THE HIGH COURT

[2023] IEHC 471

[RECORD No. 2022 145/MCA]

BETWEEN:

JUAN MIGUEL MARINO CAMARASA

APPELLANT

AND

THE LABOUR COURT

RESPONDENT

AND

TYCO IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 26th day of July, 2023

INTRODUCTION

1. This matter comes before me as an appeal on a point of law from the decision of the Labour Court dismissing the Appellant's claim of alleged unfair dismissal, and in so doing, upholding the decision of the Adjudicator Officer at first instance. The Appellant appeared before me as a litigant in person. In essence, he seeks an order setting aside the decision of the Labour Court under the Unfair Dismissals Act, 1977 (as amended) by reason of its failure to find a breach of the Protection of Employment Act, 1977, most particularly ss. 9, 10 and 12 thereof by reason of the collective redundancy of a group of 12 employees which included the Appellant. He further pleads a breach of s. 28 of the Emergency Measures in the Public Interest (COVID-19) Act, 2020, although during the hearing before me he confirmed that this was an intended reference to s. 29 of that same Act.

2. In its Statement of Opposition, in addition to disputing that there is any merit in issues raised on this appeal, the Notice Party raises preliminary issues as follows:

(a) the within appeal issued out of time and should be struck out.

(b) the Appellant has impermissibly and inappropriately sought to raise, for the first time in these proceedings, issues and claims by way of appeal on a point of law that were never raised and were not properly before the deciding body, the Labour Court, and these claims should be struck out for want of jurisdiction.

(c) the Appellant has not identified any error of law; and has not clearly and concisely set out the point of law arising, and this appeal should be struck out on the grounds that it is frivolous and vexatious and/or discloses no cause of action and is bound to fail.

BACKGROUND

3. The Appellant was employed as a "*Lead User Experience Architect*" with the Notice Party based in Cork from 2015. Following the onset of the COVID-19 Pandemic, the Appellant signed a document subscribing to the Temporary COVID-19 Wage Subsidy Scheme. In June, 2020, the Appellant was invited to join a group call with his colleagues in the Integrated Offerings Unit during which he was advised that the Unit was being dismantled and there would be resulting redundancies. The Appellant was notified on the 5th of June, 2020 that his position was being made redundant. On the 8th of June, 2020, the Appellant was furnished with a draft agreement, described as a "*standard waiver agreement*" by counsel for the Notice Party, reflecting the termination of his employment by reason of redundancy. The draft agreement provided for an enhanced redundancy package upon agreement to provide certain waivers and enter into restrictive covenants as set out for a period of six months. The Appellant did not sign this draft agreement.

4. On the 19th of June, 2020, the Appellant was made redundant together with eleven other members of his unit and subsequently received his statutory redundancy entitlement. The Notice Party's position was and remains that the disbandment of the unit was because of a global restructuring and the Appellant's role along with 11 other roles in Cork and other roles within the unit internationally were made redundant.

5. The Appellant lodged a complaint to the Workplace Relations Commission under the Unfair Dismissals Act, 1977 (as amended) on the 1st of September, 2020. The primary grievance ventilated at that time was that the Appellant had not received a letter of redundancy which it was contended delayed his receipt of social protection benefits. In response to this claim, the Notice Party pointed out that the Appellant had been legally represented and had never sought such a letter. It was further contended that the Appellant was aware of the information he subsequently sought to have included in a letter and the absence of a letter was being used as a "*device to litigate*". In a written decision (ADJ-00029629) dated the 9th of July, 2021, the Adjudicator determined that the Appellant's employment was validly terminated by reason of a *bona fide* redundancy and that he was not unfairly dismissed. The Adjudicator recorded that the Appellant's arguments "*appeared to stem from his dissatisfaction with the terms of the compromise agreement on offer. Such unhappiness is understandable but cannot be used to sustain a complaint of Unfair Dismissal*."

