomura and requiring it to provide a non-discriminatory explanation proving that it had not committed an unlawful act of discrimination.

88 The majority of Ms Madarassy's allegations of sex and pregnancy discrimination failed at the first stage. It is clear, however, that in some instances the tribunal also considered the second stage, at which it accepted as adequate Nomura's explanation for its treatment of Ms Madarassy. The reasons given for the rejection of the particularised individual allegations of discrimination show that the tribunal applied the correct construction of section 63A(2).

89 For example, she alleged sex discrimination in the criticisms of work undertaken by her on behalf of Nomura on the Videoton deal in summer and autumn 2000. (Videoton is an electronics manufacturing company.) Although the tribunal ruled that the complaints were out of time and that it was not just and equitable to extend the time, it nevertheless considered the complaints and it rejected them in paras 203, 204, 206 and 209 of the decision.

90 The language differs slightly from paragraph to paragraph. The essence of each of them was that the sex discrimination complaint failed because Ms Madarassy "failed to show" (paras 203 and 209), or "has not satisfied us" (para 204), or "has not established" (para 206) that a hypothetical male in the same situation would have been treated differently. The first stage of section 63A(2) was not passed by Ms Madarassy, as the tribunal could not conclude that she had suffered less favourable treatment on the ground of sex. There was nothing for Nomura to disprove by way of an adequate non-discriminatory explanation.

91 Paragraphs 216 and 218 dealt with allegations of sex discrimination in connection with delays in the confirmation of her employment from July 2000 and in the provision of written objectives and of critical comments about her. The tribunal held that these complaints were in time. It then considered whether "a hypothetical male comparator in the same situation would have been treated differently": para 215. The tribunal concluded that "there is no evidence that had she been a male she would have been treated any differently in relation to this": para 216, and that "she has failed to satisfy the tribunal that she was less favourably treated than a hypothetical male employee in the same situation in respect of whom the respondent had concerns over his communication skills, written work and other matters that were concerns in relation to Ms Madarassy": para 218. The complaints therefore failed at the first stage, because there was no evidence of less

favourable treatment from which the tribunal could conclude that Nomura had committed an act of sex discrimination. There is no error of law in this approach.

92 Paragraph 225 dealt with Ms Madarassy's absence from work on 6 September 2000 to attend a scan at her doctors. At this time Mr Boardman did not know that she was pregnant. Although the tribunal held that this was a complaint about an isolated act which was out of time, it considered the allegation of sex discrimination and held that it failed as there was no evidence to show that a hypothetical male comparator in the same situation as she had been—absent for several hours without explanation—would have been treated any differently from Ms Madarassy. There is no error of law in rejecting a claim for sex discrimination if the complainant has no evidence of less favourable treatment than a comparator of a different sex.

93 Paragraph 228 dealt with complaints that Mr Boardman conducted a discriminatory campaign against her from September 2000, regularly shouting at her, abusing, intimidating and threatening her. The tribunal held that it was satisfied on the evidence that Mr Boardman shouted at members of staff whether they were male or female: "There was equality of shouting regardless of gender or level within ECM." This was the culture of this workplace. It might be horrible, but it was not sexist. The complaint of discrimination failed at the first stage, as there was no comparative less favourable treatment of Ms Madarassy. Again there is no error of law. It is also clear that the tribunal referred to and accepted the evidence of Nomura on Mr Boardman's indiscriminate treatment of all employees under him by shouting at them.

94 Paragraph 267 dealt with Ms Madarassy's complaint, which it held was out of time, that in December 2000 Mr Boardman refused to speak to her in private when he went outside to have a cigarette with Mr Salam. The tribunal said that there was evidence that Mr Boardman indicated to Ms Madarassy, who was a non-smoker, that she could accompany him, but she said she would await his return. It concluded that, even if this amounted to less favourable treatment, there was no evidence to suggest that a hypothetical male non-smoker would be treated any differently. The claim failed as Ms Madarassy was not treated less favourably on the ground of sex and section 63A(2) was not satisfied. The tribunal accepted the evidence of Mr Boardman on the facts of this incident.

95 The complaint considered in para 282 related to the performance review in February 2001, which the tribunal held was an isolated act, which was out of time and it was not just and equitable to extend time to found jurisdiction. The tribunal went on, however, to consider the allegation of sex discrimination based on the claim that the review was incorrect, incomplete and false, and rejected it on the ground that she was not treated unfairly and that a hypothetical male comparator in the same situation would not have been treated any differently.

96 The complaint dealt with in para 323 was that, after her return from maternity leave, she was not allowed to concentrate on the financial sector. Whilst her male colleagues were allowed to concentrate on their sectors of specialisation, she said that she was given impossible tasks. The tribunal accepted the evidence of Mr Boardman that he did involve her in financial institutions work and held that she "failed to show that she has sustained any less favourable treatment in relation to this allegation". In

holding that her complaint failed the tribunal had concluded that there was in fact no unfavourable treatment which could found a claim for sex discrimination. A

97 The complaint dealt with in para 350 was that Ms Madarassy was not properly considered for the risk management roles vacant within Nomura in October 2001. The tribunal rejected her claim because "she has not shown that she suffered less favourable treatment". The tribunal accepted Nomura's evidence that she had insufficient relevant experience to fulfil this role. There was no error of law in holding that in these circumstances the claim failed. B

98 The complaint dealt with in para 365 was that her dismissal was discriminatory. This was rejected, as the tribunal found that, as explained in the part of the decision on unfair dismissal, she was redundant. It was also satisfied that "a hypothetical male employee in the same situation as Ms Madarassy would have suffered the same fate". She had scored lower than male colleagues in the redundancy matrix. The fact that she was dismissed, that she was a woman and suffered detriment, whereas male colleagues were not dismissed, was insufficient to move the burden of proof to Nomura. It was necessary to consider the treatment of Ms Madarassy as compared with a male comparator in the same or not materially different circumstances. This approach does not involve any error of law. C D

99 In my judgment, none of these paragraphs rejecting claims of sex discrimination involves any misunderstanding or misapplication of the burden of proof applying to sex discrimination claims.

(B) The tribunal's approach to evidence

100 According to this ground of appeal the employment tribunal erred in its approach to the evidence and its findings of fact by seeking corroboration of facts where none was required and by concluding that there was no evidence, when in fact there was evidence from Ms Madarassy. The tribunal therefore failed to direct itself properly in relation to what was evidence for the purposes of making findings of fact and the impact of section 63A(2). E F

101 Mr Allen sought to make good this ground of appeal by referring to a number of paragraphs in the decision of the employment tribunal.

102 Paragraph 182 dealt with alleged discrimination in relation to Ms Madarassy's title and its use on business cards. She was called "associate director". She said she should be called "senior banker", which was in fact printed on her business cards. She alleged that there was a conversation or discussion in which she was told by Mr Hoshino that she should be described as associate director on the business cards. The tribunal said in para 182 that there was "no corroborative evidence that this discussion took place and the tribunal was unable to make any finding on it". G

103 This is one of the allegations (paragraph 1.1 of the particulars) which in granting permission to appeal this court ruled could not be pursued. Mr Allen nevertheless used it as an instance of the tribunal's wrong approach to the evidence in the case. H

104 Mr Goulding pointed out that the evidence on this point was unsatisfactory. The alleged discussion about business cards had not in fact been mentioned in the particulars. According to Ms Madarassy she was told that she should be described as associate director on her business cards.

According to Mr Boardman she had business cards on which she was described as senior banker. In the closing written submissions on behalf of Ms Madarassy the significance of this evidence was not mentioned. The business cards were not put in evidence. In these circumstances it is not surprising that the tribunal said that it was unable to make any finding on the alleged discussion.

105 Paragraph 236 dealt with allegations about Mr Boardman's behaviour (allegation 1.8). The tribunal stated: "There is no evidence before us from which we can find that Ms Madarassy's working conditions became unpleasant or the attitudes of her colleagues changed." Mr Allen criticised this paragraph, pointing out that there was evidence, as Ms Madarassy herself gave evidence on the issue.

106 The tribunal had not overlooked the fact that she had given evidence on this point in support of her case. This is apparent from para 226 onwards, in which the tribunal summarised and considered her allegations about Mr Boardman's conduct. It is also apparent from the written submissions from each side on the evidence given by Ms Madarassy and by Mr Boardman. I am satisfied that, read in context, the meaning of para 236 is that the evidence before the tribunal was insufficient to satisfy it of the facts alleged by Ms Madarassy.

107 Paragraph 246 dealt with allegation 1.11 that in about December 2000 Mr Boardman began to interrupt and intentionally cut short her discussion with colleagues. The tribunal said that "Ms Madarassy has put forward no evidence in relation to this matter" and held that the complaint failed. Although Mr Allen criticised the tribunal, it appears that the tribunal was correct on this. No evidence was given by Ms Madarassy to support the allegation. No such evidence was mentioned in Ms Madarassy's closing submissions. The tribunal accepted Nomura's submission that the allegation was unsupported by the evidence.

108 Paragraph 328 dealt with allegation 1.22 that in July 2001 Mr Boardman started giving Ms Madarassy secretarial/assistant tasks, such as addressing envelopes for him by hand, saying "women tend to have nicer handwriting". The tribunal said: "there is no evidence before the tribunal of Mr Boardman asking Ms Madarassy to address envelopes for him by hand, or saying that women tend to have nicer handwriting. The allegation is not proved."

109 Although Mr Allen criticised the tribunal on this point, it appears that Ms Madarassy in fact gave no evidence in support of this allegation. There was no error by the tribunal in finding that the allegation was not proved.

110 There is no substance in this ground of appeal. It is reasonably clear that the tribunal sometimes used the expression "no evidence" to cover both the situation where Ms Madarassy produced no evidence on the point either from herself or from any one else and the situation in which she gave evidence on the point, which the tribunal did not accept as establishing the allegation.

111 It would have been better if the tribunal had not used the expression "no evidence" when it meant "no credible evidence" but the substance of its approach to the relevant evidence and its treatment of it is reasonably clear. It discloses some rather loose use of language, but that does not amount to an error of law in the decision of an employment

tribunal if the factual conclusions and reasoning of the tribunal are sufficient to explain the decision reached on the point. These allegations failed for lack of evidence acceptable to the tribunal.

(C) Pregnancy and a male comparator

112 The tribunal dismissed the allegation that Ms Madarassy's treatment was affected by her pregnancy and maternity. The ground of appeal is that, in relation to complaints of pregnancy and maternity-related discrimination, there is no requirement for either a real or a hypothetical male comparator. The tribunal had not drawn the distinction between sex discrimination and pregnancy discrimination. In the latter case the sole question is whether she was treated less favourably.

113 Mr Allen submitted that the tribunal erred in law in referring to a hypothetical male comparator. The following paragraphs were singled out for criticism by Mr Allen for wrongly including references to a hypothetical male comparator: 175, 215 and 218, 267, 282, 333, 346, 352, 354 and 365.

114 Mr Allen cited *Webb v Emo Air Cargo (UK) Ltd (No 2)* [1995] ICR 1021 for the proposition that, in a pregnancy case, there is no need for a comparator for the purpose of establishing unlawful discrimination. The tribunal wrongly thought that such a comparator was necessary. It had failed properly to distinguish between sex discrimination and pregnancy discrimination.

115 Mr Goulding submitted that this ground of appeal should be rejected for three reasons: first, the point was not taken before the appeal tribunal and two of the paragraphs of the employment tribunal now criticised (paras 215 and 218 relating to treatment in relation to her maternity leave) have in any case been remitted by the appeal tribunal to the employment tribunal: secondly, the point taken rests on a misconception of the law that a hypothetical male comparator is irrelevant to every allegation of pregnancy discrimination; and, thirdly, on the facts the tribunal dismissed the allegation that her treatment was affected by her pregnancy.

116 In my judgment, Nomura has a good answer to this ground of appeal quite apart from the dispute about whether this point had been taken before the appeal tribunal. Mr Goulding submitted that the point was not taken, but Mr Allen pointed to paragraph 21(c) of the grounds of appeal.

117 No question of pregnancy discrimination could have arisen before November 2000, as her pregnancy was not known to Nomura before then. In respect of particular allegations of treatment thereafter, such as those considered in paras 267, 282, 333, 346, 352, 354 and 365, the finding of the tribunal was that the treatment complained of was not affected or influenced by Ms Madarassy's pregnancy because a hypothetical male comparator would have been treated in the same way in the situation in question. They were findings of fact by the tribunal, not errors of law by it.

118 The submission that a hypothetical male comparator is always irrelevant in cases of alleged pregnancy discrimination is incorrect. The mere fact that a tribunal compared Ms Madarassy's treatment with that of a hypothetical male comparator does not disclose an error of law in this case. It is necessary to take account of the factual nature of the particular allegation. As is clear, for example, from the *Webb v Emo Air Cargo* case [1995] ICR 1021 there is no place for a hypothetical male comparator in

A the case of dismissal of a female employee for becoming or being pregnant.

119 It does not follow, however, that it is wrong for an employment tribunal to make a comparison with a hypothetical male comparator for the purpose of determining whether pregnancy or some other reason was the ground for the particular treatment of a pregnant female employee. As explained earlier, two routes are open to the tribunal and both of them are B legitimate. The first route is to identify the attributes of a hypothetical comparator. The second is to go straight to the question why the complainant was treated as she was. There was no error of law on taking the first route of the hypothetical comparator.

(D) Time limits

C **120** A significant number of the 33 individual complaints were based on facts occurring outside the strict three-month time limit set for complaints in section 76(1) of the 1975 Act.

121 The tribunal found that certain acts were out of time, as they did not extend over a period within the meaning of section 76(6)(b). It also refused to extend time on the just and equitable ground under section 76(5). D As the appeal is academic in all those instances where the appeal has failed on the burden of proof ground and where the allegations have been remitted for review by the employment tribunal (allegation 1.18), I shall only deal briefly with the submissions on the time limit ground.

122 The employment tribunal's approach to limitation was criticised by Mr Allen (a) for determining issues on "continuing act" and "just and equitable" before reaching conclusions on the disputed facts and the E complaints; and (b) for considering the issue of "continuing act" without considering the similarity of the acts complained of in similar allegations and having regard to the totality of the evidence as laid down by this court in *Comr of Police of the Metropolis v Hendricks* [2003] ICR 530.

123 The following paragraphs in particular were criticised for dealing with the continuing act point in a compartmentalised fashion and for failing F to consider the connection between the alleged acts in order to ascertain whether there was a discriminatory course of conduct by Nomura. The tribunal held in paras 211 (the content of a conversation on 3 September 2000), 223 (an alleged shouting incident on 6 September 2000) and 326 (Mr Boardman's request to Ms Madarassy to address envelopes) that the acts in question were one-off acts which did not extend over a period or form part of a course of conduct or of a discriminatory state of affairs. They were G therefore out of time.

124 I am unable to find any error of law in the decision on the continuing act point. The rulings of the tribunal were made after the tribunal had heard all the evidence in the case. It is distinguishable from a case like *Hendricks* in which an attempt was made to have the continuing act point decided before hearing all the evidence relating to an alleged course of conduct extending over many years.

H **125** In my judgment, there was no error of law in the decision of the tribunal on the refusal of the tribunal to exercise its discretion to extend time on the just and equitable ground. The grounds of appeal made no direct challenge to the substantive decision refusing to extend time and so no permission was granted to appeal on this ground. Although there are

submissions on this point in the skeleton argument, they do not identify any error of principle or demonstrate that the refusal was plainly wrong.

126 I would reject these grounds of appeal.

(E) Health and safety risk assessment complaint

127 This ground was raised by Nomura in its cross-appeal to the Employment Appeal Tribunal against the finding of the employment tribunal in favour of Ms Madarassy of unlawful discrimination by reason that a health and safety risk assessment was not undertaken in relation to Ms Madarassy's pregnancy (allegation 1.12).

128 Nomura's cross-appeal was allowed, the order of the employment tribunal was set aside and the matter was remitted to the same tribunal. Nomura does not challenge the remission, the appeal tribunal having accepted its contention that the employment tribunal erred in law in upholding Ms Madarassy's complaint that it was in breach of the relevant provisions of the health and safety regulations protecting new or expectant mothers and that this constituted sex discrimination. Ms Madarassy now seeks to have the decision of the employment tribunal restored.

129 This point involves consideration of the Management of Health and Safety at Work Regulations 1999. They were made under section 2(2) of the European Communities Act 1972 and implement Council Directive 89/391/EEC (OJ 1989 No L183, p 1) (a Directive to encourage improvements in the safety and health of workers at work) and Council Directive 92/85/EEC (OJ 1992 No L348, p 1) (the Pregnant Workers Directive), which make provision for the conducting of risk assessments in the case of pregnant women and women who have recently given birth or who are breastfeeding.

130 Regulation 3(1) requires employers to make an assessment of the risks to the health and safety of employees to which they are exposed whilst they are at work.

131 Regulation 16 concerns risk assessment in respect of new or expectant mothers. It provides:

> "(1) Where—(a) the persons working in an undertaking include women of child-bearing age; and (b) the work is of a kind which could involve risk, by reason of her condition, to the health and safety of a new or expectant mother, or to that of her baby, from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of the Council Directive 92/85/EEC . . . on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, the assessment required by regulation 3(1) shall also include an assessment of such risk.
>
> "(2) Where, in the case of an individual employee, the taking of any other action the employer is required to take under the relevant statutory provisions would not avoid the risk referred to in paragraph (1) the employer shall, if it is reasonable to do, and would avoid such risks, alter her working conditions or hours of work."

132 Regulation 18 provides that regulation 16(2) and (3) does not impose any obligation on an employer in relation to an employee until she has notified him in writing that she is pregnant, has given birth within the

previous six months, or is breastfeeding. Ms Madarassy gave notification of her pregnancy in early November 2000. Nomura did not carry out any risk assessment pursuant to regulation 16(1), which does not depend on such notification.

133 Ms Madarassy's case was that proof of some risk was not required before the 1999 Regulations imposed an obligation on Nomura to undertake a risk assessment. The purpose of the assessment was to determine whether such a risk exists in relation to the vulnerable category of workers. It was not for the pregnant worker to identify a risk. It was the function of the risk assessment to do that. Failure to carry out the protective step of an assessment required by regulation 16 was sex or pregnancy discrimination and was a "detriment" within section 6(2)(b) of the 1975 Act. The decision of the Employment Appeal Tribunal in *Hardman v Mallon (trading as Orchard Lodge Nursing Home)* [2002] IRLR 516, paras 14–15 was cited on the disparate impact on pregnant workers of a failure to carry out a risk assessment under the 1999 Regulations and the automatic unlawful discrimination which occurs in such a case. In that case there was direct medical evidence that the employee's work, as a care assistant in a nursing home for the elderly, could involve heavy lifting, which posed a risk to her or her baby's health and safety.

134 If, contrary to her submission that it was not necessary to identify a potential risk, it was necessary to do so, it was submitted that there was such evidence of risk in the form of Ms Madarassy's unchallenged evidence as to radiation exposure and the findings of the employment tribunal (paras 260–261).

135 Nomura contended that its obligation as employer did not arise unless three conditions are satisfied by the evidential material before the employment tribunal. The work must be of a kind (a) which could involve risk, (b) by reason of her condition, (c) to the health and safety of a new or expectant mother, or to that of her baby.

136 As to the employment tribunal's conclusion, in para 261, that Nomura's obligation arose in relation to the comfort of Ms Madarassy sitting before a computer and to radiation from a computer, Nomura submitted that there was no evidence, expert or otherwise, apart from some general statements made by Ms Madarassy herself about pain and discomfort, as to her working conditions or as to discomfort and radiation in particular. The tribunal had reached a conclusion without evidence to support it. It had confused discomfort with risk to health and safety. In particular, it had not found that radiation from the computer could involve risk to health or safety nor was there any evidence of detriment to Ms Madarassy on which a complaint of discrimination could be founded.

137 Mr Allen responded that it was sufficient to establish a possible risk and that Ms Madarassy suffered detriment in not getting the benefit of a risk assessment.

138 On this point I agree with the appeal tribunal (paras 216–221) that the employment tribunal erred in law. It did not make an express finding of a risk to health and safety arising from exposure to radiation emitted from the computer; nor was there evidence before it on which it could make such a finding. A finding that the work involved potential risk to health and

safety was necessary before there was an obligation on Nomura under regulation 16 to carry out a risk assessment.

139 I would therefore dismiss Ms Madarassy's appeal on this ground, leaving in place the order remitting the matter of the health and safety risk assessment to the same employment tribunal.

(F) Remission to same or different tribunal

140 This ground of appeal is that the appeal tribunal erred in remitting the two allegations 1.15 and 1.18, on which it found that the employment tribunal had erred in law, to the same employment tribunal which would also review its decision on the alleged failure (allegation 1.12) of Nomura to carry out a health and safety risk assessment.

141 *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, para 46, was cited for the guidance given by the Employment Appeal Tribunal on this point. Factors relevant to whether the remission should be to the same tribunal or to a different tribunal include the length of time which has passed since the tribunal's decision; the risk of loss of recollection and the ability of the original tribunal to refresh the memories of the members from notes of evidence and submissions; the length and complexity of the case; the extent to which the decision under appeal was flawed or mishandled; the risk that the tribunal has already made up its mind to reach a certain result in the case and its ability to reconsider the matter fully and reach a different decision on the evidence and arguments; and the ability of the tribunal to exercise its usual professional approach and skills on the remission.

142 Mr Allen contended that the allegations in question should have been remitted for rehearing by a different tribunal. A considerable time had passed since the original hearing. The tribunal had produced a totally flawed decision, misdirecting itself on the fundamental point of the burden of proof and on its approach to the evidence in the case.

143 Mr Allen also referred to Ms Madarassy's original grounds of appeal, which were later withdrawn (see the section below on the costs order), and to the tone of the members' comments when responding to her allegations against the tribunal ("insulting", "preposterous"). From the standpoint of the objective observer this gave rise to a real possibility of a risk of bias on the part of the tribunal at a remitted hearing.

144 Further, the numerous factual findings against Ms Madarassy in the original decision gave the impression that the tribunal had so committed itself to the decision in favour of Nomura that an objective re-think by it was impracticable.

145 I am satisfied that the appeal tribunal did not err in law in exercising its discretion to remit the three allegations to the same tribunal. It directed itself in accordance with the principles stated in the decision of the Employment Appeal Tribunal in the *Sinclair Roche* case. For the reasons given earlier the decision of the tribunal was not flawed by misdirection on the burden of proof or on its approach to the evidence. The decision to remit a small number of the numerous allegations to the same tribunal, which knows the detailed factual background to the case, having heard all the evidence in the course of a long hearing, is proportionate and appropriate in terms of cost, time and efficiency without any real possibility of a risk of apparent bias on the part of a fair-minded and informed observer or other obstacle to the attainment of justice: see *Amec Capital Projects Ltd v*

Whitefriars City Estates Ltd [2005] 1 All ER 723. Despite the passage of time the tribunal will be able to refresh its memory from the notes of evidence and the other papers and can be safely trusted to deal with the remitted matters in an impartial and professional manner.

146 I would not interfere with the discretion of the appeal tribunal on this point.

(G) Review or rehearing

147 The ground of appeal is that the appeal tribunal erred in remitting the three allegations on which it found errors of law by the employment tribunal for a review rather than for a rehearing. Reference was made to the limited circumstances in which an employment tribunal has power to review its decisions on the application of a party or of its own motion: rule 13(1) of the Employment Tribunals Rules of Procedure in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (SI 2001/1171). It was contended that the passage of time since the decision of the employment tribunal made it inappropriate to direct the tribunal to review its decision on the three allegations rather than rehear the remitted matters from scratch.

148 This point has no substance, amounting to little more than a verbal quibble. The appeal tribunal had power to make this form of order in the exercise of its discretion to remit under section 35(1)(a) and (b) of the Employment Tribunals Act 1996. The appeal tribunal made it clear that, in carrying out its review in accordance with the judgment of the appeal tribunal, the employment tribunal had power to hear further evidence on the application of the parties or of its own motion.

149 I am unable to find any respect in which the appeal tribunal erred in directing the review of the decisions on the particular allegations. It had power to make the order in its discretion. In exercising the discretion it neither erred in principle nor took a course that was plainly wrong.

(H) Bonus claim

150 There is an issue between the parties as to whether the issue about a bonus claim is before this court.

151 Ms Madarassy made an allegation of sex discrimination in relation to the provision and amount of a bonus in April 2001 (allegation 1.16). She alleged that she received a smaller bonus than her male colleagues. She later named seven male comparators, including Mr Boardman and Mr Salam. The chairman of the tribunal refused an application by her for disclosure of the bonuses of the individuals, holding that none of them appeared to be true comparators.

152 At the substantive hearing the tribunal directed that the issue of disclosure on comparators be deferred to the end of the hearing when the parties could make submissions on it in the closing submissions. In the closing submissions Ms Madarassy's then counsel submitted that it was appropriate to disclose the figures and that the matter could be dealt with at any remedies hearing.

153 The tribunal found that only Mr Salam was an appropriate comparator, that it did not have the evidence to enable it to resolve the

allegation of less favourable treatment and that in any case it was a one-off issue which was out of time.

154 It is said that the point was before the appeal tribunal because every refusal of the employment tribunal to find for Ms Madarassy on a specified act of discrimination was raised on the appeal, unless it had been expressly excluded at the preliminary hearing. The point was, however, a complaint about the failure to make the order for disclosure about Mr Salam's April 2001 bonus.

155 At a preliminary hearing on 3 February 2004 Burton J rejected the ground of appeal against the failure of the employment tribunal to order Nomura to disclose the remuneration levels of the named male comparators for the purposes of the bonus claim. The disclosure issue was excluded on the ground that it had no prospect of success. It did not proceed to a full hearing. The decision to exclude this ground was not appealed.

156 Before this court Ms Madarassy appealed against every rejection of her sex discrimination claims, unless the court had excluded an allegation on the grant of permission to appeal. This issue was not expressly excluded.

157 Mr Goulding did not accept that this issue is properly before the Court of Appeal. He said that Nomura had proceeded on the basis that the bonus issue did not feature in the appeal to this court. He pointed out that it was not before the Employment Appeal Tribunal at the full hearing. The skeleton argument for Ms Madarassy made no criticism of the tribunal's approach to the bonus claim allegation 1.16, not even in relation to the burden of proof ground as particularised by reference to particular paragraphs. The allegation was not referred to in the oral argument.

158 The skeleton argument for Ms Madarassy in this court referred to many paragraphs of the tribunal on the burden of proof ground, but made no mention of the tribunal's approach to the bonus issue. It also referred to paragraphs on the issue of time limits, but not to the paragraph in which the bonus issue was held to be out of time. As the matter was not raised in the grounds of appeal or in the skeleton argument there was no call for it to be expressly excluded when permission to appeal was granted with limitations.

159 I agree with Mr Goulding on this point. The issue is not before this court. It is unnecessary to deal with the bonus issue other than to say that it does not in any event appear to raise any point that is not covered by the rulings made above rejecting Ms Madarassy's grounds of appeal on the burden of proof and the time limits points.

(I) Costs

160 This point arises on an adjourned application for permission to appeal.

161 Ms Madarassy was acting in person when she lodged her very long notice of appeal (108 paragraphs, 31 pages) with the Employment Appeal Tribunal on 31 March 2003. She made allegations of bias and improper conduct on the part of the employment tribunal.

162 On 9 May 2003 Judge Peter Clark ordered her to lodge an affidavit giving details in support of her allegations of bias or improper conduct. Judge Peter Clark gave a costs warning to the effect that the unsuccessful pursuit of the allegations might give rise to an award of costs. The order also directed the notice of appeal to be served on Nomura, which was invited to

A lodge concise submissions in opposition for consideration at the preliminary hearing.

163 On 23 May 2003 Nomura filed and served concise written submissions directed at persuading the Employment Appeal Tribunal not to allow the appeal to proceed beyond the preliminary hearing. Mr Goulding relied on the costs incurred in so doing to justify the award of costs later made in favour of Nomura by the Employment Appeal Tribunal.

B **164** Mr Allen submitted that there was no sensible reason for Nomura responding to the allegations made by Ms Madarassy in her notice of appeal. The order made by Judge Peter Clark provided for Nomura to have an opportunity to respond to the affidavit following its receipt. There was nothing to respond to until the affidavit was submitted.

165 In her affidavit lodged on 23 May 2003 in accordance with the C direction Ms Madarassy expressly withdrew some of the allegations, but not all of them. A number of allegations of improper conduct remained in the notice of appeal. Some additional allegations were made by Ms Madarassy in the affidavit itself.

166 A first draft amended notice of appeal was submitted on 23 September 2003. The allegations of bias and improper conduct were no longer pursued.

D **167** Mr Allen contended that the appeal tribunal erred in making an order against Ms Madarassy in respect of costs incurred after she had acted upon a costs warning given at the earliest possible stage by withdrawing parts of her appeal. The award of costs was, he contended, perverse in that no reasonable tribunal would have made an award of costs in the circumstances. Such orders would denude costs warnings of any effect. E They would discourage parties from abandoning weak allegations at an early stage. The order should be set aside.

168 While I agree with Mr Allen that it would be contrary to the purpose of a costs warning to make the party warned liable for costs incurred after the party had heeded the warning and ceased the conduct warned against, I have reached the conclusion that, on the facts of this case, the appeal tribunal did not err in principle in the exercise of its discretion F to order Ms Madarasssy to pay costs of £2,000 to Nomura. Although Mr Allen commented on the amount of the costs claimed by Nomura, there was no appeal against the quantum of the costs ordered against Ms Madarassy.

169 Nomura had incurred legal costs in responding to the notice of appeal, which contained the allegations that led the appeal tribunal to G make the order directing affidavit evidence from Ms Madarassy and inviting Nomura to make concise submissions. Ms Madarassy's allegations of improper conduct were only completely dropped when the amended notice of appeal was served several months after the respondent had incurred the costs in respect of the concise submissions and only shortly before the preliminary hearing which was due to take place on 29 September 2003.

H **170** In these circumstances the appeal tribunal was entitled to come to the conclusion that Ms Madarassy had behaved improperly and unreasonably in making the allegations in the first place and that Nomura's costs in relation to the written submissions were incurred in consequence of the allegations.

171 I would refuse the application for permission to appeal the costs order on the ground that there is no real prospect of persuading the Court of Appeal to interfere with the discretion of the appeal tribunal.

Result

172 I would dismiss the appeal on the ground, first that there was no error of law in the decision of the employment tribunal on any of the many aspects of its decision which were appealed to this court, and, secondly, there was no error of law in the decision of the Employment Appeal Tribunal to remit three of the allegations for review by the same employment tribunal or to make the £2,000 costs order against Ms Madarassy.

LAWS LJ

173 I agree.

MAURICE KAY LJ

174 I also agree.

Appeal dismissed with costs, subject to detailed assessment.
Interim payment by claimant of £80,000 within 28 days.
Permission to appeal refused.

Solicitors: Palmer Wade; Osborne Clarke.

R V R

MARKET INVESTIGATIONS LTD.

v.

