Walsh J.
Griffin J.
Hederman J.

(141/88)

THE SUPREME COURT

JUDICIAL REVIEW

BETWEEN/

AER LINGUS TEORANTA

Applicant
Appellant

v.

THE LABOUR COURT, EVELYN OWENS, CORMAC P. McHENRY AND SEAN O'MURCHU

Respondents

JUDGMENT delivered on the 20th day of March 1990 by WALSH J. [Nem Diss]

This matter comes before the Court by way of appeal from the order and judgment of Miss Justice Carroll given on the 26th day of February 1988.

The application had been one for judicial review by way of certiorari and prohibition in respect of two interim decisions of the Labour Court dated the 8th June 1987 and the 30th June 1987 in a claim by twenty four hostesses employed by Aer Lingus and hereafter

called "the complainants". The background to the case is dealt with in some detail in the judgment of this Court in the case of The State (Aer Lingus) v. The Labour Court 1987 ILRM.

The complainants had been employed by Aer Lingus as hostesses prior to August 1970. In accordance with the usual terms of employment in the Public Service their contracts contained a condition that they must retire upon marriage. This Public Service marriage bar was abolished in 1973.

As each of the complainants had married prior to August 1970 their contract of employment with Aer Lingus ceased and each one received by virtue of the provisions of the contract a marriage gratuity which was in the form of a lump sum payment. They thereupon ceased to be employees of Aer Lingus by virtue of the terms of the initial contract. Subsequently Aer Lingus employed them at various times on a temporary basis during summer peak seasons. The marriage bar did not affect temporary employment and the complainants were paid on an incremental

basis. In August 1970 Aer Lingus recruited air hostesses on the basis of seven year contracts and the hostesses so recruited were not subject to the marriage bar which only applied to permanent positions. None of the complainants was recruited on that basis. Nineteen other hostesses who had been recruited before 1970 but who had married after August 1970 and who had been obliged to retire by virtue of the marriage bar were re-employed by Aer Lingus on seven year contracts in 1973. These particular hostesses were given recognition and credit for their service dating back to the date of first entering into the employment of Aer Lingus as an hostess including any period they spent as a temporary hostess after their marriage. Subsequently other hostesses who had married after August 1970 were also reinstated on the basis of a seven year contract. The complainants continued to be employed as married temporary air hostesses but were not offered the seven year contract. In 1977 Aer Lingus accepted into full permanent employment all air hostesses who had been employed on the seven year contracts and agreed

to grant them full recognition of their past service. The complainants were not included in this arrangement and continued to do temporary seasonal work.

In 1980, by means of a collective agreement negotiated between the complainants union namely, the Federated Workers Union of Ireland and Aer Lingus, it was agreed that the complainants would be admitted to permanent employment provided they satisfied certain specified criteria. Part of the agreement was that "all other aspects of privileged travel rules, sick leave provisions, departmental seniority, etc. will operate on the basis of the actual date of recommencement of employment". In the result the complainants were admitted to permanent employment on the 19th May 1980 and were placed at the bottom of the seniority listing.

On the 3rd August 1982 each of the complainants served notice on Aer Lingus complaining that she was the victim of discrimination contrary to sect. 2(b) and sect. 3 of the Employment Equality Act, 1977, in that the company was guilty of such discrimination by failing to take into account the pre-marriage permanent service and

the post-marriage temporary service prior to their re-employment for use in deciding seniority ranking affecting all aspects of the position including the choice of route, paid holidays, leave allotment, pensions etc.

The question of whether the complainants were out of time or not was the subject of a hearing by the Labour Court on the 27th June 1983 and the decision of that body notified on the 10th August 1983 was that they were out of time as they had not lodged their claims within six months of the occurrence of the alleged discrimination. However, the Labour Court did hold as admissible matters referred to in a letter sent on behalf of the complainants o the 1st October 1982 complaining of particular instances of alleged discrimination in May 1982, July 1982 and September 1982. The alleged acts of discrimination in 1982 were all to the effect that they had not been given the privileges or rights which they would have been given if on their re-employment they had been given full credit for the years they had served prior to their marriage as permanent hostesses and subsequently as temporary hostesses. It arose fro

the fact that their seniority by virtue of the agreement negotiated by the trade union commenced only after the date they were re-employed on a permanent basis subsequent to that agreement with the trade union. The Labour Court accepted for investigation the alleged acts of discrimination referred to in the letter of October 1st 1982 and referred them to an Equality Officer for investigation. On the 19th October 1982 Aer Lingus was informed by the Equality Officer that the matter had been referred for investigation to an Equality Officer on the basis that the complaint was that "non-recognition of certain temporary and permanent service constitutes discrimination under sect. 2(a) and sect. 3 of the Act." Aer Lingus was requested to make a submission to the Equality Officer. The first time that Aer Lingus actually received a copy of the referral letter of the 3rd September 1982 was about the 10th April 1987. Aer Lingus contended that when they replied to the questionnaire sent to them by the Equality Officer following the receipt by the Labour Court to the letter of 8th September 1982 that their

