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THE HIGH COURT

2008 62 MCA

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACT 1988 AND

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 90(1) OF THE SAID ACT

BETWEEN

CALOR TEORANTA

APPLICANT

AND

MICHAEL McCARTHY

RESPONDENT

JUDGMENT of Mr. Justice Clarke delivered the 19th of March 2009

1. Introduction

1.1 These proceedings involve an appeal taken by the applicant ("Calor") under s. 90(1) of the Employment Equality Act 1998, ("the Act") against a determination of the Labour Court (Determination No. EDA089) made on the 11th April, 2008. In that determination the Labour Court found that Calor had discriminated against the respondent ("Mr. McCarthy") on the grounds of age in contravention of s. 8 of the Employment Equality Acts 1998 and 2004 ("the Acts"). The Labour Court, in consequence, awarded Mr. McCarthy the sum of €46,000.

1.2 It is necessary to turn first to the procedural history of the application up to the determination of the Labour Court.

2. The Process Before and at the Labour Court

2.1 On the 23rd December, 2004, Mr. McCarthy made a complaint of discrimination against Calor to the Equality Tribunal under the provisions of the Act. The basis of Mr. McCarthy's complaint was that the termination of his employment with Calor on reaching the age of sixty constituted discrimination on the basis of age. Mr. McCarthy's complaint was heard by an Equality Officer on the 18th June, 2007. By decision dated the 12th September, 2007, the Equality Officer concerned found that Mr. McCarthy had not been discriminated against.

2.2. On the 16th October, 2007, Mr. McCarthy appealed the decision of the Equality Officer to the Labour Court in accordance with s. 83 of the Act. The Labour Court heard Mr. McCarthy's appeal on the 14th March, 2008. It will be necessary to return to one aspect of that hearing in more detail in due course as it gives rise to one of the grounds of appeal with which I am concerned. However, Calor says that it was taken by surprise by one aspect of the evidence given at the hearing. It would appear that some days later a representative of Calor wrote to the Labour Court asking that Calor be permitted to lead additional evidence to counteract the evidence which, it was said, had taken Calor by surprise. Correspondence ensued between the Labour Court and both parties. In substance the Labour Court declined to hear that additional evidence and proceeded to make the determination of the 11th April, 2008, to which I have already referred.

2.3 It is next appropriate to turn to the general legal principles applicable to an appeal such as that with which I am concerned.

3. The Legal Basis of the Appeal

3.1 The appeal provided for from a decision such as that of the Labour Court in this case is confined to an appeal on a point of law. The scope of such an appeal has been considered in a number of cases stemming from *Henry Denny and Sons Ireland Limited v. Minister for Social Welfare* [1988] 1 I.R. 34. In more recent times the Supreme Court again had to consider the scope of such an appeal in *National University of Ireland Cork v. Ahern and Others* [2005] 2 I.L.R.M. 437, where McCracken J. (speaking for the Supreme Court) indicated that the fact that an appeal is on a point of law does not prevent the court from examining "the basis upon which the Labour Court found certain facts". McCracken J. went on to note that:-

> "The relevance, or indeed the admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by the Labour Court and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law, and can be considered on an appeal under section 8(3)."

3.2 *Ahern* was a case involving a complaint under the Anti Discrimination (Pay) Act 1974. The reference to s. 8(3) was a reference to the relevant section of that Act. The case is illustrative of the sort of matters which are properly scrutinised by a court hearing an appeal on a point of law. One of the issues in *Ahern* was as to whether the workers concerned were engaged in "like work" to comparators put forward as the basis for their contention as to discriminatory pay and conditions. Dealing with that aspect of the case McCracken J. noted as follows:-

> "I accept that the consideration of whether there was 'like work' or not is almost entirely a question of fact. The Labour Court did set out in some detail its considerations of the various aspects of the work performed by the security services officers and the switchboard operators and reached a conclusion of fact. Insofar as this conclusion determines that there was 'like work' there were grounds upon which the Labour Court was entitled to

make that finding, and indeed as the general duties between the main body of switchboard operators and the comparators did not differ greatly, the Labour Court was also entitled to find that the comparators were engaged in 'like work' with the Respondents."