MINISTER OF SOCIAL SECURITY

1968 July 24; 29 — Cooke J.

Master and Servant—Contract of service—Service of, or for services—Market research interviewer—Part-time services—Series of contracts—Company controlling conduct of interviews—Interviewer free to work at time of choice—Freedom to work for others—Whether performing services as person in business on own account—Whether extent of control consistent with contract of service—Whether nature of whole contract consistent with contract of service—Considerations—Whether interviewers "employed person"—National Insurance Act, 1946 (9 & 10 *Geo.* 6, *c.* 67)*—National Insurance Act,* 1965 (*c.* 51), *s.* 1 (2).[1]

A member of a panel of part-time interviewers of a company engaged in market research was supplied with the company's "Interviewer's Guide" which gave detailed instructions as to the method in which interviews were to be conducted on behalf of the company. When the company was making a survey, the interviewer might be asked if she was willing to do a number of days' work within a fixed period. If she agreed, she would be sent the particulars and detailed instructions of the assignment, including the persons she was to interview and the questions she was to ask; she might also be asked to attend the company's briefing meetings, or she might receive instructions from the company's supervisor. She was paid for the number of days which the company estimated the interviews would take and expenses but, provided she completed the work within the allotted time, she was free to work when she chose; during the assignment she could work for others, and the company considered that they could not dismiss her. The Minister held that she was an employed person under section 1 (2) of the National Insurance Acts, 1946 and 1965,[1] and in insurable employment within section 1 (2) of the National Insurance (Industrial Injuries) Acts, 1946 and 1965.

On the company's appeal, contending that she was engaged under a series of contracts for services and not contracts of service:—

Held, dismissing the appeal, that since control, although a matter for consideration, was not decisive, the fundamental test in determining whether a person was performing services under a contract of service or for services was whether the person engaged to perform those services was performing them as a person in business on his own account and thus under a contract for services (post, p. 184G–H) but that no exhaustive list of the relevant considerations or their weight could be compiled

[1] National Insurance Act, 1965, s. 1: "(2) For the purposes of this Act, insured persons shall be divided into the following three classes, namely—(*a*) employed persons, that is to say, persons gainfully occupied in employment in Great Britain, being employment under a contract of service; (*b*) self-employed persons, that is to say, persons gainfully occupied in employment in Great Britain who are not employed persons; (*c*) non-employed persons. . . ."

(post, pp. 184G–185B); that, in the present case, the extent of control exercised by the company was so extensive as to be consistent with the interviewer being employed under a contract of service, notwithstanding that she had a discretion as to when to do the work (post, pp. 186D–H); and that, having regard to the nature and provisions of the contract looked at as a whole, the interviewer was not in business on her account, but was employed by the company under a series of contracts of service (post, pp. 186H–188C), the right to work for others not being inconsistent with the existence of a contract of service (post, p. 186F), and was accordingly, in insurable employment.

Per curiam: The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service (post, p. 188B).

Dicta of Dixon J. in *Queensland Stations Proprietary Ltd.* v. *Federal Comr. of Taxation* (1945) 70 C.L.R. 539, 552; Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161, 169, P.C.; Denning L.J. in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248, 279; [1952] 2 All E.R. 956, C.A. and *United States of America* v. *Silk* (1947) 331 U.S. 704 applied.

Ready Mixed Concrete (South East) Ltd. v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497; [1968] 2 W.L.R. 775; [1968] 1 All E.R. 433; *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343; [1951] 1 All E.R. 574, C.A. and *Morren* v. *Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576; [1965] 2 All E.R. 349, D.C. considered.

The following cases were referred to in the judgment:

Amalgamated Engineering Union v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441; [1963] 1 All E.R. 864.

Bank voor Handel en Scheepvaart N.V. v. *Slatford* [1953] 1 Q.B. 248; [1952] 2 All E.R. 956, C.A.

Cassidy v. *Ministry of Health* [1951] 2 K.B. 343; [1951] 1 All E.R. 574, C.A.

Collins v. *Hertfordshire County Council* [1947] K.B. 598; [1947] 1 All E.R. 633.

Hobbs v. *Royal Arsenal Co-operative Society Ltd.* (1930) 23 B.W.C.C. 254, C. A.

Montreal v. *Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161, P.C.

Morren v. *Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576; [1965] 2 All E.R. 349, D.C.

Queensland Stations Proprietary Ltd. v. *Federal Commissioners of Taxation* (1945) 70 C.L.R. 539.

Ready Mixed Concrete (South East) Ltd. v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497; [1968] 2 W.L.R. 775; [1968] 1 All E.R. 433.

Sadler v. *Henlock* (1855) 4 E. & B. 570.

United States of America v. *Silk* (1946) 331 U.S. 704.

Whittaker v. *Minister of Pensions and National Insurance* [1967] 1 Q.B. 156; [1966] 3 W.L.R. 1090; [1966] 3 All E.R. 531.

The following additional cases appear in the case stated by the Minister:

Gould v. *Minister of National Insurance* [1951] 1 K.B. 731; [1951] 1 All E.R. 368.

Short v. *J. and W. Henderson Ltd.*, 1946 S.C.(H.L.) 24, H.L.

Stevenson, Jordan and Harrison Ltd. v. *MacDonald and Evans* [1952] 1 T.L.R. 101, C.A.

Wilson v. *Minister of Pensions and National Insurance,* The Times, February 10, 1955.

The following additional case was cited in argument:

Willy Scheidegger Swiss Typing School (London) Ltd. v. *Minister of Social Security* (1968) 5 K.I.R. 65.

CASE STATED by the Minister of Social Security.

On August 2, 1966, Market Investigations Ltd. (hereinafter called "the company"), who were the appellants in this case, applied for the decision of the Minister of Social Security, under section 64 (1) of the National Insurance Act, 1965, and section 35 (1) of the National Insurance (Industrial Injuries) Act, 1965, of the questions whether whilst working in association with the company Mrs. Anne Florence Irving [hereinafter called "Mrs. Irving"] of [an address in Cheshire] was (1) included in the class of employed persons or in the class of self-employed persons for the purposes of the National Insurance Acts, 1946 and 1965; (2) employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Acts, 1946 and 1965.

On October 11, 1966, the Minister appointed Mrs. C. M. Vivian Williams, barrister-at-law and member of the solicitor's office of the Ministry of Social Security, to hold an inquiry into questions arising on the application and to report thereon. On December 1, 1966, Mrs. Williams held an inquiry in London. The company was represented by counsel and adduced evidence. Mrs. Irving was given due notice of the inquiry, but she declined to attend and was not represented.

On consideration of the evidence led at the inquiry the Minister found the following facts. The company, whose registered office was at 1/2, Berners Street, London, W.1, was engaged in the field of market research, and in addition to their permanent staff at the headquarters office they employed interviewers for about eight to ten thousand interviews annually to provide information for the company's customers about the habits and opinions of members of the general public, retailers or other people in commerce, industry and the professions. A small number of the interviewers, whom the company directed to work anywhere at any time, were employed full time, but for the most part the company drew from a panel of about 470 interviewers, mostly married women wishing to earn pin money: the company had only 39 male interviewers. The company preferred to draw from a large number of interviewers infrequently rather than from a small number frequently as from the nature of the work it was important to diminish the effect of any personal prejudice on the part of the interviewer. Interviewers were recruited either by advertisement or through personal contacts. All interviewers were issued with or had access to a copy of the company's "Interviewer's Guide" a copy whereof was annexed and might be read as part of this case. That was a 26 page document outlining the techniques in interviewing and on page 1 it stated

> "The value and success of any survey depends primarily on the care taken over interviewing, the accuracy of recording and the absence of bias. Any errors in interviewing can be carried through analysis to the final report and may lead to totally misleading results"

and it proceeded to give detailed examples of various types of surveys, methods of interviewing, recording of information and classification of persons interviewed into social grades. Before each survey went into the field the questionnaire was piloted to make sure that it was unambiguous in that questions would be asked, and answers recorded, in the best possible way. The final questionnaire, samples and interviewing instructions were then compiled by the company's research executives who were also able to estimate the time a given number of interviews should take. The company's field office staff organised the allocation of assignments and the area organiser was responsible for selecting the interviewers she thought could cope with each assignment: she then telephoned them to enquire whether they were free to work on a given number of days within a given period, say two or three days' work during a 10 to 14 day period. There was no obligation on a member of the panel to accept offers of work, but if there were frequent refusals that member would not be offered any further assignments. An interviewer was free to work for other firms doing similar work during the same period, provided he or she submitted work within the deadline required by the company. Each interviewing assignment was a distinct and separate arrangement and once a member of the panel had indicated that he or she was available, he was sent particulars of the assignment and instructions. The area organiser was also responsible for collecting and checking work carried out by the interviewers. The company checked with approximately 10 per cent. of the people stated by the interviewers to have been seen to ensure that they had been interviewed. The company did not allow interviewers to send a substitute without prior permission of the company. Interviewers were sent so many days' work based on the number of interviews the research executives determined could properly be done in a seven hour day, including travelling time. Thus it was known how much an interviewer would be paid, less expenses, when she received a particular assignment. When an interviewer was first engaged, a supervisor accompanied her to see that the techniques the company liked for interviewing were understood. On some of the more difficult assignments, a briefing meeting for interviewers was held at one of the company's centres or at other times the supervisor met the interviewer and gave the interviewer a personal briefing and might even accompany her on the first one or two interviews to make sure that the interviewing was carried out correctly. Once the interviewer was actually working in the field, the supervisor had no means of contacting her as the company had no record of where or when she would be working.

Mrs. Irving, resident at [a different address in Cheshire] (known to the company as "Dicti Irving") applied to be put on the company's panel of interviewers on April 15, 1964: this was at the suggestion of the area organiser since at that time the company required interviewers to work in pairs on a particular survey and Mrs. Irving's husband was already on the company's panel of interviewers. At that time Mrs. Irving had experience of interviewing, but not in the field of market research. She described herself as a housewife, indicating that on average she would be free to work four days a week, including weekend work, briefing sessions and that she was free to travel and work away from home if requested for three nights at a time. Between May 14, 1964, and December 3, 1965, a period of

approximately 81 weeks, Mrs. Irving was paid by the company for a total of 61 days' work and eight half-day's work. She was paid by the company for that work a total of £122. In addition she was paid sums totalling £48 10s. 1d. for expenses incurred by her in performing the work. In the aforesaid period Mrs. Irving rendered services for the company for more than eight hours a week during the following 14 weeks, that is to say, the weeks which began on June 29, 1964, August 10, 1964, October 19, 1964, November 2, 9, 16, 23 and 30, 1964, January 4 and 11, 1965, February 15, 1965, April 5, 1965, September 20, 1965, and November 29, 1965. For the most part Mrs. Irving was paid on a daily basis as outlined [above] (at first the daily rate was 30s. increased to 35s. and latterly to 40s. daily): at other times she was paid 5s. or 10s. per interview. She also received a meal allowance and travelling expenses. One of the company's supervisors accompanied Mrs. Irving during the first few interviews on her first assignment.

The terms and conditions of each assignment varied. The company through their officers issued instructions in writing relating to the way in which each assignment was to be carried out and issued variously record sheets (a specimen copy was enclosed between pages 6 and 7 of the "Interviewer's Guide"), quota sheets (a specimen copy was enclosed at page 7 of the "Interviewer's Guide"), blank questionnaires on which to record informant's answers, prompt cards (a specimen copy was enclosed at page 17 of the said "Interviewer's Guide"), recruitment sheets, samples of products, expense sheets, labels and return envelopes. For the purpose of some of the surveys Mrs. Irving was given lists of the persons to be interviewed, the precise questions to be asked, the order in which they were to be asked and recorded and how to probe if she received a vague answer. For other surveys she had discretion to interview various persons in divers specified age or income groups In all cases the answers had to be recorded in the form required by the company. On some assignments it was suggested that interviews should be conducted in the afternoons or evenings, but provided the assignment was completed within the specified deadline, Mrs. Irving could work as and when she chose and did not necessarily have to complete seven hours' work during one day.

Mrs. Irving was required to forward the completed questionnaires to the company's head office at the end of each day's interviewing, the object being to facilitate internal organisation and to avoid swamping the company's processing department. On occasion, when there was a complicated survey, Mrs. Irving was required to attend the company's briefing sessions in London and on at least one occasion (in April, 1965) she was paid £2 for attending such a meeting plus travelling expenses. The company's officers were of the opinion that they could not have dismissed Mrs. Irving in the middle of an assignment, but if they had been dissatisfied with her work they would have sent her no further assignments. On December 22, 1965, Mrs. Irving wrote to the company's area supervisor, apologised for not undertaking the previous two assignments offered and suggested that her name be removed from the panel of interviewers. The company did not pay national insurance contributions at the rate appropriate for

employed persons in respect of Mrs. Irving, neither did they make deductions from her earnings for tax under the P.A.Y.E. system, which they did in respect of their full-time interviewers. A

The following contentions were made on behalf of the company. That the problem was whether Mrs. Irving was engaged under a contract of service or a contract for services. That the law did not lay down any test of universal application by which one type of contract was to be distinguished from the other. That the tests most frequently applied were those B laid down by Lord Thankerton in *Short* v. *J. and W. Henderson Ltd.*, 1946 S.C.(H.L.) 24, 33. The most important of those tests in reference to the present case was whether the master has the right to control the method of doing the work. It was this test which was applied in *Wilson* v. *Minister of Pensions and National Insurance*, The Times, February 10, 1955, and *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441 and *Gould* v. *Minister of* C *National Insurance* [1951] 1 K.B. 731. It was also applied by the Minister in a decision given in July, 1955, in respect of a B.B.C. interviewer (*Decision M.48*). It was also the test suggested by the Ministry in its note to the form of application. That the alternative tests suggested in *Stevenson, Jordan and Harrison Ltd.* v. *MacDonald and Evans* [1952] 1 T.L.R. 101 and *Morren* v. *Swinton and Pendlebury Borough Council* [1965] D 1 W.L.R. 576, C.A., were applicable only to professional people who were engaged for their skill and experience. That Mrs. Irving was not such a person and accordingly the tests did not apply to her. That Mrs. Irving was not continuously engaged under one contract, but was intermittently engaged under a series of contracts. That none of these contracts contained any provision for termination by the company of Mrs. Irving's services. That since each contract involved so many hours' work to be E done and a very much larger working period in which Mrs. Irving could do it as and when she liked, any form of control was impossible. That one of the essential features of control was that the person controlled must be at work during specified periods. That, therefore, the company had no right to control how the work was to be done. That, in the premises, Mrs. Irving worked for the company pursuant to a series of contracts for F services and was not employed under a contract of service.

On consideration of all the above-mentioned matters the Minister concluded that: Mrs. Irving's employments by the company were employments under contracts of service, and she was gainfully occupied in those employments in Great Britain; by virtue of section 1 (2) (*a*) of the National Insurance Act, 1946, and subsequently by virtue of section 1 (2) (*a*) of the National Insurance Act, 1965, Mrs. Irving was included in the class of G employed persons for the purposes of the aforesaid Acts respectively by virtue of her work for the company during the weeks stated [above]; by virtue of regulation 2 of, and paragraph 10 (*b*) of Schedule 1 to, the National Insurance (Classification) Regulations, 1948, as amended (S.I. 1948 No. 1425 and S.I. 1957 No. 2175 (the eight-hour rule)), Mrs. Irving was not included in the class of insured persons during other weeks in H which she worked for the company during the period from May 14, 1964, to December 3, 1965; by virtue of section 1 of, and paragraph 1 of Part I of Schedule 1 to, the National Insurance (Industrial Injuries) Act, 1946, and

subsequently by virtue of section 1 of, and paragraph 1 of Part I of Schedule 1 to, the National Insurance (Industrial Injuries) Act, 1965, Mrs. Irving's employment by the company during the last aforesaid period was insurable employment within the meaning of the last two aforesaid Acts respectively.

On February 16, 1967, the Minister accordingly decided that, while working in association with the company during the weeks commencing June 29, August 10, October 19, November 2, 9, 16, 23, and 30, 1964, January 4 and 11, February 15, April 5, September 20, and November 29, 1965, Mrs. Irving was (1) included in the class of employed persons for the purposes of the National Insurance Acts, 1946 and 1965, and (2) was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Acts, 1946 and 1965.

On February 16, 1967, notice of the decision was sent to Mrs. Irving and, through its solicitors, to the company.

On March 1, 1967, the company's solicitors on behalf of the company requested the Minister to state the grounds of the decision, and on April 27, 1967, a statement of the grounds of the decision was sent to the company's solicitors in the terms set out in a copy annexed to the case.

On May 18, 1967, the company, through its solicitors, by notice in writing addressed to the Minister required the Minister to state a case, setting forth the facts on which her decision was based and her decision thereof, which, in accordance with the provisions of R.S.C. Ord. 111, the Minister did in the terms set out herein.

Peter Pain Q.C. and *Keith Evans* for the appellant company. The two approaches to the determination of whether a person is an employed person under a contract of service or a self-employed under a contract for services are, first, the application of the classic test, the degree of control, and, secondly, the consideration of all the contractual terms to determine whether they are more consistent with a contract of service or a contract for services. Absence of control is a strong indication that there is a contract for services, and here the company's lack of control over Mrs. Irving is consistent with a contract for services.

When considering the contract as a whole, the matters which indicate that this is a contract for services includes the fact that the company considered it had no power to dismiss Mrs. Irving during a contractual period. The Minister qualified this, saying " the company officers were of the opinion that they could not have dismissed Mrs. Irving in the middle of an assignment." If so-called employers consider they have no right of dismissal it is an indication that there is no such right and here the company were content with the negative power that, if the work was done badly, they would not enter into a further contract with Mrs. Irving. The contract neither provides for specific times of working nor for time off, holidays or sick pay. These are matters which are usually to be found in a contract of service. Even in a part-time contract of service, it is to be expected that the service is a continuous one, but here the work is intermittent, and there are substantial gaps between the contractual periods. During the contractual periods, Mrs. Irving has to work to a deadline, but

she is at liberty to work for others. She works for a fixed fee, and she is in a similar position to a chartered accountant who is brought in to do a prescribed task for an organisation but, provided the task is completed by a fixed date, he is at liberty to work as and when he chooses.

The modern authorities which state the present-day position of the law are *Morren* v. *Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576; *Whittaker* v. *Minister of Pensions and National Insurance* [1967] 1 Q.B. 156; *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497. Such matters as ownership of assets, chances of profit and risk of loss do not really help in this case. The test of skill alone does not help, for there are many examples of employed persons with considerably more skill than an interviewer; but Mrs. Irving must exercise a degree of skill in obtaining the answers to the questions, even though those questions are formulated by the company.

Mrs. Irving is a person who can work when she chooses, she has no duty to accept employment, and she can disregard any control the company attempts to assert over her whilst she is working, for the contractual terms do not permit any interference by the company in the manner and times she works. Neither she nor the company considered that she was an employed person in an insurable employment. This series of contracts is more consistent with a series of contracts for services than contracts of service.

Gordon Slynn for the Minister of Social Security. The courts have adopted a number of tests to determine whether a relationship is that of master and servant or of independent contractors. It is important to bear in mind that these tests have been used for different purposes including consideration of vicarious liability in tort, the transfer of a servant, contracts, the Workmen's Compensation Acts. Firstly, the classic test is based on control but, although absence of control is a strong indication of a contract for services, the presence of control is not conclusive against the relationship of independent contractors if other factors outweigh it. The degree of control an employer exerts over an employee varies with the degree of skill needed by the employee to perform his task. Secondly, there is the test applied by Lord Thankerton in *Short* v. *J. and W. Henderson Ltd.*, 1946 S.C.(H.L.) 24, 33 who adopted the four indicia: whether an employer paid the servants wages and had the right to select and dismiss the servant and to control the method of doing the work. Another test applied in *Stevenson, Jordan & Harrison Ltd.* v. *MacDonald and Evans* [1952] 1 T.L.R. 101 and referred to in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248 was whether the person performing the task was part of the organisation. Finally, MacKenna J. in *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497 applied the test of economic reality and that test incorporates the four elements propounded by Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.* (1947) 1 D.L.R. 161 of ownership of assets, control, chance of profit and risk of loss. Not one of these tests is absolute or conclusive and the correct approach is to consider all the factors and, applying all the tests, so far as relevant, determine whether the contract is one of service or for services: see Atiyah's *Vicarious Liability in the Law of Torts* (1967), p. 38.

A Control is, however, an important element even if it is less determinative than formerly: see *Short* v. *J. and W. Henderson Ltd.*, 1946 S.C. 24, *Whittaker* v. *Minister of Pensions and National Insurance* [1967] 1 Q.B. 156 and *Gould* v. *Minister of National Insurance* [1951] 1 K.B. 731. Although, as in *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497 control is not a B decisive factor if other factors outweigh it, control is a strong indication that the contract is one of service. Conversely, absence of control is a strong indication of a contract for services, but again it is not a conclusive factor; see *Morren* v. *Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576.

In this case the company exert a very considerable degree of control C over the manner in which Mrs. Irving carries out and conducts the interviews. The Interviewer's Guide gives detailed directions as to how the interviews are to be conducted. The fact that the interviewer cannot be contacted when in the field must be read in the light of all the other factors including the instructions from the supervisor, form of questions and the briefing sessions in London. The instructions are so detailed that the interviewers are left with very little initiative and independence. D Flexibility as to the time worked, and the fact that the work is part time, does not mean that a person is not an employee: *Hobbs* v. *Royal Arsenal Co-operative Society Ltd.* (1930) 23 B.W.C.C. 254. In *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441 it could not have been known when a sick steward was visiting the sick and, in every case where canvassers are employed, an employer E cannot know when and where they are working. Nor does it matter that it cannot be said at the beginning how long the job will take.

A number of short contracts may suggest independence, but they may in fact create a master-and-servant relationship: see *Sadler* v. *Henlock* (1855) 4 E. & B. 570. If a man is employed once as a servant he does not cease to be a servant because he is subsequently engaged from time to time, e.g., a sandwich-board man, a hall attendant engaged on specific F occasions. The lack of provision for holiday, time off and sick pay in these contracts does not indicate contracts for services as by the very nature of the contracts such provisions are not applicable in the circumstances even if the contracts are contracts of service.

The fact that the company thought it could not dismiss during a period or in the middle of an assignment makes no difference. The contract of G a servant like that of an independent contractor can be terminated for repudiation; in the case of a servant it is called dismissal. Equally, both may be subject to termination on notice under an implied term, but not if this would be inconsistent with the express terms as where the contract whether of service or for services was for a fixed period. Then you can only terminate for a repudiation. [Reference was made to *Willy Scheidegger Swiss Typing School (London) Ltd.* v. *Minister of Social Security* H (1968) 5 K.I.R. 65.]

The degree of control in this case is such that they are contracts of service but, even if control is not an important test, the application of

the economic reality and integration tests achieve the same result and these are contracts of service. The interviewer here clearly did not have an independent business. A

Pain Q.C. replied.

Cur. adv. vult.

July 29. COOKE J. The appellant company in this case, Market Investigations Ltd., are engaged in the field of market research. In addition to their permanent staff at the headquarters office, they employ interviewers for about eight to ten thousand interviews annually to provide information for the company's customers about the habits and opinions of members of the general public, retailers or other people in commerce, industry and the professions. B

The company employ a small number of interviewers who work full time, but for the most part they draw from a panel of about 470 interviewers, mostly married women wishing to earn pin-money. C

Between May 14, 1964, and December 3, 1965, Mrs. Ann Florence Irving was a member of that panel and from time to time during that period she engaged herself to the company to act as an interviewer in connection with particular surveys which the company were conducting. D

On August 2, 1966, the company applied to the Minister for a decision whether, whilst working under those engagements, Mrs. Irving was included in the class of employed persons for the purpose of the National Insurance Acts, 1946 and 1965, and was employed in insurable employment within the meaning of the National Insurance (Industrial Injuries) Acts, 1946 and 1965.

Section 1 (2) of the National Insurance Act, 1965, defines "employed persons" as persons gainfully occupied in employment in Great Britain, being employment under a contract of service. The definition in the National Insurance Act, 1946, was to the same effect. E

By section 1 (2) of the National Insurance (Industrial Injuries) Act, 1965, and paragraph 1 of Part I of Schedule 1 to that Act, insurable employment for the purposes of that Act includes, subject to exceptions not here material, employment in Great Britain under any contract of service. The corresponding provisions of the National Insurance (Industrial Injuries) Act, 1946, were to the like effect. F

The submission of the company before the Minister was that Mrs. Irving worked for the company under a series of contracts for services. The Minister's conclusion was that Mrs. Irving's employments by the company were employments under contracts of service. The Minister went on to hold that in certain weeks during the period between May 14, 1964, and December 3, 1965, Mrs. Irving was included in the class of employed persons for the purposes of the National Insurance Acts and that her employment with the company was insurable employment within the meaning of the National Insurance (Industrial Injuries) Acts. G

From that decision the company now appeals. The sole issue for determination in the appeal is whether, as the company say, Mrs. Irving was employed during the relevant period under a series of contracts for services or, as the Minister says, she was employed during that period H

under a series of contracts of service. [His Lordship referred to the facts found by the Minister in the case stated, and continued:]

The authorities on the distinction between a contract of service and a contract for services have been extensively reviewed in a number of recent cases, and in particular I refer to the judgment of Mocatta J. in *Whittaker* v. *Minister of Pensions and National Insurance* [1967] 1 Q.B. 156 and the judgment of MacKenna J. in *Ready Mixed Concrete (South East) Ltd.* v. *Minister of Pensions and National Insurance* [1968] 2 Q.B. 497.

With these and other recent decisions before me, I do not myself propose to embark on a lengthy review of the authorities. I begin by pointing out that the first condition which must be fulfilled in order that a contract may be classified as a contract of service is that stated by MacKenna J. in the *Ready Mixed Concrete* case [1968] 2 Q.B. 497, 515, namely, that A agrees that, in consideration of some form of remuneration, he will provide his own work and skill in the performance of some service for B. The fact that this condition is fulfilled is not, however, sufficient. Further tests must be applied to determine whether the nature and provisions of the contract as a whole are consistent or inconsistent with its being a contract of service.

I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B was entitled to exercise over A in the performance of the work would be a decisive factor. However, it has for long been apparent that an analysis of the extent and degree of such control is not in itself decisive. Thus in *Collins* v. *Hertfordshire County Council* [1947] K.B. 598, it had been suggested that the distinguishing feature of a contract of service is that the master cannot only order or require what is to be done but also how it shall be done. The inadequacy of this test was pointed out by Somervell L.J. in *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343, 352, where he referred to the case of a certified master of a ship. The master may be employed by the owners under what is clearly a contract of service, and yet the owners have no power to tell him how to navigate his ship. As Lord Parker C.J. pointed out in *Morren* v. *Swinton and Pendlebury Borough Council* [1965] 1 W.L.R. 576, 582, when one is dealing with a professional man, or a man of some particular skill and experience, there can be no question of an employer telling him how to do work; therefore the absence of control and direction in that sense can be of little, if any, use as a test.

Cases such as *Morren's* case [1965] 1 W.L.R. 576 illustrate how a contract of service may exist even though the control does not extend to prescribing how the work shall be done. On the other hand, there may be cases when one who engages another to do work may reserve to himself full control over how the work is to be done, but nevertheless the contract is not a contract of service. A good example is *Queensland Stations Proprietary Ltd.* v. *Federal Commissioner of Taxation* (1945) 70 C.L.R. 539, the " drover " case, where Dixon J. said, at p. 552:

> " In considering the facts it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed and the cattle are handled. For instance, in the present case the circumstance that the drover agrees to obey and carry out all lawful

instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered."

If control is not a decisive test, what then are the other considerations which are relevant? No comprehensive answer has been given to this question, but assistance is to be found in a number of cases.

In *Montreal* v. *Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161, Lord Wright said, at p. 169:

"In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

In *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248, Denning L.J. said, at p. 295:

"The test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation."

In *United States of America* v. *Silk* (1946) 331 U.S. 704, the question was whether certain men were "employees" within the meaning of that word in the Social Security Act, 1935. The judges of the Supreme Court decided that the test to be applied was not "power of control, whether exercised or not, over the manner of performing service to the undertaking," but whether the men were employees "as a matter of economic reality."

The observations of Lord Wright, of Denning L.J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which

the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him.

In the present case it is clear that on each occasion on which Mrs. Irving engaged herself to act as an interviewer for a particular survey she agreed with the company, in consideration of a fixed remuneration, to provide her own work and skill in the performance of a service for the company. I therefore proceed to ask myself two questions: First, whether the extent and degree of the control exercised by the company, if no other factors were taken into account, be consistent with her being employed under a contract of service. Second, whether when the contract is looked at as a whole, its nature and provisions are consistent or inconsistent with its being a contract of service, bearing in mind the general test I have adumbrated.

As to the first question: The facts found by the Minister show that the control of the company is exercised at two stages. Before the interviewer engages herself for the particular survey, she will probably have seen the company's "Interviewer's Guide." This document contains detailed instructions on the technique of interviewing, and much of it is couched in imperative language. It would be tedious to cite examples at length, and I quote only a few. On page 3, I read:

> "It will always be necessary to recall several times if you cannot contact your informant at the first call. It is only after you have done this that you will be allowed to take a substitute name from your list."

On page 8,

> "No interviews may be taken with children under 16 without the prior consent of a parent or guardian."

On page 13, under "Factual Questions,"

> "This type of question must be asked in strict order as shown on your questionnaire."

On page 16, under "Open Ended Questions,"

> "You must—(a) record all your informant says verbatim and not attempt to summarise or paraphrase even a very vague and/or wordy reply; (b) probe until you are satisfied that you have obtained the fullest answer possible."

On the Minister's findings, I have no doubt that the instructions in the "Interviewer's Guide," after having been seen by the interviewer, are incorporated into the terms of any contract which the interviewer may thereafter make with the company to participate in a particular survey.

The second stage of control comes after the interviewer has agreed to take part in a particular survey, that is to say, after the contract has been made. The interviewer is then sent instructions which according to the Interviewer's Guide give details of whom to interview, what to say to informants, how to handle the questionnaire and other forms, and also deal with contact with the office. In addition to that, the interviewer might in particular cases be required to attend the office of the company for instructions, or might receive instructions from a supervisor.

The control which the company had the right to exercise was, however, limited in various ways. They had no right to instruct Mrs. Irving as to when she should do the work. The only requirement imposed on her was that the work should be completed within a specified period. During that period Mrs. Irving was free to do similar work for other organisations, so that the company had no right to prohibit her from doing that. No doubt it would be agreed before Mrs. Irving accepted the assignment that her work would be in a given area; if so, the company would have no right to send her to another area. In addition to those limitations on the right of the company to give instructions to her, there was a practical limitation on the possibility of giving instructions to her while actually working in the field, because, as found by the Minister, the supervisor would then have no means of getting into touch with her.

It is apparent that the control which the company had the right to exercise in this case was very extensive indeed. It was in my view so extensive as to be entirely consistent with Mrs. Irving's being employed under a contract of service. The fact that Mrs. Irving had a limited discretion as to when she should do the work was not in my view inconsistent with the existence of a contract of service. For examples of a servant having such a discretion, see *Hobbs* v. *Royal Arsenal Co-operative Society Ltd.* (1930) 23 B.W.C.C. 254, C.A., and *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441. Nor is there anything inconsistent with the existence of a contract of service in the fact that Mrs. Irving was free to work for others during the relevant period. It is by no means a necessary incident of a contract of service that the servant is prohibited from serving any other employer. Again, there is nothing inconsistent with the existence of a contract of service in the master having no right to alter the place or area within which the servant has agreed to work. So far as concerns practical limitations on a master's power to give instructions to his servant, there must be many cases when such practical limitations exist. For example, a chauffeur in the service of a car hire company may, in the absence of radio communication, be out of reach of instructions for long periods.

