THE SUPREME COURT

[Appeal Nos. 594/12 & 606/12

Murray J.
Hardiman J.
MacMenamin J.

BETWEEN:

AMJAD HUSSEIN

APPLICANT/RESPONDENT

V.

THE LABOUR COURT

RESPONDENT/RESPONDENT

AND BY ORDER:

MOHAMMAD YOUNIS

NOTICE PARTY/APPELLANT

JUDGMENT of Mr. Justice John Murray delivered the 25th day of June, 2015

1. This is an appeal against the order of the High Court which, by way of judicial review, set aside two decisions of the respondent, the Labour Court. Those two decisions are respectively:

> (a) A decision dated 7th September, 2011 pursuant to s.28(8) of the Organisation of Working Time Act, 1997, determining that the employer, who is the appellant in this case, pay to the above named notice party the sum of €5,000.
>
> (b) A decision dated 9th September, 2011 of the said Labour Court, pursuant to s.31(1) of the National Minimum Wage Act, 2000, determining that the appellant pay to the notice party the sum of €86,134.42.

2. A curious feature of these proceedings is that in the judicial review neither of the decisions of the Labour Court are impugned for the manner, as such, in which it exercised its statutory powers. It is rather that those decisions are impugned by reason of an alleged fundamental frailty in an earlier adjudication of the Rights Commissioner under the respective Acts, although that earlier adjudication is not the subject of judicial review. This is a crucial element in the consideration of the issues in this appeal. At this point I think it would be convenient to set out the two statutory provisions under which the Labour Court made the two decisions which are now impugned.

Section 28(8) of the Organisation of Working Time Act, 1997, as amended by s.19 of the Protection of Employees Act, 2003

> *"(8) Where a decision of a rights commissioner in relation to a complaint under this Act has not been carried out by the employer concerned in accordance with its terms, the time for bringing an appeal against the decision has expired and no such appeal has been brought, the employee concerned may bring the complaint before the Labour Court and the Labour Court shall, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the decision."*

Section 31(1) of the National Minimum Wage Act, 2000

> *"(1) Where a decision of a rights commissioner in relation to a dispute under this Act has not been fully complied with by the employer concerned and the time for bringing an appeal against the decision has expired and no such appeal has been brought or if such an appeal has been brought it has been abandoned, the employee concerned may bring the dispute before the Labour Court and the Labour Court shall, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the decision of the rights commissioner."*

Background Facts and Circumstances

3. According to the High Court judgment the applicant is a national of Pakistan as is the notice party Mr. Younis. The applicant operates at least one restaurant with Pakistani or Asian cuisine in Ireland. The applicant and the notice party are second cousins. In September 2002 the applicant had returned to Pakistan on holidays and the claim of the notice party, which he made before the Rights Commissioner, is that he was then recruited by the applicant to come and work in Dublin as a Tandoori chef. The notice party arrived in Ireland in the summer of 2002. He does not speak English and has had no real contact with the Irish community. The claim which he brought before the Rights Commissioner arose out of his contention that he was exploited by his cousin when he arrived in Ireland. On his account he was required to work seven days a week with no holidays (save for one month in September 2009) which was unpaid. He was paid what amounted to pocket money in cash. Being dissatisfied with his position it appears that he obtained advice from an immigrant advice body and resigned from his employment in December, 2009. He then set in train a series of claims pursuant to the Terms of Employment (Information) Act, 1994, the Organisation of Working Time Act, 1997 and the National Minimum Wage Act, 2000. As appears from the Determination of the Rights Commissioner, referred to below, his claims were, *inter alia*, based on the fact that he would work eleven hours per day, and was not in receipt of scheduled rest breaks. From February, 2005 some two and a half years into his period of employment he worked until midnight culminating in an eight hour day. The claim was based also on the fact that he worked seven days a week without one day off and the only day off he received was the 25th December when the restaurant was closed. He did not receive any annual leave with the exception of one month in September, 2009, which was unpaid. He also complained about poor accommodation provided by the applicant.

4. For his part, the applicant has always contested the facts as stated by the notice party. It was his claim that the notice party worked for him with a work permit under the relevant legislation for the period between July 2002 and July 2003 but that he had never obtained a work permit for him after that date. The applicant maintained that the notice party thereafter effectively worked with him as a member of his extended family. Before the Rights Commissioner he claimed that the notice party was working in the restaurant as a member of the family by helping out in the kitchen and that he had no specific job. He told the Rights Commissioner that the notice party worked five to six days a week and these were not recorded as he was not an employee.