3.3 Thus, on the "like work" aspect of the case, the Supreme Court determined that the question was one of fact and that the court should not interfere with that finding of fact by the Labour Court provided that there was a basis in the evidence for the relevant determination.

3.4 However, on the question of discrimination, the Supreme Court, having noted that there were different terms as to pay between the workers concerned and the comparators put forward, but that there were established differences in pay between other categories of workers which appeared to be based on objective factors, found that the Labour Court "ought then to have considered the question whether the difference in remuneration between the respondents and the comparators might have the same basis. The Labour Court failed to give any consideration whatever to the fact that the comparators worked shorter hours and lesser duties than their full time colleagues".

3.5 This latter passage demonstrates that the Supreme Court was happy to scrutinise the manner in which the Labour Court had come to its conclusion in that case concerning discrimination. The failure to carry out an appropriate analysis was identified and resulted in a successful appeal with the matter being remitted back to the Labour Court to carry out the analysis which the Supreme Court determined should originally have been made. The difference between the two issues is, of course, that the "like work" question was a pure question of fact while the discrimination question involved a number of issues which required the Labour Court to address the reasons for any established difference in terms and conditions. The discrimination question was open to scrutiny on the basis of whether all relevant factors had been addressed.

3.6 It is clear, therefore, that this Court can scrutinise the extent to which the Labour Court considered all necessary matters and excluded from its consideration any matters that were not appropriate. However, a legitimate and sustainable judgment of the facts based on a proper consideration of all relevant materials should not be interfered with by this Court. Likewise, particular deference should be paid to the judgment of the Labour Court on matters which are within its own special expertise. See *Ashford Castle v. S.I.P.T.U.* [2006] I.E.H.C. 201.

3.7 Against that general background it is necessary to turn to the central grounds of appeal raised on behalf of Calor.

4. The Grounds of Appeal

4.1 In order to understand the grounds of appeal it is necessary to say something about the issues which arose before the Labour Court. There was no doubt but that Mr. McCarthy was, in fact, required by Calor to retire at sixty. There was a dispute between Mr. McCarthy and Calor as to whether sixty was, in fact, his agreed retirement age. It will be necessary to consider the basis of the findings of the Labour Court in that regard in due course. The Labour Court concluded that, when Mr. McCarthy opted to sever his employment and return as a casual employee, he did so on the understanding that he could work until he attained the age of sixty five. The Labour Court went on to hold that the relevant understanding governed Mr. McCarthy's terms of employment up to and until he was required by Calor to retire at 60.

4.2 So far as that finding is concerned Calor makes three points:-

(a) Firstly, Calor urges that it is not the function of the Labour Court, in hearing a discrimination claim, to determine the contractual retirement age of a relevant employee;

(b) Secondly, Calor says that the relevant finding is unsustainable on the evidence; and

(c) Thirdly, Calor asserts that the failure of the Labour Court to permit it to call additional evidence in relation to that aspect of the case amounted, in all the circumstances, to an unfair procedure.

4.3 A fourth ground of appeal concerns the proper application of the provisions of s. 34 of the Act which provides for exceptions relating to a variety of grounds. The relevant subsection is subs. (4) which provides:-

"(4) Without prejudice to subsection (3), it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees."

4.4 Fifthly, Calor suggests that the manner in which the Labour Court conducted its assessment of compensation fails to display a sufficient analysis to justify the determination.

4.5 In the light of identifying those issues it is next appropriate to turn to the determination of the Labour Court.

5. The Determination of the Labour Court

5.1 The view which the Labour Court took was dependent on the finding of fact to which I have referred concerning Mr. McCarthy's retirement age. For reasons which it will be necessary to analyse in some greater detail, the Labour Court came to the view that Mr. McCarthy's retirement age was, in fact, sixty five. On that basis the termination of Mr. McCarthy's employment at sixty was held to be on the grounds of age, in circumstances where Mr. McCarthy was treated differently than a person in a comparable position who had not attained the age of sixty would have been treated. The Labour Court thus held that Mr. McCarthy had been the subject of discrimination within the meaning of s. 6(1) of the Act, and was entitled to succeed.

