Neutral Citation: [2016] IEHC 518

THE HIGH COURT

RECORD NUMBER: 2015/3001P

2015/3002P

2015/3003P

2015/3004P

BETWEEN:

DR. SYLVIE LANNEGRAND, DR. MARGARET HODGINS,

DR. ADRIENNE GORMAN AND DR. ROISIN HEALY

Plaintiffs

-and-

THE NATIONAL UNIVERSITY OF IRELAND GALWAY

Defendant

JUDGMENT of Mr. Justice Binchy delivered on the 26th day of July, 2016.

Background

1. These are four separate sets of proceedings in which the defendant has made an application in each case, seeking orders for the trial of preliminary issues of law, or in the alternative an order for a modular hearing of preliminary issues. The applications are brought pursuant to Order 25, rule 1 and or Order 34, rule 2 of the Rules of the Superior Courts. The proceedings in each of these cases arise out of applications for promotion made by the plaintiffs, all of whom are lecturers employed by the defendant University, in which applications the plaintiffs were unsuccessful. The plaintiffs issued their proceedings following upon the determination by the Equality Tribunal (now the Workplace Relations Commission) of a claim brought before that tribunal by their colleague, a Ms. Micheline Sheehy Skeffington. The tribunal determined in 2014, that Ms. Sheehy Skeffington had been subjected to discrimination by the defendant, by reason of her gender, when she was denied a promotion by the defendant to the post of Senior Lecturer. The plaintiffs' claims arise in respect of the same round of promotional applications as that in which Ms. Sheehy Skeffington had participated, and about which she complained to the Equality Tribunal.

2. At the outset, it should be observed that, for the purposes of this application only, the facts as pleaded by the plaintiffs are accepted by the defendant as being true. The pleadings of each of the plaintiffs are, in all material respects for the purpose of this application, in identical terms. By agreement between the parties these motions proceeded by reference to the pleadings in the case of the first named plaintiff. Proceedings issued in each case on 20th April 2015. The plenary summons in each case seeks a number of reliefs including *inter alia*, declarations that the promotion competition was in breach of the plaintiffs' contractual entitlements to gender equality, as well as a declaration that the manner in which the competition was conducted was in breach of sections 12(k) and 26 of the Universities Act 1997. The plaintiffs also seek a declaration that the competition breached the provisions of the Employment Equality Acts 1998-2012 (hereafter the "Employment Equality Acts"), the Recast Gender Directive 2006/54/EC and the Charter of Fundamental Rights of the European Union, and that the plaintiffs are entitled to be promoted to the positions for which they applied (senior lecturers) effective from 1st July, 2009 and that their salary, pension entitlements and other benefits and emoluments should be adjusted accordingly. The plaintiffs also seek orders appointing them to the positions of senior lecturers and requiring the defendant to provide equal treatment to the plaintiffs, as well as damages for breach of contract, loss of professional reputation, future career prospects and legitimate expectation.

3. The plaintiffs are all lecturers in the defendant University, employed across a number of Departments. In 2008/2009 each of the plaintiffs applied for promotion to the position of senior lecturer in their respective departments. The plaintiffs claim that there was an express or implied term of gender equality and non-discrimination in each of their contracts of employment. The positions for which they applied were to be filled by way of competition. Each of the plaintiffs were shortlisted for interview, but were ultimately unsuccessful in their applications. The plaintiffs claim that this was in spite of having met the minimum requirements for the position and having excellent references. The plaintiffs claim that their non-appointment, including the criteria for application, selection process, interview process short listing process, marking and assessment, and feedback meetings were all tainted by discrimination, both direct and indirect, on grounds of gender and family status, when compared with their male counterparts.

4. A full defence was filed by the defendant in each case on 5th February, 2016, in which it is pleaded at paragraph 3 of each defence that the Employment Equality Act 1998 to 2012, the Recast Gender Directive and the Charter of Fundamental Rights of the European Union do not confer independent rights at common law or modify the terms of a contract of employment to be enforced by the common law courts and that the Court has no jurisdiction to adjudicate on the plaintiffs' claims under the Employment Equality Acts, the Recast Gender Directive or Charter of Fundamental Rights. The defendant further pleads that if such a cause of action exists, it is statute barred, having been brought outside the 6 month time limit for such claims as provided for by the Employment Equality Acts. A notice for particulars was served by the plaintiffs on the defendant on 19th April, 2016, along with a reply and objection to the defence. This has not yet been replied to by the defendant, and nor has discovery yet been requested by either party in the proceedings.

