Neutral Citation Number: [2008] IEHC 75

THE HIGH COURT

1994 No. 7021 P

BETWEEN

JOHN GILDEA, WILLIAM KING, GARRETT MADIGAN & OTHERS

PLAINTIFFS

AND

AER LINGUS PLC

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 3rd March, 2008.

Background to judgment

1. The substantive claims in these proceedings were before this Court and issues arising therefrom were adjudicated on on three occasions in 2002 and 2003. The plaintiffs were employees of the defendant (Aer Lingus) who, in 1990 and 1991, were seconded to a subsidiary company of Aer Lingus known as TEAM Aer Lingus (TEAM) and who, at the end of 1998, transferred back to Aer Lingus on the sale of TEAM and its undertaking to a Danish company, FLS.

2. The first substantive issue with which the court was concerned was whether the plaintiffs and other workers who transferred to TEAM were guaranteed parity of pay, while they were in TEAM, with workers of Aer Lingus who were not seconded but remained working in the maintenance and engineering area of activity in the division of Aer Lingus known as Commuter. In a judgment delivered on 15th April, 2002, Kearns J. decided that issue against the plaintiffs, holding that the relevant contract did not include any term, express or implied, whereby TEAM workers would enjoy parity of pay with comparable workers in Aer Lingus. While useful in setting the scene in which the dispute between the parties arose, that judgment is not of any relevance to the issues with which the court is now concerned, because the decision was accepted by the plaintiffs and the dispute thereafter concerned the plaintiffs' rights and entitlements after they returned to Aer Lingus at the end of 1998.

3. On the second occasion on which the court was concerned with the substantive issues, the primary issue which the court determined was whether the plaintiffs, following their return to Aer Lingus from TEAM, were entitled to maintenance work which accorded with their qualifications and experience, or, if such work was not available, whether they were entitled to compensation or damages in lieu thereof. Kearns J. delivered his judgment on that issue on 8th October, 2002. He decided the issue in favour of the plaintiffs, and in a later judgment of 30th April, 2003 he limited the plaintiffs' entitlement to a period of four years following the end of their secondment to TEAM. The conclusions of Kearns J. on that issue are the starting point for this Court's consideration of the first issue, the so-called "NDT claims", addressed in this judgment and they will be considered in detail later.

4. In 2002 and 2003 the substantive issues were litigated by reference to the claims of five plaintiffs who were chosen as sample or test cases. In April, 2003 Kearns J., having heard evidence from those five plaintiffs, dealt with a number of issues in relation to their claims, including whether they were entitled to general damages. In an ex tempore judgment delivered on 30th April, 2003 he held that they were not. The status of that judgment vis-à-vis the plaintiffs other than the five sample or test plaintiffs, as regards one aspect of the claims of some of those plaintiffs, is at the core of the second issue with which the court is now concerned, the claims for damages for personal injuries.

5. The order of the court on foot of the three judgments of Kearns J. was perfected on 4th June, 2003. The order specifically related to the claims of the five sample plaintiffs and recited the process through to 30th April, 2003. Insofar as is relevant for present purposes, the court declared as follows:

> "1. The Plaintiffs were at all material times and continue to be in the employment of Aer Lingus.
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> 2. The Plaintiffs are entitled as employees of Aer Lingus upon the end of their secondment to TEAM to be treated as though TEAM had never existed and were to be paid the same levels of remuneration as mechanical engineers employed by Aer Lingus who had not been seconded, to have their seniority fully recognised and to be placed on the appropriate incremental scale as though they had never left Aer Lingus, such entitlement to be limited to a period of four years following the end of their secondment with TEAM Aer Lingus …"

6. The order then set out the sums to be paid to each of the five sample plaintiffs.

7. The plaintiffs appealed to the Supreme Court and judgment on the appeal was delivered by McCracken J., with whom the other four judges concurred, on 20th December, 2005. As the judgment of McCracken J. discloses, there was only one issue to be adjudicated on by the Supreme Court and that was whether the rights of the plaintiffs to be entitled to be treated as if they had never been seconded at all but had remained in the employment of Aer Lingus were in some way limited in time. The Supreme Court held that they were not. In consequence, the words "such entitlement to be limited to a period of four years following the end of their secondment with TEAM Aer Lingus" were deleted from the declaration made by the High Court at paragraph 2 of the order dated 4th June, 2003. The Supreme Court ordered that the matter be remitted to the High Court for assessment of the monies owing to the plaintiffs.

