[2020] IEHC 55

THE HIGH COURT

IN THE MATTER OF A STATUTORY APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS ACT 2015

[2019 No. 83 MCA]

BETWEEN

MAREK BALANS

APPELLANT

AND

TESCO IRELAND LIMITED

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 31st day of January, 2020.

1. This is an appeal on a point of law pursuant to the provisions of s. 46 of the Workplace Relations Act 2015 against a decision of the Labour Court made on 21st January, 2019. The appellant, Mr. Balans, is a night worker employed by the respondent in a distribution centre. Mr. Balans made a number of complaints to an adjudication officer of the Workplace Relations Commission in respect of his employment. The first related to an alleged impermissible deduction from his wages and the operation and application of the Payment of Wages Act, 1991 ("*the Act of 1991*"), s. 5(6). The second related to his alleged entitlement to be paid a premium for hours worked *between Saturday and Sunday* and the meaning of that time period under the contract. The third relates to the grievance procedure operated by the respondent. He also made application for extension of time, from six to twelve months, within which to make a claim for compensation.

2. On the 23rd August, 2018, the adjudication officer upheld the appellant's complaint that there had been a breach of the Act. He also recommended that the respondent pay the applicant redress of €1,000 for the manner in which its grievance process was operated. He rejected the application for extension of time and also the contention of the appellant that hours worked between Saturday and Sunday included the hours from midnight on Friday/Saturday until 6 a.m. on Saturday morning. His decision and recommendation were appealed to the Labour Court by both parties.

3. The Labour Court in its principal finding overturned the decision of the adjudication officer and found that no unlawful deduction had been made from the appellant's wages. It held that the rate of pay specified in the plaintiff's contract arose as a result of a computational error. The court also disagreed with the recommendation to pay redress, but the decision of the adjudication officer on all other issues was upheld.

4. A number of grounds of appeal have been advanced on behalf of Mr. Balans:-

   i. The Labour Court fell into error in its interpretation of the contract of employment. By interpreting the contract as it has, it is argued that the Labour Court has purported to rectify the contract and thereby exercise a jurisdiction which it does not enjoy.

   ii. The Labour Court misinterpreted the meaning of "*hours worked between Saturday and Sunday*" and held, in error, that the contract precluded Mr. Balans from

receiving a 20% premium for hours worked between midnight on Friday/Saturday and 6 a.m. on Saturday mornings.

iii. The Labour Court erred in holding that there was no reasonable cause to justify an extension of the six-month period for the purposes of lodging a claim with the Workplace Relations Commission, and in doing so that it failed to provide adequate reasons for its finding. It is to be observed, that insofar as the latter part of this challenge is concerned (i.e. inadequate reasons), the respondent maintains that the court ought not to entertain such ground as it is not advanced in the notice of motion.

Background

5. In view of the issues raised on this appeal it is relevant to consider the background to the dispute. This is addressed in the affidavit sworn by the appellant on the 27th February, 2019 in support of this appeal and by Mr. Alan Jones, sworn in response on the 9th May, 2019.

6. In 2012 the appellant was employed by the respondent as a night warehouse operative on a part time/short hours contract. He was employed on the night shift, three days a week. In November, 2013 the parties entered into a contract ("*the 2013 contract*") which in turn was replaced on the 16th June, 2015 by a further contract, the terms of which are the subject matter of this dispute ("*the 2015 contract").* This provided for employment on a full time basis. It is suggested by the respondent that the 2015 contract has been superseded by a further contract issued by the respondent on the 11th May, 2017 but which the appellant has refused to sign.

