

Immigration control civil servant wins allowance breach claim

ANDY PRENDERGAST

An assistant principal at the Department of Justice has been awarded over €33,000 for a payment of wages breach, with a WRC adjudicator finding an out of hours allowance not fully paid to him was an “integral part” of his agreement to take the role.

Finding against the Department of Justice, WRC adjudicator Davnet O’Driscoll noted that sanction from the Department of Public Expenditure & Reform (DPER) for the out of hours allowance was not sought by HR in Justice for 20 months.

Mr Martin Switzer, an assistant principal officer with the Department of Justice, moved from Kerry to take up an immigration control position at Dublin Airport in 2018, on the basis that he would receive an on call/out of hours allowance of €18,023 per annum. The job requires working weeks up to 60-70 hours, including weekend work. He worked the role from May 2018 until May 2020.

A decision was not made on Mr Switzer’s allowance until late 2021, when he was granted an allowance for €1,197 gross per annum. The common ‘out of hours’ allowance in the Department is €14,475, as confirmed by the Minister in parliamentary questions.

Justice said that a business case has to be submitted to DPER for the allowance and that it was not guaranteed to be paid to anyone. It denied that any assurances were given to Mr Switzer for the allowance.

The complainant said that the head of the border management unit and an assistant general secretary in Justice gave him verbal assurances, before he took up the post, that he would receive an €18,023 per annum allowance.

Justice further argued at the WRC that Mr Switzer’s claim is “not stateable as a matter of law” and that the WRC “has no power under the [Payment of Wages] Act to force an uplift or create an allowance level in addition to salary paid to the complainant.”

CARLTONA DOCTRINE

The complainant said he had a legitimate expectation he would receive the allowance, which influenced his decision to accept the post (having initially rejected it). He incurred extra costs of renting in Dublin while performing the role.

He cited the 1943 UK decision of *Carltona v Commissioner of Works* which sets down that a decision of an official of a government department is essentially a ministerial decision.

Justice said that the WRC does not have jurisdiction to adjudicate on claims reserved for the Chancery Court.

AO O'Driscoll said she accepted the complainant's evidence that he was promised the allowance of €18,023 per annum. She pointed to the 1982 decision of Lord Denning in *Amalgamated Investment & Property & Co Ltd v. Texas Commerce Investment Bank Ltd*, which states: "When the parties to a transaction proceed on the basis that an underlying assumption – either of fact or of law – and whether due to misrepresentation or mistakes makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands".

INTEGRAL PART

The adjudicator said that payment of the on call/out of hours allowance "was an integral part of the agreement by the complainant to the role."

Therefore the complainant's wages properly payable include the on call out of hours allowance for the period May 2018 until March 2020, of €34,544.41 less €1,197.50 already paid, giving a sum payable of €33,346.91.

She ordered the Department of Justice to pay Mr Switzer €33,346.91.

The employer was represented by Emma Cassidy BL, instructed by the Chief State Solicitors Office. (ADJ-00036988, AO: *Davnet O'Driscoll*)