8. The matter came back to the High Court for hearing on 6th March, 2007. After hearing submissions and evidence for one and a half days, on the second afternoon of the hearing the matter was adjourned by consent to enable the parties to endeavour to resolve issues which had arisen. Eventually, the matter was re-listed for hearing on 12th February, 2008. On that occasion the court heard submissions and evidence over two days. The parties were in discussions for the next two days.

9. The discussions ultimately resulted in an agreement (the Settlement Agreement) which leaves three matters, other than costs, to be determined by the court. All other matters are to be resolved by an agreed process or, alternatively, they were disposed of. Two of the matters to be determined by the court are dealt with in this judgment and they are:

> (1) what are described as the "NDT claims", which relate to three plaintiffs; and
>
> (2) claims for damages for personal injuries which are to be decided in these proceedings and which relate to seven plaintiffs.

10. The third matter is separate and distinct and is not dealt with in this judgment.

11. In addition to these proceedings (the *King* proceedings), the Settlement Agreement relates to two other actions which were before the court in March, 2007 and in February, 2008, namely:

> (a) *Barber & Ors. v. Aer Lingus Plc* (Record No. 3155P/2006) (the *Barber* proceedings) which, by order of this Court (Clarke J.) dated 20th November, 2006 had been listed for hearing with the *King* proceedings; and
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> (b) *Byrne & Ors. v. Aer Lingus Plc* (Record No. 2000/7354 P) (the *Byrne* proceedings).

12. The position of the parties in the three actions, as recited in the Settlement Agreement and as represented to the court, is that the findings of the High Court in the *King* proceedings, as varied by the Supreme Court, would be binding on all the parties.

13. So the Settlement Agreement, as regards the invocation of the court's jurisdiction, effectively disposes of all claims in the three actions apart from the three matters, which are to be decided by the court. It also provides that the court shall decide the question of costs that may arise in each action.

NDT Claims

14. The NDT claims relate to three of the plaintiffs in the *King* proceedings, William King, Thomas Burke and Brian Webberley, whom I will refer to collectively as the NDT Claimants. The issue to be determined is whether on their return from TEAM to Aer Lingus in 1998 and thereafter they were and are entitled to be remunerated on the pay scale referable to a Senior Simulator Specialist, as they contend.

15. The following historical outline is based on the evidence of Mr. King and Mr. Webberley. Mr. Burke did not testify, but the court was informed that his position was the same as Mr. King. It is also based on the evidence of Mr. Dermot McShane, who was called on behalf of Aer Lingus, and on various documents which were put in evidence. It represents my understanding of the true situation which prevailed over the period of the employment of the NDT Claimants, although it may not accord fully with the NDT Claimants' understanding.

16. When the NDT Claimants were seconded from Aer Lingus to TEAM in 1990 all three were graded as Senior NDT Inspectors. Up to 1990 the non-destructive testing function, which was part of the mechanical and engineering function, was carried on "in house" by Aer Lingus. In 1990 and 1991 the function was transferred to TEAM. Thereafter, no non-destructive testing functions were carried out by Aer Lingus. After the sale of TEAM, Aer Lingus outsourced its non-destructive testing requirements to the purchaser, FLS, and subsequently to its successor, SRT. The position, accordingly, was that when the NDT Claimants returned to Aer Lingus at the end of 1998 there was no work in the non-destructive testing area for them to perform.

