

THE HIGH COURT

[2017/ 81 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE  
RELATIONS COMMISSION ACT, 2015

BETWEEN

TRINITY LEISURE HOLDINGS LIMITED TRADING AS TRINITY CITY HOTEL

APPELLANT

AND

SOFIA KOLESNIK AND NATALIA ALFIMOVA

RESPONDENTS

**JUDGMENT of Mr. Justice Binchy delivered on the 7th day of October, 2019**

1. This is a judgment on an appeal brought by the appellant against a decision of the Labour Court of 17th January 2017. As prescribed by O. 84 (C) of the rules of the Superior Courts, the appeal is brought by way of an originating notice of motion, grounded on an affidavit sworn on behalf of the appellant by a Mr. Ronnie Neville, solicitor, of Mason Hayes and Curran, solicitors for the appellant. Provision for such appeals is made by s. 46 of the Workplace Relations Act 2015, on a point of law only.
2. The respondents advanced identical claims against the appellant alleging various breaches of employment law legislation, only one of which is relevant to this appeal, and that is the claim that the claimants were not paid a premium for working on Sundays. That claim is advanced pursuant to s. 14(1) of the Organisation of Working Time Act 1997 ("the Act of 1997"). The appellant seeks, *inter alia*, the following orders: -
  - (i) An order declaring that the Labour Court erred in law in assuming jurisdiction under s. 14(1) of the Act of 1997, or in applying that section to the respondents in granting them relief pursuant to the same;
  - (ii) An order allowing the appeal on the ground that the Labour Court erred in law in awarding Sunday premium to the respondents;
  - (iii) A declaration that the Labour Court erred in law in determining that the appellant had to tender evidence in relation to what element of the respondent's hourly rate of pay was specifically referable to them having to work on Sundays;
  - (iv) A declaration that the Labour Court erred in law in failing to find the fact of the respondents having to work on Sundays had been taken into account in the determination of their pay.
3. A statement of opposition was delivered on behalf of the respondents in which they deny each ground of appeal relied upon by the appellant in its appeal/notice of motion. In summary, the respondents plead that the decision of the Labour Court involves unappealable findings of fact, and that the appellant has failed to identify any errors of law on the part of the Labour Court in arriving at its decision.
4. The first named respondent originally entered into her contract of employment on 10th September 2007, and the second named respondent entered into her contract of

employment on 11th September 2006. The respondents were not initially employed by the appellant and their respective employment contracts transferred to the appellant in September 2013 pursuant to the EC (Protection of Employment on Transfer of Undertakings) Regulations 2003, S.I. 131 of 2003. Their contracts made provision for payment of salary at an hourly rate, which, on the date on which their claims were made, was in each case €9.53 per hour. In each case, the contract having stated the hourly rate of pay, goes on to state: -

“This includes your Sunday premium based on you getting every third Sunday off (i.e. you work two Sundays out of three). Payment will be made weekly with one week in arrears and will be paid directly into your bank account [...]”

5. It was the respondent’s contention before both the Labour Court and the Rights Commissioner that where a Sunday premium is included in an employee’s rate of pay, then some element of the employee’s pay must be specifically referable to the obligation to work on Sundays. Since in this case the contract did not identify any element of the claimants’ pay as being a premium for working on Sundays, then it follows that the fact of the employees having to work on Sundays has not been taken into account, and the employees are therefore entitled to be compensated in accordance with those provisions of s. 14(1) of the Act of 1997 that apply where the fact of an employee having to work on a Sunday has not been taken into account in the determination of his or her pay.
6. In response to this, it is the appellants’ case that the determination of the employee’s pay does take account of the fact that they are required to work on Sundays, because this is expressly stated to be so in the contracts, and there is no requirement that the contract should identify how much of the hourly rate of pay is specifically referable to Sunday work.
7. The Labour Court held against the appellant, in each case in identical terms, on the grounds that: -

“[...] the respondent failed to tender any evidence to the court in relation to what, if any, element of the complainant’s hourly rate of pay was specifically referable to her contractual obligation to work on Sundays. It follows that the respondent’s cross appeal in this regard fails. At first instance, the adjudication officer directed the respondent to pay the complainant ‘a premium of 30% of the basic rate for all hours worked on Sundays falling within the period 25th September 2013 to 24th March 2014’. The court affirms that decision”.

