THE HIGH COURT

[2008 No. 10492 P)

BETWEEN

KATHERINA STEPHENS

PLAINTIFF

AND

ARCHAEOLOGICAL DEVELOPMENT SERVICES LIMITED DEFENDANT

JUDGMENT of Mr. Justice John MacMenamin delivered the 21st day of December, 2010

1. By notice of motion dated the 9th November, 2009, the defendant seeks, in summary:-

> (i) An order pursuant to the Rules of the Superior Courts striking out matters in the plaintiff's statement of claim said to be unnecessary, scandalous, or which would tend to prejudice, embarrass or delay a fair hearing of the claim;
>
> (ii) Alternatively, in order that the entire statement of claim be struck out on the grounds that the pleadings, *inter alia*, by reason of the plaintiff pursuing her claims in the Employment Appeal Tribunal as well the High Court therein amounting to an abuse of process, or are vexatious;

and/or

> (iii) An order that this Court decline jurisdiction to hear the matter pleaded in the claim as no prior authorisation for the proceeding was granted by the Injuries Board.

2. To understand what follows it is necessary to deal with the background to the claim in some detail. It must be emphasised that what follows do not constitute findings of fact, but rather the evidential framework of the procedural issues which arise herein. The precise basis for the reliefs claimed are outlined specifically in the judgment.

3. The plaintiff commenced her employment with the defendant on or about the 5th December, 1997. She was employed as an Operations Manager, a position which she held up to her cessation of work on or about the 17th October, 2008. The defendant company is a small one engaged in archaeological consultancy work.

4. It appears that the plaintiff enjoyed a relatively close relationship with the company's owners. It is said a meeting took place between them in August, 2007, they discussed the possibility that Mr. Stephen Ryan, a former member of staff (previously the company financial controller), might be rejoining the company. The plaintiff pleads that at this meeting she was assured - and it was agreed - that Mr. Ryan would not be put in a position superior to her own, and that any such appointment would not be made without her consent.

5. The plaintiff claims that in breach of this agreement, Mr. Ryan was appointed to the post of Chief Executive Officer in September, 2007. The plaintiff says that thereafter the Chief Executive engaged in a campaign of intimidation and harassment which placed her future employment in question.

6. Late in 2007, the plaintiff was diagnosed with breast cancer. She was on sick leave for upwards of one year. This continued until the 10th October, 2008. On the 17th October, 2008, a meeting took place between herself and Mr. Ryan. The plaintiff pleads that Mr. Ryan imposed a number of onerous and unlawful conditions on her return to work. Matters reached an impasse. The plaintiff consulted her legal advisers. There was extensive correspondence between solicitors. On the 7th November, 2008, Eamon Murray & Company, solicitors for the plaintiff, wrote to the defendant company complaining that, when the plaintiff had reported back to the office for work, her personal belongings were nowhere to be found, and that Mr. Ryan insisted that if she wished to return to work her desk would have to be placed beside his. The plaintiff says she was forbidden to return to work unless she undertook to comply with these conditions and gave undertakings as to her future conduct.

7. In the same letter (of 7th November, 2008) the plaintiffs solicitor alleges that after the same meeting, a series of emails followed, ending in a message received from the company on 4th November, 2008, where the company sought to meet her to negotiate an agreed resolution to the dispute, and affirming the company's intention to defend any claims. At about the same time, it is said that the payment of the plaintiffs salary ceased. The plaintiffs solicitors claim that this conduct amounted to a *de facto* "dismissal".

8. In the course of the 7th November letter the plaintiffs solicitors wrote:-

> "... We believe that we need not advise you of the other remedies that are open to our client in relation to the injury and loss that she has suffered at the hands of the company and separate remedies that she has in respect of her *wrongful dismissal*." (Emphasis added).

The significance of the reference to "wrongful dismissal" will be explained later in this judgment.

9. The defendant's solicitor, Brannigan & Company, responded on 18th November, 2008. Their letter indicated that the defendant had no difficulty in paying the plaintiffs salary upon her return to work, but that such payment was conditional on her actual return. The letter also mentioned the possibility of a meeting between solicitors. Further correspondence took place in the month of November. However, this talk of negotiation came to nothing. The plaintiff did not return to work. She did not receive her salary.