5.2 I did not understand counsel for Calor to disagree that, at the level of principle, it would amount to discrimination on the grounds of age to terminate someone's employment because the person concerned had reached an age which was short of that person's agreed retirement age.

5.3 It is also important to note that the Labour Court gave detailed consideration to the decision of the European Court of Justice ("ECJ") in *Felix Palacios de La Villa v. Cortefiel Servicios SA* [2007] E.C.J. Celex Lexis 6773 (Case C-411/05). In its

judgment in *Palacios* the ECJ determined that a national retirement age was only consistent with EU law where the retirement age concerned was objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy or the labour market and that the means put in place to achieve that aim of public interest were not inappropriate and unnecessary for purpose.

5.4 On that basis the Labour Court considered that there were serious questions concerning the proper interpretation of s. 34(4) of the Act having regard to the jurisprudence of the ECJ. It is clear that the Labour Court would have given very serious consideration to making a reference to the ECJ if it had come to the conclusion, as a matter of fact, that Mr. McCarthy's retirement age was sixty rather than sixty five. In that eventuality there would have been no doubt but that Mr. McCarthy had been required to retire at his contractual retirement age. The question which then would have arisen is as to whether s. 34(4), properly interpreted in the light of the Directive which it seeks to implement in Irish law, provides, in all cases, an immunity in respect of a discrimination claim where someone retires at a contractual retirement age. However, because the Labour Court came to the view that, as a matter of fact, Mr. McCarthy's retirement age was sixty five, the Labour Court did not consider it necessary to deal with s. 34(4) on the basis that Mr. McCarthy had not, in its view, therefore, been required to retire at his contractual retirement age.

5.5 It is next necessary to turn separately to each of the grounds of appeal put forward.

6. The Decision on Retirement Age
6.1 As set out earlier, two separate grounds are relied on under this heading. Firstly it is said that it was outside the proper role of the Labour Court to determine Mr. McCarthy's retirement age. Secondly it is said that the finding of fact as to retirement age, if it was open to the Labour Court to make such a finding, was not sustainable on the evidence.

6.2 I propose to deal quite shortly with the first point. It is, of course, true to say that it is no function of the Labour Court to make a legally binding decision as to a party's retirement age *per se*. However, that is not what the Labour Court, in my view, did in this case. Rather the Labour Court had to consider, as an element in the discrimination claim, the question of what Mr. McCarthy's true retirement age was. If his true retirement age was sixty then Calor would, *prima facie*, have an entitlement to rely on s. 34(4) of the Act, subject to the difficult questions of the interpretation of that section in the light of community law to which I have briefly referred. On the other hand if Mr. McCarthy's true retirement age was sixty five, then causing him to retire at sixty (being on the grounds of age) was undoubtedly discriminatory. In those circumstances it seems to me that the Labour Court was required to make a finding of fact as to Mr. McCarthy's retirement age, not because that question was, in itself, a matter which the Labour Court had to decide, but rather because a decision on that question was a necessary ingredient in a consideration of the discrimination claim with which the Labour Court was concerned. Bodies charged with reaching legally binding determinations in a whole range of areas have to make findings as to fact which are material to the exercise of their statutory role. Where a determination (such as one in respect of retirement age) is material to the question of whether there has been discrimination then there can, in my view, be no legitimate objection to the Labour Court making any appropriate and sustainable finding of fact on such an issue. On that basis it does not seem to me that that ground had any merit.

6.3 The second question under this heading is as to whether the relevant finding was sustainable on the evidence. I leave aside for the moment the question of whether Calor should have been allowed call further evidence. The history of the retirement age applicable to Mr. McCarthy was somewhat complicated. When Mr. McCarthy first commenced employment with Calor in 1964, it would appear that the relevant retirement age was sixty five. In or about November, 1987 an agreement was reached which allowed employees of Calor to elect between sixty five and sixty as their retirement age. It was common case that, at that time, Mr. McCarthy elected for sixty and signed a form consenting to this change in his conditions of his employment.

