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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **19/6/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

WILLIAM STEWART

Plaintiff/Appellant;

and

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant/Respondent.

STEPHENS J

Introduction

[1] This is a plaintiff's appeal from a decision in the County Court. The plaintiff, William Stewart, claims that in breach of his contract of employment the defendant, the Department of Finance and Personnel, since June 2008 has changed his hours of work as a security guard so as to deprive him of two hours guaranteed overtime per day.

[2] Overtime (extra time added to the regular working day) can be categorised as voluntary, compulsory or guaranteed. Voluntary overtime is overtime in relation to which there is no contractual obligation on the employee to perform if he is requested to do so by his employer. Compulsory overtime is overtime in relation to which there is a contractual obligation on the employee to perform if he is requested to do so by his employer. Guaranteed overtime is overtime which the employer is contractually obliged to offer to the employee. Guaranteed overtime can be either voluntary in which case the employee is not contractually obliged to perform it or compulsory in which case the employee is contractually obliged to perform it. As a general proposition overtime is voluntary and the obligation is on the party who contends that it is compulsory or guaranteed to so establish.

[3] The plaintiff alleges that there was a term in his contract of employment guaranteeing two hours overtime, Monday to Friday inclusive and also that it was

compulsory that he performed those two hours of overtime. He claims for the loss of overtime payments on a continuing basis from June 2008 to date.

[4] In relation to the assessment of damages Mr McKee, who appeared on behalf of the plaintiff, accepted that in June 2008 the defendant could have terminated the plaintiff's employment on 12 weeks' notice and then offered to re-employ the plaintiff on the basis of a contract which did not guarantee overtime. That by adopting such an approach the defendant could have removed its contractual obligation to offer the two hours guaranteed overtime to the plaintiff. However he contended that the plaintiff's claim to damages should not be limited to a 12 week notice period because the defendant had not adopted that course of action.

[5] Also in relation to the assessment of damages Mr McKee accepted that the plaintiff's calculation of loss of overtime pay could not be sustained as it made no allowance for holiday periods during which the plaintiff was not working. Accordingly that if the plaintiff was successful in relation to the issue of liability, the exact amount of damages would have to be adjusted to allow for holiday periods and some other matters raised by the defendant.

[6] In view of the uncertainty in relation to the amount of damages both parties sought a decision in relation to liability and thereafter, if I decided in favour of the plaintiff, an opportunity to agree the amount of the plaintiff's damages and failing such an agreement that I would then hear further evidence. In this judgment I deal solely with the issue of liability.

[7] The plaintiff gave evidence. David Topping, another security guard employed by the defendant at its Stormont Estate was called as a witness on behalf of the plaintiff, as was Mr Griffin, a full time official with the Northern Ireland Public Service Association (NIPSA). No witnesses were called on behalf of the defendant though there were three agreed bundles which contained documents the majority of which emanated from the defendant.

The liability issues between the parties

[8] It is common case that the plaintiff was first employed as a security guard by the defendant in 1974 and that he has worked in that capacity throughout his employment at various locations belonging to the defendant. That since 1990 he has worked at the defendant's Stormont Estate.

[9] The plaintiff's case is that between 1990 and June 2008 whilst employed at the defendant's Stormont Estate his dayshift hours were from 9 a.m. to 5 p.m. but that he was also required to work 1 hour's overtime between 8.00 am and 9.00 am and 1 hour's overtime between 5.00 pm and 6.00 pm. The plaintiff contends that these two hours of overtime each day were both compulsory and guaranteed. Furthermore that at that location if he was on the nightshift there were two hours

overtime which were both compulsory and guaranteed. I will refer to the two hours overtime whether on day shift or night shift as "the two hours overtime".

[10] The plaintiff's case is that on a unilateral basis in June 2008 the defendant brought to an end the two hours overtime and instead engaged private contractors to carry out the additional work. It is common case that in June 2008 the plaintiff was no longer required to work the two hours overtime and that the two hours overtime was no longer offered to him.

[11] It is defendant's case that the two hours overtime were voluntary. The defendant also contends that the two hours overtime were not guaranteed.

Sequence of events

[12] By letter dated 10 January 1973 from the Civil Service Management Division the plaintiff was offered employment as a security guard. The letter included a statement that:-

> "6. The general conditions of service will be in accordance with such regulations and instructions governing these matters, as may be made or issued from time to time by the Ministry of Finance."

The plaintiff accepted the offer of employment by letter dated 13 January 1974.

[13] By letter dated 29 April 1985 Mr M G Slack of the Department of Finance and Personnel responded to three questions posed by Mrs M J A McClelland of NIPSA. The letter is headed "Security Guards Overtime". The letter to which he was responding which contained the three questions has been lost. The letter makes it clear that a standard day for a security guard

> "which includes 2 hours *built in overtime* is from 8 am to 6 pm and all guards carry out these duties". (emphasis added)

In distinction to two hours *built in* overtime there was in addition

a. *rostered overtime* which it is clear from the letter was voluntary in that 8 of the security guards refused to and were permitted not to work the additional rostered hours and

b. *ad hoc overtime* which is overtime which occurs from time to time for a variety of reasons.

Those security guards who were not prepared to work *rostered overtime* were not eligible for *ad hoc overtime*.

[14] By letter dated 24 July 1989 the plaintiff was informed that arrangements had been made by the defendant for him to be transferred to the Stormont Estate. The letter informed him that

> "hours of work, etc:- day shift: 8 am - 6 pm Mon-Fri nightshift: (1 wk in 5) 9 pm - 8 am Sun - Sat overtime available".

