THE HIGH COURT

[2018 No. 335 MCA]

BETWEEN

DUNNES STORES

APPELLANT

AND
MARY DOYLE GUIDERA

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 10th day of September, 2018

1. On 18th December, 2017, an adjudication officer of the Workplace Relations Commission upheld a complaint made by the respondent against the appellant under the Employment Equality Act 1998. An appeal was lodged to the Labour Court, which issued a determination on 30th July, 2018 headed "In The Matter of Section 44, Workplace Relations Act, 2015 and Section 83(1), Employment Equality Acts, 1998 to 2015". That determination was received by the appellant on 31st July, 2018.

2. The appellant now applies *ex parte* for an order under O. 106 r. 5 of the Rules of the Superior Courts 1986, extending the time for an appeal from that determination of the Labour Court to the High Court. Jurisdiction to extend time is set out in O. 106 r. 5, which provides that an originating notice of motion under O. 106 r. 2 should be issued within 21 days of the date on which the determination of the Labour Court was given, provided that the time can be extended on application *ex parte* within six weeks from that date. On the appellant's calculations, which I am prepared to accept for the purposes of the *ex parte* stage, the appellant is still within the six-week period in terms of an application made on 10th September, 2018.

3. Determining the applicable time limit here involves the interplay of a number of statutory provisions as follows:

(i). Order 106 r. 2 refers to an appeal to the High Court on a point of law from a determination of the Labour Court under s. 90(1) of the Employment Equality Act 1998.

(ii). Section 90(1) of the 1998 Act in turn refers to a determination made by the Labour Court of "*an appeal under this Part*", meaning Part VII of the 1998 Act, which encompasses ss. 74 to 106.

(iii). The first pertinent section is s. 79, which allows for the investigation of certain complaints by the Director General of the Workplace Relations Commission.

(iv). Pivotal here is s. 83 of the 1998 Act, which applies s. 44 of the Workplace Relations Act 2015 (and I note here, crucially, s. 44 alone and not the entirety of Part 4 of the 2015 Act), to a decision of the Director General under s. 79 of the 1998 Act in the same manner that s. 44 of the 2015 Act applies to an adjudication under s. 41 of that Act.

(v). Part 4 of the 2015 Act covers ss. 38 to 53. Section 41 allows for applications to the Director General in relation to a list of Acts specified in schedule 5, which does not include the 1998 Act.

(vi). Section 44 of the 2015 Act gives a right of appeal to the Labour Court in relation to a decision of the Director General.

(vii). Section 46 of the 2015 Act provides that there can be an appeal to the High Court within 42 days of a Labour Court determination "*under this Part*", meaning part 4.

4. Given that s. 83 of the 1998 Act applies only s. 44 of the 2015 Act and not s. 46, it is clear that the limitation period for an appeal to the High Court in employment equality cases is that set out in s. 90 of the 1998 Act and not s. 46 of the 2015 Act. However, it is also fair to say that the drafting is somewhat complex. Mr. Marcus Dowling B.L., who appears for the appellant, describes it as "*Byzantine*". A CPD paper by Mr. Tom Mallon B.L. entitled "Workplace Relations Act 2015, Role of the High Court" and which, at time of writing, is posted on the Bar Council website, refers to complaints under the Employment Equality Act at para. 1 but goes on at para. 14 to refer to a 42-day time limit without any reference to the fact that a different time limit may apply under s. 90 of the 1998 Act - different in the sense that the s. 90 of the 1998 Act does not in itself set out a specific time period for the appeal and one then must have recourse to Rules of Court.

5. In terms of the extension of time to appeal to the High Court, the basic test remains that in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd* [1955] I.R. 170, as was reaffirmed by the Supreme Court in *Goode Concrete v. CRH plc* [2013] IESC 39 (Unreported, Supreme Court, 10th October, 2013). The tests in terms of an intention to appeal and arguable grounds of appeal are adequately deposed to on behalf of the appellant.

6. As regards whether there is a satisfactory explanation, the issue here is whether a mistake by legal advisers for a party amounts to a sufficiently satisfactory explanation. One cannot take a completely hard and fast view of that question. On surveying all of the jurisprudence, Delany and McGrath in *Civil Procedure* (4th Ed., Round Hall, 2018) note the point made by Lavery J. in *Éire Continenta* that the conditions must be considered in relation to all the circumstances of the particular case; and the learned authors conclude that "*it would appear that in most but not all applications to extend time for the bringing of an appeal to the Court of Appeal or the Supreme Court, it will be appropriate to apply the Éire Continental requirements as guidelines. However, it may not necessarily be fatal to such application if one, or possibly more, of these conditions is not satisfied, provided the court is disposed to granting an application based on all the circumstances of the case. The court may adopt a more flexible attitude to the application of the guidelines if refusing an application would lead to injustice*" (para. 23-125). The Supreme Court has also taken a more relaxed view of mistakes by legal advisers in the context of amendment of proceedings in *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29 [2012] 2 I.R. 570.

7. In the present situation, a number of factors militate in favour of regarding the appellant's excuse as sufficient:

(i). There was a *bona fide* mistake.

(ii). The inherent complication of the statutory scheme is a factor. I include under this heading the undesirable inconsistency in drafting practice where certain enactments are scheduled in schedule 5 of the 2015 Act and others are

added through deeming or applying provisions.

(iii). The inconsistency in statutory time limits as between different enactments in a related area is a factor. Indeed perhaps the rules committee might think it is worth considering aligning the time limit in O. 106 with that in the 2015 Act so it is a uniform 42 days all round.

(iv). Next, the fact that there was hitherto some lack of clarity that was not confined to legal advisers for the appellant, as illustrated by the CPD paper referred to.

(v). Further, there is the fact that the decision was received on the last day of term, being the 31st July, 2018, so the vacation is always a relevant factor.

(vi). Finally, there is the fact that the appellants acted promptly on realising the difficulty.

8. I don't mean to suggest that any or even all of these factors are crucial and there may well be cases where it would be unjust not to extend time on the basis of a simple error without much more. But, in the present case, in all those circumstances I will grant the order sought for an extension of time to appeal to the High Court from the determination of 30th July, 2018.