17. Their claim is that the grade existing in Aer Lingus which should have been chosen as the comparator for determining their pay on return was and is Senior Simulator Specialist. As a matter of fact, the basis on which they have been remunerated in accordance with the judgments of this Court (Kearns J.) and the Supreme Court in these proceedings is by reference to the pay scale for the grade of Shift Controller Technical in the case of Mr. King and Mr. Burke, and Shift Supervisor Technical in the case of Mr. Webberley. At this juncture the court is concerned with whether their claim for the differential between what they have been paid between the end of 1998 and now, or, in the case of Mr. Webberley, the date of his retirement, on the one hand, and what they would have been paid as Senior Simulator Specialists, on the other hand, in the same period is well-founded. The court is not concerned with the quantification of the claim.

18. On the basis of the evidence adduced, it would appear that the grade of NDT Inspector came into being on foot of a collective agreement dating from August, 1984. The grade applied to NDT personnel who achieved specialist qualifications which were relevant to the specialist functions they carried out. The personnel were non-supervisory personnel, but the effect of the agreement was that they were paid by reference to a pay scale which was also applicable to supervisors. An agreement in June, 1989 with Technical Supervisors, which involved restructuring of the grades and introduced the new grades of Senior Supervisor and Supervisor Aircraft Engineer, impacted on the 1984 agreement. In November, 1989 this impact was dealt with by the introduction of a new Senior NDT Inspector pay scale and a reorganisation of the NDT Section. Thereafter, Mr. King and Mr. Burke were remunerated at Senior Supervisor level, whereas Mr. Webberley was remunerated on the Senior NDT Inspector scale, which, as I understand it, mirrored the Supervisor Aircraft Engineer pay scale. However, a special arrangement was made with Mr. Webberley on 29th November, 1989 which was personal to him. Under that arrangement, on reaching the maximum point of the Senior NDT Inspector scale he would progress on a personal basis on to the Senior Supervisor scale between the 25th and 26th points of the scale. Mr. Webberley's evidence was that that arrangement was never implemented because he had transferred to TEAM before he reached the maximum point on the Senior NDT Inspector's scale and when he reached the maximum point in 1994 he got no further increments.

19. The court's attention was drawn to two matters which arose while the NDT Claimants were seconded to TEAM. The first was a recommendation of the Labour Court in November, 1994 in relation to Technical Supervisors within TEAM. The recommendation recorded that the specialist staff who were on the Technical Supervisor pay scales, such as the Senior NDT Inspectors, although they were not expressly mentioned, would retain their then current pay structure. So, apart from recognising their speciality, the recommendation did not affect the NDT personnel in TEAM in real terms. The second matter was an agreement, which was referred to as the Flynn Agreement of September, 1998, and which related to engineering personnel who had not gone on secondment to TEAM but were employed as what were known as "Aer Lingus Commuter Engineering" personnel. That agreement involved, *inter alia*, the alteration of job titles. The job title of Senior Supervisor became Shift Controller Technical. In relation to the period since their return to Aer Lingus at the end of 1998, Mr. King and Mr. Burke have been paid by reference to the pay scale applicable to Shift Controller Technical. The job title of Supervisor Aircraft Engineer became Shift Supervisor Technical under the agreement. In relation to the period from his return to Aer Lingus at the end of 1998 to his retirement Mr. Webberley was paid in accordance with the pay scale applicable to a Shift Supervisor Technical.

20. The basis on which the NDT Claimants contend that the appropriate comparator is the Senior Simulator Specialist is the similarity, historically, between the functions and method of remuneration of Simulator Specialists and Senior NDT Inspectors. Like NDT Inspectors, Simulator Specialists performed a specialist function. Both grades were remunerated on the basis of a supervisor pay scale, although they were not supervisors. They worked the same type of shift.

21. The function performed by the Simulator Engineers related to the operation and maintenance of flight simulators. That function remained within Aer Lingus and the Simulator Specialists remained in Aer Lingus. Some differences between the functions of the Simulator Specialists and the function of the NDT Inspectors were pointed out in the evidence of Mr. McShane: that the NDT Inspectors' functions were of a maintenance and engineering nature, whereas the Simulator Specialists functions related to avionics; and that the NDT Inspectors reported to the Maintenance and Engineering division, whereas the Simulator Specialist reported to Fight Operations. I do not consider those differences to be of significance. What I do consider to be of significance is the fact that there

was no formal relativity between the pay scale of the NDT Inspectors and the pay scale of the Simulator Specialists, which I understand to be accepted by Mr King, if not by Mr. Webberley. As a matter of fact, however, there were parallels between NDT cadre and Simulator cadre in that before the agreement of December, 1998 to which I will refer to later, Senior Simulator Specialists were remunerated on the pay scale applicable to Senior Supervisors and Simulator Specialists were remunerated on the pay scale applicable to Supervisor Aircraft Engineers.