8. Section 14(1) of the Act of 1997 provides as follows: -

“14. — (1) An employee who is required to work on a Sunday (and the fact of his or her having to work on that day has not otherwise been taken account of in the determination of his or her pay) shall be compensated by his or her employer for being required so to work by the following means, namely—

- (a) by the payment to the employee of an allowance of such an amount as is reasonable having regard to all the circumstances, or
- (b) by otherwise increasing the employee's rate of pay by such an amount as is reasonable having regard to all the circumstances, or
- (c) by granting the employee such paid time off from work as is reasonable having regard to all the circumstances, or
- (d) by a combination of two or more of the means referred to in the preceding paragraphs."

9. In the event of a claim being advanced by an employee to a rights commissioner (now , since the Workplace Relations Act, 2015 , an adjudication officer) or the Labour Court, pursuant to the Act of 1997, subsections 14(3) – (6) provide a mechanism for determining reasonable compensation to employees in respect of Sunday work, by reference to collective agreements for comparable employees.
10. On this appeal, it is the respondents' case that the decision of the Labour Court is to the effect (although it is not actually stated in the decision) that the fact of the employees having to work on Sundays has not been taken into account in the determination of their pay. As is apparent from the extract from the decision of the Labour Court quoted above, the precise conclusion that that it arrived at, and the reason that it affirmed the decision of the Adjudication Officer, was that it found that the appellant had not tendered any evidence as to what, if any, element of the respondents' pay related to their obligation to work on Sundays. It is the respondents' case that this is a decision on a matter of fact, and not on a matter of law, and is not therefore amenable to appeal. This, it is submitted, is well established by a long line of authorities (to which I refer below). Furthermore, it is argued that if a Sunday premium is included in an employee's rate of pay, then some element of that rate of pay must be specifically referable to the obligation to work on Sundays, and it was a matter for the appellant to give evidence in this regard, and it failed to do so. It is submitted on behalf of the respondents that for this reason the Labour Court was correct to reject the appellant's appeal. The Labour Court made its decision based upon the evidence before it and it is unclear how it can be argued that it made an error of law in doing so. The respondents suggest that these proceedings are being used as yet another appeal on the same points, rather than on a meritorious point of law.
11. It is submitted that the Labour Court properly applied the express terms of the contract and, in accordance with the parole evidence rule, found that the appellant had failed to tender evidence in relation to what, if any, element of the hourly rate of pay was specifically referable to the contractual obligation to work on Sundays. Since the written contracts set out the hourly rate of pay without any ambiguity, they are not amenable to variation by parole evidence, even had such evidence been presented, which it was not. Specifically, the respondents argue that since the employment contracts make no reference to the minimum wage, this Court should not have any regard to whatever the minimum wage may have been at any point in time in considering whether or not the employment contracts of the respondents take into account the requirement to work on

Sundays. This point is made in response to arguments made on behalf of the appellant both at the hearing of this appeal and before the Labour Court.

12. It is submitted on behalf of the appellant that the decision of the Labour Court is based on three clearly identifiable errors of law as follows: -

- (1) The Labour Court incorrectly assumed jurisdiction to consider the respondents' claim to Sunday premium in circumstances where the employment contracts state that the requirement to work on Sundays had been taken into account in the determination of the respondents' pay.
- (2) The Labour Court failed to give any consideration as to whether or not it had any jurisdiction to examine a claim for Sunday premium in circumstances where the first limb of s.14(1) of the Act of 1997 has been complied with i.e., where the contract states that the requirement to work on Sundays has been taken into account. Instead, the Labour Court proceeded directly to consider the claim of the respondents.
- (3) Thirdly, if the Labour Court was entitled to find that the respondents were entitled to an additional Sunday premium (which is denied), it failed to consider afresh the appropriate premium to be awarded to the respondents, but rather simply endorsed the amounts awarded by the adjudication officer, without due consideration, including inviting submissions from the appellant, and having regard to the wording of s.14(2) of the Act of 1997.

