THE HIGH COURT

[2013 No. 123 MCA]

IN THE MATTER OF SECTION 15(6) OF THE PROTECTION OF EMPLOYEES (FIXED TERM WORK) ACT 2003

BETWEEN

ARON GOKUL, KAREN O'MAHONY, GER PETIT,

KAREN HOURIHAN AND ROBBIE O'MEARA

APPLICANTS/APPELLANTS

AND

AER LINGUS PLC

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 9th day of September, 2013

1. The net question which is presented as a preliminary issue in the course of this statutory appeal from a decision of the Labour Court is whether this Court enjoys a jurisdiction to extend time for the delivery by the respondent of the appearance required by O. 12, r. 2A(a). While O. 12, r.2A(a) stipulates that any such appearance shall be entered within eight days of the service of the appropriate originating notice of motion commencing the statutory appeal, it is common case that the respondent has failed to do so. In essence, the issue is whether this omission is fatal to the respondent's right to defend the proceedings and to be heard on the appeal.

2. The issue arises in this way: the appellants are all former employees of Aer Lingus who commenced employment with that company on fixed term contracts on various dates between 2004 and 2005. They were subsequently appointed with permanent contracts with effect from 2006 and 2007. In late 2008, Aer Lingus experienced severe trading difficulties and the appellants' contracts were terminated by reason of voluntary redundancy. This was done as part of a scheme whereby employees could leave their employment and return on revised pay and conditions. Each of the appellants received a redundancy lump sum and it appears they also signed a document waiving all claims against Aer Lingus in respect of the termination of that employment.

3. Aer Lingus had earlier become a public limited company in 2006 as a result of its privatisation. At that time it introduced a share ownership scheme which was allocated to employees through an Employee Share Ownership Trust ("ESOT"). It appears that the distribution of the shares was predicated on each of the employees having spent one year in continuous employment. It was determined that the appellants were not eligible to participate in the scheme because they did not have the requisite service in 2006 as they were on fixed termed contracts of employment at that time. The appellants then contended that the failure to make such allocations amounted to discrimination within the meaning of Protection of Employees (Fixed Term Work) Act 2003 ("the 2003 Act").

4. The matter was considered by the Labour Court which gave its decision on 4th April, 2013. The Court found that even if the appellants were in fact fixed term employees within the meaning of s. 2 of the 2003 Act, it was not necessary to rule on the merits of the dispute for the simple reason that the claim was statute barred for the purposes of s. 14(3) of the 2003 Act. The claim was accordingly dismissed. The appellants now appeal to this Court pursuant to s. 15 of the 2003 Act.

5. This is the general background against which this matter comes before the court. This appeal commenced by means of an originating notice of motion and grounding affidavit on 30th April, 2013. Aer Lingus contends that the appeal is misconceived because it is out of time.

6. As it happens, this question does not directly arise for consideration quite at this moment because I am first required to determine an antecedent issue, namely, the contention by the appellants that Aer Lingus are precluded from raising such an issue because they themselves have not complied with the requirements described by O. 12 r. 2A(a) in that no appearance to this appeal was filed by Aer Lingus within the eight days specified by this sub-rule. Order 12, rule 2A(a) provides:-

> "A respondent in proceedings commenced by originating notice of motion pursuant to O. 81A, O. 84B or O. 84C, to whom such notice of motion has been given, *shall enter* an appearance to such notice of motion in the form No. 9 in Appendix A Part 2 within eight days of the service of the notice of motion. Where a respondent is given notice of such motion after the date first fixed for the time of the notice of motion, he shall enter an appearance within the time fixed for the court for that purpose. A respondent in such proceedings shall not, without the leave for the court be entitled to be heard in such proceedings unless he has entered an appearance." (emphasis supplied)

7. It is common case the procedure of the present appeal is governed by O. 84C of the Rules. While it is true that neither O. 12(2A) or O. 84C makes specific provision for the extension of time in respect of the entry of an appearance – although O. 84C, r. 2(5)(c) allows the Court to extend time for the issue of a notice of motion -it should also be recalled that O. 122, r. 7 provides that:-

> "*Subject to any relevant provision of statute*, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed." (emphasis supplied)

8. Counsel for the appellants, Mr. Gokul, placed considerable emphasis on the undeniably mandatory nature of the language contained

in O. 12, r. 2A(a). Yet two broader considerations, both bearing significantly on the proper interpretation of these words, must also be borne in mind.