The Sequence of Claims brought by the Notice Party against the Applicant
5. 30th April, 2010: Notice Party brought complaints before the Rights Commissioner under the following Acts:

> (a) Terms of Employment (Information) Act, 1994, as amended, that he never received written terms and conditions of employment as provided by s.3 of the Act.
>
> (b) A claim pursuant to the Organisation of Working Time Act, 1997 that the respondent was in breach of the provisions of the Act by failing to provide annual leave entitlements; to provide holidays entitlements; his Sunday premium breaks or any proper breaks. He also claimed breach of this Act by being required to work in excess of 48 hours per week.
>
> (c) He claimed under the National Minimum Wage Act, 2000 that the respondent failed to pay the national minimum wage and provided a comprehensive breakdown of the monies he claimed were due to him.

12th October, 2010: Rights Commissioner held a hearing of the claims at which both the applicant and the notice party were present.

31st March, 2011: The Rights Commissioner made a decision in favour of the notice party on all three claims and made monetary awards to the respondent against the applicant. (The Rights Commissioner's decision is referred to in more detail later in this judgment).

6. The applicant, Mr. Hussein, did not pay to the notice party, Mr. Younis, the sums which the Commissioner had directed should be paid.

7. It is important to note that the applicant had a right of appeal on the merits, against the decision of the Rights Commissioner which was made pursuant to s.27 of the Organisation of Working Time Act, 1997. Section 28(1) gave him a right of appeal and a rehearing before the Labour Court on relevant evidence and the Labour Court could then, under the section, *"make a determination … affirming, varying or setting aside the decision"* made by the Rights Commissioner. The remedy of appeal was not availed of by the applicant. In an affidavit before the High Court he said that the Rights Commissioner's decision was sent to his business and for some reason remained unopened for some unspecified number of weeks. He had participated in the hearing before the Rights Commissioner and knew that a decision was imminent. The decision was sent to him at his employer's address and he did not appeal. His reasons for not appealing do not in my view have any bearing on the legal issues in the case and do not mitigate the fact that he had a statutory right of appeal and did not avail of it.

8. He had a similar right of appeal from the decision of the Rights Commissioner under the National Minimum Wage Act, 2000. That is provided for in s.27(1) of that Act. Neither did the applicant exercise his right of appeal on the merits.

9. Having failed to respond to requests on behalf of the notice party to pay the sums which had been awarded to him by the Rights Commissioner the notice party exercised his right to bring the issue of enforcing the award of the Rights Commissioner before the Labour Court in respect of each claim namely, pursuant to s.28(8) of the Organisation of Working Time Act, 1997, as amended, and s.31(1) of the National Minimum Wage Act, 2000.

10. **7th December, 2011: 9th September, 2011:** On these dates the Labour Court made its respective decisions pursuant to s.28(8) of the 1997 Act and s.31(1) of the Act of 2000.

11. The notice party's solicitors, following the determinations of the Labour Court, wrote on several occasions to the applicant seeking payment of the sums which he was liable to pay, and advising him that failure to do so would result in an application to the Circuit Court for the final enforcement of the award.

12. **2nd February, 2012:** The notice party made an application to the Circuit Court by way of notice of motion returnable for 20th February, 2012 for the final enforcement of the award of the Rights Commissioner. The learned High Court judge notes that that was adjourned to 12th March as there were difficulties in effecting service on the applicant. The trial judge observed that the applicant's "general conduct in this regard was not altogether satisfactory. He delayed and vacillated and his persistent failure to respond to the quite legitimate requests of Mr. Younis's solicitor, Mr. MacGuill was unimpressive".

7th March, 2012: The applicant sought and obtained from the High Court, by way of ex parte application, leave to bring judicial review proceedings in respect of the two decisions of the Labour Court referred to.

13. A fundamental element of this case is that the judicial review application and leave was limited to reviewing the lawfulness of the two Labour Court decisions of September, 2011.