Application for the trial of a preliminary issue

5. This application is brought by way of notice of motion dated 21st June 2016 which seeks an order pursuant to Order 25, rule 1 and/or Order 34, rule 2 of the Rules of the Superior Courts directing the trial of a preliminary issue of law, or for a modular trial of the four following issues:

> (i) Whether, as a matter of law, the Employment Equality Acts 1998-2011 modify the terms of the Plaintiffs' contracts of employment to include an implied contractual right to gender equality and/or confer on the plaintiffs an independent cause of action at common law for alleged breach of contract;
>
> (ii) Whether, as a matter of law, European Union law gives rise to an independent cause of action against the Defendant

for damages for breach of an alleged implied contractual right to gender equality, which is justiciable by this Court in light of the implementation by the State, through the Employment Equality Acts 1998-2011, of the principles of law contained in European Law and the establishment therein of statutory procedures for the pursuit of complaints of gender equality.

(iii) Whether, if a cause of action does lie, the Plaintiff's claim is statute barred having been brought outside the time limits prescribed in the Employment Equality Acts;

(iv) Whether, as a matter of law, the Universities Act 1997 gives rise to a cause of action against the Defendant in common law for breach of contract or for breach of its provisions.

6. The application is grounded on the Affidavit of Mr. Peter Feeney, sworn on 1st June 2016. At the outset, it is averred by Mr. Feeney that the trial of preliminary issues is likely to result in a saving of both time and costs. He avers that 47 applications for promotions were received from eligible lecturers across the defendant university. In the case of the first named plaintiff, her application, which was submitted on 31st October 2008, consisted of 50-60 pages setting out her duties and career achievements, including her publications, research funding, committee involvement and other roles within the defendant university. In his affidavit, Mr Feeney describes the application process, which included the applications being assessed by a promotions board of 14 academic peers of the plaintiffs, from across the defendant University. The interview panel consisted of eight persons, seven persons internal to the defendant and one external and the panel was chaired by the President or Registrar of the University. On 30th April, 2009, the plaintiffs were informed that they were unsuccessful in their applications.

7. Mr. Feeney avers that the plaintiffs did not challenge their failure to be promoted, or use the defendant's internal grievance procedure, or otherwise appeal their non-appointment in any way. In addition, no statutory claim was brought under the Employment Equality Acts either to the Equality Tribunal, or the Circuit Court on the basis of gender discrimination.

8. Referring to the pleadings, it is averred by Mr. Feeney that the defendant denies that there is known to law any cause of action for a claim in contract based on gender equality. Therefore there are issues of law in contention between the parties, which he avers are net and separable issues of law. He makes the case that the plaintiffs' claims are "novel" and are not dependent on any findings of fact; any material facts relevant for the purpose of the preliminary issues are not in dispute by the parties.

9. It is further averred that an identifiable issue of law arises as to whether or not a cause of action independent of the statutory tribunals exists, or whether the Workplace Relations Commission or the Circuit Court are the proper forums to determine claims of alleged gender discrimination, in the context of employment disputes.

10. On behalf of the defendant it is averred that there will be considerable savings in time and cost in having the issues identified determined in advance by way of trial of preliminary issues. It is further averred that the issues identified are readily capable of being determined in isolation and do not require a consideration of the facts of the case. Furthermore, if the issues of law sought to be determined are determined in the defendant's favour, it is the defendant's case that that will be dispositive of the proceedings.

11. Mr Feeney contends that the trial of the action will be lengthy and costly, requiring extensive oral testimony and evidence from experts, the attendance of a large number of witnesses from the defendant and the promotions board established by the defendant for the competition. Mr. Feeney also avers that the trial will be disruptive to the proper functioning of the defendant University; he said that it is likely that the trial will impact seriously on relationships between staff members in particular and will "create a partisan and divisive atmosphere."

12. The case is also made that the preparation for the trial will be protracted and expensive, in particular having regard to what Mr. Feeney avers will be "extensive discovery" and that the discovery will intrude on the rights of third parties. The defendant also contends that the plaintiffs will not be able to discharge the costs of the litigation, although this was expressly refuted by counsel for the plaintiffs at the hearing of the motion. For these reasons it is the defendant's argument that the preliminary trial of the issues is a sensible course of action for all of the parties.