I therefore turn to the second question, which is whether, when the contract is looked at as a whole, its nature and provisions are consistent or inconsistent with its being a contract of service.

Mr. Pain, for the company, points first to the fact that Mrs. Irving was appointed on each occasion to do a specific task at a fixed fee. He

points to the fact that the company's officers were of the opinion that they could not have dismissed Mrs. Irving in the middle of an assignment. He says that these factors are more consistent with the conception of a contract for services than a contract of service.

As to the first factor, appointment to do a specific task at a fixed fee, I do not think that this is inconsistent with the contract being a contract of service. See, for example, *Sadler* v. *Henlock* (1855) 4 E. & B. 570.

As to the right of dismissal, it is necessary to distinguish between a right of dismissal for breach and a right of dismissal irrespective of breach.

It is noticeable that as regards the right of dismissal for breach, the Minister's finding is somewhat cautiously worded; it relates to what the company's officers thought and not to what the provisions of the contract were. In the absence of some special term either expressed in the contract or to be implied from particular circumstances, I should have thought that certain types of breach might well justify dismissal of an interviewer, even in the middle of an assignment. I cannot see on what ground the right to dismiss in the middle of an assignment is said to be entirely excluded in this case; but assuming that it is, that fact does not in my view assist the company in establishing that the contract is a contract for services and not a contract of service. Even in a contract for services a breach by one party which goes to the root of the contract will entitle the other party to terminate it. In this respect, there is no difference between a contract for services and a contract of service, except that in the latter case the master's right is spoken of as a right of dismissal—a peculiarity of words which makes no difference to the substance.

So far as concerns dismissal irrespective of breach, it is of course clear that the interviewer in this case could not, in the absence of a breach, be dismissed in the middle of an assignment. But there is nothing in this which is inconsistent with the contract being a contract of service. It is quite common for contracts of service to be entered into for fixed periods with no provision, express or implied, for dismissal during the specified period.

Then Mr. Pain says that the fact that the contract makes no provision for time off, sick pay and holidays, suggests that it is not a contract of service. I cannot accept that this is a test which is of great assistance in the present case. The fact that the contract makes no provision for time off is merely a reflection of the fact that there are no specified hours of work. I have already dealt with this. The fact that there is no provision for sick pay and holidays is merely a reflection of the fact that the contract is of very short duration. If a man engages himself as an extra kitchen hand at a hotel for a week in the holiday season, there will be no provision for sick pay and holidays, but the contract will almost certainly be a contract of service.

The company then refer to the fact that Mrs. Irving's work was performed under a series of contracts, each for a specific survey. They say that the relationship of master and servant is normally conceived of as a continuous relationship, and that the fact that there is a series of contracts is more consistent with those contracts being contracts for services than contracts of service. For my part, I doubt whether this factor can usefully be considered in isolation. It must I think be considered in connection

with the more general question whether Mrs. Irving could be said to be in business on her own account as an interviewer. In considering this more general question I take into account the fact that Mrs. Irving was free to work as an interviewer for others, though I think it is right to say that in this case there is no finding that she did so. I also take into account the fact that in her work as an interviewer Mrs. Irving would, within the limits imposed by her instructions, deploy a skill and personality which would be entirely her own. I can only say that in the circumstances of this case these factors are not in my view sufficient to lead to the conclusion that Mrs. Irving was in business on her own account. The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that the right to work for others is not inconsistent with the existence of a contract of service. Mrs. Irving did not provide her own tools or risk her own capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work.

Taking all the factors into account and giving full weight, I hope, to Mr. Pain's persuasive arguments, I am clearly of opinion that on the facts of this case the Minister was right in concluding that Mrs. Irving was employed by the company under a series of contracts of service, and the appeal accordingly must fail.

Appeal dismissed.
Minister to pay the costs of the appeal under section 65 of the National Insurance Act, 1965.

Solicitors: *P. R. Kimber; Solicitor, Ministry of Social Security.*

H. J.

[COURT OF APPEAL]

HENDERSON *v.* HENRY E. JENKINS & SONS AND ANOTHER

1968 Oct. 28, 29, 30, 31; Nov. 4

Danckwerts, Sachs and Edmund Davies L.JJ.

Negligence—Burden of proof—Latent defect—Motor vehicle—Brake failure causing collision—Failure caused by latent defect in hydraulic pipe—Standard practice to examine pipe in situ—Part of pipe not visible unless removed—Whether established that standard practice not negligent.

Road Traffic—Negligence—Maintenance of vehicle—Latent defect in braking system—Brake failure causing collision—Corrosion of hydraulic brake pipe—Standard practice to examine pipe in situ—Part of pipe not visible unless removed—Whether negligence established—Burden of proof.

[Reported by R. W. LUCIE-SMITH, ESQ., Barrister-at-Law.]

estate of Terence, the father; and that there is rent due from him, to one-seventh of which the estate of Ann, the testatrix, is entitled: the Plaintiff has, therefore, in his hands, monies which belong to the estate of the testatrix; and I think the Court ought not to disregard that fact, and decree the full payment of his legacy by the executors of Ann. It is not suggested that there was any joint lease of the premises to the four tenants in common, who at different times occupied the house: they appear to be, at law, severally liable in respect of their occupation. I cannot, however, direct an account of what is due from the Plaintiff unless the whole of the residuary legatees are parties, and are bound by the account and inquiries. If the residuary legatees of Terence, who are not before the Court, will appear and **[99]** consent to be bound by the account, I may direct it to be taken in this suit. If anything be found due from the Plaintiff, William Mac Mahon, as the tenant of the premises in question, that will be set off as against his legacy; but it will not form any set-off against the legacy to the Plaintiff Henrietta, his wife.

The Plaintiffs consented to waive the undertaking on behalf of Charles, who was abroad, and an account was directed of the two legacies and interest. And all the residuary legatees of Terence appearing by their counsel, and consenting to be bound by the inquiries and accounts thereby directed, and the Plaintiffs and Defendants not opposing their appearance, but, so far as they were able, consenting thereto, it was referred to the Master to ascertain whether the Plaintiff, William Mac Mahon, was during any and (if any) what time in the occupation of "The Lower House" in, &c., since the death of the said Terence Mac Mahon, and, if so, whether the Plaintiff, William Mac Mahon, ought to be charged with any and (if any) what sum of money, in respect of such occupation; and the Master was to state whether anything and what was paid, and when, since the death of the said Terence Mac Mahon, by the Plaintiff, William Mac Mahon, for or in respect of repairs and outgoings of the said house, or otherwise on account thereof; and whether, at the death of the testatrix, Ann Mac Mahon, the Plaintiff, William Mac Mahon, had any and what assets of the said Ann Mac Mahon in his hands applicable to pay the said legacies, with liberty to state special circumstances.

[100] HENDERSON *v.* HENDERSON. *July* 4, 7, 11, 20, 1843.

[S. C. at law, 6 Q. B. 288; 11 Q. B. 1015. See *Mutrie* v. *Binney*, 1887, 35 Ch. D. 620; *In re Henderson*, 1887-89, 35 Ch. D. 716; 37 Ch. D. 244; and (sub nom. *Nouvion* v. *Freeman*), 15 A. C. 1. Discussed, *Worman* v. *Worman*, 1889, 43 Ch. D. 296.]

The next of kin of an intestate filed their bill in equity in the Supreme Court of Newfoundland against A., the brother and deceased partner of the intestate, for an account of the estate of the father of A. and of the intestate possessed by A., and an account of the partnership transactions, and the dealings of A. with the estate since the death of the intestate. The bill was taken, *pro confesso*, against A. in the Colonial Court, and, on a reference, the Master reported that certain sums were due to the several next of kin on the account of the estate of the intestate's father possessed by A.; but that no account between A. and the intestate had been laid before him: the Supreme Court decreed that the sums found by the Master to be due to the next of kin and the costs should be paid to them by A. The next of kin brought their actions in this country against A. upon the decree. A. then filed his bill in this Court against the next of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him on the partnership accounts and on private transactions; alleging various errors and irregularities in the proceedings in the Supreme Court, and that A. intended to appeal therefrom to the Privy Council; and praying that the estate of the intestate might be administered, the partnership accounts taken, the amount of the debt due to A. ascertained and paid, and the next of kin restrained by injunction from proceeding in their actions.

Demurrer, for want of equity, allowed on the ground that the whole of the matters

were in question between the parties, and might properly have been the subject of adjudication in the suit before the Supreme Court of Newfoundland.

That, inasmuch as the Privy Council is the Court of Appeal from the Colonial Court, and has jurisdiction to stay the execution of the decree pending the appeal, the Court will not interfere by injunction, on the ground of error or irregularity in the decree of the Colonial Court.

Whether, in a case of error shewn in the judgment of the Court of a foreign country, from which there was no appeal to any of Her Majesty's Courts, the decision would be the same, *quære?*

The bill was filed in May 1843 by Bethel Henderson against Elizabeth Henderson, the widow of Jordan Henderson, his deceased brother, and Charles Simms and Joanna, his wife, who was the daughter of Jordan; and also against J. Gadsden, the administrator of the estate of Jordan, in England; and it stated that William Henderson, a merchant in Bristol and Newfoundland, the father of the Plaintiff and Jordan Henderson, in 1808, admitted them into partnership with him, and in 1817 resigned all his interest in the trade to them: that the Plaintiff and Jordan carried on the business in partnership from 1817: that the share or interest in the partnership, which their father gave up to them, was worth £15,000 or thereabouts, and was continued in, and formed part of, the partnership of the Plaintiff and Jordan: that Jordan Henderson died in March 1830 intes-**[101]**-tate, leaving the Defendants, Elizabeth, his widow, Joanna (the wife of the Defendant, C. Simms), his daughter, and also leaving William, a son: that Elizabeth, the widow, obtained letters of administration of the estate of Jordan in Newfoundland, and, together with the Plaintiff, carried on the partnership business for the purpose of winding it up; but before that was done, a fire in the island in August 1832 destroyed the buildings and plant of the partnership, and all the books, except the ledgers; and that disputes then arose between the Plaintiff and Elizabeth, the widow.

The bill then set forth a petition presented in November 1832 by the Defendants, the widow and children of Jordan, to the Judges of the Supreme Court in Newfoundland, which alleged that William, the father, before his death, gave or bequeathed £1000 to or for the Petitioner, Joanna, and gave or bequeathed the rest of his estate between Bethel, the Plaintiff, and Jordan, his sons, equally: that Bethel was living with William, the father, at Bristol, and possessed himself of his estate: that Jordan died possessed of considerable real and personal estate in the partnership, both in England and Newfoundland: that Bethel had possessed himself of all such estate, as well as of the partnership books, and carried on trade therewith, and had drawn monies thereout: that he also refused to satisfy the Petitioners whether Jordan had left any will; and prayed that Bethel might be decreed by the Supreme Court to come to an account in respect of all and singular the premises; and that as well the estate of William, the father, as the estate of Jordan, might be applied in a course of administration.

The bill stated that no personal representative of William, the father, or of Jordan, was a party to the said proceeding in the Supreme Court: that Elizabeth, **[102]** the widow, presented another petition, dated the 8th of December 1832, not intituled in any cause to the said Judges, which alleged that, since administration of the estate of her husband had been granted to her, Bethel, the Plaintiff, had rendered her certain accounts of debts and assets in Newfoundland, but refused to account to her for the property of the deceased in England: that he was then about to leave the country, whereby the Petitioner would, in all probability, be prevented from bringing him to any account respecting the said estate, unless the Supreme Court should grant immediate process against him: that a brig, called "The Elizabeth," belonging to the intestate and Bethel equally, had, without the Petitioner's authority, been laden at Harbor Grace, by Bethel, principally on freight, under an engagement to sail on the 10th of December for Bristol: that the Petitioner had good reason to know that the monies of Jordan, in the possession of Bethel in England, amounted from £5000 to £8000: the Petitioner therefore prayed the writ of *ne exeat regno*, to restrain Bethel from departing out of the jurisdiction, and that he might be ordered to exhibit to the Court a full account of all the estate of Jordan come to his hands: that C. Simms, by

affidavit, intituled "*Elizabeth Henderson* v. *Bethel Henderson*," deposed that Bethel was then justly indebted to Elizabeth, the widow, administratrix of the estate of Jordan, in the sum of £3100 sterling, exclusive of such further sum as he might be indebted to her on account of monies and property in England; and that he threatened to leave the island and go beyond sea, out of the jurisdiction of the Court, whereby the said debt would be lost or endangered, or the recovery thereof would be difficult.

The bill stated that an instrument purporting to be a writ of *ne exeat regno*, dated the 10th of December **[103]** 1832, was issued out of the Supreme Court, with a summons or *subpœna*, in the first-mentioned suit: that the Plaintiff, on the 22d of December, executed his bond, with two sureties, to the high sheriff of the island, in the sum of £6200, conditioned to be void if the Plaintiff should personally appear before the Court by the 10th of June then next, and render a full account of the estate of Jordan come to his hands, whether arising from the estate of William, the father, or otherwise; and also an account of the said partnership business, and answer and fulfil the orders and decrees of the Supreme Court touching the said estate, and also touching a certain bill, then filed, of Elizabeth Henderson and others, against the Plaintiff: that the Plaintiff then quitted the island and returned in 1834: that, on the 14th of June 1834, the Supreme Court ordered the bond to be put in suit, unless the Plaintiff should put in his answer to the first petition; and, in July 1834, the Plaintiff appeared in that suit by H. A. Emerson, Esq., Her Majesty's Solicitor-General in the island, who also prepared the Plaintiff's answer, which was sworn and filed on the 11th of July 1834, intituled in the first suit only.

The bill then stated the purport of the Plaintiff's answer: that exceptions were taken by the Petitioners, for that he had not set out an account of the partnership transactions, or of the estate of Jordan possessed by him; or whether William, the father, left any and what estate, for the use of Jordan or his family: that the Supreme Court ordered that the accounts prayed for in the first suit should be filed before the 25th of July, or that the bond should be assigned to the Petitioners to be put in suit: that the Plaintiff had, for several years, employed J. Fitzgerald, an accountant in the island, in keeping the accounts of the said business; and in order that Fitzgerald might make out the accounts of the **[104]** partnership, the Plaintiff, on the 20th of July, delivered over to him the books and accounts of the business in England, and on the same day the Plaintiff quitted the island.

The bill then stated that Fitzgerald made out in distinct parts the accounts of the partnership from 1817 to the death of Jordan, and the subsequent accounts of the Plaintiff, and filed the same on the 4th of August 1834, and verified them by affidavit, as true extracts from the Plaintiff's books: the bill stated the balances appearing by the several accounts; the result of which was that £4500 and £883, 7s. 5d. were owing to the Plaintiff from the Newfoundland concern, and that a further sum of £2366, 15s. 4d. was owing to him from the estate of Jordan, in respect of transactions since his death; and a large sum was also owing to the Plaintiff as a private debt, in respect of advances he had made for the use of Jordan and his family.

The bill then set forth a letter received by the Plaintiff from his solicitor and counsel, H. A. Emerson, Esq., stating that delay had occurred in the report on the exceptions, owing to the answer having been mislaid by the Clerk of the Court, and adverting to what had been since done: that the Plaintiff received no further information respecting the suit, except that he had recently learnt that the Master, on the 26th of December 1835, reported the Plaintiff's answer to be sufficient, but that the accounts had been subsequently filed; and, upon the motion of the Plaintiff's counsel, the accounts were referred to the Master for his report: that the Petitioners excepted to the Master's report, and in January 1835 obtained an order discharging the order by which the accounts were referred to the Master: that no further proceedings were ever taken on the said peti-**[105]**-tion: that in 1836 the Plaintiff discharged H. A. Emerson, Esq., as his solicitor, and did not employ any other solicitor, and thenceforwards had no counsel or solicitor in the island, as all the Defendants and their solicitor well knew.

The bill then stated that in January 1837 the Defendants obtained a rule for leave to amend the first-mentioned petition or bill, no person being authorized by the Plaintiff, who was out of the jurisdiction, to oppose the same; that in May 1837

the Defendants exhibited a bill in their own names (and in that of William, the son, without his authority), addressed to the Judges of the Supreme Court. [The bill was then set forth: it charged the Plaintiff with having possessed the sum of £30,000 in respect of the estate of William, the father, impeached the partnership and other accounts put in by the Plaintiff in various specific points, and charged him with misappropriation and loss of the partnership property and estate since the death of Jordan, and calling for discovery on various subjects: and it prayed that the Plaintiff might account and pay to the Defendants their share of the alleged assets of William, the father, the partnership property which belonged to Jordan, the amount of the losses thereto by the carrying on of the trade since his death, and that they might be at liberty to inspect the original books of account of the Bristol trade.]

The bill stated that the summons or *subpœna*, requiring the Plaintiff to appear to the bill, was served on H. A. Emerson, Esq., on the pretence that as he had been the Plaintiff's solicitor and agent in the petitions, he was so in the said third suit: that a commission was issued by the Supreme Court to take the Plaintiff's answer, and that in October 1837 one of the persons named in the **[106]** commission communicated with the Plaintiff, then residing at Bristol, and required him to put in his answer, and lent the Plaintiff a copy of the bill, being the first intimation of the suit which he had received. The bill then stated that the pretended service and other proceedings were wholly irregular, contrary to the rules of the Supreme Court, which were set out, and also to the statute for the better administration of justice in Newfoundland (5 Geo. 4, c. 67): that the commission was returned with a declaration by the commissioners that the Plaintiff had not put in, and did not intend to put in, any answer.

The bill then stated that the Defendants (the Plaintiffs in the third suit) in December 1839 obtained a rule *nisi* to take their bill *pro confesso* against the Plaintiff, and served the same on H. A. Emerson, Esq., who, without authority, took upon himself to appear on the motion as the Plaintiff's counsel and solicitor, and on the 11th of February 1840 the Supreme Court ordered the last-mentioned bill to be taken *pro confesso*, and referred it to the Master to compute principal and interest due to the Defendants: that on the 18th of April 1840 the Master of the Supreme Court made a rule or order, addressed to H. A. Emerson, Esq., appointing the 23d of April to take the account: that the meeting was adjourned to the 30th of April, when the Defendants' solicitor put in an account, charging the Plaintiff with sums amounting to £17,054, 12s. 9d. in respect of the partnership transactions, and £15,000 in respect of the estate of William, the father, but allowing no credits whatever to the Plaintiff: that the Master made his report, dated the 6th of June 1840, and thereby, after stating that *he had not had any account between* Bethel and Jordan laid before him, he found that the **[107]** Defendant, Bethel, received from William, the father, some time previous to his death, which occurred in the year 1821, the sum of £30,000 sterling, in trust to pay one moiety thereof to Jordan; and that Jordan died intestate, in 1830, leaving the Plaintiff Elizabeth, his widow, and two children only, namely, Joanna (married to C. Simms) and William; and he found that of the said sum of £30,000 sterling, one moiety, or £15,000, together with interest thereupon, was then due to the widow and children of Jordan by the Defendant, Bethel, to be paid in the proportions thereinafter directed; and, upon the said sum of £15,000, he computed simple interest, from the 1st of January 1822, to the 1st of June 1840, at £4 per cent. per annum, which amounted to £11,650 sterling, making, with the principal, the sum of £26,650, which he thereby reported to be due and payable to the Plaintiffs by the Defendant, Bethel, in the following proportions, namely, the sum of £8883, 6s. 8d. to the Plaintiff, Elizabeth Henderson; a like sum to the Plaintiff, C. Simms and Joanna, his wife; and a like sum to the Plaintiff, William Henderson.

The bill stated that this report was filed on the 6th of June 1840: that an order *nisi* to confirm was served on H. A. Emerson, Esq., and that the same was confirmed absolutely on the 10th of June 1840: that the Defendants obtained an order for a final decree *nisi*, but the Judges of the Supreme Court directed that as H. A. Emerson, Esq., had withdrawn from the defence of the suit, the notice of motion for the final decree should be served on the Plaintiff personally: and that, if cause should not be shewn by the then next term, the final decree should be made: that no notice of such

motion was ever served upon the Plaintiff; but that in March 1841 the Plaintiff was served with a document purporting to be a *subpœna* to hear judgment; to which was **[108]** attached a notice, signed by the solicitor of the Defendants, "that the Master's report, filed on the 6th of June 1840," stood confirmed; that, on the affidavit of the service of the said document, the Supreme Court, on the 6th of June 1841, made a decree. [The bill set forth the decree, which recited the various proceedings, as having been duly prosecuted; and ordered and decreed that Bethel, the Defendant therein named, should pay to Elizabeth, the widow, £8883, 6s. 8d. sterling; to C. Simms and Joanna, his wife, £8883, 6s. 8d., and to William, the son, £8883, 6s. 8d.; and that he should also pay to the Plaintiffs their costs of the suit.]

The bill then specified many of the statements recited in the decree, which it alleged were untrue; that the third bill was in fact an original, and not an amended, bill; and that there were various other irregularities in the proceedings; the bill alleged that in December 1841, before the Plaintiff had notice of the decree, the same was inrolled; that in August 1842 the Plaintiff was applied to, by the attorney of the Defendants, for payment of the said sum of £8883, 6s. 8d. to the Defendant Elizabeth, the widow, and the like sum to the Defendant, Simms, and Joanna, his wife, with £55 costs, which was the first notice he received of the final decree; and that the Defendants had lately brought two actions against the Plaintiff in the Queen's Bench to recover the said sums.

The bill charged that the decree was wholly irregular, and ought not to be enforced, and that the same ought to be reversed by Her Majesty in Council, on the Plaintiff's appealing against the said decree, which, notwithstanding the inrolment thereof, he intended to do; that there was no personal representative of Jordan Henderson, appointed in this country, party to any of the **[109]** proceedings; and that there was no personal representative whatever of William, the father, a party thereto; that none but a personal representative of Jordan Henderson was entitled to, or could give a discharge for, any part of his personal estate.

The bill alleged that the whole of the estate of William, the father, had consisted of the partnership property, given up by him to Jordan Henderson and the Plaintiff, his sons, and continued by them in the business, and that the Plaintiff was only accountable for the same with, and as part of, the other partnership assets; and, if the partnership accounts were properly taken, it would appear, and was the fact, that a very large sum of money was due and owing to the Plaintiff from the estate of Jordan, in respect of advances by the Plaintiff to the concern, payments beyond his receipts, and money drawn out by Jordan, his widow and family; and that the estate of Jordan was also indebted to the Plaintiff in two sums of £547 and £538, in respect of monies which the Plaintiff had expended, at Jordan's request, in the education of his said children.

The bill prayed that an account might be taken of what was due to the Plaintiff from the estate of Jordan, and of the other debts of Jordan, and of his personal estate, and that the same might be applied in a due course of administration: that an account of the partnership transactions between the Plaintiff and Jordan might be also taken: that all necessary inquiries might be directed to ascertain the personal estate of William, the father; that so much, if any, of the said two sums of £8883, 6s. 8d. as might be found payable by the Plaintiff (he not admitting that any part thereof was so payable) might be applied and administered as part of the assets of Jordan: that the Defendants, Elizabeth, the widow, and Simms and **[110]** his wife, might be restrained by injunction from proceeding with the said or any other action to recover the said two sums of £8883, 6s. 8d.: and that a commission might be issued to examine witnesses in Newfoundland.

To this bill the Defendants, Elizabeth, the widow, and Simms and his wife, demurred for want of equity, want of parties and multifariousness.

Mr. Tinney, Mr. Burge and Mr. Rolt, for the demurrer.

Mr. Purvis and Mr. Bagshawe, for the bill.

The points submitted to the Court in argument will sufficiently appear from the judgment. The authorities cited were *Phillips* v. *Hunter* (2 H. Bl. 402), *Cottington's case* (2 Swans. 326, n.; Lord Nottingham's MS.), *White* v. *Hall* (12 Ves. 321), *Henley* v. *Soper* (8 B. & C. 16), *Fuller* v. *Willis* (1 Myl. & K. 292, n.), *Alivon* v. *Furnival* (1

Cr. Mees. & Ros. 277), *Cowan* v. *Braidwood* (1 Man. & Grang. 882), *Becquet* v. *M'Carthy* (2 B. & Adol. 951), *Houlditch* v. *Marquis of Donegal* (8 Bligh (N. S.), 301), *Russell* v. *Smyth* (9 Mees. & W. 810), *Ferguson* v. *Mahon* (11 Ad. & Ell. 179), *Thompson* v. *Derham* (1 Hare, 358). Burge Com. Col. Law, vol. 3, p. 1058.

THE VICE-CHANCELLOR [Sir James Wigram]. The Plaintiff by his bill alleges that he and Jordan, his late brother, were partners in business, one branch of which was carried on at Bristol and the other at Newfoundland: and that, in respect of that partnership, he is **[111]** a creditor to a large amount on the estate of Jordan; that part of the partnership property was derived from their father; and that all the property which they derived from their father formed part of the assets of the partnership. The Plaintiff also alleges that he is a creditor on the estate of Jordan, in respect of a private debt; and the bill prays such an account as would comprise all these matters which are in question between the Plaintiff and the estate of Jordan. Upon these facts a decree for an account against Gadsden, the personal representative of Jordan in England, would be of course, and perhaps also, if that had been the object of the suit, the decree for an account might have been extended to Elizabeth, the widow, as the personal representative of Jordan in Newfoundland. The widow of Jordan and Simms and his wife are, however, before the Court in the character of next of kin, and there is no pretence for making them parties in that character in a suit for the mere administration of the estate of Jordan. The relief sought against those parties is founded upon the proceedings which have taken place in the Court in Newfoundland, and the use which they are about to make of these proceedings in this country.

The Defendants, who have demurred, insist, in support of their demurrer, first, that all and every part of the matter in question on this bill was concluded by a final decree of the Supreme Court of Newfoundland, dated in June 1841, made in a suit wherein the Defendants and William, the son of Jordan, were Plaintiffs, and the present Plaintiff was Defendant, except in so far as that decree is subject to be reviewed in the Privy Council; secondly, that by that decree the amount recovered was decreed to be paid to the Plaintiffs in that suit as beneficial owners, and that the same thereby ceased to be part of the estate of Jordan, subject to his debts. They **[112]** insist, moreover, that the proceedings appear upon the bill with sufficient certainty to sustain the decree upon the grounds advanced; and that the only party against whom the Plaintiff can proceed to recover his claim, or any part of it, is the Defendant, Gadsden.

I have read the bill carefully, and, without going minutely through the facts of the case, it is sufficient to say, for the purpose of explaining the order I am about to make, that the original bill in the Supreme Court of Newfoundland claimed an account of the same partnership dealings, of which accounts are prayed by the present bill; and also sought accounts in respect of the estate of William Henderson, the father, possessed by Bethel on account of Jordan; that the Defendant in that suit, who is the Plaintiff here, made claims by his answer to the original bill corresponding in substance with those which he makes by his bill in the present suit: that an amended bill, or a bill which the Court at least thought it right to term an amended bill, was afterwards filed by the same Plaintiffs against Bethel: that the amended bill stated and charged that Bethel was largely indebted to the estate of Jordan on the partnership accounts; but that such accounts could not be taken in consequence of Bethel absenting himself from the island and not producing the documents; and it further appears that, Bethel having absented himself from the jurisdiction, an order of the Supreme Court was made in February 1840 for taking the amended bill *pro confesso;* and that the amended bill was by the same order referred to the Master to compute principal and interest due to the Plaintiffs; and that the Master made his report in June 1840. [His Honor stated the report (*supra*, pp. 106, 107).] It appears further that the Supreme Court pronounced its final **[113]** decree in June 1841, and thereby, after referring to all the antecedent proceedings in the cause, decreed that Bethel Henderson should pay to the widow and two children of Jordan, who were Plaintiffs, the sum of £8883, 6s. 8d. each, and costs of the suit.

This decree, explained by the report, has in effect severed William the father's estate from the bulk of the property in question, and the partnership accounts and

the private debt are not specifically the subject of adjudication. Upon this decree Elizabeth, the widow, and Joanna, the daughter of Jordan, and the husband of Joanna have brought their actions in this country.

The bill charges that the proceedings leading to this decree were irregular, that the decree itself was irregular, that a large balance was due to the Plaintiff, and that the decree ought not to be enforced, but ought to be reversed by Her Majesty in Council, on appeal, which the Plaintiff intends to bring. The bill specially alleges, as one ground of irregularity, that the report of the Master, of the 6th of June 1840, wholly omitted any notice of the account connected with the partnership, and is confined to the monies alleged to be due from the Plaintiff, in respect of the estate of William Henderson, the father; and that a large sum of money is due to the Plaintiff on the partnership accounts, as would appear if they were properly taken. On behalf of the Defendants, it has been argued that the proceedings on the face of the bill shewed that the decree concluded the whole matter, that I could not rehear that decree, and that it was final and conclusive, unless reversed by the Privy Council, the proper appellate tribunal.

Without giving any opinion upon the question whether charges, shewing that the proceedings in a foreign **[114]** Court were altogether null and void, as being against natural justice, would or not, upon general demurrer, have been treated as null, and have sustained the bill as to the whole of the relief prayed, I have no doubt that mere irregularity in the proceedings is insufficient for that purpose, in a case in which an appeal lies from the Colonial Court to the mother country, and there is a tribunal competent to reform the errors of the Court below, and even to suspend the execution of the decree pending the appeal, if justice requires that it should be suspended.(1)

But as the Plaintiff in this case argued only that the whole question between the parties was not concluded by the decree, and did not contend that, upon the charges in the bill, I ought to disregard the decree, I assume, for the present purpose, that I must, upon this demurrer, consider the amount due from Bethel, in respect of William the father's estate, as concluded by the decree of the Supreme Court, subject only to the appeal to the Privy Council; and that the only question I have now to decide is whether I am to consider the partnership account and the claim of Bethel in respect of the private account as having been likewise the subject of adjudication by the Supreme Court in the island, or whether those items in the general account, which certainly might have been taken in that suit, are to be considered as excepted out of the operation of the decree, under the special circumstances appearing on the Master's report, and the other proceedings stated in the bill..

In trying this question I believe I state the rule of the **[115]** Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Those who have had occasion to investigate the subject of bills of review in this Court will not discover anything new in the proposition I have stated, so far as it may apply to proceedings in this country: and in an application to a Court of Equity in this country, for its aid against the effect of a proceeding by a Court of Equity in one of the colonies, I conceive it to be the duty of this Court to apply the same reasoning, at least in the absence of charges in the bill, shewing that a different principle ought to be applied. (See *Bentinck* v. *Willink*, 2 Hare, 1.) The observations of Lord Cottenham in the case of *The Marquis of Breadalbane* v. *The Marquis of Chandos* (2 Myl. & Cr. 732, 733) have

(1) See stat. 3 & 4 Will. 4, c. 41, s. 21; and see also the Charter of Justice of Newfoundland, Clark's Summary of Colonial Law, pp. 433, 434.

an important bearing upon this point. I may mention also the cases of *Farquharson* v. *Seton* (5 Russ. 45), *Partridge* v. *Usborne* (*Id.* 195), and the judgment of Lord Eldon in *Chamley* v. *Lord Dunsany* (2 Sch. & Lef. 718), as shewing the general principle to which I have adverted. It is plain that litigation would be intermin-**[116]**-able if such a rule did not prevail. Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *primâ facie*, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule.