6.4 In 1994 Calor introduced a scheme which allowed employees to opt to terminate their employment and return as casual employees on reduced pay and less favourable conditions. Those who opted for this arrangement received an enhanced redundancy lump sum and reduced pension. Mr. McCarty opted for this arrangement. It was Mr. McCarthy's case that in the course of proposing that package to him, a Mr. Colin Lindsay, a director of Calor, told him that if he opted to accept the proposal he could remain in employment until the age of sixty five. It was said in evidence by Mr. McCarthy that Mr. Lindsay's statement was made in the presence of a Mr. Michael Kinnefeck who was a manager with Calor. Corroborative evidence in relation to this issue was given by a Mr. Christy Harty, a former colleague of Mr. McCarthy. There was, therefore, ample evidence before the Labour Court, which it was entitled to accept, concerning the arrangements entered into at that time.

6.5 That was not, however, the end of the story. Further negotiations took place in 2002, arising out of an industrial dispute, which resulted in the terms of settlement of that dispute being reduced to writing in a document dated May 2002, which was intended to set out the then terms and conditions of Calor's employees and which provided that:-

> "The normal retirement age will continue to be sixty but the participants in the Defined Contribution Scheme may opt with the company's agreement to stay on until sixty five."

There is no doubt but that Mr. McCarthy signed the relevant document. However, the Labour Court had the benefit of the evidence of Mr. Tom O'Carroll, operations director of Calor, who indicated that, at the time that the document concerned was put in place, he was unaware of any separate agreement having been entered into by Mr. McCarthy providing for a retirement age of sixty five. Mr. O'Carroll also gave evidence that it was not intended that the May, 2002 document would alter the terms and conditions of any employees. In those circumstances the Labour Court came to the view that the signing of the 2002 document by Mr. McCarthy did not alter his retirement age.

6.6 In summary, therefore, the Labour Court held that Mr. McCarthy had agreed a retirement age of sixty five in 1994, and that that agreement had not been varied in 2002.

6.7 I am of the view that there was more than sufficient evidence to enable the Labour Court to come to that view. It did not, of course, have to accept Mr. McCarthy's evidence as to what transpired in 1994. However, it did so. Subject only, therefore, to the next issue which arises as to whether Calor should have been permitted to call further evidence, it seems to me that no legitimate attack can be made on the finding of the Labour Court as to what transpired in 1994.

6.8 In the light of Mr. O'Carroll's evidence it seems to me that the Labour Court was also entitled to determine that the

2002 documentation was not intended to alter any terms and conditions and that it did not, in fact, do so. Again the Labour Court was not constrained to take that view. It could, for example, have seen the signing by Mr. McCarthy of the 2002 documentation as being further evidence that Mr. McCarthy did not, in fact, have an assurance that sixty five would be his retirement age. However, the Labour Court did not form such a view on the facts and it was, in my view, entitled to come to the conclusions which it did.

6.9 I am, therefore, satisfied that, subject to the procedural point to which I will next turn, the finding of fact in respect of Mr. McCarthy's retirement age was both an appropriate matter for the Labour Court to consider and was a finding which was open to the Labour Court to make on the evidence before it. I must now turn to the procedural issue which I have identified.

7. The Procedural Issue

7.1 As indicated earlier Mr. McCarthy gave evidence to the Labour Court, which the Labour Court accepted, that the relevant assurances were given to him by a Mr. Colin Lindsay, a director of Calor. It is that fact which Calor says took them by surprise. In that context it is necessary to trace the case as made by Mr. McCarthy. In the submissions in writing made on his behalf to the Labour Court, Mr. McCarthy's representatives stated the following:-

> "At the time he elected for the voluntary redundancy scheme the complainant was advised and given to understand that retirement age would remain at sixty five and that he could continue working to age sixty five. Mr. McCarthy so relied on this promise and inducement."