10. Proceedings were issued on the 8th December, 2008. The contents oft he pleadings will be considered in detail later. They form part of the matter in issue.

11. Later, on 24th March, 2009, Murray & Co. wrote, reiterating that the plaintiff had received no pay since October, 2008 and that she now regarded herself as having been constructively dismissed. They added "...we now propose to bring an application to the Employment Appeals Tribunal in addition to our High Court proceedings".

12. On the 16th June, 2009, the defendant's solicitors responded, seeking a date to be identified as to when the plaintiff asserted that she had left the company and also seeking a letter of resignation.

13. On the 14th July, 2009, the defendant's solicitors wrote to Murray & Co. making a number of points. These were in summary:-

> 1. that the plaintiff had never sought the interlocutory injunctive relief claimed in her High Court proceedings;
>
> 2. that the plaintiff was not entitled to commence constructive dismissal proceedings before the Employment Appeals Tribunal as well as the High Court proceedings;
>
> 3. that the plaintiffs High Court proceedings purported to advance a personal injuries suit on behalf of the plaintiff, where no prior application had been made to the Injuries Board.

They called on the plaintiff to withdraw the proceedings. They contended that the plaintiff was not entitled to pursue her claim for payment under the Minimum Notice and Terms of Employment Acts in the circumstance where a claim of constructive dismissal had been brought by the employee and where the contract was terminated without notice.

The pleadings
14. In the plenary summons issued on the 8th December, 2008, the plaintiff sought, in summary, injunctions restraining the defendant from:-

> (a) demoting the plaintiff or removing her from her position of operations manager in the absence of fair procedures;
>
> (b) treating the plaintiff as other than in continued employment of the defendant;
>
> (c) advertising, recruiting or appointing any other person to carry out the plaintiffs work or position;
>
> (d) taking any steps inconsistent with the plaintiffs continued employment;
>
> (e) interfering with the plaintiff discharging her responsibility as operations manager.
>
> and ordering the defendant:-
>
> (f) to take steps to protect the health and safety of the plaintiff in accordance with the defendant's policies;
>
> (g) to pay the plaintiffs salary in full pending the hearing of the action:

on foot of these the plaintiff also claimed

> (h) damages including aggravated or exemplary damages for breach of contract, misrepresentation, breach of warranty, breach of a relationship oftrust and confidence, negligence, breach of fiduciary duty, infringement of the plaintiffs constitutional rights, breach of statutory duty, wilful infliction of mental distress;
>
> (the above is a summary of the claimed reliefs: not a quote from the pleadings).

15. An appearance was entered to the plenary summons on the 12th December, 2008. This was unconditional.

16. Between the time of the plenary summons and the statement of claim (delivered on 20th March, 2009), the plaintiff did not apply to court for interlocutory relief. It is said now that this was as a consequence of her sense that, by then, there had been a breakdown in the relationship of trust and confidence between herself and her former employers, such that interlocutory relief would have been futile.

The statement of claim
17. The statement of claim is a rather long document. It is some 26 pages. In addition to the reliefs outlined, it contained two aspects which are criticised.

18. The first of these, set out after para. 10 of the statement, is headed "Particulars of Harassment, Intimidation and Stress Inducing Events". Thereafter, there follows a detailed narrative of events said to have taken place between August/September, 2007 and 20th October, 2008. This material includes accounts of conversations, quotations from emails and the plaintiffs alleged reaction thereto.

19. The second arises from further particulars set out after paragraph 12. These are headed "Particulars of Personal Injury including Mental Distress, Damage to Reputation, Loss, Damage, Inconvenience and Expense". They set out the plaintiff's sense of 'harassment' as a result of what are said to be the "persistent phone calls, voicemails and emails" during the period of her sick leave. It is said this caused her physical and mental distress. It describes her concern when she found her desk had been cleared out when she returned to work. These particulars did not contain anything amounting to a psychiatric or medical report; but the plaintiff reserved the right to furnish particulars of personal injury, including mental distress between the time of delivery of the statement of claim and the hearing of the action. It was claimed that the plaintiff awaited reports in relation to the psychological and mental stress which she suffered as a result of the defendant's actions.

