Neutral Citation. Number [2006] IEHC 145

THE HIGH COURT

RECORD NO. 2004 No. 336 SP

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACT, 1977
ON THE APPLICATION OF THE MINISTER FOR FINANCE

BETWEEN

THE MINISTER FOR FINANCE

APPELLANT

AND
THE CIVIL AND PUBLIC SERVICE UNION,
PUBLIC SERVICE EXECUTIVE UNION,
IRISH MUNICIPAL PUBLIC AND CIVIL TRADE UNION
ON BEHALF OF TEN CLAIMANTS

RESPONDENTS

Judgment of Miss Justice Laffoy delivered 11th May, 2006.

Background

1. A job-sharing scheme was introduced in the civil service in 1984. The conditions of the scheme were set out in Circular 3/84, an appendix to which governed matters such as pay, annual and sick leave, superannuation and promotion. In relation to promotion it was provided that job-sharing staff would be eligible for promotion on the same basis as full-time staff, subject to two conditions. The first of the conditions was that, for the purpose of the service requirements governing promotion, each year of service in a job-sharing capacity would be reckoned as the equivalent of six months' service in a full-time capacity.

2. That condition in relation to eligibility for promotion was applied until the decision of the European Court of Justice in *Gerster v. Freistaat Bayern* [1997] E.C.R. 1-5273. In that judgment, which was delivered on 2nd October, 1997, the court answered a question referred to it by the Bavarian Administrative Court as to whether a provision of Bavarian State law infringed Council Directive 76/207/EEC (the Directive), ruling as follows:

> "Council Directive 76/207/EEC of 9th February, 1976 on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions precludes national legislation which requires that, for the purposes of calculating the length of service of public servants, periods of employment during which the hours worked are between one-half and two-thirds of normal working hours are counted as only two-thirds of normal working hours, save where such legislation is justified by objective criteria unrelated to any discrimination on grounds of sex."

3. The national court in Bavaria had found that the situation across the board in the Bavarian civil service was that 87% of part-time employees were women (para. 33 of the judgment). The court held that in a situation of that kind it must be concluded that in practice provisions such as those in issue result in discrimination against women employees as compared with men and must in principle be regarded as contrary to the Directive unless the distinction is justified by factors unrelated to discrimination on grounds of sex (para. 34).

4. As appears from the decision of the Labour Court which is the subject of these proceedings (p. 3), the vast majority of civil servants who participated in the job-sharing scheme under Circular 3/84 were women. Following the decision in the *Gerster* case, it was recognised that it was necessary to amend the job-sharing scheme and this was done in Circular 4/98, which issued on 10th February, 1998. The condition in relation to promotion to which I have referred earlier was deleted and replaced by a condition that, for the purposes of reckonable service (insofar as it affects qualifying service for purposes other than pay, incremental progression and superannuation), credit should be given for all job-sharing service upon the same basis as full-time service. It was directed that the amendment was to apply to all appointments made since 2nd October, 1997, the date on which judgment was delivered in the *Gerster* case.

5. The Respondents are trade unions which represent about 500 civil servants who participated in the job-sharing scheme prior to the judgment in the *Gerster* case and in respect of whom, in the early months of 1998, on the basis of that judgment, they referred claims to the Labour Court that they had been discriminated against by the pro-rating of service in determining eligibility for promotion under Circular 3/84. As early as June, 1998 it had become apparent that the application of s. 19(5) of the Employment Equality Act, 1977 (the Act of 1977) was going to arise in a very large number of the claims. Section 19(5) provides as follows:

> "Save only where a reasonable cause can be shown, a reference under this section shall be lodged not later than six months from the date of the first occurrence of the act alleged to constitute discrimination."

6. It was also apparent that the clarification of the law by the *Gerster* judgment would be advanced as the principal "reasonable cause" by those claimants. In order to obviate the burden of hearing and deciding individually each of those cases, it was suggested by the Labour Court to the parties that one, or a small number, of "test" time-limit cases, which relied solely on the existence of the *Gerster* decision for the purposes of s. 19(5), should be heard by the Labour Court, the intention being that the decision of the Labour Court on that issue would set a precedent for the other cases. The parties agreed to that course. The claims of ten claimants were chosen as test cases. The Labour Court considered, as a preliminary issue, the application of s. 19(5) to those ten cases and issued its decision on 14th January, 2002, holding that reasonable cause had been shown.