13. Both parties made comprehensive submissions on the jurisdiction of this Court in appeals from the Labour Court. Both parties referred to the same passage from the decision of Hamilton C.J. in the case of *Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 IR 34, where he stated, at pp. 37-38: -

"That the Court should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them, it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

14. Both parties also referred to the decision of the Supreme Court in the case of *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] ILRM 421, in which case Kenny J., in considering the approach to be taken where mixed questions of fact and law arise held: -

"If they are based on the interpretation of documents, the courts should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the Commissioner. If the conclusions drawn from the primary

facts are ones which no reasonable Commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he had adopted a wrong view of the law, they should be set aside.”

15. Both parties also referred to and relied upon the decision of Baker J. in *Health Services Executive v. Sallam* [2014] IEHC 298, a case which also considered an appeal from the determination of the Labour Court. In that case, Baker J. stated: -

“The power of the High Court in an appeal from a determination of the Labour Court was explained by McCracken J. in the Supreme Court in *National University of Ireland Cork v. Ahern & Ors.* [2005] IESC 40, [2005] 2 IR 577, where he stated as follows: - at para. 9: -

‘The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this Court cannot examine the basis upon which the labour court found certain facts. The relevance, or indeed admissibility, of the matters relied upon by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered or taken into account by it in determining the facts.’

This Court, then, may on appeal consider whether the Labour Court wrongly took into account or ignored a fact or piece of evidence, incorrectly applied a legal test in coming to a conclusion, or erred in law in its interpretation of the law.”

16. Counsel for the respondents in this case argue that cases such as *Health Services Executive v. Sallam* and *National University of Ireland Cork v. Ahearn* make it clear that in considering appeals from the Labour Court, this Court is obliged to afford the decision of the Labour Court a curial deference. In this regard the respondents also rely upon the decision of Gilligan J. in *Electricity Supply Board v. The Minister for Social Community and Family Affairs* [2016] IEHC 59 in which he stated in his conclusion: -

“I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to

whether it was open to the appeals officer to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision.”

17. The respondents submit that no error of law on the part of the Labour Court has been identified by the appellant. The employment contracts are clear and give rise to no ambiguity. They provide for an hourly rate of pay to the claimants. While that hourly rate of pay is stated to take account of the fact that the claimants are required to work on Sundays the contracts do not explain how this is so, and nor did the claimant present any evidence before the Labour Court to explain how the rate of pay takes into account the requirement of the claimants to work on Sundays. Moreover, the Labour Court would not have been entitled to hear such evidence, had it been tendered, if the effect of such evidence would be to vary the unambiguous contractual terms as set out in the written contracts of employment.
18. Counsel for the appellant also relies on the decision of *Earagail Eisc Teoranta v. Doherty & Ors.* [2015] IEHC 347, a case in which the appellant employer submitted that the Employment Appeals Tribunal had erroneously interpreted s. 5(1) of the Payment of Wages Act, 1991 (the “Act of 1991”) and had incorrectly proceeded on the basis that the provisions at subs. (a)-(c) of that section were to be taken conjunctively. The court was satisfied that this argument concerned a point of law and concluded that there was a manifest error in the tribunals’ interpretation of s. 5 of the 1991 Act. Kearns P. held at p. 26: -