Sequence of issues now considered
20. The reliefs sought by the moving party in this notice of motion were set out at the commencement of this judgment. However, as a matter of logic, it follows that these should be taken in reverse order. Any question of the mere *content* of the pleadings would be entirely otiose were the court to hold first that it had no jurisdiction to entertain a claim at all as the plaintiff should first have made application to the Injuries Board, or were the court to conclude that the proceedings were an abuse of process, or that the Claim should be struck out as being vexatious or scandalous. Consequently, I turn first to the questions as to whether the court has jurisdiction to entertain the claim.

Should the plaintiff have first applied to the Personal Injuries Board?
21. It will be recollected that the plaintiff pleads that she was subjected to intimidation, harassment and stress. For this reason the defendant contends that the proceedings should not have been initiated without prior application to, what is now, the Injuries Board. In the absence of any interlocutory relief having been pursued, the defendant says the claim brought should be reduced to what was effectively a wrongful dismissal action claiming damages for personal or psychological injuries inflicted on the plaintiff. Thus it should have gone to the Injuries Board as a preliminary step.

The Personal Injuries Assessment Board Act 2003
22. The legislative intent behind the Act of 2003 has been recently considered by O'Neill J. in *Sherry v. Primark* [2010] IEHC 66 (Unreported, High Court, O'Neill J., 19th March, 2010). The issue which arises here, however, is more discrete one. It is confined to the facts of this particular action. The point is simply whether *this* set of proceedings is captured by the legislation.

23. It is necessary first to consider the provisions of the Personal Injuries Assessment Board Act 2003 ("the 2003 Act"). Section 3 of that Act provides:-

> "This Act applies to the following civil actions-
>
> > (a) A civil action by an employee against his or her employer *for negligence or breach of duty arising in the course of the employee's employment with that employer ... "*

The question which arises is whether this is, in fact, an action of an "employee" against an "employer" for "negligence or breach of duty" such that it is captured by s. 3(a) of the Act of 2003. Were it so it would have been necessary for the plaintiff to apply first to the Injuries Board.

24. It is necessary to consider also the provisions of s. 4 of the Act. This section defines a "civil action" as being:-

> "... an action intended to be pursued for the purpose of recovering damages, in respect of a wrong for -
>
> (a) personal injuries, or
>
> (b) both such injuries and damage to property...
>
> *but does not include*
>
> > (i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is bona fide intended and not for the purposes of circumventing the operation of *section 3* to claim damages or other relief in respect of any other cause of action." (emphasis added)

25. If these proceedings come within s. 3 of the Act, then clearly, by virtue of ss. II and I2 of the Act, the Court has no jurisdiction, as no prior application was made to the Injuries Board.

26. The issue which arises here is one of jurisdiction; not discretion under s. 17(d) of the Act. There is there a *discretion* vested in the Injuries Board not to arrange for the making of a medical assessment in circumstances which include where the injuries consist of psychological damage. There is a faint echo of s. 4, however, where s. I7(iii) provides that the Injuries Board may, within its discretion, decide not to arrange for the making of an assessment

> "(iii) ... because aggravated or exemplary damages are bona fide, (and not for the purposes of circumventing the operation of the Act) sought to be recovered in the claim."

I do not interpret this statutory provision as reducing the jurisdiction of the Injuries Board however. Rather, it is an identification of a discretion vested in the Board in proceedings which should properly have been the subject matter of an application. The pursuit of aggravated or exemplary damages in a claim does not, in itself, remove a case from the jurisdictional scope of the Act.

27. The plaintiffs case is that this is not a personal injuries action for negligence or breach of duty as normally understood. By affidavit, the plaintiffs solicitor, Ms. Clare Murphy, deposes that, when the proceedings were brought "it was a *bonafide* intention of the plaintiff to seek injunctive relief to compel the defendant to facilitate the plaintiffs return to work". However, she adds, as matters evolved, it became apparent that any relationship of trust and confidence between the parties had completely broken down. Ms. Murphy accepts that some of the reliefs sought in the original pleadings are no longer appropriate. On behalf of her client, she specifically abandons any claims for relief by way of injunction at this point. Counsel for the defendant submits that these claims should simply be struck out and that, absent such claims for equitable relief, the case should properly be seen as an action for personal injuries or breach of duty, thus falling within the terms of s. 3 of the Act of 2003.

