THE COURT OF APPEAL

CIVIL

[2024 No 116]
Neutral Citation Number [2024] IECA 263

Costello J.

BETWEEN

DEIRDRE MORGAN

APPELLANT

AND

THE LABOUR COURT

RESPONDENT

AND

KILDARE AND WICKLOW EDUCATION AND TRAINING BOARD
TUSLA
HEALTH AND SAFETY AUTHORITY
DEPARTMENT OF JUSTICE AND EQUALITY
MINISTER FOR EDUCATION AND SKILLS
IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTIES

JUDGMENT (*Ex tempore*) of Ms. Justice Costello delivered on the 5th day of July 2024

1. One judge of the Court of Appeal, sitting alone, may hear and determine an application to dismiss an appeal on the basis that the appeal is an abuse of process, frivolous or vexatious, or without substance or foundation: that is provided in s.111 of the Courts and Civil Law (Miscellaneous Provisions) Act 2023, which amends s.7A of the Courts (Supplemental Provisions) Act 1961. I have been nominated by the President of the Court of Appeal for that purpose and I am approaching this motion on foot of that jurisdiction.

2. The application before me is an order pursuant to O.19, r.28 of the Rules of the Superior Courts, striking out the appellant's appeal for failure to disclose any reasonable grounds of appeal and/or for being frivolous or vexatious and/or for having no reasonable chance of success. Further, in the alternative, an order pursuant to O.124, r.1 of the Rules of the Superior Courts setting aside the appellant's appeal as being irregular in form, as the appellant is subject to an *Isaac Wunder* order, which requires that she obtain leave of the High Court to bring this appeal and which she has not sought or obtained. Further, or in the alternative, an order pursuant to the inherent jurisdiction of this honourable Court striking out the appellant's appeal as being an abuse of process, and finally, an order pursuant to the inherent jurisdiction of this honourable Court extending the terms of the existing *Isaac Wunder* order. That latter relief was not pursued because I pointed out to counsel that that would require a panel of three judges, so I am considering merely the first three reliefs sought in the notice of motion. They come within the scope of s.111, and accordingly, I have considered, in accordance with the section, whether it is in the interests of justice that the matter be heard and determined by a division of three judges, rather than me, sitting alone, and I have concluded that it is not, and accordingly, I have heard the application myself and I will give my decision on the motion.

3. Ms. Morgan is the subject of an *Isaac Wunder* order made by the High Court in the following terms on 28 June 2022, the relevant parts of the order as follows:

> *"It is ordered that, pursuant to the Court's inherent jurisdiction, the appellant, Ms Morgan, be restrained from instituting any further proceedings in whatever Court or forum, including the Workplace Relations Commission, or from making any complaints to the Workplace Relations Commission against the Minister for Education and Skills, concerning any matter relating to the appellant's term of employment with Kildare and Wicklow Education and Training Board, including*

> *any matter relating to the suspension or termination of her contract of employment and her pension and gratuity entitlements without prior leave of a judge of the High Court (the Minister and the Board) having been put on notice of any such application for leave."*

4. Ms. Morgan's various statutory appeals and motions and her application for leave to seek judicial review were heard and determined in the High Court in 2022. Ms. Morgan appealed the judgments and orders to the Court of Appeal, save one matter, which could not be appealed directly to the Court of Appeal. In relation to the appeals before the Court of Appeal, they were heard in July 2023, and judgment is awaited. Prior to the hearing of these appeals, Ms. Morgan brought an application to adduce new evidence for the purposes of those appeals, and on 24 February 2023, I heard that application and I refused it.

5. My order of 24 February 2023 was that "*it is ordered that the application to adduce further evidence, as set out in the said affidavit of the appellant filed on 7 February 2023, be refused*".