Decision of Rights Commissioner
14. The decisions of the Rights Commissioner of the 31st March, 2011 were made by virtue of his statutory powers pursuant to the complaints made to him by the notice party under the provisions of the Acts referred to above. His decision, under the heading "Determination", was set out in the following terms:-

> *"The claimant and his representatives have presented comprehensive verbal and written submissions to the hearing and the respondent's representative gave a verbal response.*
>
> *Having carefully examined all the evidence as presented to the hearing I form the opinion that the claimant has presented valid complaints.*
>
> *Terms of Employment (Information) Act*
>
> *The claimant was not provided with any formal documentation in relation to his employment over an extended period of*

time pursuant to section 3 of the aforementioned Act.

It is my decision therefore that the claimant be awarded compensation in the sum of €1,500 in compensation to be payable for the breaches of the Terms of Employment (Information) Act.

Organisation of Working Time Act

The claimant has evidenced breaches by the respondent in relation to the provision of annual leave entitlements, the provision of public holiday entitlements, the concept of working in excess of 48 hours per week and the failure to provide Sunday premiums and proper breaks.

The respondents were not in a position to present any records in relation to the above matters and as such on the balance of probabilities my determination is that the claimant has presented a valid complaint.

It is my decision that the claimant be awarded the compensatory sum of €5,000 to be paid by the respondent to the claimant for the breaches of the Organisation of Working Time Act.

National Minimum Wage Act

The claimant presented a letter dated the 29th April, 2010 under the auspices of section 23 where he requested a statement of his wages for the period of 8th December 2008 to the 8th December 2009. As the claimant was not in receipt of a response from this matter within four weeks he has lodged his complaint.

The claimant has given a comprehensive breakdown of the national minimum wage due for the various period of employment and deducted the actual monies received from the employer. The total calculation for the monies due to the employee amount to some €86,134.42.

It is qualified under the auspices of the legislation that a cousin is not regarded as an immediate family member such as to seek excuse from the legislation.

It is my determination that the claimant has presented a valid complaint and it is my decision that he be awarded the sum of €86,134.42 to be paid by the respondent for the breaches of the National Minimum Wage Act." (emphasis added)

Decisions of the Labour Court

15. The determination of the Labour Court dated the 7th September, 2011 was stated in the following terms:-

> *"A complaint having been received under s.28(8) of the Organisation of Working Time Act, 1997, by Muhammad Younis c/o MRCI 55 Parnell Sq. West, Dublin 1, that his former employer Amjad Hussein, t/a Poppadoms, 46 Rochfort Park, Lucan, Co. Dublin and Unit 5B, Newlands Cross, Clondalkin, Dublin 22 failed to implement a decision of a Rights Commissioner R–091912 – WT – 10/MMG*
>
> *And the said decision not having been carried out by the employer, and no appeal having been brought against the said decision within the time limit for such appeal,*
>
> *The Court hereby determines that the said employer pay to the said employee €5,000 in accordance with the decision of the Rights Commissioner."*

16. The decision of the Labour Court of 9th September, 2011 was set out in the following terms:-

> *"A complaint having been made under s.31(1) of the National Minimum Wage Act, 2000 (the Act), by Muhammad Younis, c/o … that Amjad Hussein, t/a Poppadoms, … failed to implement a decision of a Rights Commissioner … dated 31st March, 2011,*
>
> *And the said decision not having been carried out by the employer, and no appeal having been brought against the said decision with the time limit for such appeal,*
>
> *The Court hereby determines that the said employer pay to the said employee €86,134.42 in accordance with the decision of the Rights Commissioner."*

Decision of the High Court

17. The learned High Court judge having referred to the background facts went on to consider the Labour Court determinations. He referred first of all to the decision of the Rights Commissioner. He then referred to the fact it was brought before the Labour Court and he referred to the determinations of the Labour Court in the following terms:-

> *"The findings (and, by implication, the reasoning) of the Commissioner were then upheld in two separate decisions dated 7th September 2011 and 9th September 2011."* (emphasis added)

I have emphasised certain aspects of this statement as they seem to imply that the trial judge's perception or understanding of the Labour Court determinations is that they involved an examination of the decision of the Rights Commissioner on its merits and/or a review as to its correctness in law. Insofar as the learned trial judge did have that perception, I think it is an incorrect one as I explain in my judgment below.