28. The defendant lays some emphasis on the letter of the 7th November, 2008, wherein Murray & Company specifically warned of the "other remedies" that were open to their client in relation to the "injury and loss" that she has suffered and the "separate remedies that she has in respect of her wrongful dismissal". It is said this is now a *de facto* "wrongful dismissal claim" seeking damages for personal injuries.

29. • The question here is first one of statutory interpretation, and second, the application of the statute to the facts of this case. To use the term employed by the drafter in s. 4 of the Act: is this an action "intended to be pursued for the purpose of recovering damages for personal injuries"; or is it, rather, an action intended to be pursued in which, in addition to damages for personal injuries, it is *bona fide* intended to claim damages for other relief not for the purpose of circumventing the operation of s. 3 of the Act?

30. The interpretation of s. 3 and s. 4 together must, of course, be objective. Subjective "intention" cannot be determinative in itself. However, I consider that the true meaning of s. 4 necessitates that a court must look first to what was the actual *intention* of the plaintiff in 'pursuing' the proceedings. I am of the view the test which should be applied is as to that "intention" at the time of the initiation of the proceedings; because it was then, and only then, that the relevant "intention" was formed. If it had been the intention of the plaintiff *then* to circumvent the operation of s. 3 of the Act, plainly the action should be struck out. The court must also address the question as to whether there was a *bona fide* intention to claim damages or other relief in respect of any other cause of action. Again, this must not be for the purpose of circumventing the operation of section 3.

31. The defendant relies on the correspondence to which reference has been made earlier. The relevant portions have been set out. There is the reference to a potential claim for wrongful dismissal. But I do not consider this as sufficient evidence to establish *mala fides*. I do not consider this as determinative evidence as to the plaintiffs state of mind or "intention" *when* the proceedings were brought. There was nothing to prevent at least an *application* for an injunction in December, 2008. Such application would not have been out of the question, whatever its outcome. I am unable to find the letter as *evidence* of subsequent *mala fides*, or an intention to circumvent the operation of the Act. In fact, there is only one piece of actual evidence directly on the question of intention, and that is Ms. Murphy's affidavit sworn on behalf of the plaintiff, to which reference has just been made. It is important to emphasise that no counter balancing evidence of any equal weight has been adduced on this important question of intention. It is true that the correspondence raises a *question* of a wrongful dismissal claim and an action for personal injuries. But, as will be seen, no claim for wrongful dismissal was actually pleaded.

32. In my view, the test for the jurisdictional question is as to the subjective intention analysed objectively at the time ofthe bringing of the proceedings. The balance of the evidence favours the plaintiff. Additionally, there is the content of the plenary summons itself. It is replete with pleas for equitable relief by way of injunction. There is too, what is now, infelicitously, termed the fluid "factual matrix". At the time the writ was issued the facts were still evolving. The cause of action was not yet entirely crystallised as being one confined to damages.

33. Taken together, I consider that the *evidence* establishes, as a matter of probability, the intention of the plaintiff. At that time, it was to pursue remedies by way of injunction. The fact of that "intention", at the time the proceedings were brought, brings the case outside the range of s. 3, and within the provisions of section 4.

34. I would emphasise that this finding is made on the facts of this case, and the inferences which may be drawn from the pleadings. The decision should not, therefore, be read as having significance beyond the factual ambit of this case. There has been no actual evidence in rebuttal which carries similar weight.

35. There is support for this conclusion also by reference to the contents of the statement of claim. This is an action where it was intended to seek remedies, not just in negligence, but for breach of contract, misrepresentation and under a range of other headings. These include, to quote:-

"(i) breach of fiduciary duty;

(j) ... infringement of constitutional rights;

(k) breach of statutory duty;

(1) such interim or interlocutory relief as to this Honourable Court shall seem meet;

(m) damages for the wilful infliction of mental distress and emotional upset, harassment and bullying."

