

THE HIGH COURT

[2017 No. 34 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE
RELATIONS ACT 2015 AND PURSUANT TO THE PAYMENT OF WAGES ACT 1991

BETWEEN

CHARLES STEFANAZZI

APPELLANT

AND

THE LABOUR COURT

RESPONDENT

AND

DEPARTMENT OF ARTS, HERITAGE, REGIONAL, RURAL AND GAELTACHT AFFAIRS

NOTICE PARTY

JUDGMENT of Mr. Justice MacGrath delivered on the 9th day of October, 2019.

1. This is an appeal on a point of law pursuant to s. 7(4)(b) of the Payment of Wages Act, 1991 (*"the Act of 1991"*) from the determination of the Labour Court made on the 20th December, 2016, whereby it refused Mr. Stefanazzi's appeal from a decision of the adjudication officer on the issue of the wages properly payable to him in accordance with s. 5(6) of the Act of 1991.
2. Mr. Stefanazzi is employed by the notice party in the Site Designation and Plans Unit of the National Parks and Wildlife Service. This unit was historically under the control of the Department of the Environment, Heritage and Local Government but was transferred to the Department of Arts, Heritage and the Gaeltacht (*"the Department"*) from 2011. He is employed at clerical officer grade but maintains that for some considerable time he has been fulfilling the duties of a geographic information system technician (*"GIS technician"*) at executive officer level, which attracts a higher rate of pay.
3. In its determination, the Labour Court described the central contention of the applicant as being the failure of the Department to pay wages properly due to him and that this failure constituted a deduction in accordance with s. 5 of the Act of 1991, ss. (6) of which provides: -

"Where -

- (a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act).*
- (b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee, then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion."*

The Labour Court's Determination

4. The appeal was heard by the Labour Court in accordance with the provisions of s. 44 of the Workplace Relations Act, 2015 on 14th December, 2016. Ms. Caitriona Ryan, the head of human resources at the notice party's Department, who has sworn affidavits on behalf of the notice party, avers that in the course of the hearing an objection was made that the appellant's claim had not been filed within the appropriate time limits as set out in s. 6(4) of the Act of 1991 but the Labour Court focused on a different point, namely *how wages become properly payable to a civil servant in the Department* (emphasis added) and subsequently made its ruling on this. It seems that in coming to this decision, the Labour Court was of the view that a finding on this issue had the potential to be determinative of the case.
5. The preliminary issue deemed to require determination was whether, at the material time, a rate of pay was properly payable to the appellant, higher than that which was actually paid to him. If no such rate of pay was properly payable to him at the material time, then s. 5(6) of the Act of 1991 could have no application because the pay received by him would have been in accordance with that which was properly payable to him.
6. The Labour Court expressly records in its determination that the parties accepted its decision as regards this approach and consequently made submissions concerning the mechanisms employed to assign a rate of pay, or a grade, to a civil servant in the Department. The Labour Court also expressly noted that while there was disagreement with regard to the range of mechanisms available to award acting up allowances or higher duty allowances, *it was common case that a procedure had to be followed by the Department in order to apply a rate of pay, award a grade, or assign an acting up/higher duty allowance to a person in the position of the applicant* (emphasis added). It is also expressly stated that it was common case that the application of any greater allowance following the execution of such procedure required the sanction of the Department of Public Expenditure and Reform, and that no available procedure had been followed in relation to the applicant in order to secure for him a higher grade or an acting up/higher duty allowance. The court also noted the Department's assertion that no sanction had been received from the Department of Public Expenditure and Reform for the application of a higher rate of pay, the award of the higher grade, or the assignment of an allowance to the appellant.
7. The Labour court found that no procedure had been followed by the Department which would create a rate of pay properly payable to Mr. Stefanazzi, other than that which he did receive at the material time. It found that he was not at any time assigned an acting up/higher duty allowance, awarded a grade other than that of clerical officer in the Department, or otherwise had a higher rate of pay applied to him. It determined that the total amount of wages paid to the appellant at the material time was not less than the amount properly payable to him throughout that period. His appeal could not therefore succeed.
8. For the sake of completeness, it ought to be recorded that the adjudicating officer in his ruling described the complaint as being misconceived and hopelessly out of time, stating

that the appellant was relying on a breach which allegedly occurred in 2009 to advance a complaint made in 2015. He also stated that the Act was not the appropriate vehicle for advancing what he regarded as a re-grading claim. The appellant disagrees with this assessment and contends that there were ongoing and continuous breaches of the Act, and that in any event, the hearing before the Labour Court was a *de novo* hearing.