22. What I also consider to be of significance is that it is clear from the evidence of Mr. McShane that Simulator Specialists did not regard themselves as being in a situation comparable to NDT Specialists. In 1996 they submitted a pay claim seeking rates of pay based on the then current industry norm, that is to say, rates payable by other flight simulator operators, for example, other airlines. That claim eventually led to the December, 1998 agreement which was based on a recommendation of Mr. Phil Flynn. The agreement resulted in a three-level grading structure introducing, in addition to the Simulator Specialist and the Senior Simulator Specialist, a new lowest grade of Simulator Engineer. What is crucial for present purposes is that the then existing incremental pay scales were abandoned and replaced, in the case of each grade, with a single annualised figure, which included basic pay, payment for lieu days, average rosters and overtime and acknowledgement of productivity. The new grading structures and pay provisions were conditional on the implementation of changes in work practices and a revised shift system. Mr. McShane's evidence was that the Flynn December, 1998 agreement is unique within Aer Lingus, in that it is the only annualised hours contract which exists between Aer Lingus and any group of its four and a half thousand employees.

23. It is necessary at this juncture to consider the court's current function, which, in general terms, is to determine the NDT Claimants' contractual rights in the light of the judgment of this Court (Kearns J.) delivered on 8th October, 2002 and the judgment of the Supreme Court delivered on 20th December, 2005. In his judgment, Kearns J. set out his conclusion on the position of the claimants on their return to Aer Lingus in 1998 as follows:

> "I conclude therefore on this issue that on returning to Aer Lingus in 1998, the claimants were at that point entitled to do so as if TEAM had never existed, that they were then entitled to be paid the same levels of remuneration as mechanical engineers employed by Aer Lingus who had not been seconded. They are further entitled, in my view, to have their seniority fully recognised and to be placed on the appropriate incremental scale as though they had never left Aer Lingus. … on their return and from that point onwards they should be no better off and no worse off than Aer Lingus staff engaged in maintenance and engineering work at that time …"

24. Later, Kearns J. stated:

> "… the claimants are entitled to be treated as though they had never transferred to TEAM Aer Lingus, that they are entitled to all appropriate increments or benefits on the basis that they earned and achieved the same seniority by 1998 as those Aer Lingus employees who did not transfer, that they were on returning entitled to such recognition and are now entitled to compensation in lieu thereof if they have suffered financial loss as a consequence of not getting such recognition."

25. As I have already stated, that finding was not in issue on the plaintiff's appeal to the Supreme Court. The only issue was whether the plaintiffs' rights consequent on that finding were in some way limited in time. The Supreme Court held that they were not.

26. Before applying the judgment of Kearns J. to the NDT Claimants I want to record the following reservations. I respectfully endorse the observations made by Kearns J. in his *ex tempore* judgment of 30th April, 2003 in which he reiterated a view he had expressed many times during the hearing that the *King* proceedings have more of the hallmarks of an industrial dispute than a court case and that the adjudication required called for the expertise of an industrial relations expert, not a High Court judge. Moreover, notwithstanding that I have carefully considered the evidence adduced, I do not profess to have acquired any real understanding of the complexity of grading, pay scales and other terms and conditions of employment or other aspects of industrial relations in Aer Lingus.