7. The rate of pay as recorded in the 2013 contract was as follows:-

"Payment rates break down as follows:-

- *Basic rate - €9.69.*
- *Hours worked between 22:00 and 06:00 attract a consolidated rate of pay that includes a 20% premium for unsocial hours.*
- *Hours worked between Saturday and Sunday attract a 20% premium if part of rostered working week."*

It was also provided that the rate of pay would be subject to the usual taxation deductions. Thus, under the 2013 contract the appellant was entitled to a basic hourly rate of pay of €9.69 together with a bonus of 20% in respect of unsocial hours and a further premium of 20% in respect of hours worked "*between Saturday and Sunday*", if part of the rostered working week. In the 2015 contract, the basic rate of pay is stated to be €11.87 per hour. The contract was signed by the parties. The respondent maintains that an error was made in the 2015 contract in that the basic rate was calculated in a manner which incorrectly incorporated the 20% premium for unsocial hours which he had received under the 2013 contract. The applicant maintains entitlement to this rate of pay

and 20% premium for unsocial hours based on this figure. He also claims entitlement to further premia based on this figure. Since June, 2015 he has been paid €10.29 per hour, rather than €11.87 as expressly stipulated in the contract.

8. On the 6th October, 2016, Mr. Balans made a complaint under the respondent's internal grievance procedure. On the 24th March, 2017 this was determined not to be well – founded. An internal appeal was dismissed on the 5th May, 2017. On the 14th August, 2017 he made a complaint to the Workplace Relations Commission.

9. The adjudication officer found that the stated €11.87 per hour in the 2015 contract arose as a result of a mistake on the part of the respondent. He continued:-

> *"Nevertheless, it is difficult to see grounds why this should be set aside because of such a unilateral mistake. There is nothing unconscionable about a rate of pay of €11.87. I accept the evidence that this was not a prevailing rate of pay in the respondent, but it was the rate of pay inserted into the contract. The complainant did not contribute to the respondent's mistake. Applying the doctrine of mistake, there is no basis to set aside the binding nature of the basic rate of pay as €11.87 per hour."*

He found that the rate of €11.87 was properly payable and that the underpayment to the appellant amounted to a deduction within the ambit of s. 5 of the Act.

10. Section 5 of the Act of 1991 prohibits an employer from making deductions except in accordance with the provisions of that section. These include:-

"(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute,

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or

(c) in the case of a deduction, the employee has given his prior consent in writing to it."

The appellant maintains that none of these considerations arise.

11. Section 5(6) provides:-

"(6) 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), or

(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."

12. Wages is defined in s. 1 of the Act of 1991 as:-

"…any sums payable to the employee by the employer in connection with his employment, including—

(a) any fee, bonus or commission, or any holiday, sick or maternity pay, or any other emolument, referable to his employment, whether payable under his contract of employment or otherwise…"

The Decision of the Labour Court

13. The Labour Court found that the enforcement of contract under common law is not a matter for the Labour Court. To ground a claim under the Act of 1991, the wages concerned must be properly payable. It noted that it had found in a previous decision *Department of Public Expenditure v. Brian Collins* (PW/18/14), as had the Employment Appeals Tribunal in *Aer Lingus v. Matchett* (PW/18/18), that an error in the contract does not mean that the rate of pay set out in the contract was properly payable. The Labour Court concluded:-

> *"Having regard to the submissions of both parties and the oral submissions made on the day, the court is clear in this case also that the rate of pay set out in the complainant's contract arose due to a computational error and was not properly payable."*

14. The Labour court concurred with the adjudication officer on the extension of time issue. It overturned his Recommendation to award compensation under the Industrial Relations Act, 1969 because of the finding that the company's grievance process was procedurally sound. With regard to the hours worked between Saturday and Sunday, the Court concurred with the Decision of the adjudication officer that:-

> *"… an additional premium payable for 'Hours worked between Saturday and Sunday', while the wording could be expressed more clearly, does not mean that a premium is payable for hours worked on Saturday mornings."*

Submissions made to the Labour Court

15. The occurrence of the stated mistake in the contract is explained at para. 4 of the employer's submissions to the Labour Court which are exhibited to the appellant's affidavit in support of his application to this court. When the respondent's HR administration team drafted the contract of employment for the complainant, they inserted his employee number and the rate of €11.87 per hour which was the

consolidated figure of the then basic hourly rate payable of €9.89 together with the 20% premium for unsocial hours. It was submitted to the Labour Court that this was a clear error of an administrative or clerical nature. Reliance was placed by the respondent on the decision in *Aer Lingus v. Matchett*, where the court had concluded:-