The appeal to this Court

9. The appeal to this Court is grounded on an affidavit of the appellant sworn on the 25th January, 2017, at paras 3 to 5 of which Mr. Stefanazzi summarises the errors of law into which he asserts the Labour Court fell. These are as follows: -

- a. it failed to recognise the breach of the Act of 1991;
- b. it overextended the limits of its role by exonerating the Department on the preliminary point while at the same time acknowledging that the notice party did not follow its own procedure as an employer of the plaintiff; and
- c. the procedures not followed by the Department should have been held determinative in the Labour Court' finding under the Act of 1991.

Factual background

10. The appellant obtained an honours degree in geography from Trinity College Dublin in 2004, a major component of which was GIS. He commenced employment with the Department (or rather its predecessor) as a temporary clerical officer in June, 2007. Initially he provided cover for an executive officer who was on leave from the Site Designation and Plans Unit of the National Parks and Wildlife Service ("*NPWS*"). It is his case that at interview with the Public Appointment Service he informed the interviewer that he was only interested in taking up a position that was closely associated with his qualification, a major component of which was GIS. He maintains that he was informed that the Department had a GIS unit but did not have an administrative division and he was therefore assigned to the Sites Designations and Plans Unit which had a close working relationship with the GIS unit. On 1st August, 2007 it was decided by the personnel unit to establish a position on a probationary basis, being that of clerical officer within the same unit. He maintains that the basis of this offer was that he was successful in entering a competition for the established position of clerical officer, that he had made it known that his qualifications would be an asset to the department and that a posting in the NPWS would be beneficial to his career development. He signed a probationary contract on 15th August, 2007 for a period of one year. He was made permanent in 2008.

11. The appellant contends that on 23rd July, 2009 it was agreed between Mr. Jim Kelly, assistant principal of the Site Designations and Plans Unit and the GIS coordinator, Mr. Robert Ovington, to transfer him from Unit to the GIS to take over from a GIS technician who was due to take a career break from the end of August, 2009. The appellant maintains that it was a requirement of the Department that GIS technician candidates should hold certain qualifications; including a primary degree with GIS or equivalent, and that he was so qualified. He avers that he has continued to carry out the duties of GIS technician since joining the unit. He points to the fact that the notice party paid for

specialist training in the field of GIS and funded a Masters degree course at Dublin Institute of Technology which he attended during business hours. He was awarded an M.Sc. in Spatial Information Management/GIS in 2012. In 2013, he applied to become a member of the Society of Chartered Surveyors Ireland, to what is described as the Graduate Route 2 pathway and was accepted by the Board of the Society and the Department.