13. Mr. Feeney also contends that the plaintiffs' claims are statute barred under the Employment Equality Acts and that the defendant is prejudiced on account of delay. He claims that the plaintiffs have been guilty of inordinate delay in bringing their claims. He points to what he says are a number of prejudices the defendant will face in defending the proceedings due to the alleged delay on the part of the plaintiffs in bringing their claims. In particular, he points to the fact that in the time elapsed since the interviews, of the 14 members of the interview panel, one member of the promotion board has died, six have retired and two further retirements are due in August 2016, and in 2017. The academic registrar has also retired. It is averred on this basis, that the defendant will be grossly prejudiced in having to defend the proceedings on the basis of available records, without the oral evidence of many of the individuals who made the decision to promote.

Replying Affidavit of Ms. Lannegrand

14. The plaintiff swore a replying affidavit on 12th July 2016. She avers that the matters raised in the proceedings are matters of national public interest. She avers that the proceedings must be seen in the context of the sophisticated and complex facts involved and that it is not suitable to have the issues, the subject of this application, determined on a preliminary basis or in a modular manner; and nor are these matters readily capable of being determined in isolation from all other issues in the proceedings, about which evidence, including expert evidence, will have to be heard by the Court. The plaintiff says that there are material issues of fact in dispute between the parties, and that it is not possible for the Court to determine the preliminary issues without also determining all matters of fact in dispute, in order for which the Court will need to hear evidence.

15. The plaintiff further avers that discovery is essential for a fair trial of the matters raised on this application, and that it is relatively common for the course and outcome of proceedings to alter following discovery. She argues that it is not possible for the court to determine the preliminary issues in a vacuum, without either evidence or discovery of documents, and that it would have to adopt an artificial approach to do so. She says that the issues raised by this application are not issues of pure law, as they are inextricably linked to the facts giving rise to the proceedings.

16. The plaintiff denies that the proceedings are statute barred or that she has delayed inordinately in the proceedings, or that the defendant is in any way prejudiced by the passage of time between the conclusion of the promotions competition and the date on which the plaintiff issued proceedings. She avers that the defendant still has in its possession all documentation and information that it needs for the defence of the proceedings. She says that the fact that one member of the interview panel has died and that others have retired should not impair the defendant in its defence as there is no reason why other members of the panel cannot give evidence. The plaintiff rejects the contention that the trial of preliminary issues will save substantial time and costs and argues that, on the contrary, it will delay the conduct of the proceedings and add considerably to the expense of the same.

17. The plaintiff argues that if this application is allowed, she will be denied her entitlement to an effective judicial process in accordance with her rights under the Employment Equality Acts, the European Convention on Human Rights, the Recast Gender Directive and the Charter of Fundamental Rights of the European Union.

18. Mr. Feeney swore an affidavit in reply to the affidavit of Ms. Lannegrand on 15th July, 2016 which is not necessary to summarise here.

Submissions of the Defendant

19. It is submitted on behalf of the defendant that the plaintiffs' proceedings are brought in this Court in order to avoid the limitation period imposed by section 77(5) of the Employment Equality Acts (6 months, extendable by 12 months where reasonable cause is shown), as the plaintiffs are out of time to bring proceedings under the those Acts. The defendant takes issue with the assertion that the Employment Equality Acts create a common law action for damages for breach of an equality clause; it is submitted that sub-sections 77(1) and (3) of the Employment Equality Act 1998 (hereafter "the Act of 1998") (as amended), which I set out in full below provide that the forum for redress for breach of a gender equality clause is the Workplace Relations Commission or the Circuit Court, the latter of which has unlimited monetary jurisdiction.

20. Insofar as the plaintiffs seek to rely on section 101 of the Act of 1998 (as amended) as creating a common law action, the defendant submits that the only purpose of section 101 is to prohibit parallel proceedings arising out of the same facts; not to create a new common law action. The defendant submits that section 101 can only refer to pre-existing common law actions, which were part of the law prior to the enactment of the Employment Equality Acts. It is submitted that gender equality is an entirely statutory construct; there is no entitlement at common law to bring proceedings for breach of gender equality.