Now, what are those circumstances? One circumstance relied upon was that, by the decree of the Colonial Court of the 11th of February 1840, the amended bill only was taken *pro confesso*. The amended bill, it appears, is not, as in this Court, the original bill amended and written upon, so that the amended bill wholly supersedes and comes in the place of the original bill; but the amendments are upon a distinct record.

The bill in this cause charges that the last bill was in fact and substance an original bill, and addressed to different Judges, and that it was not an amended bill; this charge I might have been bound to take as a fact if the Plaintiff had not, by settling out the amended bill and the final decree, given me an opportunity of judging in what sense only the charge is true. I find that the amended bill proceeds upon and refers to the original bill, and to the answer of the Defendant thereto, and the final decree of the Court recites the whole of the proceedings anterior to the final decree, beginning with the original bill. It is impossible, therefore, to contend with effect that the amended bill, though in a sense distinct from the original bill, as being written upon other paper, leaving the first bill still on the record, was not a continuance of the pleadings in one and the same cause, and this, critically considered, is not inconsistent with the charge in the bill which I have just read.

[117] Another objection was the absence or the irregularity of service upon the Plaintiff. Although it is not necessary that I should go into the question respecting the notice, I ought not to disregard the fact that the Plaintiff represents that he had on different occasions actual notice of the suit, and of the relief which was sought against him by it, however irregularly that notice might have been communicated; and if the Plaintiff thought that he might safely disregard the proceedings, and abstain from interposing any defence, on the ground of their irregularity, I think I ought to consider him as having relied on the strength of his case for establishing that irregularity by a complaint in the same jurisdiction, or in the Court of Appeal, and not to have relied on being therefore able to set the decree of the Supreme Court at defiance, even while it remained unreversed.

I may here recur to the observation that the omission of the Master to take the partnership accounts is stated in the bill to be an error in the decree, forming one ground for appeal to the Privy Council.

The point upon which I have had most difficulty in satisfying myself is this: if the decree of the Supreme Court is conclusive upon one party it must, I conceive, be conclusive upon both; and, if not conclusive upon both, it ought to be conclusive upon neither. Now the amended bill alleged that the Plaintiffs there were creditors upon the partnership account, but that the accounts of the partnership cannot be taken, owing to the manner in which the Defendant in that suit had acted. These allegations were established as facts, by the effect of the order for taking the bill *pro confesso;* and it appeared to me during the argument that the present Defendants (the Plaintiffs in Newfoundland) might have a **[118]** right to say that the accounts not taken by the Master were open for their benefit, by reason that it was the conduct of the Defendant alone which had prevented those accounts from being taken. But that, I think, is not a correct view of the case. The decree was to compute what was due to the Plaintiffs for principal and interest; that is, upon all the accounts in question in the pleadings, including the partnership and private account. The Plaintiffs were not compelled to take such a decree, but, having taken it, they are bound by the consequences, and must be taken to have waived any disadvantage to themselves which would result from it.

The conclusion to which I must come, in a case where relief is sought in this Court

in consequence of errors and irregularities in the decree of a Colonial Court, and an appeal lies from that decree to the appellate jurisdiction in this kingdom, is to allow the demurrer. I do not say that my conclusion would have been the same if the proceedings which were impeached had taken place in a foreign Court, from which there was no appeal to any superior jurisdiction which a Court of Equity in this country could regard as certain to administer justice in the case. I express no opinion on that point.

Demurrer allowed, with liberty to amend.

Dec. 18. The bill was not amended; and this day, on the motion of the Defendants, was ordered to be dismissed.

[119] HUMBLE *v.* SHORE. *Dec.* 23, 1842.

[See the judgment more fully reported, 1 H. & M. 550 (n.). Overruled, *In re Palmer*, [1893], 3 Ch. 369; *In re Allan* [1903], 1 Ch. 276, and cases there cited.]

A suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the *subpœna* to appear and answer, assigned his share: the assignee was held to be a necessary party to the suit.

In an administration suit, a party interested in the residue, by his answer, averred that, according to his information and belief, the suit was collusive as between the Plaintiffs and the executors and other parties: there being no replication, the allegation was taken as proof of the fact; and it was held that the fact was no objection to the making of the decree.

The Plaintiffs were entitled, under the will of Lydia Shore, to certain residuary shares in her real and personal estate, and the bill was filed against the executors and trustees, and the other parties interested in the residuary estate of the testatrix, to carry into execution the trusts of the will. The cause coming on for hearing,

Mr. Temple and Mr. Freeling, for one of the residuary legatees, objected that he had executed an assignment of his share in the residuary estate after the filing of the bill, but before he had been served with the *subpœna*, and that the assignee was a necessary party to the suit: *Pigott* v. *Nower* (3 Swans. 529, n.).

Mr. Rolt, for the Plaintiffs, submitted that an assignee *pendente lite* would be bound by the proceedings in the cause, and that the absence of the assignee was not therefore any ground for refusing the usual decree: *Landon* v. *Morris* (5 Sim. 262).

THE VICE-CHANCELLOR allowed the objection and the cause stood over.

May 13, 1843. The Plaintiffs filed their supplemental bill against the assignee of the residuary share, seeking the like relief against the Defendant as was prayed by the original bill. The Defendant admitted the will, but said he was informed and believed that the suit was collusive as be-**[120]**-tween the Plaintiffs and the executors and other parties; and that he had instituted another suit against the executors, impeaching their conduct with respect to particular matters which did not form the subject of any special charge in this suit. The Plaintiffs did not reply to this answer. At the hearing,

Mr. Romilly and Mr. Rolt said that the allegation that the Defendant was "informed and believed" the Plaintiffs and Defendants colluded was no averment of the fact; and if it were true, the fact was wholly unimportant. The Plaintiffs and the other residuary legatees (except the Defendant to the supplemental bill and his assignor) desired that the accounts should be taken, and the trusts executed in this suit: in that sense a great part of the suits in this Court were collusive: any special inquiries which the objecting Defendants could suggest might be made in the decree.

Mr. Daniel, for the executors, offered to submit to any inquiries with respect to

that, in my judgment, this appeal fails because upon its proper construction the statute does not grant the right asserted by the applicant. I only desire to add that in all relevant respects I adopt the most carefully argued and lucid judgment of the deputy judge.

Appeal dismissed with costs. Leave to appeal to House of Lords.

Solicitors: *Boxall & Boxall, for Boys & Maughan, Margate; Robinson & Allfree, Broadstairs.*

N. P.

READY MIXED CONCRETE (SOUTH EAST) LTD. *v.* MINISTER OF PENSIONS AND NATIONAL INSURANCE

1967 *Oct.* 4, 5, 6, 9, 10, 11; *Dec.* 8, MacKenna J.

Master and Servant—Contract of service—Service of, or for services—Owner-driver—Payment on mileage basis—Provision of exclusive use of vehicle for company's deliveries—Vehicle to be driven by owner—Power to hire competent driver with company's consent—Vehicle and driver to wear company's livery—Company's rules to be complied with—Freedom of owner in performance of obligations—Whether sufficient control to create master and servant relationship—Whether contractual terms inconsistent with contract of service—Relevance of ownership of assets and bearing of financial risk—Declaration that owner-driver independent contractor—Whether conclusive—Whether "employed person"—Whether independent contractor—National Insurance Act, 1965 (*c.* 51), *ss.* 1 (2), 3 (*b*).

National Insurance—Insurable employment—Owner-driver—Contract to carry company's concrete—Payment on mileage basis—Exclusive use of vehicle for company's deliveries—Vehicle to be driven by owner but power to hire driver with company's consent—Company's rules to be complied with—Whether a "contract of service"—Whether owner-driver independent contractor—Whether "employed person"—National Insurance Act, 1965 (*c.* 51), *ss.* 1 (2), 3 (*b*).

A written contract between a company marketing and selling concrete and L., which declared L. to be an independent contractor, provided, inter alia, that for payment at mileage rates L. at his own expense would carry concrete for the company and make available throughout the contract period a vehicle bought by him

[Reported by Mrs. Jennifer Winch, Barrister-at-Law.]

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from a finance organisation associated with the company. He was to obtain an A carriers' licence and was to maintain, repair and insure the vehicle (which was to be painted in the company's colours) and an attached mixing unit belonging to the company, and to drive the vehicle himself, but might with the company's consent hire a competent driver if he should be unable to drive at any time. L. was obliged to wear the company's uniform and to comply with the company's rules and was prohibited from operating as a carrier of goods except under the contract. The company had control over major repairs to the vehicle and power to ensure that L.'s accounts were prepared by an accountant in a form approved by the company.

The Minister of Pensions and National Insurance determined that L. was within the class of employed persons under section 1 (2) of the National Insurance Act, 1965,[1] as being an "employed person" under contract of service with the company under section 3 (*a*).

On appeal, on the contentions that the contract was not a contract of service, and that L. was an independent contractor:—

Held, allowing the appeal, (1) that the inference that parties under a contract were master and servant or otherwise was a conclusion of law dependent on the rights conferred and duties imposed by the contract and if the contractual rights and duties created the relationship of master and servant, a declaration by the parties that the relationship was otherwise was irrelevant (post, pp. 512G—513A).

(2) That a contract of service existed if (a) the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master, (b) the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master, and (c) the other provisions of the contract were consistent with its being a contract of service (post, p. 515C–D); but that an obligation to do work subject to the other party's control was not invariably a sufficient condition of a contract of service, and if the provisions of the contract as a whole were inconsistent with the contract being a contract of service, it was some other kind of contract and the person doing the work was not a servant (post, p. 517A); that where express provision was not made for one party to have the right of control, the question where it resided was to be answered by implication (post, p. 516A); and that since the common law test of the power of control for determining whether the relationship of master and servant existed was not restricted to the power of control over the manner of performing service but was wide

[1] National Insurance Act, 1965, s. 1 (2): ". . . insured persons shall be divided into the following three classes, namely (*a*) employed persons, that is to say, persons gainfully occupied in employment . . . being employment under a contract of service . . ."

S. 3 (*b*): "Every employer of an employed person . . . shall be liable to pay weekly contributions in respect of that person . . ."

enough to take account of investment and loss (post, p. 522F), in determining whether a business was carried on by a person for himself or for another it was relevant to consider who owned the assets or bore the financial risk (post, p. 520G—521A).

Dicta of Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161, 167, P.C.; and *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance* [1963] 1 W.L.R. 441; [1963] 1 All E.R. 864, applied.

Dictum of Denning L.J. in *Bank voor Handel en Scheepvaart* v. *Slatford* [1953] 1 Q.B. 248, 290; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779 and *Short* v. *J. and W. Henderson Ltd.* (1946) 62 T.L.R. 427, H.L. considered.

(3) That the rights conferred and the duties imposed by the contract were not such as to make it a contract of service, and that L. had sufficient freedom in the performance of the obligations to qualify him as an independent contractor.

READY MIXED CONCRETE (SOUTH EAST) LTD. *v.* MINISTER OF PENSIONS AND NATIONAL INSURANCE

APPEAL against a decision of the Minister of Pensions and National Insurance.

The following case was stated by the Minister of Social Security (formerly the Minister of Pensions and National Insurance) under section 65 of the National Insurance Act, 1965 and R.S.C. Ord. 111.

1. On November 15, 1965, a company, Ready Mixed Concrete (South East) Ltd., applied for determination by the Minister under section 64 of the National Insurance Act, 1965, of the question whether Thomas Henry Latimer was by virtue of a contract between himself and the company dated May 15, 1965, an employed or self-employed person for the purposes of the National Insurance Act, 1965, during the week commencing November 8, 1965: and also whether the company was liable for payment of flat rate contributions in respect of Mr. Latimer for the purposes of section 3 of the Act, during that week.

2. The Minister appointed Mr. M. W. M. Osmond, Barrister-at-Law and member of the Legal Department of the Ministry of Pensions and National Insurance to hold an inquiry into questions arising on the application and to report to her thereon. Mr. Osmond accordingly held an inquiry in London on January 11 and 12, 1966, and both Mr. Latimer and the company were represented at the inquiry by Mr. G. Slynn, of counsel.

3. Subject to all questions of relevance and admissibility the Minister accepted the evidence led at the inquiry as establishing the following facts.

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(1) Ready Mixed Concrete (United Kingdom) Ltd. (hereinafter referred to as "Ready Mixed"), carried on the business of making and selling ready mixed concrete and similar materials, and operated through a number of wholly or partly owned subsidiary companies, one of which was the company.

(2) The company was incorporated in 1963 and operated at eight plants at various places in the South East of England one such plant being at Crayford, Kent.

(3) It was, and always had been, the policy of the Ready Mixed Group that the business of making and selling concrete should be carried on as far as possible separately from the business of delivering the concrete to customers, and in furtherance of that policy, on commencing trading some ten years ago, Ready Mixed entered into a contract for the delivery of concrete with an independent company of haulage contractors. In 1959, being dissatisfied with the operations of the independent company, Ready Mixed determined the contract and introduced a scheme of delivery by drivers (hereinafter referred to as "owner-drivers") working under contracts similar to, but not identical with, a form of agreement known as agreement "D" (a copy whereof was annexed to the case). It was considered that not only would the scheme further the policy of keeping the making and selling of concrete separate from its delivery, but that the scheme would benefit the Ready Mixed Group by stimulating speedy and efficient cartage, the maintenance of trucks in good condition, and the careful driving thereof, and would benefit the owner-driver by giving him an incentive to work for a higher return without abusing the vehicle in the way which often happened if an employee was given a bonus scheme related to the use of his employer's vehicle.

(4) In a letter dated September 6, 1962, addressed to Ready Mixed, the Ministry of Pensions and National Insurance expressed the opinion that agreements in the form of agreement "D," being one of a series of agreements by which the owner-driver scheme was given legal effect, did not constitute contracts of service between members of the Ready Mixed Group and owner-drivers, who were accordingly to be regarded as self-employed persons for the purposes of the National Insurance Act, 1946.

(5) It was, and always had been, since the introduction of the owner-driver scheme in 1959, the intention both of the Ready Mixed Group and of the owner-drivers that the latter should be treated as independent contractors, and not servants of member

companies of the Ready Mixed Group. Some owner-drivers had, in addition to delivering concrete in pursuance of contract with such members, carried on other remunerative occupations. A few owner-drivers had an interest in more than one truck, themselves employing drivers to work for them, and the company was willing to allow suitable owner-drivers to own more than one truck.

(6) Notices under the Contracts of Employment Act, 1963, were not issued to owner-drivers. Income Tax was paid by owner-drivers under Schedule D of the Income Tax Act, 1952. Contributions were paid by owner-drivers as self-employed persons under the National Insurance Act, 1946, until March, 1965, when the Ministry of Pensions and National Insurance requested the payment of contributions by and in respect of them as employed persons.

(7) Mr. Latimer became employed under a contract of service by a member of the Ready Mixed Group in 1958 as a yardman batcher at Northfleet. In 1960 he was transferred to the plant at Crayford as a batcher. In 1963 he entered into a contract with the company whereby he agreed to collect, carry and deliver concrete as an owner-driver for two years. At the same time he entered into a hire purchase agreement relating to a Leyland lorry. He finished paying for that in about one year, and the vehicle then became his property. On May 15, 1965, he entered into a contract (hereinafter referred to as "the contract") with the company whereby he agreed to collect, carry and deliver concrete as an owner-driver for a further period of five years. (A copy of the contract was annexed to the case.†)

On June 17, 1965, he entered into a hire purchase agreement with Readymix Finance Ltd. whereby in place of his other vehicle which he sold he agreed to purchase a Leyland vehicle, EUW 152 C, by means of 48 consecutive monthly instalments of £62 19s. 6d., the first instalment being payable on July 1, 1965.

(8) From May 15, 1965, Mr. Latimer collected, carried and delivered concrete at and from the company's plant at Crayford and was paid an allowance in accordance with the contract. In particular the company had made the payments in respect of earnings to Mr. Latimer required by clause 20 of the contract. Such payments were estimated to amount to approximately £4,500 a year. For the years ending June 30, 1964 and June 30, 1965, Mr. Latimer received £4,204 and £4,512 respectively from the com-

† The terms scheduled to the contract are set out as an appendix to this report, post, pp. 527–534.

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pany under the contract between them then in force. After the payment of all expenses the net amount of remuneration remaining in Mr. Latimer's hands for the two years was £3,327 and £2,004 respectively.

(9) In November 1965, 709 persons were employed as owner-drivers under contracts with the Ready Mixed Group, 58 persons were so employed with the company, and eight persons in addition to Mr. Latimer were so employed at the company's Crayford plant.

(10) The method of collecting, carrying and delivering concrete in operation at the Crayford plant was as follows. Loading commenced each day at a time fixed by the plant manager and proceeded in accordance with a system organised by the nine owner-drivers whereby the truck which was loaded with concrete first on one day was loaded last the next day and so on in rotation. Owner-drivers awaited the announcement by loudspeaker of their turn for loading in a room known as the mess room. Before leaving the plant with a load of concrete each driver obtained from the ticket office four tickets upon which appeared such details as the quantity and quality of the concrete or other material to be delivered, its destination and the time of loading. One ticket was retained in the office and one by the owner-driver: the other two were signed by the customer as a receipt for the load, one being then retained by the owner-driver and the other being returned to the office. Having delivered his load, the owner-driver returned to the plant to collect a further load and so on throughout the day. Owner-drivers did not work set hours, and there were no fixed meal breaks. While on the plant premises owner-drivers were expected to comply with, and did comply with, directions given on behalf of the company for the purposes of securing an orderly and safe system of loading, parking and driving of the vehicles. No instructions were given on behalf of the company to owner-drivers concerning the method of driving trucks from the plant to the place of delivery, and in particular owner-drivers were not instructed as to the routes which they were to follow. No instructions were given on behalf of the company to owner-drivers as to how to discharge the concrete at the delivery site. While on the delivery site owner-drivers complied with instructions of the site foreman concerning the discharge.

(11) Holidays were taken by nine owner-drivers employed at the company's Crayford plant on dates arranged between themselves so as to ensure as far as possible that no more than one owner-driver was on holiday at any one time.

(12) A relief truck driver was employed by the nine owner-drivers who carried from the company's Crayford plant with the knowledge and approval of the company. The relief driver was paid a wage of £25 a week out of funds provided equally by the owner-drivers. The relief driver was employed to take over the operation of any vehicle whose regular owner-driver was absent through sickness or being on holiday or any other reason. The relief driver received his wage each week irrespective of whether or not he had been required to take over the operation of a vehicle in that week.

(13) Three or four drivers were employed by the company under contracts of service during the months of March to September in each year when the demand for and production of concrete was high. Those drivers had fixed hours of work from 8 a.m. until 5.30 p.m. and the length and time of their holidays was controlled by the company. They were paid at the rate of 5s. 11d. per hour, with an addition for overtime. An average weekly wage for such an employee was between £18 and £20. They paid income tax by means of P.A.Y.E. and contributions as employed persons were paid by and in respect of them under the National Insurance Act. They were not responsible for the maintenance or running costs of the trucks. If not occupied during working hours in delivering concrete they were, unlike owner-drivers, required to perform other tasks about the plant. They were instructed by the plant manager as to the routes which they were to follow between the plant and delivery site.

(14) Owner-drivers who carried from the company's Crayford plant were free to purchase fuel for their trucks either from a pump on the plant premises or from any supplier elsewhere. It was not the practice of Mr. Latimer to purchase fuel from the plant pump. The drivers employed by the company were required to draw fuel from the plant pump; owner-drivers could use truck maintenance facilities available at the plant, or if they preferred make use of any garage of their choice. If owner-drivers used the company's maintenance facilities they were charged for all the work done to their vehicles.

(15) No rules, regulations or requirements of the kind envisaged by clause 14 (b) of the schedule to the contract had been issued by the company, other than for securing orderly and safe working at the plant. One such rule issued recently prohibited the presence of children on the plant premises.

(16) If any person acting on behalf of the company had sought

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to instruct Mr. Latimer how to deliver concrete or how to drive his truck, Mr. Latimer would have told that person to mind his own business. No such person so instructed Mr. Latimer.

(17) Mr. Latimer caused accounts to be prepared by a professional accountant as required by clause 25 of the contract. Such accounts were headed "T. H. Latimer, Esq., Haulage Contractor, Ready Mixed Concrete, 13 Morgan Drive, Stone, Kent."

(18) Mr. Latimer was, and had been during the week commencing November 8, 1965, the holder of an "A" licence issued for the purposes of section 166 (2) of the Road Traffic Act, 1960.

(19) The cost of the concrete mixing or agitating unit, referred to in the contract as "the equipment" was £2,000 or thereabouts.

(20) Clause 6 of the schedule to the contract had never been operated.

4. It was contended on behalf of Mr. Latimer and the company that the contract between the parties was not one of service. It was submitted:

(1) in relation to clauses, 2, 3, 4, 7, 8, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27 and 32 of the schedule to the contract that they were inconsistent with the master/servant relationship, and, in particular, that the obligation to purchase, maintain, licence and insure the vehicle would, though sitting lightly upon an independent contractor, be impositions upon a servant, and further that while clauses of that nature are not usually to be found in "independent contractor" contracts, they were implied.

(2) in relation to clauses 5, 6, 9, 14, 17, 25, 26, 29 and 31 of the schedule: (a) That if the clauses were construed, as they should be, in the context of the contract as a whole, their true meaning was not inconsistent with the relationship of principal and independent contractor. In particular the obligations to carry out orders, rules, regulations or requirements (whether or not in terms qualified by the word "reasonable") could only be obligations to obey orders etc. which might properly have been given by a principal to an independent contractor, and although the obligations to obey were expressed to exist at all times when operating the truck, the words "at all times" had to be interpreted as limited to those times when it would have been proper for a principal to give an order to a sub-contractor. (b) That if, contrary to the company's and Mr. Latimer's contention, a wide degree of control was envisaged by the working of the contract, the evidence showed such control was not exercised. As regarded collecting and delivering the only control exercised by the company and the

customer respectively was that which must of necessity be exercised over servant and independent contractor alike, to ensure safe and orderly working. As to carrying, no control was exercised at all, and any attempt to exercise control would have been bitterly resented by Mr. Latimer in particular, and owner-drivers in general, as being an interference with the manner in which he conducted his own business and looked after his own property. (c) That the kind of control which was exercised in fact was the only kind which the company was entitled under the contract to exercise. (d) That the use of the words "as if he were an employee" in clause 14 (e) of the contract emphasised that in truth Mr. Latimer was not a servant. The provision enjoined Mr. Latimer to obey orders of the kind, but only of the kind, which might properly be given to an independent contractor as faithfully and fully as if he were an employee. (e) That even if the clauses did bear their prima facie meaning and entitled the company to exercise a stringent control over Mr. Latimer, control was neither the only nor the conclusive test. It was merely one factor among many to be considered.

(3) in relation to clauses 10, 11, 12 and 13 which relate to Mr. Latimer's right to employ, with the company's consent, a deputy driver, that they were wholly inconsistent with the master/servant relationship.

(4) In relation to clauses 7 and 15, that they merely imposed upon Mr. Latimer a contractual obligation to comply with certain statutory requirements.

(5) In relation to clause 30, which declared Mr. Latimer to be an independent contractor that the clause conclusively determined the status of the parties to the contract as between themselves and that such a declaration as to status was binding upon the Minister unless it were shown that the contract as a whole was a sham, entered into with the deliberate intention of deceiving third parties, and this could not be shown. If clause 30 was not decisive of the issue, on a proper construction of the whole contract including clause 30, alternatively of the remaining clauses, the contract was one for services and not of service. Alternatively if the Minister was entitled to go behind clause 30, all the facts and circumstances should have been looked at, including the intention and behaviour of the parties.

5. The Minister, having regard to the fact that the contract had been reduced to writing, considered as irrelevant so much of the evidence given at the inquiry as related:

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(1) to the Ministry's informal expression of opinion as to the nature of a contract between members of the Ready Mixed Group and owner-drivers, and generally to the evolution of the contract;

(2) to the opinions professed by the solicitor employed by Ready Mixed, the General Manager of the company, and by Mr. Latimer as to the true meaning and effect of the contract and to any action which had been or might have been taken in reliance upon any such opinions;

(3) to the intentions of the company and of Mr. Latimer as to the relationship to be created inter se by the contract;

(4) to the way in which statutory provisions other than the National Insurance Act were regarded as applying to Mr. Latimer and other owner-drivers;

and, accordingly, for the purpose of arriving at her decision the Minister disregarded the following: (i) Correspondence passing on various dates in July, August and September, 1962, between Ready Mixed Concrete (United Kingdom) Ltd. and the Ministry of Pensions and National Insurance concerning the classification of owner-drivers for the purpose of the National Insurance Act; (ii) Copy form of agreement, known as agreement "D" between the company and an owner-driver; (iii) All in paragraph 3 (4) of this case; (iv) All in the first sentence of paragraph 3 (5) of this case; (v) All in paragraph 3 (6) of this case; (vi) All in paragraph 3 (16) of this case.

6. The Minister considered that she could have regard to the remaining facts set out in paragraph 3 of the case, as they showed the surrounding circumstances in which the contract came to be made.

7. The Minister was of the opinion that the contention put forward on behalf of Mr. Latimer and the company that the contract was not a contract of service was wrong, and, in particular, rejected the following submissions referred to in paragraph 4 of this case; namely that contained in sub-paragraph (1), sub-paragraph (2) (a), sub-paragraph (2) (c), sub-paragraph (2) (d), sub-paragraph (3) and sub-paragraph (5) of paragraph 4.

8. Accordingly, the Minister decided that: (a) Thomas Henry Latimer of 13, Morgan Drive, Horns Cross, Stone, near Greenhithe, Kent, was included in the class of employed persons for the purposes of the National Insurance Act, 1965, during the week commencing Monday, November 8, 1965; and (b) the company, as the employer of the said Thomas Henry Latimer, was liable to pay

a flat rate contribution in respect of him under section 3 (b) of the said Act for the said week.

MINISTER OF SOCIAL SECURITY *v.* GREENHAM READY MIXED CONCRETE LTD. AND ANOTHER

REFERENCE by the Minister of Social Security.

The Minister, by notice of motion in accordance with R.S.C., Ord. 111, referred to the court for an order a question concerning a contract between John King and Greenham Ready Mixed Concrete Ltd. A case was stated by the Minister. The facts do not call for report.

MINISTER OF SOCIAL SECURITY *v.* READY MIXED CONCRETE (SOUTH EAST) LTD. AND ANOTHER

REFERENCE by the Minister of Social Security.

The Minister, by notice of motion in accordance with R.S.C., Ord. 111, referred to the court for an order a question as to the construction of a written contract dated December 6, 1965, between Arthur William Bezer and Ready Mixed Concrete (South East) Ltd., namely whether his employment was under a contract of service for the purposes of section 1 (2) (*a*) of the National Insurance Act, 1965. A case was stated by the Minister. The facts do not call for report.

The three cases were listed and heard together. In each case the question was whether the contract was a contract of service. The parties were agreed that, if the contract between the company and Latimer was not a contract of service, the contracts of King and Bezer respectively were not contracts of service.

Roger Parker Q.C. and *Gordon Slynn* for Ready Mixed Concrete (South East) Ltd. and Bezer.

H. A. P. Fisher Q.C. and *Adrian Hamilton* for Greenham Ready Mixed Concrete Ltd. and King.

Nigel Bridge for the Minister of Social Security formerly the Minister of Pensions and National Insurance.

The following cases, in addition to those cases referred to in the judgment, were cited in argument: *Morren* v. *Swinton & Pendlebury Borough Council* [2]; *Performing Rights Society* v. *Mitchell &*

[2] [1965] 1 W.L.R. 576; [1965] 2 All E.R. 349, D.C.

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Booker (Palais de Dance) Ltd.[3]; *Denham* v. *Midland Employers' Mutual Assurance Ltd.*[4]; *O'Reilly* v. *I.C.I. Ltd.*[5]; *Gould* v. *Minister of National Insurance*[6]; *In re Hughes (G. W. & A. L.) Ltd.*[7]; *Whittaker* v. *Minister of Pensions and National Insurance*[8]; *Stevenson Jordan & Harrison* v. *MacDonald & Evans*[9]; *Short* v. *Henderson Ltd.*[10]; *Simmons* v. *Heath Laundry Co.*[11]; *Braddell* v. *Baker*[12]; *Binding* v. *Great Yarmouth Port & Haven Commissioners*[13]; *Century Insurance Co.* v. *Northern Ireland Road Transport Board*[14]; *Mersey Docks and Harbour Board* v. *Coggins & Griffith*[15]; *Watcham* v. *Attorney-General of East Africa Protectorate*[16]; and *Rolls Razor Ltd.* v. *Cox.*[17]

Cur. adv. vult.

December 8. MACKENNA J. read the following judgment. The first of these three cases is an appeal against a decision of the Minister of Pensions and National Insurance, now the Minister of Social Security, by which she determined that Thomas Henry Latimer was included in the class of employed persons for the purposes of the National Insurance Act, 1965, during the week commencing November 8, 1965, and that Ready Mixed Concrete (South East) Ltd. were his employers and liable under section 3 (*b*) of the Act to pay in respect of him a flat rate contribution for that week. The company required the Minister to state a case setting forth her decision and the facts on which it was based, which she has done, and that case comes before me on appeal.

An employed person means for the purposes of the Act one employed under a contract of service, and the question raised by the appeal is whether Latimer was employed under such a contract. The Minister has found that he was; the company say that he was not.

[3] [1924] 1 K.B. 762; 40 T.L.R. 308.
[4] [1955] 2 Q.B. 437; [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561, C.A.
[5] [1955] 1 W.L.R. 839, 1155; [1955] 2 All E.R. 567.
[6] [1951] 1 K.B. 731; [1951] 1 T.L.R. 341; [1951] 1 All E.R. 368.
[7] [1966] 1 W.L.R. 1369; [1966] 2 All E.R. 702.
[8] [1967] 1 Q.B. 156; [1966] 3 W.L.R. 1090; [1966] 3 All E.R. 531.
[9] [1952] 1 T.L.R. 101, C.A.
[10] (1946) 174 L.T. 417; 62 T.L.R. 427, H.L.
[11] [1910] 1 K.B. 543; 26 T.L.R. 326, C.A.
[12] (1911) 27 T.L.R. 182, D.C.
[13] (1923) 128 L.T. 743, C.A.
[14] [1942] A.C. 509; [1941] 1 All E.R. 491, H.L.
[15] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345, H.L.
[16] [1919] A.C. 533; 34 T.L.R. 481, P.C.
[17] [1967] 1 Q.B. 552; [1967] 2 W.L.R. 241; [1967] 1 All E.R. 397, C.A.

The company are one of the Ready Mixed Group and are engaged in the business of making and selling concrete. On May 15, 1965, Latimer and the company entered into a written contract which was in force at the material time. The circumstances preceding the making of that contract were described in the case.