18. At paragraph 13 of his judgment the learned trial judge stated

> *"At the heart of the applicant's case is that Mr. Younis has no standing to invoke the protection afforded by the employment legislation of this State, since by definition any contract of employment was an illegal one in the absence of an employment permit. So far as illegal contracts are concerned, the courts must, where possible, avoid applying too*

severe an approach, still less some formalistic approach which assumes that the enforcement of an illegal contract always presents insuperable public policy objections … In some cases, however, the court has no alternative but to hold that the contract in question is rendered substantively illegal by statute. This, as we shall see, is one such case."

19. He then went on to refer to a key provision of the Employment Permits Act, 2003 (as amended by the Employment Permits Act, 2006). He correctly pointed out that the effect of the provisions of this Act is that a non-national may not enter the service of an employer or be in employment in the State unless he has an employment permit granted by the Minister. He also pointed out that it was an absolute offence for a non-national to be in employment without such a permit. He concluded that this was the position as a matter of fact in this case that the notice party was in the employment of the applicant without a work permit. He concluded that a contract of employment between the applicant and the notice party must be taken as void it was not simply a case of an incidental illegality.

20. At para. 18 he stated:-

"To my mind, therefore, the present case cannot be sensibly distinguished from the decision of the Supreme Court in Martin v. Galbraith [1942] I.R. 37. Here the plaintiff sued to recover overtime payments which had been earned in circumstances where he had worked in excess of a statutory prohibition contained in a statute."

21. He referred to the statement of Murnaghan J. in that case to the effect:-

"Parties to a contract which produces illegality under a statute passed for the benefit of the public cannot sue upon a contract unless the Legislature has clearly given a right to sue."

22. The learned trial judge concluded that any contract of employment between the applicant and the notice party would be contrary to the provisions of statute and substantively illegal. He concluded therefore that "*neither the Rights Commissioner nor the Labour Court could lawfully entertain an application for relief in respect of an employment contract which is substantively illegal in this fashion"* and for these reasons, he set aside the decisions of the Labour Court.

Submission of the Parties
23. The basic premise and anchor point of the applicant's case for the setting aside of the two Labour Court decisions is that the earlier decision of the Rights Commissioner was tainted by illegality in making an award on foot of an employer/employee relationship which was unlawful. The same basic point is made in relation to an alleged want of jurisdiction, or excessive jurisdiction, by the Rights Commissioner in respect of the award made pursuant to the Organisation of Working Time Act, 1997.

24. For the reasons explained below, I have concluded that the decisions of the Labour Court were not concerned with the merits or lawfulness of the decision of the Rights Commissioner. That latter decision is not the subject matter of this judicial review and the Labour Court acted within the ambit of its statutory powers. In the light of my conclusions on the fundamental premise relied upon by the applicant, it is not necessary to examine such issues as the circumstances in which an unlawful contract may or may not be enforceable. Similarly, it has not been necessary to examine the specific issues addressed by counsel on behalf of the Attorney General or on behalf of the *amicus curiae*, Amnesty International. Accordingly, I refer in brief summary form to the submission of the parties related to the basic premise on which the applicant grounded his application for judicial review.

Submissions of the Notice Party/Appellant
25. In the course of this appeal one of the issues, a fundamental one, which had to be addressed was whether the application of the applicant was in substance a misplaced attempt to set aside the decision of the Rights Commissioner in this case, which is not the subject of the judicial review application or leave granted. It was submitted that, in essence, the applicant seeks to quash the decision of the Rights Commissioner although he did not appeal the decision within the time available to him, and did not seek judicial review of that decision. He could not, in any event, do that because it is out of time. The essence of the submission of the notice party in this respect is that the Labour Court, in making the two decisions which it did, acted entirely and strictly within the ambit of its powers. This did not involve a review of or upholding of the decision of the Rights Commissioner on its merits. Therefore, the question whether the contract of employment between the parties on which the Rights Commissioner based his award was lawful or not did not arise. Furthermore, it was submitted that, although the Rights Commissioner referred in his summary of the position adopted by the two parties at the hearing before him, including reference to the fact that the applicant claimed that the appellant was working for him without a work permit, there was no finding to that effect by the Rights Commissioner. It was not open to the High Court to go behind the decisions made by the Labour Court and determine the lawfulness of those decisions by reference to the merits of the Rights Commissioner's decision, but in particular on the basis of a finding of fact which the Rights Commissioner had not made. The Labour Court, in any event, it was submitted, was bound as a matter of law to make the two decisions it did once it was satisfied that there was in existence a decision of the Rights Commissioner which the employer had not complied with.