21. The defendant also submits that whether EU law can be relied upon directly, as the plaintiff purports to do in these proceedings, in circumstances where the Oireachtas has adopted a statutory mechanism for redress, is also a pure question of law. In the defendant's submission, this is not permissible; the defendant submits that it is not open to the plaintiffs to assert rights in this Court to gender equality in reliance on the Recast Gender Directive or the Charter of Fundamental Rights of the European Union. It is further submitted that the jurisdiction of the High Court in such matters is appellate only, by way of appeal from the Labour Court or the Circuit Court on a point of law, and not as a Court of first instance.

22. The defendant also submits that it is a matter a of law whether or not the Universities Act 1997 gives the plaintiffs an independent cause of action for damages.

23. The defendant submits that all the above questions are questions of law, amenable to trial as preliminary issues and that determining these issues in this manner will save substantial costs and court time; if the matter proceeds to a full trial, the proceedings will be lengthy and complex involving a large number of witnesses. Moreover, extensive discovery will be required. It is further submitted that no prejudice will be caused to the plaintiffs in having these issues decided by way of preliminary trial. Therefore, it is submitted that if it is determined at a preliminary stage that there is no gender equality condition, express or implied, in the contracts of employment of the plaintiffs, and/or that the plaintiffs have no cause of action at common law for breach of such a condition, and/or the plaintiffs' claim is statute barred, the plaintiffs' proceedings will be disposed of or substantially disposed of at an early stage, with significant savings in court time and cost.

24. The defendant submits that the following are the relevant considerations to be taken into account by a court on applications for the trial of a preliminary issue :

(i) There must be a net issue of law which can be separated out from other parts of the trial;

(ii) The relevant facts must not be in dispute;

(iii) There must be a saving of time or costs.

It was further submitted that the Court should engage in an exercise of weighing up what is just and convenient between the parties, taking into account the public interest that unnecessary expenditure of time and money in a lengthy hearing should be avoided, where possible.

25. In support of the above, the defendant relies on a number of authorities, including *Cork Plastics (Manufacturing) v. Ineos Compound UK Limited* [2008] IEHC 93 and *Tritton Development Limited v. Marken* [2007] IEHC 21 (unreported 12th February, 2007), in the latter of which Dunne J. held that in cases involving questions of mixed fact and law, preliminary trials should only be ordered in exceptional circumstances. However, the defendant argues that the present proceedings are exceptional in circumstances where the plaintiffs are trying to break new ground in a novel action for which there is no precedent, and where there already exists an effective statutory remedy.

26. The defendant also relies the decision of the Supreme Court in *L.M. v. Commissioner of An Garda Síochána and Ors*. [2015] IESC 81 wherein O'Donnell J said, at paragraph 30;

> *"…..there are some cases, particularly with substantial claims, where there will be considerable savings of time and therefore cost, in adopting an approach which seeks to isolate issues capable of being determined in advance, and which may have a substantial impact upon the scope of the proceedings. This will particularly be the case where it is apparent that any trial will be lengthy and costly, and where the preparation necessary may be protracted and expensive. There are also circumstances where a novel claim is brought by a number of persons in a similar situation, and where the trial of a single issue may be dispositive."*

It is submitted that this is particularly applicable to the present case, where the hearing of the four actions will be lengthy and costly, and where the preliminary trial of the issues may be dispositive. It is the defendant's case that there are net issues of law that can be separated out and heard at the preliminary trial of the action. The defendant also relies on *Smyth v. Commissioner of An Garda Síochána and Others* [2013] IEHC 209.

27. It is also submitted on behalf of the defendant that while the authorities make clear that the trial of a preliminary issue will not be ordered if there are facts in dispute, this does not arise in this case where the defendant admits the facts as pleaded by the plaintiffs, for the purpose of this application. Accordingly, it is submitted there are no facts or alternatively no relevant facts in dispute for the purpose of this application.

28. For all of these reasons, the defendant submits that there are net issues of law that are appropriate for trial as preliminary issues, which may substantially dispose of the proceedings, and thereby save both costs and court time.

Plaintiffs' Submissions
29. At the outset, the plaintiffs submit that the defendant's application is premature and the facts are significantly in dispute and that the matters proffered by the defendant are not capable of being determined on a preliminary basis.