12. Mr. Stefanazzi places particular emphasis on written observations of the GIS manager, Mr. Gareth John, in a 2013 review document which was submitted to the personnel unit of the Department, entitled "*GIS Service and Staff Review for Department of Arts, Heritage and the Gaeltacht*". Mr. John highlighted the situation of a clerical officer in the NPWS GIS unit carrying out the duties of the GIS technician but not being remunerated accordingly. The appellant asserts that he was suitably qualified as a GIS professional to fulfil that role and that the Department facilitated the advancement in his technical ability and responsibility and paid for his attendance at a number of specialised training courses and conferences attended by fellow GIS technicians.
13. In an affidavit sworn on the 20th April, 2017, Ms. Ryan avers that the appellant's case is built on an erroneous belief that he is employed at a higher grade than he actually is. It is the Department's case that in 2009 the appellant expressed an interest in becoming more involved in GIS within the Department. This expression of interest was responded to positively by management in what is described as a spirit of goodwill and in accordance with the Department's business needs. The notice party maintains that the appellant was clearly informed, on transfer, that by working with the GIS unit he would continue to serve in the role of clerical officer and that the transfer did not entail him replacing another GIS employee or assuming duties that had previously been carried out by a GIS employee. It is also the Department's case that it was made clear to the appellant that he would continue to remain part of the Site Designations Unit to which he had been originally assigned.
14. The Department maintains that Mr. Stefanazzi is and was at all times fully aware that promotion to a higher grade is only possible through participation in open interview-based competitions. He has not achieved such position as a result of participation in the official recruitment process, as required. Recruitment and promotion within the civil service is managed by the Public Appointment Service operating under the Public Service Appointments (Management) Act, 2004. No competition for recruitment had taken place since 2006. Thus, it is contended that in the absence of such competition it was not possible for the appellant to have been promoted to the role of GIS technician.
15. The notice party also disputes the contention that the appellant has fulfilled the functions of a GIS technician and draws the court's attention to the fact that when the Civil Public and Services Union ("*CPSU*") agitated this issue on his behalf, it was informed, and accepted, that remuneration at the level of GIS technician could only be considered if the appellant was promoted to a comparable grade of executive officer following participation in an interview-based competition. The CPSU wrote to the Department on the 18th June,

2014 asserting that Mr. Stefanazzi had taken on the full GIS technician role from July, 2009, equivalent to executive officer level. The union referred to *HSE West v. A Worker* AD 1242 (2012), where the Labour Court found that it was unsustainable to continue an arrangement whereby different rates are paid for identical work and that the union's claim in seeking the application of the appropriate rate for the job was not precluded by the Public Service Agreements 2010-2014.

16. On 16th April, 2014, a solicitor representing the appellant wrote to the Department and made the same point. In a reply of 13th May, 2014, the Department stated that since 2009 Mr. Stefanazzi had been assigned to work with the GIS as a clerical officer providing assistance to the technical staff of that unit and while he had expressed his interest in developing his career in GIS, in light of the ongoing moratorium on public service recruitment since 2009, the Department continued to be restricted in its ability to recruit new staff and to offer promotional opportunities to existing staff.
17. In a further affidavit sworn by Ms. Ryan on 21st June, 2017, she avers that while in certain circumstances, a higher up allowance is available, it did not apply to Mr. Stefanazzi as he was not carrying out such work and at all times he worked in the capacity of clerical officer. To be appointed to an acting up position or a higher duty capacity position in 2012, the sanction of the Department of Public Expenditure and Reform was required. If sanction was given, a competitive process would then have to be undertaken and she maintains that Mr. Stefanazzi was fully aware of the competition process. Further, she maintains that the duties which were carried out by Mr. Stefanazzi during the period in question did not carry the same level of responsibility as those carried out by a GIS Technician Grade 1 staff member. She states that he was the subject of a lateral transfer which arose from his expression of interest and that he was clearly aware of the position which he was assuming which was to provide assistance in his capacity as clerical officer. She exhibits correspondence between the union and the Department. At all material times the appellant had been employed as a clerical officer and had been remunerated as such and therefore no unlawful pay deductions were made under the provisions of the Act of 1991. The appellant participated in a competition for an executive officer position in 2013 but was unsuccessful. She maintains that the refunding of fees is not relevant and that the purpose of the scheme is to benefit the employee's personal or career development and thus contribute to the overall objectives of the Department.
18. Ms. Ryan also states that a recruitment moratorium was imposed generally on the civil service in 2009. However, situations did exist where government departments, with the prior approval of the Department of Public Expenditure and Reform, could acquire sanction to fill special positions, subject to available payroll resources, in order to address existing and emerging business needs. Thus, for example, the competition for promotion to GIS manager in 2013 was one of those sanctioned exceptions.
19. Mr. Stefanazzi maintains that the eligibility criteria for the GIS manager position for which he applied in 2013, required a relevant GIS qualification and a minimum three years post