6. On the 29th of July, 2021, the Appellant submitted an appeal to the Labour Court. The Appellant's appeal from the decision of Adjudicator came before the Labour Court in February, 2022. A Notice of Determination issued from the Labour Court on the 28th of March, 2022. In its Determination, the Labour Court recorded as follows:

> *"The complainant contends that three aspects of the process administered by his employer render his dismissal unfair. He was unsure of his final termination date as his employer failed to provide him with a redundancy certificate, he did not receive the same ex-gratia terms as applied to other employees in the past, and he was not offered alternative roles within the company."*

7. Accordingly, it is clear that the Appellant raised no issues in relation to notification and consultation rights which arise in the case of a collective redundancy. Indeed, it is expressly recorded:

> *"The Complaint does not take issue with the timeline provided for consultation, which was two weeks minimum notice, as required under the Redundancy Payments Acts, 1967. The Complainant accepts that his role ceased to exist as a result of a restructure when his unit was disbanded, and he does not take issue with his selection for*

redundancy. He does not assert that the Respondent failed to follow an agreed redundancy process."

8. The Labour Court in its Determination addressed under separate headings the three component parts of the complaint as argued by the Appellant before it, namely, the failure by the Notice Party to provide a certificate of redundancy, the terms of the *ex gratia* offer and the failure to offer alternative roles within the company. The Labour Court, having heard the case, concluded:

"Having regard to all of the circumstances of this case, the Court is of the view that matters identified by the complainant did not render the dismissal to be unfair. As a result, the court is of the view that the termination of the complainant's employment by reason of redundancy was not unfair. On the basis of the foregoing, the court finds that the complaint of unfair dismissal contrary to the act of 1977 is not well founded. Accordingly, the decision of the adjudication officer is upheld."

9. The Appellant sought to appeal to the High Court by Notice of Motion which he sent to the Central Office High Court by registered post on the 5th of May, 2022, with 42 days of the decision appealed from. The Appellant was asked by the Central Office to make changes to the Notice of Motion and ultimately, a revised version of the Notice of Motion issued on the 27th of May, 2022, outside the 42 day period, and the matter was returnable before the High Court on the 4th of July, 2022.

DISCUSSION AND DECISION

10. This appeal is from a decision of the Labour Court dated the 28th of March 2022. Section 46 of the Workplace Relations Act 2015 (as amended) lays down a 42-day time for such appeals providing:

"46. A party to proceedings before the Labour Court under this Part may, not later than 42 days from the service on that party of notice of the decision of the Labour Court in those proceedings, appeal that decision to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive."

11. This time limit is also reflected in Order 105 and Order 106 of the Rules of the Superior Courts, 1986. Order 105 is headed *"Appeals and references from the Labour Court."* Order 105, rule 5 provides:

> *"5. The originating notice of motion shall be issued within the time limit specified for appeals to the Court from the Labour Court in (as the case may be): (i) section 40 of the Act of 1967, or (ii) section 10A of the Act of 1977, or (iii) section 46 of the Act of 2015."*

12. Order 106 is headed *"Proceedings under the Employment Equality Acts 1998 and 2004 and the Workplace Relations Act 2015*". Order 106, rule 5 provides that:

> *"The originating notice of motion referred to in rule 2 shall be issued within 42 days of the date on which the determination of the Labour Court was given."*

13. Order 106, rule 4 also requires certain parties to be served with proceedings within that 42-day period as follows:

> *"the originating notice of motion referred to in rule 2 shall be served on all parties to the determination of the Labour Court and on the Minister for Business, Enterprise and Innovation."*

14. As set out above, the originating Notice of Motion in this appeal did not issue until the 27th of May, 2022 outside this 42-day period. Issued proceedings were not served on the Respondent until after this 42-day period expired. It is unclear if the Minister was ever served as required under Order 106, rule 4. Arising from the failure to issue and serve within 42 days, the question of compliance with time limits was raised from the outset of these proceedings on behalf of the Notice Party, including by letter dated the 8th of July, 2022 from the Solicitors for the Notice Party to the Appellant, and by way of preliminary objection in the Statement of Opposition.

15. I accept the Appellant's evidence that a Notice of Motion was sent to the Central Office for issue by letter dated the 5th of May, 2022. This was within 42 days of the Labour Court determination in accordance with the time limit under s. 46 of the 2015 Act. Stamp duty had been paid on this document. I am also satisfied that this document was served the following day on the Notice Party through their legal representatives. Indeed, the Notice Party accepts that a copy unissued Notice of Motion was received. On affidavit the Appellant avers to the fact that he was requested to adapt the form. The Appellant has explained on his feet that the Notice of Motion was not accepted by the Central Office of the High Court because he had named the Notice Party instead of the Labour Court as Respondent.

