Neutral Citation: [2015] IEHC 46

THE HIGH COURT

[2011 No. 1015P]

BETWEEN:

CIARAN CULKIN

PLAINTIFF

AND

SLIGO COUNTY COUNCIL

DEFENDANT

JUDGMENT of Kearns P. delivered on the 6th day of February, 2015

By notice of motion dated 28th July, 2014 the defendant seeks an order striking out the plaintiff's proceedings issued by way of personal injuries summons dated 2nd February, 2011 as an abuse of process and/or duplication of the plaintiff's equality claim against the defendant.

BACKGROUND

The plaintiff is a retired engineer who was employed by the defendant County Council in various capacities over a period of 39 years having commenced work as an apprentice technician in 1970. He attained two diplomas in engineering during the course of his employment and was promoted a number of times until he reached the rank of Senior Executive Technician. He also earned a B.Eng.Hons degree in 2005. It is contended that the plaintiff began experiencing difficulties at work in or around 1996 when a new supervisor was appointed.

A report prepared on 6th January, 2010 by the Anti-bullying Research and Resource Centre at Trinity College details the nature of the bullying the plaintiff was allegedly subject to during his employment. It is alleged that the plaintiff experienced various kinds of negative behaviours including that information regarding training courses and opportunities was withheld from him, that malicious rumours were spread about him, that he was ordered to perform tasks below his level of competence, that he was excluded and isolated socially, that he was denied pay increments and promotion opportunities, that his opinions and views were neglected despite his experience, and that he was treated with hostility. It is alleged that this behaviour has left the plaintiff suffering with a number of psychological and physiological symptoms.

On or about the 10th September, 2009 the plaintiff made a complaint to the Equality Tribunal pursuant to the provisions of the Employment Equality Acts 1998 to 2008. His EE1 form states that he was subject to discriminatory treatment in relation to *"access to employment, promotion/re-grading, training, conditions of employment, discriminatory dismissal, victimisation, and victimisatory dismissal".* After completing his degree in 2005, the plaintiff applied for a number of engineering positions only to be deemed "not qualified" for promotion. He complained that he was continuously frustrated in his attempts to obtain relevant engineering experience within the Council because of his age and his disability, which he contends was induced by historic bullying and harassment. He instituted a grievance procedure in early 2000 but states that this was unsatisfactorily concluded in 2005 following *"gross procrastination."* It is the plaintiff's position that the respondent failed to deal appropriately with systematic bullying and exclusion until he was ultimately constructively dismissed in May 2009.

In addition to his equality complaint, authorisation from the Personal Injuries Assessment Board in relation to his High Court proceedings issued on the 19th November, 2010 and a Personal Injuries Summons issued on the 2nd February, 2011.

The plaintiff's case before the Equality Tribunal was heard on the 25th July, 2012, 9th April, 2013, 10th April, 2013 and the 26th June, 2013. Mr. John Moran, Senior Executive Officer in the defendant Council, states that a preliminary submission was made to the Equality Tribunal expressing the Council's view that the matters before the Tribunal were the same as those being pursued in the High Court proceedings and that the plaintiff was precluded from pursuing both claims. Mr. Moran avers that rather than seeking to have the matter before the Tribunal adjourned however, the plaintiff requested that the Equality Officer continue to hear the case.

STATUTORY PROVISIONS

The procedure for making a complaint to the Equality Tribunal is governed by the Equality Act 1998, as amended. ('the Act').

Section 77(1) of the Act states:–

> "77.—(1) A person who claims—
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> (a) to have been discriminated against or subjected to victimisation,
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> (b) to have been dismissed in circumstances amounting to discrimination or victimisation,
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> (c) not to be receiving remuneration in accordance with an equal remuneration term, or
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> (d) not to be receiving a benefit under an equality clause, in contravention of this Act may, subject to subsections (3) to (9), seek redress by referring the case to the Director."

Section 101 of the Act relates to 'alternative avenues of redress and provides as follows –

> "101.—(1) If an individual has instituted proceedings for damages at common law in respect of a failure, by an employer or any other person, to comply with an equal remuneration term or an equality clause, then, if the hearing of the case has begun, the individual may not seek redress (or exercise any other power) under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be.

(2) Where an individual has referred a case to the Director under section 77(1) and either a settlement has been reached by mediation or the Director has begun an investigation under section 79, the individual—

(a) shall not be entitled to recover damages at common law in respect of the case, and.

(b) where he or she was dismissed before so referring the case, shall not be entitled to seek redress (or to exercise, or continue to exercise, any other power) under the Unfair Dismissals Acts 1977 to 1993 in respect of the dismissal, unless the Director, having completed the investigation and in an appropriate case, directs otherwise and so notifies the complainant and the respondent."