graduate experience with GIS. He asserts that the fact that he was accepted into this competition, constitutes an acknowledgement of his role as a GIS technician for a period of more than three years. Ms. Ryan states that the fact that he participated in such a competition did not in any way confirm that he satisfied the eligibility requirements. Qualifications and eligibility are not verified until the final stage of the process and an invitation to take part in tests, interviews or any other element of the selection process is not an acceptance of eligibility. The appellant, however, maintains that he had such experience and therefore satisfied eligibility criteria for the competition, and that funding under the Payment and Refund of Fee Schemes is only awarded to staff where the postgraduate qualification is directly related to the role, and his qualification was not related to the role of clerical officer. Ms. Ryan disputes this and in an affidavit sworn on 12th September, 2017 outlines various factors which are considered and assessed in order for a successful candidate to qualify for 100% funding. These include the year of study, the relevance of the course of study to the work of the Department and the level of the course chosen. She states that the appellant's application for funding was assessed in accordance with that criteria.

20. Mr. Stefanazzi contends that the Labour Court did not give due consideration to the evidence which was presented by him in support of his contention that he was fulfilling the role of GIS technician. It is clear that his submissions to the Labour Court, which were referred to in argument before this court, were very detailed and highlighted the many areas of responsibility, qualifications, training, course studies and duties (including digital editing of photographs and technical support to the NPWS) which he undertook and which he maintains are consistent with the role of GIS technician rather than clerical officer. He alleges that the Labour Court ruling fell short of an appropriate investigation. He states that the notice party's assertion that he was not carrying out the role of GIS technician was with a late attempt to justify not paying him properly.
21. In an affidavit sworn on 18th July, 2017, Mr. Stefanazzi highlights what he considers to be a contradictory position adopted by the Department in relation to the higher duty allowance being available to staff of the Department from that which it adopted in the Labour Court; where it "*proclaimed to the Labour Court that the only way in which he could be paid for the position he was carrying out as a GIS Technician*" would be for him to compete in an external competition, He states that he presented evidence that staff in the Department were in receipt of an acting up/higher duty allowance, and had been promoted automatically and without external competition based on those higher duties – a position which he asserts was conceded to be true. He produced to the Labour Court and relied on a letter dated 4th October, 2012 from the Secretary General of the Department in which it was stated that all acting up/higher duties allowances were restricted under the moratorium and that "*where an exception to the moratorium is allowed, such allowances can only be paid where the acting exceeds a continuous period of 84 days*". He maintains that in acknowledging that a higher duty/acting up allowance was available to staff, the Department continued to benefit from him fulfilling the role of GIS technician. It was not a coincidence, he states, that the Department chose him to fill this roll. Ms. Ryan in an affidavit sworn by on 12th September, 2017, however, she

reiterates that promotion to a higher grade, including in an acting capacity, is only possible through participation in a competitive process. She also maintained that the appellant was assigned tasks appropriate to his grade and those carried out by him required a level of supervision which would not be required for a GIS Technician Grade 1.

The Appellant's submissions

22. The appellant's submissions were succinctly outlined in the forms/information sheets completed by him in respect of applications in proceedings involving a litigant in person, and which he repeated and supplemented in submissions to this court. A number of his arguments were outlined in his affidavits and have been referred to earlier in this judgment. Mr. Stefanazzi submits that the court has jurisdiction to intervene and should do so and that despite the Labour Court being provided with substantive evidence in support, it dismissed the claim without taking cognisance of the facts and thus acted in breach of the Act of 1991. He also contends that he had a legitimate expectation to be awarded an acting up allowance for the role which he was fulfilling. He relies on a number of authorities which are referred to below. He submits that the Labour Court erred in law in not affording him the opportunity to present his evidence, that it erred in deciding to hear a preliminary issue rather than to allow him to present all his evidence, that it erred in affording undue weight to the absence of procedures and in failing to recognise that there had been a breach of the provisions of the Act of 1991. Reliance is also placed on the decision of O'Malley J. in *Minister for Education and Science v. The Labour Court & Ors* [2015] IEHC 429. He requests this Court to determine whether the Labour Court erred in law by making its decision on a preliminary point and submits that it came to its decision without examining the facts or affording him the opportunity to present his evidence.
23. The appellant relies on the Labour Court decision in *HSE West* where the Court upheld the recommendation of the Rights Commissioner and ordered that an employee be placed on an appropriate salary scale to reflect her duties at work, despite the argument of the employer that a moratorium had been placed on promotions at the time the claim arose. He submits that this constitutes a correct interpretation of the claim as being an application of an appropriate rate for the job, rather than an application for an increase in an existing rate. He also relies on a decision of the Employment Appeals Tribunal ("*EAT*") in *Malanaphy v. Minister of Transport, Tourism and Sport* W 655/2012 (2012) where the applicant was seeking to be paid in line with his predecessors. The EAT was satisfied that the appellant had fulfilled the same role albeit under a different title which was not graded. The EAT concluded that it was fundamentally unfair to deny the appellant like payments for like work solely based on the premise that the new named position had not yet been graded.
24. Mr. Stefanazzi also argues that he has a legitimate expectation to such pay because he was carrying out the role of GIS technician in similar manner as his GIS technician colleagues.