30. The plaintiffs also submit that the issues proffered by the defendant are not suitable for trial by way of preliminary issue. In particular, it is submitted that the defendant has denied all of the plaintiffs' pleas in the statement of claim and has criticised the plaintiffs for failing to particularise their claim. The plaintiffs also argue that discovery has not yet been made, and the documents necessary for the plaintiffs to establish less favourable treatment or discrimination have not yet been considered; and furthermore the pleadings have not yet closed. In the submission of the plaintiffs, the proceedings must be heard, the evidence must be given and tested; the proceedings cannot be determined in a vacuum. It is argued that the defendants have put the plaintiffs on full proof and that the facts are very much at issue in the proceedings.

31. Furthermore, the plaintiffs make the point that it is not the case, as is contended by the defendant, that material facts, sufficient for the purpose of this application, are not in dispute. For example, the plaintiffs argue, that Mr. Feeney in his second affidavit avers that many of the alleged breaches of contract occurred more than six years prior to the date the proceedings issued. The plaintiffs submit that this is an issue on which evidence will have to be adduced. It is also submitted that the issues involved are not purely issues of law, but rather a mixture of fact and law. It is submitted that it would be unjust and unfair for the Court to grant the present application, in circumstances where the defendant's pleadings take issue at every turn with the plaintiff's claims. The plaintiffs rely on the decision of Lynch J. in this Court in the case of *McCabe v Ireland* [1999] 4 I.R. 151 at page 157 where he said:-

> *"A preliminary issue of law obviously cannot be tried in vacuo; it must be tried in the context of established or agreed facts. The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the facts if the actual determination of the preliminary issue should not dispose of the matter at issue. The facts must be agreed or the moving party must accept, for the purposes of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party."*

32. The plaintiffs submit that key issues in the proceedings, including whether a gender equality clause is implied into the contracts of employment, whether the claims are statute barred and whether the Universities Act 1997 gives rise to a cause of action against the defendant, are all issues requiring the establishment of facts at a full trial of the proceedings. It is further submitted that the facts and the claims are inextricably linked.

33. The case is made by the plaintiffs that section 101 of the Employment Equality Acts envisages the possibility of two alternative claims: that of a breach of a gender equality clause (deemed to form part of the contract of employment by section 21 of the Employment Equality Acts) at common law, or a statutory claim brought before the Workplace Relations Commission made under the Employment Equality Acts, but that a claimant may not pursue both remedies. Therefore, it is submitted that there is a clear distinction between these alternative claims envisaged by section 101. The case of *Culkin v. Sligo County Council* [2015] IEHC 46 is relied on by the plaintiffs in support of this argument. In that case, the plaintiffs submit that Kearns P., in dismissing the plaintiffs claim because he had already exercised his entitlement to pursue a claim under the Equality Acts, accepted the possibility of a common law claim of discrimination being maintained and jurisdiction arising in that context, as an alternative remedy to pursuing a claim under the Employment Equality Acts.

34. It is also argued on behalf of the plaintiffs that a claim made pursuant to common law for breach of contract is not subject to the time limit of six months prescribed under the Employment Equality Acts for the bringing of a claim under those acts.

35. It is also submitted that exceptional circumstances are necessary in order to justify the trial of issues as a preliminary issue. To that extent, the plaintiffs rely on the cases of *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd* [1961] Ch. 375, which was cited with approval in this jurisdiction in *Tara Exploration and Development Co. Ltd v. Minister for Industry and Commerce* [1975] 1 I.R. 33 an authority on which the plaintiffs also rely. It is submitted on behalf of the plaintiffs that there are no exceptional circumstances in this case that would justify the trial of issues as a preliminary issue. The plaintiffs claim that the preliminary issues will take considerable time to be dealt with and that a trial of these issues will increase not reduce costs; they claim that the issues will have to be considered afresh at the trial of the action in addition to the preliminary stage leading to a duplication of effort and an increase in cost..