7.2 That assertion had been made, in one form or another, in the earlier stages of the process. It was, therefore, clear that Mr. McCarthy was going to assert that he had been given such assurances. It is true that the document concerned (or its predecessors) does not specify the identity of the person whom it would be alleged gave the assurances concerned. Nor, it would appear, was the identity of the person concerned mentioned before the Equality Officer, at least so far as the papers before this Court are concerned. However, there is no doubt but that Calor must have been aware, prior to the hearing at the Labour Court, that it was likely that Mr. McCarthy would assert and seek to establish in evidence that he was given the relevant assurances. Calor was represented by IBEC at the hearing concerned. It is important to note that, in the written submissions filed by IBEC on behalf of Calor at the Labour Court, no mention is made of the assertion to which I have referred as to Mr. McCarthy having been given assurances. Nor, it would appear, did Calor seek, in advance of the hearing, any further details of the nature of the assurances concerned or the identity of the persons by whom such assurances were alleged to have been given. Furthermore, it does not appear that the IBEC representative appearing on behalf of Calor sought an adjournment on the day of the hearing to facilitate calling the relevant additional evidence.

7.3 Rather a letter was written to the Labour Court in the days immediately after the hearing (and before the Labour Court had issued its determination) seeking a facility to call the witness concerned. That letter (of the 18th March) was, quite properly, forwarded by the Labour Court to the representatives of Mr. McCarthy who opposed any re-opening of the case (by a replying letter of the 19th March).

7.4 A Body, such as the Labour Court, must be afforded a significant degree of procedural autonomy as to the manner in which it conducts its proceedings. That is not, of course, to say that in structuring its procedures the Labour Court is not obliged to ensure that those procedures conform with the principles of constitutional justice. There may be cases where the principles of constitutional justice would require that there be an adjournment of proceedings or a facility given to a party taken by surprise to have an opportunity to present further evidence.

7.5 However, I have come to the view that this is not such a case. Firstly, it seems to me, on a reading of the documents which were before the Labour Court, that Calor was on notice, at least in general terms, that Mr. McCarthy's case involved a contention concerning the giving of assurances in relation to sixty five being the appropriate retirement age for Mr. McCarthy and that such assurances had, in fact, been given in or around 1994. On that basis it ought to have been clear to Calor that that issue was likely to arise.

7.6 While it is true to state that Calor do not appear to have had any information prior to the hearing as to the identity of the person who might be said to have given such assurances, it seems to me that it would have been open to Calor to seek such information in advance of the hearing. I am fully appreciative of the fact that the Labour Court attempts to conduct its proceedings in as informal a way as possible. That does not, however, mean that a party cannot be entitled to request, in advance, any necessary details of its opponent's case which would be required to give it a fair opportunity to prepare for the hearing. If Calor conceived that it might be in some difficulty in relation to proper preparation for the hearing by virtue of not knowing the identity of the person or persons who might be said to have given the relevant alleged assurances, then Calor could and should have sought to have those matters clarified in advance.

7.7 Likewise, the issue having arisen at the hearing, Calor should have immediately drawn the Labour Court's attention to the difficulty which had arisen and sought an adjournment of the hearing or some other appropriate accommodation. I can readily envisage that, in circumstances where a party sought additional details in advance of a hearing but was not given them, where the additional details were presented, therefore, for the first time at the hearing, and where the party, in those circumstances, sought an adjournment, the Labour Court might have little option, in order that the proceedings comply with the standard of fairness required by reference to the principles of constitutional justice, but to adjourn the case or otherwise afford the party concerned an opportunity to lead additional evidence. However, in circumstances where the case was allowed to go to hearing without such additional details being sought and where no application was made on the day for an adjournment, I am satisfied that the circumstances of this case placed the Labour Court in a situation where it had a discretion to allow or not allow a re-opening of the evidence by acceding to or refusing the application made on behalf of Calor.

7.8 In a letter of the 1st April, 2008, from the Chairman of the Labour Court to Calor, it was indicated that the court felt that it would be inappropriate to reconvene the hearing in the light of the points made by the representatives of Mr. McCarthy in their written reply of the 19th March to the letter of the 18th March requesting a re-opening. The points made in that responding letter broadly reflect, although expressed in more strident terms, the issues which I have sought to analyse in the immediately preceding part of this judgment.