He does not maintain that he had been re-graded but contends that he has been carrying out the duties of a GIS technician. A central thrust of his argument is that by not having procedures, as opposed to not following them, the notice party may circumvent its

statutory obligations. Insofar as the preliminary issue is concerned, he informed this court that there may have been a misinterpretation of what was being proposed by the Labour Court. It is to be observed, however that a case is not made by Mr. Stefanazzi on affidavit that he was in any way misled by the Labour Court in relation to its proposal to deal with the matter by way of preliminary issue. Indeed, at para. 7 of the affidavit sworn by him on 15th May, 2017 he avers: -

"I say that during the Labour Court hearing the Plaintiff brought the Court's attention to parts of his submission as at the Court's resolve it wanted to examining (sic) how wages become properly payable to a civil servant. However I believe the Plaintiff's submission as a whole which was submitted to the Labour Court within the statutory period of time prior to the hearing more than validated such a preliminary point as brought to the fore by the Labour Court."

The Notice Party's submissions

25. Mr. Leonard B.L., on behalf of the notice party, submits that as this is an appeal on a point of law from the determination of the Labour Court due respect must be shown to that decision. The Labour Court is a specialist body in the area of industrial relations disputes and the principle of curial deference applies. This is particularly so where the court is called upon to resolve disputes of a factual nature. That this court may disagree with a factual conclusion is not a sufficient basis upon which to intervene and it can only do so where the conclusion is so abhorrent to logic and common sense, or involves an error of law. He places reliance on the decision in *HSE v. O'Doherty* [2015] IEHC 611 where Noonan J. reiterated the reluctance of the courts to interfere with a finding of fact by the Labour Court and would only do so if the finding was irrational, unreasonable and was not supported by the available evidence. It is contended that the finding under challenge cannot be described as unsustainable but was an entirely logical and rational decision based on a comprehensive and fair analysis of the information which was before the Labour Court. It is submitted that the claim pursuant to the Act of 1991 is based on the applicant's erroneous belief that he was employed at a higher grade than was the case. Counsel suggests that reliance by Mr. Stefanazzi on the comments in Mr. John's report confirms that Mr. Stefanazzi was employed as a clerical officer. He submits that the Labour Court considered Mr. John's evidence and his report but ultimately what the Court was obliged to consider was a complaint under the Act of 1991.

The role of the court on appeal

26. In *Fitzgibbon v. Law Society* [2015] 1 I.R. 156, Clarke J. (as he then was) observed at para. 73: -

"Where the legislature confirms a right to a statutory appeal, it must evidently be assumed that this was intended to have some meaning and some purpose. Where, for example, judicial review is independently available, it must be considered as conferring some additional benefit(s) on the appellant. Something separate from a mere 'test' for legality, or the mere quashing or remitting of a decision based on standard judicial review grounds. The range of possibilities in this regard is extensive, varying from a full appeal, as from the Circuit Court to the High Court on