36. The plaintiffs also rely on *Duffy v. News Group Newspapers Ltd, Wendy Henry and Mike Beamount* [1994] 1 I.L.R.M. 364 as authority to support an argument that the procedure under Order 25, rule 1 is only suitable where no evidence is required to be called, and therefore that the procedure is not suitable in this case given that evidence will need to be given in respect of a number of issues, including the date of the last discriminatory act. The plaintiffs also rely on *Tara Exploration and Development Co. Ltd v. Minister for Industry and Commerce* in this regard, where it was stated by O'Higgins C.J:-

> *"The infrequent use of this procedure may be explained by the restricted field in which it can operate. First of all, there must be a question of law which can be identified amongst the issues in the action. Further, this question of law must be such that it can be decided before any evidence is given. If special facts have to be proved or if facts are in dispute, the rule does not apply. In addition, it must appear to the court to be convenient to try such question of law before any evidence is given. This will involved a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly, or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper and just in the circumstances."*

37. Finally, on behalf of the plaintiffs, it is submitted that the general principle of effective judicial process or remedy as prescribed in the Recast Gender Directive would be deprived of an essential part of its effectiveness if this application is granted. The plaintiffs submit that their rights will be unnecessarily curtailed if the application is granted, as the plaintiffs will be denied access to an effective judicial process; they will not be permitted a full hearing of all evidence. It is also submitted that the principles of equivalence and effectiveness as relating to access to and enforcement of rights created by laws of the European Union will be denied to the plaintiff, meaning that the dealing with these issues as preliminary issues deprives the plaintiffs of a remedy equivalent to or as effective as that provided for under EU law, and the Recast Gender Directive in particular. In this regard the plaintiffs rely upon the decision of the European Court of Justice of the European Union ("CJEU") in the case of *Impact v. Minister for Agriculture and Food and Others* (Case C– 268/06) [2008] IRLR 552 where the Court said at paragraph 46 of its judgment:-

> *"The detailed procedural rules governing actions for safeguarding an individual's rights and/or Community law must be no*

less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."

Statutory Provisions
38. Section 21(1) of the Act of 1998 states that:

> *"If and so far as the terms of a contract of employment do not include (expressly or by reference to a collective agreement or otherwise) a gender equality clause, they shall be taken to include one."*

Section 30 contains a similar provision in respect of a non-discrimination equality clause.

39. Section 77(1) and (3) of the Act of 1998 (as amended) provide:

> *"(1)A person who claims –*
>
> *(a) to have been discriminated against or subjected to victimisation,*
>
> *(b) to have been dismissed in circumstances amounting to discrimination or victimisation,*
>
> *(c) not to be receiving remuneration in accordance with an equal remuneration term, or*
>
> *(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 General of the Workplace Relations Commission.*
>
> *(3)If the grounds for such a claim arise –*
>
> *(a) under Part III, or*
>
> *(b) in any other circumstances (including circumstances amounting to victimisation)*
>
> *to which the Equal Pay Directive or Equal Treatment Directive is relevant,*
>
> *then, subject to subsections (4) to (9), the person making the claim may seek redress by referring the case to the Circuit Court instead of to the Director General of the Workplace Relations Commission."*

40. Section 101 of the Act of 1998 (as amended) is also relied on by both the plaintiffs and the defendant. Section 101(1) provides that:

> *"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 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 equality clause…"*

That section goes onto say that where an individual has referred a case to the Workplace Relations Commission under section 77(1) and where the Director General has begun an investigation under section 79, the individual shall not be entitled to recover damages at common law. The same prohibition applies in respect of cases referred to the Circuit Court

Applicable Principles
41. The principles applicable to applications of this kind were reviewed and summarised by McKechnie J. in the Supreme Court in the decision of *Liam Campion and Ors. v. South Tipperary County Council* [2015] IESC 79. At para. 35 of his judgment he states:

> *"The following therefore is a summary of the legal position before Order 25 of the RSC can be successfully invoked:-*
>
> *• There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.*
>
> *• There must exist a question of law which is discreet and which can be distilled from the factual matrix as presented.*
>
> *• There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.*
>
> *• The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.*
>
> *• Conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.*
>
> *• Exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.*
>
> *• As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.*

> • *It must be "convenient" to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters.*
>
> • *"Convenience" therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation.*
>
> • *The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.*
>
> • *The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally*
>
> • *Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."*

42. In the same case McKechnie J. observed that:-

> *"it remains the position that at primary level, a unitary trial is the starting point … whilst I greatly favour all suggestions which curtail the possibility of having diffuse and lengthy trials, one must be sure however that what is provided for in that regard, will in fact achieve, the intended end."*