Latimer began to work for the company in 1958 as a yardman batcher. In that capacity he served them first at Northfleet and later at Crayford, two of the eight plants which they operated. At the time when he entered their service they delivered the concrete to their customers through an independent company of haulage contractors. In 1959, being dissatisfied with the operations of these contractors, they determined their contract with them, and introduced a scheme of delivery by owner-drivers. It is stated in the case that the provisions of the company's contract with the owner-drivers, when the scheme was introduced, were similar to those of the contract in force at the material time, to which I shall come presently, though not identical with them. The case also states that it is, and always has been, the policy of the group "that the business of making and selling concrete should be carried on as far as possible separately from the business of delivering the concrete to the customers," and that the owner-driver scheme was introduced to further that policy, in the belief that it would stimulate

> "speedy and efficient cartage, the maintenance of trucks in good condition, and the careful driving thereof, and would benefit the owner-driver by giving him an incentive to work for a higher return without abusing the vehicle in the way which often happens if an employee is given a bonus scheme related to the use of his employer's vehicle."

This was in 1959. In 1963 Latimer ceased to be employed as a batcher and agreed to work for the company as an owner-driver. He entered into a contract for the carriage of concrete, presumably in the form used at the inception of the scheme, and also into a hire-purchase contract relating to a Leyland lorry. The first-mentioned contract continued for two years, during which time Latimer became the owner of the lorry. At the end of the two years the contract was determined, and the Leyland lorry was sold. On May 15, 1965, he entered into a new contract with the company, and, a month later, into a hire-purchase contract relating to another vehicle, a new Leyland, EUW 152 C. The hire-purchase company are Ready Mixed Finance Ltd. They are, as their name indicates, one of the group.

There are other facts which I must mention, but before doing

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so it is convenient that I should summarise the provisions of the new contract between the company and Latimer. The commencement date was June 1, 1965, and the termination date April 30, 1970. The company are to procure that the hire-purchase company will offer to sell the Leyland to Latimer on credit terms, painted in colours and with distinguishing signs selected by the company, and adapted to carry the company's concrete-mixing unit, fleet number 52140, which the company will fix to the Leyland, and he is to buy the Leyland from the hire-purchase company. The contract refers to the Leyland as "the vehicle," and to the Leyland with the mixing unit attached as "the truck," and I shall use these descriptions. If required to do so he must at his expense instal radio equipment on the vehicle. He is to procure an "A" contract licence under the Road Traffic Act, 1960, covering the use of the truck.

Clause 5 is in these terms:

> "The owner-driver shall at all times of the day or night during the term of this agreement (excepting only in accordance with the terms hereof) make available the truck to the company for the purpose of collecting carrying and delivering the materials used for or in connection with the business of the company (not being a business of carrying or arranging for the carriage of goods) whenever and wherever so required by the company whether such requirement is notified to the owner-driver or to his servants or agents and shall duly and promptly collect carry and deliver such quantity or quantities of the materials as and when required in the manner at the time and to the destination directed by the company, and it is further provided that the truck shall be used exclusively for the purposes set out in this agreement and for no other purpose. In furtherance of the terms of this clause the owner-driver shall if so required by the company at his own expense ensure that the company is able to contact him by telephone at his usual residence or residences."

The company can call on him to make the truck available for delivering the materials of any other group company, subject to his obtaining a "B" licence, which he must in that case try to get. He must comply with the conditions of his licences and obey any other rules or regulations, parliamentary, local or parochial. Under clause 10 he may, with the company's consent and subject to clause 12, appoint a competent driver to operate the truck in his place. He must pay this driver National Joint Council wages or better, and, if the company are dissatisfied with the driver, he must provide another. Clause 12 is in these terms:

A "Notwithstanding the provisions of clause 10 of this schedule the company shall be entitled to require the owner-driver himself to operate the truck on every or any day up to the maximum number of hours permitted under the provisions of section 73 of the Road Traffic Act, 1960, or any statutory amendment or re-enactment thereof and the owner-driver shall comply with such requirement unless he shall B have a reason for not so doing which would have been valid had he been the employed driver of the company and shall have notified the company in advance of such reason and shall be able to produce and upon the request of the company in fact produce evidence to substantiate the same. The owner-driver shall not himself be obliged to operate the truck during such holiday times and periods (not extending for more than two weeks in any calendar year) as have been C agreed by the company in writing."

I read clauses 10 and 12 to mean that Latimer must drive himself if required to do so by the company, unless he has an excuse which would be valid in the case of a servant.

He must not operate as a haulier or carrier of goods except D under the contract. If he fails to operate the truck himself or to cause another driver to do so, the company may appoint a driver on his behalf, and he must pay that driver's wages, and that driver shall be deemed to be in his employment.

He must wear the company's uniform, complying with all the company's rules, regulations or requirements (clause 14 (b)), carry E out all reasonable orders from any competent servant of the company "as if he were an employee of the company," and by his conduct and appearance "including the speed and manner in which he operates the truck" use his best endeavours to further the good name of the company. He must not alter the truck without the company's consent. He must keep it freshly painted F in the colours and with the signs directed by the company. He must keep it washed, cleansed, oiled, greased, maintained and in good and substantial repair. This obligation extends to the company's mixing unit, whose worn parts he must, with certain exceptions, renew if the need for renewal is due to fair wear and tear. All these things are to be done at his expense. Where the G repairs would cost more than £50 or take more than a day to execute, the company may require the work to be done by a named group company or by someone else of the company's choice. The company may specify any repair work which they think should be done, and he must do it.

For all these services he is to be paid 8s. 6d. per cubic yard for the first radial mile and 1s. 1d. per cubic yard for each mile

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thereafter. Provision is made for minimum annual earnings: £1,500 x $\frac{280-Y}{280}$, where Y represents the number of days in excess of 85 when the truck and a driver were not available for at least four hours. Those rates are to be revised at the request of either party if there is any alteration in the National Joint Council's rates of wages or in the cost of fuel, or at his request "in the event of any substantial reduction in the profitability of the agreement to the owner-driver by reason of any levy or tax imposed by Parliament on carriers of goods by road transport generally."

He is to pay all the running costs. He may not charge the vehicle or the mixing unit or make them subject to any lien except under the hire-purchase contract. The company, if they wish, may pay the hire-purchase instalments direct, and debit them to him. If he does not pay his bills, the company may pay them for him. He must have his accounts prepared in a form and by an accountant approved by the company. If any provision is made in the account, he must set it aside in a manner approved by the company.

The company are to insure the vehicle in his name and the mixing unit in his or theirs, in each case in such form and for such amounts as they think fit but at his expense, debiting his account with the charges which he authorises them to pay. He must spend any money he receives under these policies in repairing or replacing the insured property. He must, if required to do so, assign to the company any rights he may have under the policies.

The company are given the right to acquire the vehicle on the expiration or determination of the contract.

Either party may determine the contract by notice after April 30, 1970. Before that date the company may determine it by 28 days' notice if he has been incapacitated for 60 days, and summarily if (i) he commits a breach of any term of the contract, or (ii) is guilty of conduct tending to bring the company into disrepute, or (iii) commits an act of bankruptcy, etc., or (iv) if he, "having been warned by the company of any grounds for dissatisfaction it may have in respect of the operation of the truck shall not within a reasonable time have removed the cause of such dissatisfaction."

Clause 30 of the contract declares him to be an independent contractor.

It may be stated here that whether the relation between the

parties to the contract is that of master and servant or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of master and servant, it is irrelevant that the parties have declared it to be something else. I do not say that a declaration of this kind is always necessarily ineffective. If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention.

So much for the contract between the company and Latimer.

There is nothing unusual in the provisions of the hire-purchase contract. The cash price of the vehicle is £2,380 11s. 6d.; the charges are £642 3s. 6d.; and the money is payable by 48 monthly instalments of £62 19s. 6d. The hire-purchase company are given the right to determine the contract if these instalments are not paid and in certain other events. Latimer is described in the contract as a "contractor self employed."

The Minister has found a number of facts which she has stated in the case.

(a) Payments to Latimer under the previous agreement for the year ended June 30, 1964, were £4,204. After the payment of all his expenses he was left with £3,327. The corresponding figures for the year ended June 30, 1965, were £4,512 and £2,004. (b) In November, 1965, the group employed 709 persons as owner-drivers, of whom nine, including Latimer, were employed at the company's Crayford plant. (c) Loading at that plant begins at a time fixed by the plant manager. The nine owner-drivers have established a system under which the truck first loaded today will be last loaded tomorrow and so on in rotation. The owner-driver waits in a mess room until a loudspeaker calls him for loading. When he has delivered his load he returns to collect another, and so on through the day. He does not work set hours and has no fixed meal break. While on the plant premises he is expected to comply with directions given on the company's behalf to secure an orderly and safe system of loading, parking and driving, and he does comply with them. The company give no instructions to owner-drivers about the method of driving the trucks from the plant to the place of delivery or of discharging the concrete, and do not tell them what routes to take. While on the delivery site they follow the site foreman's instructions about discharge. (d) The nine owner-drivers arrange the dates of their holidays so as to ensure as far as possible that no more than

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one driver is on holiday at any one time. With the knowledge and approval of the company they employ between them a single relief driver, contributing equally to his weekly wage of £25. He takes over the operation of any vehicle whose regular owner-driver is absent through sickness, or because he is on holiday, or for any other reason. (e) During the busy season the company employ three or four additional drivers under contracts of service. Those men work fixed hours and are paid at the hourly rate of 5s. 11d. Their wages (with overtime at a higher rate) average between £18 and £20 a week. They are not responsible for the maintenance or running costs of the trucks they drive. When not engaged in delivering concrete, they, unlike the owner-drivers, do other jobs. They are told what routes to take. (f) The owner-drivers can, if they wish, buy their petrol from a pump on the plant premises. Latimer does not. The drivers mentioned in (e) must take their supplies from the pump. Owner-drivers are allowed to use the company's maintenance facilities, but they are charged for all work done to their vehicles. (g) The company have made no "rules, regulations or requirements" under clause 14 (b) of the schedule except for securing orderly and safe working at the plant. (h) If anyone acting for the company sought to instruct Latimer how to deliver concrete or how to drive his truck, he would tell that person to mind his own business. Nobody has sought to instruct him. (i) The accounts prepared for him by his accountant in accordance with the requirements of the contract are headed "T. H. Latimer, Esq., Haulage Contractor, Ready Mixed Concrete, 13 Morgan Drive, Stone, Kent." (j) Latimer holds an "A" licence. (k) The cost of the mixing unit is £2,000. (l) Latimer has not been required to deliver materials for other group companies. (m) In 1962 the Ministry of Pensions and National Insurance expressed the opinion that the form of contract then used by the company was not one of service. (Many of the provisions of the later form of contract are not present in the earlier.) Owner-drivers have been treated under other Acts (including the National Insurance Act, 1946) as self-employed persons. (n) It is, and always has been since the introduction of the owner-driver scheme in 1959, the intention both of the Ready Mixed Group and of the owner-drivers that the latter should be treated as independent contractors, and not servants of member companies of the Ready Mixed Group.

A B C D E F G

It is stated in the case that the Minister disregarded the facts summarised in (h), (m) and (n). In my opinion this was rightly

done. (h) is irrelevant: it is the right of control that matters, not its exercise. As to (n), I have already said that whether the relation between the parties to a contract is that of master and servant is a conclusion of law dependent upon the provisions of the contract. If the rights conferred and the duties imposed by the contract are such that the relation is that of master and servant, it is irrelevant that the parties who made the contract would have preferred a different conclusion. As to (m), opinions expressed by Ministries on the question which I have to decide, and any action taken on those opinions, are also irrelevant unless they create an estoppel in the company's favour, and it is not argued that they do.

I must now consider what is meant by a contract of service.

A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

I need say little about (i) and (ii).

As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

> "What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."—*Zuijs* v. *Wirth Brothers Proprietary, Ltd.*[1]

[1] (1955) 93 C.L.R. 561, 571.

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To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication.

The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.

(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.

(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.

(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.

(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.

(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: *Amalgamated Engineering Union* v. *Minister of Pensions and National Insurance.*[2]

I can put the point which I am making in other words. An

[2] [1963] 1 W.L.R. 441, 451, 452; [1963] 1 All E.R. 864.

obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.

I find authority for this way of dealing with the case in the judgment of Dixon J. in *Queensland Stations Proprietary Ltd.* v. *Federal Commissioner of Taxation*.[3] There the question was whether a payment made by the company to a drover was "wages" within the meaning of a Pay-roll Tax Assessment Act, which depended on whether the relation between the company and the drover was that of master and servant. The drover was employed under a written contract to drove 317 cattle to a destination. The contract provided that he should obey and carry out all lawful instructions and use the whole of his time, energy and ability in the careful droving of the stock, that he should provide at his own expense all men, plant, horses and rations required for the operation, and that he should be paid at a rate per head for each of the cattle safely delivered at the destination. He was held to be an independent contractor. This passage comes from the judgment of Dixon J.[4]:

> "There is, of course, nothing to prevent a drover and his client forming the relation of employee and employer. . . . But whether they do so must depend on the facts. In considering the facts it is a mistake to treat as decisive a reservation of control over the manner in which the droving is performed and the cattle are handled. For instance, in the present case the circumstance that the drover agrees to obey and carry out all lawful instructions cannot outweigh the countervailing considerations which are found in the employment by him of servants of his own, the provision of horses, equipment, plant, rations, and a remuneration at a rate per head delivered. That a reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract appears from . . ."

There follows the citation of a number of English cases, including *Hardaker* v. *Idle District Council*,[5] the building contractor's case.

[3] (1945) 70 C.L.R. 539.
[4] Ibid. 552.
[5] [1896] 1 Q.B. 335; 12 T.L.R. 207, C.A.

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If the independent contractor need not be free from the other party's control "in the performance of the task," what freedom must he possess if he is to be called "independent"? Must he be free to choose the plant, equipment and materials as he wishes, or can he submit to some control in these respects too without affecting the substance of his independent contract? I do not see why not. In practice there will always be some scope for independent action by the man who undertakes to provide the means of performance and to accomplish the result for which he is to be paid.

I compare, and to some extent contrast, with this judgment of Dixon J.[6] another judgment of the same judge in *Humberstone* v. *Northern Timber Mills.*[7] There the question was whether the owner-driver of a truck was a servant under a contract of service so as to be covered by a Workmen's Compensation Act. For a number of years the owner had taken his truck at about the same time each day to the respondents' factory where he had been given goods to deliver to their customers. He carried on delivering goods until about the same time each evening when he knocked off. He maintained the truck and supplied the fuel at his own expense, and was paid for goods carried at a rate per car-mile. From these facts it was inferred that there was a continuing contract between the respondents and the owner which was not a contract of service. For this last conclusion Dixon J. gave these reasons[8]:

> "*The question is* not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but *whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.* In the present case the contract by the deceased was to provide not merely his own labour but the use of heavy mechanical transport, driven by power, which he maintained and fuelled for the purpose. The most important part of the work to be performed by his own labour consisted in the operation of his own motor truck and the essential part of the service for which the respondents contracted was the transportation of their goods by the mechanical means he thus supplied. The essence of a contract of service is the supply of the work and skill of a man. But the emphasis in the case of the present contract is upon mechanical traction. This was to be done by his own property in his own possession and control. *There is no ground for imputing to the parties a common intention that*

[6] 70 C.L.R. 539.
[7] (1949) 79 C.L.R. 389.
[8] Ibid. 404.

in all the management and control of his own vehicle, in all the ways in which he used it for the purpose of carrying their goods, he should be subject to the commands of the respondents.

"In essence it appears to me to have been an independent contract and I do not think that it was open to the board to find otherwise.

"The subject has recently been dealt with in this court in *Queensland Stations Proprietary Ltd.* v. *Federal Commissioner of Taxation.*[9] As in that case the contract is one for the performance of a service for one party by another who is to employ plant for the purpose and to be paid by the results."

Were it not for the words which I have italicised I would have said that the reasoning here was the same as in the earlier case. Because of the driver's obligation to provide the truck, to maintain and fuel it, and to accept payment by results, it was a contract for the transportation of goods and not a contract of service. But the italicised words seem to make the consignor's right of control (if it existed) a sufficient condition of a contract of service, and to treat the owner-driver's obligation to provide the truck, etc., merely as evidence, making difficult, or precluding, the imputation of an intention to the parties that he should be subject to control. If the obligation to provide the truck, etc., were relevant only as evidence of intention in the matter of control, it would cease to be relevant where the parties had expressed their intention in that matter, and if, as in the *Queensland* case, the contract expressly provided that the driver should be subject to the other party's control, he would be a servant. But the *Queensland* case decided that the driver's was an "independent contract": his obligation to provide the men, the horses, etc., determined its nature and made it, notwithstanding his submission to control, something other than a contract of service.

If there is in this respect a difference between the two judgments, I prefer the earlier.

The opinion of Lord Wright in *Montreal* v. *Montreal Locomotive Works Ltd.*,[10] forgotten by at least one of the counsel who argued the case, and discovered by Mr. Atiyah, must be mentioned here. There were two questions in that case; whether a corporation was the occupant of an armaments factory so as to be liable to pay an occupation tax, and whether it was carrying on a business in the factory so as to be liable to pay a business tax. The answer to both questions depended on whether the corporation was acting

[9] 70 C.L.R. 539.

[10] [1947] 1 D.L.R. 161, P.C.

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as the government's agent in the manufacture of the armaments or as an independent contractor. All the funds necessary for the enterprise were provided by the government, which bore all the financial risks. The corporation was subject to the government's control in making the armaments and received a fee for each unit of production. It was held on these facts that the corporation was not liable to pay the taxes. Mr. Atiyah cites the following passage from Lord Wright's opinion [11]:

> "In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the shipowner though the charterer can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

In Lord Wright's first illustration of the shipowner, the charterer and the shipmaster, control is shown in two ways not to be conclusive. Though the shipowner had delegated to the charterer his right to give directions to the shipmaster, and in that limited sense no longer had control, he was still the master. Again, though the charterer had the power of giving directions, and in that sense had control, he was not the master. The second illustration shows that a right of control limited by law or by trade union regulations may be sufficient for the relation of master and servant. This does not take us very far in the direction of a fourfold test. It is easier to relate Lord Wright's (2), (3) and (4) to the case mentioned in the last sentence of the quotation. If a man's activities have the character of a business, and if the question is whether he is carrying on that business for himself or for another, it must be

[11] [1947] 1 D.L.R. 161, 169, P.C.

relevant to consider which of the two owns the assets ("the ownership of the tools") and which bears the financial risk ("the chance of profit," "the risk of loss"). He who owns the assets and bears the risk is unlikely to be acting as an agent or a servant. If the man performing the service must provide the means of performance at his own expense and accept payment by results, he will own the assets, bear the risk, and be to that extent unlike a servant. I should add that there is nothing in the Canadian case, *Montreal* v. *Montreal Locomotive Works Ltd.*,[12] to support the view that the ownership of the assets is relevant only to the question of control. Lord Wright treats his three other tests as having a value independent of control in determining the nature of the contract.

U.S. v. *Silk*[13] was the most important of the American cases cited to me. The case disposed of two suits raising the question whether men working for the plaintiffs, Silk and Greyvan, were "employees" within the meaning of that word in the Social Security Act, 1935. The judges of the Supreme Court agreed upon the test to be applied, though not in every instance upon its application to the facts. It was not to be what they described as "the common law test," viz., "power of control, whether exercised or not, over the manner of performing service to the undertaking." The test was whether the men were employees "as a matter of economic reality." Important factors were said to be "the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation."

Silk sold coal by retail, using the services of two classes of workers, unloaders and truck drivers. The unloaders moved the coal from railway vans into bins. They came to the yard when they wished and were given a wagon to unload and a place to put the coal. They provided their own tools and were paid so much per ton for the coal they shifted. All the nine judges held that these men were employees[14]:

> "Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the

[12] [1947] 1 D.L.R. 161.
[13] (1946) 331 U.S. 704.
[14] Ibid. 716.

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Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases."

Silk's drivers owned the trucks in which they delivered coal to Silk's customers. They paid all the expenses of operating their trucks including the wages of any extra help they needed or chose to employ. They came to the yard when they pleased and were free to haul goods for other people. They were paid for their deliveries at a rate per ton. Greyvan carried on a road haulier's business. Their drivers too owned their trucks and were required to pay all the costs of operation. They were not allowed to work for anyone else but Greyvan, and had to drive the trucks themselves or, if they employed a relief driver, to be present when he drove. They had to follow all the rules, regulations and instructions of Greyvan. They were paid a percentage of the tariff which Greyvan charged the customers.

By a majority of the court both sets of drivers were held to be independent contractors [15]:

> ". . . where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

This reasoning apparently requires that there should be some power of control vested in the driver if he is to qualify as an independent contractor. That the power need not be very extensive appears from the facts in *Greyvan's* case. The driver's investment, and the risk undertaken by him, seem to be the important things.

The authorities I have already cited (the judgment of Dixon J. and the opinion of Lord Wright in the Canadian case) show that the common law test is not to be restricted to the power of control "over the manner of performing service," but is wide enough to take account of investment and risk.

Section 220 (2) of the American Restatement, Agency 2d, includes among the relevant factors:

[15] (1946) 331 U.S. 719.

A "(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work."

The comment on the first part of this paragraph is in these words:

B "*Ownership of instrumentalities.* The ownership of the instrumentalities and tools used in the work is of importance. The fact that a worker supplies his own tools is some evidence that he is not a servant. On the other hand, if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the directions of the owner in their use, and this indicates that the owner is a master. This C fact is, however, only of evidential value."

This says in effect that the employer's ownership of the instrumentalities is relevant only because of a rebuttable presumption that the parties meant him to control the use of his own property. It also says that the worker's ownership is evidence that he is not a servant, but it does not say why. If the reason is the same in D both cases, and the worker's ownership is evidence only because of its bearing on control, it is plain from what I have already said that I do not agree.

The point is discussed in Mr. Atiyah's book at pp. 64, 65. I quote these three sentences:

E "It seems, therefore, that the importance of the provision of equipment lies in the simple fact that, in most circumstances, where a person hires out a piece of work to an independent contractor he expects the contractor to provide all the necessary tools and equipment. . . . Indeed, it may well be that little weight can today be put on the provision of tools of a minor character, as opposed to the provision of plant and equipment on a large scale. In the latter case the F real object of the contract is often the hiring of the plant, and the services of a workman to operate the plant are purely incidental."

I have had these sentences in mind when framing my five examples.

I note a United States decision later than *Silk's* in which a G Federal Court of Appeal held that an owner-driver was a servant, stating that his ownership of a trailer merely raised an inference about control which was rebutted by the express terms of the contract: *National Labour Relations Board* v. *Nu-Car Carriers Inc.*[16-18]

I have almost completed my review of the authorities. There

[16-18] (1951) 189 Fed. 2d 756.

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is, as well, the dictum of Denning L.J. in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*,[19] repeated in his Hamlyn Lectures:

> "In this connection I would observe that the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation."

This raises more questions than I know how to answer. What is meant by being "part and parcel of an organisation"? Are all persons who answer this description servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders? Though I cannot answer these questions I can at least invoke the dictum to support my opinion that control is not everything.

Then there are "the four indicia" of a contract of service, first mentioned in *Park* v. *Wilsons and Clyde Coal Company Ltd.*[20] and repeated by Lord Thankerton in *Short* v. *J. and W. Henderson Ltd.*[21]:

> "(a) The master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal."

It seems to me that (a) and (d) are chiefly relevant in determining whether there is a contract of any kind between the supposed master and servant, and that they are of little use in determining whether the contract is one of service. The same is true of (b), unless one distinguishes between different methods of payment, payment by results tending to prove independence and payment by time the relation of master and servant. Reference to the facts in *Park* v. *Wilsons and Clyde Coal Company Ltd.*[22] shows the use for which these tests were devised. Park had contracted with the company to drive a stonemine at a money rate per fathom, and he had engaged Haggerty to help him. Park and Haggerty had been injured by the negligence of other men admittedly in the company's service. The question was whether Park and Haggerty were fellow-servants of those whose negligence had injured them, so as to be caught by the doctrine of common employment. In deciding whether Haggerty was a servant of the company or of Park, it was obviously relevant to inquire who had

[19] [1953] 1 Q.B. 248, 295; [1951] 2 T.L.R. 755; [1951] 2 All E.R. 779.
[20] 1928 S.C. 121, 159.
[21] (1946) 62 T.L.R. 427, 429, H.L.
[22] 1928 S.C. 121.

selected him, who paid his wages and who had the right of suspending or dismissing him, and if Park did (or could do) these things otherwise than as the company's agent, he himself was unlikely to be their servant.

Three workmen's compensation cases in Ireland raised the question whether men whose work was carrying goods and materials were employed under contracts of service: *Moroney* v. *Sheehan*[23]; *O'Donnell* v. *Clare County Council*[24]; and *Clarke* v. *Bailieborough Co-operative Agricultural and Dairy Society Ltd.*[25] It appears from the statement of facts in each case that the workman had his own horse and cart, but this is not referred to either in the arguments or in the judgments which held that the men were employed under contracts of service. *Doggett* v. *Waterloo Taxi-Cab Co. Ltd.*[26] is an English case under the Workmen's Compensation Act, 1906, in which it was held that the owners of a taxi-cab, hired by them to a driver in consideration of a share in the takings, were not his employers under a contract of service. I mention these cases to show that they have not been overlooked.

I mention also, and for the same reason, an argument addressed to me by Mr. Parker, on the provisions of the Road Traffic Act, 1960. The argument, founded on section 164 (1) and (3), was to the effect that when Latimer was driving his truck a licence was needed under this part of the Act only if he was carrying on his own business. If he was merely the company's servant employed by them to drive his own vehicle on their business, no licence was needed. This cannot have been intended. The draftsman must have considered that a man in Latimer's position would always be an independent contractor, and if he did so he was probably right. That was the argument. But one cannot be sure that he considered the point, and if one is not sure of that the argument proves nothing.

It is now time to state my conclusion, which is that the rights conferred and the duties imposed by the contract between Latimer and the company are not such as to make it one of service. It is a contract of carriage.

I have shown earlier that Latimer must make the vehicle available throughout the contract period. He must maintain it (and also the mixing unit) in working order, repairing and replacing

[23] (1903) 37 Ir.L.T. 166.
[24] (1913) 47 Ir.L.T. 41.
[25] (1913) 47 Ir.L.T. 113.
[26] [1910] 2 K.B. 336; 26 T.L.R. 491, C.A.

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worn parts when necessary. He must hire a competent driver to take his place if he should be for any reason unable to drive at any time when the company requires the services of the vehicle. He must do whatever is needed to make the vehicle (with a driver) available throughout the contract period. He must do all this, at his own expense, being paid a rate per mile for the quantity which he delivers. These are obligations more consistent, I think, with a contract of carriage than with one of service. The ownership of the assets, the chance of profit and the risk of loss in the business of carriage are his and not the company's.

If (as I assume) it must be shown that he has freedom enough in the performance of these obligations to qualify as an independent contractor, I would say that he has enough. He is free to decide whether he will maintain the vehicle by his own labour or that of another, and, if he decides to use another's, he is free to choose whom he will employ and on what terms. He is free to use another's services to drive the vehicle when he is away because of sickness or holidays, or indeed at any other time when he has not been directed to drive himself. He is free again in his choice of a competent driver to take his place at these times, and whoever he appoints will be his servant and not the company's. He is free to choose where he will buy his fuel or any other of his requirements, subject to the company's control in the case of major repairs. This is enough. It is true that the company are given special powers to ensure that he runs his business efficiently, keeps proper accounts and pays his bills. I find nothing in these or any other provisions of the contract inconsistent with the company's contention that he is running a business of his own. A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.

A comparison of Latimer's profits with the wages earned by men who are admittedly the company's servants confirms my conclusion that his status is different, that he is, in the words of the judgment in *Silk's* case, a "small business man," and not a servant.

That is all I need to say about *Latimer's* case.

Happily I need say less about the two other cases, *King's* and *Bezer's*. In each of these the question is whether the man's contract is one of service. The parties are agreed that if Latimer's

contract is not one of service, neither is King's nor Bezer's. I agree, and these two cases will be decided accordingly.

Appeal allowed with costs.
On references orders accordingly.
Costs against Minister.

Solicitors: *Linklaters & Paines; McKenna & Co.; Solicitor, Ministry of Social Security.*

APPENDIX

The schedule to the contract, annexed to the case stated, provided: "1. This agreement shall be operative as from the commencement date.

2. On or before the commencement date: (a) The company shall procure that the hire purchase company will effect all structural alterations and additions to the vehicle (including any power take off unit or front-end modification to the engine) necessary to the operation thereon of the equipment and shall paint the vehicle in the colour or colours and with the distinguishing signs and marks specified by the company and shall then offer the vehicle for sale to the owner-driver. (b) The owner-driver shall purchase the vehicle from the hire purchase company. (c) The company shall ensure that credit facilities are available to the owner-driver for the purchase of the vehicle from the hire purchase company.

3. On or before the date of the purchase and sale referred to in the preceding clause the company shall at its own expense provide and fit the equipment to the vehicle. The equipment shall at all times remain the property of the company and shall not be removed from the vehicle except in accordance with the terms of this agreement.

4. The owner-driver shall forthwith upon the exchange of this agreement obtain an "A" contract licence based upon this agreement covering the use of the truck hereunder.

5. The owner-driver shall at all times of the day or night during the term of this agreement (excepting only in accordance with the terms hereof) make available the truck to the company for the purpose of collecting carrying and delivering the materials used for or in connection with the business of the company (not being a business of carrying or arranging for the carriage of goods) whenever and wherever so required by the company whether such requirement is notified to the owner-driver or to his servants or agents and shall duly and promptly collect carry and deliver such quantity or quantities of the materials as and when required in the manner at the time and to the destination directed by the company and it is further provided that the truck shall be used exclusively for the purposes set out in this agreement and for no other purpose. In furtherance of the terms of this clause the owner-driver shall if so required by the company at his own expense ensure that the company is able to contact him by telephone at his usual residence or residences.

6. The company may require the owner-driver to make the truck available to any associated company for the purpose of collecting, carrying and delivering the materials of such associated company and the owner-driver shall subject to his obtaining a "B" licence as hereinafter mentioned comply with such requirement in accordance with the terms of the preceding clause. If any such requirement is made by the company the owner-driver shall use his best endeavours to obtain in substitution for the "A" contract licence the grant of a "B" licence covering the use of the truck from any plants both of the company and of such associated company. The parties hereto hereby agree that unless a "B" licence is obtained by the owner-driver in accordance with this clause the truck

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will not be used for or in connection with the carriage of any goods of any parent or subsidiary company of the company.

7. The owner-driver shall at all times ensure that he holds a licence in accordance with clause 4 or clause 6 of this schedule and that the operation of the truck at all times falls within the provisions of such licence and shall further comply with all conditions, provisions, regulations and rules for the time being in force . . . in any way relating the vehicle or its use or operation and shall indemnify the company against all actions proceedings claims demands and expenses and other liabilities incurred by the company in respect of any breach of this provision.

8. The owner-driver shall not during the continuance of this agreement or within 14 days after its termination (howsoever caused) without the prior written consent of the company (except in the case of any hire purchase agreement with the hire purchase company) charge or sell or purport to charge or sell the vehicle or the equipment or in any manner permit or allow the same or purport to allow them to become subject to any lien charge or incumbrance.

9. Where the truck is not or will not be available to the company in accordance herewith for any reason whatsoever the owner-driver shall so notify the company by at least seven days' notice or by such shorter notice as in the circumstances be reasonable.