*circuit (s. 38 of the Courts of Justice Act 1936), to one strictly limited, say on a point of law, perhaps even further limited by the nature of the point and only then on due certification by the trial court (see as examples, s.29 of the Courts of Justice Act 1924 as substituted by s. 22 of the Criminal Justice Act 2006 and as later amended and s. 50(3)(f) of the Planning and Development Act 2000). In between, one can find several other variable forms of 'appeal'. It therefore follows that the availability of such a right does not mean that all reviews, by way of appeal, are necessarily the same: quite obviously they are not. As Costello J. pointed out in *Dunne v. Minister for Fisheries* [1984]1 I.R. 230, 'in every case the statute in question must be construed' (p.237). Barron J. in *Orange* said 'the test for competition cases cannot be a guide for other cases' (p. 238): certainly, without much concordance on many other important factors, this surely must be right. This therefore being the situation, it then becomes necessary to consider each legislative framework in its own right".*

27. Clarke J. acknowledged that expertise and knowledge is at the very heart of the rule and that the greater level of expert knowledge which a body has, the greater should be the respect; but cautioned against the over application of the principle of curial deference.
28. In *An Post v. Monaghan* [2013] IEHC 404, Hedigan J. observed that the role of the court is limited and it may intervene only where it finds that the decision is based on an identifiable error of law or an unsustainable finding of fact. The authorities in this point highlight the fact that such decisions are made by expert administrative tribunals and furthermore that when it comes to the question of fact, a practical reason for the reluctance to interfere is that this Court has not heard the evidence which the Labour Court had the benefit of hearing. Thus, for example, in *Dunnes Stores v. Doyle* [2014] 25 ELR 184, Birmingham J. considered that findings of fact by the EAT was deserving of great respect as it was at a tribunal representing both sides of industry.
29. It is clear that the role of this court on an appeal such as this is limited. It may only intervene where an error of law has been demonstrated or where a finding of fact has been made which is unsupported by the evidence presented to the Tribunal below. In the light of the appellant's submissions, written and oral, in essence, therefore, a principal issue to be addressed on this appeal is whether, as a matter of law, the court erred in determining the matter by way of preliminary issue.

Decision

30. In the affidavits and submissions of the appellant, no ground of appeal is suggested to arise on the basis of the inadequacy of reasons provided by the Labour Court for adopting the preliminary procedure and framing it in the manner in which it did. The court acknowledges that Mr. Stefanazzi was unrepresented before the Labour Court. It may be that had he been represented, the course of action proposed by the Labour Court might not have been acceded to. Nevertheless, in the light of the contention that the Labour Court erred in law in its approach, and in the interest of justice, it is relevant to consider its jurisdiction in relation to the procedures employed.

31. Section 20(5) of the Industrial Relations Act, 1946 empowers the Labour Court to make rules for the regulation of its procedures. Section 20 was amended by s. 50 of the Workplace Relations Act 2015, pursuant to which the Labour Court (Employment Rights Enactments) Rule 2016 were adopted. Rule 57 provides: -

"The Court may, in its discretion, give a preliminary ruling on any aspect of the case where it is satisfied that time and expense may be saved by the giving of such a ruling."

Rule 47 also provides that the conduct of the hearing of an appeal is to be regulated by the chairman of the division of the Labour Court before which the appeal takes place. For the sake of completeness it is to be noted that these rules have now been replaced by the Labour Court Rules 2019 which at rules 41 and 31 make similar provisions in respect of preliminary rulings and the conduct of the hearing. Therefore, it appears to me that the Labour Court had the power to proceed by way of preliminary ruling if satisfied that time and expense might be saved in so doing.

32. There is no reference in the determination of the Labour Court as to the basis upon which it considered that the preliminary issue, as defined by it, had the potential to be determinative of the case. Little insight is presented as to the basis upon which as a matter of law the Labour Court concluded *how wages become properly payable to a civil servant in the Department*, was potentially determinative of the issues before it. It would seem that this was a procedure which the court itself raised and adopted. Further, there is little discussion as to the meaning or correct interpretation of the expression "*properly payable*" in s. 5(6) of the Act of 1991.