27. In essence, in my view, the finding of Kearns J. assimilates the position of a claimant returning from TEAM to Aer Lingus in 1998 to that of an engineer on an incremental salary scale who did not leave Aer Lingus in 1990. I am satisfied on the evidence that, in giving effect to those findings, Aer Lingus was correct in deciding that the appropriate comparator for an NDT Inspector who was on the Senior Supervisor pay scale was the Shift Controller Technical and that the appropriate comparator for an NDT Inspector who was on the Supervisor Aircraft Engineer pay scale was Shift Supervisor Technical. The specialist nature of the work of NDT Inspectors was recognised and rewarded by remunerating them on a Supervisor scale, notwithstanding that they did not exercise supervisory functions. That was the effect of the 1989 agreement. As regards the NDT Claimants, the effect of the September, 1998 agreement was that it changed the job title of the grades (Senior Supervisor and Supervisor Aircraft Engineer) to which they were linked for pay purposes.

28. While it is a fact that for approximately two decades up to 1998, the specialty of the Simulator Specialists had been recognised and rewarded on the same basis as that of the NDT Inspectors, by linkage to the Senior Supervisor and Supervisor Aircraft Engineer pay scales, the position of the Simulator Specialists changed in December, 1998. By negotiating the wholly different pay structure conditioned on altered working terms and conditions which was agreed in December, 1998, the Simulator Specialists broke their link to the Senior Supervisor and Supervisor Aircraft Engineer grade pay scales. However, the grading structure and incremental pay scales to which the NDT Inspectors were linked remained in being, although they had been revised by the September, 1998 agreement by the time the NDT Claimants' secondment with TEAM ended. Therefore, the appropriate comparators for the NDT Claimants at that time, in my view, were the engineers formerly at Senior Supervisor and Supervisor Aircraft Engineer level, but now known by their new job titles in the Commuter division and, subsequently, according to Mr. McShane's evidence, at Cork and Shannon airports.

29. Accordingly, with one qualification, I consider that the NDT Claimants have been paid the appropriate level of remuneration in accordance with the judgment of Kearns J. The qualification is that it would appear that the special agreement entered into with Mr. Webberley on 29th November, 1989 has not been honoured. This issue was not specifically addressed in argument and I do not propose making any definitive finding on it at this juncture. However, I suggest that, although the agreement was personal to Mr. Webberley, in order to give effect to the substance of the judgment of Kearns J. it should be honoured in relation to the period after Mr. Webberley's secondment with TEAM ended.

Claims for damages for personal injuries

30. The Settlement Agreement provides, at Clause 6.2, as follows:

> "The High Court shall, in the *King* proceedings, determine the issue between the parties as to whether the claims for damages for personal injuries being brought by the plaintiffs named in the Fifth Schedule hereto are maintainable having

regard to the previous decision of the High Court in the *King* proceedings."

31. The plaintiffs named in the Fifth Schedule are Pat Foley, Pat Gleeson, Brian Herbert, Paul Mahon, Pat Molloy, Mr. King and Mr. Webberley. I will refer to them collectively as the "PI Claimants". The PI Claimants other than Mr. Herbert and Mr. Mahon are plaintiffs in the *King* proceedings. Mr. Herbert and Mr. Mahon are plaintiffs in the *Byrne* proceedings, which never got to the stage of delivery of defence or being set down for trial. All of the PI Claimants are claimants in the *Barber* proceedings.

32. Before addressing the issue identified in clause 6.2 of the Settlement Agreement, I consider it prudent to record that my understanding is that there is consensus that, if the court determines that the claims for damages for personal injuries are maintainable, those claims will be determined in the *King* proceedings, although the Settlement Agreement does not explicitly so state.

33. The starting point of consideration of this issue is to ascertain what is claimed in the pleadings in the *King* proceedings in relation to general damages and personal injuries. The claim of the plaintiffs in the *King* proceedings was formulated in an amended statement of claim delivered pursuant to leave of the court granted on the first day of the hearing, 5th March, 2002. In paragraph 14 it was pleaded that the plaintiffs had been occasioned "great mental upset and distress and interference with their ordinary employment (*sic*) of life". Various matters were then alluded to: having been deprived of the opportunity to work; having been deprived of wages on which they depended to support themselves and their families; uncertainty created as to their future livelihood; and failure and refusal to honour and recognise their status as employees of Aer Lingus.