9. First, it must be recalled that O. 12, r. 2A merely enjoys the status of a statutory instrument. Accordingly, it does not have the same normative status in our legal system as that of a statute enacted by the Oireachtas. The Oireachtas can, of course, in principle create jurisdictional bars to legal proceedings by requiring, for example, the litigation to be commenced within a particular time. Any such legislative restriction on the right of access to the courts would, of course, have to respect fundamental constitutional principles: see, *e.g.*, *White v. Dublin Corporation* [2004] IESC 35, [2004] 1 I.R. 545 and *Blehein v. Minister for Health and Children* [2008] IESC 40, [2009] 1 I.R. 275.

10. The drafters of the Rules of the Superior Courts could not, however, validly change the law by prescribing a fixed and unalterable limitation period of this kind as if it were akin to the operation of the Statute of Limitations. This, of course, is not to say that the Rules of the Superior Courts cannot provide for effective time-limits or that litigants who do not comply with the time limits specified by rules of court are not at real risk of finding themselves non-suited by reason of default of pleading. It is rather to say that a strict jurisdictional bar – such as that contained, for example, in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 which imposes a requirement that proceedings be commenced within two weeks subject to a right to extent time – could only be imposed by primary legislation enacted by the Oireachtas. The right of access to the court is a constitutional fundamental for both plaintiffs and defendants and if that right is to be abridged by means of a jurisdictional bar, this can only be done in accordance with a law duly enacted by the Oireachtas.

11. In any event, given that such a strict jurisdictional bar would involve a change in the ordinary law, Article 15.2.1 of the Constitution (which vests the exclusive legislative power in the Oireachtas) would also require that any such change could only be brought by primary legislation enacted by the Oireachtas and could not be done not simply by Rule of Court: see, *e.g.,* by analogy the comments of O'Higgins C.J. in *Cooke v. Walsh* [1984] I.R. 710 and those of Keane C.J. in *Mulcreevy v. Minister for Environment* [2004] IESC 5, [2004] 1 I.R. 72.

12. All of this is of some importance in the context of the point so forcefully advanced by the appellants regarding what they maintain is the jurisdictional character of O. 12, r. 2A, so that – on this argument – the Court must treat the failure on the part of the defendants to file an appearance within time as dispositive of the matter as there is simply no power to extend time. The short answer to this contention is that it is itself predicated on the assumption that one may treat a statutory instrument or Rule of Court for this purpose as if it were the equivalent of a statute creating a jurisdictional bar for litigants who did not comply with a particular time-limit prior to proceeding with their proposed litigation. Yet it is clear from a consideration of Article 15.2.1 and key decisions such as *Cooke v. Walsh* and *Mulcreevy* that this approach is simply legally impermissible.

13. The second general consideration is that the Rules of Court must be read as being subject to a specific rule which is of general application, namely, O. 122, r. 7. It is clear from this provision that, subject only to any provisions of statute to the contrary, the Rules themselves confer a general power to extend the time stipulated elsewhere by the Rules, including, for example, O. 12, r. 2A(a), even if no power to extend time for the entry of an appearance is contained in that specific sub-rule. Here it may be significant that this general power to extend time is expressed to be subject to any relevant statutory provisions to the contrary. This means, for example, that this Court could not invoke O. 122, r. 7 for the purposes of extending time within which to bring an application for eave to apply for judicial review which was otherwise governed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, since the power to extend time in those cases is contained in the primary statute itself and must be exercised subject to those conditions. Of course, the clear implication here – which, in any event, is borne out by the express language of O. 122, r. 7 itself – is that this provision is broad enough to facilitate the extension of any time limit specified elsewhere by the Rules of the Superior Courts as distinct from the time-limits prescribed by statute. This is true even in those instances – such as O. 12, r. 2A(a) - where the Rules of the Superior Courts specify a time limit which is expressed to be in mandatory or imperative language.

14. It might also be observed that a construction of the Rules of the Superior Courts which insisted on perfect and undeviating compliance with the requirements of the Rules would be at odds with fundamental principles regarding the constitutional right of access to the courts. The contemporary case-law is clear that legislative provisions which regulate the right of access to the courts must be interpreted in a manner which respects these fundamental principles: see, *e.g., Re MJBCH Ltd. (in liquidation)* [2013] IEHC 256, *Dunmanus Bay Mussels Ltd. v. Acquaculture Licence Appeals Board* [2013] IEHC 214 and *O'Higgins v. University College, Dublin* [2013] IEHC 431.

