

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 537

[2021 160 MCA]

BETWEEN

CATHERINE MCLOUGHLIN

APPLICANT

AND

DR. DIARMUID MURRAY SENIOR

RESPONDENTS

JUDGMENT of Mr. Justice Heslin delivered on the 30th day of September, 2022

Introduction

1. By originating motion dated 8 July 2021 (“the motion”) Ms Catherine McLoughlin (“the appellant”) applied to this court by way of an appeal on a point of law against a decision of the Labour Court dated 3 June 2021 (“the decision”). The respondent is a party to the proceedings in circumstances where the Labour Court is not obliged to participate.
2. The following reliefs were sought in the said motion:-
 1. An order pursuant to the provisions of s. 46 of the Workplace Relations Commission Act 2015 (“the 2015 Act”) appealing the decision on the grounds that the Labour Court erred in fact and in law in its interpretation of the meaning of “*exceptional circumstances*” within the meaning of s.44(4) of the 2015 Act for the purpose of extending time to maintain an appeal in a claim for unfair dismissal;
 2. An order pursuant to the provisions of s. 46 of the 2015 Act appealing the decision on the grounds that the Labour Court erred in fact and in law in its application of the facts at issue in this case to the meaning of “*exceptional circumstances*” within the meaning of s. 44 (4) of the 2015 Act for the purpose of extending time to maintain an appeal from the Workplace Relations Commission (“the WRC”) to the Labour Court in an unfair dismissals claim;
 3. An order pursuant to the provisions of s. 46 of the 2015 Act appealing the decision of the Labour Court on the grounds that it erred in fact and in law in its approach to the hearing in this matter as to the meaning and application of “*exceptional circumstances*” within the meaning of s. 44 (4) of the 2015 Act for the purpose of extending time to maintain an appeal in a claim for unfair dismissal;
 4. An order pursuant to the provisions of s. 46 of the 2015 Act appealing, on a point of law, the Labour Court’s decision on the grounds that the Labour Court erred in fact

and in law in failing to hear all of the available evidence and consider all of the circumstances relevant to the meaning and application of "exceptional circumstances" within the meaning of s. 44 (4) of the 2015 Act for the purpose of extending time to maintain an appeal in a claim for unfair dismissal;

5. An order remitting the matter back to the Labour Court for a rehearing.

Oral and written submissions

3. As I did at the conclusion of the hearing, I want to express my thanks to Ms McVeigh BL for the appellant and to Ms Ruigrock BL for the respondent, who made oral submissions with clarity and skill which were of great assistance to the Court. Shortly before the hearing, written legal submissions, dated 14 June 2022, were furnished on behalf of the respondent. I declined an adjournment request which was made on behalf of the applicant, but, in addition to affording time on the day of the hearing so that the appellant's Counsel could consider those submissions, I took the view that there would be no risk of injustice to allow the appellant to furnish legal submissions, in writing, after the conclusion of the hearing, within a set time-limit, with an opportunity for any responding submission within a fixed period. Counsel agreed two weeks and two weeks, respectively, for the exchange of written legal submissions *post* the hearing. Written submissions dated 29 June 2022 were received from the appellant and written submission dated 14 July 2022 were received from the respondent. These were also of assistance to the court and I wish to express my thanks to both counsel and their instructing solicitors. I have carefully considered all submissions both written and oral and, during this judgement, I will make reference to the principal submissions and authorities which were put to the Court.

S. 44 of the 2015 Act

4. It is appropriate at this point to set out the sections referred to in the appellant's motion and to highlight certain subsections which featured most during the hearing. Under the heading "*Appeal to Labour Court from decision of adjudication officer*", s. 44 of the 2014 Act begins as follows:

"44. (1) (a) A party to proceedings under section 41 may appeal a decision of an adjudication officer given in those proceedings to the Labour Court and, where the party does so, **the Labour Court shall—**

(i) give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal.

(ii) make a decision in relation to the appeal in accordance with the relevant redress provision, and

(iii) give the parties to the appeal a copy of that decision in writing.

(b) In this subsection "relevant redress provision" means—

(i) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a complaint under that section of a contravention of a provision of an enactment specified in *Part 1* or *2* of Schedule 5 , the provision of that enactment specified in *Part 2* of Schedule 6 ,

(ii) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a dispute as to the entitlements of an employee under an enactment specified in *Part 3* of Schedule 5 , the provision of that enactment specified in *Part 2* of Schedule 6 and

(iii) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a complaint under *subsection (3)* of that section, paragraph 2 of Schedule 2 to the Act of 2012.

(2) An appeal under this section shall be initiated by the party concerned giving a notice in writing to the Labour Court containing such particulars as are determined by the Labour Court in accordance with rules under subsection (5) of section 20 of the Act of 1946 and stating that the party concerned is appealing the decision to which it relates.

(3) Subject to subsection (4), a notice under subsection (2) shall be given to the Labour Court not later than 42 days from the date of the decision concerned.

(4) The Labour Court may direct that a notice under subsection (2) may be given to it after the expiration of the period specified in subsection (3) if it is satisfied that the notice was not so given before such expiration due to the existence of exceptional circumstances.

(5) A copy of a notice under *subsection (2)* shall be given by the Labour Court to the other party concerned as soon as may be after the receipt of the notice by the Labour Court." (emphasis added)

Burden of proof

5. It is common case that s. 44 (3) was not complied with by the appellant. Her case is that "exceptional circumstances" exist, *per* s.44(4) and that the Labour Court erred in law in its decision, including by breaching s. 44(1)(a)(i).
6. It is common case that the burden of proof as regards satisfying the Labour Court as to the existence of "exceptional circumstances" rested at all material times on the appellant.

S. 46 of the 2015 Act

7. Section 46 of the 2015 Act, which refers to “*Appeal to High Court on point of law*”, goes on to provide as follows:

“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.”

Background

8. It is no function of this court to make any determination in respect of any issue of substance with respect to an ‘unfair dismissal’ claim of the type the appellant seeks to bring and nothing in this judgment purports to do so. It may be useful, however, to set out the backdrop to the present motion as brought. According to the respondent’s submissions, the following is the context in which the present motion arises.
9. Dr. Diamuid Murray Snr (“the respondent”) is a retired general practitioner who is said to have operated two practices which opened in or about 1984, one in Ballyhaunis and the other in Knock, both being in County Mayo.
10. On or about 3 June 2008, the appellant is said to have commenced employment with the respondent at the Ballyhaunis practice as a receptionist/administrator.
11. The 2nd practice in Knock is said to have 2 part-time receptionists/administrators who work “one week on, one week off” and who commenced employment in 1984 and 1998, respectively.
12. The respondent contends that the staff in Knock complete the same administrative tasks as the appellant and have the same skill set/level and expertise as the appellant.
13. The respondent contends that the appellant was made redundant in December 2017, after a necessary re-structure. It is contended that the staff in Knock were the longer serving employees, with some 19 and 33 years’ service, respectively.
14. The respondent is said to have retired in 2017, and it is contended that both practices were taken over by the respondent’s son. It is contended that the respondent’s practice was not profitable at the time he retired and that it was, in fact, being funded directly by the respondent’s savings.
15. It is contended that, when his son took over, the respondent’s practice was re-structured to reduce costs, which involved the centralisation of all administrative functions in the Knock practice.
16. It is contended that, in circumstances where the respondent did not have an agreed redundancy policy in place and all employees were said to have the same skills to carry out the required role, the ‘default’ approach of “Last in, first out” (or “LIFO”) was considered appropriate.

17. It is contended that the redundancy of the appellant was a genuine requirement for the viability of the business and that the selection was impersonal and based exclusively on service, in circumstances where the appellant had some 10 years less service than every other employee, resulting in her selection.
18. The appellant's employment terminated on 31 December 2017.
19. On 21 June 2018 the appellant lodged a complaint with the WRC seeking relief pursuant to the unfair dismissals act 1977 ("the 1977 Act"). This was lodged 'in time', being 9 days before the expiry of the relevant deadline,
20. The Director General of the WRC referred the matter to an adjudication officer, a Mr Ray Flaherty and, on 17 January 2019, an oral hearing of the matter took place.
21. On 19 November 2019, a decision issued (Adjudication Reference: ADJ-00015310) which concluded that the dismissal was as a result of redundancy; and the appellant's unfair dismissal claim failed.
22. It is not in dispute that the appellant had 42 days from the WRC decision (of 19 November 2019) to lodge an appeal to the Labour Court (this is provided for in s. 44 (3) of the 2015 Act which I quoted *verbatim* above).
23. The appellant's solicitor sent the appellant's appeal, by registered post, on 20 December 2019, being within the said 42-day period. There is no dispute in relation to this fact.
24. The appellant's appeal was not, in fact, received by the Labour Court until 2 January 2020, which is 44 days after the WRC decision and, thus, outside the relevant time-limit. There is no dispute in relation to this fact.
25. The Labour Court decided to consider the preliminary issue as to whether or not the appeal was received within the permitted time-limit. Both parties were given advance notice of this and invited to furnish submissions on the preliminary issue, which they did. On 20 May 2021, a Labour Court hearing took place.
26. The decision of the Labour Court issued on 3 June 2021 (Reference No: UDD2143). This is the decision appealed against on a point of law.
27. The Labour Court determined that the appellant's appeal was received outside the 42-day period and that the appellant did not provide sufficient proof of "*exceptional circumstances*" to warrant an extension of time.

The respondent's position

28. In essence, the respondent submits that no point of law has been disclosed in the appellant's application and that the appellant has not identified any error of law made by the Labour Court or identified any facts found or inferences drawn by the Labour Court which would not have been made by any reasonable decision-making body.

29. The respondent further submits that, in failing to identify a point of law on which to ground her appeal to this court, the appellant's application cannot succeed.
30. The respondent also contends that the Labour Court considered the relevant evidence provided by the appellant in support of her contention that an extension of time should be granted and reached a conclusion, having heard from both sides, that the appellant had not shown "exceptional circumstances" to extend time, in light of the evidence before the Labour Court.
31. As well as submitting that it is long-established that the fact the 42nd day may fall on a weekend or public holiday is not relevant, the respondent contends that the applicant simply failed to support her application to the Labour Court by proffering sufficient evidence to meet the test of "exceptional circumstances".

This Court's role in a 'point of law' appeal

32. This is an appeal on a point of law. Thus, one basis for a right to relief is if the appellant can demonstrate that the Labour Court took an erroneous view of the law. However, this is not an appeal *de novo*. It is not a re-hearing of the matter. This court has no jurisdiction to set aside findings of fact unless it is established that there was no evidence to support such findings. Similarly, this court cannot set aside inferences drawn from facts unless those inferences were ones which no reasonable decision-making body could draw. The foregoing and other important statements of principle were set out by Mr Justice Gilligan in *ESB v. The Minister for Social Community and Family Affairs & Ors* [2006] IEHC 59. In that case, the learned judge set out the relevant law in the following terms:

"The Law

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] I.R.L.M. 421, *Henry Denny and Sons_(Ireland) Limited -v- Minister for Social Welfare* [1998] 1 IR 34 and *Premier Periclase -v- Valuation Tribunal* HC 24th June, 1999 U/R."