33. In *Earagail Eisc Teoranta v. Ann Marie Doherty and Others* [2015] IEHC 347, Kearns P. stressed the obligation on a decision maker to provide reasons for its decisions. He concluded, in the circumstances of that case, that there had been a manifest error of law in the Tribunal's interpretation of s. 5 of the Act of 1991. It had determined that under s. 5(1)(c) the written consent of the employee was required before the company could bring about any changes to salary levels. He further concluded that the Tribunal had failed to provide adequate reasons for a number of its findings. While the duty to give reasons did not require extensive analysis of every aspect: -

"...and indeed, as held in Faulkner, the 'gist' of the basis for a decision is sufficient. However, in the present case I am satisfied that the brief determination of the Tribunal is wholly inadequate to meet even this low threshold. It is not clear how the Tribunal arrived at the determinations it did and there is not as much as a fleeting reference to vital matters such as the 'reduction or deduction' argument or why section 8.2 of the company handbook is not applicable".

34. Submissions had been made relating to relevant sections of the contract of employment handbook but there was no finding in relation to them. He continued: -

“There is no engagement whatsoever, however minimal, with the detailed submissions of the appellant in relation to its financial circumstances at the time and no consideration of the circumstances relied upon by the appellant for introducing the pay cut”.

He was satisfied that the Tribunal had erred in failing to apply well-established principles of construction to the provisions of the handbook and in failing to give reasons for its finding. Importantly, he stated: -

“Both sides were in dispute on this point and the decision of the Tribunal fails to indicate which submission was preferred and why” (emphasis added).

35. It is evident from the passage above that there was a conflict between the parties as to the proper manner in which the handbook should be construed and Kearns P. was critical of the inadequacy of the reasons given for the decision of the EAT. In this case, however, it is clear from the express wording of the determination of the Labour Court that the parties accepted its decision regarding the preliminary issue and made submissions on the mechanisms undertaken or employed to assign a rate of pay or to upgrade in the Department. It is difficult to see a basis upon which it might be contended that where the parties have consented to, or have accepted a particular procedure, that one who is subsequently disappointed with the outcome ought to be entitled to protest that the procedures which were employed were unfair or arose as a result of an error of law. It is not suggested by Mr. Stefanazzi in the affidavits sworn in support of this appeal that he was in some way misled by the Labour Court. Although to this Court he submitted that there may have been a misunderstanding about what was proposed by the Labour Court, the extract from his affidavit referred to in para. 24 above, would tend to suggest that he was satisfied that the Labour Court had information before it to determine the case on a preliminary basis.
36. While I have considerable sympathy with the argument made by Mr. Stefanazzi in connection with the nature of the duties being fulfilled by him, many of which tend to support and corroborate his argument that he was in fact fulfilling the duties of a GIS technician, the fact of the matter is that the express determination of the Labour reflects an agreed approach to the determination of the issue on the preliminary basis proposed. Given the limited role of this Court on an appeal such as this, the room for intervention must, of necessity, be limited.
37. It is true that the Labour Court does not provide any specific reason as to how it came to its decision to proceed by way of preliminary issue. It seems to me that if there had been an absence of consensus, a disagreement or demur from the suggested course of action, there may be merit in an argument that the failure of the Court to provide reasons as to why it adopted such approach might lead to its determination being susceptible to successful challenge on appeal on the basis of the reasoning of Kearns P. in *Earagail Eisc Teoranta*. However, the fact that this was a procedure which was acceded to at the time, and upon which submissions were made leads me, not without some hesitation, to the

conclusion that it would be inappropriate to interfere with the determination of the Labour Court on this basis.