15. I may venture to repeat here what I said in *Dunmanus Bay Mussels* with regard to the effects of non-compliance with even a jurisdictional requirement specified by statute:

> "a conclusion that the non-compliance with these statutory requirements rendered the proceedings wholly irregular and thus beyond the capacity of the courts to rescue by means of an appropriate amendment would amount to a manifestly disproportionate interference with the applicant's constitutional right of access to the courts…the consequences of the non-compliance with this statutory requirement fall to be evaluated by reference to the impact which such non-compliance might otherwise have on an applicant's constitutional right of access to the courts."

16. I then went on to observe that this was the approach which had been adopted by Finlay Geoghegan J. in *Re MJBCH Ltd. (in liquidation).* This was a case where the plaintiff claimed damages for personal injuries against the defendant company and had issued proceedings without realising that an order had been made by this Court some two months previously providing for the winding-up of the company. When the proceedings were then served on the company, the plaintiff's solicitor received a letter from the official liquidator advising them of this development. The plaintiff's solicitors then applied to this Court for an order pursuant to s. 222 of the Companies Act 1963 ("the 1963 Act") seeking the retrospective leave of the court to the commencement of the proceedings, given that this provision stipulates no proceedings shall be brought against a company in liquidation without prior leave of the court.

17. Finlay Geoghegan J. concluded that s. 222 should not be construed as prohibiting the retrospective grant of leave:

> "…having regard to the purpose of s.222..and the [relevant] constitutional principles, in the absence of express words which provide that that the commencement of proceedings without leave of the court in breach of s. 222 render proceedings a nullity or which preclude the court from granting leave for commencement after the event s. 222 should not be so construed."

18. Finlay Geoghegan J. then went on to hold that this was an appropriate case in which to grant leave. The grant of leave would not compromise an essential objective of the section – namely, that all proceedings relating to the company being would up should be placed under court supervision – and nor would it prejudice the orderly wind-up of the defendant company. She noted that failure to

grant leave might have serious consequences for the plaintiff, not least because if the plaintiff was required to issue fresh proceedings and then seek leave, it might then transpire to be statute-barred. The plaintiff, moreover, was not to know that the defendant had already been wound up when the first set of proceedings had been issued.

19. These principles can be applied with advantage to the present case. The eight day time limit for the filing of an appearance is designed to promote the early and orderly notification of the fact that a particular defendant intends to appear to defend the proceedings. While it is true that in time-honoured fashion the drafters of the Rules employed mandatory and imperative language ("....shall enter an appearance to such notice of motion in the form No. 9 in Appendix A Part 2 within eight days of the service of the notice of motion…."), yet it may nonetheless be supposed that they would have been as surprised as anyone else to learn that they had thereby erected a jurisdictional bar to the further defence to the proceedings where through some mischance or oversight a purely formal and essentially administrative step prescribed by the Rules had not been complied with within the prescribed time-period. Nor would one of the objectives of the Rules – namely, the orderly and effective administration of justice – be compromised if the Court enjoyed a power to extend time in respect of a routine matter such as the entry of an appearance.

Conclusions

20. It is clear, therefore, from the foregoing analysis that this Court does enjoy a wide power to extend time in respect of time limits prescribed by rules of court pursuant to O. 122, r.7 and that O. 12, r. 2A(a) cannot in any event be construed as if it had erected a jurisdictional bar precluding a defendant from defending the proceedings simply by reason of the fact that an appearance had not been filed within the eight day period prescribed by the Rules. Of course, the Court must and necessarily does have power to strike out the proceedings of all litigants for persistent or contumelious default or where the delays have been prejudicial, either to those of other litigants or to the public interest and this jurisdiction remains entirely unaffected by the present decision.

21. Nothing of the kind arises here. Both parties have endeavoured to join issue on the appeal and such (relatively) small delays as there have been have been harmless and non-prejudicial to the other party. It is for these reasons, therefore, that I will accordingly make an order pursuant to O. 122, r. 7 extending time for the entry of an appearance on condition that Aer Lingus file an appearance within seven days from today's date.