Budd J. in *Brides v. Minister for Agriculture* [1998] 4 IR 250 dealt with the position of the examining role of the High Court in an appeal such as this wherein he stated at pp.274/5:

'Since this is an appeal on a point of law, it is not a rehearing. Accordingly, the facts as found by the Labour Court are binding on this court where those facts are supported by credible evidence and this court should be slow to disregard the inferences drawn by the Labour Court from its findings of fact unless the inferences drawn are wholly unwarranted on the findings of fact made. The role of this court has been explained by Kenny J. in the Supreme Court in *Mara (Insp. of Taxes) v. Hummingbird* [1982] I.L.R.M. 421 at p. 426 in a case stated where the Income Tax Appeal Commissioners found, as a fact, that Hummingbird purchased premises in Baggot Street, Dublin, as an investment and so its sale was not in the course of trade'.

At page 426 Kenny J. said:-

'A case stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayer purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusion or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw. The ways of conducting business have become very complex and the answer to the question whether a transaction was an adventure in the nature of the trade nearly always depends on the importance which the judge or commissioner attaches to some facts. He will have evidence some of which supports the conclusion that the transaction under investigation was an adventure in the nature of trade and he will have some which points to the opposite conclusion. These are essentially matters of degree and his conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the

case) unless they are such that a reasonable commissioner could not draw them or they are based on a mistaken view of the law.’

Hamilton C.J. in his judgment in *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 IR 34 at p. 37 dealt with the role of the court in an appeal such as this and succinctly stated at pp. 37 - 38 of the judgment:-

‘...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.’

...

The legal principles at issue in this matter were further discussed in the decision of the Supreme Court in *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* (Unreported, Supreme Court, 15th July, 2004) wherein both the judgments in *Denny* and *Mara* were followed, Geoghegan J. stating at p. 13 of the judgment that the principles as outlined by Keane J. in *Henry Denny* ought to have been applied by the Appeals Officer in the *Castleisland* case and in his view if they had been, there would have been a different result.”

- 33.** The *ESB* case concerned an appeal on a point of law, brought pursuant to s. 271 of the Social Welfare (Consolidation) Act 1993, against the decision of an Appeals Officer to classify six contract metre-readers as being engaged under a contract of service, as opposed to a contract for services, for the purposes of social welfare contributions. Having considered the relevant authorities, Gilligan J stated the following in *ESB*:

“I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the Court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officer, to arrive at

the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision.”

34. In *Ryanair v. Labour Court* [2005] IEHC 330, the applicant, sought an order quashing a decision of the Labour Court, which resulted from a preliminary investigation conducted by the respondent pursuant to s. 3 of the Industrial Relations (Amendment) Act, 2001, wherein the respondent determined that a trade dispute existed between the applicant and the notice party for the purposes of the aforesaid Act. Having cited, *inter alia*, the well-known decisions in *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, Mr. Justice Hanna stated (at p.27) that:

“...if the applicant fails to establish that a decision of the Labour Court was irrational in the sense that there was no relevant material upon which it could ground such a decision or that such material could not properly be relied on or that the material and evidence offered by the applicant so conclusively and overwhelmingly trumped such case as was offered by the notice party to such an extent as to render a decision in its favour perverse then, in such circumstances, this aspect of the applicant's case would have to fail.”

35. In *National University of Ireland Cork v. Ahern* [2005] 2 I.R. 577, the Supreme Court held that the Labour Court had erred in law in reaching its decision by not differentiating between the matters to be taken into consideration when considering the concept of “like work” under s. 3(c) of the Anti-Discrimination (Pay) Act 1974 (“the 1974 Act”) and those relevant to the determination of the grounds for differing remuneration under s.2 (3). The respondents were 42 male employees of the applicant who worked as security service operatives and claimed they were being discriminated against in their pay on the grounds of sex, contrary to the provisions of the 1974 Act. The equality officer ruled that 2 telephone switchboard operators were valid comparators employed on “like work”. The applicant appealed to the Labour Court on the grounds that “like work” did not exist between the jobs of the respondent’s and the comparators. The Labour Court concluded that the work was equal in value and, having considered s. 2(3) of the 1974 Act, held that the different rates of pay were not justified on grounds other than sex. The applicant appealed to this court under s.8(3) of the 1974 Act, which permitted an appeal on a point of law and Mr Justice Lavan refused the relief sought and upheld the Labour Court’s determination. At para. 9 of his judgment, which was delivered on behalf of a 5-person Supreme Court, Mr Justice McCracken stated the following under the heading “*Question of law*”:

“The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed 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 s.8(3)."

Exceptional circumstances

36. In *Byrne v. PJ Quigley Ltd* [1995] E.L.R. 205, the Employment Appeals Tribunal considered a preliminary issue as to whether there were "exceptional circumstances" which would justify an extension of time for the initiation of a claim to the Tribunal. The relevant legislation specified a six-month time limit, but went on to provide that if the Rights Commissioner or Tribunal, as the case may be "...is satisfied that exceptional circumstances prevented the giving of the notice within the period aforesaid, then, within such period not exceeding 12 months from the date aforesaid as the Rights Commissioner or the Tribunal, as the case may be, considers reasonable." In a majority decision the Tribunal stated *inter-alia* the following:

"(1) The words 'exceptional circumstances' are strong words and should be contrasted with the milder words 'reasonably practicable' in the claimant's written submission or 'reasonable cause' which permit the extension of time for lodging a redundancy claim under section 12(2)(b) of the Redundancy Payments Act, 1971. 'Exceptional' means something out of the ordinary. At the least the circumstances must be unusual, probably quite unusual, but not necessarily highly unusual.

(2)(a) In order to extend the time the Tribunal must be satisfied that the exceptional circumstances 'prevented' lodging the claim within the general time limit. It is not sufficient if the exceptional circumstances cause or triggered the lodging of the claim.

(2)(b) It seems to follow that the exceptional circumstances involved must arise within the first six months, 'the period aforesaid'. If they arose later they could not be said to 'prevent' the claim being initiated within that period." (emphasis added)

37. In *Joyce Fitzsimons-Markey v. Gaelscoil Thulach na nOg* [2004] 15 E.L.R.110, the Labour Court considered an application to extend time which was made pursuant to s. 77(6) of the Employment equality Act 1998 (which employs language identical to that used in s.8(2) (b) of the 1977 Act (as amended by the Unfair Dismissals (Amendment) Act 1993) and uses the phrase "exceptional circumstances"). As its 17 October 2003 judgment makes clear, the Labour Court was specifically referred to the E.A.T.'s decision in *Byrne v. PJ Quigley Ltd*. On the facts before it, the Labour Court was "...satisfied that the applicant was induced to believe that she had gone about initiating her claim correctly and that it had been properly lodged in time. This arose from erroneous advice and misinformation which she had obtained from those upon whose advice and judgement she was entitled to rely. In the courts view this prevented her from lodging her claim with the court within the time-limit." In extending the time in which to lodge the relevant complaint the Labour Court held that:

- (1) *To be exceptional a circumstance need not be unique or unprecedented or very rare, but it cannot be one which is regularly or routinely or normally encountered.*
- (2) *Exceptional circumstances alone are not sufficient to grant an application for an extension of time, an applicant must show that those circumstances operated so as to prevent the applicant from presenting her complaint within time.*
- (3) *An applicant can be prevented from doing that which they intended to do by being given wrong information or advice (or by having necessary information or advice withheld) by one with whom they have a relationship of trust and confidence.*

Evidence

38. Mr John Duggan, solicitor for the appellant, swore an affidavit on 8 July 2021 to ground the appellant's motion, in which certain documents are exhibited. On 20 October 2021, the respondent swore a relatively short replying affidavit which, in essence, asserted (i) that the facts did not amount to what could be considered as "*exceptional circumstances*"; (ii) that on the basis of the facts and applying the applicable law the Labour Court held that the appellant failed to meet the requisite standard of proof; and (iii) that the Labour Court did not err in fact or in law. It seems to me that, in order for this court to decide this point of law appeal, it is necessary to engage with the evidence. I want to make clear, however, that insofar as this judgment analyses and engages with that evidence, this is not done from the perspective of decision-maker or, for that matter, as if this was a merits-based appeal *de novo*. The foregoing comments inform and apply to the analysis of the evidence in this judgment.

Affidavit of Mr. John Duggan

39. From paras. 3 to 5, inclusive, Mr. Duggan avers that he received notification from An Post that all deliveries to be effected before Christmas were to be posted no later than 20 December 2019 and that he sent the appellant's appeal by registered post on 20 December 2019. He exhibits a registered post receipt, dated 20 December 2019, in that regard.

Public holidays

40. Mr Duggan went on to aver that he was not made aware that the offices of the Labour Court would be closed or unavailable to receive deliveries on any dates other than public holidays, being 25 and 26 December 2019 and 1 January 2020. As I will presently come to, Mr Duggan's evidence before the Labour Court included his confirmation that no enquires were made to ascertain when the Labour Court was or was not closed from 20 December 2021 onwards.

41. During the hearing before me, counsel for the applicant provided an extract from the Organisation of Working Time Act 1997 (Consolidated) Act up-to-dated to October 29, 2021, the Second Schedule to which, under the heading "Public Holidays" states:

1. Each of the following days shall, subject to the subsequent provisions of this schedule, be a public holiday for the purposes of this act:

(a) Christmas Day;

(b) St Stephen's Day;

(c) *St. Patrick's Day;*

(d) *Easter Monday, the first Monday in May, the first Monday in June and the first Monday in August;*

(e) *the last Monday in October;*

(f) the 1st day of January;

(g) *any other day or days prescribed for the purposes of this paragraph. (emphasis added)*

42. There is no dispute between the parties that the foregoing comprise public holidays and it is common case that, in these circumstances, one would expect the Labour Court office to be closed on 25th and 26th December and on 1st January. That, however, does not seem to me to be determinative of any issue. It does not, for example, constitute evidence of what dates the Labour Court was or was not, in fact, open between 20 December 2019 (when the appeal was sent by registered post) and 2 January 2020 (when it was received).

43. Nor does the fact that the foregoing comprise public holidays constitute evidence of what arrangements were, or were not, in place during the relevant period (i.e. commencing 20 December 2019 and ending on 2 January 2020) for registered post to be accepted by or on behalf of the Labour Court.

44. Nor does this listing of public holidays constitute evidence as to the specific date or dates when attempts to deliver the 20 December 2019 registered letter were made. Having made the foregoing observations, it is appropriate to continue to look at the contents of Mr Duggan's affidavit.