6. In relation to the matter in which no appeal lay to this Court, Ms. Morgan applied for leave to appeal directly to the Supreme Court, and the Supreme Court determination refused leave on 20 April 2023. Ms. Morgan then applied, under the exceptional jurisdiction, referred to as the *Greendale* jurisdiction, to the Supreme Court, to correct an error in its determination. By a ruling delivered by Baker J. on behalf of the Court on 9 January 2024, this application was refused. At para. 14 of the ruling, Baker J. held:

> *"Even if the alleged errors were made, these were errors of fact not of law, and even were they were to be treated as errors of law, no argument has been made by the applicant that would suggest that the errors were such as to raise a point of general legal public importance. Her argument seeking to revisit the Determination is premised on general propositions regarding the administration*

of justice and the protection of high-level rights. In order that the exceptionality threshold be met to justify revising an order of this Court, an applicant must contend for more than general and high-level propositions, but must show that the grounds of general legal importance arise in regard to the interpretation or application of those principles. No such grounds are shown in this application. The matters sought to be raised are peculiar to the facts of the case, and no argument is advanced that these factual matters are, or could be, of general legal importance. Still less, could one arise now and at this remove from the primary decision the subject of that appeal."

7. Thus, as things stand, there is no appeal before the Supreme Court and there is no application for leave to appeal to that Court.

8. In these proceedings [2020 No. 123 MCA], Ms. Morgan applied to the High Court for leave to apply for an order pursuant to s. 97(2)(b) of the Employment Equality Act 1998, as she was required to do under the terms of the *Isaac Wunder* order which I have read out. Leave was refused by Phelan J. in the High Court on 1 March 2023. For some reason, that order was not perfected until 15 April 2024, and on 13 May 2024, Ms. Morgan appealed to this Court against the refusal to grant her the reliefs sought. Her notice of appeal is based upon a finding made by Mr. Gary O'Doherty of the Equality Tribunal at a date prior to 2008, which Ms. Morgan asserts was binding and final and which the High Court and the Supreme Court have failed properly to apply or to follow. She contends that that the courts have unlawfully reopened matters finally determined by Mr. O'Doherty.

9. Her grounds of appeal to this Court read as follows:

"The error of repeated engagement in/with reopening of a final, binding Equality Tribunal decision by the following judges [judges of High Court and Supreme Court].

The error of the Supreme Court judges in not dealing with the gravamen of the Labour Court or High Court reopening, as applied for by me, in my application form, and its descent into uncertainty in law and litigation without an end.

The error of the Supreme Court in not dealing with the gravamen of my motion calling for it to use its Greendale jurisdiction to vary its written determination so that the Equality Tribunal's final conclusion in 2012 can no longer be called into question 'I want the Court of Appeal to draw the inference that the above errors can be fixed by giving me consent to disclose the information under s. 97 of the Employment Equality Act to the Supreme Court that the High Court refuses me'."

Ground two relates to what are said to be errors of reopening the Equality Tribunal decision which pertain to vicarious liability for sexual harassment, which includes child sexual harassment and worse, discrimination on grounds of sex and supremacy of European law.

10. Ms. Morgan says that the wrongful "*reopening*" of Mr. O'Doherty's finding by the Labour Court was repeated by the High Court and the Supreme Court. The finding pertains to vicarious liability for sexual harassment that includes "*child sexual harassment and worse*". Her notice of appeal was delivered at a time when her application for leave to appeal to the Supreme Court had concluded and it is therefore most curious that the purpose which she seeks to achieve by her appeal to the Court of Appeal is to rectify an error effected, according to Ms. Morgan, by the Supreme Court.

11. The notice of appeal does not address the reasons given by the High Court for refusing her leave to bring the intended proceedings or why she says the judge erred in so refusing.

12. It is also disquieting that when Ms. Morgan explained why she wanted the documents, she stated, in an email, on 12 January 2023 to Ms. Karen McNamara in the Chief State Solicitor's Office:

> "*Based on s. 97 of the Employment Act, I would need the consent of Kildare and Wicklow Education and Training Board to provide you with the list you request. My application is not limited to an exact Court case. I seek consent to disclose information to as many persons and bodies as may be in Ireland or abroad with due sensitivity for the children involved. This is in order to address the full range of issues pertaining to the child sexual abuse and sexual harassment. I understand you act for the Minister for Education and the Minister for Justice and Equality in these matters, I copied the Minister for Child Welfare and Responsibility because child sexual abuse in State-run schools is sadly an issue here."*

The reference to a range of issues and a range of bodies being not limited to one exact court case, and if needs be, to sending it beyond Ireland, displays a concerning understanding of the use of documents and the scope of s.97 of the Act of 1998.