26. The notice party made other extensive submissions on the issue of illegality of the contract of employment arising from any alleged absence of a work permit and in particular what consequences, if any, that would have for the lawfulness of a contract of employment of the kind that existed between the notice party and the applicant. In the light of my conclusion on the first issue, namely, that the Labour Court was not in either of its decisions concerned with the merits of the decision of the Rights Commissioner it is not necessary to refer to those other submissions.

Submissions of the Applicant
27. The primary submission of the applicant is that the respondent, the Labour Court, acted without jurisdiction and contrary to public policy. In essence it is submitted that the notice party and appellant, Mr. Younis, lacked any capacity to enter into a contract of employment since he did not have the work permit required by law. Alternatively, it was submitted, he was not entitled to enforce any such alleged contract due to the established principles concerning contracts tainted by illegality. In short, it was submitted that the award of the Rights Commissioner must be considered to be fundamentally flawed, as it was based on a relationship of employer and employee which was not permitted to exist in law. Since the decision of the Rights Commissioner is unlawful in purporting to make an award on foot of a contract of employment, contrary to public policy, the two decisions of the Labour Court being founded on the unlawful decision of the Rights Commissioner, are similarly flawed. The decisions of the Labour Court in question purport to give effect to a decision based on an illegal contract and contrary to public policy.

28. It was also submitted that the decision made by the Rights Commissioner exceeded his jurisdiction and was *ultra vires* because it upheld claims that related to periods longer than the statutory maximum period – being 12 months prior to the making of a request to an employer under s.23 of the Act of 2000, and 6 months prior to the reference of a dispute to the Rights Commissioner under s.27(4) of the Organisation of Working Time Act, 1997. Again it was submitted that the respondent, the Labour Court, acted without jurisdiction and contrary to public policy in making a decision which effectively enforced one which was *ultra vires* and outside the

scope of the level of award permitted by the Acts referred to. Counsel for the applicant referred to a decision of this Court in *Martin v. Galbraith Limited* [1942] I.R. 37, which established that an illegal contract of employment is unenforceable.

29. The applicant also submitted that the Rights Commissioner's decision is legally sterile and would have remained so until confirmed by the Labour Court. Without the determination under review the Rights Commissioner's decision would be of no binding force. It was also submitted that even though the Rights Commissioner's decision was not the subject of judicial review that this was an order to which the applicant was entitled *ex debito justitiae*. Reference was made to *The State (Vozza) v. District Justice O'Floinn* [1957] I.R. 227, where the applicant had been convicted of an offence in the District Court and appealed unsuccessfully to the Circuit Court. In that case the Supreme Court set aside the orders of both the Circuit Court and the lower court, the District Court.

Submissions of the Attorney General
30. The Attorney General was invited to make submissions on the broader issue raised in the written submissions between the principal parties concerning the rights, in the light of the relevant legislative provisions, of immigrants or non-nationals who have worked for an employer in this country but done so without a lawful permit. Since it is not necessary, for the reasons explained in the judgment, to address the question of the alleged illegality of the employment in respect of which the Rights Commissioner made his award, it is not necessary to refer to these submissions, helpful though they otherwise were welcome.

Submissions of the *Amicus Curiae*
31. Amnesty International was permitted to make submissions as an *amicus curiae* in this case. The essence of these submissions addressed generally the rights, and indeed fundamental rights, which should be accorded to or which should be respected in respect of undocumented immigrants who are exploited by employers. The applicant took exception to the suggestion that he, as an employer, was involved in the kind of actions or activity covered by these submissions. Certainly these submissions went in significant part beyond any view of the facts in this case. However, for the reasons already explained, it is not necessary to deal with the issues raised in these submissions linked as they are to the question of alleged illegality being the basis of the Rights Commissioner's decision.

Decision
32. First of all it must be underlined that no application was made and no leave granted for a judicial review of the decision of the Rights Commissioner which awarded the sums in question to the notice party as a consequence of his finding of a breach by the applicant of his lawful obligations as an employer.