16. A comparison of the Notice of Motion in the Notice Party's papers and the one that ultimately issued which was contained in the Appellant's book of papers, confirm that there are in fact two versions of the Notice of Motion. One Notice of Motion issued from the Central Office with a return date on the 4th of July, 2022 with the Labour Court as Respondent and a separate version of a Notice of Motion was served unissued but stamped to reflect that duty had been paid, without a return date, identifying the Appellant's former employer as Respondent instead of Notice Party. As this appeal clearly did not issue within 42 days of the decision appealed from the first question for me is whether the time-limit provided under s. 46 of the 2015 Act is absolute or whether I have a power to extend time.

17. The issue of time limits in appeals of this nature was very recently considered in *Aherne v National Council for Special Education* [2023] IEHC 143 (Heslin J.). That case bears significant similarities to this case. It also concerned an appeal from a decision of the Labour Court which had issued outside the 42-day period and Ms. Aherne was also representing herself in that appeal. In that case the Court noted that having regard to s. 46 of the 2015 Act:

> *"the starting point for the analysis is that the will of the Irish people, as expressed through legislation enacted by the Oireachtas, is to impose a strict 42- day (i.e., six week) time limit within which to bring an appeal".*

18. The Court then considered Order 84C, r.5 of the Rules of the Superior Courts 1986 which provides:

"(5) Subject to any provision to the contrary in the relevant enactment, the notice of motion shall be issued: (a) not later than twenty-one days following the giving by the deciding body to the intending appellant of notice of the deciding body's decision, or (b) within such further period as the Court, on application made to it by the intending appellant, may allow where the Court is satisfied that there is good and sufficient reason for extending that period and that the extension of the period would not result in an injustice being done to any other person concerned in the matter. "

19. Order 84C, r.6 of the Rules of the Superior Courts 1986 then goes on to state:

"(6) Subject to any provision to the contrary in the relevant enactment, an application to the Court referred to in paragraph (b) of sub-rule (5): (a) shall, unless the Court otherwise permits, be made by motion on notice to any person who the relevant enactment provides shall be a respondent to the appeal and to any other person who the Court directs shall be given notice of such application, and (b) may be made after the period of twenty-one days referred to in paragraph (a) of that sub-rule. "

20. The Court proceeded to determine the application for an extension of time without deciding which provision of the Rules of the Superior Courts governed the appeal in circumstances where no provision to extend time exists under the terms of Orders 105 or 106 and without further engagement with the fact that the power in O.84C, r. 6 is expressly stated to be "*Subject to any provision to the contrary in the relevant enactment."* The significance of the fact that in this case the relevant enactment mandates that an appeal on a point of law from a decision of the Labour Court be brought within 42 days for a power to extend time under the Rules was not addressed in the decision.

21. Counsel for the Notice Party confirmed in response to a question from me that her instructing solicitor was also involved in the *Aherne* case. The Notice Party's solicitor was in a position to confirm that it was not contested in that case that the Court had a power to extend time. Accordingly, it appears that the Court heard no argument as to whether there is a power to extend time in respect of appeals on a point of law under s. 46 of the 2015 Act. Indeed, in the judgment in *Aherne* it is recorded (at para. 17):

"There is no dispute between the parties that the appropriate approach for this Court to take was to have regard to the principles set out in the well–known decision in Eire Continental Trading Co. Ltd. v. Clonmel Foods Ltd. [1955] IR 170 (as reaffirmed in Goode Concrete v. CRH plc. [2013] IESC 39)."

22. It is clear therefore that the issue with which I am concerned now as to whether the Court has any power to extend time is one which was neither raised by the parties nor considered by the court in *Aherne*.

23. Not surprisingly, given that the issue of a power to extend time was not put in contest or argued in any way, the Court proceeded to consider Ms. Aherne's application for an extension of time having regard to the principles set out in *Eire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] IR 170 (as reaffirmed in *Goode Concrete v. CRH* [2013] IESC 39) namely that the applicant must show that he had a *bona fide* intention to appeal formed within the permitted time, he must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient and he must establish that an arguable ground of appeal exists.