“I have carefully considered the submissions of both sides and am satisfied that there is a manifest error of law in the tribunals’ interpretation of s. 5 of the 1991 Act. The determination of the tribunal clearly indicates the tribunals’ view that, pursuant to s. 5(1)(c) of the 1991 Act, the written consent of the employees was required before the appellant company could bring about any changes to salary levels. However, these exceptions listed at (a),(b) and (c) of s. 5(1) are clearly not to be taken conjunctively. The word “or” is expressly used in the provision and it is clear that each subsection concerns separate instances which might give rise to an exception to the rule that an employer shall not make a deduction from the wages of an employee. Sub-section (b) states that deductions are allowable where they are authorised by virtue of an employees’ contract of employment, which is something the tribunal should have considered independently of sub-section (c). However, in treating ss. (a) – (c) as conjunctive, the tribunal erred in law.”

19. Counsel for the appellant also referred me to a number of decisions of the Labour Court itself in which it considered claims advanced under s. 14 of the Act of 1997. In the case of *Group 4 Securitas v. SIPTU* [DWT 996] the Labour Court held that s. 14 of the Act of 1997 did not allow for a claim of enhancement of the premium paid to employees in the security industry in respect of Sunday working, the premium for which was IRE5, and had been set some thirteen years previously. The Labour Court in its decision stated: -

“Section 14(1) Of the Organisation of Working Time Act, 1997, clearly states that where an employee's pay has not taken account of the requirement to work on

Sunday, he/she shall be compensated. In this case the employee is paid an allowance for working on Sunday and, therefore, does not have a case under the Act. The court does not consider that section 14, under which this claim has been brought, allows for a claim for enhancement of the rate."

20. In the case of *Duesbury Limited, T/A Old Ground Hotel v. Mary Frost* [DWT 1032], the claimant gave evidence that she had become employed by the respondent in that case in 1996, when it took over ownership of the hotel. She claimed that while employed by the previous owner, she was paid double time in respect of working on Sunday, but this was discontinued by the respondent when it took over the hotel. She claimed that the obligation to work on Sunday was not taken into account in her personal rate of pay.
21. The witness for the respondent gave evidence as to her belief that the claimant's rate of pay included consideration for working on Sundays, but she was not employed by the respondent when the claimant's rate of pay was fixed and had no involvement in fixing the same. Crucially, the evidence given on behalf of the respondent was unsupported by any documentary records or other corroborative evidence of any kind. In those circumstances, the Labour Court stated that it could not accept the evidence of the respondent as going far enough to rebut the direct evidence of the claimant. The court also stated in its decision that: -

"It is clear from subsection (1)(b) of this section [ i.e. s.14(1) of the Act of 1997] that the right to compensation for Sunday working can be satisfied where the requirement is taken into account in determining the employee's rate of pay. This suggests that some element of the employee's pay must be specifically referable to the obligation to work on Sundays."

22. The case of *Duesbury* was referred to in the decision of the Labour Court in this case, arising out of the fact that before the Labour Court, counsel for the appellant had referred to that decision for the purpose of distinguishing the facts in *Duesbury* from the facts in this case. The Labour Court thought that the appellant was relying on *Duesbury* in support of its arguments in this case, whereas on this appeal it was submitted that counsel for the appellant was referring to *Duesbury* to the intent of distinguishing the facts in that case from the facts in this case. In its decision the Labour Court stated: -

"However, notwithstanding the respondent's purported reliance on the determination in *Duesbury*, the respondent failed to tender any evidence to the Court in relation to what, if any, element of the Complainant's hourly rate of pay was specifically referable to her contractual obligation to work on Sundays."

This gave rise to an additional ground of appeal on the part of the appellant in this appeal.

23. In the case of *Matthew Scally and Aoife Lynch and Michelle Kelly*, [DWT 13102] the Labour Court found in favour of the claimants in circumstances where the respondent was unable to say how the rate of pay of the claimants was computed. Moreover, the hourly

rate paid to the claimants was directly in line with that prescribed by the then applicable employment regulation order, which rate was exclusive of Sunday premium. For this reason, the court was satisfied that the rate paid to the claimants did not contain any element of compensation for the purposes of s. 14 of the Act of 1997.