> *"…it is clear to the Court that the salary set out in the letter of appointment ... was not the appropriate salary point to pay the Complainant ... and consequently must have been an error on the Respondent's part, therefore, it was not unlawful for the Respondent to deduct the monies."*

16. This was relied on as authority for the proposition that an administrative error in a contract of employment should not result in the error being compounded and being applied in practice. It was submitted that the respondent should not be bound by the error especially as it went outside the collective agreement on site and could have far reaching implications for the respondent. The respondent also submitted that the appellant was seeking to be paid 40% higher than other colleague, which would have significant implications for equality in pay in the distribution centre. It was contended that the adjudication officer misinterpreted the provisions of the Act and that the respondent had clearly demonstrated that this was a clerical mistake within the meaning of the section. The correct rate of pay as per the established agreed rates was properly payable and this is what the appellant received. There was therefore no illegal deduction. The amount/rate properly payable under the contract within the meaning of the Act was €9.89 and that it was this amount that the 20% premium applied in the event of the working of unsocial hours. Further submissions were made in respect of the Saturday/Sunday issue and the period of time in respect of which the claim might be made.

17. The essence of the submission made on behalf of Mr. Balans was that he was entitled to be paid his contractual salary subject to any lawful deductions. The contractual hourly rate specified in the contract was €11.87. This was undisputed. Any error which may have been made by the respondent should not entitle it to unilaterally reduce his salary. The subsequent attempt by the respondent to request the employee to sign a new contract illustrated that the employer also believed that it had made an error which had legal effect. Submissions were also made in respect of other two issues.

Submissions to this Court

18. Mr. Kirwan S.C. on behalf of the appellant submits that the Labour Court fell into error as a matter of law in its analysis of the contract and the provisions of the Act of 1991. The Labour Court has no jurisdiction to correct or amend errors or disregard the clear terms of the written contract. If such jurisdiction had been intended to be conferred by the Oireachtas, it would have so provided. Under s. 5(6) of the Act of 1991 the wage properly payable to Mr. Balans was his basic hourly rate of €11.87 together with such further premia to which he may be entitled. Counsel relied on a decision of the EAT in *Sullivan v. Department of Education* [1998] ELR 217, which addressed the meaning of "*deductions*" in s. 5. The EAT held that while there was no specific definition of deduction in the Act, guidance could be taken form the definition of "*wages*" in s. 1 and emphasis should be placed on the word "*payable*". The Tribunal stated:-

> *"… if an employee does not receive what is properly payable to him or her from the outset then this can amount to a deduction within the meaning of the 1991 Act. We take payable to mean properly payable. The definition of wages goes on to give examples of types of payments which can amount to wages and states that the payments can amount to wages whether payable under his contract of employment or otherwise … although in our view it is not simply a matter of what may have been agreed or arranged or indeed paid from the outset but, in the view of the Tribunal, all sums to which an employee is properly entitled."*

19. Reliance is also placed on *Ministry of Defence v. Country and Metropolitan Homes (Risington) Limited* [2002] EWHC 2113. Rectification is a discretionary equitable remedy. Counsel argued that *Matchett* is distinguishable. Mr. Matchett had been promoted but his letter of appointment provided for an incorrect pay scale. The case did not concern the plaintiff's contract of employment, rather his letter of appointment, and further, having realised the error, his employer deducted the amount of the overpayment. It is emphasised by counsel that, on the facts, the contract authorised Aer Lingus to make such a deduction. Counsel also argues that the reliance of the Labour Court on its decision in *Department of Public Expenditure v. Collins* was misplaced and that, in any event, such decision is contrary to the approach adopted by Hunt J. in *Babinskas v. First Glass Limited* [2016] IEHC 598. It is contended that the Labour Court erred in a manner similar to that which occurred in *Babinskas*, discussed below, by disregarding Mr. Balans' entitlement to be paid the wage as set out in the contract. It is argued that the respondent has attempted to vary the contract and to require Mr. Balans to enter into a new agreement precisely because the July, 2015 contract of employment is binding on them. There is no error within the meaning of s. 5(6) of the Act. There is nothing computational about deliberately paying someone less than is specified in their contract of employment. This was not a computational error, and to so hold amounts to an error of law. Reliance is placed on *Morgan v. Glamorgan County Council* [1995] IRLR 68, where Mummery P., in addressing the equivalent legislation in that jurisdiction discussed the meaning of the words "*err*" and "*computation*" as follows:-