24. It seems to me that the failure to bring the Court's attention in *Aherne* to a line of relevant case-law which includes *Noone v. Residential Tenancies Board* [2017] IEHC 556 likely resulted in the Court assuming a jurisdiction to extend time which it did not have. In *Noone v. Residential Tenancies Board,* Noonan J. squarely addressed the question of whether the High Court has jurisdiction to enlarge the time for bringing an appeal from a determination order made by the Residential Tenancies Board. Section 123 of the Residential Tenancies Act, 2004 provides for a 21 days' time limit without provision for an extension of time. Noonan J. further considered the jurisdiction to extend time under O. 84C and the decisions of the High Court and Court of Appeal in the case of *Keon v. Gibbs* ([2015] IEHC 812 and [2017] IECA 195). He relied, in particular, on the decision of Hogan J. in the Court of Appeal in the *Keon* case quoting extensively from his judgment from para. 19 of his decision as follows:

"[20.] As I have already indicated, the appellant has sought to appeal this decision on its merits. But before considering this question, it is, however, necessary to examine at

least in passing a jurisdictional issue which was not directly addressed in the High Court. This was in large part because as counsel for the receiver, Mr. Mooney, informed us, his client wanted that Court to consider simply the merits of the application to extend time rather than address a jurisdictional question which – depending on the way it was resolved - might, in turn, raise a separate constitutional issue.

[21.] It was on this basis, therefore, that the Court determined at the outset of the appeal in an ex tempore ruling delivered by Finlay Geoghegan J. to proceed with the merits of the appeal to extend time and that it would only finally determine the jurisdictional issue in the event that it proved necessary to do so. In view of the clear conclusions which I have reached (and which I will detail presently) that the appellant has not presented any arguable grounds of appeal so that it would, in any event, be inappropriate to extend time, it is unnecessary to reach any concluded view on this jurisdictional issue. I feel nonetheless that it is important to draw attention to this jurisdictional issue as it may assume an importance in any subsequent case."

25. As noted by Noonan J. (at para. 20 of his judgment in *Noone*) Hogan J. went on, *obiter*, to express some very helpful views on the jurisdictional issue under s. 123 of the Residential Tenancies Act, 2004 and Noonan J. adopted and agreed with the following observations of Hogan J. in *Keon*:

"[24.] Perhaps the first thing to note is that there is nothing in s. 123 of the 2004 Act which indicates that this statutory time limit might be extended under any circumstances. It is true that in Law Society of Ireland v. Tobin [2016] IECA 26 this Court held that it enjoys an inherent jurisdiction to extend time where the relevant statutory provision permitting an appeal did not expressly provide for such a power. This, however, was in the context of an appeal from the High Court to this Court, where the right of appeal is constitutionally guaranteed by Article 34.4.1 unless regulated or excepted by law. ...

[25.] The present case is quite different, since - unlike the position in Tobin - the right of appeal to the High Court from the Tribunal is entirely dependent on statutory vesture. If, however, the Oireachtas has not provided for a power to extend time in this particular context, an issue must arise as to whether there is such a power at all under

any circumstances, no matter what good reason for the delay may be advanced by any putative appellant.

[26.] The second thing to note is that the High Court proceeded on the basis that Ord. 84C independently conferred a power to extend time. I am not, with respect, convinced, however, that this premise is altogether correct. It is true that Ord. 84C, r. 2(5)(b) does provide for a power to extend time, but this is expressed to be contingent on 'any provision to the contrary in any relevant enactment.' If the proper construction of s. 123(3) of the 2004 Act is that it provides for a strict 21 day time limit which is not capable of extension, then this would amount to a 'provision to the contrary' such as would negative the potential operation of Ord. 84C, r. 2(5)(b). Certainly, if this is the proper construction of s. 123(3), then the scope of that appellate jurisdiction could not be changed or enlarged by Rules of Court: see, e.g. , The State (O'Flaherty) v. O Floinn [1954] I.R. 295 ; Rainey v. Delap [1988] I.R. 470. A further consideration is that in view of the provisions of Article 15.2.1 of the Constitution (which vests exclusive legislative power in the Oireachtas) then, as I observed in Gokul v. Aer Lingus plc [2013] IEHC 432: 'any such change could only be brought by primary legislation enacted by the Oireachtas and could not be done not simply by Rule of Court….'"

26. Noonan J. applied this reasoning in concluding that by any reckoning, the appellant was outside the 21-day period in bringing the appeal before him and he was satisfied that there was no ambiguity in the wording of the section which might be said to leave open the possibility of the court having a discretion to extend the time. He observed (at para. 22):

"Had the Oireachtas intended that such a discretion be available to the court, it could have expressly so provided... Had the Oireachtas wished to provide for a similar power to extend on the part of the court in the case of an appeal to the High Court, it would presumably have done so in similar terms. The fact that the Oireachtas did not do so must be viewed as not only deliberate but as amounting to a provision "to the contrary" within the meaning of O. 84C r. 2(5)(b) as suggested by Hogan J."