It is not, therefore, a simple action for personal injuries for "negligence" against an employer (see again s. 3 of the Act).

36. Finally, it is important to recollect in this context the manner in which the law has recently evolved. Claims for what are termed "harassment and bullying" are not now confined to negligence claims. They may arise in contract (see *Berber v. Dunnes Stores* [2009] IESC 10, (Unreported, Supreme Court, 1ih February, 2009); *Pickering v. Microsoft Ireland Operations Ltd.* [2006] 17 ELR 65). A breach of contract action lies without the s. 3 range.

37. It is true that for the purposes of this decision the key phrase ins. 4 is "intended to be pursued". This is, of course, somewhat broader in meaning than any other term which might have been used by the drafter, such as an action *"initiated* for the purpose of recovering damages". One could well envisage circumstances where, on other facts, a court might lay greater emphasis on the word "pursued", or conclude that the "intention" was not *bonafide*. But, on the evidence this is not such a case. Consequently, (subject to what follows) I consider that this court has jurisdiction to entertain and deal with the claim. This part of the relief claimed by the defendant will therefore be dismissed.

Is the plaintiff debarred from proceedings in the High Court and the

Employment Appeals Tribunal?

38. I tum then to the next jurisdictional issue, that is whether the plaintiff is debarred from pursuing her remedies in the Employment Appeals Tribunal *and* in the High Court.

39. Here it is again necessary to look first at the statutory framework.

40. Section 7 of the Unfair Dismissals Act 1977 provides for certain areas of redress for unfair dismissal before the Employment Appeals Tribunal. Such redress may take the form of reinstatement, re-engagement or (as provided in the parent Act of 1977):-

> "...(c) payment by the employer to the employee of such compensation (not exceeding an amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with the regulations under section 17 of the Act) in respect of any financial loss incurred by him and attributable to the dismissal as is just and equitable having regard to all the circumstances."

41. Subsection(2) of the same section identifies matters to which the Tribunal shall have regard in determining the amount of financial compensation. These include the extent to which the financial loss was attributable to some act, omission or conduct by the employer or employee; to mitigation of loss, or to failure of compliance with codes of practice.

Subsection (3) identifies "financial loss" as including:

> "... any actual loss and any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution attributable to the dismissal, or the rights of the employee."

The focus is on financial loss therefore - specifically - not general damages for pain and suffering.

While this provision was amended by s. 6 of the Unfair Dismissals (Amendment) Act 1993 the parameters for an award by the tribunal

remained strictly within the realm of *financial* loss and still do not encompass any scope for a claim under any heading in the law of torts, nor for the awarding of punitive or exemplary damages.

42. The provisions of s. 15 of the original Act of 1977 are also material. This provides, insofar as relevant:-

> "... 15(1) Nothing in this Act, apart from this section, shall prejudice the right of a person to recover damages at common law for wrongful dismissal.
>
> (2) Where an employee gives a notice in writing under section 8 (2) of this Act in respect of a dismissal to a rights commissioner or the Tribunal, he shall not be entitled to recover damages at common law for wrongful dismissal in respect of that dismissal.
>
> (3) Where proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of an employee, the employee shall not be entitled to redress under this Act in respect of the dismissal to which the proceedings relate...."

43. This provision was amended by s. 10 of the Unfair Dismissals (Amendment) Act 1993 so that subsection 2 and 3 now read:-

> "(2) Where a recommendation has been made by a rights commissioner in respect of a claim by an employee for redress under this Act or the hearing of a claim by the Tribunal has commenced, the employee shall not be entitled to recover damages at common law for wrongful dismissal in respect of the dismissal concerned.
>
> (3) Where the hearing by a court of proceedings for damages at common law for wrongful dismissal of an employee has commenced, the employee shall not be entitled to redress under this Act in respect of the dismissal to which the proceedings relate."

From these statutory citations a number of points emerge clearly:-

> (1) the compensation which may be awarded by the Employment Appeals Tribunal is confined to financial loss as defined.
>
> (2) a claimant is not entitled to pursue either statutory or common law remedies in the circumstance where, either the jurisdiction of the tribunal or the court has been triggered by first, either an appearance before a rights commissioner, or the hearing of a claim by the tribunal, or second, where a claim in court for damages for wrongful dismissal has commenced.