20 April 2021 email from An Post

45. Mr Duggan avers, *inter alia*, that he received communication from An Post to the effect that four attempts were made at delivery of the registered letter and, in that regard, he exhibits an email from An Post, dated 20 April 2021. In terms of the 'timeline', this email was sought and obtained by the appellant almost 16 months *after* the delivery of her appeal. It is common case that the appellant applied to the Labour Court for an extension of time in which to bring her appeal and that the Labour Court fixed a hearing date to deal with that specific matter as a preliminary issue. The aforesaid email of 20 April 2021 was obtained by the appellant a full month *prior* to the Labour Court hearing which took place on 20 May 2021.

46. It is common case that a copy of this email (sent on 20 April 2021 at 12:30 by An Post's "Customer Services", to the appellant's gmail address) was put before the Labour Court and that it comprised evidence relied upon by the appellant during the hearing on 20 May 2021. It

was the *only* documentary or other evidence from An Post which the appellant furnished to the Labour Court. It is appropriate to set out its terms *verbatim*, as follows:

"Good afternoon,

Prior to our conversation today, I detailed the delivery record of this item below and have additionally attached the signature request for this as well.

This item was posted on the 20th of December 2019 at 16:26 from Boyle.

This item was then sorted through the Athlone Mail Centre and forwarded to the local delivery depot in Ravensdale which would do the deliveries in the Dublin 2 and Dublin 4 areas.

There were then 4 subsequent delivery attempts regarding this item to which the failure of these attempts was due to the business being closed.

The item was then delivered on the 2nd January 2020 at 11:49 of which I have attached the signature request for this item.

Kind regards..."

- 47.** Insofar as Mr Duggan makes the following averment at para 5: *"I understand from An Post that the four occasions when delivery was attempted was 23rd, 24th, 30th and 31 December 2019"*, the aforesaid email does *not* constitute evidence establishing those or an other dates.
- 48.** The 20 April 2021 email is the only one Mr Duggan exhibits in this appeal and, as observed, it was the only email from An Post which was put before the Labour Court at the hearing. If Mr Duggan's averment is based on a *different* email from An Post, none was ever put to the Labour Court, be that in advance of or during the hearing of the preliminary issue, and none has been put before this Court, in the context of determining the present motion.
- 49.** The 20 April 2021 email certainly confirms that four delivery attempts were made, but it is not all clear from the email *when* these attempts were made. An Post's email does not indicate, for instance, whether any, or all, attempts were made on or before 30 December (which, it is common case, was the statutory deadline). Plainly, if the attempts at delivery took place on, say, 31 December, 1 January and 2 January, or if multiple attempts were made at delivery on one or more of these dates, all such attempts would have been *after* the expiry of the 42-day statutory period.
- 50.** It also seems fair to say that, in circumstances where An Post appear to have replied very promptly to a query raised on about 20 April 2021, there was nothing before the Labour Court (and nothing was put before this Court) to suggest that, had a follow-up request been promptly made to An Post requesting the latter to specified the dates/times of the four delivery attempts, a prompt response would not have been forthcoming, at least in time to put that response before the Labour Court in advance of the hearing (which took place a month later on 20 May 2021).

- 51.** Similarly, there is no evidence of anything which prevented the appellant from (i) making such enquiries with An Post as she regarded as appropriate and (ii) obtaining from An Post such documentary evidence as she and/or her legal advisers felt was necessary for the hearing, at any point between the delivery of the appeal on 2 January 2020 and the hearing of the preliminary issue on 20 May 2021. The foregoing comment is particularly relevant in respect of the period commencing with the appellant's application to the Labour Court for an extension of time and the hearing of that application by way of a preliminary issue.
- 52.** It is a matter of fact that no email from An Post, clarifying the specific dates when delivery attempts were made, was ever put before the Labour Court, be that in advance of or during the hearing. This is despite the fact that *when* any unsuccessful delivery attempts occurred was plainly a relevant, indeed a very important, issue of fact in the context of the Labour Court's consideration of the preliminary issue.

Advance notice

- 53.** It is common case that both sides received advance notice from the Labour Court that it proposed to deal with the preliminary issue. Indeed, both sides were invited to and did make submissions in advance of the hearing. That being so, and from a fair procedures and natural justice perspective, both sides had every reasonable opportunity to furnish, by way of evidence and submissions, anything they intended to rely upon at the hearing of the preliminary issue.
- 54.** The only documentary or other evidence from An Post which the appellant chose to proffer at the hearing was, as I say, the 20 April 2021 email.

What were contended to be exceptional circumstances

- 55.** From para. 6 onwards of Mr Duggan's affidavit, he makes the following averments:

"6. When this matter came before the Labour Court on 20 May 2021, I sought an extension of time pursuant to the provisions of section 44 (4) of the workplace relations act. I sought an extension of time based on the exceptional circumstances arising here, namely:

- (a) The fact that the appeal documents were sent by registered post on 20 December 2019 and well within the requisite timeframe for the lodging of an appeal;*
- (b) In circumstances where it was in order for me to assume and be satisfied that the registered post documents would be delivered before the Christmas closure of public buildings;*
- (c) That the Labour Court building would be open and in a position to receive documentation on days other than public holidays;*
- (d) that arranging for registered post of the documentation was a prudent and appropriate way to lodge the appeal documents."*

At paragraph 7, Mr Duggan referred to and exhibited a copy of his 'Attendance Note', which is dated 21 June 2021, in respect of the Labour Court hearing of 20 May 2021. It records *inter-alia* the submissions and points made by Mr Duggan on behalf of the appellant. It read as follows:

"I began by reading the submission dated 11 May 2021.

I also made the following points.

The appellant, had she chosen to do so, could not have given notice of appeal on any of the days 23rd, 24th, 27th or 30 December 2019, by any other means, including personal delivery, as the offices of the court were not open to receive the notice of appeal.

If the offices of the court had been open, the notice of appeal would have been delivered on 23rd December, well within the time for doing so.

There are no provisions in the rules of the court or the act establishing the court for the offices to be closed on days which were not public holidays.

I pointed out that the fact that the Labour Court offices were closed reduced the time period for an appeal from 42 days to 31 days. The registered letter would need to have been posted on 19 December 2019 at the latest to ensure delivery on the last day the court was open.

The fact that the offices of the court were closed on days which were not public holidays, and which were otherwise working days, is not regular, routinely or normally encountered. It is a circumstance which is out of the ordinary course, unusual, special, or uncommon.

Mr Allen Ledwith BL read the respondents submission.

Then, Mr Tom Geraghty asked me to clarify the appellant's position with regard to the appeal, as he had understood that the grounds for an extension of the time to appeal were on the basis of postal delays. I confirmed to him that the grounds were on the basis that the offices of the Court were closed and could not receive registered post. I explained that initially I had understood that the reason that the notice of appeal was not delivered in time was because of postal delays. However, I subsequently discovered that the reason that the notice of appeal was not delivered was because the offices were closed and could not receive registered post. I explained that my client had made enquiries with An Post and had received confirmation by email that there were 4 attend deliveries of the registered letter containing the notice of appeal at the offices of the Cour on 23rd, 24th, 30th and 31 December 2019, but that the offices were closed and delivery could not be made.

Mr Geraghty pointed out that the court had no evidence with regard to the court offices being closed or the attempted deliveries by An Post. I pointed out to him that the email received by my client from An Post stated that the offices were closed and that four attempted deliveries were made. I told him that my client had subsequently received an email from an post setting out the dates on which the deliveries were attempted. He pointed out that this was not included in the submission documents. I explained that we had only received that in the last few days. I told them that my client could give evidence with regard to the emails which she had received from an post setting out the details of the attempted deliveries. Mr Geraghty did not accede to this request. No evidence was given by any party, although both parties were in attendance. I also suggested that the matter could be adjourned to allow the document to be furnished. This was not exceeded to.

Mr Geraghty enquired as to whether or not I had made enquiries with the WRC as to whether or not the offices of the court were open during the relevant period. (I did not know that the WRC operated the Labour Court building, or who in fact operated the Labour Court building.) I told him that I had not. He seems to suggest that the offices where [sic] open and that he himself was working within the same building on the dates in question."

- 56.** Arising from the foregoing, at least the following can be said. Firstly, it underlines the reality that both sides were given advance notice of the fact that the Labour Court would be conducting a hearing in respect of the preliminary issue. Secondly, it illustrates that both sides were, as a matter of fact, given the opportunity to be heard, and to present such evidence as they wished to rely on at the hearing as a basis for their submissions.
- 57.** As the said Attendance Note records, both sides in fact read out their respective submissions. It is not in dispute that the hearing took place on 20 May 2021 and it is also a fact that the appellant's submissions were "*dated 11 May 2021*" i.e. some 9 days earlier. Thus, these were submissions prepared well in advance of the hearing and this Court is entitled to assume, as was the Labour Court, that those submissions referred to such evidence as the appellant and her legal advisors regarded as relevant. There is certainly no evidence before this Court to the effect that the appellant was denied the opportunity in advance of the hearing to proffer any documentary evidence she wished to proffer in the context of the submissions made on her behalf.
- 58.** To my mind the foregoing fatally undermines the submission made to this Court to the effect that the Labour Court erred in law by, according to the appellant's counsel, breaching the statutory obligation placed on it, *per s. 44 (1) (a) (i) of the 2015 Act*, which provides that "*...the Labour Court shall...give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal...*". There was no breach of this statutory obligation in my view. Plainly, this statutory provision represents no more or less than a legislative reference to well-established principles of natural and constitutional justice, insofar as procedural fairness is concerned. There was no breach of these principles in my view. The appellant was afforded the opportunity to be heard and to proffer relevant evidence in the context of the hearing afforded to her.
- 59.** The contents of the 'Attendance Note' also reflect the fact, which was not in dispute before the Labour Court, that the appellant's appeal was posted on the evening of 20 December 2019. Exhibit 'JD1' to Mr Duggan's affidavit comprises a copy of the 'certificate of postage', which is dated 20 December 2019 and bears the address: "*The Labour Court, Lansdown [sic] House, Lansdown Road, Ballsbridge, Dub 4*".
- 60.** The 20 April 2021 email from An Post customer services confirms *when* on the 20th of December it was posted, namely: "*at 16:26 from Boyle*". To put this in context, it is common case that the registered letter was sent from Boyle, Co. Mayo on the evening of the Friday immediately

before Christmas-week (i.e. December 20th was a Friday; the 21st was a Saturday; the 22nd was a Sunday; and the Monday was December 23rd 2019).