7. The appellant appealed to this Court against the decision of 14th January, 2002 on the basis that there had been insufficient evidence, and, in particular, that no evidence had been adduced from any of the ten claimants, to allow it to draw the conclusions it had drawn. The appeal came on for hearing in this Court on 12th December, 2002. The court (Kelly J.) dismissed a motion brought by the respondents seeking a preliminary ruling on a point of law that the court did not have jurisdiction to hear the appeal. In relation to the substantive appeal, the parties agreed that the appeal should be allowed and a consent order was made on 13th December, 2002 ordering that the matter be remitted to the Labour Court for determination of the following issue in the light of such agreed facts or affidavit or oral evidence as might be adduced by either party in respect of any or all of the ten claimants:

> "Whether or not in the light of the factual position as agreed or determined by the Labour Court in respect of all or any of the ten claimants the decision of the European Court of Justice in *Gerster* … constituted a reasonable cause to extend time within the meaning of section 19(5) …"

8. On the hearing of that issue the Labour Court received evidence on affidavit, including an affidavit sworn by each of the ten claimants. The hearing took place on 6th April, 2004. The Labour Court issued its decision on 29th July, 2004 (the 2004 decision), holding that reasonable cause had been shown as to why the claims were not made within the limitation period prescribed by s. 19(5), that the time for bringing those complaints should be enlarged and that they were, accordingly, in time. The Labour Court determined that the claims should be referred to the Director of Equality Investigations for investigation and recommendation. The appellant appeals against the 2004 decision in these proceedings.

The proceedings

9. In these proceedings the appellant seeks an order pursuant to s. 8(3) of the Anti-Discrimination (Pay) Act, 1974 (the Act of 1974) setting aside the 2004 decision on a number of grounds, including –

> (a) that the Labour Court erred in law and in fact in determining that the claimants had shown reasonable cause for the purposes of s. 19(5) of the Act of 1977 for not lodging their claim within six months from the date of the first occurrence of the act alleged to constitute discrimination,
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> (b) that the Labour Court erred in law in determining that the elaboration of the law in the judgment in the *Gerster* case constituted a reasonable cause for the purposes of s. 19(5) of the Act of 1977, and
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> (c) that the Labour Court erred in law in determining that reasonable cause existed in respect of periods of time exceeding six years from the date of the alleged act of discrimination by reason of s. 11(2)(a) of the Statute of Limitations, 1957 (the Act of 1957).

10. The appellant also sought a declaration that the elaboration of the law by the European Court of Justice in its judgment in the *Gerster* case is incapable as a matter of law of constituting reasonable cause for the purposes of s. 19(5) of the Act of 1977.

11. An appeal under s. 8(3) of the Act of 1974 is an appeal on a point of law.

12. The proper approach to be adopted by this Court in determining an appeal on a point of law is well settled. *In Henry Denny & Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34, which involved an appeal to the High Court from a decision of a Chief Appeals Officer on a question of law, the Supreme Court applied the principles which had been stated by the Supreme Court in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] 2 I.L.R.M. 421 in relation to the approach to be adopted on a case stated by an appeals commissioner under the Income Tax Act, 1967 and, in particular, the following passage from the judgment of Kenny J. at p. 426:

> "A case stated consists in part of findings and questions of primary fact … these findings and primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as the commissioner. If the conclusions from primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If, however, they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from primary facts were ones that no reasonable commissioner could draw."

13. It was submitted on behalf of the respondents that s. 19(5) essentially poses a question of fact to be determined by the Labour Court. While in many, if not most, cases in which the application of s. 19(5) was in issue while it was in force that may well have been the case, the core issue which was posed in the order of 13th December, 2002 for determination by the Labour Court involved the proper interpretation of s. 19(5), which is a question of law, and its application to the agreed or determined facts. Accordingly, as regards the core issue, this Court is not constrained in any way by the determination of the Labour Court in construing s. 19(5).

The 2004 decision

14. The Labour Court gave a comprehensive reasoned decision in which, after summarising the affidavit evidence, it made certain findings of fact. It found that each of the claimants was aware of the contents of Circular 3/84, including the conditions set out in the appendix in relation to eligibility for promotion referred to earlier, at the material time. It accepted the substance of a submission made on behalf of the appellant that each claimant was aware of the underlying facts on which her claim was based, and that what she was not aware of was that the bringing of a claim on the basis of those facts could ultimately succeed. It was submitted on behalf of the appellant in this Court that, therefore, the essential argument of the claimants must be understood as being that they were not aware, as a matter of law, that the treatment of which they were fully aware might constitute illegal discrimination on grounds of sex contrary to the Directive and the Act of 1977. In my view, that is a correct analysis of the respondents' position.

15. The Labour Court also found as fact that:

> (i) the relevant organs of the State believed that the terms of Circular 34/84 complied with the State's obligations under European law and, in particular, under the Directive, and
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> (ii) that the trade unions representing civil servants, which included the respondents, did not believe that it offended against the principle of equal treatment as between men and women.

16. The Labour Court then turned to the meaning of s. 19(5). The first question it addressed was when time started to run under that provision. It held that it ran from the date on which the first act of alleged discrimination occurred in each case, recording that, in essence, the parties were *ad idem* on that point. Each of the claims had been referred to the Labour Court more than six months from the date on which the first act of alleged discrimination occurred, so that each claim was time barred unless reasonable cause could be shown that the time for making the claim should be enlarged.