27. Noonan J. also referred to the decision in *Curran v. Solicitors Disciplinary Tribunal* [2017] IEHC 2 where the court was required to consider s. 7(12)(b) of the Solicitors (Amendment) Act 1960 which provides for the bringing of an appeal to the High Court from a

decision of the Solicitors Disciplinary Tribunal "*within 21 days of the receipt by the appellant of notification in writing of the finding*". In that case Eagar J. held that the language of this section was mandatory in nature and did not permit of an extension of time. In finding that the wording of the provision was clear, Eagar J. noted (at para. 22):

> *"When the legislature chose to extend the availability of an appeal against the decision of no finding of prima facie case, it expressly chose to limit this wider right of appeal to a strict time frame, without discretion to extend time."*

28. Noonan J. further concluded in *Noone* (at para. 25) in finding no power to extend time that:

> *"Even if there was any potential conflict between the terms of s. 123 and O. 84C, which I do not believe there is, for the reasons explained by Hogan J. the clear intent of the legislature, evident from the wording of s. 123, cannot be overborne by secondary legislation such as the Rules of the Superior Courts."*

29. It seems to me that by a parity of reasoning, I must also conclude that I have no power to extend the time limit fixed under s. 46 of the 2015 Act. Accordingly, while I do not lightly depart from the decision in *Aherne* which presumed a jurisdiction to extend time in respect of an appeal under s. 46 of the 2015 Act, it seems to me that it is appropriate to do so given that the issue does not appear to have been considered in *Aherne* on the basis that a point not argued is a point not decided. To this extent it might be said that the decision does not conflict with the conclusion I have reached. Insofar as it does, it seems to me, much as it did to Noonan J. in *Noone*, that the *Worldport* principles are engaged. In *Re Worldport Ireland Ltd. (In Liquidation)* [2005] IEHC 189*,* Clarke J. noted (at p. 7):

> *"Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period."*

30. Having regard to the fact that the issue was not the subject matter of any consideration by the Court in *Aherne*, it may be said that the first and/or second of the *Worldport* principles arise. The fact that the court was not invited to, and did not in fact, consider this issue in arriving proceeding as if it had a power without interrogating this assumption seems to me to provide a sufficient reason why I should consider myself not bound to follow the implicit underlying rationale that the court possesses jurisdiction to extend the 42-day period limited by s. 46 of the 2015 Act.

31. Lest I am wrong in my view that I have no power to extend time, no matter what the circumstances, I propose in like manner to the Court in *Aherne* to consider whether I would have been disposed to grant an extension of time on *Eire Continental* principles, presuming a power to do so. I do so in circumstances where the Notice Party appeared to approach this case on the basis that the Court had jurisdiction to extend time until the question was raised directly with counsel during the hearing and in circumstances where the matter was not set down for trial of a preliminary issue alone but was, in effect, a telescoped hearing.

32. In *Aherne* the appellant had paid stamp duty on the last day of the 42-day period (22 July) but the proceedings had not in fact issued on that date, as she did not have an appointment with the Central Office, had attended on the 22nd of July for the first time requesting an appointment and was advised that there were no appointments available that day before 2 p.m. and that walk-ins were not facilitated. Ms. Aherne was given an appointment slot for later that day, but this was not availed of. In this regard Ms. Aherne pointed to the fact that she had a medical appointment in Galway on the 22nd of July at 14:45pm. She also submitted that she did not actually receive the Labour Court's decision until a few days after it issued. While the Court was not satisfied that time ran from when a party became aware of the decision, even affording her that benefit to the 25th of July, the proceedings did not issue within time. The Court accepted that Ms. Aherne had formed the necessary intention to appeal but the Court ultimately concluded she did not meet the remaining *Eire Continental* criteria because:

> *"It seems to me that the reasons for missing the statutory deadline were a range of decisions, freely made by the applicant, including: (a) not to travel to Dublin sooner, (b) not to contact the Central Office sooner; (c) not to attend the Central Office in person on 22 July, despite having been given an appointment; (d) not to attend in*

person on 25 July; as well as (e) those decisions which, collectively, amounted to what the applicant described on 22 July as her "poor planning", whereby she created what she referred to as an "emergency" . In my view, these decisions do not constitute a good or sufficient reason to extend time. Nor do they disclose the existence of a mistake which would satisfy the second of the conditions in Eire Continental."