"Given to"

61. It is common case that the 2015 Act does not mandate any specific method of service. The obligation resting on an appellant is to ensure that their appeal is "...***given to*** the Labour Court..." (emphasis added) within the 42-day period (see s. 44 (3) of the 2015 Act).
62. In light of the wording which the Oireachtas chose to use in s. 44 (3), it seems uncontroversial to say that the focus of the 2015 Act, and the obligation on an appellant, is on ensuring that the appeal is in fact *received by* the Labour Court (i.e. *given to* and, thus, received by), as opposed to when the appeal is *sent by* a would-be appellant, or, for that matter, when *attempts* are made to give the appeal to the Labour Court.
63. The Oireachtas could have chosen, for instance, to provide in the 2015 Act that 'proof of postage' (be that ordinary or registered post) would constitute adequate service. Had it done so, the focus would be on when an appeal had been *sent by* an appellant (as opposed to *given to* the Labour Court). That is not the choice which the Legislature made and in the present case the appeal was, in fact, *given to* the Labour Court outside of the 42-day time limit.
64. Where a piece of legislation requires that something be (i) *given to* a statutory body; and (ii) that this be done by a 'hard' deadline, but (iii) does not provide that proof of registered post shall constitute adequate service, there is an obvious difficulty, as a matter of first principles, with an assumption by the sender that registered post will, of itself, necessarily constituted adequate service, regardless of how genuinely-held that assumption.

Service options

65. As a matter of first principles, there are a range of methods by which an appellant might comply with s. 44(3) of the 2015 Act. A non-exhaustive list would seem to me to include:
 - (1) For an appellant to deliver their appeal, personally, thus ensuring that it was *given to* the Labour Court within the 42-day period;
 - (2) For an appellant to arrange for a 3rd party to do the foregoing (be that a friend / courier / summons-server / solicitor, or other agent);
 - (3) For the appeal to be sent by ordinary pre-paid post in adequate time to *ensure* that it arrived at (i.e. was *given to*) the Labour Court's office within the 42-day period;
 - (4) For the appeal to be sent by registered post and *given to* the Labour Court within the time limit (i.e. for the appellant to *ensure* that it was in fact 'signed for' within the 42 days and, thus, given to the Labour Court).

66. A would-be appellant seems to me to be entirely 'at large' in relation to what method of service she, or those advising her, might decide to adopt. However, it seems equally clear that at all material times, the relevant obligation rests on the would-be applicant. It is not an obligation to prove (i) that an appeal was *sent*; or (ii) the *mode* by which it was sent; or (iii) the reasonableness of the *belief* that it was sent in time, but (iv) an obligation to prove that it was *given to* the Labour Court, as s. 44 (3) requires.

Signature

67. In the present case, the fourth of the aforesaid methods was chosen. That being so, a further fact which was without doubt before the Labour Court, and never in dispute, is that a signature would be required in order for the registered letter to be delivered (i.e. *given to* the Labour Court) as opposed to the letter being sent, or merely reaching the office in question.

68. Self-evidently, what was required if the appeal was to be *given to* the Labour Court by the mode of service chosen in this particular case is that (a) that a successful attempt at delivery took place within the 42-day period; and (b) that the Labour Court office, or building in which the Labour Court conducts its business, was open; and (c) that there was someone present who was able and willing to sign for the letter at the time of delivery. It seems to me that, having opted to serve the appeal by registered post, the onus was on the would-be appellant to ensure that (a), (b) and (c) occurred. This is because the wording in the relevant section places that onus on the appellant.

69. The wording in the Act places upon the appellant the responsibility to ensure that the appeal was *given to* the Labour Court, regardless of the method of delivery chosen and, in the present case, the appellant's obligation was to ensure that the letter in question was given to the Labour Court on or before 30 December. This did not occur.

The meaning of "exceptional circumstances"

70. The view expressed in the EAT's decision in *Byrne v. PJ Quigley Ltd* is that exceptional circumstances in the present context must be circumstances which are, at the very least, "*quite unusual*". In my view, what is required goes somewhat further and I take this view for the following reasons.

71. The Oireachtas chose not to use, for example, the words *good reason* in s.44 (4). The bar was set higher. Nor did the Oireachtas employ the term *special circumstances* in that section. In my view, the bar was set higher still, by the use of the term *exceptional*.

72. In the context of an analysis of Order 8, r. 1(4) of the Rules of the Superior Courts (i.e. "*special circumstances which justify an extension*" of a summons) the Court of Appeal (Haughton J.) in *Murphy -v- Health Service Executive* [2021] IECA 3 conducted a careful and insightful analysis

of the meaning of *special circumstances*. At para. 72 the learned judge stated with regard to "...the use of the word 'special'..." that "While this does not raise the bar to 'extraordinary', it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present".

- 73.** Those observations made with regard to the use of the term *special* seem to me to apply with even *greater* force with regard to *exceptional* circumstances. Giving both words their literal and plain meaning, the terms *exceptional* and *extraordinary* seem to me to be equivalent. As commonly understood, the terms *exceptional* and *extraordinary* are synonyms. Even if I am wrong in that view, it seems to me that the term *exceptional* is far closer to *extraordinary* than the word *special* and goes beyond something "quite unusual".
- 74.** Something "quite unusual" could fairly be called something "beyond the ordinary or the usual" i.e. *special* circumstances (*per* the Court of Appeal's analysis in *Murphy*). However, it seems to me that the Oireachtas set the bar even higher when it chose to use the term *exceptional* in s. 44(4). That being so, whereas the EAT used the term "quite unusual" in *Byrne v PJ Quigley Ltd*, I believe s. 44 (4) requires even more of the circumstances. In other words, *exceptional* seems to connote something even greater as regards the circumstances being well out of the ordinary – in short, not merely *quite* unusual, but *highly* unusual. That does not mean *unique* or *unprecedented*, but it does mean *rare* and this seems to me to be more than *quite* unusual.
- 75.** The foregoing views are not at all inconsistent with those expressed by the Labour Court in *Gaelscoil Thulach na nOg v. Joyce Fitzimons-Markey EET034* where the Labour Court (referring to Lord Bingham C.J. in *R v. Kelly* [1999] 2 All E.R. 13 at 20) held that "To be exceptional a circumstance need not be unique or unprecedented or very rare; but it cannot be one which is regular or routinely or normally encountered".

Not reasonably foreseeable

- 76.** Each case will fall to be determined on its own facts, but it seems to me that certain further statements of principle can safely be made, as follows. The test which emerges from s. 44 (4) seems to me to be *prima facie* an objective one. Thus, from an *objective* standpoint, the circumstances must not have been reasonably foreseeable. If the circumstances were reasonably foreseeable in objective terms, they could hardly be described as exceptional circumstances, in my view.
- 77.** For the sake of completeness, I would also suggest that if the evidence in a given case discloses that from a subjective standpoint the would-be appellant, in fact, foresaw the very circumstances relied upon, they could hardly be considered to be exceptional in that particular case.
- 78.** Clearly, there is a limit to the utility of an analysis at the level of principle. Therefore, it seems useful to look at certain practical examples which are offered with reference to the facts in this

case, as follows. This is not to usurp the decision-maker's role but to illustrate the meaning of exceptional circumstances in the context of the principles I have suggested above.

- 79.** It is hardly controversial to say that many offices close for weekends. Indeed, the commonly understood meaning of the term 'working-days' is the 5 days, from Monday to Friday, inclusive. The foregoing would appear to me to be a matter of common knowledge. Thus, from an objective standpoint, the prospect of an office being closed on a Saturday and a Sunday would seem to be reasonably foreseeable (as opposed to being in any way rare, or unusual, never mind highly unusual).
- 80.** Furthermore, and leaving aside weekend closures, it also seems uncontroversial to say that it is not particularly unusual for offices to be closed for *more* than a total of 9 working-days per annum. In other words, although the Working Time Act 1997, which the applicant relied upon in submissions, defines 9 particular days as 'public holidays', it seems reasonably foreseeable (as opposed to rare or in any way unusual) that an office might well be closed on days *other* than public holidays, especially during the Christmas and New Year period when, as a matter of common knowledge, many people take holidays and, thus, many offices may be closed.

The position as of Friday evening 20th December 2019

- 81.** Whilst emphasising again that this is not a re-hearing of the matter, to determine this 'point of law appeal', involves, inter alia (i) looking at the meaning of "*exceptional circumstances*"; (ii) looking at whether the Labour Court adopted a different and inappropriate meaning of that term; and (iii) looking at the state of the evidence said to amount to exceptional circumstances.
- 82.** I have looked at (i) in the manner set out earlier in this judgment. As to (ii), there is no evidence to support a finding by this Court that the Labour Court adopted any different or inappropriate meaning of the term. Rather, the Labour Court adopted – correctly in my view – the analysis in the *Gaelcoil* case. In the context of looking at (iii), it might be useful, at this juncture, to consider what the appellant, through her legal adviser, knew or must have known at 4:26 pm on Friday, 20 December 2019, when the registered letter containing the appeal was posted in Boyle. This included the following:
- that there was no reality in a registered letter posted in Boyle, Co. Mayo on the evening of 20th December being both delivered and 'signed for' that same evening. This seems to me to be objectively incontrovertible. Moreover, it is not asserted that the appellant or her solicitor subjectively believed that the registered letter would be delivered and 'signed for' the same day. On the evidence before this Court, neither knew precisely *when* the letter would be delivered, other than assuming that this would be at some unspecified point before the expiry of the deadline (on 30 December 2019), despite having made no relevant enquiries;

- that the following day was Saturday, 21st December 2019. As a matter of common sense and/or common knowledge, it is not at all unusual for offices to be closed on weekends (not being a 'working-day' as commonly understood in the context of office work). Viewed objectively, there was a distinct possibility (i.e. it was reasonably foreseeable) that the office might be closed and/or there might not be someone available on a Saturday to 'sign for' post on a weekend. Nor is it averred on behalf of the appellant that it was subjectively understood that post would be delivered and signed for on Saturday 21st December;
- that the same was true, if not more so, in relation to Sunday 22nd December. Nor is there any averment to the effect that the appellant or her solicitor subjectively believed that the registered letter would be delivered and signed for on Sunday 22nd December;
- that Monday 23rd; Tuesday 24th (i.e. Christmas Eve) and Friday 27th, although certainly *not* public holidays, all fell within 'Christmas week' and it is not uncommon for office workers to take holidays / offices to be closed on dates during the Christmas/ New Year period in addition to those closures for public holidays. In other words, the prospect of the office being closed on one or more of those dates during Christmas week seems to me to be, in objective terms, reasonably foreseeable (even if not, on the evidence before this court subjectively foreseen by the appellant or her legal representative);
- that Wednesday 25th and Thursday 26th were 'Christmas Day' and 'St. Stephen's Day', respectively, and, being 'public holidays' as statutorily defined, there was no reality in expecting registered post to be delivered and 'signed for' on either day. Again, this seems to be the case, both from an objective and a subjective perspective;
- that December 28th was a Saturday, and December 29th was a Sunday and, again, there was a distinct possibility that an office would be closed at the weekend (see previous comments);
- that the last and final date to ensure the appeal was "*given to*" the Labour Court was Monday 30th December, being the day before New Year's Eve. The prospect of the office being closed the day before New Year's Eve, where New Year's Day 'fell' on a Wednesday, seems to me to be reasonably foreseeable, from an objective perspective. It certainly does not seem to me to be something particularly out of the ordinary or rare. No expert evidence is required to know that many persons take holidays between the 24th of December and the 1st of January and that it is not unusual for certain offices and businesses to be closed for some, or all, of those dates.