24. Finally, I was referred to the case of *Paul Fitzpatrick, t/a The Morgan Hotel and Jarmila Riecka* [DWT 1523] which is probably the most relevant of these cases because the claimant's contract of employment expressly provided that her salary took account of the obligation to work on Sundays. Unfortunately, the precise wording of the contract of employment of the claimant in that case is not recorded in the decision of the Labour Court. However, the court held: -

"On its plain and ordinary meaning, paras (a)-(d) of this subsection take effect only where the fact of the employee being required to work on Sunday is not otherwise taken into account in determining his or her pay. The court has reviewed the claimant's written contract of employment and it is satisfied that the fact of her having to work on Sundays was taken into account in determining her salary. It follows that the respondent did not contravene s. 14 of the Act in relation to the claimant."

#### **Discussion and Decision**

25. It is not in dispute that the claimants were required to work two out of three Sundays. The Labour Court found as a fact that this requirement had not been taken into account in the determination of the claimants' pay. The Labour Court arrived at this finding of fact on the basis that the appellant did not adduce any evidence at the hearing before the Labour Court to satisfy the Labour Court that the respondents' pay took into account their obligation to work on Sundays.
26. While submissions appear to have been made to the Labour Court to the effect that the minimum wage was at all relevant times less than the hourly rate paid to the respondents, and that this was how the pay of the respondents took into account their contractual obligation to work on Sundays, no oral evidence was given to the Labour Court to this effect, and nor is this stated in the contracts of employment of the respondents. There was therefore no evidence of any kind presented to the Labour Court relating to this issue, to the intent of proving that the excess of the rate of pay over the minimum wage was the means by which the rate of pay took account of the obligation to work on Sundays.
27. However, it is not correct to say that there was no evidence at all before the Labour Court as regards the question as to whether or not the rate of pay of the respondents takes account of the requirement to work on Sundays. The Labour Court had before it written evidence, in the form of the contracts of employment of the respondents. The language used in the contracts is plain English and could not be more clear. The contracts state that the hourly rate of pay "includes your Sunday premium based on you getting every third Sunday off". The wording is not buried in small print somewhere in the middle of the contract, but appears on the front page thereof, in the third clause of the contract.



28. Section 14(1) of the Act of 1997 imposes an obligation on employers to pay a reasonable remuneration to employees in respect of Sunday work by reference to stated criteria set out in ss.14(1)(a)-(d), unless the requirement to work on Sundays is otherwise taken into account in the rate of pay of the employee. Here, in stating that the hourly rate of pay "includes your Sunday Premium" the contracts make it clear that the requirement to work on Sundays is included in the rate of pay of the respondents, or, in the words of the Act of 1997, is "taken into account in the rate of pay of the employee", and in executing the contracts, the respondents accept that to be the case.
29. Neither of the decisions of the adjudication officer or the Labour Court record any evidence having been given either by the appellant or the respondents in either forum on this question, although it is clear that submissions on the question were made. However, it hardly needs to be said that submissions are not evidence. The only evidence presented to either forum on the question was the contract of employment in each case, which contained a clear and unambiguous statement, i.e., that the rate of pay included the Sunday Premium, based upon the respondents having every third Sunday off.
30. It is the respondents' contention that the court ought to take account of the vulnerable position that employees such as the respondents are in when presented by an employer with such contracts, and that it is the duty of the employer to ensure that the contract clearly identifies the portion of the hourly rate of pay that relates to Sunday work. Having failed to so provide in the contract, or to give any evidence on the issue, the appellant, it is submitted, has failed to establish that the rate of pay of the respondents takes account of the requirement to work on a Sunday for the purposes of s.14(1) of the Act of 1997.
31. The difficulty with this line of argument is that it ignores not just the clear and unambiguous language of the contracts of employment, but also the fact that the respondents do not appear to have given any evidence on the question. If they did, it is not recorded either in the decision of the adjudication officer or the Labour Court, and nor were any submissions made to me as regards the evidence that they gave on the question.
32. While a statement in a contract that the rate of pay takes account of the requirement to work on Sundays may not always be conclusive, if an employee wishes to assert that the rate of pay does not do so then in my opinion he or she must advance some credible evidence to rebut the express provision of the employment contract, or at least so as to shift the onus of proof in the matter to the employer, although he or she will still have to overcome the parole evidence rule. However, it may be possible to do so. For example it might be that events have overtaken the contract, and that surrounding circumstances no longer reflect that which was originally agreed. For example, if the rate of pay provided for in the contract, was at the time the contract was completed, greater than the statutory minimum wage, but is no longer so at the time the complaint is advanced, it is difficult to see how that rate of pay could still be said to reflect the requirement to work on a Sunday, since that is the minimum rate of pay which the employer must in any event pay. Whatever the reason, faced with written evidence of his or her own