13. In a carefully reasoned 20-page judgment, Phelan J. set out why she would not grant Ms. Morgan leave. At para. 36, she stated that she was satisfied that the order of the High Court made on 28 June 2022 meant that the High Court was *functus officio* and given that the High Court was now *functus officio*, the question of leave to adduce new evidence is squarely a matter for the appellate court. At para. 38 she said:

> *"The effect of the final orders is to bring to an end the proceedings before the High Court. The High Court cannot at this stage properly reopen proceedings which have been finally determined. Even if there was no* Isaac Wunder Order *in place, I could not entertain an application of the type contemplated in respect of proceedings which have concluded. On the basis that there is an*

> Isaac Wunder Order, *I am satisfied that I should not grant leave to the Appellant to issue her intended Notice of Motion. I am satisfied that the High Court has no further function in relation to the Appellant's proceedings, and for this reason her intended application should not be entertained by the High Court and cannot succeed."*

At para. 42, the judge said:

> *"Quite apart from my view that this court is* functus officio *and my reading of s. 97 of the 1998 Act as not operating to preclude the Appellant from adducing relevant information in the proceedings under Part VII of the 1998 Act, I also find it impossible to accept as* bona fide *or well-founded the Appellant's application. I note the motion dated 15th July 2022 is vague, unclear and imprecise as to what document is in question. This is significant insofar as it is relevant to the Appellant's* bona fides *in bringing this application late and where the proceedings have already been determined. In her application as presented the Appellant does not identify what information she would wish to disclose and has been prevented from disclosing because of the terms of s. 97 of the 1998 Act. Greater clarity would be expected if this were a* bona fide *attempt to introduce relevant information."*

At para. 45:

> *"The within proceedings have no connection to the 2012 or 2009 proceedings but concern an appeal of a Labour Court decision made on 1st April 2020. It appears that whatever information the Appellant seeks to adduce was not before the Labour Court. The [Board and the Minister] properly stress that the Labour Court decision under challenge in these proceedings could only have been impugned by reference to the evidence and materials that were before*

that decision maker. As Ferriter J. found in giving an ex tempore *judgment in the Appellant's appeal in March 2022:*

> *'it is a well-established principle that one can only rely in an appeal on matters which were before the decision making body from the appeal is sought to be brought'."*

At para. 49:

> *"Against the background of the appellant's litigation, which had been more fully set out in the judgment delivered by Ferriter J. on the 1st of June 2022, I am satisfied that the Appellant has engaged in a practice of bringing further actions to determine issues which have already been determined by a court of competent jurisdiction even where it is obvious that an action cannot succeed, or that the action would lead to no possible good. Given that the High Court is now* functus officio *in relation to these proceedings, it is my view that no reasonable person could reasonably expect to obtain the reliefs sought. The timing of the within application after judgments had been delivered is most consistent with the conclusion that the within application is agitated for the improper purpose of preventing the finalisation of proceedings and not for the purpose of the assertion of legitimate interests. When the timing is considered together with the evidence of the Appellant's prior practice as set out in the judgment herein delivered in June 2022, which practice has been demonstrated as being to repeatedly and unsuccessfully seek to re-open issues already determined, I am reinforced in this conclusion.*

50. I am satisfied the intended application in this case is the type of further proceedings which the Isaac Wunder Order *made by Ferriter J. was designed to prevent. The contemplated application is frivolous and vexatious, with no reasonable prospect of success. I do not consider the Appellant to have a proper litigation purpose in seeking to pursue the motion in the High Court."*

Conclusion

14. There are many reasons why the appellant's application for leave should not be entertained. Prime among them is the fact that the High Court is *functus officio*. The appeal which was before the High Court in these proceedings concerned an appeal on a point of law against a Labour Court decision whereby the High Court reviewed the evidence and material that was before the decision-maker when making its decision. The High Court afforded the appellant an opportunity to move a motion to adduce certain evidence, but she declined to do so. She cannot properly now seek to relitigate the same motion.

15. In any event, evidence that the appellant sought to introduce before an Equality Officer in 2012, or seeks to introduce now in relation to a complaint, being the 2009 complaint, which was finally determined more than a decade ago, is wholly irrelevant to the appeal on a point of law in respect of a decision of another administrative body which is the subject of these proceedings. Orders made by Ferriter J. dismissing these proceedings are now under appeal and the appellant has issued a similar motion before the Court of Appeal to that which she seeks leave to issue in the High Court. In circumstances where the within proceedings had concluded in the High Court but appeals are pending in the Court of Appeal any question as to the leave to admit further or new evidence falls properly to be determined by this court and is not a matter for the High Court on an application under s.97(2)(b).