33. The order of the High Court is limited to setting aside the two decisions of the Labour Court. It was set aside because the High Court appears to have concluded, as a matter of fact, that the notice party did not have a work permit for at least most of the period when he worked for the appellant and for that reason he was not entitled, as an employee, to make the claims which he did before the Rights Commissioner. The alleged illegal nature of the contract appears to be based on a finding of fact by the High Court that there was no work permit. Any such finding of fact by the High Court would constitute a finding on the merits of the notice party's claim before the Rights Commissioner. There is nothing inherently wrong in an employee making the claims that were made against the employer in this case. It may be defeated on the merits, as a matter of law, if facts justifying a dismissal of the claim were to be established and so found by the Rights Commissioner. He did not make such a finding (see paragraph 37 below). It is not open to the High Court in judicial review to make a new finding of fact on the merits in a judicial review case of this nature for the purpose of determining whether the original decision was right or wrong or should be upheld. In any event, the decision of the Rights Commissioner is not the subject matter of the judicial review. The decision of the Rights Commissioner is not set aside, and could not have been. It still stands. Moreover, as regards the two decisions of the Labour Court, which are the subject of the judicial review, it was not, as I explained, within the statutory function of the Labour Court under those sections to consider or make any finding of fact concerning the merits of the Rights Commissioner's decision. Accordingly, it did not, and could not, make any finding of fact relating to the merits of the claim before the Rights Commissioner, least of all any finding related to the existence of a work permit. An application to the Labour Court under the relevant sections by an employee is simply an initial step in an enforcement procedure, as I explain later in this judgment in examining its statutory functions in this regard.

34. If the applicant was dissatisfied with a finding of fact of the Rights Commissioner in his determination or considered that he was wrong in law in the decision which he came to, he could have exercised his right of appeal under the Act to the Labour Court (and thereafter on a point of law to the High Court). The Labour Court would then have had jurisdiction to hear the matter on its merits as to fact and law. He did not do this.

35. The important point for consideration in this context is the nature of the statutory powers being exercised by the Labour Court when it made the two decisions which are sought to be impugned. Then the question is whether there are grounds in law for impugning the manner in which it exercised those specific statutory powers. The short answer, which I think is evident from s.28(8) of the 1997 Act and s.31(1) of the 2000 Act, is that the Labour Court was only concerned whether:

(a) there was an existing determination of the Rights Commissioner in favour of the notice party;

(b) that the employer had not appealed and the time for doing so had expired, and

(c) the employer had not complied with the Determination of the Rights Commissioner.

The Labour Court had no powers to review the decision of the Rights Commissioner under those sections, and once satisfied of the objective elements just referred to it was bound to determine in each case that the applicant, as employer, pay the amounts found to be due by the decision of the Rights Commissioner. I explain further below why this inevitably flows from a proper construction of the section.

36. Before doing so, I would refer to a subsidiary but important question even though it is not necessarily determinative. The notice party has submitted in the High Court and in this appeal that there was no actual finding of fact by the Rights Commissioner to the effect that the notice party had been working for the applicant without a work permit required by law. The point made on behalf of the notice party is that the official document containing the decision of the Rights Commissioner first sets out just a summary of the evidence given by the notice party and the appellant. It was submitted by counsel in written submissions, as regards that summary, that it recounts "that he [Mr. Younis] understood there was a problem with his work permit in 2009, and Mr. Hussein's evidence, as recorded, that he couldn't in 2009 obtain a renewal of a work permit. There is no evidence, much less any finding, that Mr. Younis worked at any time without a work permit. … Assuming such evidence was given before the Rights Commissioner, there is nothing in his decision to suggest that he accepted this evidence. Given the nature of Mr. Hussein's evidence he may well have decided that the evidence was unreliable".

37. It is correct that there is not to be found in the Determination of the Rights Commissioner any finding of fact that the notice party worked without a work permit. Having recited in a very summary form the case that was made by both sides, he concluded that "*Having carefully examined all the evidence as presented to the hearing I form the opinion that the claimant has presented valid complaints".* Mr. Younis, the notice party, made complaints and a claim against the applicant, Mr. Hussein. Before he could be denied his remedies before the Rights Commissioner on the grounds that his employment was illegal the fact that he did not have a work permit when employed would have to have been established and a finding to that effect made. There was no such finding. Apart from bringing an appeal on the merits to the Labour Court, the applicant could have judicially reviewed the decision of the Rights Commissioner if he could establish that the evidence before him was such that he had been compelled to make such a finding of fact on a consequential finding on the legality of the employment. Of course, the decision was neither appealed nor any judicial review sought upon such a basis. The issue concerning the powers and jurisdiction of the Labour Court should be seen in this context, including that there was no error on the face of the Determination.