17. The Labour Court recognised that the net question for consideration by it was whether or not reasonable cause had been shown. Having reviewed the authorities to which it had been referred, the Labour Court set out its conclusions in part as follows:

> "… all of the applicants believed that the system of pro rating their service was unfair but none of them considered that it might be unlawful. Some of the applicants raised the issue with their employers while others raised it with their Trade

> Union. In all cases, they were told that the calculation of service pro rata was standard and, by implication, could not be challenged. While individuals may not have been happy with the advice which they received it was, in the court's view, perfectly reasonable for them to have accepted that the advice was nonetheless sound in terms of the options available to them.
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> This factual background provides a reasonable explanation and a justifiable excuse as to why the applicants did not take the initiative, before the decision in *Gerster*, to challenge the Government as an employer alleging that the job-sharing scheme offended against European Law. Even if they did suspect that the scheme did offend against employment equality law (and there is no evidence to suggest that they did) it is highly unlikely that any of the applicants would have been in a position to take on the financial and other hazards associated with bringing such an action which, in all probability, would have ended in the ECJ. The decision in the *Gerster* case brought about a significant change in these circumstances in that the Trade Unions, realising that the state of the law was not as they and the Government had understood it to be, felt able to pursue the present cases before this Court.
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> In the light of the decision in *Gerster* there is no doubt that the applicants have a good arguable case on the merits, which in the interest of justice should be heard. Moreover, it is accepted by the [appellant] that [he has] not suffered any prejudice as a result of the delay in that all witnesses and records necessary to defend all and every action are still available."

18. There are findings of fact embodied in those conclusions with which the appellant has taken issue. I will return to this topic later.

The law

19. The court has been referred to only one decision of this Court in which s. 19(5) was considered: the decision of Murphy J. in *Cork Corporation v. Cahill* [1987] I.R. 478. The claimants in that case were female attendants employed by Cork Corporation at its swimming pools. Approximately one year prior to the commencement of the Act of 1977 their union had entered into an agreement with Cork Corporation in relation to the rostering of male and female attendants at the swimming pools. More than six years after the agreement was made, the complainants complained to Cork Corporation that it discriminated against them contrary to s. 3(4) of the Act of 1977. Within two months thereafter the matter was referred to the Labour Court. After a preliminary hearing, the Labour Court notified Cork Corporation that it was satisfied that reasonable cause had been shown in accordance with s. 19(5) to allow the issue to be dealt with. The matter was then referred to an equality officer. The recommendation of the equality officer was appealed by the claimants to the Labour Court. The Labour Court allowed compensation to the claimants, following which Cork Corporation appealed to this Court. On the appeal, Cork Corporation contested the ruling of the Labour Court and the application of s. 19(5). From reading the judgment of Murphy J. it is clear that he encountered a number of problems. First, neither party had put evidence before the Court as to what evidence had been given to the Labour Court in relation to the conduct of the claimants between the date when the Act came into operation and February, 1981, when, it was said, they made complaints to local trade union officials. Murphy J. was not prepared to infer that no evidence was given to the Labour Court as to the conduct of the claimants during that period. Secondly, there was no other appropriate record of what transpired before the Labour Court when the hearing in relation to the application of s. 19(5) took place. Thirdly, there was no direct and immediate challenge to the manner in which the Labour Court exercised its jurisdiction in relation to the application of s. 19(5). Having alluded to these problems, Murphy J. stated as follows:

> "Moreover, as I have said before, it seems to me that in the absence of an appropriate record of the proceedings before such tribunals or a direct and immediate challenge to the manner in which they exercise their jurisdiction that I feel compelled to assume that they have before them the appropriate facts on which to base their conclusions."

20. Because of the manner in which he was constrained to deal with the matter, because of the difficulties he encountered, the judgment of Murphy J. does not provide any guidance on the core issue in these proceedings.

21. The primary argument advanced by the appellant in support of his contention that the 2004 decision should be set aside was that, as a matter of law, ignorance of one's legal position, as distinct from the ignorance of the underlying facts which might constitute the alleged wrongful act, cannot as a matter of law constitute justification for an extension of the time limit stipulated in s. 19(5). Counsel for the appellant cited two authorities, both of which raise the same issue, in support of that proposition: the decision of this Court (Carroll J.) in *Murphy v. Ireland* [1996] 3 I.R. 307; and the decision of the Supreme Court, upholding a decision at first instance of Carroll J., in *McDonnell v. Ireland* [1998] I I.R. 134. The issue in each case was whether the plaintiff was barred by the provisions of s. 11(2) of the Act of 1957 from pursuing a claim against the State arising from the purported forfeiture of an office he held in the public service following a conviction of a scheduled offence in an action initiated more than six years after the purported forfeiture but after the Supreme Court had held in *Cox v. Ireland* [1992] 2 I.R. 503 that s. 34 of the Offences Against the State Act, 1939, under which the purported forfeitures were effected, was unconstitutional. The relevant portion of s.11(2)(a) of the Act of 1957 provides:

> "… an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

22. In each case it was held that the plaintiff's claim was barred by virtue of that provision.

23. The time limitation at issue in the *Murphy* and *McDonnell* cases differs from the provision at issue here in that it imposes an absolute bar on the bringing of an action when the stipulated period has expired and does not provide for extending time. The issues which the courts had to address in each of the cases were whether the type of action being pursued came within the Act of 1957 at all and, if it did, when the cause of action accrued, that is to say, when time started running. The instant case unquestionably comes within s. 19(5) and, as I have stated, the parties are in agreement as to when time started running. While the content of the judgments in the *Murphy* and *McDonnell* cases was determined by the issues that had to be addressed, for present purposes what is important is to identify the underlying rationale of the judgments.

24. In the *Murphy* case, having held that the existing law of tort provided adequate protection for the enforcement of the constitutional rights which the plaintiff was seeking to enforce, but that the statutory limitation periods applicable to torts also applied, Carroll J. stated as follows (at p. 313)

> "There is no substance in the plaintiff's argument that there was no cause of action until he knew that s. 34 of the Act of 1939 had been held to be unconstitutional. He had the right to bring proceedings once he was notified that his job was forfeited. But he had to bring such action within the statutory period. The forfeiture complained of was a single act not a continuing wrong."

25. Carroll J. held further that the plaintiff had been guilty of laches, referring to the adoption by Henchy J. in *Murphy and Murphy v. The Attorney General* [1982] I.R. 241 of the definition of laches contained in Snell's *Principles of Equity* (29th Edition, at p. 35), that it "essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim" and quoting the following passage from his judgment:

> "What is a 'substantial lapse of time' must depend on the circumstances of the particular case. I would consider that a tax payer who allowed his PAYE tax contributions to be deducted from his earnings, every week or every month, for the whole of a tax year, without bringing proceedings to assert the unconstitutionality of such deductions, should (in the absence of exceptional and excusing circumstances) be barred from recovering the sums unwarranted collected during that tax year."

26. In the *McDonnell* case, the Supreme Court held that a declaration of unconstitutionality of an Act of the Oireachtas rendered the Act void *ab initio*. Although there was some divergence of opinion, Barron J. being of the view that the correct cause of action was breach of contract together with claims for equitable relief rather than a claim for breach of constitutional rights, the preponderance of opinion was that a breach of constitutional rights was a civil wrong which was remediable by an action for unliquidated damages which could be described as a tort and which, accordingly, was within the ambit of s. 11(2) of the Act of 1957. Counsel for the appellant relied on the following passage from the passage of Barrington J. at p. 146:

> "The next question is what was the appropriate relief for the plaintiff to claim. I cannot see that this creates any difficulty. The plaintiff could have done what any person who claims he was wrongfully deprived of an office could do. That is to say he could have sued, *inter alia*, for a declaration that he was entitled to hold the office, for an order for the payment of his arrears of salary or alternatively for damages for being wrongfully deprived of his office. If the Minister had pleaded s. 34 of the Act of 1939 in his defence, the plaintiff could have served notice on the Attorney General and claimed that s. 34 was invalid having regard to the provisions of the Constitution.
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> The plaintiff's problem is that he did not do this. A point arrived in May, 1980 when the plaintiff's claim insofar as it was based on tort or breach of duty became statute barred and insofar as it claimed equitable relief became liable to be defeated by a plea of laches. Neither the plaintiff nor his superiors can be blamed for presuming that s. 34 of the Act of 1939 did not violate the Constitution. Counsel for the plaintiff submits that it would be unfair to invoke the doctrine of laches against the plaintiff who left school at the age of 16 and could hardly, therefore, be expected to know his constitutional rights. On the other hand, the plaintiff had become a clerk in the public service and at the date of his conviction was under consideration for promotion. Later, he entered the butchering business and came to run his own butchers shop. So there is no question of his being under any form of disability."

27. It seems to me that the underlying rationale of the *Murphy* and *McDonnell* cases, as manifested in the passages from the judgments quoted above, is that, in the absence of evidence that the plaintiff was under a disability of a type that prevents the statutory limitation period running, the absence of subjective knowledge on the part of the claimant of his or her legal or constitutional rights, or that an action is likely to be successful, does not prevent a cause of action accruing and time running under the Act of 1957.

28. In the 2004 decision the Labour Court considered the decision in the *Murphy* case, but concluded that it was not relevant to the issue it was concerned with because, unlike the Act of 1957, there is express provision in s.19(5) for the enlargement of time where reasonable cause is shown. While such a distinction exists, in my view, it does not render the decisions in the *Murphy* and *McDonnell* cases irrelevant to the ascertainment of the intention of the Oireachtas in enacting s. 19(5).