7.9 Those issues, in my view, brought the case into an area where it was within the discretion of the Labour Court as to

whether to allow or refuse the application to reconvene the hearing. I do not believe that the failure of the Labour Court to reconvene the hearing can, therefore, be described as an error of law such as would justify allowing this appeal.

7.10 It is next necessary to turn to the issues raised under section 34.

8. Section 34
8.1 As pointed out earlier it is clear that Calor placed significant reliance on section 34 of the Act. It is also clear that the Labour Court took the view that, in the light of its finding that Mr. McCarthy's contractual retirement age was sixty five, s. 34 had ceased to be relevant in that, on the basis of its finding as to Mr. McCarthy's retirement age, Mr. McCarthy had not been, in fact, compulsorily retired at his retirement age but rather five years earlier. It seems to me that the Labour Court was entirely correct in that regard. Had it been satisfied that Mr. McCarthy's contractual retirement age was sixty then, undoubtedly, the questions which arose as to the proper interpretation of s. 34, if necessary in the light of the jurisprudence of the ECJ, would have become material to the Labour Court's determination.

8.2 However, the facts as found by the Labour Court did not require those legal issues to be addressed and the Labour Court was, in my view, correct in not addressing same. This ground of appeal must also fail.

8.3 I turn finally to the question of the assessment of compensation.

9. Compensation
9.1 In awarding compensation under the Acts, the Labour Court is entitled to award a sum for discrimination generally and also to award a sum based on any actual loss which may be found to be attributable to the discrimination concerned. However, at an overall level, the jurisdiction of the Labour Court is confined to two years gross salary. In the circumstances the maximum award which the Labour Court could have made on the facts of this case could have slightly exceeded €46,000.

9.2 In the event the Labour Court noted that compensation is required to be effective, proportionate and dissuasive placing reliance on *Von Colson and Kamann v. Land Nordhein-Westfalen* [1984] E.C.R 1891. In that case the ECJ noted that:-

> "That means that the compensation awarded must, at minimum, reflect the economic loss attributable to the discrimination found to have occurred. It must also provide a dissuasive element against future infractions of the right to equal treatment."

In that regard it is noted that the complainant was deprived of five years potential employment. It is further noted that, at the time his appointment terminated, his annual salary amounted to €23,313.

9.3 In determining the appropriate compensation in the sum of €46,000, the Labour Court noted that that amount was made up as to €38,000 in respect of past and future pecuniary loss and €8,000 in respect of the effects of the discrimination found to have been suffered.

9.4 Calor makes complaint that there is no analysis as to how the compensation sum was arrived at. Strictly speaking that suggestion is true. However, it must also be noted that Mr. McCarthy retired on the 1st January, 2005, and the Labour Court was dealing with this matter some three years later. It was clear that Mr. McCarthy had not worked during the relevant period. It seems obvious from the determination of the Labour Court (though it would, perhaps, have been preferable if this was set out in terms) that the Labour Court, having determined that €8,000 was an appropriate sum to award for the non pecuniary effects of discrimination, awarded the maximum sum that could, thereafter, be awarded in respect of pecuniary loss. It is difficult to see how there could be any point of law involved in the assessment of non-pecuniary loss in the sum of €8,000 such as would entitle this court to interfere with same.

9.5 On the basis of an award of €8,000 in respect of the non-pecuniary effects of discrimination, it was clear that the maximum award which was open to the Labour Court in respect of pecuniary loss was of the order of €38,000, having regard to the jurisdictional limit placed on such awards at two years gross salary and in the light of the fact that Mr. McCarthy's relevant salary would appear to have been just over €23,000. Thus, the maximum jurisdiction for the overall award was just over €46,000. The deduction of the €8,000 allowed in respect of non-pecuniary loss left a maximum possible award of the order of €38,000 for pecuniary loss.

9.6 While the award does not, in terms, set out the basis on which the calculation of pecuniary loss was conducted, it seems to me that there is only one inference to be drawn from the fact that the Labour Court awarded a rounded down version of the maximum amount which it was entitled to determine in respect of pecuniary loss. That inference is to the effect that the Labour Court was satisfied that any pecuniary loss would, in fact, have exceeded the maximum which could have been awarded. In those circumstances carrying out a detailed calculation of the amount of the pecuniary loss would, for obvious reasons, be redundant, as the award would be capped at the jurisdictional limit in any event.