agreement that his/her hourly rate of pay takes into account an obligation to work on Sundays, an employee advancing a claim under s. 14(1) of the Act of 1997 must lead some evidence to explain why he/she claims that what is stated in the contract is not correct. In failing to do so, the employee leaves the contract unchallenged, and the employer is under no obligation to go into evidence on the issue

33. Upon receiving a complaint from an employee that his or her rate of pay does not take account of the requirement of Sunday work, it is obvious that the Labour Court must undertake an investigation as to whether or not this is so. Its conclusion on the issue constitutes a finding of fact, which, in the ordinary course, in accordance with the authorities referred to above, will not be disturbed by this Court. In this case however that finding of fact was arrived at by the Labour Court on the basis that the appellant "failed to tender any evidence to the court in relation to what, if any, element of the complainants' hourly rate of pay was specifically referable to [their] contractual obligation to work on Sundays". In the circumstances of the case, this was a conclusion on a matter of law, because in so deciding the Labour Court decided that a clear statement made in a contract of employment signed by both parties may not be relied upon, and instead must be proven in a particular way. In drawing this conclusion the Labour Court in my view made an error of law. It did so firstly by ignoring the express statement in the contracts of employment of the respondents, that their hourly rate of pay includes their Sunday premium. Secondly it did so by interpreting the Act of 1997 in such a manner as to impose an obligation on an employer either to ensure that a contract of employment is drawn up in a particular way i.e., to explain by way of a breakdown any statement to the effect that an hourly rate takes into account the obligation to work on a Sunday, or, alternatively, to adduce oral testimony at the hearing of a complaint pursuant to s. 14 of the Act of 1997 in order to prove a statement agreed expressly to by an employee in his/her contract of employment.
34. Finally, I should address one other argument advanced on behalf of the respondents. It was argued that, pursuant to s. 3(1)(g) of the Terms of Employment (Information) Act, 1994 (the "Act of 1994"), there is an obligation on the employer to show the method of calculation of the employees' remuneration, and that it cannot be said that the appellant has done so in this case. The failure to comply with the provisions of the Act of 1994 is of course a separate complaint, and one which the respondents made in this case also, together with other complaints under the Act of 1994. The Labour Court determined those complaints in favour of the respondents, but considered that the breaches of the 1994 Act were technical and did not cause the respondent any detriment. However, the decision of the court does not record any specific breach of s. 3(g) of the Act of 1994. In the context of this appeal however, the respondents point to s. 3(1)(g) of the Act of 1994 to bolster their argument that there is an obligation on an employer to identify the element of the rate of pay of the respondents that is specifically referable to the contractual obligation to work on Sundays. However, this argument must also be rejected because it is clear that in providing simply that the respondents are to be paid a specific rate per hour worked, the appellant has met its statutory obligation to the respondents under s. 3(1)(g) of the Act of 1994.

35. For these reasons the appeal must be allowed, and the claim of the respondents under s. 14(1) of the Act of 1997 dismissed.