Labour Court – Statutory Function

38. There is, however, a more fundamental question which arises in this case, namely, what is the subject matter of the judicial review. That subject matter is the lawfulness of the two decisions taken by the Labour Court.

39. The Labour Court under the two sections in question in this case was not concerned with determining whether the notice party had a valid claim against the applicant on foot of an employment contract. The jurisdiction and function of the Labour Court in each section, and they are couched essentially in the same terms, is, I emphasise again, confined to determining:

(a) That a decision of a Rights Commissioner in relation to a complaint has been made;

(b) That the decision has not been carried out by the employer concerned in accordance with its terms.

40. These are the only objective facts which the Labour Court has to determine under s.28(8) of the 1997 Act, and s.31(1) of the 2000 Act (see sections as recited at paragraph 2 above).

41. Those sections are in complete contrast to the provisions of s.28(1) and s.28(6) of the Act of 1997, on the one hand, and to s.27(1), s.28 and s.30(2) of the Act of 2000, on the other. These latter are the provisions which provide for a full right of appeal on the merits by an aggrieved party, such as the applicant, from a decision of the Rights Commissioner to the Labour Court. In each case there is a further right of appeal from a decision of the Labour Court to the High Court on any question of law arising. None of these were availed of by the applicant.

42. The terms of the determination of the Rights Commissioner are cited at paragraph 14 above. It is, in its terms and on its face, a determination under the relevant statutes in favour of the notice party. Once the objective fact of the existence of that decision is established for the purposes of the particular sections under which the Labour Court is acting and that the employer has failed to comply with it, the Labour Court has no option but to make the decisions which they did. The applicant has not, in my view, established any grounds from which it could be argued that the applicant was entitled to some form of order *ex debito justitiae*. The decision of the Rights Commissioner was simply not the subject of a judicial review before the High Court or before this Court. This Court is, as explained, only concerned with the manner in which the Labour Court exercised its statutory powers. Counsel for the applicant relied on *The State (Vozza) v. District Justice O'Floinn* (cited above) for supporting a proposition that one could in some way go behind the decisions of the Labour Court in this case and rely on an alleged frailty of the earlier Rights Commissioner's decision for impugning them. There are a number of elements of that case which distinguish it from the circumstances of this case, but the most fundamental one is that in that case *certiorari* was sought against both the decision of the District Court and the decision of the Circuit Court. Thus, unlike this case (apart from the fact that that case was concerned with the validity of a criminal conviction) both orders in issue were the subject matter of the *certiorari* proceedings.

43. Accordingly, the Labour Court, in exercising powers under the relevant sections, is not and cannot be concerned with whether the evidence before the Rights Commissioner supported the decision or whether it was the correct decision. It is only concerned as to whether a decision has been made. This is underscored by the fact that each of the sections make it a precondition for the exercise of this particular jurisdiction that no appeal had been brought. Moreover, each section provides that the Labour Court should make this decision without hearing the employer concerned, and adding "*other than in relation to the matters aforesaid"*, referring to the objective facts that (a) a decision has been made and (b) it has not been carried out by the employer.

44. The express provision that the decision may be made without hearing the employer, except on those particular matters, is manifestly because there is no other issue of either fact or law before the Labour Court concerning the merits or otherwise of the decision of the Rights Commissioner.

45. Thus, once the Labour Court had objective evidence of a decision and Determination, as quoted above at paragraph 14, and evidence that the employer had not paid the amount of the award in each case, it was bound to make the decisions which it did pursuant to s.28(8) of the Act of 1997 and s.31(1) of the Act of 2003. It is not permitted to act otherwise under these sections.

46. This is what the Labour Court decided. In my view, it clearly acted pursuant to and in accordance with its jurisdiction.

47. Since the Labour Court exercised its powers properly and within the parameters defined by the sections in question, there is no basis, in my view, for setting aside its two decisions by way of judicial review.