SUBMISSIONS OF THE DEFENDANT

The defendant submits that the plaintiff's complaint to the Equality Tribunal is almost identical to the complaints raised in his personal injuries proceedings. It is submitted that once an investigation was commenced in relation to the complaint to the Equality Tribunal, s.101 of the Act became operative and the plaintiff is consequently precluded from pursuing a simultaneous claim in the High Court.

Counsel refers the Court to the decision of Hedigan J. in *Cunningham v. Intel* [2013] IEHC 207. It is submitted that the facts of *Cunningham* are on all fours with the present application and that the decision of Hedigan J. in relation to s.101(2), combined with the well established rule in *Henderson v. Henderson*, both of which are designed to prevent the duplication of proceedings, make clear that the plaintiff must elect to proceed either with the Equality Tribunal proceedings or the High Court proceedings, but cannot pursue both.

In *Cunningham*, the plaintiff instituted a claim for discrimination against the defendant in relation to access to employment, promotion and re-grading, conditions of employment, and harassment. The Equality Tribunal rejected the complaint and, as in the present case, an appeal to the Labour Court was pending at the time of the application before Hedigan J. It was claimed that the same events caused the alleged personal injury and the defendant objected to having to defend the same claim in two sets of proceedings. Hedigan J. stated that all matters and issues arising from the same set of facts or circumstances must be litigated in the one set of proceedings save for special circumstances. It was held that –

> *"…it is clear from her own pleadings and submissions in the two sets of proceedings that both her employment claim and her personal injury claim arise out of the same matters, i.e. alleged mistreatment in the working environment. This she alleges commenced on the announcement of her pregnancy, continued through her commencement of maternity leave, through that leave and culminated in her dissatisfaction with the way she was treated on her return to work. The plaintiff in issuing these personal injury proceedings after her employment equality complaints, in my view, drew an artificial distinction which does not stand up to analysis.*
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> *In terms of the reliefs sought, the claim in the personal injury proceedings is for compensation for the stress and the health problems arising therefrom. It is clear that such a remedy may be awarded by the Labour Court in the employment equality proceedings…*
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> *…Thus the plaintiff is not precluded from recovering compensation in the Labour Court in respect of the personal injury she alleges she has suffered. Moreover, the defendant herein has stated unequivocally in open court in this application that they will not oppose the plaintiff bringing into her claim before the Labour Court her complaints dating from her announcement of her pregnancy."*

Counsel submits that it is significant that Hedigan J. referred to two sets of proceedings arising out of the same "matters" rather than "case". Hedigan J. concluded that the plaintiff had breached the provisions of s.101(2)(a) as well as the rule in *Henderson* and struck out the personal injury proceedings.

The defendant contends that, as was found to be the case in *Cunningham*, there is considerable overlap between the plaintiff's equality complaint and the personal injury proceedings. In the affidavit of Mr. John Moran, Senior Executive Officer with the defendant Council, the nature of the plaintiff's complaint to the Equality Tribunal is set out in detail and it is submitted that these are the *"self-same matters that are being complained of in the proceedings before the High Court."* It is submitted that an examination of the anti-bullying report and the plaintiff's EE1 complaint to the Tribunal shows that both claims arise from the same set of facts.

It is submitted on behalf of the defendant that the plaintiff was given the opportunity to make a fully informed decision as to which proceedings he wished to pursue. Counsel contends that even after issuing his 10th September, 2009 complaint the plaintiff could have opted instead to pursue personal injury proceedings, as long as he did so before an investigation was commenced pursuant to s.79. However, despite being put on notice that the present objection would be taken, he elected to proceed with an extensive Equality Tribunal hearing.

In relation to the interpretation of the relevant statutory provisions, counsel for the defendant submits that the word 'case' as it appears in s.101(2)(a) must be taken to have an all encompassing meaning which includes all of the underlying facts of a case and can not be said to relate only to a 'case' under s.77(1). It is submitted that 'case' is not defined in the Act and that the section was amended for the purpose of preventing complainants from having a second chance to recover in common law proceedings having failed in their statutory complaint. It is further submitted that 'case' can not be said to refer to s.77(1) cases as such cases are uniquely statutory causes of action and therefore the reference to a restriction on a common law claim would be irrelevant.

Furthermore, counsel submits that the Labour Court has a wider discretion than the High Court in respect of awarding medical damages and so there is no question of the plaintiff's right to a remedy being curtailed. For those reasons, it is submitted that the plaintiff's personal injuries proceedings should be dismissed.

SUBMISSIONS OF THE PLAINTIFF

Counsel for the plaintiff contends that the rule in *Henderson* does not arise for the purposes of this application, which instead turns solely on the question of statutory interpretation, and in particular the correct interpretation of s.101 (2)(a).