16. I am of the view that the High Court was entirely correct in its decision, and thus, this appeal is bound to fail and is an abuse of process for the following reasons:

(a) The application to adduce new evidence for the purpose of the then pending appeal was heard by me, and refused, in February 2023 on the basis that the question of admitting this evidence formed part of the appeal then pending for hearing in the Court of Appeal. It is the same evidence which is sought to be adduced now. In moving this application, Ms. Morgan is seeking to relitigate a point which has already been decided against her.

(b) The appeal has been heard and judgment is awaited, therefore, the issue will be resolved finally when the Court delivers its judgment. If either I or the High Court, were to grant the relief which Ms. Morgan seeks, it would cut directly across the decision pending from the Court of Appeal and could only lead to litigation confusion. Therefore, this application is not being sought to pursue a legitimate litigation purpose. The matter will be decided by the Court of Appeal who have seisin of this issue.

(c) It would serve no valid purpose to permit Ms. Morgan to pursue the reliefs she claims because her proceedings as they currently exist stand dismissed. There can be no question, ever, of adducing evidence for the purpose of these proceedings. Furthermore, the Supreme Court has refused her leave to appeal and there is no purpose , as set out in her notice of appeal, which could be served in those circumstances.

(d) In addition, the appeal from the decisions of Ferriter J., which includes the complaint in relation to s. 97(2)(b), and the question of further evidence, has been heard and judgment is reserved, and so, equally, there can be no question of considering any further evidence at this point in time. The appeal has been

heard. You do not introduce new evidence after an appeal has been heard and judgment is awaited.

(e) This is the fourth such application which has come before the court. Even if one discounts the refusal of the relief by Ferriter J. on the basis that Ms. Morgan felt it was being dealt with in a sequential order, which meant that it was utterly pointless and therefore declined to move it, she did move the application previously, both before Phelan J. and myself in 2023, and on any version of events, this amounts to a third such application of matters which have been determined against her. That is the very definition of abusive litigation.

(f) The purpose of the application is to introduce evidence which she wishes to deploy in the Supreme Court in some manner. However, there is no appeal before the Supreme Court and its determination is final. Effectively, she is seeking to be granted leave to seek fresh reliefs with a view to reopening litigation which had been finally concluded. Again, that is the very definition of abusive litigation.

(g) Ms. Morgan fairly says that she wishes to establish that the finding of Mr. Gary O'Doherty is binding and conclusive and the only conceivable reason for so doing would be to seek to unravel all that has occurred since, and that, again, would amount to an abuse of process.

(h) The matter before the High Court, which was the subject of an appeal to this Court, was an appeal from the Labour Court on a point of law. That issue is to be determined by reference to the facts which were before the decision-maker, so, regardless of the strength or otherwise of the evidence which Ms. Morgan now, at this hour, seeks to introduce into what I only describe as this tangled

> web of litigation, it could not serve any legitimate litigation purpose because the High Court, and this Court on appeal, and any other court that may have to look at this, will only be considering whether the Labour Court erred on a point of law on the materials that were before it.

17. For these reasons, I would dismiss the appeal. I would also add that I am of the view that Ms. Morgan required leave of the High Court even to bring this appeal. To construe the order of Ferriter J. otherwise would be clearly to frustrate the purpose of the order. Therefore, bringing this appeal without first seeking and obtaining the leave of the High Court to do so, was itself a breach of the order and that in turn amounts to an abuse of process.

18. Therefore, I will strike out the appeal on the basis that it is an abuse of process and is frivolous and vexatious. Separately, I will also strike out the appeal on the basis that it was brought in breach of the terms of the *Isaac Wunder* order to which it was subject. It is not open to Ms. Morgan to continuously vex litigants in the manner in which she has done, for whatever, I can only describe it as misguided, reason. It amounts to what is determined in law to be an abuse of process. The fact that she may feel very strongly, as she clearly does, that she is right in so doing, does not absolve her from the consequences of a final order bringing litigation to its conclusion. She must abide by the terms of final and conclusive orders.

19. For these reasons, I grant the reliefs as I have set out above.