33. I am satisfied that the Appellant would satisfy the first limb of the *Eire Continental* test in that he clearly formed the intention to appeal within the 42-day time limit as evidenced by sending a Notice of Motion for issue, duly stamped, to the Central Office on the 5th of May, 2022, within the 42 day time limit. It is submitted by the Notice Party, however, that even where the Appellant is found to satisfy the first limb of the *Eire Continental* test, as it is acknowledged that he also provided draft unissued papers to the Notice Party within the 42-day period, he nonetheless does not satisfy either of the other two limbs of the test, nor is there any other basis in the interests of justice for me to exercise my discretion to extend time in the instant case.

34. In this regard the Notice Party argues that there has been no explanation for the delay, nor evidence of any mistake. Further, the fact that the Appellant is not legally represented does not relieve him of the obligation to issue his appeal within time, as confirmed in the judgment in *Aherne* where it is stated:

"The applicant represents herself, as is her absolute right. However, it does not seem to me that in setting a fixed 42-day deadline for appeals of this kind, the Oireachtas intended that it was a deadline which would only apply to those with legal representation, or that litigants-in-person were not subject to the same requirements as fellow-citizens who had instructed solicitors. Nothing of the sort is suggested in the legislation and, that being so, it does not seem to me to be open to the Court to 'import' into the Statute that which the Oireachtas did not intend."

35. The facts in this case are somewhat different to those in *Aherne* in that the Appellant did not wantonly fail to attend at appointments in the Central Office to regularise the issue of his proceedings. He attended to the issue of proceedings within time, albeit by post rather than in person, but made an error in the constitution of his appeal by failing to properly name the

Labour Court as Respondent. As a result of this mistake on the part of the Appellant the Central Office refused to issue his Notice of Motion. Bearing in mind that the Labour Court normally elects not to participate in appeals on a point of law and has elected not to participate in this one, it is not surprising that a lay litigant would proceed on the basis that the *legitimus contradictor* is the other party to the claim before the Labour Court, rather than the Labour Court. It seems to me understandable that the Appellant as a lay litigant would be mistaken as to the fact that the Labour Court should be named in the appeal. In the overall circumstances which include the fact that the Appellant was based in Cork, had served the wrongly drafted Notice of Appeal on the Notice Party within 42 days and proceeded to address the mistake raised with him by the Central Office without undue delay, I am persuaded that a drafting error of the nature involved here is a mistake within the meaning of *Eire Continental* and of a kind which might warrant an extension of time were the Court otherwise satisfied it was appropriate to do so and jurisdiction to do so existed. It seems to me that the inflexible operation of a time limit of this nature as against a lay litigant who presented the appeal in time but due to an error in form it did not issue would not be in the interests of justice had he stateable grounds of appeal. This brings us to the third limb of the *Eire Continental* test.

36. In considering whether an extension of time should be given in accordance with *Eire Continental* principles, I must assess whether the Appellant has a statable ground of appeal in accordance with the third limb of the test set out in that case. As noted by O'Malley J. in the Supreme Court's decision in *Seniors Money Mortgages (Ireland) DAC v. Gately &Ors.* [2020] 2 ILRM 407 at (para. 64):

> *". . . it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the Court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court."*

37. It is submitted by the Notice Party that the Appellant fails this part of the *Eire Continental* test. It is the Notice Party's position that the Appellant has not identified a stateable ground of appeal and that the appeal is based on claims which were not before the WRC or Labour Court. It is submitted that the appeal is frivolous and/or vexatious and bound to fail.