> *"Although the error may be one of 'any description' within the meaning of s.8(4), it must be a) an 'error' on the part of the employer and b) it must be an error which affects 'the computation' of the gross wages. As neither the word 'error' nor the word 'computation' are defined by statute, they must be given their ordinary meaning. In its ordinary and natural meaning an error is a mistake something incorrectly done through ignorance or inadvertence. 'Computation' of wages is a matter of reckoning the amount, of ascertaining the total amount due by a process of counting and calculation."*

` The court concluded that no error of computation had occurred because the deduction from the applicant's wages arose from a deliberate decision.

20. On the second issue it is submitted that the expression "*hours worked between Saturday and Sunday"* includes the period between midnight on Friday/Saturday and midnight on

Sunday/Monday and that if it was the intention of the respondent to limit the premium payable to specific portions of the weekend, it should have expressly so stated. As there is ambiguity in the wording of the contract, the *contra proferentum* principle ought to apply and the contract construed against the employer.

21. With regard to the extension of time, it is submitted that the Labour Court was incorrect as a matter of law in holding there was no reasonable cause for extending the time for lodging his complaint to the Workplace Relations Commission. The appellant engaged with the respondent's grievance procedure, including internal appeal procedures, which as a matter of law amounts to reasonable cause. It is further submitted that no reason for this conclusion had been proffered by the Labour Court contrary to requirement for the stating of reasons as held by Kearns P. in *Earagail Eisc Teoranta v. Doherty and Ors* [2015] IEHC 347. As previously stated, the respondent objects to the court embarking on any consideration of this ground.

22. Mr. Dunne S.C., counsel for the respondent, stresses the limited role of this Court on this appeal. He submits that it is fundamentally misconceived to suggest there is or has been an attempt made to rectify the contract. The Labour Court applied the provisions of the Act, which is a self – contained statutory code. The focus of the inquiry is to establish what wages are properly payable. The applicant could have brought a claim for breach of contract or for specific performance, but he failed to do so. There was no deduction. Counsel submits that when the Act of 1991 is construed as a whole, it is clear that the Oireachtas was aware that mistakes might occur in contractual documentation. This is evident from the provisions of s. 4 which specifically refers to errors or omissions. Section 4(3) of the Act of 1991 provides:-

> *"(3) Where a statement under this section contains an error or omission, the statement shall be regarded as complying with the provisions of this section if it is shown that the error or omission was made by way of a clerical mistake or was otherwise made accidentally and in good faith."*

By virtue of the provisions of ss. 4(1) and 4(2), an employer is obliged to give an employee a statement in writing specifying clearly the gross amount of the wages payable to the employee and the nature and amount of any deduction therefrom. He is also obliged to take such reasonable steps as are necessary to ensure that both the matter to which the statement relates, and the statement are treated confidentially by the employer and his agents and by any other employees. Section 4(2) provides:-

"(2) A statement under this section shall be given to the employee concerned—

(a) if the relevant payment is made by a mode specified in section 2 (1) (f), as soon as may be thereafter,

(b) if the payment is made by a mode of payment specified in regulations under section 2 (1) (h), at such time as may be specified in the regulations,

(c) if the payment is made by any other mode of payment, at the time of the payment."

Section 4(4) provides that an employer who contravenes subs. (1) or (2), shall be guilty of an offence and shall be liable on summary conviction to a fine.

23. Counsel also submits that the term "*wages*" within the meaning of the Act is not necessarily to be defined exclusively by reference to the contract of employment. The first step is to determine what wages are properly payable, an exercise which was carried out by the Labour Court. It made a finding of fact that there was an error in the figure set out in the contract, a conclusion to which it was entitled to arrive. This is not an error of law.