No enquiry made about office 'opening hours' when letter was sent

83. I felt it appropriate to look at the foregoing, not because it is this Court's role to re-consider the evidence from a merits based perspective (it is not) and not to purport to reach any finding on

the matter, or to substituted this Court's finding for the Labour Court, but because one of the facts which was before the Labour Court (indeed, it is confirmed in the Attendance Note exhibited on behalf of the appellant) is that no enquiry was made by or on behalf of the appellant at any stage to establish what days the Labour Court would, or would not, be open during the Christmas and New Year period (specifically, during the period from 20th December 2019 onwards).

- 84.** It will be recalled that the Attendance Note (which refers to "Mr Geraghty", the Deputy Chairman of the Labour Court) recorded *inter-alia*:

"Mr Geraghty enquired as to whether or not I had made enquiries with the WRC as to whether or not the offices of the court were open during the relevant period. (I did not know that the WRC operated the Labour Court building, or who in fact operated the Labour Court building.) I told him that I had not."

No evidence given to the Labour Court about 'opening hours'

- 85.** In addition to no such enquiries having been made at the time when the registered post letter was *sent*, it is also entirely fair to say that no evidence was given by the appellant, at the *hearing*, as to what days the Labour Court was, as a matter of fact, open or closed during the period 20 December 2019 to 2 January 2020.

No evidence given about any arrangements to 'sign for' post

- 86.** Nor was any evidence given to the Labour Court in relation to what, if any, arrangements were in fact in place, during the said period (from 20 December 2019 onwards), with regard to signing for registered post, in particular, any registered post which An Post might seek to deliver when the Labour Court's office was closed.

Four attempted deliveries

- 87.** At para 8 of his affidavit, Mr Duggan confirms that he provided the Labour Court with "*the documentation I had received from An Post indicating that four attempted deliveries had been made*". It is common case that the foregoing is a reference to the 20 April 2021 email from An Post's Customer Services which, as I have mentioned previously, is silent as to the date(s) when delivery attempts were made, other than confirming that a successful attempt took place on 2 January 2021.

The opportunity to get further evidence

- 88.** Mr Duggan went on to aver that "*I indicated to the Labour Court that I wanted the opportunity to get further evidence from An Post as to the dates when they sought to deliver the documentation. I was refused that opportunity.*" The foregoing averments relate to a principal element of the applicant's case, namely, that the Labour Court erred in law by failing to give the appellant an opportunity to present relevant evidence (in breach of s.44 (1) (a) (i) of the

2015 Act). I referred to this issue earlier and I am satisfied that there was no error on the Labour Court's part.

- 89.** The appellant was given the opportunity to be heard and the opportunity to present any and all evidence which the appellant or her legal advisers regarded as relevant. This opportunity, in compliance with s.44(1)(a)(i), was in the form of the hearing of the preliminary issue, advance notice of which had been given to both sides, with both sides having also been given, and taken, the opportunity to proffer such evidence and make such submissions as they wished.
- 90.** Counsel for the appellant laid particular emphasis on the following passage from Mr Justice McKechnie's decision in *Zalewski v. The Workplace Relations Commission & Ors* [2021] IESC 24, wherein the learned judge stated:

*"106. In looking at this matter, it is important to differentiate between the position of an adjudication officer, and the role of the District Court: in this regard, one must start by again considering the process conducted by the AO (para. 93), from complaint to decision, and the legal position of the parties when that process has concluded. As previously noted, **to fulfil the functions demanded by statute, the AO, having received a complaint, must consider all relevant evidence which either party offers and must afford to each of them an opportunity to be heard: for such purposes, he or she has the power to order the attendance of witnesses and the production of documents, both under pain of criminal sanction.** The officer must adjudicate on the resulting evidence, both oral and documentary, and must do so by way of a decision which is then published..."* (emphasis added)

- 91.** It seems to me that this *dicta* reflects, insofar as the Labour Court is concerned, the statutory obligation created by s.44 (1) (i) of the 2015 Act. The appellant has not established that this obligation was breached.

Advising on proofs

- 92.** As a matter of first principles, it is not for the Labour Court to provide an 'advice on proofs' to the appellant in respect of the preliminary issue. In oral submissions made by the appellant's counsel, it was emphasised that "*Nobody said to Mr Duggan in advance of the hearing that the specific dates when attempts were made at service was an issue*" (or words to that effect). That may well be so, but it does not seem to me that there was any obligation on the Labour Court (or, for the sake of completeness, on the respondent) to inform the appellant in advance of the hearing of what evidence the appellant should proffer in order to underpin such submissions as the appellant wished to make.
- 93.** I say the foregoing in circumstances where it cannot seriously be contended that evidence of the specific dates when attempts were made to deliver the registered letter containing the appeal was not a relevant matter, insofar as the hearing of the preliminary issue was concerned.

From a common-sense perspective, it was highly relevant to the very issue which the Labour Court was to decide.

- 94.** As I observed earlier, the only evidence which the appellant chose to proffer from An Post (in the form of the 20 April 2021 email from Customer Services) confirms attempts at delivery but is entirely silent about *when* attempts were made. It seems obvious to say that much might turn on precisely *when* attempts were made, in the context of a determination of the preliminary issue. For example, and as previously observed, if all attempts were made between 31 December and 2 January, inclusive, then no attempt at delivery would have been made within time.
- 95.** The latter observation may be somewhat beside the point, in circumstances where the central issue is that it was for the appellant and her legal representative(s) alone to prepare for the hearing in respect of an issue in respect of which advance-notice was given. Doing so involved ensuring that any, and all, relevant evidence upon which the appellant wished to make submissions (and, as I have observed, it is a matter of fact that written submissions were prepared on the appellant's behalf, as of 11 May 2021) was presented to the Labour Court.

Refusal to adjourn

- 96.** An error of law, according to the appellant, was for the Labour Court to refuse to grant an adjournment so as to allow the appellant to submit "*further evidence*" from An Post, specifically, evidence to confirm the specific dates on which attempted deliveries were made. In light of the facts and circumstances outlined, I cannot take the view that the Labour Court's decision to decline an adjournment constituted either a breach of s. 44(1) (a) (i), or, for that matter, a breach of fair procedures and constitutional justice.
- 97.** It seems to me that, were this Court to follow the logic of the appellant's submission, it would be to countenance a situation where even though all parties knew, in advance, the issue to be determined at a hearing, having been afforded ample time to produce such evidence as they regarded as relevant in the context of the submissions each side wished to make, neither the Labour Court nor the parties themselves could have any confidence that matters would be determined as a result of that hearing.
- 98.** On the contrary, depending on how the hearing progressed, a party could seek an adjournment in order to produce *further* evidence. If the refusal of such a request was truly to deny the party in question an opportunity to be heard and to present relevant evidence, the logic is that at any adjourned date, a further adjournment request could be made and would also have to be exceeded to.
- 99.** In short, it would be to countenance a situation where the Labour Court's statutory function could be impeded to a material extent, if not entirely frustrated. In my view, neither s.44 (1) (a) (i), nor the principles of natural justice, require what the appellant contends for.

Second-guessed

- 100.** It also seems to me as a matter of first principles that the Labour Court is entitled to organise its own business in the context of fulfilling its statutory role and, subject to compliance with fair procedures principles, can legitimately expect that decisions it makes to grant or refuse adjournments cannot be 'second-guessed' by this Court, to whom the Oireachtas most certainly did *not* entrust the role of decision-maker.
- 101.** As is clear from the Attendance Note exhibited by Mr Duggan (and from the Labour Court's decision which I will presently refer to) the appellant did not provide the Labour Court, either prior to or on the day of the hearing, with any email or other evidence from An Post specifying the dates on which unsuccessful deliveries were in fact attempted.
- 102.** It is common case that this was not a situation where the appellant's legal representative attempted to make such an email available to the Labour Court *during* the hearing, but the latter refused to accept it. On the contrary, it is not disputed Mr Duggan sought an adjournment, so as to allow such documentary evidence to be furnished at a future date.

In the last few days

- 103.** On the foregoing issue, Mr Duggan's 'Attendance Note' records *inter alia* that the appellant received "*in the last few days*" (i.e. *prior* to the hearing before the Labour Court) an email from An Post setting out the dates on which deliveries were attempted. Given that this documentary evidence was, according to her solicitor's attendance note, in the appellant's possession at least a "*few days*" prior to the hearing, it was not explained to the Labour Court why that email was not produced prior to or during the hearing. Nor was any explanation given in the affidavit which was put before his Court. This fortifies me in the view that there was no breach of the appellant's right to be heard and to furnish relevant evidence.

Second email from An Post

- 104.** It is also appropriate to point out that there is nothing to suggest that there was anything which prevented the appellant or her representatives from submitting to the Labour Court what appears to have been a *second* email from An Post, in advance of the hearing, in the event that it was regarded by them as relevant and was something which the appellant sought to rely upon in the context of the appellant's submissions. Again, this underlines that it was not an error of law on the part of the Labour Court to decline to adjourn the matter in these circumstances.

No surprise

- 105.** The hearing of the preliminary issue by the Labour Court, which had been 'flagged' in advance to both sides, certainly does not comprise a situation where the appellant was taken by surprise, in any way, as to the issue which was to be decided. They were 'full square' on notice of the issue and were given the opportunity, consistent with s.44 (1) (a) (i) to be heard on that issue

and to proffer (whether in advance of or at the hearing) such evidence as they considered relevant and wished to rely on when making submissions at the hearing.

A 'second bite at the cherry'

106. In my view, the statutory obligation created by s.44(1)(a)(i) is not to give a 'second bite at the cherry' merely because a party who has already had the opportunity to proffer evidence wants to put in *more* evidence at a future date and wants an adjournment to facilitate this. Nor, in my view, do the principles of natural justice or procedural fairness require this. On the latter topic, it may well be the case that proceedings in the Labour Court operate with less formality than litigation before this court. Despite this difference, the self-same fair procedures and natural justice requirements apply to proceedings in both. It is difficult to conceive of a situation where, during a trial of High Court proceedings in respect of an issue which both parties were on notice of and had the opportunity, which they took, to proffer such documentary evidence and legal submissions as they deemed relevant, that a trial judge would grant an adjournment simply because one side wanted to put in *more* evidence in respect of, not a *new* issue, but the very issue the trial had been convened to determine. If that can be said of proceedings before this Court, I fail to see any error of law on the Labour Court's part in the circumstances of the present case.