10. The owner-driver shall with the consent of the company be entitled (subject to clause 12 . . .) to appoint a competent and suitably qualified driver to operate the truck in place of him. If any such other driver is so appointed the owner-driver shall ensure that such other driver complies with all the terms conditions and obligations of this agreement applicable to the operation and use of the truck. If the company has reasonable grounds for dissatisfaction with any driver appointed by the owner-driver it shall be entitled to give notice of this to the owner-driver and the owner-driver shall forthwith provide a suitable and acceptable driver in lieu of such driver and shall not permit such driver to operate the truck.

11. Any driver employed by the owner-driver to operate the truck shall be employed on conditions of employment and at rates of wages no less favourable to such driver than those for the time being laid down by the National Joint Council for the Ready Mixed Concrete Industry.

12. Notwithstanding the provisions of clause 10 . . . the company shall be entitled to require the owner-driver himself to operate the truck on every or any day up to the maximum number of hours permitted under section 73 of the Road Traffic Act, 1960, or any statutory amendment or re-enactment thereof and the owner-driver shall comply with such requirement unless he shall have a reason for not so doing which would have been valid had he been the employed driver of the company and shall have notified the company in advance of such reason and shall be able to produce and upon the request of the company in fact produce evidence to substantiate the same. The owner-driver shall not himself be obliged to operate the truck during such holiday times and periods (not extending for more than two weeks in any calendar year) as have been agreed by the company in writing.

13. If at any time the owner-driver shall fail both to operate and to cause any other driver to operate the truck in accordance herewith then without prejudice to any other rights of the company arising from such breach the company shall be entitled to appoint a driver or drivers to operate the truck in accordance with this agreement on behalf of the owner-driver for such period as the company may at the time of such appointment consider reasonable and to revoke any such appointment: and the owner-driver hereby irrevocably authorises the company to make or revoke any such appointment or appoints and undertakes to be responsible for all wages earnings and liabilities earned or incurred by any driver so appointed by the company and hereby agrees that for all purposes such driver or drivers shall be deemed to be in the exclusive employment of the owner-driver.

14. The owner-driver shall at all times while operating the truck:

(a) Wear a clean and presentable uniform of the pattern and colours prescribed by the company which shall be provided by and at the expense of the owner-driver. (b) Comply with all rules regulations or requirements of the company. (c) Ensure that no water or other substance is added to the materials unless the customer to whom the materials are being delivered or a responsible person on behalf of such customer insists upon such an addition and completes the appropriate part of the delivery docket. (d) Ensure that none of the details on any delivery docket is altered. (e) Carry out all reasonable orders from any competent servant of the company as if he were an employee of the company. (f) Where so requested by the company be responsible for the collection of and transmission to the company of any moneys to be paid to the company on the delivery of any of the materials. (g) By his conduct and appearance (including the speed and manner in which he operates the truck) use his best endeavours to further the good name of the company.

15. The owner-driver shall not do anything which might cause a contravention of the Road Traffic Act, 1960 (and especially of sections 4, 24 and 73 the provisions of which have been brought to the notice of the owner-driver), or of any statutory amendment or re-enactment thereof or of any rules or orders thereunder for the time being in force and he shall not accept or carry out any orders or instructions given to him which would result in any such contravention.

16. The owner-driver shall at all times hold a current driving licence valid for the class of vehicles into which the truck falls.

17. The owner-driver shall not carry out or permit to be carried out any alteration to the truck except with the written consent of the company.

18. (a) The owner-driver shall at all times to the satisfaction of the company: (i) Keep the truck well and freshly painted and signwritten in the colours and in the manner directed by the company. (ii) Wash cleanse oil grease and maintain the truck (including in particular the internal cleansing of the drum forming part of the equipment and the removal of all residual concrete and other solids therefrom) both mechanically and otherwise (including the replacement or reconditioning of all worn damaged or defective parts thereof) with the exception only of the replacement of the main drum and cradle (excluding accessories attached thereto and in particular excluding drum blades) of the equipment where the need for such replacement or reconditioning is due only to fair wear and tear. (iii) Generally keep the truck in good and substantial repair and condition.

(b) The works to be carried out by the owner-driver under (a) of this clause shall be carried out in such a manner that the truck shall cease to be available to the company for as short a time as possible and shall on each occasion that the truck will not be available to the company in accordance herewith notify the company as soon as possible specifying the precise nature of the works to be carried out and of any defect making necessary such works.

(c) Where the owner-driver is about to carry out any replacement or reconditioning of or any major repair on the vehicle of the equipment or any other works whose cost exceeds £50 or which would result in the truck being unavailable to the company in accordance herewith for more than twenty-four hours the company shall have the option to require that the work shall be carried out for and at the expense of the owner-driver by Readymix Transport Ltd. or by any other person firm or company nominated by the company.

(d) The owner-driver may with the consent of and shall upon the written requirement of the company without charge maintain wash down and garage the truck in the open air or otherwise at any plant from which it is operating Provided that the company may at any time and without assigning any reason therefor withdraw such consent or requirement And Provided Also that the owner-driver shall at no time be entitled as of right to use any of the company's facilities or equipment for such maintenance washing down or garaging.

(e) The owner-driver shall if so required by the company cause the truck to be available for inspection by the company or by any person firm or company and at any place nominated by it and if after such

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inspection or at any other time the company considers that the condition of the truck is such that the provisions of this agreement have not been complied with the company may thereupon require the owner-driver forthwith to put in hand and complete such works as may be specified by the company and the owner-driver shall comply with such requirement. If the owner-driver shall fail forthwith to put in hand or to complete such works as aforesaid the company shall without prejudice to any other right which it might have by reason of such breach be entitled forthwith to carry out such works or to nominate any person firm or company to carry out such works on its behalf and the owner-driver shall forthwith repay to the company the cost of such works.

(f) The company may at any time serve notice on the owner-driver that it wishes to replace the equipment or the main drum the cradle or any other part thereof and thereupon the owner-driver shall forthwith make the truck available for such purpose as when and where requested by the company and the company shall carry out or have carried out such replacement at its own expense with all reasonable speed.

19. The owner-driver shall in addition to the other obligations referred to in clause 18 . . . be responsible for the wear and tear on the equipment with the exception of fair wear and tear on the main drum and cradle thereof (excluding accessories attached thereto and in particular excluding drum blades) and upon any replacement thereof whether in accordance with clause 18 (f) . . . or otherwise or upon the termination of this agreement (howsoever caused) shall pay to the company such a sum calculated with reference to the expired portion of the estimated life of the equipment (other than as aforesaid) or of the separate component parts thereof as is certified by the company to be due in respect of such wear and tear.

20. (a) Subject as hereinafter mentioned the owner-driver shall be entitled to earnings for the services provided hereunder calculated as follows: (i) At (subject to (c) of this clause) the rates for each delivery of the materials on the basis that the quantity of the materials constituting each delivery was not less than the minimum delivery Provided that in the case of concrete which weighs less that 138 pounds per cubic foot (known as "Lightweight Concrete") such calculation shall be on the basis that the quantity of the materials constituting each delivery was not more than the capacity of the equipment referred to in clause 2 (c) of this agreement. (ii) At the waiting period rate for all the time in excess of the waiting period during which the truck is while delivering the materials delayed on a site through no act or default of the owner-driver. Provided that a statement showing the length of such delay and signed by the customer to whom the materials are being delivered or by a responsible person on behalf of such customer or on behalf of the company is on the day of such delay passed to "shipper" at the plant from which the materials were dispatched.

(b) (i) The rates have been calculated on the basis that the truck will operate from the specified plants: during such time as the truck operates from any other plant than the specified plants then (a) of this clause shall be read as if the reference to "the rates" were a reference to "the current rates of payment from time to time paid by the company to new owner-drivers at the plant from which the truck is operating." (ii) For the purpose of any calculation under (a) of this clause the number of radial miles in each delivery of the materials shall be taken from the radial mile map at the plant from which the delivery is made by the "shipper" or other employee of the company responsible for deliveries at the said plant. If any dispute shall arise as to the number of radial miles in any delivery notice thereof shall be given to the owner-driver or the company as the case may be within seven days of the day of the delivery concerned. Such dispute shall be referred to a senior executive of the company whose decision shall be final.

(c) (i) Within seven days from the end of each week the owner-driver shall submit to the company invoices in the form specified by the company showing in respect of that week the quantity of the materials delivered by the truck during that week and the amounts due in respect of such deliveries in accordance with the previous provisions of this clause.

(ii) Within seven days after the end of each calendar month the owner-driver shall render to the company a detailed statement of such invoices as relate to that month in the form specified by the company. (d) The company shall (subject to the right of the company to make any deductions retentions or to obtain reimbursement from the owner-driver under any other provision of this agreement) by the end of the month following that in respect of which the detailed monthly statement is rendered to the company make payment of the amount found to be owing in respect thereof and notice by the owner-driver of any dispute arising from any such payment shall be given to the company within seven days thereof.

21. The owner-driver shall be entitled to receive in respect of each minimum earnings period (having regard to all sums laid out by the company on behalf of the owner-driver) at least such a sum as is obtained from the calculation of minimum earnings. Minimum earnings are based on a working year of two hundred and eighty days and "y" represents the number of days (if any) in excess of 85 days in any minimum earnings period on which the truck and a driver to operate it were not available to the company for the carriage of the materials in accordance with this agreement (otherwise than as a result of any action on the part of the company) for a period in any one day of at least four hours. Calculations of minimum earnings shall be prepared by the owner-driver at his own expense and submitted to the company within six weeks after the end of any minimum earnings period and if the amount found to be owing under this clause is in excess of the amount actually earned by the owner-driver under this agreement during the minimum earnings period in question then the company shall within three months after the end of such minimum earnings period pay the deficit to the owner-driver.

22. Either party hereto shall be entitled to have the rates increased or decreased by the amount (to the nearest penny) appropriate to allow for any variations in the following expenses at the date hereof: (a) The cost at which the owner-driver is able to provide drivers for the truck (including for all times at which the truck is operated by the owner-driver the wages to which the owner-driver would have been entitled had he been an employee) in accordance with the conditions of employment and rates of wages laid down by the National Joint Council for the Ready Mixed Concrete Industry. (b) The cost at which the owner-driver is able to purchase fuel lubricating oils and tyres for use on the truck and it is further provided that the rates shall at the request of the owner-driver be subject to review in the event of any substantial reduction in the profitability of this Agreement to the owner-driver by reason of any levy or tax imposed by Parliament on carriers of goods by road transport generally.

23. (a) The company shall be entitled to pay (and until it shall have given to the owner-driver 14 days' notice in writing shall pay) any instalments due from the owner-driver under the terms of any hire purchase agreements between the hire purchase company and the owner-driver as the same fall due and to charge the same to the owner-driver. (b) Subject to (a) of this clause the owner-driver shall pay all debts and liabilities and perform all obligations in respect of the truck and any goods or materials supplied or work carried out in connection therewith (including where the company shall have given notice to the owner-driver in accordance with (a) of this clause all instalments due under any such hire purchase agreement and also including all debts and liabilities under any such hire purchase agreement) as the same fall due and shall not allow the vehicle or the equipment to become subject to any charge or lien (other than any such hire purchase agreement) and if the driver shall not after a reasonable time have remedied any breach of this sub-clause the company shall be entitled without prejudice to any other rights of the company arising from such breach to pay such debts or liabilities or meet such obligations on behalf of the owner-driver and to recover any moneys so expended by deduction from any payments from time to time due to the owner-driver from the company or from the reserve fund or otherwise.

24. The company from time to time shall notwithstanding anything else herein contained be entitled to retain from the earnings of the owner-driver

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for any month a sum not exceeding the sum resulting from the calculation of the deduction rate so that at any time it holds a balance up to but not exceeding the amount of the reserve fund and shall hold such moneys as security for the proper performance of all the obligations of the owner-driver hereunder. The company shall be entitled to retain the reserve fund free of interest and at any time to draw upon it to meet any debts liabilities or obligations of the owner-driver hereunder whether to the company or otherwise and shall account to the owner-driver for any such drawings made in any calendar month at the same time as it makes payment of his earnings for that month. After the termination of this agreement the company shall render its final account in respect of the reserve fund and any such drawings at the same time as making the last payment of earnings hereunder Provided that if the company has reasonable grounds for believing that any of the obligations of the owner-driver hereunder has not been performed it shall be entitled to continue to retain and if necessary to draw on a reasonable proportion of the reserve fund for a reasonable time thereafter.

25. The owner-driver shall at his own expense and to the satisfaction of the company cause to be maintained by a professional accountant or firm of accountants approved by the company in a form approved by the company profit and loss accounts for each period of three months ended on the last day of February May August and November in each year or for any shorter period commencing on the commencement date and ending on the next of such dates thereafter and balance-sheets as at the end of each of such periods relating to the business carried on by the owner-driver hereunder and the owner-driver shall in any manner specified by the company set aside any provision made in such accounts. The owner-driver shall submit such accounts and balance-sheets to the company by the end of the month following the period covered thereby.

26. (a) On or before the date of the purchase and sale referred to in clause 2 of this schedule the company shall negotiate for and use its best endeavours to effect on behalf of in the name of and at the expense of the owner-driver a policy (which expression shall in this clause include the plural) of motor insurance on the vehicle. The policy shall be in such form for such amounts through such insurance brokers with such insurance company and on such terms and conditions and subject to such limitations and exceptions as the company may require. Such policy shall have indorsed thereon the interest of the company as owners of the equipment and where applicable both the interest of the hire purchase company as owners of the vehicle under any hire purchase agreement with the owner-driver and the interest of the owners of the radio equipment. Where such policy is effected through insurance brokers the company shall not be entitled to any commission fee or other brokerage from the owner-driver for effecting or maintaining the same nor shall it be entitled to claim any reimbursement of its own administrative expenses from the owner-driver. The owner-driver hereby irrevocably authorises the company during the term of this agreement to effect or on the termination of this agreement to cancel such policy on his behalf and agrees that no alteration or amendment thereto shall be made without the written consent of the company. The owner-driver further irrevocably authorises the company during the terms of this agreement to pay on his behalf all premiums due under such policy as and when they fall due and to deduct the amount thereof from any payments from time to time due to the owner-driver from the company or from the reserve fund and to collect and in due course to account to the owner-driver for any return premium due on the cancellation of any policy as aforesaid. (b) The company shall negotiate and effect a policy of insurance on the equipment on the same terms as those contained in (a) of this clause relating to the vehicle save that the policy may at the option of the company be in the name of the company and save that if a policy is so effected in the name of the company it shall not bear the indorsements referred to in (a) of this clause. (c) The company shall at all times during the continuance of this agreement use its best endeavours to keep in force any policy effected in accordance with (a) and (b) of this clause or to effect and keep in force an

alternative policy in accordance therewith. (d) In the event that the company is unable to effect or to keep in force a policy in accordance with (a) (b) and (c) of this clause whether by reason of the driving or claims record of the owner-driver or of any drivers appointed by him or otherwise the company shall forthwith notify the owner-driver accordingly and thereupon the owner-driver shall endeavour to negotiate for and to obtain at his own expense a policy on the insured goods through such insurance brokers such insurance company in such form and upon such terms and conditions and subject to such limitations and exceptions as the company may in their absolute discretion approve and in the event of the owner-driver failing to effect a policy so approved by the company within 14 days of such notification or at any time failing to keep such policy in force then this agreement shall thereupon terminate. Any policy effected by the owner-driver hereunder together with all renewal notes and receipts for premiums shall at all times be available to the company and the owner-driver shall produce the same to the company for inspection within three days of being required in writing so to do. (e) In the event either of the total loss of or any damage to the insured goods or any of them the owner-driver shall forthwith lay out any insurance moneys received by him in respect thereof on repairing reinstating or replacing the same Provided that the owner-driver shall if so required by the company forthwith and at his own expense assign to the company all rights claims and benefits under any such policy in his name And Provided Also that any moneys payable under any such policy in his name in respect of loss of or damage to the insured goods shall if so required by the company be paid by the insurance company to the company and the owner-driver hereby irrevocably authorises the company to give a good discharge for the receipt of such moneys. The company shall deal with any rights claims and benefits assigned to it or any moneys paid to it under the provisos aforesaid in accordance with the obligations of the owner-driver hereunder. (f) The owner-driver shall comply with the terms and conditions of any policy effected hereunder and in particular in the event of any loss of or damage to the insured goods or of the insured goods being involved or concerned in any loss damage or accident the owner-driver shall forthwith give notice thereof in writing both to the company and to the insurance company or where applicable to the insurance brokers in the manner laid down therein.

27. The owner-driver at his own expense shall forthwith if required so to do by the company in writing provide and instal radio equipment on the vehicle and shall at all times at his own expense maintain the radio equipment in good and substantial repair and condition and shall pay a licence fee which may be required. The owner-driver shall operate the radio equipment in accordance with any rules regulations and laws appertaining thereto whether of the company or otherwise.

28. This agreement shall be personal to the owner-driver and the owner-driver shall not be entitled to assign the benefit hereof.

29. The owner-driver shall not without the written consent of the company at any time during the continuance of this agreement except as herein provided engage or be concerned in any employment business or trade as a haulier or carrier of any goods or materials of whatever description.

30. The owner-driver is hereby declared to be an independent contractor.

31. Any rule or regulation of the company referred to in this agreement shall be deemed to include any rule or regulation of any of the plants of the company or of any associated company from which the truck is operating . . . and any order or requirement of the company referred to in this agreement shall be deemed to include any order or requirement of any competent servant of the company or of any associated company (whether such requirement is in writing or otherwise).

32. (a) On the expiration or sooner determination of this agreement (howsoever caused) the company shall for seven days have the option to purchase the vehicle free from all liens charges or encumbrances at the market price thereof (as if the equipment were not mounted thereon)

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such price to be determined in default of agreement by an independent valuer. The owner-driver shall take any action or pay any sums necessary to release the vehicle from any such liens charges or encumbrances and in default of his so doing the owner-driver hereby irrevocably authorises the company to do so on his behalf. Such option shall be exercisable by the company by the service of notice in writing to that effect on the owner-driver and upon the service of such notice the property in the vehicle (whether or not it is subject to any charge) shall pass to the company. (b) If the company shall not exercise the option referred to in (a) of this clause, the owner-driver shall within eight days from the termination of this agreement (howsoever caused) or within 24 hours of such sooner time as the company shall inform the owner-driver that it does not intend to exercise such option make the vehicle available to the company for not less than three working days so that the company may remove the equipment from the vehicle. In default of the owner-driver making the vehicle available in accordance herewith the company in addition to any other rights arising as a result of such default shall be entitled to drive the vehicle and to take it away for up to six working days for the purpose aforesaid.

33. This agreement shall remain in force until determined by either party giving to the other not less than 28 days' previous notice in writing expiring on or at any time after the termination date Provided that this agreement shall be subject to termination by the company—(a) By not less than 28 days' notice in writing given at any time while the owner-driver shall have been incapacitated from driving the truck in accordance herewith by reason of ill health or accident for a total period of 60 days in the preceding six months. (b) By a summary notice in writing if the owner-driver shall have committed a breach of any of the covenants and conditions on his part herein contained or shall have been guilty of conduct tending to bring himself or the company or any associated company into disrepute or shall have committed an act of bankruptcy or entered into any arrangement or composition with his creditors or suffered execution to be levied on his property. (c) By a summary notice in writing if the owner-driver having been warned by the company of any grounds for dissatisfaction it may have in respect of the operation of the truck shall not within a reasonable time have removed the cause of such dissatisfaction.

34. The expiring agreement shall terminate on the commencement date and where the expiring agreement provided for the payment of any sum by way of minimum earnings in a similar manner to the provisions of clause 21 of this schedule minimum earnings hereunder shall be calculated as if the commencement date were the calculation date and as if his earnings under the expiring agreement from the calculation date to the commencement date had been earned under this agreement.

[COURT OF APPEAL]

C.A

1968
April 5

WIDGERY and FENTON ATKINSON L.JJ. and ROSKILL J.

REGINA *v.* CUMMERSON

Crime—Mens rea—Statutory offence—Whether absolute—Insurance of motor vehicle—False statement in proposal form—Whether making a false statement for purpose of obtaining issue of an insurance certificate an absolute offence—Road Traffic Act, 1960 (8 & 9 *Eliz.* 2, *c.* 16), *s.* 235 (2) (*a*).

The defendant, in order to obtain a certificate of insurance for a car purchased by her husband, went to an insurance company's office on his behalf and answered questions on a proposal form

Appeal No. UKEAT/0506/09/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 19 August 2010

Before

THE HONOURABLE MRS JUSTICE SLADE

MS V BRANNEY

MR J R RIVERS CBE

THE ROYAL BANK OF SCOTLAND GROUP — APPELLANT

MR M LINDSAY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ZOE THOMPSON (of Counsel) Instructed by: Messrs Reed Smith LLP Solicitors Broadgate Tower 20 Primrose Street London EC2A 2RS
For the Respondent	MR MARK LINDSAY (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Claimant, a manager, was dismissed for sending pornographic material to a more junior employee.

The Employment Tribunal erred in substituting its own view of the appropriateness of the sanction of dismissal rather than considering whether dismissal was within the range of reasonable responses of a reasonable employer in the circumstances. Finding of unfair dismissal set aside. Case remitted to a different Employment Tribunal.

THE HONOURABLE MRS JUSTICE SLADE

1. The Royal Bank of Scotland appeals from the judgment of an Employment Tribunal entered in the register on 8 September 2009 that Mr Lindsay had been unfairly dismissed. We will refer to the parties as Claimant and Respondent, their titles before the Employment Tribunal.

2. Having found that Mr Lindsay, the Claimant, was dismissed for misconduct, the Employment Tribunal concluded that the Respondent had carried out an appropriate and reasonable investigation by the time of its decision to dismiss, that the Respondent had genuinely formed the belief that Mr Lindsay had been guilty of misconduct and it, therefore, directed itself that the essential question in the case was whether the Respondent's decision to dismiss fell outside the range of reasonable responses of the reasonable employer. The Employment Tribunal answered that question at paragraph 55 of their judgment. They held that the decision of the Respondent to dismiss the Claimant was grossly disproportionate and fell outside the range of reasonable responses. Accordingly the Claimant's unfair dismissal complaint was upheld. It is from that conclusion that the Respondent appeals.

3. The Respondent contends that the Employment Tribunal erred by substituting their view as to the appropriate sanction for the Claimant's conduct, rather than applying their self-direction to assess whether objectively the dismissal of the Claimant was within the range of reasonable responses of the reasonable employer in all the circumstances.

Summary of Facts

4. The Claimant was employed by the Respondent from 1 April 2007 until his dismissal on 6 October 2008. He worked in the management role of regional head of business development in the invoice financing business of the Respondent. His role was to head up a team whose task it was to attract clients to the Respondent. Amongst the employment policies of the Respondent which applied to the Claimant was the group's IT security policy. That set out generic descriptions of inappropriate material and levels of disciplinary action which may be taken for possession of such material at work.

5. The policy set out three categories of material, A, B and C. Category B concerned:

> **"Material which may be legally possessed, but which may nevertheless be classed as obscene such that its publication for gain may constitute an offence:**
>
> - **Material which is inappropriate for the workplace**
> - **Soft core pornography**
> - **Sexual jokes"**

On the published policy matrix against Category B the potential level of disciplinary action is set out as:

> **"Gross Misconduct or Misconduct**
>
> **Each case will be reviewed individually. Employee action on receipt of the material will impact on the disciplinary action taken."**

It is to be noted that in the introduction to the matrix the policy contains the following:

> **"Please note that the examples given are not exhaustive; depending on content it is possible that material sharing the same generic description (e.g. sexual jokes) may fall within separate categories."**

6. In the course of an investigation into other allegations against the Claimant in 2008 his email account was accessed. An email sent by the Claimant to a Mr Dearden, another employee of the Respondent, dated 24 June 2008, was seen. That email had the heading "FW: European Soccer Uniforms XXX". It contained eight untitled JPEG attachments. It had been sent to the Claimant by a Mr Donnelly on that day. The Employment Tribunal found that the images featured naked women made up to appear as if they are wearing football kits. The Employment Tribunal found that three images in particular were sexually explicit.

7. On 1 October 2008 the Claimant attended a disciplinary meeting convened to consider five allegations against him, one of which related to the sending of pornographic images. The disciplinary hearing was conducted by Miss Saville. Miss Saville concluded that three of the allegations, including that concerning the sending of the pornographic images, were made out and she decided to dismiss the Claimant for gross misconduct. Miss Saville considered that each one of the matters which she had found to be proved against the Claimant on their own would have been sufficient to warrant a decision to summarily dismiss the Claimant.

8. The Claimant appealed. The appeal hearing took place on 11 November 2008 and it was conducted by Mr Morrin. By a decision dated 30 January 2009 Mr Morrin upheld the Claimant's appeal on all issues save for the finding that the Claimant had abused the Respondent's IT facilities. Mr Morrin dismissed the Claimant's appeal against the sanction of dismissal for that offence.

The Conclusions of the Employment Tribunal

9. At paragraph 43 the Employment Tribunal found:

> **"We find that the Respondent genuinely believed that the Claimant had forwarded an email containing pornographic images to a junior member of staff on 24 June 2008. We agree with Miss Thompson that Mr Morrin could reasonably conclude that the Claimant was sitting next to or near Mr Dearden on the day in question, that he opened it, viewed its contents and forwarded it to Mr Dearden."**

10. The Tribunal held:

> **"45. We also conclude that the Respondent carried out such investigation into the matter as was fair and reasonable and within the range of reasonable responses in the circumstances.**
>
> **…**
>
> **47. Accordingly, it is the judgment of the Tribunal that the Respondent has made out its case it had a potentially fair reason for the dismissal of the Claimant based upon his conduct and that the Respondent had in its mind reasonable grounds upon which to sustain that belief, following reasonable investigation, at the time of the decision to dismiss the Claimant.**
>
> **…**
>
> **55. The Tribunal has been extremely careful not to substitute its own view for that of the employer. However, in this case, the Claimant's offence was towards the lowest end of the spectrum. This is not, in our judgment, one of those cases where the misconduct in question can be said to be such that any employee would know or believe that it would result in instant dismissal (whether set out in a policy or not). It was a one-off, isolated incident. It was sent by the Claimant shortly after one of his senior managers had forwarded sexist material concerning female drivers. The sender of the email to the Claimant was well-known to the Claimant and was recognised by the Respondent as being an introducer of work. The recipient was well-known to the Claimant and to the Claimant's own sender. It is our judgment that the decision of the Respondent to dismiss the Claimant was grossly disproportionate and fell outside the range of reasonable responses. Accordingly, the Claimant's unfair dismissal complaint is upheld."**

Submissions

11. Ms Thompson, counsel for the Respondent, relies on four matters in support of the contention that the Employment Tribunal substituted their own view of the reasonableness of the sanction of dismissal rather than considering whether the dismissal fell within the band of reasonable responses of a reasonable employer. In support of that contention Ms Thompson relies on four matters.

12. First, in paragraph 48 of the judgment, in setting out the mitigating features of the Claimant's offence the Tribunal introduced their own mitigating features. Ms Thompson draws

attention to the fact that, having set out the mitigating features to which she had drawn attention which were considered by the Respondent, the Employment Tribunal added:

> **"To that, we might add that the Claimant knew Mr Donnelly and Mr Donnelly in turn knew Mr Dearden. [Mr Dearden was the end recipient of the pornographic material] In other words all of the three individuals in the chain were well-known to each other and had forged business relations together."**

The Tribunal also added as a mitigating feature:

> **"It is also accepted by the Respondent that Mr Noble, who is senior to the Claimant, did send inappropriate sexist emails although those were not of a pornographic nature."**

13. Ms Thompson contends that the Employment Tribunal erred in relying on the mitigation introduced by them in that those matters were not relevant to the employer's decision. Their introduction indicates very clearly that the Tribunal made their own assessment of the gravity of the Claimant's conduct rather than assessing the reasonableness of the approach of the Respondent to it.

14. Secondly, Ms Thompson relies on paragraph 48 of the judgment in another regard. She contends that the Tribunal's judgment in that paragraph shows that the Tribunal failed to set out perhaps the most aggravating feature of the Claimant's offence; a feature which was relied upon to a considerable extent by the Respondent in taking the decision to dismiss the Claimant. That was the senior position that the Claimant held within the Respondent organisation. He was a manager responsible for managing other staff and that he could be expected to set an example to such staff.

15. Thirdly, Ms Thompson says that it is clear from comments of the Employment Tribunal in paragraphs 54 and 55 of their judgment that they relied upon their own view of the seriousness of the pornography and also took into account that emails containing sexist jokes had been sent to the Claimant by a more senior employee. It is to be noted that the Employment Tribunal did not have before it the text of those allegedly sexist jokes, nor indeed did the employers. All that the Tribunal had before them to make their observations was the title of those emails: "Why middle aged women should stay at home" and "Women Drivers…eh?". The Employment Tribunal did not have any further material about those emails to enable them to assess their comparable gravity with the sexually explicit pornographic material which they did have before them.

16. Fourthly, it is said by Ms Thompson that the Tribunal erred by making their own assessment of what would be the least serious of Category B infringing material according to the matrix which forms part of the Respondent's IT policy. It was their own assessment of the seriousness of the pornographic material which led the Employment Tribunal to comment that infringement of the IT by possession in forwarding such material should not be regarded as gross misconduct.

17. The Claimant, appearing in person, contends that Ms Thompson's approach is over analytical and that we should not go through the Employment Tribunal judgment line by line. In effect, we should not go through it with a fine toothcomb. Read as a whole, Mr Lindsay contended, that the Employment Tribunal reached a conclusion which was open to them on the evidence.

Discussion and Conclusion

18. The principles of law relied upon by both the Respondent and the Claimant are clear and correctly stated by them. The task of the Employment Tribunal in these circumstances was to consider whether the employer's conduct in dismissing the Claimant fell within the band of reasonable responses to the employee's conduct. The Employment Tribunal in these circumstances must not stray into taking that decision by relying upon what they would have decided. A decision of an Employment Tribunal must not be subject to a fine toothcomb analysis and it should not be interfered with unless there is a demonstrable error of law, or perversity.

19. The Employment Tribunal stated in their judgment that they had been extremely careful not to substitute their own view for that of the employer. It is not sufficient to articulate that correct approach; it must be carried out in practice. In our judgment the contentions of Ms Thompson, that the Employment Tribunal substituted their own approach and judgment for that of the employer and failed to consider whether the sanction of dismissal as a response to the Claimant's conduct was one which was within the band of reasonable responses of a reasonable employer is well made out.

20. In our judgment the Employment Tribunal erred in their reliance as a mitigating feature on at least one of the two matters relied upon by Ms Thompson as having been added by them. That was the Tribunal's reliance on emails sent by Mr Noble which were referred to them in their judgment. As we have observed, neither the Employment Tribunal nor the Respondent were in a position to assess the gravity of those emails. The Tribunal did not see their content, only their titles. Yet, the Employment Tribunal did apparently rely on the sending of those emails by a more senior manager to the Claimant as justifying a more lenient view to be taken of the pornography which the Claimant forwarded on to a more junior employee.