24. Mr. Dunne S.C. points out that the appellant was originally employed to work 22.5 hours per week but in 2015 his contract of employment was renewed as his working hour commitment changed significantly. His rate of pay did not alter at that time and it is argued that there is no averment in the appellant's affidavit to the effect that he understood that his rate of pay would have increased or that there was any agreement to that effect. There was no such agreement. The appellant does not contradict the assertion of Mr. Jones that a clerical mistake was made nor was this contradicted before the Labour Court. It is therefore submitted that it was permissible for the court to rely on the provisions of s. 5(6) of the Act. There was a clerical computational error in the calculation of his hourly rate, and this was evident from the material which was opened to the Labour Court. Further, the respondent points to the fact that no complaint was made concerning what he was paid in the period from June, 2015 to the 6th October, 2016. In exercise of its statutory function the Labour Court was entitled to look beyond the terms of the contract as executed by the parties to determine what constitutes wages properly payable. The Act of 1991 confers considerable discretion on the court in the determination of such issues.

25. Counsel thus emphasises the statutory framework of the Act and submits:-

i. The rationale of the Act, as evident from its long title, is to provide further protection to employees in relation to the payment of wages.

ii. The investigation which is required to be carried out, must be viewed in the context of the redress available which is limited to a complaint that the employee's wages had been subjected to unlawful deduction.

iii. Section 5(5) of the Act permits the deduction of overpayment of wages, where such overpayment may have been made for any reason and this clearly includes an error in computation or, it is submitted, an error in the stated wages payable. Thus, the jurisdiction conferred on the Labour Court is an extensive one.

26. Reliance is placed on the decision of the EAT in *Sullivan v. Department of Education* [1998] ELR 217 and *Dunnes Stores (Cornelscourt) Limited v. Lacey* [2007] 1 I.R. 478. In

Sullivan it was held that emphasis ought to be placed on the expression "*properly payable*" within the meaning of the Act.

27. With regard to the second issue, the respondent submits that it was within the courts' jurisdiction to make such finding on the evidence. The Labour Court had correctly adopted the reasoning of the adjudication officer on this point. The adjudication officer stated:-

> *"Giving these words their ordinary meaning, the premium is paid for hours between Saturday and Sunday, not between Friday and Saturday. The fact of the complainant working the early hours of Saturday morning does not enable him to recover this additional premium pursuant to this provision. This element of the claim is therefore, not well founded."*

28. Finally, with regard to the refusal to extend time, it is submitted that the finding of the Labour Court who concurred with the adjudication officer, is unassailable and that no error of law arises. In *O'Donnell v. Dun Laoghaire Corporation* [1991] I.R.L.M. 301, Costello J., when addressing whether there were good reasons for extending time, stated:-

> *"The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time, I think it is clear that the test must be an objective one and that the court should not extend the time merely because an aggrieved plaintiff believes that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under O. 84, r. 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay…"*

29. Thus, it is submitted that the appellant has not discharged the onus of establishing reasonable cause for extending the time. Further, in the context of statutory appeals such as s. 46 of the Workplace Relations Act 2015, O. 84C of the Rules of the Superior Courts provides for procedures where provision is not made either by the enactment concerned or by another order of the Rules.

30. With regard to s. 4 of the Act of 1991, the adjudication officer considered this section and concluded that it concerned statements of wages paid to employees *i.e*. payslips. He also expressed the opinion that the section was not justiciable before an adjudication officer and that s. 4(3) offered a good faith defence to employers facing prosecution arising from an error in a payslip or other similar document. He continued:-

> *"Section 4(3) cannot be extended to apply to errors relating to wages and statements issued pursuant to s. 3 of the Terms of Employment (Information) Act or in the contract of employment. There is no statutory provision which enables the employer to set aside a contractual term even where there is an error made in good faith."*

31. The Labour Court, although noting the argument made by the respondent that the adjudication officer had erred in his interpretation of s. 4(3) of the Act did not address this further in its determination and it does not appear to have formed a basis for any part of its reasoning.