[15] The plaintiff transferred in 1990 to the Stormont Estate and upon transfer he was given the "Security Post:- Hours of Duty" notice. By this notice the security guards at the Stormont Estate were informed that the required hours of duty were 8 am to 6 pm. The notice goes on to state that:-

> "Your general hours of duty are essentially 0900 - 1700 Monday - Friday – 40 hours working week all hours worked outside of this format will be payable at appropriate overtime rate. However the nature of the role of Stormont security guards requires all personnel on day duty to report for work to the relevant post assigned at 0800 hours and end their duty at 1800 hours."

He was also informed by Mr Ferguson, the Chief Security Guard at Stormont, that his hours of work on day shift were 8 am to 6 pm which included 2 hours built in overtime.

[16] The plaintiff's evidence, and the evidence of the plaintiff's witnesses, which I accept, is that prior to the plaintiff's arrival at the Stormont Estate in 1990, and throughout the whole period from his arrival to June 2008, he was required to work, whether on day shift or night shift, the two hours overtime. It was not rostered in any way but rather every security guard was required to perform this work. It was compulsory in the same way as ordinary hours of work from 9 am to 5 pm were compulsory.

[17] In relation to the ordinary hours of work and in relation to the two hours overtime an employee could of course ask the defendant, as his employer to permit him to be absent from work for a special reason such as a doctor's appointment or some pressing family matter but whether the defendant acceded to such a request was entirely at the defendant's discretion. Such dispensations ordinarily would apply in relation to some temporary and perhaps also unexpected event. But dispensations could arise in relation to more permanent and entirely predictable events. Again entirely at the employer's option special

arrangements could be made in relation to ordinary hours of work or the two hours overtime. For instance one security guard was regularly permitted not to work one of the two hours overtime on day shift (8 am to 9 am). The reason for this was that his wife was unwell and he had to take his children to school. Another security guard was accommodated due to the personal circumstances of his mother and was permitted not to work from 5 pm to 6 pm. These dispensations were at the entire option of the defendant.

[18] I reject the defendant's contention that the two hours overtime was voluntary. I have come to that factual conclusion on the basis of the oral evidence alone. However quite apart from the oral evidence I note for instance the terms of the letter dated 24 July 1989 which stated that the plaintiff's hours of work were 8 am to 6 pm. Those are the hours that he was required to work and those hours included the two hours overtime. Also the concept of "built in" overtime that is overtime which is inherent, integral or innate to the working week is consistent with the two hours overtime being compulsory. Mr Wolff who appeared on behalf of the defendant was unable to point to any unambiguous document emanating from the defendant to the plaintiff establishing that the two hours overtime was voluntary. I find as a fact that the two hours overtime was compulsory.

2008 Civil Service HR Policy

[19] In 2008 the defendant produced to the plaintiff a document entitled "Northern Ireland Civil Service HR Policy." I enquired as to the precise date in 2008 of this document but it was not possible for either party to inform me of that date. However both parties proceeded on the basis that the document was a contractual document incorporated into the plaintiff's contract of employment and that it governed the relationship between the plaintiff and the defendant prior to June 2008, the date upon which the two hours overtime came to an end. I will refer to this document as the 2008 document.

[20] The 2008 document deals with the defendant's obligation to make a number of hours of work per week available to its employees. It does this by reference to a contractual concept of "conditioned hours". These are the hours which Mr Wolff on behalf of the defendant accepts that the defendant is contractually obliged to make available to its employees and which in turn the employees are contractually obliged to work.

[21] In the 2008 document under the heading "Conditioned Hours. Non Industrial Staff" it was stated:-

> "1.1. For the majority of full-time non-industrial civil servants pay is related to a specific number of hours of attendance per week, known as "conditioned hours". The number of hours varies

> between grades and may be expressed as a gross figure including meal breaks or a net figure excluding meal breaks."

The 2008 document went on to provide that security guards were included in "grades conditioned to 40 hours gross week". Accordingly the plaintiff's conditioned hours were 40 hours gross per week. These were the hours which the defendant was contractually obliged to make available to the plaintiff and which in turn the plaintiff was contractually obliged to work.

[22] The 2008 document also went on to provide a definition in respect of overtime. Again that definition incorporated the contractual concept of "conditioned overtime". The definition which was provided was in the following terms:-

> "2.1 Hours worked at management's request in excess of conditioned hours are regarded as overtime. These hours are voluntary in nature, except where they are part of the conditioned overtime for a post. Authorised overtime will, as far as possible, be worked on Monday to Friday. Overtime should only be worked at weekends if circumstances clearly justify this as necessary."

The defendant's submissions in relation to conditioned hours and conditioned overtime

[23] Mr Wolff, who appeared on behalf of the defendant, accepted that the concept of *conditioned hours* of work created an obligation on the defendant to make those hours of work available to its employees. He also accepted that the concept of *conditioned overtime* should carry with it the same obligation on the defendant that is the obligation to make available to its employees those hours of overtime. Accordingly he accepted that conditioned overtime was the same as guaranteed overtime. I am content within the context of an adversarial system to proceed on the basis of that concession.

Conclusion

[24] I find as a fact that the two hours overtime were conditioned overtime. Accordingly on the basis of the defendant's concession the two hours overtime was not only compulsory but also guaranteed. The defendant in breach of contract and from June 2008 failed to make available to the plaintiff the two hours overtime.

[25] I enter judgment for the plaintiff for damages to be assessed. I will afford the parties an opportunity to agree damages and will fix a review date.