21. Secondly, the Employment Tribunal erred in omitting what was on the evidence a serious consideration in the mind of Mr Morrin in upholding the decision to dismiss the Claimant. Ms Thompson took us to a number of passages in which the managerial position of the Claimant had been referred to as a significant factor in the decision to dismiss. We refer to one as an example. In re-examination Mr Morrin said, as appears from a document in our bundle at page 71 at paragraph 34:

> **"He adds that the behaviour of senior managers within the business is important because, as Managing Director, he is looking to senior managers to lead by example. This is undermined when senior managers do not follow the Group's standards of behaviour. The Claimant was in the role of senior manager. He was a regional director responsible for a team of people, not a small group of people in the office, including 6 other associate employees."**

22. Thirdly, in our judgment, the Employment Tribunal made their own assessment of the relative gravity of the pornography forwarded by the Claimant and the assumed sexist emails sent by Mr Noble. They relied on their views and erred in so doing. They also erred in basing their views on an assumption without evidence of the contents of those emails.

23. Fourthly, the Employment Tribunal made their own assessment of the gravity of the offence of the Claimant and their own assessment of the seriousness of the material forwarded by the Claimant within the matrix on IT policy. They said in paragraph 55 of the judgment: "However, in this case, the Claimant's offence was towards the lowest end of the spectrum." In our judgment, they erred in making their own assessment rather than considering whether the assessment and judgment made by the Respondent was one within the range of reasonable responses of a reasonable employer in the circumstances.

24. In our judgment, the Employment Tribunal erred in substituting their own view of the reasonableness of the sanction of dismissal rather than considering whether the dismissal fell

within the range of reasonable responses of a reasonable employer. Accordingly, this appeal is allowed. We remit the case to a differently constituted Employment Tribunal to decide whether the sanction of dismissal was within the range of reasonable responses of a reasonable employer in the circumstances. Dependent on this determination, the remission is for the Employment Tribunal to determine the fairness of the dismissal within the **Employment Rights Act 1996** section 98(4).

25. The relevant findings of fact and determinations are otherwise to stand. Those include the conclusions and decisions of the Employment Tribunal on all the factors in **British Home Stores Ltd v Burchell** [1978] IRLR 379, namely the belief by the employer that the employee was guilty of misconduct, the reasonableness of the investigation and any other steps up to the assessment of the reasonableness of the sanction imposed.

vexatious to return to the appeal tribunal in order to argue his remaining grounds of appeal. If he does, he may find himself in peril as to the order for costs which the appeal tribunal have jurisdiction to make under paragraph 19 (1) of Schedule 11 to the Act of 1978. We make these observations having regard to the facts that before us the employee made his submissions with moderation and common sense, and his Pyrrhic forensic victory before the appeal tribunal may carry with it a risk that he might feel that it should encourage him to continue with his litigation although the decision of this court has removed the foundation of at least a great deal of the grounds of appeal pleaded in his notice of appeal to the appeal tribunal. We therefore allow the appeal.

Appeal allowed.
No order as to costs.

Solicitor: *A. R. Myers.*

[Reported by COLIN BERESFORD, ESQ., Barrister-at-Law]

[EMPLOYMENT APPEAL TRIBUNAL]

ICELAND FROZEN FOODS LTD. *v.* JONES

1982 July 28, 29

Browne-Wilkinson J., Mr. J. P. Bell and Mrs. M. Boyle

Employment—Unfair dismissal—Reasonableness of dismissal—Misconduct—Foreman's failure to secure warehouse—Dismissal—Finding that employer unreasonable in treating conduct as ground for dismissal—Test of whether employer acting reasonably—Employment Protection (Consolidation) Act 1978 (*c.* 44), *s.* 57 (3) (*as amended by Employment Act* 1980 (*c.* 42), *s.* 6)

The employee, a night shift foreman, was dismissed by the employers for failing to operate the security system at the employers' premises and for taking part in an attempt to deceive the employers into making extra overtime payments. On his complaint to an industrial tribunal that his dismissal was unfair, the tribunal rejected the employers' submission that when applying section 57 (3) of the Employment Protection (Consolidation) Act 1978, as amended,[1] a tribunal should not find the dismissal unfair unless the decision to dismiss was so unreasonable that no reasonable employer would have decided to take that course. They took the view that the correct test

[1] Employment Protection (Consolidation) Act 1978, s. 57, as amended: "(3) . . . the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case."

was whether in their opinion the employers had acted reasonably, and they found that the employee's misconduct was not sufficiently serious to warrant dismissal. They accordingly held that the employers had acted unreasonably in dismissing him, within the meaning of section 57 (3), and that the dismissal was unfair.

On the employers' appeal:—

Held, allowing the appeal, that the correct approach for an industrial tribunal, when applying section 57 (3) of the Act of 1978, was to consider whether the employers' decision to dismiss fell within the band of reasonable responses to the employee's conduct which a reasonable employer could adopt; that the industrial tribunal had erred in law in rejecting that approach; and that, accordingly, the case would be remitted to a different industrial tribunal for reconsideration.

N. C. Watling & Co. Ltd. v. *Richardson* [1978] I.C.R. 1049, E.A.T. followed.

Jowett v. *Earl of Bradford (No. 2)* [1978] I.C.R. 431, E.A.T. not followed.

Per curiam. Although the statement of principle in *Vickers Ltd.* v. *Smith* [1977] I.R.L.R. 11, is entirely accurate in law, for the reasons given in *N. C. Watling & Co. Ltd.* v. *Richardson* [1978] I.C.R. 1049, we think industrial tribunals would do well not to direct themselves by reference to it (post, p. 25B).

The following cases are referred to in the judgment:

British Leyland U.K. Ltd. v. *Swift* [1981] I.R.L.R. 91, C.A.
Jowett v. *Earl of Bradford (No. 2)* [1978] I.C.R. 431, E.A.T.
Rolls-Royce Ltd. v. *Walpole* [1980] I.R.L.R. 343, E.A.T.
Vickers Ltd. v. *Smith* [1977] I.R.L.R. 11, E.A.T.
Watling (N. C.) & Co. Ltd. v. *Richardson* [1978] I.C.R. 1049, E.A.T.

No additional cases were cited in argument.

APPEAL from an industrial tribunal sitting at Shrewsbury.

The employers, Iceland Frozen Foods Ltd., appealed from a decision of the industrial tribunal on November 13, 1981, that the employee, John Graham Jones, had been unfairly dismissed, on the ground, inter alia, that the industrial tribunal had erred in law in their construction of section 57 (3) of the Employment Protection (Consolidation) Act 1978.

The facts are stated in the judgment.

J. Tracy Forster for the employers.
D. J. Hale for the employee.

BROWNE-WILKINSON J. delivered the following judgment of the appeal tribunal. This is an appeal from a decision of an industrial tribunal which held that Mr. Jones, the employee, had been unfairly dismissed by his employers, Iceland Frozen Foods Ltd. He was employed by the company from April 13, 1980, until July 2, 1981, when he was summarily dismissed by the warehouse distribution manager, Mr. Boyland. The employers carry on business in retail food distribution selling frozen foods. They operate 43 shops all of which are supplied from a cold store at the Deeside Industrial Estate at Queensferry. Adjacent to that store are the administrative offices

of the company. The store and the administrative offices do not intercommunicate. At the time of his dismissal the employee was the night shift foreman at the warehouse. The company is of fair size with about 450 employees altogether.

The circumstances of the dismissal were these. The night shift operated a 40 hour week. If, on any night, they had finished their work they knocked off early; if they had not finished their work by the end of the shift they continued to work thereafter. Only if in any week they had in all worked more than 40 hours was overtime paid. They were also working under a scheme which provided a bonus in the event that errors in the loading of the lorries were avoided. The ordinary night shift hours were from 10 p.m. until 6 a.m. There was a break between the last day shift and the commencement of the night shift, and also a break between the end of the night shift at 6 a.m. and the commencement of ordinary work some hour and a half later. It was part of the employee's duties at the start of the night shift to unlock the warehouse and disconnect the electronic security system covering both the warehouse and the office. At the end of the night shift, it was his duty to lock up the warehouse (and the office accommodation if it were open) and to re-activate the security system which was itself linked to a central security system run by an independent contractor.

The events in question took place on the night of July 1 and 2, 1981. When the day shift arrived on the morning of July 2 it was found that the office accommodation was unlocked and although the warehouse was locked the electronic security system had not been re-activated. Mr. Boyland was present when that was discovered. Mr. Boyland then looked into the matter with the security company and confirmed that the electronic alarm had not been re-activated. He drew the inference, correctly, that the employee could not have locked the administrative block or re-activated the alarm before leaving the premises after the conclusion of the night shift. He also discovered that the night shift had worked for the full eight hours on the night of July 1 and 2 but the number of items that had been loaded was substantially smaller that the normal average for a full eight hour shift; indeed, it was approximately 20 per cent. less than on the previous night. He reached the conclusion that there had been a deliberate " go-slow " by the night shift workers with the objective of earning overtime for that week. He thought that the employee, as foreman, must be a party to that deliberate go-slow.

As a result, Mr. Boyland summoned the employee to an interview before the start of the night shift on the evening of July 2. The meeting took place at 6.30 p.m. and lasted for about 10 minutes. The industrial tribunal were unable to make express findings as to what took place at that meeting save in certain respects which we will mention hereafter. At the conclusion of the meeting Mr. Boyland summarily dismissed the employee.

The employee then brought proceedings claiming that he had been unfairly dismissed. The industrial tribunal held that the dismissal was unfair and awarded him compensation assessed at £1,719, having held the employee to have contributed to his own dismissal to the extent of 40 per cent. and reduced the compensation by that proportion.

The industrial tribunal approached the question of the substantive fair-

ness of the dismissal and the procedural fairness of the dismissal separately. The tribunal came to the conclusion that the reason for dismissal of the employee was his failure to re-activate the security alarm and to lock up the premises, and also the belief which Mr. Boyland held that the employee, as foreman, had allowed or possibly encouraged the night shift to "go-slow" that night.

As to the substantive merits of the decision to dismiss, the industrial tribunal asked itself this question: Did the two-fold faults by the employee make it reasonable to dismiss him? They answered that "In our view, they did not." They did not regard his failure in relation to the alarm as being serious, saying that everyone makes mistakes sometimes. They did not regard the particular error as to security as being of an obviously serious nature on that occasion. They obviously regarded the time of day at which it took place, namely, in the morning between 6 a.m. and 7.30 a.m. as being a time at which the premises were not very vulnerable and pointed out that there were drivers around at that time.

As to the "go-slow," they did not think it was reasonable to dismiss on that ground bearing in mind the fact that some three months previously the employee, as foreman, had been told that he had been too tough and peremptory with his gang. Having set out their reasons much more fully than we have sought to summarise them they conclude by saying:

> ". . . in our view neither of the [employee's] faults, either singly or taken together, came anywhere near being sufficiently serious to make it reasonable to dismiss him applying the provisions of section 57 (3) as amended. For these reasons we find this dismissal to be unfair on its general merits."

They then went on to say that in their view the dismissal was also unfair on procedural grounds. The employee, under his contract, had the right to be accompanied by a representative at any disciplinary meeting before a decision was taken to dismiss him. That provision had been breached. They also came to the conclusion that at the short 10 minute meeting the employee was not allowed to put over his case at all, his case being that the night shift were working slower than usual with the object of avoiding errors and thereby earning the full bonus for careful loading. The industrial tribunal also took the view that the reality of the case was that there had been over much haste in the dismissal. The tribunal for those and other reasons held that the dismissal would have been unfair on procedural grounds alone.

Although, as will appear, we do not regard the treatment of the case in two separate portions (the one dealing with the reasonableness of the substantive decision and the other the reasonableness of the procedure) to be a desirable course, in order to deal with the arguments presented to us we too will divide it into those two sections.

As to the decision of the industrial tribunal that the dismissal was unfair in that dismissal was an inappropriate sanction for the offence committed, it is submitted that the industrial tribunal misdirected themselves in law in the way they approached section 57 (3). From the passages we have read (which in our view are the only ones that are material) it is

clear that the industrial tribunal simply find that it was not reasonable to dismiss him. They do not indicate in the passage we have read whether in so saying they are taking the view that they would not have thought it reasonable in the circumstances, or whether they were considering whether the decision to dismiss fell within the band of reasonable conduct which a reasonable employer could adopt. However, in paragraph 20 of their decision they make it clear that they were not adopting the latter test. They say:

> " In this connection we would mention the case of *Rolls-Royce Ltd.* v. *Walpole* [1980] I.R.L.R. 343. Miss Tracy Forster's submission was that this case decided that an industrial tribunal should not when applying section 57 (3) find the dismissal to be unfair unless the decision to dismiss was so unreasonable that no reasonable employer would have decided to dismiss. If the *Walpole* case really decides this, then it is really harking back to the decision in *Vickers Ltd.* v. *Smith* [1977] I.R.L.R. 11, which the present chairman endeavoured in the case of *Jowett* v. *Earl of Bradford* (*No. 2*) [1978] I.C.R. 431 to apply in his dissenting view at first instance in the latter case: it seems to us that if the *Walpole* case really has the effect submitted by Miss Tracy Forster then it must be regarded as inconsistent with *Jowett* v. *Earl of Bradford.* We do not really regard the *Walpole* case as being any more than a primarily factual decision that in that particular case there was no evidence upon which the industrial tribunal could reasonably find that the dismissal was other than reasonable applying the section 57 (3) test. There can be no doubt of course (with all respect to the Employment Appeal Tribunal) that different divisions of the Employment Appeal Tribunal have from time to time set out the test in different language, and we would not wish to try and reconcile all the statements of the law in a considered paper on the subject. It seems to us that the right course is simply to endeavour to apply as industrial jurors the test laid down by section 57 (3) as amended without adorning the language of that section in any way. That is what we have endeavoured to do in this case. . . . It certainly seems to us that if a test on the lines of *Vickers Ltd.* v. *Smith* is the true test, then it would result in the number of successful claims for unfair dismissal (presently, we understand, only about one-third of the cases which are actually contested) being very much reduced because the number of cases which come before us in which there has been a 'conduct' dismissal on grounds so slim that a tribunal would be likely to form the view that no reasonable employer would have dismissed, is relatively small."

In our judgment, the industrial tribunal misdirected themselves in law in their approach to this question. The paragraph we have just read indicates that the industrial tribunal disregarded the principle enunciated in *Rolls-Royce Ltd.* v. *Walpole* [1980] I.R.L.R. 343 (which they regarded as being identical with the principle in *Vickers Ltd.* v. *Smith*) relying, as they did, on the decision of another division of the appeal tribunal in *Jowett* v. *Earl of Bradford* (*No. 2*) [1978] I.C.R. 431. In the *Jowett* case it was held

that *Vickers Ltd.* v. *Smith* did not lay down any rule of law as to the principle to be adopted in approaching the application of section 57 (3) but merely laid down guidelines. Therefore, in the view of the appeal tribunal in the *Jowett* case, an industrial tribunal could not misdirect itself in law if it failed to adopt the approach set out in *Vickers Ltd.* v. *Smith.*

In our view, the decision in *Jowett*'s case is no longer good law. The history of the matter is this. In *Vickers Ltd.* v. *Smith* [1977] I.R.L.R. 11, 12, this appeal tribunal reversed the decision of an industrial tribunal on the grounds:

> " not only was it necessary to arrive at the conclusion that the decision of the management was wrong, but that it was necessary to go a stage further, if they thought that the management's decision was wrong, and to ask themselves the question whether it was so wrong, that no sensible or reasonable management could have arrived at the decision at which the management arrived in deciding who should be selected . . . for redundancy."

This appeal tribunal only has jurisdiction to alter the decision of an industrial tribunal if it has erred in law. It necessarily followed that in *Vickers Ltd.* v. *Smith* the appeal tribunal was regarding the principle we have just read as a principle of law, failure to comply with which constituted an error of law.

Next, comes the decision in the *Jowett* case which treated *Vickers Ltd.* v. *Smith* as laying down guidelines only, not as stating a principle of law.

Very shortly thereafter the matter was considered by another division of this appeal tribunal in *N. C. Watling & Co. Ltd.* v. *Richardson* [1978] I.C.R. 1049. In that case Phillips J., having quoted the words of the predecessor of section 57 (3), said, at p. 1056:

> " The difficulty is that the words can be applied in practice in more than one way. One view—now rejected in the authorities, and to be regarded as heretical—is that all the industrial tribunal has to do is say to itself, reciting the words of paragraph 6 (8), ' Was the dismissal fair or unfair? '; that having done that it has arrived at an unappealable decision; and that in answering that question it is not required to apply any standard other than its own collective wisdom. What the authorities, including *Vickers Ltd.* v. *Smith,* have decided is that in answering that question the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the fairness or unfairness of the dismissal is to be judged not by the hunch of the particular industrial tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved. It has to be recognised that there are circumstances where more than one course of action may be reasonable. In the case of redundancy, for example, and where selection of one or two employees to be dismissed for redundancy from a larger number is in issue, there may well be and often are cases where equally reasonable, fair, sensible and prudent employers would take different courses, one choosing A, another B and another

> C. In those circumstances for an industrial tribunal to say that it was unfair to select A for dismissal, rather than B or C, merely because had they been the employers that is what they would have done, is to apply the test of what the particular industrial tribunal itself would have done and not the test of what a reasonable employer would have done. It is in this sense that it is said that the test is whether what has been done is something which 'no reasonable management would have done.' In such cases, where more than one course of action can be considered reasonable, if an industrial tribunal equates its view of what itself would have done with what a reasonable employer would have done, it may mean that an employer will be found to have dismissed an employee unfairly although in the circumstances many perfectly good and fair employers would have done as that employer did. . . . The moral is that none of the phrases used in the authorities, such as 'did the employer act in a way in which no reasonable employer would have acted?' is to be substituted as the test to be applied. The test is, and always is, that provided by paragraph 6 (8). The authorities do no more than try, according to the circumstances, to indicate the *standard* to be used by the industrial tribunal in applying the paragraph. But every time the starting point for the industrial tribunal is the language of the paragraph."

It does not appear that the decision in the *Jowett* case was cited in *N. C. Watling & Co. Ltd.* v. *Richardson.*

In *Rolls-Royce Ltd.* v. *Walpole* [1980] I.R.L.R. 343, exactly the same principle as that set out in *N. C. Watling & Co. Ltd.* v. *Richardson* [1978] I.C.R. 1049 was enunciated in different but helpful words; the decision of the industrial tribunal was reversed by the appeal tribunal for failure to conform to that principle. Mr. J. D. Hughes said, at p. 346:

> "As this appeal tribunal pointed out in the judgment in *Watling's* case, in a given set of circumstances it is possible for two perfectly reasonable employers to take different courses of action in relation to an employee. Frequently there is a range of responses to the conduct or capacity of an employee on the part of an employer, from and including summary dismissal downwards to a mere informal warning, which can be said to have been reasonable. It is precisely because this range of possible reasonable responses does exist in many cases that it has been laid down that it is neither for us on an appeal, nor for an industrial tribunal on the original hearing, to substitute our or its respective views for those of the particular employer concerned. It is in those cases where the employer does not satisfy the industrial tribunal that his response had been within that range of reasonable responses, that the industrial tribunal is enjoined by the statute to find that the dismissal of the relevant employee has been unfair."

Again, the *Jowett* case does not appear to have been cited in *Rolls-Royce Ltd.* v. *Walpole.*

Finally, in *British Leyland U.K. Ltd.* v. *Swift* [1981] I.R.L.R. 91 the Court of Appeal reversed the decision of an industrial tribunal that a

dismissal was unfair and substituted a decision that it was fair. Lord Denning M.R. said, at p. 93: A

> "The first question that arises is whether the industrial tribunal applied the wrong test. We have had considerable argument about it. They said: '. . . a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate.' I do not think that that is the right test. The correct test is: Was it reasonable for the B employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably C keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

Ackner L.J. said, at p. 93:

> "As has been frequently said in these cases, there may well be circumstances in which reasonable employers might react differently. An D employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case."

E

Although the reasons given by the third member of the Court of Appeal, Griffiths L.J., are not the same, in our judgment the decision of the Court of Appeal in the *Swift* case was that the industrial tribunal had erred in law by failing to apply the right principle. Even though the *Jowett* case was not cited in the Court of Appeal it is, in our view, inconsistent with the decision of the Court of Appeal in that case and is no longer good law. It follows that in the present case the industrial tribunal F has misdirected itself in law by failing to follow the *Watling* v. *Richardson* principle.

Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in G answering the question posed by section 57 (3) of the Act of 1978 is as follows: (1) the starting point should always be the words of section 57 (3) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial H tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which

A one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

B Although the statement of principle in *Vickers Ltd.* v. *Smith* [1977] I.R.L.R. 11 is entirely accurate in law, for the reasons given in *N. C. Watling & Co. Ltd.* v. *Richardson* [1978] I.C.R. 1049 we think industrial tribunals would do well not to direct themselves by reference to it. The statement in *Vickers Ltd.* v. *Smith* is capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that C nothing short of a perverse decision to dismiss can be held to be unfair within the section. This is how the industrial tribunal in the present case seems to have read *Vickers Ltd.* v. *Smith.* That is not the law. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses and industrial tribunals would be well advised to follow the formulation of the principle D in *N. C. Watling & Co. Ltd.* v. *Richardson* [1978] I.C.R. 1049 or *Rolls-Royce Ltd.* v. *Walpole* [1980] I.R.L.R. 343.

Reverting now to the facts of this case, it is suggested that notwithstanding the misdirection, we can uphold the decision of the industrial tribunal on the ground that on any footing it was manifestly unreasonable for the employers to dismiss in the circumstances of this case. The industrial tribunal obviously regarded the employee's faults as minor ones. E We cannot accede to the view that notwithstanding the misdirection we can substitute our own decision in this case. Take, for example, the failure to lock the office and to set the alarm. The industrial tribunal took the view that the offence was comparatively trivial; it does not necessarily follow that all reasonable employers would share their view on the matter. It may well be that the misdirection on this point is fundamental to the decision F of the case. We do not know enough of the circumstances of the employers' business to decide whether the importance which they obviously attached to the breach of security was such that a reasonable employer might take the view that the risk of repetition of the breach of security was too great to allow the risk to continue. We express no view on the point one way or the other. We simply cannot decide the matter ourselves on the material we have before us.

G As to the alternative ground relied on by the industrial tribunal, namely, procedural unfairness, as we have said we do not think it the correct approach to deal separately with the reasonableness of the substantive decision to dismiss, and the reasonableness of the procedure adopted. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the H circumstances. Moreover, it has been demonstrated to us from the notes of evidence that on an important issue on procedure the industrial tribunal apparently misdirected itself. The industrial tribunal took the view that Mr. Boyland at the short interview did not give the employee an oppor-

tunity to state his case as to the reason for the go-slow. The notes of evidence disclose that both Mr. Boyland and the employee himself gave evidence that at that interview the employee did put forward his explanation of the go-slow by the night shift. In the circumstances, it cannot be safe for us to uphold the decision of the industrial tribunal on the ground of procedural unfairness alone.

We therefore allow the appeal and remit the case to a differently constituted industrial tribunal to consider the matter afresh. It will be for the new industrial tribunal to consider whether in all the circumstances of the case the nature of the employee's shortcomings were such that a reasonable employer carrying on the employers' business would have regarded the dismissal as being a reasonable response and whether, in the circumstances of the case, the dismissal was carried out in a fair way. As we say, that is a matter entirely for the new industrial tribunal. But we do point out that whatever the merits of the substantive decision in this case, the procedure by which the dismissal was carried out has to be carefully considered and taken into account. It may not have been fair, and we say no more than that, to have dismissed the employee with the haste which was shown in this case without giving him an opportunity to have a representative there. But that will be a matter for the tribunal to weigh together with all the other circumstances of the case.

Appeal allowed.
Case remitted to another tribunal for reconsideration.

Solicitors: *Bullivant & Co., Liverpool; de Cordova, Alis & Filce, Shotton.*

J. W.

A Employment Appeal Tribunal

Barton *v* Investec Henderson Crosthwaite Securities Ltd

2003 March 6; April 3

Judge Ansell, Mrs D M Palmer and Mr G H Wright

B *Discrimination — Sex — Burden of proof — Burden on complainant to establish facts capable of constituting unlawful discrimination — Burden shifting to employer to prove treatment in no sense on ground of sex — Inferences to be drawn from employer's disregard of code of practice or questionnaire — Whether relevant to equal pay claim — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983 (SI 1983/1794), reg 2(2)) — Sex Discrimination Act 1975 (as amended by Race Relations Act 1976, Sch 4, para 1 and Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001 (SI 2001/2660), regs 3, 5), ss 1(2), 56A(10), 63A, 74(2)*

C

On a complaint of sex discrimination under section 1(2) of the Sex Discrimination Act 1975[1], it is for the applicant, pursuant to section 63A, to prove on the balance of probabilities facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the applicant which is unlawful by virtue D of Part 2, or which by virtue of section 41 or 42 is to be treated as having been committed by the employer. Whether the applicant has proved such facts will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. Those inferences can include any that it is just and equitable to draw in accordance with section 74(2)(b) from an evasive or equivocal reply to a questionnaire or any other questions falling within section 74(2). Likewise, the tribunal must decide whether any provision of a code of practice is relevant, and, E if so, take it into account pursuant to section 56A(10). At this stage the tribunal does not have to reach a definitive determination of unlawful discrimination (para 25(1)–(7)).

Once the applicant has proved facts from which the inference could be drawn that the employer has treated the applicant less favourably on the ground of sex, the burden of proof moves to the employer, and it is for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act, F by proving on the balance of probabilities that the treatment was in no sense whatsoever on the ground of sex. A tribunal is thus required to assess, not merely whether the employer has proved an explanation for the facts from which inferences can be drawn, but whether it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question; and, since the facts necessary to prove an explanation would normally be in the possession of the employer, a tribunal would normally expect cogent evidence to G discharge that burden of proof, in particular where the employer sought to explain a failure to deal with the questionnaire procedure, or to follow a code of practice (post, para 25(8)–(12)).

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL(NI) distinguished.

Where, therefore, an applicant's complaint of sex discrimination under the 1975 Act, in relation to bonus payments, and claim for equality of pay under the Equal Pay H Act 1970[2], in relation to her remuneration, were dismissed by an employment

[1] Sex Discrimination Act 1975, s 1(2): see post, para 12.
S 56A(10), as inserted: see post, para 14.
S 63A, as inserted: see post, para 13.
S 74(2): see post, para 16.

[2] Equal Pay Act 1970, s 1, as substituted: see post, para 12.

tribunal, despite the tribunal's concerns over the employer's response to a sex discrimination questionnaire and its non-transparent bonus policy, and the applicant appealed—

Held, allowing the appeal, (1) that there was an abundance of primary fact material from which the tribunal could, and should, have drawn inferences, in the absence of an adequate explanation from the employer, entitling it to conclude that an act of discrimination falling within section 1(2) of the Sex Discrimination Act 1975 had been committed and that the burden of proof was placed on the employer to prove that sex was not a reason for the less favourable treatment; and that the employment tribunal had not dealt with the matter by the required two-stage process, and the complaint would be remitted for rehearing (post, paras 31, 32, 33).

(2) That, in determining the claim under the Equal Pay Act 1970, the tribunal had failed adequately to take into account important factors in concluding that the material factor defence in section 1(3) had been established by the employer, and that matter also would be remitted (post, para 37).

Per curiam. (i) Where section 74 of the Sex Discrimination Act 1975 refers to "this Act" it should not, as a matter of construction, be taken to include the Equal Pay Act 1970; nor is section 74 to be treated as having been incorporated into the 1970 Act by inference. However, the parties were agreed that under the normal common law rules of evidence inferences against an employer which could be drawn under section 74, particularly if the employer fails to deal with questions in relation to aspects of contractual pay, could also be used against the employer in 1970 Act proceedings (post, para 28).

(ii) No tribunal should be seen to condone a City bonus culture, involving secrecy and/or lack of transparency because of the potentially large amounts involved, as a reason for avoiding equal pay obligations (post, para 30).

The following cases are referred to in the judgment:

Anya v University of Oxford [2001] EWCA Civ 405; [2001] ICR 847, CA
Bilka-Kaufhaus GmbH v Weber von Hartz (Case 170/84) [1987] ICR 110; [1986] ECR 1607, ECJ
Brunnhofer v Bank der Österreichischen Postparkasse AG (Case C-381/99) [2001] ECR I-4961, ECJ
Chattopadhyay v Headmaster of Holloway School [1982] ICR 132, EAT
Glasgow City Council v Zafar [1998] ICR 120; [1997] 1 WLR 1659; [1998] 2 All ER 953, HL(Sc)
Hinks v Riva Systems Ltd (unreported) 22 November 1996, EAT
Khanna v Ministry of Defence [1981] ICR 653, EAT
King v Great Britain-China Centre [1992] ICR 516, CA
Morris v London Iron and Steel Co Ltd [1987] ICR 855; [1988] QB 493; [1987] 3 WLR 836; [1987] 2 All ER 496, CA
North West Thames Regional Health Authority v Noone [1988] ICR 813, CA
Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337; [2003] 1 All ER 26, HL(NI)
Strathclyde Regional Council v Wallace [1998] ICR 205; [1998] 1 WLR 259; [1998] 1 All ER 394, HL(Sc)
Tyldesley v TML Plastics Ltd [1996] ICR 356, EAT

The following additional cases were cited in argument:

Carrington v Helix Lighting Ltd [1990] ICR 125, EAT
Coote v Granada Hospitality Ltd (Case C-185/97) [1999] ICR 100; [1998] ECR I-5199, ECJ

A The following additional cases, though not cited, were referred to in the skeleton arguments:

Glasgow City Council v Marshall [2000] ICR 196; [2000] 1 WLR 333; [2000] 1 All ER 641, HL(Sc)

Hayes v Charman Underwriting Agencies (unreported) 19 December 2001, EAT

Nagarajan v London Regional Transport [1999] ICR 877; [2000] 1 AC 501; [1999] 3 WLR 425; [1999] 4 All ER 65, HL(E)

B *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School* [1997] ICR 33, EAT

P v S (Case C-13/94) [1996] ICR 795; [1996] ECR I-2143, ECJ

Qureshi v Victoria University of Manchester (Note) [2001] ICR 863, EAT

APPEAL from an employment tribunal sitting at London Central

By an originating application dated 5 September 2001, the applicant, C Ms Louise Barton, made a complaint of discrimination contrary to the Sex Discrimination Act 1975 and a claim for equality of pay with two comparators under section 1 of the Equal Pay Act 1970 against her employer, Investec Henderson Crosthwaite Securities Ltd. By a decision promulgated on 30 September 2002 the employment tribunal held that (1) the employer had proved that the variation in salary and long-term D incentive payments between the applicant and her comparator was genuinely due to a material factor which was not the difference of sex; (2) difference in treatment between the applicant and the comparator in relation to the grant of share options was due to a material factor which was not the difference of sex for the purposes of the 1970 Act, or if the share options were not regulated by the contract of employment, did not amount to less favourable treatment of the applicant on the ground of her sex; and E (3) the employer did not treat the applicant less favourably on the ground of sex in awarding bonuses.

By notice of appeal dated 18 October 2002 the applicant appealed on the grounds, inter alia, that (1) in determining the sex discrimination claim the tribunal had not adopted the correct approach to the issue of sex discrimination; and (2) in determining for the purposes of the claim under F the 1970 Act whether the material factor defence provided in section 1(3) of the Act was made out, the tribunal had, notwithstanding its correct identification of the appropriate test, failed properly to apply such test to the facts.

The facts are stated in the judgment.

Robin Allen QC and *David Reade* for the applicant.