29. It was accepted by the parties that O. 84, r. 21 of the Rules of the Superior Courts, 1986, (the Rules) which delimits the time for bringing an application for leave to apply for judicial review, is analogous to s. 19(5). Sub-rule (1) of O. 84, r. 21 provides as follows:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers there is good reason for extending the period within which the application shall be made."

30. In the 2004 decision, the Labour Court observed that a relatively short time limit is provided in O. 84, r. 21, with discretion in this Court to extend the time where there is "good reason to do so". It is clear from reading the 2004 decision that the Labour Court accepted that the authorities on O. 84, r. 21 could be applied by analogy to s. 19(5). In particular, the Labour Court quoted, and, indeed, applied the seminal passage in the judgment of Costello J., as he then was, in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 (at p. 315) in which he construed the term "good reasons" as follows:

> "The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and that the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under Order 84, rule 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay. There may be cases, for example where third parties had acquired rights under an administrative decision which is later challenged in a delayed action. Although the aggrieved plaintiff may be able to establish a reasonable explanation for the delay the court might well conclude that his explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights *(State (Cussen) v. Brennan* [1981] I.R. 181)."

31. In *De Roiste v. Minister for Defence* [2001] 1 I.R. 190, on the appeal to the Supreme Court, Fennelly J. stated (at p. 216) that the expression "good reasons" was well explained in that passage. More recently in *Dekra Éireann Teo. v. Minister for the Environment* [2003] 2 I.R. 270, which concerned the application of the time limit for initiating an application for review of a decision to award a public contract, the Supreme Court approved that passage and applied it in analysing the meaning of "good reason" in O. 84A, r. 4 of the Rules.

32. Counsel for the respondents accepted that the Labour Court was correct in applying the reasoning of Costello J. in the *O'Donnell* case on the meaning of "good reasons" by analogy to the meaning of "unless reasonable cause is shown" in s. 19(5). Where the parties diverged was as to how it should be applied. Counsel for the respondents laid particular emphasis on the fact that Costello J. derived assistance from the decision of the Supreme Court in *State (Furey) v. Minister for Defence* [1988] I.L.R.M. 89 in applying the principles he had enunciated, in the passage which I have quoted, to the facts before him. Costello J. observed that the evidence established that, as regards part of the period of delay, Mr. O'Donnell was contesting his liability to pay water charges not through the courts but with the assistance of three different public representatives and queried whether that course of conduct was a "good

reason" within the meaning of O. 84, r. 21 which would have justified the court extending the time for applying for judicial review of the relevant orders imposing the water charges, had the proceedings been brought by way of judicial review rather than by plenary action. Having stated that assistance in answering the question was to be found in the *Furey* case, he continued as follows (at p. 317):

> "There the applicant had been a member of the Defence forces. He was discharged on 15th August, 1975. He instituted proceedings four years later for an order of *certiorari* to quash his discharge. He was successful in the High Court and the Minister appealed. One of the grounds of appeal was that the application should have been refused on the grounds of delay. This was rejected by a majority decision. The evidence of the plaintiff was to the effect that he did not realise that he could pursue his complaint through the court, that he could not afford legal advice, that over a four year period he had written many letters to the Department, to local members of parliament and to successive Ministers for Defence. On these facts it was concluded that the applicant had not disentitled himself by his delay to the remedy he sought.
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> The facts of this case are not identical with those in *Furey*. But they are close enough. Mr. O'Donnell, like Mr. Furey, tried to get redress through political pressure. When he was advised to do so, he went to a solicitor. It is true that he has not sworn that he did not get legal advice before this because he had not the means to do so but I think I am entitled to take into account the notorious fact that current levels of legal fees are perceived by most people to be very high and that this fact constitutes a powerful disincentive to legal action by persons like Mr. O'Donnell who are in receipt of a public service pension and who live in a home which could be seized and sold to pay costs should his action fail. I think therefore that his efforts to settle the dispute through the intervention of public representatives establish that there is reasonable explanation as to why between June, 1988 and July, 1989 he did not institute these proceedings."

33. A feature of the *Furey* case, which was not adverted to by Costello J. in the O'Donnell case, was that a colleague of Mr. Furey, who like him had been a witness to an incident in the Glen of Imaal arising from which another member of the army was disciplined, had also been discharged from the army after the incident and had instituted proceedings for *certiorari* and had been successful in the High Court and the Supreme Court *(The State (Gleeson) v. Minister for Defence* [1976] I.R. 280). McCarthy J., who delivered the majority judgment in the Supreme Court in the *Furey* case, stated (at p. 96) that he was unable to find any distinguishing feature of relevance between the *Gleeson* case and the *Furey* case, which he emphasised was not because of the similarity of fact but because the circumstances affecting the legal issues between the parties appeared to him to be identical. An issue arose in the *Furey* case as to the knowledge of Mr. Furey of the decision in the *Gleeson* case. Mr. Furey had averred that he had not consulted a solicitor until by chance he had met Mr. Gleeson. However, he did not aver when he met Mr. Gleeson. It was argued on behalf of the Minister that Mr. Furey must have been aware of the decision in the *Gleeson* case. McCarthy J. (at p. 97) indicated that the contention about Mr. Furey's knowledge of the *Gleeson* case should be disregarded since the Minister, having served notice to cross-examine Mr. Furey, did not pursue the matter. I mention this because I find it difficult to discern the extent to which the decision in the *Furey* case was based on the knowledge or otherwise of Mr. Furey of his likelihood of success. The final observations of McCarthy J. on the issue of delay (at p. 100) were as follows:

> "Further, I see no logical reason why delay, however long, should, of itself, disentitle to certiorari any applicant for that remedy who can demonstrate that a public wrong has been done to him – that, for instance, a conviction was obtained without jurisdiction, or that, otherwise, the State has wronged him and that the wrong continues to mark or mar his life."

34. In the *De Roiste* case, having quoted that last passage, Keane C.J. commented as follows (at p. 197):

> "As the learned High Court judge pointed out, this observation was clearly obiter in the context of the particular case. In the judgments which they will deliver in this case, Denham and Fennelly JJ. analyse the relevant law in detail. I am satisfied that, in the light of their explanation of the relevant law, with which I entirely agree, this passage cannot be regarded as a correct statement of the law."

35. Counsel for the respondents was correct in submitting that what was disapproved of by the Supreme Court in the *De Roiste* case, and subsequently by the Supreme Court in the *Dekra* case, was the obiter statement by McCarthy J., which I have quoted. While the *ratio decidendi* of the *Furey* case was not disapproved of, this does not avail the respondents, because it is difficult to determine the extent to which the *ratio* was predicated on Mr. Furey's lack of knowledge of his legal and constitutional rights or the likelihood of success in the proceedings, as opposed to the efforts he had made to seek re-enlistment in the army during the period of delay.

36. As the 2004 decision illustrates, what was correctly deduced by the Labour Court from the authorities in which O. 84, r. 21 and O. 84A, r. 4 were being applied is that the onus is on the respondents in the instant case to establish that reasonable cause has been shown and the respondents must not only establish reasons which explain the delay but also which afford a justifiable excuse for it. However, I do not think that the Labour Court was correct in its conclusion that the imperative which applies in the area of public procurement that a review of a contract should be initiated as quickly as possible, which was recognised in the *Dekra* case, does not apply to issues in relation to discrimination in the sphere of employment under the Directive or the Act of 1977. As has been argued on behalf of the appellant in earlier stages of this dispute, the treatment of one employee in this type of situation may have consequences for other employees. Hence, the short limitation period provided for in s. 19(5).

37. The respondents have not pointed to any Irish authority in which ignorance of legal rights has been found to have been a justifiable excuse for delay in initiating proceedings. The appellant has pointed to one case in which this Court (Morris J., as he then was) held that there is no authority for the proposition that a plaintiff was entitled to postpone bringing a case until evidence was available which will copper fasten the matter in his or her favour*: McDonald v. McBain* [1991] 1 I.R. 284.

38. Counsel for the respondents relied on a number of English authorities which, it was submitted, support the respondents' position.

39. The most recent of the authorities relied on by the respondents, *Marks & Spencer Plc v. Williams-Ryan* [2005] 1 C.R. 1293, was a decision of the Court of Appeal of England and Wales which post-dates the 2004 decision. However, it applied two earlier decisions of the Court of Appeal which are referred to in the 2004 decision*: Dedman v. British Building & Engineering Appliances Limited* [1974] I.C.R. 53 and *Palmer v. Southend-on-Sea Borough Council* [1984] I.C.R. 373. The statutory provision in issue on that appeal provided that an employment tribunal should not consider a complaint of unfair dismissal unless it was presented to the tribunal before the end of the period of three months beginning with the effective date of termination or "within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months". In identifying the legal principles applicable to that provision, Lord Phillips M.R. stated as follows:

> "20. The first principle is that section 111(2) should be given a liberal interpretation in favour of the employee. …

21. In accordance with that approach it has repeatedly been held that when deciding whether it was reasonably practicable for an employee to make a complaint to an employment tribunal, regard should be had to what, if anything, the employee knew about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had had he or she acted reasonably in all the circumstances. So far as that question is concerned there is a typically lucid passage in the judgment of Brandon L.J. in *Walls Meat Company Limited v. Khan* [1979] I.C.R. 52, 61 which I would commend:

> 'With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.
>
> For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant.
>
> While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. But, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making enquiries as to how, and within what period, he should exercise it. By contrast, if he does not know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such enquiries.'