Decision

32. This is an appeal on a point of law pursuant to s. 46 of the Workplace Relations Act 2015. It is not necessary to provide a detailed analysis of the court's role on this appeal as has been discussed in *Fitzgibbon v. Law Society* [2015] 1 I.R. 156, *An Post v. Monaghan* [2013] IEHC 404, *Dunnes Stores v. Doyle* [2014] 25 E.L.R. 184, and *Health Services Executive v. Abdel Raouf Sallam* [2014] IEHC 298, where Baker J. observed that the High Court must show appropriate curial deference to the Labour Court, but that such deference arises when the Labour Court deploys its particular expertise on industrial relations issues.

33. Thus, the court has a limited role on this statutory appeal which is confined to a point, or points, of law. It must respect the specialist role of the Labour Court. Nevertheless, it may intervene where an error of law has been demonstrated or where a finding of fact has been made which is unsupported by the evidence. To this end, the process by which findings of fact are made may be a question of law. The court's role in the determination of an appeal on a point of law under s. 46 of the Workplace Relations Act, 2015, however, is broader than that which it enjoys on an application for judicial review.

34. Section 5 of the Act of 1991 prohibits the making of deductions from wages save in certain circumstances. Section 5(6) provides that where 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, then, except insofar as the deficiency or non – payment is attributable to an error of computation, the amount of the deficiency or non – payment should be treated as a deduction made by the employer from the wages of the employee on the occasion.

35. Central to the court's analysis must be the concepts of wages *properly payable* and the circumstances in which, if there is a deficiency in respect of those such payments, it arose as a result of an *error of computation.*

36. The provisions of s. 5(6) of the Act of 1991 were considered by Finnegan P. in *Dunnes Stores (Cornelscourt) Limited v. Lacey* [2007] 1 I.R. 478. A Rights Commissioner had found in favour of the respondents holding that the cessation of service pay amounted to an unlawful deduction, which was upheld by the EAT. It was argued that the EAT should address the question of remuneration properly payable to an employee before considering the question of a deduction or whether a deduction was unlawful. Finnegan P. concluded at p. 482:-

> *"I am satisfied upon careful perusal of the documents relied upon by the respondents that the same cannot represent the agreement or an acknowledgement of the agreement contended for but rather contain a clear denial*

of the existence of any such agreement. No other evidence of an agreement was proffered. In these circumstances I am satisfied that the Employment Appeals Tribunal erred in law in failing to address the question of the remuneration properly payable to the respondents, such a determination being essential to the making by it of a determination. Insofar as a finding is implicit in the determination of the Employment Appeals Tribunal that the appellant agreed to pay to the respondents service pay and a long service increment, then such finding was made without evidence and indeed in the face of the evidence: I am satisfied that there has been no deduction of pay from the respondents within the terms of the Act of 1991 but rather their remuneration has been unilaterally increased by the appellant making a payment which recognises their long service in excess of that which was payable prior to the 18th September, 2002. In either case there has been an error or law. Accordingly I allow the appeal."

37. This decision supports the proposition that the first matter which should be addressed by the Labour Court is to determine what wages are properly payable under the contract.

38. Both parties rely on the decision of Hunt J. in *Babianskas v. First Glass Ltd* [2016] IEHC 598, in support of their respective positions. It is appropriate therefore to consider this decision. There, the plaintiff was employed as a lorry driver who made a claim under the Organisation of Working Time Act 1997 in respect of annual leave and public holidays. His written contract of employment stipulated that he was entitled to be paid €34,384 per annum, which converted to a weekly wage of €668.75. He was in fact paid €554.48 per week. Hunt J. found that the Labour Court had correctly summarised the substance of the appellant's case as follows:-

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

39. The Labour Court noted that the purpose of the Regulations was to ensure that for annual leave or public holidays an employee received no less or no more than he or she would have received if he or she was working during the period in question. Finding against the appellant in respect of the holiday and annual leave claims, it found that the appropriate reference point for such claims was the lower amount actually received by the employee rather than the higher rate specified in the contract of employment. Hunt J. stated that the Labour Court was required to determine whether the amount liable to be paid was that specified in the contract, or that actually paid to the appellant over a protracted period after the date of the written contract. He continued:-

"In my view, having correctly identified that Regulation 2 was the relevant applicable provision in the case, it did not proceed to provide a clear analysis of the legal basis upon which it considered that the amount liable to be paid was the amount actually paid rather than the higher amount specified in the written contract between the parties."