G *Roy Lemon* for the employer.

Cur adv vult

3 April. The following judgment of the appeal tribunal was handed down.

H **JUDGE ANSELL**

1 This is an appeal from a decision of an employment tribunal sitting at London Central, which, following a hearing held in June 2002, by a reserved decision promulgated on 30 September 2002, unanimously held that (1) the employer had proved that the variation in salary and long-term incentive

payments between the applicant and her comparator, Matthew Horsman, was genuinely due to a material factor which was not the difference of sex; (2) a difference in treatment between the applicant and Matthew Horsman in relation to the grant of share options was due to a material factor which was not the difference of sex for the purposes of the Equal Pay Act 1970 or, if the share options were not regulated by the contract of employment, did not amount to less favourable treatment of the applicant on the ground of her sex; (3) the employer did not treat the applicant less favourably on the ground of sex in awarding bonuses.

2 This case raises important issues both as regards the burden of proof in sex discrimination cases, following the insertion of section 63A into the Sex Discrimination Act 1975 in October 2001, and also with regard to what are termed the "opaque pay structures" in City of London financial institutions, particularly those structures which allow individual managers considerable discretion, which, the applicant contends, runs contrary to the whole ethos of the equal pay and anti-discrimination legislation over the last 30 years.

3 The applicant, aged 52 at the time of the hearing, has 23 years' experience in the fund management and broking investment banking fields and, in particular, 20 years as a respected media expert. She joined the employer as an analyst in June 1990, and by the late 1990s she had become their research director. She was particularly successful in the old style of backroom analysis, but was said to be less happy with the more modern rôle of the analyst, involving a high profile image for both herself and her employer. Over the years, she had also involved herself in stock sales for her clients, although, again, the modern trend was towards concentrating sales with specialist salesmen. The tribunal found that the applicant's way of doing her own sales was not appreciated or encouraged by senior management. The tribunal's conclusion was, however, that the applicant had a genuinely high profile in a limited specialist media context, but less so in the developing broader media world of broadcasting and the internet.

4 The employer employs 150 staff, comprising 40 in credit finance, 40 in sales, 40 in research, and the rest in support functions. The employer is a subsidiary of a larger organisation, Investec Bank UK, which is itself linked to Guinness Mahon and the Bank of Yokohama. The employer's only witness before the employment tribunal was Perry Crosthwaite, the chairman, and the person who, the tribunal found, was very much the key figure in the setting of salaries and other benefits and bonuses. The tribunal found that the four elements to the final package of the employees concerned in these events comprised the basic salary, a bonus awarded at the end of the financial year, share options and long-term incentive payments. Long-term incentive payments are amounts awarded, but paid over a period of time between two to four years, whose principal aim is to keep valuable employees within the organisation.

5 Matthew Horsman joined the employer on 1 January 1997 as a research director, having previously been a respected financial journalist with "The Independent" newspaper. The applicant had been actively involved in his recruitment. In the years after his arrival, the applicant and Mr Horsman pooled their bonuses, although they were not necessarily

A shared. By June or July 1999, the tribunal found, Mr Crosthwaite had been made aware that there were attempts being made by other organisations to poach Mr Horsman. He was desperate not to lose him as he was regarded as one of the three key members of staff within the organisation. At that time, both he and the applicant were on a basic salary of £105,000, and a decision was made to increase Mr Horsman's salary to £150,000 and to
B award him a long-term incentive payment of £75,000. Further, in December 1999, he was granted 12,000 share options, whereas the applicant only received 7,500. It is these three aspects of pay that give rise to the claim under the 1970 Act, although, as we have already indicated, the tribunal was unsure as to whether or not share options fell within the ambit of the 1970 Act.

6 By early 2001, the applicant had been given information in relation to
C the possible disparity of salaries between her and Mr Horsman; that information did not extend to the disparity as regards share options or long-term incentive payments. As a result of a complaint to her employer, the employer increased her salary from April 2001 to £150,000, the same as Mr Horsman, but said nothing to her about the other aspects of salary. She only found out about those matters much later in the year, once proceedings
D had been commenced. The other main issue in the case relates to the setting of bonuses. The tribunal held that after 1998 bonuses were less closely based on the revenue produced by the particular employee. The determination as to what factors were taken into account with regard to bonus setting after that date and the nature of the process involved are very much at the heart of this case.

E 7 Michael Savage joined the media term as a specialist media salesperson in June 2000, having 14 years' experience in the City, and having both trained as a research analyst and then developed specialist sales skills. The tribunal found that the employer saw him as a very valuable acquisition, combining sales, analytical, organisational and client-handling skills, and to secure him they offered him a salary of £150,000 and a long-term incentive payment of £150,000 per annum for two years, and a guaranteed minimum
F bonus of £50,000, although the long-term incentive payment element in the remuneration did involve some compensation for benefits that he had lost from his previous employment. He was not the comparator for equal pay purposes, since the tribunal held, and it is not disputed, that he was not involved in like work with the applicant. The tribunal also held, although the issue had been a matter of some argument within the tribunal hearing,
G that Mr Savage was put in charge of the team at the end of 2000. They found that the applicant had received this news badly and became increasingly non co-operative, declining to contribute to a team budget and compiling her own.

8 The 1975 Act claim arises from the award of the 2001 budget in the spring of that year. The tribunal found that the employer's bonus setting was: "a rough and ready process, not a precise science. It was not a paper
H based exercise." They also spoke of an "underlying philosophy of avoiding precision and written material to prevent giving individuals the material on which they could challenge their bonuses". The bonuses awarded in the spring of 2001 were £1m to Mr Horsman, £600,000 to Mr Savage and £300,000 to the applicant. It is said that she had generated revenue of

£3·2m, Mr Savage £5·3m and Mr Horsman £10m. There was considerable cross-examination in the tribunal as to respects in which the applicant's figures had been undervalued and Mr Savage's overvalued. The applicant's complaint was in relation to the differential between her bonus and that of Mr Savage, particularly as he had been in the organisation for only ten months of the bonus year.

9 The tribunal found that, comparing the cases of the applicant and Mr Horsman, the genuine material factor defence in section 1(3) of the 1970 Act was made out. It referred in particular to the employer's concern about the threat of Mr Horsman being head-hunted, and its desire to keep him on a par with the other two key players in the organisation; and it went on to find:

> "all the increases were conscientious, unscientific efforts to secure Matthew Horsman for the future of the business by putting his benefits at the top of the range sustainable within the [employer] organisation: putting his benefits in line with those of other key players established proportionally."

10 With regard to the bonus issue, the tribunal held that after 1998 the approach to bonuses was "multi-factorial" and not simply driven by revenues. It referred to public profile, client management and team participation as being relevant considerations. In paragraph 81 of its reasons, the tribunal said:

> "The tribunal also had questions in relation to the history of the litigation in this case, the avoidance of disclosure of information and the changing of the [employer's] case over time. More generally, the tribunal [was] also concerned about the backdrop of an unwritten, non-transparent bonus policy in an organisation without an appraisal system and without an equal opportunities policy. It took into account that this was a culture with a significant preponderance of men where the applicant was the most senior female."

Later, in paragraph 88, the tribunal said:

> "The tribunal took as part of [its] industrial knowledge that it is a vital component of the City bonus culture that bonuses are discretionary, scheme rules are unwritten and individuals' bonuses are not revealed. [It was] satisfied that the cultural reason for this is that invidious comparisons would become inevitable. If such comparisons were generally possible the bonus system would collapse. The tribunal accepted the [employer's] unwillingness to disclose bonuses until compelled by law to do so as part of that culture, particularly bearing in mind that the applicant was until January 2002 an employee still in employment, seeking bonus details about fellow employees. It found Perry Crosthwaite's unwillingness to be open on the subject of bonus figures consistent with that culture."

Yet it concluded in paragraph 90: "the differentials were [not] consciously or subconsciously motivated or permeated by discrimination."

11 The applicant contends that this case raises important issues for this court to consider. First, we are invited to look at the issue of the burden of

A proof and sex discrimination claims in the light of the changes brought about by section 63A of the 1975 Act. Next, we are asked to consider the proper approach to a failure to comply with the questionnaire procedure and/or the code of practice. Then we are asked to consider effectively whether the court should condone, as the tribunal appeared to do, an "opaque" procedure for bonus setting, involving lack of transparency and
B objectivity which, according to the tribunal's views, appears to be prevalent in some financial institutions. Indeed, Mr Allen, on behalf of the applicant, with his usual clear and erudite manner, called this case a "paradigm example" of how inequality occurs in a system.

Statutory framework

C 12 Section 1 of the Equal Pay Act 1970, which did not come into operation until 29 December 1975, provides:

> "(1) If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed
D to include one.
>
> "(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the 'woman's contract'), and has the effect that—(a) where the woman is employed on like work with a man in the same employment—(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a
E term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable . . .
>
> "(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not
F the difference of sex and that factor—(a) in the case of an equality clause falling within subsection (2)(a) or (b) above, must be a material difference between the woman's case and the man's . . .
>
> "(4) A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they
G do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well as to the nature and extent of the differences."

H Section 1(2) of the Sex Discrimination Act 1975 provides:

> "In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if—(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man . . ."

Section 5(3) provides:

"A comparison of the cases of persons of different sex or marital status under section 1(1) or (2) . . . must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

13 The said section 1(2)(a) of the 1975 Act applies to discrimination in the employment field, and by section 6:

" . . . (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her . . . (b) by dismissing her, or subjecting her to any other detriment . . . (6) Subsection (2) does not apply to benefits consisting of the payment of money when the provision of those benefits is regulated by the woman's contract of employment."

Section 63A provides:

"(1) This section applies to any complaint presented under section 63 to an employment tribunal.

"(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent—(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2 . . . the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act."

14 Section 56A provides for the procedure for the Equal Opportunities Commission to issue codes of practice for certain purposes including the elimination of discrimination in the field of employment and the promotion of equality of opportunity in that field between men and women. These codes, once prepared by the Commission, have to obtain approval of the relevant Secretary of State and both Houses of Parliament. Section 56A(10) provides:

"A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Act or the Equal Pay Act 1970 before an employment tribunal any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

15 The Equal Opportunities Commission Code of Practice on Equal Pay was issued on 26 March 1997 and was brought into force on that date.

16 Under the heading "Transparency" the code provides:

"19. It is important that the pay system is clear and easy to understand; this has become known as transparency. A transparent pay system is one where employees understand not only their rate of pay but also the components of their individual pay packets and how each component contributes to total earnings in any pay period. Transparency is an

A advantage to the employer as it will avoid uncertainty and perceptions of unfairness and reduce the possibility of individual claims.

"20. The European Court of Justice has held that where the organisation concerned applies a system of pay which is wholly lacking in transparency and which appears to operate to the substantial disadvantage of one sex, then the onus is on the employer to show that the B pay differential is not in fact discriminatory. An employer should therefore ensure that any elements of a pay system which could contribute to pay differences between employees are readily understood and free of sex bias."

Paragraphs 25 onwards in the code set out a suggested review of pay systems for sex bias and in paragraph 29 bonuses are highlighted as an area of C potential difficulty. Finally, paragraph 39 provides:

"It is good employment practice for employees to understand how their rate of pay is determined. Information about priorities and proposed action could be communicated to employees as part of the process of informing them about how the pay systems affect them individually. This will serve to assure employees that any sex bias in the D payment system is being addressed."

Section 74 of the 1975 Act sets out a questionnaire procedure and allows the Secretary of State to prescribe:

"(1) . . . (a) forms by which the person aggrieved may question the respondent on his reasons for doing any relevant act, or on any other E matter which is or may be relevant; (b) forms by which the respondent may if he so wishes reply to any questions."

Subsection (2) provides:

"Where the person aggrieved questions the respondent (whether in accordance with an order under subsection (1) or not)—(a) the question, and any reply by the respondent (whether in accordance with such an F order or not) shall, subject to the following provisions of this section, be admissible as evidence in the proceedings; (b) if it appears to the court or tribunal that the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his reply is evasive or equivocal, the court or tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that G he committed an unlawful act."

Proof of discrimination—burden of proof

17 The courts have always acknowledged that it was rare for an applicant complaining of discrimination to have evidence of overtly discriminatory words or actions, therefore the affirmative evidence of H discrimination will normally consist of inferences to be drawn from the primary facts. Having established those inferences, a concept of a shifting burden began to be developed whereby the employer was then called upon to give an explanation so as to negative those inferences. In *Khanna* [2543] *v Ministry of Defence* [1981] ICR 653, 658–659, the Employment Appeal

Tribunal (Browne-Wilkinson J presiding) dealt with these evidential problems in the following way:

> "In the future, we think industrial tribunals may find it easier to forget about the rather nebulous concept of the 'shift in the evidential burden' . . . In this case, the industrial tribunal would, we suspect, have found the case rather more straightforward if, looking at all the evidence as a whole, they had simply decided whether the complaint had been established. No useful purpose is served by stopping to reach a conclusion on half the evidence. The right course in this case was for the industrial tribunal to take into account the fact that direct evidence of discrimination is seldom going to be available and that, accordingly, in these cases the affirmative evidence of discrimination will normally consist of inferences to be drawn from the primary facts. If the primary facts indicate that there has been discrimination of some kind, the employer is called on to give an explanation and, failing clear and specific explanation being given by the employer to the satisfaction of the industrial tribunal, an inference of unlawful discrimination from the primary facts will mean the complaint succeeds . . ."

18 Later in the same year, in *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132, 137, Browne-Wilkinson J repeated the concept that he had outlined in *Khanna*:

> "It is for this reason that the law has been established that if an applicant shows that he has been treated less favourably than others in circumstances which are consistent with that treatment being based on racial grounds, the industrial tribunal should draw an inference that such treatment was on racial grounds, unless the respondent can satisfy the industrial tribunal that there is an innocent explanation . . ."

In two subsequent cases in the Court of Appeal May LJ expressed a degree of dissatisfaction with the passages in *Khanna* : see *Morris v London Iron and Steel Company Ltd* [1987] ICR 855 and *North West Thames Regional Health Authority v Noone* [1988] ICR 813. Eventually, clarification was sought and obtained from the Court of Appeal in *King v Great Britain-China Centre* [1992] ICR 516, 528–529 and the frequently quoted passage of Neill LJ:

> "From these several authorities it is possible, I think, to extract the following principles and guidance. (1) It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail. (2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on the assumption that 'he or she would not have fitted in'. (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the [Race Relations Act

A 1976] from an evasive or equivocal reply to a questionnaire. (4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is B then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in *North West Thames Regional Health Authority v Noone* [1988] ICR 813, 822, 'almost common sense.' (5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the C tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case."

D That passage was approved by the House of Lords in *Glasgow City Council v Zafar* [1998] ICR 120.

19 The importance of the tribunal's fact-finding rôle in these cases was emphasised in *Anya v University of Oxford* [2001] ICR 847, 855D–E, para 10, where Sedley LJ referred to the "ubiquitous need to make the findings of primary fact without which it is impossible to consider the E drawing of relevant inferences".

20 The European Community Treaty, in article 2, set out the need for the Community to develop policies to promote "equality between men and women". The Community Charter of the Fundamental Social Rights of Workers (COM (89) 248 final), adopted by the European Council in Strasbourg in 1989, spoke in its preamble of the aims to combat F discrimination on the grounds of sex and to implement equal pay for men and women for equal work. Paragraph 16 provides:

> "Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed. To this end, action should be intensified wherever necessary to ensure the implementation of the principle of equality between men and women as regards in particular G access to employment, remuneration, working conditions, social protection, education, vocational training and career development."

Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (OJ 1998 L14, p 6) dealt with the burden of proof in cases of discrimination based on sex. The preamble to the Directive provides:

H "Whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory;

"Whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."

Article 2(1) provides: "For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex . . ." Article 4(1), under the heading "Burden of Proof", provides:

"Member states should take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

Thus section 63A of the 1975 Act was introduced as a result of that Directive and was inserted by the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001. The commencement date of 12 October 2001 was in relation to any proceedings under section 63 in an employment tribunal whenever instituted, except proceedings which were determined before that date.

21 Mr Allen argues that the new section clearly introduces a new approach to sex discrimination cases, requiring, effectively, an amendment to the guidelines in *King v Great Britain-China Centre* [1992] ICR 516 and he highlights the words "could . . . conclude in the absence of an adequate explanation". Thus he submits that the first stage of the procedure is for the tribunal to consider primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them from which they could conclude that an act of sexual discrimination had been committed absent any explanation from the employer. He submits further that these inferences could include, in appropriate cases, inferences that it is just and equitable to draw in accordance with section 74, e g from an evasive or equivocal reply to a questionnaire, and also any inferences that it is proper to draw from a failure to comply with any relevant code of practice under section 56A. He submits that at this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, but only that the facts could lead to that conclusion.

22 In those circumstances he submits that the burden of proof will then move to the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed that act. To discharge that burden, it would be necessary for the employer to prove on the balance of probabilities that the treatment in question was in no sense whatsoever on the grounds of sex, since he argues "no discrimination whatsoever" is compatible with the Equal Treatment Directive 76/207 or the Burden of Proof Directive 97/80. In other words, the burden of proof is upon the

A employer to show that sex was not any part of the reasons for the treatment in question.

23 Mr Lemon, for the employer, argues that the new section does not have such a dramatic effect as contended for by the applicant. He referred us to the most recent authority in this area *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, a decision given on 27 February
B 2003, only a few days before the hearing of this appeal. The appeal raised an issue concerning identification of the appropriate comparator and the assumption made by their Lordships that the appropriate comparator was a hypothetical comparator rather than the two male chief inspectors who had originally been put forward as comparators by the applicant. Lord Nicholls of Birkenhead states, at p 342, para 12:

C "The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reasons set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have
D decided why the treatment was afforded to the claimant. Adopting this course would have simplified the issues, and assisted in their resolution, in the present case."

Mr Allen submits that *Shamoon's* case is of little assistance to us because: (a) there was an actual comparator in our case, and (b) the tribunal decided
E the case prior to the implementation of section 63A, which was not considered at all by their Lordships. We agree with his submissions.

24 Mr Lemon, however, contends that the tribunals should not use too rigid and prescriptive an approach to these issues. The tribunal is seeking an answer to a single question: did the employee, on a prescribed ground, receive less favourable treatment than others; which question is to be answered on the balance of probabilities. He submits that if the tribunal,
F having considered all the evidence, is unable to decide where the balance of probabilities lies, and the employee has proved facts from which the tribunal could conclude that the employer had committed an act of unlawful discrimination, it would then uphold the complaint, unless the employer proves that it did not commit, or is not to be treated as having committed, the act of discrimination. We cannot agree with this submission, which does
G not appear to accord with the proper approach, as set out in both the Council Directives and section 63A of the 1975 Act.

25 We therefore consider it necessary to set out fresh guidance in the light of the statutory changes:

(1) Pursuant to section 63A of the 1975 Act, it is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate
H explanation, that the employer has committed an act of discrimination against the applicant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or 42 of the 1975 Act, is to be treated as having been committed against the applicant. These are referred to below as "such facts".

(2) If the applicant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word is "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2): see *Hinks v Riva Systems Ltd* (unreported) 22 November 1996.

(7) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant, and if so take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the employer.

(9) It is then for the employer to prove that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

(10) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive 97/80.

(11) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.

(12) Since the facts necessary to prove an explanation would normally be in the possession of the employer, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

26 We now deal with two matters of law raised in relation to the 1970 Act. The tribunal set out in paragraph 60 of their reasons the test to be satisfied to establish the material factor defence, as set out in *Brunnhofer v Bank der Österreichischen Postparkasse AG* (Case C-381/99) [2001] ECR I-4961 and *Bilka-Kaufhaus GmbH v Weber von Hartz* (Case 170/84) [1987]

ICR 110. Mr Allen submits, therefore, that the burden was on the employer to prove: (1) that there were objective reasons for the difference; (2) unrelated to sex; (3) corresponding to a real need on the part of the undertaking; (4) appropriate to achieving the objective pursued; (5) that it was necessary to that end; (6) that the difference conformed to the principle of proportionality; (7) that such was the case throughout the period during which the differential existed.

27 Mr Lemon submits that no requirement for objective justification arises and cites in support a decision of this court, *Tyldesley v TML Plastics Ltd* [1996] ICR 356, 362:

> "In the absence of evidence or a suggestion that the factor relied on to explain the differential was itself tainted by gender, because indirectly discriminatory or because it adversely impacted on women as a group in the sense indicated in *Enderby v Frenchay Health Authority* (Case C-127/92) [1994] ICR 112, no requirement of objective justification arises . . . It was sufficient in law that the explanation itself caused the difference or was a sufficient influence to be significant and relevant, whether or not that explanation was objectively justified."

Mr Allen now argues that that authority cannot apply in this case because, on the facts of this particular case, the discrimination was both tainted by sex and involved a lack of transparency. He relies on dicta of Lord Browne-Wilkinson in *Strathclyde Regional Council v Wallace* [1998] ICR 205, 214D:

> "if the factor explaining the disparity in pay is tainted by sex discrimination (whether direct or indirect) that will be fatal to a defence under subsection (3) unless such discrimination can be objectively justified . . ."

We agree with his submissions on this point as to the seven factors correctly identified by the tribunal.

28 A further issue arises as to whether it is appropriate to draw adverse inferences under section 74(2) of the 1975 Act in relation to the equal pay claim. Mr Allen first submits that, since the 1970 Act was amended and completely re-enacted and set out in Schedule 1 to the 1975 Act, as a matter of construction, where section 74 refers to "this Act", it should be taken to include the 1970 Act. We cannot agree with that submission. When one considers other sections within the Act e g sections 4, 53, 71 and 73, they refer to the 1970 Act as well as sections of the 1975 Act. Mr Allen further argues that, by inference, there should be no less favourable treatment in the 1970 Act to combat discrimination than there is in the 1975 Act, and accordingly that the questionnaire procedure should apply. Whilst we did not hear lengthy submissions on this area, we are not persuaded that section 74 should be incorporated into the 1970 Act on this basis; indeed we understand that in April 2003 a questionnaire procedure will be introduced into the Equal Pay Act legislation. However, both parties do agree that under normal common law rules of evidence inferences against the employer which can be drawn under section 74, particularly if they fail to deal with questions in relation to aspects of contractual pay, could be used against the employer in the 1970 Act proceedings.

29 Having attempted to determine the difficult issues of law that arise in this case, how do our decisions impact on the tribunal's findings? In relation to the claim under the Sex Discrimination Act 1975, the applicant contends that the facts established in relation to both the lack of transparency and the failure of the employer to deal properly, or at all, with the questionnaire, must have invoked the operation of section 63A, thus requiring, first, an indication in the decision of the tribunal that it had reversed the burden of proof and, secondly, consideration of the adequacy or otherwise of the employer's explanation. The applicant further submits that, whilst the tribunal had made reference to the relevant statutory provisions, including section 63A, it did not carry out the two-stage process and, indeed, in the final paragraph of its decision, had effectively sought to roll up the two stages by looking for the "effective and predominant cause" without undertaking the precise task imposed by section 63A. As we have already indicated, Mr Lemon submits that on the facts of this particular case the tribunal, having considered both the lack of transparency and the deficiencies in the questionnaire process, had accepted the employer's reasons for the differences in bonus between the applicant and Mr Savage, being unrelated to sex without having to invoke section 63A.

30 Dealing with transparency, the applicant's substantial complaint was in relation to certain paragraphs of the decision, in particular paragraphs 38, 39 and 88, wherein the tribunal found and appeared to condone, in part relying on their "industrial knowledge", that the City "bonus culture" was one of secrecy and lack of transparency. The employment tribunal's alleged "industrial knowledge" of this culture certainly conflicted with the lay members of this appeal tribunal, who had experience of many large institutions operating transparent bonus systems, including formal end of year appraisals, followed by a properly documented bonus setting procedure. This tribunal would certainly wish to make it clear that no tribunal should be seen to condone a City bonus culture, involving secrecy and/or lack of transparency because of the potentially large amounts involved, as a reason for avoiding equal pay obligations. Mr Allen highlighted the tribunal's findings in relation to "the backdrop of an unwritten, non-transparent bonus policy in an organisation, without an appraisal system, without an equal opportunities policy", coupled with the tribunal's findings that they were not satisfied that the employer had given all discovery possible on the topic. The employer had not produced any documents relating to the process of determination of the bonuses; there was no documentation as to the determination of the salary increase and long-term incentive payment increases for Mr Horsman, or the basis upon which the amount of those increases had been determined. The tribunal had observed, concerning Mr Crosthwaite's evidence: "He was not forthcoming, either in the conduct of the litigation or in the course of evidence, as to pay differentials and reasons for them." The employer had refused to give any details of bonuses for anyone other than the applicant and her two comparators and, indeed, the process to obtain information about both the bonuses and salary packages of Mr Horsman and Mr Savage was extremely protracted. The agreed history placed before this court showed that the basic pay of Mr Savage was not disclosed until 18 September 2001; the salary for Mr Horsman and his long-term incentive payments, together with

A those for Mr Savage, and their bonuses, were not completely disclosed until 18 December 2001, and Mr Horsman's share options were not disclosed until 28 February 2002.

31 This history leads into the second major area of complaint from the applicant, which concerns the tribunal's failure to draw proper inferences from the employer's failure to deal with the litigation process, and, in B particular, the questionnaire process. Both counsel in the hearing before us spent some time taking us through the questionnaire and the replies, in an effort to satisfy us that there had been serious default on the part of the employer, and more particularly Mr Crosthwaite, in dealing with these matters. The tribunal dealt with these issues firstly in paragraphs 47–52, under the heading "Litigation Process". In dealing with the alleged failure to provide details of Mr Savage's bonus and long-term incentive payment, the C tribunal found that "there was a consistent avoidance of providing these details until an order was made by the tribunal for their disclosure in December". The tribunal also refers to an answer in the questionnaire which denied that Mr Savage was intended to be the head of the media team, although the tribunal in paragraph 33 had found that there was an intention that Mr Savage should lead the team. The tribunal also pointed out that it D took until April 2002 for final details of all payments made to Mr Horsman to be disclosed. The tribunal also found that behavioural issues against the applicant were not expressed to be a significant component in the bonus calculation until the amended IT3 was lodged on 29 January 2002. Again, in paragraph 81, the tribunal referred to the "questions in relation to the history of the litigation in this case, the avoidance of disclosure of E information and the changing of the [employer's] case over time". Mr Allen, in both his written and oral submissions, referred to certain other inconsistencies, some of which Mr Lemon has sought to answer. We do not find it necessary to go into each and every allegation. The tribunal's findings, albeit somewhat brief, coupled with the agreed history of this case make it clear that there were a number of serious matters, arising out of the failure of the employer to deal properly with the questionnaire procedure F and/or to give clear and consistent replies, that should have required the tribunal to draw adverse inferences.

32 We are, therefore, quite satisfied that there was an abundance of primary fact material from which the tribunal could, and indeed should, have drawn inferences, in the absence of an adequate explanation from the employer, such that they could conclude that an act of discrimination had G been committed, and that therefore the burden of proof was placed upon the employer to prove that sex was not a reason for the less favourable treatment in relation to the bonus setting.

33 Mr Allen further submits that since the tribunal made no adequate findings in relation to why the employer failed to deal properly or at all with the questionnaire procedure, then it must follow that the employer has failed to discharge the burden of proof that was upon it, and that the applicant is H entitled to a finding of discrimination. Mr Lemon argues that the burden is upon the employer to prove that it did not commit the act of discrimination, and that even if it does not have a satisfactory answer to all aspects of the questionnaire procedure, providing that it can satisfy the tribunal that the difference in sex played no part in its less equal treatment, then it would have

discharged the burden. We can see the force of Mr Lemon's submission, although since the applicant's case rested principally on the lack of transparency and/or the failure to deal with the questionnaire procedure, the tribunal would certainly need to satisfy itself about these matters and examine carefully the employer's explanations before coming to the conclusion that the employer had discharged the burden upon it, particularly in the light of the importance given to both these aspects by the Code of Practice and the section 74 procedure. However, since the tribunal clearly did not, in our view, deal with the matter in the required two-stage process as we have indicated, we would propose to remit the matter to a fresh tribunal for it to reconsider the matter.

34 In relation to the equal pay claim, Mr Allen criticises the tribunal's decision, particularly in relation to its alleged failure to deal with the *Brunnhofer* criteria (*Brunnhofer v Bank der Österreichischen Postparkasse AG* (Case C-381/99) [2001] ECR I-4961) that we have set out above. In particular, he makes the following submissions.

(a) In the employer's reply to the questionnaire, it advanced three reasons for a differential in salary, two of which were related to criticisms of the performance of the applicant; at the hearing, the only reason advanced for the difference was that Mr Horsman was being head-hunted.

(b) Mr Crosthwaite's evidence was only that he had been told by another person that Mr Horsman was being head-hunted and had not made any inquiries with him about this, or as to the incentives that he was being offered. Mr Allen therefore submits that there was no evidence upon which the tribunal could make findings of fact that there was a real need on the part of the employer to increase Mr Horsman's salary and linked benefits in the way that it did.

(c) Even if there was a need in 1999 to provide some additional benefit for Mr Horsman, there was no evidence before the tribunal that the increases in salary/long-term incentive payments/share options was proportionate to meet that need. The only evidence came from Mr Crosthwaite, who said that Mr Horsman's salary was just increased to the highest that they could. In particular, there was no reason why there should have been a differential of share option when the options were granted in December 1999.

35 It was necessary for the employer to show that the material difference had existed throughout the period where there had been a difference in salary up to the point where the applicant's salary had been increased to that of Mr Horsman's in April 2001. The applicant's long-term incentive payments had not then been increased to the same as those of Mr Horsman, and when asked for an explanation for this failure in cross-examination, Mr Crosthwaite's response was: "It did not occur to us." Mr Allen argues that there was therefore no evidence to support the genuine material difference in relation to long-term incentive payments after equality of salary was restored in April 2001, particularly as the letter accompanying the salary increase in April 2001 had referred to the applicant's improved performance prior to the increase in her salary.

36 Finally, Mr Allen argues that the inferences that could be drawn from the lack of transparency and/or the failure to deal with the section 74 procedure are equally applicable within the equal pay claim.

37 Mr Lemon argues that the tribunal clearly, in paragraphs 77 and 78, deals with the seven criteria the employer has to prove to establish the material factor defence emanating from the desire to prevent Mr Horsman being head-hunted, which he contends was a continuing threat through 2000 and 2001, and that, as the tribunal found in paragraph 78, the differences "conformed to the principle of proportionality in that they corresponded to a real need of the undertaking, were appropriate to achieve that objective and necessary to that end". However, we cannot agree with that approach. Bearing in mind the background to this case, to which we have already made reference, namely the lack of transparency and the serious failure to deal with the questionnaire process, these were important factors which the tribunal failed to take into account when assessing the material factor defence. In particular, the tribunal failed properly to deal with: (1) whether the employer had proved that there were objective reasons for the difference; (2) the issues of proportionality; and (3) whether there was a real need on the part of the business for those differences existing throughout the period of the difference, i e between 1999 and 2001, particularly in the light of the employer's willingness in April 2001, following a complaint from the applicant, to increase her salary level to that of Mr Horsman without his salary then being further increased. Accordingly, in relation to the equal pay claim, we propose to allow the appeal and direct a rehearing before a different tribunal.

Appeal allowed.
Case remitted.

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