48. To have done so on the basis claimed by the applicant in these proceedings would have been, in substance, to impugn, not the decisions of the Labour Court, but rather the decision of the Rights Commissioner. The applicant did not seek to do that. When he applied for judicial review in the current proceedings the time for seeking judicial review of the decision of the Rights Commissioner had expired. These time limits are there to bring finality and certainty to decisions when taken, *inter alia*, by statutory bodies acting within their powers. Insofar as the applicant was aggrieved by the decision of the Rights Commissioner, he had his remedies, appeal on the merits, followed, if appropriate, by an appeal on the point of law to the High Court, or judicial review. He did neither.

49. The judgment of the High Court referred to the Labour Court decision as having "*upheld*" the decision of the Rights Commissioner. It was manifestly not the function of the Labour Court to uphold or refuse to uphold the merits of the decision of the Rights Commissioner. Nor did it purport to do so. The Labour Court was only concerned objectively with the fact that a decision had been made and not complied with by the employer. Thus, the Labour Court decisions did not, as the learned High Court judge seems to have suggested, implicitly engage in upholding the reasoning of the Rights Commissioner.

50. The applicant in his submissions referred to the reliance placed by the learned High Court judge on the decision of this Court in

Martin v. Galbraith [1942] I.R. 37. The learned trial judge was of the view that "*the present case cannot be sensibly distinguished from the decision of the Supreme Court".* If this case involved a judicial review of the decision of the Rights Commissioner, or if the Labour Court had been hearing an appeal from that decision on its merits under other sections of the respective statutes, then that case may well have been a relevant authority. *Galbraith* was a decision of this Court in a Case Stated from the High Court arising from the hearing of an appeal from the Circuit Court. In other words, the High Court was trying the issues concerning contractual obligations on their merits. The issues referred to the Supreme Court by the High Court were thus issue of law concerning the merits of the case. The determination of the questions raised in the Case Stated was for the purpose of enabling the High Court to decide on the merits. That is entirely different from the nature of the issues in this case, which is concerned with the lawfulness of the manner in which the Labour Court exercised its particular statutory powers.

51. As regards the submission of the applicant that the Rights Commissioner exceeded his jurisdiction in calculating and making his award under the National Minimum Wage Act, 2000, the same considerations apply as I have applied to the contention that the alleged illegality of the employment relationship was a ground for impugning the later decisions of the Labour Court. Examining that issue would also, in substance, involve a judicial review of the determination of the Rights Commissioner. The Labour Court, when making its decision was not concerned with, and had no jurisdiction to consider, the merits of the Rights Commissioner's decision in this particular regard.

52. With so many regulatory measures in the modern economy concerning employment relationships and the supply of goods and services, the circumstances in which a contractual relationship which gives rise to some form of illegality might be considered a ground for not enforcing it, is a complex one. Traditional judicial dicta, in the older cases in particular, may have to be reviewed or nuanced in the light of the modern regulatory environment, and applied with the principle of proportionality in mind. Since any issue of illegality concerning the employment relationship between the relevant parties in this case does not arise within the proper parameters of this judicial review, it is not necessary to address those issues (or other contingent issues) in any way.

53. I would, however, add, even though it is entirely hypothetical, that if the subject matter of the liability to be enforced involved something which was inherently immoral or inherently against the public interests, such as an agreement to rob or to distribute the proceeds of a robbery, then the issue of illegality and public policy would arise from a different perspective. Obviously, that is not the case and unlikely to be the kind of thing which would be attributed to a Rights Commissioner by statute to decide. In this case one is dealing with an inherently lawful subject matter, namely, the relationship of employer and employee, a relationship which the Rights Commissioner, in his Determination, found to exist and give rise to a liability of the applicant. Again, there was no appeal or judicial review of that decision.

54. Judicial review proceedings are not, in any sense, an appeal from the decision concerned. They are concerned with reviewing whether the decision-maker has acted within his or her powers and in accordance with those powers. In this context I do not think there is any basis for suggesting that the applicant would be entitled to have the decisions of the Labour Court set aside *ex debito justitiae*. This is because the form and subject matter of the Rights Commissioner's decision to which I have referred (an inherently lawful activity of employer/employee relationship), the fact that judicial review of that decision is outside the scope of these judicial review proceedings, these judicial review proceedings in which leave to bring these proceedings, leave having been sought and granted only in respect of the Labour Court decisions.

55. I conclude for the reasons stated that the Labour Court cannot be said to have erred in law in making the two decisions which are in issue in these proceedings.

56. Accordingly, I would allow the appeal and set aside the order of the High Court.