33. The amendments were contained in paragraphs 14A and 14B. In paragraph 14B the plaintiffs pleaded that they had, by reason of the matters pleaded in the preceding paragraph, suffered and that they continued to suffer, *inter alia*, loss of job satisfaction, upset, anxiety, fear, insecurity and distress". There was no mention of personal injuries. In the preceding paragraph, paragraph 14A, in broad terms, the plaintiffs pleaded breaches of the agreements, representations and warranties concerning their secondment.

34. In the prayer for relief, the plaintiffs claimed damages for breach of contract, misrepresentation and/or breach of warranty. They did not claim damages for negligence. I think I should make it clear that, in determining this issue, I have attached no significance to the finding of Kearns J. in his judgment of 8th October, 2002, adverted to by counsel for the plaintiffs, that "the assurance contained in Mr. O'Neill's letter of 30th April, 1990 was both a representation and a term of the agreement and that, insofar as it may be regarded as a representation, the defendants making it were under the duty of care alluded to in *Hagan & Ors. v. ICI Chemicals and Polymers Limited* (2002) I.R.L.R. 1-92". That finding appears to be clearly within the express parameters of the elements of the statement of claim to which I have referred.

35. In February, 2002, within weeks of the commencement of the first hearing on 5th March, 2002, updated particulars in relation to the claims of the five sample plaintiffs were delivered. The common themes in the particulars were allegations that these plaintiffs had been betrayed, bullied and were under pressure resulting in mental upset and distress. Further, by reason of being deployed in jobs which were not commensurate with their skills and experience after secondment, they suffered psychological effects. While it was alleged that these plaintiffs had suffered bouts of depression and feelings of anxiety, it was not alleged that they had a psychological or a psychiatric injury or that they had required medical treatment.

36. The five sample plaintiffs testified before Kearns J. on 29th and 30th April, 2003. Counsel for Aer Lingus characterised their evidence as relating to "mental distress-type issues", although in one case there was evidence of mild depression, but none of the evidence indicated injury to the extent of clinical psychiatric condition. That characterisation was not in dispute

37. By contrast, it was quite clear before the hearing before Kearns J. on 29th and 30th April, 2003 that the five PI Claimants who are plaintiffs in the *King* proceedings were alleging that they suffered from personal injuries as a result of wrongdoing on the part of Aer Lingus and were seeking damages for personal injuries. In four cases the relevant particulars were delivered in May and June, 2001 and in the fifth in March, 2003. All of the particulars have a common thread with the particulars delivered in relation to the five sample cases, in that in each there is an allegation of mental distress as a result of the plaintiffs' treatment by Aer Lingus, anger, anxiety, worry, fear, panic attacks, loss of confidence and loss of self-esteem being specified. However, in each case it was also claimed that the relevant plaintiff suffered a psychological or a psychiatric injury as a result of the wrongdoing of Aer Lingus, stress, depression and clinical depression being variously specified. In each case it was alleged that the plaintiff required medical treatment for the condition and particulars of the treating physician, the diagnosis, and the medication or other treatment prescribed were given with varying degrees of detail. In one case it was alleged that the plaintiff had also suffered physical symptoms, abdominal and gastric symptoms. In a number of cases it was alleged that the plaintiff's condition resulted in absence from work.

38. It is convenient at this stage to set out the position of the parties in relation to the issue. There is consensus that it was agreed that the points of principle decided in the five sample or test cases would be binding on all the parties. Where the parties diverge is that Aer Lingus contends that one of those points of principle was whether general damages were recoverable by the plaintiffs, irrespective of whether the claim related to damages for mental distress or damages for personal injuries. The position of Aer Lingus is that that point of principle was decided by Kearns J. on the basis that such damages were not recoverable and that all of the plaintiffs are bound by that decision, whether they are claiming merely for mental distress or are also claiming for psychological or psychiatric injury. The plaintiffs' position, on the other hand, is that what was at issue before Kearns J. was entitlement to damages for mental distress only, that the issue of recoverability of damages for personal injuries was expressly reserved and that, accordingly, Kearns J. did not adjudicate on the claims for damages for personal injuries.