44. However, here the situation is more nuanced. As can be seen from the chronology of events set out earlier, the plenary summons was served *before* the employment contract was discharged. I expressly refrain from making any finding as to the question by whom it was discharged, or when.

45. To repeat, no application for interlocutory relief was ever brought on between 8th December, 2008, and 25th March, 2009 when the statement of claim was delivered. In light of the plaintiffs solicitor's letter of 23rd March, 2009, it must be highly questionable whether a court would have granted interlocutory relief by then. Even the plaintiff accepted that there had been a breakdown of trust. Thus, by that time it would have been impossible for her to compel her remaining in employment with the defendant by way of restraining order.

46. On the 10th April the plaintiff signed what is known as a T1-A Form and lodged a claim with the Employment Appeals Tribunal. This was received on the 1st May, 2009. In that document the plaintiff sought compensation under the Minimum Notice and Terms of Employment Acts 1973-2004 and the Unfair Dismissal Acts 1977-2001.

47. In an addendum to the Tl-A Form, the plaintiff set out very much the same • material as in the section of the statement of claim headed "Particulars of Harassment and Intimidation and Stress Inducing Events". By inference, both would appear to be drawn from a set of written instructions from the plaintiff. In the T1-A Form, the plaintiff referred to the fact that she had initiated High Court proceedings, although the date given is erroneous. Importantly, however, the statement of claim omits claim for damages for wrongful dismissal. Thus the instant case is distinguishable from other decided authority wherein there was a clear overlap in the remedies sought by a claimant in the High Court and that before the tribunal. (See, for example, *The State (at the prosecution of Dublin Corporation) v. The Employment Appeals Tribunal and Lawrence Mooney* (Unreported, High Court, Gannon J., 20th October, 1986) and on different facts, *The State (James Ferris) v. Employment Appeals Tribunal and Royal Liver Friendly Society* (Unreported, Supreme Court, 10th December, 1984). No wrongful dismissal claim is made here.

48. Counsel for the defendant, however, relies strongly on the decision of the Supreme Court in *Parsons v. Iarnród Eireann* [1997] 2 I.R. 523. The facts of *Parson*s bear some consideration. Arising from a labour dispute, the plaintiff appeared before a disciplinary committee of that defendant company. He was dismissed from his employment. He informed the defendant he intended to pursue a claim through the rights commissioner's office under the Unfair Dismissals Act 1977. The matter was heard before a rights commissioner, who recommended the plaintiff should proceed to the next stage of the defendant's internal disciplinary proceedings. This took place and the plaintiffs dismissal was confirmed. Subsequently, the plaintiff issued proceedings seeking a declaration that the decision to dismiss him from his employment was null and void, and an injunction compelling the defendant to reinstate him and damages for breach of contract and wrongful and/or unfair dismissal. As can be seen then, in *Parsons*, the plaintiff had *invoked* the rights commissioner procedure. Subsequently, as well as claiming injunctions, he also sought damages for what was termed in the statement of claim "wrongful and/or unfair dismissal". The claim was doomed to failure in the courts on two separate grounds: first the invocation of the rights commissioner procedure; second the claim for wrongful dismissal.

49. In the course of his judgment, speaking for the Supreme Court, Barrington J. set out the statutory boundaries in this way:-

> "... Section 15 of the Unfair Dismissals Act, 1977, provides that the worker must chose between suing for damages at common law and claiming relief under the new act. Sub-section 2 accordingly provides that if he claims relief under the Act of 1977, he is not entitled to recover damages at common law; while subs. 3 provides that where proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of an employee the employee shall not be entitled to redress under the Unfair Dismissals Act, 1977, in respect of the same dismissal ...." (p. 529)

He added later in the judgment, at p. 530:-

> "If the plaintiff loses his right to sue for damages at common law the heart is gone out of his claim and there is no other freestanding relief which he can claim at law or in equity ...."

The issue in this case is whether *Parsons* is a binding authority or whether, on the facts, it should be distinguished.