Sub-sections (a) to (d) of s.77 (1) of the Act set out four kinds of cases for which redress can be sought by referring a case to the Director. Counsel for the plaintiff submits that before it was amended, the previous s.101(2) only precluded common law claims in respect of the 'failure' to comply with an equal remuneration term or an equality clause as set out in s.77(1) (b) and (c) where such a complaint has already been made to the Tribunal. Complaints at s.77 (1) (a) and (d) were not within the ambit of s.101 (2).

However, it is submitted that s.101 (2)(a) as amended refers instead to a 'case' under s.77 (1) and the term 'failure' has been removed. It is submitted that the purpose of this amendment was to bring all of the complaints under ss.77 (1), including those at (a) and (d), within the ambit of s.101 (2)(a). For that reason, counsel submits that rather than precluding a common law case based on the broad underlying facts, s.101(2)(a) exists to preclude cases which are already covered and have been pursued pursuant to s.77(1). It is submitted that this is the constitutional interpretation which gives effect to the legislative intention.

In relation to the defendant's reliance on *Cunningham*, counsel for the plaintiff contends that *Cunningham* is distinguishable as the plaintiff was a litigant in person and the decision of Hedigan J., while correct in relation to the facts and arguments advanced, is *per incuriam*. It is submitted that no finding was made in *Cunningham* in relation to the correct interpretation of the term 'case' as it appears in s.101(2)(a).

DECISION
I have carefully considered the relevant statutory provisions and the submissions of both parties and am satisfied that the plaintiff's personal injuries proceedings must be dismissed. The rule in *Henderson v Henderson* is well established and is frequently applied as part of the policy of the courts to avoid double litigation of the same issues, as considered by the Supreme Court in *A.A. v. Medical Council* [2003] 4 IR 302. This rule is in the interests of all parties to a case, who should not be expected to prosecute or defend the same proceedings repeatedly, and to the public, who have an interest in ensuring that court time is not wasted.

The plaintiff in these proceedings issued a complaint before the Equality Tribunal on the10th September, 2009. His EE1 form details the nature of the bullying he was allegedly subjected to and he was afforded a four day hearing before the Tribunal. At the outset of the Tribunal hearing, following a preliminary submission by the defendant, the option of pursuing his Equality Tribunal complaint or his common law claim was made clear to the plaintiff and he opted to pursue a remedy before the Tribunal. I am satisfied that the plaintiff is now estopped from resiling from this position after having had his claim rejected by the Tribunal.

To allow the plaintiff to proceed with his common law claim would be to breach the rule in *Henderson v. Henderson* and, in my view, would also fail to give effect to the intention of the legislature in relation to s.101(2)(a) of the Employment Equality Act. As submitted by counsel for the defendant, s.77 (1) cases are purely statutory in nature. To interpret the provision in the manner contended for by the plaintiff would render sub-section (a) entirely redundant, for there is no entitlement to recover damages at common law in respect of such cases. The term 'case' therefore must be taken to include the underlying facts which give rise to the complaint.

Counsel for the defendant urges the Court to depart from the decision of Hedigan J. in *Cunningham* on the basis that the plaintiff in those proceedings was a litigant in person. It is suggested that this somehow minimises the precedential significance of the decision. In my view however, the fact that a litigant in person was involved in proceedings is more likely to have the effect of causing the deciding judge to take even greater care in examining the submissions and explaining his or her decision. In any event, while this Court is not strictly bound to follow decisions of other High Court judges, it is well established that there must be substantial reasons to warrant any departure. In *Kearns v. Manresa Estates Ltd* (Unreported, High Court, 25th July, 1975), it was held that:-

> *"Although I am not bound by decisions of other judges of the High Court, the usual practice is to follow them unless I am satisfied that they were wrongly decided."*

In *Irish Trust Bank Ltd. v. Central Bank of Ireland* [1976] ILRM 50 it was held that –

> *"…a court should not depart from a decision of another court of equal jurisdiction unless it is established that the decision was based on insufficient authority or incorrect submissions, or that the judgment departed in some way from the proper standard to be adopted in judicial determination."*

More recently, in the case of *Re Industrial Services Co. Limited* [2001] 2 I.R. 118 Clarke J. held that: –

> *"It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong."*

In the present case, counsel for the defendant has not suggested that the decision of Hedigan J. was in any way deficient or that it was 'wrongly decided'. The facts of *Cunningham* are closely related to the present application and I am not satisfied that a substantial reason to depart from the decision has been raised.

The matters complained of in the plaintiff's common law and Equality Tribunal proceedings both date from the time a new supervisor was appointed and arise from the very same alleged incidents of mistreatment. The rule in *Henderson v. Henderson*, coupled with the provisions of s.101 (2)(a), requires that where there is such a considerable degree of overlap the plaintiff should be precluded from pursuing his High Court proceedings. The plaintiff's right of appeal to the Labour Court remains, and his right to an effective remedy is therefore unaffected.

For the reasons outlined above, the plaintiff's personal injuries claim is dismissed.