The starting point is that the appellant was initially liable to be paid the amount stipulated in the written contract, and only became liable to be paid a lesser amount if there was some enforceable variation of that contract, whether by waiver, estoppel or agreement. He continued:-

> *"The Labour Court simply referred to his apparent acceptance of the lower sum over a long period of time. The protracted acceptance of the lower sum is an undoubted fact, but in my view it was insufficient on its own to permit the Labour Court to decide that the appellant was liable to be paid the lower amount on the basis of a simple extrapolation that the level of liability was fixed solely by the fact that a lower sum was subsequently accepted by him."*

40. The learned judge held that the obligation of the Labour Court to ascertain the sum that the appellant was liable to be paid for the purposes of Regulation 2 implied that it had carried out an inquiry and an analysis of the meaning and application of that provision in the context of the facts before it. He continued:-

> *"The assumption that the relevant sum was the actual amount paid, coupled with a reference to the issue of potential unlawful deductions being determined elsewhere, did not in my view amount to a full consideration of the meaning and application of the term 'liable' in the context of the instant case. There is certainly a serious issue as to whether the term 'sums liable to be paid' is necessarily synonymous with payments actually made."*

He found the Labour Court had erred in law by assuming or inferring that the apparent acceptance by the appellant of the lesser sum than that to which he was initially contractually entitled, automatically meant that this was the sum which he was liable to be paid. He considered that the proper and full resolution of this issue required more extensive factual and legal analysis by the Labour Court, not that the final result must necessarily be different. He therefore remitted the matter to the Labour Court for further consideration.

41. Mr. Dunne S.C. submits that *Babianskas* does not assist Mr. Balans because the court was there concerned with a failure on the part of the Labour Court to properly assess the correct wages paid to the appellant and that the point of law appeal focused on the failure on the part of the Labour Court to properly hear the parties on the significant questions of law at issue and to allow for an adequate challenge of evidence. It is submitted that the Labour Court, in this case, carried out its obligation to conduct an analysis of the wages which were properly due to the appellant. To this end, they engaged with the evidence and concluded that the wages as contained in the contract were incorrectly computed by reference to an error. It is also submitted that there is no criticism that the Labour Court had failed to properly consider the evidence. It had determined that there was no unlawful deduction of wages in circumstances where any such alleged deficiency was due to a computational error. There was adequate material before the Labour Court to come to this conclusion. On the other hand, counsel for the appellant relies on this case as authority for the proposition that the Labour Court had erred in law by disregarding Mr.

Balans' contractual entitlement to be paid wages. He calls in aid *dicta* of Hunt J. that the starting point of legal analysis is that the appellant was initially liable to be paid the amount stipulated in the written contract which could be reduced only if there was some enforceable variation of the contract.

42. I have considered the reasoning of Hunt J. and in my view, there is nothing in this judgment which detracts from what was stated by Finnegan J. in *Lacey* or inconsistent with the approach which the Labour Court stated it was taking in this case, namely that to ground the claim under the Act of 1991 wages must be properly payable. Thus, in my view, there is nothing incorrect in this *approach*. It seems to me, however, that where the difficulty arises is that the Labour Court, rather than *making* the *necessary assessment* of wages properly payable under the Act of 1991 proceeded to perhaps unwittingly conflate that issue with the separate issue of whether there had been a deduction and whether that deduction came within the exception governed by s. 5(6). In so doing, in the opinion of this court, the Labour Court fell into error in failing to appropriately assess the wages properly payable to the appellant within the meaning of the Act of 1991.