43. It is clear from a review of the authorities in relation to such applications that the Courts treat applications of this kind with a great deal of caution, recognising that far from reducing the cost and expense associated with proceedings, the trial of a preliminary issue runs the risk of increasing the same, as well as the risk of injustice. But it is also clear that where an application of this kind meets the criteria laid down by the authorities, there can be substantial benefits to the trial of a preliminary issue. This was observed by O'Donnell J. in the Supreme Court in *L.M. v. The Commissioner of An Garda Síochána and Ors*. in the passage cited above. In the same decision, he emphasises the need for the possibility that the determination of the preliminary issue may result either in the conclusion of the proceedings or at least result in obvious savings in both costs and time. At paragraph 32, he states:

> *"It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried. A point should also raise a clear issue to which it is possible to give a clear answer. The more qualified and contingent the possible answers, the less likely that the court will be able to provide a clear and decisive disposition of the case and a clarification of the law."*

44. In *L.M.* the Court decided against the trial of a preliminary issue, concluding on the facts of the case that certain important issues might not be disposed of by the trial of the preliminary issues, that the answer to the question raised might not be unqualified and that there was likely to be little reduction in evidence or discovery even if the preliminary issue were to be determined against the plaintiffs. In *Campion* also, the Court declined the application, considering that at least one very significant issue would not be disposed of, as a result of which the determination of the preliminary issues would not reduce significantly the number of witnesses, curtail the issues to be traversed at the hearing or result in any significant saving in either costs or time.

Decision

45. In these cases, it is submitted on behalf of the plaintiffs that the preliminary issues identified are issues in respect of which evidence will have to be heard and tested, and involve issues of mixed law and fact, and not pure issues of law as required by Order 25, rule 2 of the Rules of the Superior Courts and as a result there will be a duplication of issues at the preliminary hearing and the full trial of the proceedings resulting in an increase in costs and Court time. I have difficulty in accepting these arguments.

46. Firstly, insofar as issues of fact are concerned, the defendant has agreed to accept the facts as pleaded by the plaintiffs in their statements of claim for the purposes of the trial of the preliminary issues. With the possible exception of the preliminary point relating to the statute of limitations, this should obviate the need for the court to hear any detailed evidence as to the substance of the plaintiffs' claims.

47. Secondly, the preliminary issues identified (excepting that relating to whether or not the cases are statute barred) appear to me beyond any doubt to raise issues of pure law only. Addressing each of these issues in turn:

> (i) The plaintiffs claim that it was an express or implied term of their contracts of employment that the defendant would adhere to and respect the plaintiffs' implied contractual right to an equality clause on grounds of gender and family status by reason of s. 21 and s. 30 of the Employment Equality Acts. It is not pleaded or otherwise suggested that whether or not such a term was an express or implied term of the contracts of employment of the plaintiffs arises out of discussions between the parties or representations made by the defendant to the plaintiffs. This plea is quite clearly based upon an assertion of law and the determination of this issue is no way contingent upon the evidence that might be advanced by and on behalf of the plaintiffs. It is, however, a fundamental plea that has the potential to be dispositive of the plaintiffs' cases, or, at a minimum, a significant issue in each case;
>
> (ii) The question as to whether or not European Union Law gives rise to an independent cause of action that is justiciable having regard to the implementation by the State of the principles of European Union Law is again quite clearly an issue of pure law that is in no way contingent upon evidence to be given. .
>
> (iii) The same may be said about the question as to whether or not the University Act, 1997 as a matter of law gives rise to a cause of action against the defendant which is justiciable by the court;
>
> (iv) As to whether or not the plaintiff's claim is statute-barred, some evidence is likely to be required. At the hearing of this application, it was conceded by counsel for the plaintiffs that if they do not have a right of action at common law, then their entitlement to initiate claims before the Workplace Relations Commission or the Circuit Court pursuant to the Employment Equality Acts is clearly statute-barred. However, if the plaintiffs are indeed entitled to maintain an action at common law against the defendant, then the limitation period for the initiation of such an action, being an action for breach of contract, is six years from the date of accrual of the cause of action. Because of the particular circumstances of these cases, in which the proceedings were issued just ten days before the expiration of six years from the date on which the plaintiffs were notified that they had been unsuccessful in their applications, there may be a dispute between