22. …

23. …

24. The third proposition is unquestionably one of law. It is, expanding it a little, that if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the employment tribunal in due time. The fault on the part of the adviser is attributed to the employee. …"

40. The facts in that case were that the claimant employee, a part-time sales assistant, was summarily dismissed for gross misconduct on 17th April, 2003, following a disciplinary hearing into an incident on the shop floor. At the earliest opportunity she telephoned the Citizens' Advice Bureau. In a brief conversation she was advised to exhaust the employer's internal appeal procedures, but not told of her right to complain to an employment tribunal. On 24th April, 2003 a letter of dismissal was sent informing her of the internal appeal procedure and of her right to complain to an employment tribunal, for which she would need independent advice. The information she received from the employer did not mention the time limit for complaints to the employment tribunal. She proceeded with the internal appeals procedure, which concluded by letter of 31st July, 2003, received several days later, confirming her dismissal. On 20th June, 2003 she had obtained a blank form and information concerning a complaint to an employment tribunal, but she did not find time to study the documents due to pressure of a teacher training course. The three-month time limit for presenting her complaint to the employment tribunal expired on 16th July, 2003. The tribunal received her complaint of unfair dismissal on 15th August, 2003 and concluded that it had jurisdiction to hear the complaint because it had not been reasonably practicable for her to present it before the time limit expired and it had been presented within a reasonable time thereafter. The employer's appeal to the Employment Appeal Tribunal was dismissed, as was the appeal to the Court of Appeal.

41. The decision of the Court of Appeal in the *Marks & Spencer* case was not concerned with ignorance of the law in the sense which the appellant asserts is the foundation of the respondents' case here – that the respondents were ignorant of the legal consequences of the factual situation in which they found themselves, that is to say, that it might constitute illegal discrimination on the grounds of sex contrary to the Directive and the Act of 1977. That decision was concerned with ignorance of the law as it applied to the claimant in the sense that under the law a complaint could be brought by her to an employment tribunal, but it had to be brought within a specific time limit and she was ignorant as to what that time limit was. It is not in issue in this case that the respondents, or the claimants whom they represent, were ignorant of their entitlement to refer a dispute in relation to discrimination to the Labour Court, or the time limit within which such dispute was required to be brought by virtue of s. 19(5), or both the entitlement and the time limit.

42. However, another authority relied on by the plaintiff does raise an issue of ignorance of the law in the sense in which it is raised in this case. That is the decision of the Employment Appeals Tribunal in *Mills and Crown Prosecution Service v. Marshall* [1998] I.R.L.R. 494. In that case, Ms. Marshall, a transsexual, was offered a post with the Crown Prosecution Service in 1993 when she was a man. When she explained to Barbara Mills, the Director of Public Prosecutions, that she intended to take up the position as a woman, the offer was withdrawn. She did not bring a sex discrimination complaint in respect of this until after the decision of the European Court of Justice in *P v. S* on 30th April, 1996, in which it was held that the Directive precludes discrimination against a transsexual for a reason related to gender assignment. The relevant statutory provision provided that an industrial tribunal should not consider a complaint unless it was presented to the tribunal before the end of a period of three months beginning when the act complained of was done, but the tribunal was given a discretion to extend the time limit "if, in all the circumstances of the case, it considers that it is just and equitable to do so". In delivering the decision of the Employment Appeals Tribunal, the President, Mr. Justice Morrison, rejecting an argument that to allow Ms. Marshall to present her complaint would offend against the principle of legal certainty, went on construe that provision (starting at para. 21) stating as follows:

> "… the court's power to extend time is on the basis of what is just and equitable. These words could not be wider or more general. The question is whether it would be just or equitable to deny a person the right to bring proceedings when they were reasonably unaware of the fact that they had the right to bring them until shortly before the complaint was filed. That unawareness might stem from a failure by the lawyers to appreciate that such a claim lay, or because the law 'changed' or was differently perceived after a particular decision of another court. The answer is that in some cases it will

> be fair to extend time and in others it will not. The industrial tribunal must balance all the factors which are relevant, including, importantly and perhaps crucially, whether it is now possible to have a fair trial of the issues raised by the complaint. Reasonable awareness of the right to sue is but one factor. …
>
> As a matter of statutory language, the discretion which is given by the Act to extend time is unfettered and may include a consideration of the date from which the complainant could reasonably have become aware of her right to present a worthwhile complaint."

43. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal to extend the time for bringing the complaint.

44. As a general proposition, in my view, the English authorities, which were decided in the context of different statutory criteria for extending the limitation period than apply in the instant case, do not provide guidance as to how s. 19(5) should be construed or applied. In particular, the statutory criterion which governed the issue in *Mills and the Crown Prosecution Service v. Marshall*, whether it was "just and equitable", is a much broader and more fluid concept than the concept of "reasonable cause" and confers a wider discretion. Circumstances which would justify a finding that initiating a claim was not reasonably practicable would not necessarily amount to reasonable cause shown for not initiating a claim within a stipulated period. Apart from those differences, the issue for determination by the Labour Court and the issue which arises on this appeal has to be determined in the light of the jurisprudence of the Irish courts on limitation periods.