replies were directed at the original dispute and they had no reason to believe that the letter of 1982 constituted separate references of separate disputes but regarded the contents of the questionnaire as relating to the original complaint. Aer Lingus contended that the acts referred to could not be treated as separate references and if they were to be so treated they had not been given an opportunity to challenge the matter before the decision had been taken to admit them.

The Aer Lingus case was that the complaints referred to in the letter in the three instances complained of did not arise from any discrimination on the grounds of marital status but arose solely from the seniority of the employees concerned and that these matters were incapable of constituting a discrimination within the meaning of the Act. Thus it was contended neither the Labour Court nor the Equality Officer had jurisdiction to investigate them or make any recommendation about them. They claimed that if any such investigation were to be carried out it would really b the investigation of the question of seniority in the

company's employment and claimed that any alteration in the complainants seniority would have very adverse effects on the 500 crew currently employed, whose seniority rank could be adversely affected. They therefore sought the judicial review referred to.

The Labour Court had taken the view on the detailed submissions which had been made by both parties that the acts of the alleged discrimination, while the result of the original act claimed to have been discriminator but in respect of which the complaint was out of time, could be considered as separate acts for the purpose of deciding "first occurrence" under sect. 19(5) of the Act of 1977. The Labour Court confirmed their decision to send the case to the Equality Officer for investigation.

It was contended on behalf of Aer Lingus that the Labour Court must first make an initial determination that a complaint is receivable before making the administrative decision to refer the matter to the Equality Officer. I find myself in agreement with the High Court Judge that this view is not correct. The Equality Officer

has no function to deal with any matter concerning the question of the time bar and therefore any finding he makes is strictly without prejudice to what the Labour Court may decide about the latter point. If it were otherwise then the Labour Court would, as the Judge pointed out, have to hold a preliminary enquiry into every case whereas in fact the Labour Court can decide on the question of the acceptability at the same time as it falls to determine the merits of the case. The Labour Court is quite free to have such a hearing if it wishes but I do not think it is correct to claim that it must have such a hearing. As the trial Judge pointed out the Labour Court decision may be appealed on a point of law to the High Court and she expressed the view that it is only in the event that the Labour Court holding an act to be discriminatory that the High Court should be asked to pronounce on whether as a matter of law the act is capable of constituting a discrimination contrary to the Act of 1977. In this case that would mean whether the operation of the seniority of the complainants in

their employment on the basis of their contracts of 1980 could in law amount to discrimination by reason of sex or because of marital status. She was of opinion that Aer Lingus should not be entitled to ask now that the reference to the Equality Officer be set aside in order to determine a preliminary issue. I quite agree with the views she expressed in her judgment that the procedure before the Labour Court is meant to be relatively simple and uncomplicated and for the reasons I have given I think the Labour Court is quite entitled to refer such matters to an Equality Officer who, at best, would make recommendations but it is ultimately a matter for the Labour Court to decide the merits of such cases. I also agree that it would be far preferable that the matter should not be brought to the High Court until after the determination of the Labour Court had been made as to any matter of law arising. The learned trial Judge also quite correctly mentioned the fact that the Labour Court had not yet made any findings on the merits of this case. If that was how the position had

remained I would be quite content to let the matter go back to the Labour Court. However since the High Court Judge did elect to go into the question of whether the acts complained of were capable of constituting unlawful discrimination this Court cannot avoid dealing with this part of the judgment of the High Court.

The submission of Aer Lingus is that the acts complained of are not capable of constituting discrimination within the meaning of the 1977 Act and submitted that E.E.C. Directive No. 76/207/E.E.C. was only concerned with equal treatment for men and women and not between persons of the same sex.

The learned Judge was of opinion that the Act of 1977 went further than the Directive requires in that it deals with discrimination between members of the same sex. She concluded therefore that the Directive had no application in this case. I am of the opinion that she is correct in both of these conclusions. It is quite clear that if a marital status discrimination was made between two women applicants for a position there would be a breach of

the Act. The question therefore is whether the acts complained of in this case can in law amount to a discrimination either based on sex or because of marital status.