38. In ruling on this issue the scope of my jurisdiction on an appeal on a point of law comes into play. The role of this Court in appeals of this nature was considered by Gilligan J. in *ESB v. The Minister for Social, Community and Family Affairs & Ors.* [2006] IEHC 59, where the he set out the relevant law as follows:

> *"In Deely v. Information Commissioner Unreported, High Court, 11th May, 2001 McKechnie J. noted at p. 17 that the remit of the Court in an appeal on a point of law encompassed the following: (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings, (b) it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw', (c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally, (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision. See for example Mara (Inspector of Taxes) v Hummingbird Limited [1982] l.R.L.M. 421, Henry Denny and Sons (Ireland) Limited v Minister for Social Welfare [1998] 1IR 34 and Premier Periclase v Valuation Tribunal HC 24th June, 1999 U/R."*

39. This passage was also quoted with approval in *McLaughlin v. Murray* [2022] IEHC 537, and again in *Aherne v National Council for Special Education* [2023] IEHC 143. The principle that arguments should not be advanced in an appeal on a point of law where the Labour Court never heard or considered those arguments as found by Laffoy J. in *The Minister for Finance v. Una McArdle* [2007] IEHC 98 where she held at p.7 that:

> *"Counsel for the defendant submitted that it is not open to an appellant on an appeal on a point of law from the determination of the Labour Court under s.15 (6) of the Act to present arguments as to the legal position which were not addressed to the Labour Court, citing two authorities on appeals from the Information Commissioner: The decision of this Court (Mc Kechnie J.) delivered on 11th May 2011 in Deely v The Information Commissioner; and the decision of this Court (Smyth J.) delivered on 31st May 2005 in South Western Area Health Board v. Information Commissioner. In my view, that submission must be correct in point of principle, at any rate where the legal*

issue is whether the first instance decision maker (in this case the Rights Commissioner) or the appellant decision maker (in this case the labour Court) had jurisdiction to make the relevant decision."

40. The limits on the High Court's jurisdiction on an appeal on a point of law from an expert Tribunal with express statutory remit to consider specified matters are well established. In the Supreme Court case of *Henry Denny and Sons (Ireland) Limited, trading as Kerry Foods v. The Minister for Social Welfare* [1998] 11 R 34 Hamilton C.J. held at p. 37 to 38.:

"I agree with the judgments about to be delivered but I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

41. It is clear from the foregoing that I have no jurisdiction to decide questions of fact not before the Labour Court on an appeal on a point of law under s. 46 of the 2015 Act and my jurisdiction is limited to questions of law which arise from matters properly before the Labour Court. I agree with the Notice Party that the point of law agitated by the Appellant on this appeal is difficult to discern and no clear point of law is identified with reference to the decision of the Labour Court. The Notice of Motion refers to "*facts appealed from*" when this is an appeal on a point of law only. The only claim before the Labour Court was one of alleged unfair dismissal under the Unfair Dismissals Acts 1977-2015. Indeed, from the terms of the Determination it appears the Appellant accepted at first instance that the redundancy in question was a *bone fide* redundancy (in the sense that his role was genuinely gone) and he was not unfairly selected for redundancy. His case was that he had not received a composite "*letter of redundancy*" setting out information, which he had received in other formats, such that it rendered his dismissal unfair. The position of the Appellant on appeal to the Labour Court is summarised by the Court at the start of its decision where it states:

"Following questions from the Court the Complainant clarified that he did not take issue with either the fact of redundancy or the selection process, but he did take issue with three aspects of the process - he was not given a certificate of redundancy or equivalent in accordance with section 18 of the Redundancy Payments Act 1967 and this meant he had no certainty as to his termination date; the only offers of alternative employment made to him related to positions outside of the company and he was denied the same ex-gratia terms as applied to other employees in previous redundancies. "

42. Having heard the parties and considered the evidence, including the documentary evidence before it, the Labour Court clearly recited the factual basis for their conclusions in the Determination under challenge, which included that:

"the Complainant was clearly informed about his termination date and was fully aware of that date. While it may have been good practice for the Respondent to issue a comprehensive letter setting out all relevant details relating to the termination of the Complainant's employment, the Court finds that the failure of the Respondent to issue a composite certificate or letter of redundancy to him does not render his dismissal to be unfair."

"In circumstances where there is no statutory entitlement to redundancy terms over and above those provided in the Redundancy Payments Act, 1967, and the Complainant has no contractual entitlement to enhanced severance terms, the Court cannot find that the failure of the Respondent to apply ex-gratia terms as applied to other employees in the past is a basis to render the Complainant's termination of employment unfair."

"efforts made by the Respondent to help the Complainant secure alternative employment outside of the company, after the Complainant had accepted that no suitable roles were available within the company at that time, were not unreasonable. In circumstances where the Complainant was of the view that all the internal vacancies at the time were unsuitable it was a perfectly reasonable act on the part of the employer to see it could locate external work for the Complainant. The Complainant did not avail of the outplacement supports offered to him."