39. This Court was invited to determine the issue on the basis of the historical background as disclosed by the pleadings and judgments and the transcripts of the hearings on 29th and 30th April, 2003. That is a rather peculiar task. In my view, the issue is not one of *res judicata*, as contended on behalf of Aer Lingus: no court has ever adjudicated on the claims of the PI Claimants, whether arising from the *King* proceedings or the *Byrne* proceedings. If the claims for personal injuries of the PI Claimants are not maintainable it is because of an agreement between the parties. No evidence was adduced of that agreement and the court is left in the position of having to determine what was agreed on the basis of what transpired before Kearns J. on 29th and 30th April, 2003 by reference to the transcripts.

40. The court was invited to consider the submissions made by counsel at the opening of the proceedings on 29th April, 2003, the legal arguments advanced by both sides on the issue of general damages and the observations of Kearns J. in giving his *ex tempore* judgment. The court was also invited to draw inferences from exchanges between counsel and the judge and interjections made by the judge, as well as from silence on the part of the opposition and on the part of the judge on particular issues. Having regard to the unusual nature of the task, I consider it necessary to consider the transcripts at some length.

41. In identifying the issues which the court had to address on 29th April, 2004, counsel for Aer Lingus identified one issue as an issue of law as to whether damages for mental distress are recoverable on foot of a breach of contract (p. 22) and he clarified what he

meant by damages for mental distress as "mental distress short of psychiatric injury" (p. 23). Later, when the logistics of the hearing were being discussed, Kearns J. intimated that he was going to deal with one case and do a computation on that case and then review the situation (p. 32). However, counsel for the plaintiffs queried whether that approach was possible, pointing out distinguishing features among the plaintiffs who were 55 in number at the time. Coincidentally, one of the distinctions he alluded to was the fact that there was a category called NDT Specialists. He also stated that there were a number of cases in which there were actual personal injuries, then nine or ten in number, aside from "any mental distress type case" arising from breach of contract (p. 33). In arguing that the claims of the PI Claimants are maintainable, their counsel laid particular emphasis on the fact that neither counsel for Aer Lingus nor the judge demurred in relation to the distinction which had been drawn between personal injuries, on the one hand, and mental distress, on the other hand.

42. Later that day, after the first of the plaintiffs had given his evidence, there were exchanges between counsel on both sides and Kearns J. as to whether other plaintiffs should be called. Ultimately, after Kearns J. had decided that a second witness should be called, counsel for the plaintiffs continued with the following submission in relation to the question of general damages (p. 94):

> "There will be actual personal injuries in about nine of these cases. None of those cases are before the Court in the sense that none of those plaintiffs has given evidence yet. This happened this way because we sought to determine through the evidence of the five plaintiffs at the outset the general parameters of the case and left over the general damages issue. We came here this week to deal with the five cases and resolve those, not the nine or ten general damages claims … I just need to make that absolutely clear."

43. Counsel then pointed out that he had questioned the previous witness in relation to "the issue of general damages for … the general turmoil and distress … loss of … self-esteem … ". Kearns J. interjected to say that he would hear so many of the other of the sample or test plaintiffs who had separate entitlements and then stated (p. 95):

> "When we have that out of the way, we will determine as a legal issue the entitlement or otherwise to general damages. If I rule against you on that, that will be the end of the matter."

44. The four remaining sample plaintiffs testified on 29th and 30th April and one witness, Mr. McShane, was called on behalf of Aer Lingus. On 30th April at the close of the evidence Kearns J. heard legal submissions on*, inter alia*, the issue of general damages.

45. Having referred to paragraphs 14A and 14B of the amended statement of claim, counsel for the plaintiffs submitted that the general damages fell under two broad heads and that he was only addressing the first, namely, the claim for general damages in relation to distress caused to the plaintiffs as a result of uncertainty as to their status and position, deprivation of the opportunity to exercise their skills, and loss of job satisfaction (p. 122). He stated that a number of plaintiffs, he believed the number was nine, had actual personal injury claims for general damages on which there would be medical evidence. He submitted that the court was not concerned with that. Counsel for Aer Lingus intervened to indicate that his argument would be that the law in relation to recovery of damages was the same whether the claim related to mental distress or psychiatric injury, making the assumption that the claims in question related to psychiatric injury rather than physical injury. Counsel for the plaintiffs responded that the court did not know what the personal injury claims were because they had not been opened. The five claims which had been opened were what the court was concerned with and in none of those cases was there what counsel called "a conventional or classic claim for personal injury". Kearns J. then stated (p. 123) as follows:

> "We will deal with what is on the table at the moment and see how we get on."