It is undoubtedly true that at the time the complainants were obliged to retire from their employment with Aer Lingus because of getting married there was discrimination both because of marital status and discrimination based on sex as the marriage bar did not exist for male employees. This discrimination occurred when it was not illegal and occurred many years before the coming into force of the statute. The learned High Court Judge took the view that as the complainants had been treated less favourably than other members of their own sex in that the years of experience "count for nothing" because they were married before August 1970 that there is a discrimination on the grounds of their marital status. If their previous experience in the company's employment was to be recognised as regards seniority they would be in the same position as other members of their own sex in the company. It is correct that so long as their prior

service is not recognised they are treated as persons who went into permanent employment in the service for the first time following the 1980 contracts and thus are lower in seniority than their colleagues who married after August 1970 and were ultimately engaged on a permanent basis with full recognition of their previous service.

The discrimination which they now suffer is one resulting from the fact that their seniority counts only as from the day they re-entered the permanent employment of Aer Lingus. It is correct that sect. 10 of the Act renders illegal any discriminatory clause in a contract of employment and if any such clause did exist within the meanings of section 2 or 3 of the Act then it would be illegal. The fact that it was voluntarily entered into by the complainants through their union would make no difference.

It is true that they had not received any guarantee of re-employment and there was no obligation on the company to offer later employment. It is not alleged that any of the matters occurring since their re-entry

into permanent employment are due to any immediate factors save that of seniority itself. There is no complaint whatsoever that the question of the marital status directly entered into the matter in any way since their re-employment. The relevance of their marital status in the matter is the fact that it was the cause of their retirement from the company before 1970. The question then arises as to whether this circumstance can amount in law to indirect discrimination.

The compulsory retirement of the applicants was a discriminatory act relating to marital status but it was not illegal. The Act of 1977 does not have retrospective effect. In my opinion the original discrimination was exhausted and spent when it took effect and was not in any way revived by the subsequent employment of the complainants in a temporary capacity for the relevant subsequent periods. Therefore when the complainants re-entered the service of Aer Lingus in 1980 they were entitled to be protected against any discriminatory acts relating to their sex or to their marital status

occurring after that date or built into the contract itself. I do not accept that the provisions contravened section 10 of the Act and in any event the complaint that it was discriminatory within the meaning of sections 2 or 3 of the Act of 1977 has been finally determined by the ruling of the Labour Court under section 19 of the Act and the decision of this Court already referred to. All subsequent disabilities which the complainants feel they have suffered by reason of their seniority flow from their 1980 contract for permanent employment which they accepted in 1980 acknowledging their seniority to be nil. So far as seniority is concerned they are exactly in the same position as all other women entering the service on a permanent basis in 1980. There has been no suggestion of any discrimination because of marital status since that date. It has been sought to suggest that there has been indirect discrimination on the grounds that the seniority issue was already pre-determined by the events which took place prior to 1970. It is true that the question of seniority was affected

by the date of marriage and, that is by the date of the acquisition of that status. That is different from the status itself. I do not think that the reference to marital status in the 1977 Act can be held to include differences resulting from dates of marriage can amount to discrimination between married women to be classed as a discrimination because of marital status.

In view of the non retrospective character of the Act in effect the slate is wiped clean in respect of matters occurring before the Act. The present claim is an effort to give the Act a retrospective character by asserting that every consequence of the seniority situation must be deemed to be an act of discrimination when the seniority situation itself cannot be established to be an illegal discrimination because it is traceable to a situation which was not illegal and was a discrimination which was exhausted many years before the enactment of the 1977 Act. Failure to recognise previous service may be thought to be inequitable but it does not amount to illegal discrimination. There was a

distinction made between different groups of married women dealing with their respective seniority but that is not a discrimination because of marital status nor can it be shown that marital status in the present case, as distinct from date of marriage, was an activating cause in the determination of the seniority. The complainants were not treated less favourably because they were married. All their present complaints refer to the operation of the seniority role in its ordinary way. I am of opinion that the evidence in this case does not in law sustain any breach of sections 2 or 3 of the Act of 1977 alone or when it is construed, as it should be, in the light of the Directive. In view of the breadth of the Act of 1977 no question arises as to the interpretation of the Directive. I am conscious of the fact that the decision of the Labour Court in the case of the Eastern Health Board v. Seventy-nine Psychiatric Nurses EE 15/1984 DEE 5/1984 does not appear to be consistent with this judgment.

I would allow the appeal to the extent of

granting an order prohibiting the first-named respondent from proceeding further with the investigation of and the determination of the dispute alleged to be an act of discrimination in May, July and September 1982 as set out in the letter dated the 1st October 1982, sent on behalf of the complainants to Aer Lingus. I would make a similar order with reference to the investigation and of the determination of disputes alleged to have been referred by letter dated the 16th March 1987 and the 3rd April 1987.

20-3-90.