43. Almost the entirety of the Appellant's Notice of Motion concerns alleged failures to comply with certain provisions of the Protection of Employment Act, 1977 or EU Directives in respect of collective redundancies, none of which were claims or issues before either the WRC or the Labour Court nor were they the basis for the decision in either forum. Equally, s. 28 of the Emergency Measures in the Public Interest (COVID-19) Act, 2020 (or s. 29 for that matter) has absolutely nothing whatsoever to do with the Appellant's redundancy, unfair dismissal claim, or the Labour Court's decision to dismiss his claim not least in circumstances where his redundancy was not caused by reason of COVID-19. This is evident from the body of the decision itself where the Labour Court noted, under the heading "*deliberation*" that:

> *"While the Complainant referred to alleged breaches of other employment enactments during the hearing, including the Redundancy Payments Act and the Minimum Notice and Terms of Employment Acts, the Unfair Dismissals Act is not the appropriate statutory provision for the enforcement of terms set out in those employment enactments. The only matter for consideration by the Court in the within appeal is an appeal of a decision made under the Unfair Dismissal Acts".*

44. It seems to me that the Labour Court correctly held that it had no jurisdiction to entertain claims that were not before it. The Appellant has not identified any basis on which these findings might properly be interfere with in an appeal on a point of law. While the Appellant is correct that the provisions of the Protection of Employment Act, 1977 (as amended) identified by him in his Notice of Motion provide for certain notice, consultation, and information requirements in the case of collective redundancies, these were not issues he raised in his complaint to the WRC or on appeal to the Labour Court. Had a collective redundancy, as defined, arisen, the provisions of the Protection of Employment Act, 1977 would have had application. Provision is made for a complaint to be brought to the WRC in respect of non-compliance with these provisions. It is quite clear, however, that the Appellant did not make any case before the WRC or the Labour Court on appeal that his dismissal was unfair by reason of breaches of provisions of the Protection of Employment Act, 1977 or the Emergency Measures in the Public Interest (COVID-19) Act, 2020.

45. It is important to recall that were a complaint of breach made under the Protection of Employment Act, 1977 (as amended), the remedy for same as provided under s. 11A of the

Protection of Employment Act, 1977 (as amended) is limited to a declaration as to whether the complaint is well founded or not, a direction requiring the employer to comply with the provision of the Act of 1977 concerned and, for that purpose, to take a specified course of action and/or a direction require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all of the circumstances, but not exceeding 4 weeks' remuneration in respect of the employee's employment. No provision is made for a finding of unfair dismissal predicated upon a failure to comply with the requirements of the Protection of Employment Act, 1977 (as amended) in the context of a collective redundancy.

46. As a complaint of breach was not made under Protection of Employment Act, 1977 (as amended), it has never been established whether the circumstances of the Appellant's redundancy constitute a "*collective redundancy*" within the meaning of the 1977 Act. This is a primary finding of fact from which flows consideration of an alleged breach of that Act. No tenable appeal on a point of law may be maintained where evidence has not been heard before a primary decider of fact with competence to determine the issue as to the facts which give rise to the issue of law and where no legal findings regarding a claim under the Protection of Employment Act, 1977 were made on foot of those facts. I have no jurisdiction to determine as a matter of fact whether a collective redundancy as defined arose in circumstances where no evidence was adduced before the bodies competent to determine this issue on foot of a complaint properly before them at first instance. It follows that I have not been vested with competence on a statutory appeal to decide related questions of law arising from issues which were never before the WRC and Labour Court on foot of a complaint properly before them.

47. No complaint of a failure to comply with the requirements of the Protection of Employment Act, 1977 (as amended) or the Emergency Measures in the Public Interest (COVID-19) Act, 2020 was ever made by the Appellant before the WRC or the Labour Court, it was not determined by them. It follows that a point of law in respect of such a complaint cannot arise for determination before me. I am satisfied that the Appellant has wholly failed to identify any error of law or any statable ground of appeal and accordingly, if I had a jurisdiction to extend time (which I consider I do not), it would not be appropriate to exercise it because the third limb of the *Eire Continental* test is not met. By the same logic, even if the appeal were taken within time and no preliminary issue arose as to time, it would fail because no stateable error of law has been identified.

CONCLUSION

48. For the reasons given, I am satisfied this appeal should be struck out. I will hear the parties in relation to consequential matters.