9.7 There was, of course, ample basis for concluding that the pecuniary loss suffered by Mr. McCarthy would have exceeded that jurisdictional limit (taking into account the award of €8,000 for non-pecuniary loss) of €38,000. Mr. McCarthy's gross salary at the relevant time was slightly over €23,000. It does not appear that Mr. McCarthy had any other source of income. In those circumstances the amount of deductions for tax and PRSI would have been very small and would, almost certainly, have left Mr. McCarthy with a net salary in excess of €20,000. Even if relevant welfare payments were to be taken into account (a point on which I express no view), it seems manifestly clear that Mr. McCarthy would have been worse off to a sum in excess of €10,000 per annum, as a result of having been compulsorily retired at the age of 60.

9.8 Given that the assessment was being conducted some three years after the event, and that Mr. McCarthy would not appear to have worked in that period, it is difficult to see how any assessment of the pecuniary loss concerned could have come in at much less than five years net loss for there would be little, if any, justification for making a deduction to reflect the possibility that Mr. McCarthy might obtain alternative employment prior to 65. Furthermore, it is clear that the proper measure of pecuniary loss would have been based on a five year period, having regard to the Labour Court's finding that Mr. McCarthy's contractual retirement age was 65. On that basis Mr. McCarthy could not have been the subject of a compulsory retirement, without discrimination, until 65 and thus the consequences of what the Labour Court found to be

the discriminatory act in requiring Mr. McCarthy to retire at 60 was that he lost five years employment.

9.9 On the basis of the above rough analysis, it is manifestly clear that the pecuniary loss attributable to the discrimination found in relation to Mr. McCarthy would, on any view, have well exceeded the sum of €38,000 awarded by the Labour Court. The Labour Court was, of course, constrained to limit its award to that sum for the reasons which I have already identified.

9.10 I am not, on the facts of this case, therefore, satisfied that there is any proper basis for the ground of appeal advanced which seeks to challenge the quantum of the award on the basis of a lack of analysis. I would wish to emphasise that what I have just said is dependant on the fact that, in this case, it was manifestly clear that any proper calculation of pecuniary loss would have well exceeded the maximum amount which the Labour Court could have awarded. Very different considerations would apply in a case where pecuniary loss might, even on one view, be less than the maximum available for award by the Labour Court. In those circumstances a precise calculation of pecuniary loss would have a real and significant effect on the ultimate award. It follows that in such cases it is incumbent on the Labour Court to set out the basis on which it approached its calculation of pecuniary loss, including specifying its findings of fact insofar as factual questions relating to pecuniary loss may have been contested. To do otherwise would be to leave both parties without an adequate basis for assessing whether the calculation of pecuniary loss had been properly conducted. However, where, as here, it is manifestly clear that any calculation of pecuniary loss would have well exceeded the maximum jurisdiction available to the Labour Court under the Acts, then the absence of any such analysis cannot prejudice the parties because there could be no basis for suggesting that the Labour Court could have awarded less than the relevant sum given its obligation, as it properly identified in the course of the determination, to allow as part of the compensation, any pecuniary loss which could be established subject only to the overall jurisdictional limitation itself.

9.11 In passing I should comment that it might be preferable for the Labour Court, if adopting a practice such as was adopted in this case of awarding the maximum remaining amount available in respect of pecuniary loss, to make it clear that that is in fact what is being done. However, it seems to me that it is appropriate to infer from the matters which I have sought to analyse that such a practice was in fact what led to the award in this case. On that basis I am not satisfied that any valid ground of appeal on a point of law has been made out in respect of the quantum issue as well.

10. Conclusions

10.1 For the reasons which I have set out it does not seem to me that any of the grounds of appeal, therefore, are sustainable. On that basis, I propose to reject the appeal and affirm the order of the Labour Court.

10.2 I will hear counsel in respect of costs in due course.