the parties as to the date of accrual of the cause of action and in particular as to the dates of the first and last acts of the defendants which the plaintiffs may rely upon to ground an action for breach of contract. While it is obviously a matter for the judge who will preside over the trial of the preliminary issues, it seems to me that the statement of claim discloses five possible dates that should be readily ascertainable form the evidence of just one witness of the defendant, and if necessary, each of the plaintiffs: the first is the date or dates when application criteria for each of the positions were settled, the second is the date or dates upon which the plaintiffs were shortlisted, the third is the date or dates on which the plaintiffs were interviewed, the fourth is the date or dates on which marking and assessment took place and the fifth is the date on which appointments were made. The date or dates on which the plaintiffs were informed that they were unsuccessful in their applications may also be relevant. All of these dates should be readily ascertainable and should not involve the giving of extensive evidence or take up excessive time at the trial of the preliminary issues. It is in my view possible for a Court to hear evidence as to the dates upon which these or other relevant events occurred for the purpose of making a determination as to whether or not the claims are statue barred, without having to hear all or anything like all of the evidence required to be called by the parties to deal with the proceedings as a whole. If discovery is required in this regard, it should be possible to limit such discovery to documents that would show when relevant decisions were made or relevant actions taken. In other words it should be possible, in my view, to isolate the dates on which events occurred, which the parties rely upon for this purpose, from the general body of the plaintiffs' claims against the defendant, in order to determine the date of accrual of a cause of action. But if I am wrong about this it is worth reflecting again on the decision of the Supreme Court in *L.M.* in which O'Donnell J. made clear that it remains open to a Judge, hearing the trial of a preliminary issue, to decide that the issue cannot be decided at the preliminary stage. At paragraph 34 of his decision he stated:-

> *"However, I also consider that a court is entitled, on the hearing of the preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the court to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case."*

Clearly, it would not be desirable to send an issue forward for determination as a preliminary issue if I felt that there was a serious risk that this would occur, but in my view this is not so. Moreover since other issues which are matters of pure law are being sent forward for trial by way of preliminary issue, it seems to be to be opportune to require this issue to be so determined also. The question as to whether or not a cause of action is statute barred is recognised as being one of the most suitable issues to have determined as a preliminary issue. See Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd ed, 2012) at page 529.

48. There is one final point arising from the plaintiffs' submissions. The plaintiffs have submitted that the trial of preliminary issues in some way curtails their rights under European Law, contrary to the principles enunciated by the CJEU in *Impact*. It is difficult to see how this could be so. The very issues that are the subject of this application will in any event have to be determined. I fail to see how their determination as preliminary issues in any way curtails or limits their rights under European Union Law, and indeed this has only been put forward as a general proposition, the general thrust of which is that in order to vindicate their rights under European Union law, the plaintiffs must have the opportunity to present their evidence in full. Whether or not they will have that opportunity in due course depends on the outcome of the trial of these preliminary issues. If, as a result of the determination of these issues it is found that the plaintiffs' cases must fail for whatever reason, this will not be because the issues have been tried as preliminary issues, but because they have failed to satisfy the Court of some essential element of their cases, and as a matter of logic the same outcome would result if the cases went forward for determination by way of unitary trials.

49. It is clear from the submissions made by the parties on this application that the full trial of these proceedings will involve the giving of evidence by a large number of witnesses, including expert witnesses. It is also clear that preparation for the trial will involve onerous discovery of documentation. The trial of the preliminary issues, if the defendants are successful, will either be dispositive of the entirety of the proceedings, or in the alternative will dispose of substantive issues which may shorten the full trial or, at worst, will dispose of issues which will in any event take up the same time at the full trial of the proceedings. For all these reasons I consider that it is very likely that the trial of the preliminary issues will save significant cost and time, and will certainly not add to the cost and time required to determine the issues in the proceedings. It is in my view therefore convenient to make an order directing the trial of the preliminary issues the subject of this application because I consider that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation. I also consider the making of such an order is consistent with the overall justice of the case, including fair procedures for the parties.

50. Finally, in addition to the issues identified in the motion, I consider that it is desirable to add one other issue for determination as a preliminary issue and that is this:

> "If the answer to question (i) above is in the affirmative, do the Employment Equality Acts require that any proceedings for redress in respect of any alleged breaches of rights conferred by the Acts shall only be brought before the Workplace Relations Commission or the Circuit Court in accordance with the provisions of those acts or do the acts also permit a claimant to seek, in the alternative, redress at common law?"

This question should be placed as issue number (ii) in the sequence of issues set out in the notices of motion herein.