38. Even if I am incorrect in this, having considered the evidence and in particular the evidence placed before the Labour Court and to which this court was referred in argument, I am satisfied that there was material before the Court upon which it was open to it to conclude as it did, although that is not to say that this court would necessarily have taken the same view of the facts.
39. An analysis of the decision reveals essentially two findings. The first relates to the absence of a procedure being followed which would create a rate of pay property payable other than that which was received. The court earlier in its determination had described as being common case the position of the parties that a procedure had to be followed in order to apply such a rate of pay. On that basis, it is difficult for this court to intervene where the issue was approached on the basis of a consensus of the parties and in accordance with the general powers of the Labour Court to determine preliminary issues. In any event, in my view there was evidence before the Court on which it might come to that determination. Similar reasoning applies to the second finding on the basis of the facts then presented to it - whether at the relevant time Mr. Stefanazzi was assigned acting up/higher duty allowance or awarded a grade other than that of clerical officer or otherwise had a higher rate of pay apply to him, the Labour Court noted that the application of any greater allowance following the execution of such procedure required the sanction of the Department of Public Expenditure and Reform and that it was also common case that at no time was such procedure followed in relation to the appellant in order to secure for him a higher grade or acting up/higher duty allowance.
40. To deal with certain of the authorities relied upon by Mr. Stefanazzi, in *HSE West*, the Labour Court was concerned with an application under the Industrial Relations Act, 1969, in particular s.30(9) in the context of a dispute as to whether a worker should be upgraded to a social work team leader salary. It was contended that the worker was carrying out more work for significantly less pay than her colleagues. The employer argued that the claim was precluded by the terms of the Public Service Agreement 2010-2014 and there was no standardised grade/rate of pay for people undertaking the work in question. The union argued that the case predated the moratorium on promotion and the Public Sector Agreement and contended that the social work team leader scale was the appropriate rate for the job, a view shared by the claimant's managers. The Labour Court found that it was unsustainable to continue an arrangement whereby different rates were paid for identical work. In the circumstances, the Labour Court decided that the union's claim should properly be classified as being for the application of the appropriate rate for the job, in the nature of an individual re-grading, rather than for an increase in the existing rate. As such, the claim was not precluded by the Public Service Agreement. Mr. Stefanazzi submits that this constitutes a correct interpretation of the claim as being an application for an appropriate rate for the job, rather than an application for an increase in an existing rate. The precise factual background is not entirely clear and it is further unclear whether it was necessary to follow a particular procedure, whether by way of

open competition or otherwise, with regard to the job being fulfilled. Further, it seems clear from the decision that it concerned an appeal from a recommendation of the Rights Commissioner regarding an upgrading claim and the court did not consider the provisions of s. 5(6) of the Act of 1991. The case also predated the moratorium on promotion and the Public Sector Agreement.

41. *Malanaphy* concerned an appeal to the EAT from a decision of the Rights Commissioner under the Act of 1991. It is more on point. The appellant therein was appointed Coastal Unit Sector Manager. He took over the position when those previously in the position were promoted. He was not paid a shift allowance, on-call allowance, increments, or Sunday supplement which, as he alleged, his predecessors who were of the same grade were paid. The notice party, the Minister for Transport, Tourism and Sport, argued that he was not graded at the relevant time. There was a factual issue as to whether the appellant knew or ought to have known that he would be entitled to such allowances and increments as part of his package. He claimed that he had a legitimate expectation in relation to such payments, formed on the basis of the information supplied to him and by precedent which had been set by payments made to his predecessors. The EAT concluded that he had carried out the same role as his predecessors, albeit he was given a different, ungraded, title and that it was fundamentally unfair to deny the appellant like payments for like work solely based on the premise that the newly named position was not yet graded. It found that he had a legitimate expectation that payments would be made as he claimed. There was therefore a breach of the implied terms of his contract as a result of which the provisions of s. 5(6) of the Act had been transgressed. Again, although more on point than *HSE West* it is not entirely clear that the facts are similar to that in the instant appeal and I note that a fact in dispute was one of grading; and that a newly named position was not yet graded.
42. Further, it is not clear that the decision in *Minister for Education and Science v. The Labour Court* is directly relevant. It concerned an issue which arose under a different legislative regime. It was an application for judicial review and the court was there concerned with the claim under the Protection of Employees (Part-Time Work) Act, 2001. It was held that, although not a national school teacher or a teacher in a recognised school, the Labour Court was correct in determining that she was employed on the same basis as such teachers and that teachers whose salaries were publicly funded must be deemed to be employees for the purposes of that legislation.
43. In all the circumstances, and not without some sympathy, I find that Mr. Stefanazzi, a most courteous individual and on the basis of the information before this court, a very diligent worker, has failed to discharge the onus of proof which is upon him and therefore I must dismiss the appeal.