Conclusions

45. The answer to the question of law posed in the order of 13th December, 2002 turns on the proper construction of s. 19(5). Put another way, the question to be answered is whether, in enacting s. 19(5), the Oireachtas intended that the expression "reasonable cause" should encompass, as a justifiable excuse for delay, a situation in which a person who, with the knowledge of the material underlying facts, desisted from pursuing a claim of discrimination until he or she became aware, in consequence of publicity surrounding a court decision in point, that the claim, if pursued, would be likely to be successful.

46. In my view, it must be assumed that the Oireachtas intended that the jurisprudence which generally governs time limits would be applicable to s. 19(5). Although not directly in point here, the established jurisprudence in this jurisdiction is that knowledge or discoverability of a material fact is not the trigger which sets a statutory limitation period running, unless the legislature expressly so provides. This is clearly illustrated by the decision of the Supreme Court in a medical negligence case, *Hegarty v. O'Loughran* 1 I.R. 148, which is referred to in the judgment of Morris J. in *McDonald v. McBane*. Morris J. quoted the following passage from the judgment of Finlay C.J. at p. 157:

> "I would, therefore, conclude that the proper construction of this sub-section is that contended for on behalf of the defendants and that is that the time limit commenced to run at the time when provable personal injury, capable of attracting compensation, occurred to the plaintiff which was the completion of the tort alleged to be committed against her."

47. Subsequent to that decision, the Oireachtas enacted the Statute of Limitations (Amendment) Act, 1991 and effectively reversed the decision by the enactment of s. 3(1) which provides:

> "An action … claiming damages in respect of personal injury to a person caused by negligence, nuisance or breach of duty … shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

48. That provision was amended by s. 7(2) of the Civil Liability and Courts Act, 2004. As was submitted on behalf of the appellant, the foregoing is an example of the Supreme Court setting its face against a subjective interpretation of limitation periods and the Oireachtas making a positive intervention to allow that in relation to specific causes of action in limited circumstances.

49. Further, under the established jurisprudence in this jurisdiction lack of knowledge or awareness on the part of a claimant, or the absence of a legal precedent which indicates, that, as a matter of law, a claim will have a successful outcome does not prevent a statutory limitation period from starting to run. That is illustrated by the decision of this Court in the Murphy case and the decision of the Supreme Court in the *McDonnell* case.

50. In s. 19(5) the Oireachtas has prescribed a relatively short limitation period, albeit one which can be extended where a claimant establishes "reasonable cause". The expression "reasonable cause", in my view, broadly speaking connotes similar factors and, in particular, similar conduct on the part of the claimant, as is connoted by the expression "good cause" in O. 84, r. 21. In relation to the core issue which arises in the instant case, it seems to me that, given the jurisprudential backdrop in relation to prescribing time limits generally, which I have outlined, it cannot have been the intention of the Oireachtas that failure to pursue a claim which has crystallised until a legal precedent is in place which clarifies the law and indicates that the claim is likely to be successful, followed by prosecution of the claim when the precedent is publicised, should constitute "reasonable cause" within the meaning of s. 19(5). In short, while the delay on the part of the claimants in referring their claims to the Labour Court has been explained, in my view, a justifiable excuse for the delay has not been established.

51. In setting out the conclusions of the Labour Court earlier, I adverted to the fact that the appellant takes issue with certain findings of fact incorporated in the Labour Court's conclusions. The appellant's submissions embraced arguments which go to what the state of knowledge of the claimants as to the sustainability of their claims actually was, or ought to have been, suggesting that the claimants were, or should have been, aware of the illegality of the job-sharing scheme having regard to the Directive and the Act of 1977. An argument relied on in this context was the fact that three of the claimants raised the issue of equality discrimination in relation to the implementation of the job-sharing scheme and, in particular, the pro rata calculation of service: one in connection with her entitlement to maternity leave, another in relation to the payment of an IT gratuity and the third in relation to promotion. It was also argued that, in any event, prior to the decision of the European Court of Justice in *Gerster* a certain level of uncertainty surrounded the legality of a system whereby the service of job-sharers for promotion purposes was calculated on a *pro rata* basis, reference being made, in particular, to the decisions of the European Court of Justice in *Bilka-Kaufhaus GmbH v. Weber von Hartz* [1986] ECR 1607 and in *Nimz v. Freie und Hansestadt Hamburg* [1991]

52. ECR 1-297. I consider it unnecessary to address these arguments. In my view, the resolution of the core issue in this case involves a fundamental point of principle. The state of the knowledge or awareness which the claimants had, or which they or their unions ought to have had, is irrelevant in that resolution.

53. Finally, the limitation period stipulated in s. 11(2)(a) of the Act of 1957 has no direct application to the process initiated by the

respondents under s. 19 of the Act of 1977, although it would have relevance if the claimants were to institute proceedings in a court for breach of statutory duty of breach of the State's obligations under Community law.

Decision
54. The 2004 decision is set aside.