

SUMMARY

## **2012/59 A&nbsp;foreign-national&nbsp;is denied protection under Irish employment legislation on the basis that his employment was unlawful, as he did not have a work permit (IR)**

***&lt;p&gt;In this case, the High Court, on appeal by the employer, quashed a &euro; 92,000 award made by the Labour Court to a foreign national in relation to employment law breaches because his employment was unlawful, as he did not have a work permit.&lt;/p&gt;***

### **Summary**

In this case, the High Court, on appeal by the employer, quashed a € 92,000 award made by the Labour Court to a foreign national in relation to employment law breaches because his employment was unlawful, as he did not have a work permit.

### **Facts**

The applicant, Mr Hussein and the notice party, Mr Younis, were Pakistani nationals and cousins. Mr Younis originally spoke no English when he arrived in Ireland in 2002. He had a work permit for only his first year in Ireland. Mr Younis claimed that for a further six years he worked for Mr Hussein eleven hour days, seven days a week with no holidays, was paid merely pocket money, and that Mr Hussein failed to legitimise his position with the authorities.

In 2009, Mr Younis obtained information from the Migrants Rights Centre regarding his rights and entitlements and thereafter made formal complaints against Mr Hussein under the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act 1997 and the National Minimum Wage Act 2000. In 2011, a Rights Commissioner<sup>1</sup> found in favour of Mr Younis under all three complaints. Mr Younis referred the complaints to the Labour Court, which upheld the Commissioner's findings. The Labour Court ordered that Mr Hussein pay € 1,500 under the Terms of Employment Information Act 1994;

€5,000 for various breaches of the Organisation of Working Time Act 1997 and € 86,132.42 in respect of back pay in accordance with the National Minimum Wage Act 2000.

Mr Hussein sought and was granted a judicial review<sup>2</sup> of the Labour Court's decision on the grounds that Mr Younis had no legal standing to invoke the protection of Irish employment legislation as his contract of employment, in the absence of an employment permit, was illegal.

### **High Court Judgment**

In deciding the case, the High Court stated that section 2(1) to section 2(4) of the Employment Permits Act 2003 prohibits a non-national from being employed without the appropriate employment permit, and that this prohibition applies to both employer and employee. However, while an employer can defend criminal proceedings on grounds that it took all reasonable steps to comply with the 2003 Act under section 2(4), no such defence is available to the employee as section 2(1) creates an absolute offence for an employee.

The High Court held that neither the Rights Commissioner nor the Labour Court could lawfully entertain an application for relief in respect of an employment contract that was illegal as a result of the employee to whom it related not holding a work permit. The decision of the Labour Court could therefore not be allowed to stand. Notwithstanding the decision it felt obliged to make, the High Court accepted that were Mr Younis' version of events correct, he had been the victim of appalling exploitation in respect of which he had no effective recourse.

The Court made it clear that, while it felt compelled to apply the 2003 Act, there must be concern that this law creates unintended consequences, including that undocumented workers be deprived of the benefit of the protection afforded to workers by Irish employment law. Accordingly, the Court felt it appropriate to send a copy of its decision to the Oireachtas (Irish Parliament) and the Minister for Jobs, Enterprise and Innovation for consideration of the policy implications of the 2003 Act.

### **Commentary**

Under the separation of powers of the judiciary and the executive, it is not common in Ireland for judges to put the Government on notice of their rulings. However there is now such a glaring lacuna in Irish employment law that means undocumented migrant workers are unable to benefit from employment legislation, even where they are not responsible for their unlawful status, the judge felt compelled to do so. The Government has confirmed that it will review the decision and determine what action is to be taken. As it happens, an employment permits bill has been in the pipeline for some time. Its publication is expected in early 2013. The purpose of the bill is to consolidate existing employment permits legislation and cater for future accessions to the EU. The drafting of the bill will also take into account evolving case law, with the requirement to deal with the outcome of this case at the forefront of legislators' considerations.

### **Comments from other Jurisdictions**

*Germany (Dagmar Hellenkemper):* As previously mentioned concerning the case of Ms Houna (EELC 2012/32, UK), the German employment contract would be considered void, due to the fact that as a non-national without a work permit, an employee's ability to work would be considered legally impossible according to Section 275 of the German Civil Code that provides: "A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person." An employee without work permit cannot enter into a legally binding contract. Nevertheless, the courts have decided in numerous cases that the employee must be paid for services performed, even if both parties to the employment contract know of its invalidity.

*The Netherlands (Peter Vas Nunes):* This is the third judgment reported in EELC where a worker is denied elementary employment rights solely on the ground that he is an illegal alien. See EELC 2010/82 (Austria) and EELC 2012/32 (UK).

#### **Footnotes**

<sup>1</sup> Rights Commissioners are appointed by the Minister for Jobs Enterprise and Innovation. They operate as part of the Labour Relations Commission and are independent in their functions. Rights Commissioners investigate disputes, grievances and claims that individuals or small groups of workers refer under employment legislation.

<sup>2</sup> Judicial Review is the doctrine under which legislative and executive actions are subject to review (and possible invalidation) by the judiciary.

**Subject:** Miscellaneous

**Parties:** Hussein – v - The Labour Court and Younis

**Court:** High Court

**Date:** 31 August 2012

**Determination Number:** [2012] IEHC 364

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**Creator:** High Court

**Verdict at:** 2012-08-31

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