No available evidence which the Labour Court refused to hear

107. At the risk of stating the obvious, it also seems appropriate to point out at this juncture that the appellant did not have, for example, a witness from An Post who was made available at the Labour Court hearing and who could speak to when specific delivery attempts were made. Thus, there is simply no question of the Labour Court refusing to hear from such a witness.

108. Similarly, the appellant neither submitted any documentary evidence in advance of or on the day of the hearing, nor had any witness present in the Labour Court, who could speak to (i) when, as a matter of fact, the Labour Court was open/closed during the period from 20 December 2019 onwards, and/or (ii) what, if any, arrangements were in place for registered post to be 'signed for' when the Labour Court was closed. Thus, there is no question of the Labour Court refusing to entertain any such evidence.

The appellant

109. Against the foregoing backdrop, the Labour Court declined to hear evidence from the appellant on the question of what specific dates attempt at delivery was made. In my view this was not an error of law. This is not a situation where the appellant attempted to serve the appeal, personally, on the Labour Court. Thus, she could give no first-hand account of any attempts at delivery by her. Nor is it a situation where the appellant caused a 3rd party to effect personal service at her direction.

110. Self-evidently, the appellant is not an employee of An Post and, thus, she could give no first-hand testimony as to what delivery attempts were or were not made, or when. Nor is she an

employee of the Labour Court or the WRC and, thus, could give no first-hand evidence as to (i) what dates, from 20 December 2019 onwards, the Labour Court office was open / closed, or (ii) what, if any, arrangements were in place for the Labour Court to receive registered post on days when it was closed.

111. As I mentioned earlier, it seems to me that it is for the Labour Court to order its business and to conduct the hearings before it in accordance with its statutory duties and rights and the principles of natural justice. It seems to me that it would be to trespass impermissibly on the Labour Court's remit for this court to take the view that it was illegitimate for the Labour Court to (i) decline the adjournment which was sought in order to proffer further evidence which did not relate to any new matter, but to the self- same issue which the hearing had been convened to determine and which evidence was, as a matter of fact, in the possession of the appellant prior to the hearing, as well as obtainable by her well in advance of same, but which was not furnished to the Labour Court in advance of or during the hearing, the appellant having at all material times, the benefit of legal advice and representation; and (ii) to decline to hear from the appellant, who could give no first-hand testimony on the issue in question.

Attempted deliveries were made "prior to 30 December 2019"

112. From para 9 onwards, Mr Duggan makes averments to the effect that:

- the Labour Court's application of "*exceptional circumstances*" was "*wholly irrational, unreasonable and erred on a point of law*";
- the grounds in the present case are "*clearly exceptional circumstances*";
- the appellant formed the opinion to appeal well within time and gave instructions for same to be completed and sent by registered post;
- he had no information to confirm or understand that the buildings of the Labour Court would not be open on days other than public holidays;
- he believes he was entitled to rely on the State's postal system to ensure that the documentation would be submitted well in advance of 30 December 2019;
- the Labour Court applied "*a wholly inappropriate and burdensome test which did not meet the meaning of the legislation or the spirit of the legislation*";
- the "*confirmation from an Post that four attempted deliveries were made in respect of the documents **clearly meant that these attempted deliveries were made prior to 30th December 2019**, given that the offices of the Labour Court would have been closed on 1 January 2020*". (emphasis added)

113. It is fair to say that much of the foregoing constitutes legal submissions which, in effect, criticise the *substance* of the decision reached. With regard to the factual assertion which I have highlighted above, I cannot agree that it is correct. As I mentioned earlier, the only documentary evidence which the appellant chose to furnish to the Labour Court (namely An Post's email to the appellant of 20 April 2020) went only as far as confirming (i) the registered letter was posted in Boyle at 4:26pm of Friday 20th December; (ii) it was delivered at 11:49 am

on 2nd January 2020; and (iii) there were 4 attempts at delivery, on dates which are not specified, which attempts, according to An Post, failed “*due to the business being closed*”.

114. As a matter of simple logic, the foregoing does not “*clearly mean*” that all attempts at delivery were made *prior to* 30 December 2019. An Post’s email says nothing about specific date(s) *when* delivery was attempted, apart from confirming that a successful attempt at delivery took place on 2 January 2020 (i.e. outside the statutory period). Nor does it clarify whether, for example, multiple attempts were made on a single date and, if so, when that was.

115. It is uncontroversial to say that, having received this email on 20 April 2021, a full month before the hearing date, it was open to the appellant to obtain information about the specific attempts at delivery and to have it before the Labour Court if it was deemed relevant. That was not done, as the Labour Court’s decision accurately records.

The Labour Court’s Decision

116. Given how fundamentally important it is to the appellant’s motion, it is appropriate to quote at some length from the Labour Court’s decision, dated 3 June 2021, which was signed by Mr Tom Geraghty in his capacity as Deputy Chairman (Mr. Geraghty also having been referred to in the Attendance Note, from which I quoted earlier).

117. The decision contains *inter-alia* an identification of the ‘*Preliminary Issue*’; a summary of the ‘*Arguments*’ made on behalf of the appellant and respondent, respectively, as well as the ‘*Deliberation*’ and ‘*Determination*’ of the Labour Court. These appear in the following terms:

“*Preliminary Issue*

The appeal form was received by the Court outside the statutory time limits set out in section 44 (3) of the Workplace Relations Act 2015 (“the 2015 Act”). The Complainant applied for an extension of time in which to bring the appeal in accordance with Rule 2 of the Labour Court Rules 2020. The Court decided to hear the preliminary issue of whether an extension of time can be granted in accordance with section 44 (4) of the 2015 Act. The Court made this decision in the interests of efficiency of process as a determination on this matter could be determinative of the appeal in its entirety.

It is not in dispute that in order to come within the statutory time limit set out in section 44 (2) of the 2015 Act the appeal should have been given to the court on before 30 December 2019.

Both parties provided the court with submissions on this matter.”

- 118.** Before proceeding further, it is appropriate to note that the foregoing evidences the fact that the appellant was very well aware of the issue to be decided, in circumstances where she herself had sought an extension of time.
- 119.** It also illustrates that the Labour Court provided both sides with the opportunity to be heard and, at the risk of stating the obvious, there is no question of the appellant having been constrained by the Labour Court as to what evidence or submissions she proffered.
- 120.** Nor is there any question of the appellant having been afforded inadequate time. Indeed, this is illustrated by the fact that the single email, which was obtained from An Post and proffered to the Labour Court, was received by the appellant on 20 April 2021, i.e. a full month before the hearing of the preliminary issue.
- 121.** By way of a final observation, not only was the Labour Court correct when it stated that “...*the appeal should have been given to the court on before 30 December 2019*”, its use of the phrase “*given to*” reflects, precisely, the words found in s. 44 (3) of the 2015 Act, which I examined earlier in this judgement. The decision then continued as follows:

“Summary of complainant arguments on the preliminary issue

The appeal was sent to the Court by registered post on 20 December 2019. It was marked as received on 2 January 2020.

It was reasonable to assume that a registered letter posted on 20 December would arrive at its destination before 30 December. The An Post last latest day for posting in order for post to arrive before Christmas was 20 December 2019.

The registered letter could not be delivered because, it appears that the offices of the Court were shut on the 23, 24, 27 and 30 December 2019 and, for that reason, delivery could not be effected.

The Complainant’s representative provided the Court with a Certificate of Posting from An Post that confirmed posting of a registered letter to the Labour Court on 20 December 2019 at 5:25.

The Complainant’s representative also provided the Court with a copy of an email from An Post Customer Services dated 21 April 2021, confirming that the appeal was posted from Boyle on 20 December 2019 at 16:26; that there were four subsequent delivery attempts regarding this item and that the failure of these attempts was due to the business being closed; the item was delivered on 2 January 2020 at 11:49. Proof of delivery on 2 January 2020 was also attached.

It appears that the offices of the Court were closed on 23, 24, 27 and 30 December, days which were not public holidays.

The Complainant did not expect the Court offices would be closed on days other than public holidays over the Christmas period and no notice was received or published to that effect. It was reasonable to expect that the Court would have been open to receive registered post on those days, which were not public holidays."

122. I pause at this point simply to state that there is no question of the Labour Court making any error in relation to the foregoing summary of the appellant's case and the evidence which was proffered to support it. The decision then proceeded as follows:

"Summary of respondent arguments on the preliminary issue

No exceptional circumstances arise. The Christmas period occurs every year and every year An Post issues notices and advertisements warning customers of delays due to high volumes. The Complainant and her representatives should have taken appropriate steps to ensure delivery in time.

No alternative modes of delivery appear to have been considered.

It is necessary for the Complainant to establish that there were exceptional circumstances and that those circumstances prevented the appeal being delivered in time.

The Court set out what is required to establish that circumstances are exceptional in the case of Gaelscoil Thulach na nOg v. Joyce Fitzimons-Markey EET034. The complainant has not established exceptional circumstances, nor, if there were such circumstances, that they prevented the appeal being filed in the specified time frame."

123. Earlier in this judgement, I made reference to the Labour Court's 17 October 2003 decision in the *Gaelscoil* case and it is not in dispute that it sets out the approach to "exceptional circumstances" which is routinely adopted by the Labour Court. Among other things, the Labour Court held that to be exceptional, a circumstance cannot be one which is "regularly or routinely or normally encountered" and, the Labour Court pointed out *inter alia* that:

*"The term exceptional is an ordinary familiar English adjective and not a term of art. It describes **a circumstance which is such as to form an exception, which is out of the ordinary course or unusual or special or uncommon. To be exceptional a circumstance need not be unique or unprecedented or very rare; but it cannot be one which is regular or routinely or normally encountered** (see *R v. Kelly* [1999] 2 All E.R. 13 at 20 per Lord Bingham C.J.)." (emphasis added)*

- 124.** It is appropriate to repeat at this juncture that there is no evidence before this court to the effect that the Labour Court took a different approach to the question of whether exceptional circumstances had been established by the appellant. In other words, the evidence before this court establishes that the Labour Court took the approach outlined in the *Gaelscoil* case and, in my view, there was no error of law in so doing.
- 125.** It also seems clear that the appellant accepted that the principles emerging from *Gaelscoil* represented the correct approach for the Labour Court to have taken to the issue. This is clear from the submission made on behalf of the appellant to the effect that the closure of the Labour Court offices other than on public holidays was “*not regular, routinely or normally encountered*” and that this constituted “*a circumstance which is out of the ordinary course, unusual, special or uncommon.*” The foregoing submissions are recorded in the ‘Attendance Note’ and reflect, *verbatim*, the Labour Court’s analysis in *Gaelscoil*.
- 126.** With regard to the foregoing submissions, it should be pointed out that no evidence was, in fact, put before the Labour Court as to *when* the offices were open or closed from 20 December onwards. Thus, the evidential basis for the submission was simply lacking. It will also be recalled that no *enquiries* had been made at the time the registered letter was posted (or, it seems clear, at any other time) to establish when the Labour Court office would be open or closed from Friday evening 20th December onwards. Having made those observations, it is appropriate to continue looking at the decision which having set out s. 44 ss. (3) and (4), continued as follows:

“Deliberation

The Complainant’s representative is not contending that the failure to give the appeal notice to the Labour Court within the 42-day time limit arises because of any delay on the part of the postal service. Rather, the contention is that the appeal notice could not have been delivered in time because the Court offices were closed on non-public holidays without notice and because there were no arrangements in place for the delivery of post during that time.