46. Counsel for the plaintiffs then went on to deal with the claim for general damages for the type of distress he had outlined. Counsel for Aer Lingus responded. In doing so, he referred the court to authorities in which liability of an employer for psychological or psychiatric injury to an employee was at issue (*Fletcher v. Commissioners of Public Works* [2003] 1 I.R. 465 and *Johnson v. Unisys* [2001] ICR 480) (p. 141). This court was invited to infer that Kearns J., when delivering his ex tempore judgment, was thinking of those cases. Particular emphasis was laid on the fact that at the hearing before Kearns J. counsel for the plaintiffs did not take issue with the arguments advanced by counsel for Aer Lingus before Kearns J. in his reply.

47. In his judgment, Kearns J. dealt with the question of general damages as follows (at p. 152):

> "There is a clear line of authority going back hundreds of years to the effect that general damages are not recoverable in respect of breach of contract. It seems to me that Chief Justice Kennedy's remarks whilst made in 1927 or 1928 still accurately reflect the general position of the law in Ireland. It would require a huge departure from that well-established jurisprudence to admit a claim for general damages in this case.
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> It is true to say that certain specific categories of contract claim have permitted of an award of general damages. *Jarvis v. Swan Tours* being a particular example where the whole subject matter of the contract, namely the provision of a suitable and enjoyable holiday, where the exact opposite was provided. Obviously that provided a situation where the court could consider some sort of award of general damages. Equally, *Murphy v. Quality Homes* was another case where a person required to live in an uninhabitable house over a winter was entitled to something for the discomfort, inconvenience and distress of that. But that is a very, very narrow category of cases and it seems to me it would represent a huge departure from existing law to widen the scope of general damages in a contract context to a claim of this nature."

48. As I have stated, counsel for Aer Lingus invited the court to conclude that in that passage Kearns J. was determining that a claim in contract for damages for personal injury of a psychological or a psychiatric nature was not maintainable. I cannot see how I can draw that conclusion. Kearns J. was dealing with the five test cases before him. He decided that none of the sample plaintiffs could maintain a claim for general damages. That decision was not appealed and, accordingly, as regards those five plaintiffs it is *res judicata*. Moreover, in accordance with the agreement between the parties, the decision of Kearns J. is determinative as against the other plaintiffs in the *King* proceedings and the *Byrne* proceedings of claims advanced by them for general damages for mental distress.

49. However, it is quite clear from the transcripts of 29th and 30th April, 2003 that, far from there being agreement between the parties to the effect that the decision of Kearns J. on the issue of general damages would be determinative of claims for personal injuries, counsel for the plaintiffs made it absolutely clear that the claims for personal injuries, as distinct from the claims for mental distress, were not before the court. It was also made clear that it was intended to call medical evidence in relation to the claims for personal injuries in due course. My understanding of the basis on which Kearns J. proceeded to hear legal argument on 30th April, 2003 was that he was dealing with the five sample claims before him. That, it seems to me, is the only reasonable inference which

can be drawn from his statement (at p. 123) which I have quoted above. On my reading of the transcript nothing which subsequently transpired altered that position. There is nothing in the observations of Kearns J. when dealing with the question of general damages which would suggest that he considered that he was dealing with any question other than the question raised by the five sample cases. Having said that, in my view, the crucial factor is that the transcripts clearly and unequivocally demonstrate that, as regards the personal injuries claims of the plaintiffs in the *King* proceedings, the plaintiffs were not in agreement with the stance of Aer Lingus, that the decision of Kearns J. on the question of general damages should be binding.

Accordingly, in my view, the personal injury claimants are not precluded by the decision of Kearns J. from prosecuting their claims.