43. Further, I accept counsel for the appellant's submission that in the circumstances of this case any error made in the drafting of the contract is not to be equated with a deficiency or non-payment attributable to a computational error within the meaning of s. 5(6). It does not appear to me that s. 5(6) of the Act was designed to permit the effective rectification of a contract which, on the submission of one of the parties, contains an error.

44. In arriving at its conclusion, the Labour Court relied on *Collins* and *Matchett*. In *Collins*, it was held that to ground the claim in respect of an unlawful deduction under the Act, the wages concerned must be properly payable. The claimant did not dispute that there were agreed General Council Reports setting out how workers in his position should be treated when promoted through an external competition. The Labour Court concluded from the submissions of the parties and the oral submissions made on the day that the rate of pay set out in the contract was not properly payable to the complainant. The decision does not record any further reason for this conclusion and it is unclear whether the arguments raised before this court were aired before the Labour Court in that case. In *Matchett*, it appears, as submitted by counsel for the appellant, that the contract authorised the deduction.

45. With regard to the second ground of appeal it seems to me that there was adequate material before the Labour Court to determine, as it did, that the phrase "*hours worked between Saturday and Sunday"* did not mean that the premium was payable for hours worked between midnight on Friday/Saturday and 6 am on Saturday mornings. In my view, on analysis of the documentation before the court, it was entitled to come to this conclusion and no error of law has been identified. Insofar as its contended that adequate reasons were not provided, and in so far as the court is entitled to consider the grounds of appeal being advanced on such ground, given the clear and stated reasons of the adjudication officer, the Labour Court, in my view was entitled to state its agreement with

his approach and to concur with his view. It goes without saying, however, that it may not always be sufficient to simply concur with others' reasoning. Much would be dependent on the facts and circumstances of each case.

46. Similar considerations apply to the third ground of the appeal, namely the extension of time. No case is made by the appellant that he was lulled into a false sense of security by engaging in the internal grievance procedure, nor does the appellant claim that he relied on a representation that the respondent would not rely on the time limits specified in s. 41(8) of the Workplace Relations Act 2015. It is clear from the wording of that subsection that the adjudication officer enjoys a discretion to extend the time to entertain a complaint. It provides:-

> *"An adjudication officer may entertain a complaint or dispute to which this section applies presented or referred to the Director General after the expiration of the period referred to in subsection (6) or (7) (but not later than 6 months after such expiration), as the case may be, if he or she is satisfied that the failure to present the complaint or refer the dispute within that period was due to reasonable cause."*

47. The Labour Court concurred with the decision of the adjudication officer that there was no reasonable cause to justify an extension of the six-month time limit. The adjudication officer also concluded that whatever the shortcomings of the grievance process, they did not prevent the referral of the complaint. Even if this Court were to take a different view to the Labour Court, which adopted the adjudication officer's view, I am not satisfied that any difference of view in this regard could be said to amount to an error of law. In my view there was adequate available material to enable the Labour Court to conclude as it did and to adopt the reasoning of the adjudication officer in this regard. The parties were fully aware of the reasons advanced by the adjudication officer for his decision and in the particular circumstances of this case, the Labour Court is not, in my view, to be criticised for the manner in which it explained its decision by expressing its concurrence with the decision of the adjudication officer. Further, it is matter for the appellant to discharge the onus of proof in this regard and I have seen nothing in this case that might fall foul of the principles outlined by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.R.L.M. 301, referred to above, or of Laffoy J. in *Minister for Finance v. Civil and Public Service Union and Ors* [2007] ELR 36, to which the court was also referred.

48. In the circumstances, I allow the appeal on the first ground of appeal and reject the second and third grounds of appeal. The matter ought to be remitted back to the Labour Court for determination.

49. On the evidence presented by the respondent it may be that the stance adopted by the appellant is ultimately found to be without substantive merit, but that is not a matter for the determination by this court and the court is not to be taken as expressing any view on such merits. The court has found that an error of law arises. On reconsideration of the appeal in accordance with the principles outlined in this judgment, it is open to the Labour Court to arrive, or not arrive, at the same conclusion. Further, nothing in this judgment

should be taken as affecting the rights and remedies which the parties may have in any other forum.