The email from An Post does not specify the dates of the attempted deliveries. The Complainant’s submission on the matter referred to attempted deliveries on 23, 24, 27 and 30 December. In the course of the hearing, this was clarified and the Complainant’s representative said that the Complainant was informed by An Post that attempts to deliver were made on 23, 24, 27 and 31 December 2019. No documentary evidence was provided to the Court to substantiate the claim in respect of any particular dates. The Complainant’s representative stated to the Court that his client had contacted An Post and that they had provided confirmation of attempted delivery on the dates as outlined. It was accepted by the Complainant that the date of 31 December was outside statutory

time limit and the Complainant confined the assertion to three, rather than four, relevant attempts at delivery that failed.

No evidence was furnished by the Complainant and/or her representative from the operators of the Court building to establish whether the building was open or closed on the days in question and, if closed, what facilities, if any, might have been in place for the receipt or non-receipt of post.

When this was raised with the Complainant's representative by the Court, the representative requested an adjournment to allow him an opportunity to obtain this evidence. In circumstances where the party was legally represented; the evidence in question was easily obtained; no reason was given as to why it was not obtained before the hearing and; having regard to the fact that the Complainant had been allowed to make a supplementary submission on the preliminary point, the Court refused the application.

The burden of proof in establishing the existence of exceptional circumstances rests with the Appellant in this case. To discharge that burden the Respondent [sic] must present clear and cogent evidence to support the contention that exceptional circumstances within the meaning of Section 44 (4) of the Act of 2015 existed and that those circumstances acted so as to prevent the applicant from lodging their appeal in time.

In the absence of documentary evidence from the operators of the building confirming the closure of the building, the Court is of the view that the complainant has not met the burden of proof required.

The failure on the part of the Complainant and/or her representative to provide any such related information leaves the Court in the position where it is being asked to rely solely on statements by An Post that the office was closed, with no specification as to the dates or time, in an email dated April 2021, some sixteen months after the event and the assertions of the Complainant. In the view of the Court, the Complainant has failed to come up to the necessary standard of proof on the facts upon which the assertion of exceptional circumstances rests.

The Court therefore cannot find that time should be extended for the making of the within appeal.

Determination

For the reasons set out, the Court finds that the within appeal is statute-barred and therefore must fail. The decision of the Adjudication Officer is affirmed. The Court so determines."

127. Inasmuch as the basis for the application was based on postal delay, I ask, purely as an aside, whether it could be said that postal delay over the Christmas/New Year period is truly “exceptional” in the sense of being rare? It seems to me that it could not reasonably be said that postal delay in the Christmas/New Year period is “*out of the ordinary course, unusual, special or uncommon.*” Rather, postal delays and difficulties over the Christmas and New Year period seem to me to be, in objective terms, relatively commonplace, not particularly unusual and, thus, reasonably foreseeable.

128. It seemed appropriate to make the foregoing comments in circumstances where para. “f.” of the “*grounds*” relied upon by the appellant in the motion before this Court begins: “*The Labour Court erred in its determination that the delay in the appeal documentation being delivered was due to An Post.*” It should be stated, however, that the foregoing does not appear to me to be an accurate characterisation of the Labour Court’s determination. Rather, having considered the evidence before it, the Labour Court found, on the facts, that the appellant had not demonstrated exceptional circumstances, and in so doing the Labour Court did not apply an incorrect test.

129. The case which the appellant ran was that the appeal notice could not have been delivered within time because the Labour Court offices were closed on non-public holidays, without notice, and because there were no arrangements in place for the delivery of post during that time. With regard to the foregoing, four observations seem to me to be necessary, as follows:

- (1) Part of the evidence which was before the Tribunal was that no enquiry was made by or on behalf of the appellant to establish what days the Labour Court office would be open/closed during the Christmas/New Year period. The ‘Attendance Note’ exhibited on behalf of the appellant confirms this.
- (2) Furthermore, what was not before the Labour Court was any evidence of what days the Labour Court office was, in fact, closed or open during the Christmas/New Year period (specifically, from 20 December 2019 to 2 January 2020). The Labour Court’s decision accurately records this.
- (3) Additionally, what the appellant did not put to the Labour Court was evidence in relation to what arrangements, if any, might have been in place for the receipt, or not, of post. Again, the Labour Court’s decision accurately records this.
- (4) Moreover, the appellant did not proffer any documentary or other evidence from An Post in respect of attempts at delivery on any specific dates. Once more, this is accurately recorded in the Labour Court’s decision.

- 130.** The foregoing wholly undermines, in my view, the submission made on behalf of the appellant to the effect that “*The Labour Court erred in law in discounting the fact that attempted deliveries were made within time*”. Put simply, the appellant did not furnish evidence which established that delivery attempts were made *within time* - the only evidence from An Post as to a specific date when delivery was attempted being the evidence of the successful delivery which took place on 2 January 2020 (i.e. *out of time*).
- 131.** The foregoing was the evidential landscape in which the Tribunal reached its decision. The decision discloses no error of law. Moreover, the facts as found did not lack evidence to support them. Nor can it be said that any inferences drawn were those which no reasonable decision-making body could draw.
- 132.** The Labour Court did not misunderstand or misinterpret the law, nor did it make a mistake in reasoning or come to a decision for which there was no support. Rather, this is a situation where the Labour Court came to a decision in the context of a correct interpretation of the law and in the context of findings which relate directly to the evidence which was before the Tribunal. In my view it was a decision which was reached lawfully.
- 133.** The appellant objects to that decision, but it seems to me that the present motion is a vehicle for an attack on conclusions which the Labour Court was entitled to come to, having regard to the evidence before it and having correctly interpreted and applied s. 44 (4) of the 2015 Act.
- 134.** It matters not whether this court might have come to a different view or, for that matter, might have acceded to an adjournment request, had it been the decision-maker. The fundamentally important point is that this Court was *not* tasked by the Oireachtas to determine the matter and, in the manner explained in the authorities to which I referred earlier, this court’s function is a limited one in a point of law appeal. As Mr Justice Humphreys made clear in *Transdev Ireland Ltd v. Michael Caplis* [2020] IEHC 403:

“15. The decision maker’s assessment of the evidence here is perhaps open to legitimate disagreement, but one cannot say it is outside the bounds of what was open to the Labour Court. It is always possible to pick apart a decision and to say one thing or another has not been mentioned. One could do that just as easily with a High Court decision as with a decision of the Labour Court or indeed of anybody else. But looking in the round, one cannot say that the process of rational decision-making is so lacking as to make the decision unlawful or, perhaps to be more precise, to amount to a point of law which would permit me to allow the appeal.

...

19. The issue is not whether I am minded to agree with the Labour Court, which as it happens, I am and particularly, not that it matters... Rather, the issue for me is whether the present appeals from the Labour Court determinations should be allowed on a point

of law. No point of law warranting the allowing of the appeals has been made out so I will dismiss both appeals.”

- 135.** The foregoing comments apply equally in the present case. The decision made by the Labour Court was not ‘outside the bounds’ of what was open to it. I am unable to identify an error, be that in fact or in law, with regard to the Labour Court’s interpretation of the meaning of “*exceptional circumstances*” as those words appear in s. 44 (4) of the 2015 Act.
- 136.** In my view, the appellant’s reliance on this Court’s 23 October 1990 decision (Morris J.) in *Poole v. O’Sullivan* cannot avail her. The facts in that case concerned a plaintiff who suffered an accident and sustained personal injuries on 8 July 1987. On 4 July 1990 the plaintiff’s plenary summons was transmitted to the agents of the solicitors acting for the plaintiff in order that it could be issued in the High Court Central Office. It was issued on 9 July 1990. The then three-year period as provided by s. 11 (2) (b) of the Statute of limitations 1957 expired 2 days earlier on Saturday, 7 July 1990. It was in these circumstances that Mr Justice Morris held that because the central office was not open, the relevant period would be construed as ending not on that day, but at the expiration of the next day upon which the central office was open.
- 137.** The decision in *Poole* involves a wholly different legislative and factual context. In addition to that case being concerned with when a plenary summons was issued, as opposed to when an appeal notice was “*given to*” the Labour Court, there was no dispute in *Poole* as to when the central office was and was not open. By contrast, and as the Labour Court correctly observed in its decision, the appellant did not furnish any evidence to establish (i) when the relevant building was open or closed; (ii) the specific date or dates when delivery attempts were made; and (iii) what arrangements if any were in place for the receipt of during the period in question; and, in addition, the evidence before the Labour Court was that (iv) no enquiries were made by the appellant.
- 138.** Nor does this court’s decision *Figueredo v. McKiernan* [2008] IEHC 368 offer support in respect of the appellant’s motion. In that case the defendant brought a motion seeking to dismiss the plaintiff’s claim on the grounds that it was statute-barred, having regard to the provisions of the Statute of Limitations, as amended, and the Civil Liability and Courts Act of 2004. The relevant limitation period was one of 2 years from the date of the accident which, in that case, was said to be 4 December 2004. To avoid being statute-barred, the plaintiff’s application had to have been made, under s. 11 of the Personal Injuries Assessment Board (“PIAB”) Act 2003 (“the 2003 Act”), by 30 March 2007. The plaintiff’s application was confirmed as having been received by the PIAB on 2 April 2007; an authorisation to proceed issued on 4 July 2007; and the Personal Injuries Summons issued on 5 December 2007.
- 139.** The plaintiff contended that, having complied with the requirements of the PIAB Rules 2004 in relation to the manner of making an application under s. 11 of the 2003 Act, by posting the application by pre-paid registered post to the PIAB on 29 March 2007, it would have been received by the PIAB in the ordinary course of post on 29 March 2007, i.e. within the limitation period.

140. It should be noted that s. 11 of the 2003 Act begins by stating "(1) A claimant ***shall make an application*** under this section ***to*** the Board...". The foregoing is to be contrasted with the obligation on the appellant, *per* s. 44(2) of the 2015 Act to ensure that notice of her appeal "***shall be given to the Labour Court not later than 42 days from the date of the decision concerned***". In my view, this is a material distinction, with the focus of s. 11 being on the *making of an application to the PIAB*, but the focus of s. 44(2) being to ensure the appeal is *given to the Labour Court*. Furthermore, the PIAB Rules of 2004, (S.I. No. 2019 of 2004), specify *inter-alia* that: "(1) An application under section 11 of the act shall – (a) be made in writing or by electronic mail..." It seems to me that the *Figueredo* decision, concerns a very different legislative context as well as markedly different factual circumstances.

141. The defendant in *Figueredo* contended that the effect of sub-rule 3 of Rule 3 of the PIAB Rules 2004, was that the date of making the application under s. 11 of the 2003 Act was the date on which it was acknowledged in writing as having been received by the PIAB. Dunne J. observed, *inter alia*, that if the defendant's contention was correct, a plaintiff could be statute-barred in circumstances entirely outside of their control and this would result in significant hardship. The learned judge referred to the decision in *Poole*, noting that Morris J. accepted the reasoning of the English Court of Appeal in *Pritam Kaur v. S. Russell & Sons Ltd* [1973] Q.B. 336, wherein it was held that where an act of Parliament prescribed a period for doing an act which could only be completed if the court offices were open, the court could construe the period, in a case where it expired on a day when the court offices were not open, as being extended to the next day on which they were open.

142. By contrast, the hearing before the Labour Court was one in which the appellant proffered no evidence to establish when the relevant building was open or closed; or what arrangements, if any, were in place for the receipt of post during the period in question. Moreover, the evidence before the Labour Court was that no enquiry was ever made in that regard. Furthermore, evidence was not given to establish the specific date or dates when delivery attempts were made. Thus, the factual circumstances are entirely different to those in *Figueredo*, in my view. In *Figueredo*, there was no doubt about when the PIAB office was open or closed. Moreover, there was no dispute in *Figueredo* that in the ordinary course of posting the s. 11 application would have been received by the PIAB on time (i.e. on 30 March).

143. The foregoing is not something which can be said in relation to the hearing of the preliminary issue before the Labour Court. There was very clearly a dispute between the parties as to when registered post sent on the evening of Friday 20th December could reasonably be expected to be received, in the context of *inter-alia* Christmas postal delays *et cetera*. A further point of distinction seems to me to flow from the provisions of s. 25 of the Interpretation Act 2005 ("the 2005 Act") to which the learned judge referred to in *Figueredo* and which states the following:

"25. Where an enactment authorises or requires a document to be served by post, by using the word 'serve', 'give', 'deliver', 'send' or any other word or expression, the service of a document may be effected by properly addressing, pre-paying (where required) and posting a letter containing the document, and in that case the service of

the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

144. Having quoted the foregoing section *verbatim*, Ms Justice Dunne held that there was nothing in the papers before her to indicate that the application under s.11 in that case was not delivered in the ordinary course of post. It will be recalled, however, that s.44 does *not* authorise or require service of an appeal by post. Rather, whilst silent on the mode(s) by which it is to be achieved, the obligation resting on an appellant, *per* s.44 is to ensure that their appeal is *given* to the Labour Court on time.

145. This fortifies me in the view that reliance on *Figueredo* offers no assistance to the appellant in this point of law appeal. This is particularly so, in circumstances where Ms Justice Dunne’s decision explicitly relied on the Interpretation Act in reaching the finding that the requisite application to the PIAB was made “... *by post, in circumstances where in the ordinary course of post, the application would have been in time*” and the learned judge came to the view that the plaintiff’s claim was not statute-barred.

This Court’s decision summarised

146. In essence, the Labour Court correctly applied the law and, in so doing, held that the appellant had failed to meet the necessary standard of proof, having regard to the facts upon which the assertion of “*exceptional circumstances*” was made. This was no laying down of the *wrong* test by the Labour Court, but an application of the *right* test, which test the applicant failed to meet in the Labour Court’s view, which was lawfully reached on the evidence which was before it.

147. I regard myself as bound to accept the facts as found by the Labour Court in circumstances where it made no error. I say this having examined in some detail in this judgment the evidence which was before the Labour Court and the basis upon which it made its decision, which discloses no error. Nor is there, for example, any question of the Labour Court relying on inadmissible evidence as a basis for the decision. Similarly, there is no question of the Labour Court having refused to hear probative and admissible evidence.

148. It is appropriate to conclude this judgement by making reference to the “*grounds*” (*a. to i*, inclusive) upon which the appellant brought her appeal.

149. Ground “*a.*” in the motion pleads that: “*the Labour Court erred in fact and in law in refusing to accede to the appellant’s application to extend the time for lodging her appeal from the decision of the workplace relations commission dated 19 November 2019.*” For the reasons set out in this judgement, the appellant has not established the foregoing which, in truth, is a plea which, although very appropriate to include, goes no further than making an assertion that there was an error in fact and in law.

150. Ground “*b.*” pleads that: “*The Appellant had 42 days from the decision of the Workplace Relations Commission dated 19 November 2019 to lodge an appeal with the Labour Court.*” The foregoing is not in dispute.

- 151.** Ground "c." pleads that: "*The Appellant sent her appeal by registered post on the 20 December 2019*" and the foregoing was accepted by the Labour Court, in light of the evidence proffered on behalf of the appellant.
- 152.** Ground "d." pleads that: "*The appeal documentation was not received by the Labour Court until the 2 January 2020.*" The foregoing has never been in dispute. Indeed, it was the appellant who applied to the Labour Court for an extension of time by reason of the fact that the appeal was received by the Labour Court on 2 January 2020 (i.e. out of time).
- 153.** Ground "e." pleads that: "*An Post attempted delivery of the appeal documentation on four occasions namely 23rd, 24th, 30th and 31 December, 2019. However, the documentation could not be delivered as the offices of the Labour Court were closed on the 23rd, 24th, 27th, 30th and 31st December 2019 despite the fact these days are not public holidays and no public notification of the offices being closed was available.*" The appellant did not furnish the Labour Court with evidence which established the foregoing. As the Labour Court's decision correctly records, the appellant did not proffer evidence which established (i) the specific date or dates when four delivery attempts were made; (ii) when, in fact, the Labour Court office was open or closed from 20 December 2019 to 2 January 2020; or (iii) what arrangements, if any, were in place for the receipt of post during the said period (including, in particular, arrangements to for post to be signed for during such days as the Labour Court office was closed). Nor, it might be pointed out, was evidence put before this Court in the context of the present motion which established any of (i), (ii) or (iii).
- 154.** Ground "f." pleads that: "*The Labour Court erred in its determination that the delay in the appeal documentation being delivered was due to An Post. However, the available evidence was that An Post made four attempted deliveries prior to 2 January 2019.*" Earlier in this judgement I commented on ground "f." which is not an accurate characterisation of the Labour Court's determination, in that the Labour Court did not determine that the delay in delivering the appeal on time was "*due to An Post*". On the contrary, the Labour Court's Deliberation contains, *inter alia*, the following: "*The Complainant's representative is not contending that the failure to give the appeal notice to the Labour Court within the 42-day time limit arises because of any delay on the part of the postal service*". Insofar as ground "f." refers to "*the available evidence*", it is perfectly true to say that the email from An Post which the appellant obtained on 20 April 2020 established that there were four attempts at delivery. However, the difficulty which the Labour Court had, as is made clear in its decision, is that the said email (being the only one furnished to it) does not specify the *dates* of the attempted deliveries. A central point is that the appellant made no other email from An Post *available* to the Labour Court, even though it appears there was one received by the appellant a "*few days*" before the hearing. Nor did the appellant furnish evidence to establish when the Labour Court office was closed or open during the relevant period; and what arrangements were, or were not, in place as regards receiving post (in response to which, as the decision records: "*... the representative requested an adjournment to allow him an opportunity to obtain this evidence*", which application was declined for stated reasons which this Court cannot 'second guess').

- 155.** Ground "g." pleads that: "*the Labour Court erred in refusing to hear evidence from An Post as to the attempted delivery of the appeal documents within the requisite time period.*" The appellant did not have any witness from An Post present at the hearing, from whom the Labour Court refused to hear evidence. Nor did the appellant proffer any email or other documentary evidence from An Post (apart from the 20 April 2020 email the contents of which the Labour Court considered). Insofar as ground "g." asserts that the refusal of an adjournment was a refusal to hear evidence from An Post, I am satisfied, for the reasons set out in this judgement, that the refusal of an adjournment was not an error in law.
- 156.** Ground "h." pleads that: "*The Labour Court erred in applying an unrealistic standard and burden of evidence for the appellant to discharge.*" This has not been established by the appellant. On the contrary, the evidence allows me to hold that the Labour Court properly applied the relevant test, consistent with the approach in *Gaelscoil*.
- 157.** Ground "i." pleads that: "*The Labour Court erred in law in applying the provisions of section 44 (4) of the Workplace Relations Commission Act 2015 in that they set the bar too high and failed to apply an appropriate standard to the test to be achieved for an extension of time.*" This has not been established. In truth, this plea seems to me to reflect what is at the heart of the appellant's claim, namely, dissatisfaction with the substance or merits of a decision which was lawfully made by the Labour Court, on the basis of the evidence before it.
- 158.** In essence, the decision made by the Labour Court was one which hinged on the facts which were / were not established, based on evidence which was put before that Court. It does not seem to me that the motion genuinely discloses a point of law to ground the application. Even if I am entirely wrong in that view, I am satisfied that there was no error of fact or law made by the Labour Court.
- 159.** By way of final comments, nothing in this judgement is intended to be a criticism of the appellant or her legal representatives. One might well have considerable sympathy for someone who, having formed an intention to appeal prior to the expiry of the relevant statutory period, assumed that that by sending a letter by registered post no issue was likely to arise with respect to service. However, what s.44 (2) requires is not met by forming the intention to appeal within a particular period. Nor does deciding to serve an appeal by registered post within the relevant period necessarily guarantee compliance with the section (which focuses on the appeal being *given to* the Labour Court, as opposed to being *sent by* the would-be appellant). Similarly, regardless of how genuinely one might believe that there were "*exceptional circumstances*" justifying an extension of time, the Labour Court, as decision-maker, is required to make decisions on the basis of such evidence as was before it. The Labour Court discharged its role lawfully in the present case. Not being the decision-maker, this Court has no jurisdiction to hear matters afresh and to supplant a lawfully-made decision by the Labour Court with this Court's view.

160. For the reasons set out in this judgment, I must dismiss the appellant’s motion in circumstances where it has not been established that the Labour Court erred in law and, thus, this court has no basis to disturb the determination made by the Labour Court. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”* The respondent has been wholly successful and my preliminary view is that the ‘normal’ rule that ‘costs’ should ‘follow the event’ applies. In default of agreement between the parties on that or any issue, short written submissions should be filed in the Central Office within 14 days of the start of Michaelmas Term (3 October 2022).