50. Here there is no plea of wrongful dismissal. The plaintiff has not invoked the barring mechanism of rights commissioner proceedings. A further issue then arises as to whether, in any case the facts and circumstances of the Tribunal claim and that in the High Court are separate and severable. There is helpful authority on this issue.

51. In *Quigley v. Complex Tooling and Moulding Ltd*. [2009] 1 I.R. 349, Lavan J. found that, where an employee had also acquired a *common law cause of action* against an employer prior to his dismissal, his cause of action in tort might nonetheless proceed in the High Court as well as a Tribunal claim. Where the facts of that High Court claim were independent of the subsequent dismissal therefore, a claim might be pursued in the Tribunal. In so finding, that Judge specifically approved the House of Lords decision of *Eastwood v. Magnox Electric plc*. [2004] 3 W.L.R. 322, and did not follow earlier dicta of that same court in *Johnson v. Unisys Ltd.* [2003] I A.C 518. The background case law to the *Eastwood* decision is of some importance. I will deal with this briefly.

52. In *Mahmud v. Bank of Credit and Commerce International SA* (in liq.) [1997] 3 All E.R. 1, the House of Lords had considered the application of the implied term of trust and confidence in employment contracts. There, the plaintiff claimed damages at common law for breach of this term. The House of Lords held that the claim was well founded as a matter of law. It held that damages for the trust and confidence implied term should be assessed in accordance with ordinary contractual principles.

53. What were described as "the ramifications" of this decision then came under scrutiny in *Johnson v. Unisys Ltd.* [2003] 1 A.C. 518. In *Johnson*, the plaintiff sought to extend the *Mahmud* principles further, seeking to rely on the breach of trust and confidence implied term, not as a basis for a statutory claim for unfair dismissal, nor for a claim for damages unrelated to dismissal, but as a foundation for a claim at common law for unfair dismissal. In its decision, the House of Lords concluded that Mr. Johnson's claim was founded on the fact that he had been dismissed and that the trust and confidence implied term could not be applied to dismissal itself. Further, it concluded that the grounds on which it would be wrong to impose an implied contractual duty regarding the exercise of the power of dismissal would make it equally wrong to achieve the same result by imposing a duty of care. Thus the matters which Mr. Johnson complained of in his court proceedings were held to be only within the statutory jurisdiction of an employment tribunal.

54. The vexed issue came to be considered again by the House of Lords in *Eastwood*. In the course of his speech Lord Nicholls made the following helpful observations at p. 331 of the report:-

> "... [27] Identifying the boundary of the '*Johnson* exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be *dismissed* unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.

He continued:-

> "[28] In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area."

But he added:-

> "[29] Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. *Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of his subsequent dismissal. In respect of his subsequent dismissal* he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over." [Emphasis added]

55. There is one further helpful passage from the same speech. Having commented on the possibility that it may be necessary for a tribunal and a court to traverse the same evidential ground in deciding the factual issues, Lord Nicholls went on to say:-

> "...[31] Second, the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped artificially into separate pieces. In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed."

56. The decision in *Johnson* had been much criticised. This criticism is set out in remarkable detail in Lord Steyn's speech in *Eastwood*. (He had dissented in *Johnson)*. The iteration of the judicial and academic criticisms of *Johnson*, so fully outlined in *Eastwood*, must be seen as an unusually vivid illustration of judicial schadenfreude.

57. It is undoubtedly true that the terms of the United Kingdom legislation differs somewhat from the Unfair Dismissals Acts. However, I am satisfied that the observations in *Quigley* by Lavan J. are illustrative of a distinction the lines of which were fully set out in the *Eastwood,* and which apply in our law. Provided a demarcation line can be similarly drawn, the effect of Quigley should be followed by this court. I say this subject to two caveats. First, clearly, there can be no question of double recovery; second; it may be necessary for a court to intervene by way of case management in order to identify precisely the case to be made before the Tribunal

and that which may ultimately come before this Court. I mention in passing that *Quigley* was successfully appealed: however that appeal did not concern the point at issue

here.

58. In the present case, the plaintiffs claim is that she was subjected to intimidation and harassment during the course of her employment. This allegedly occurred mainly during her certified sick leave. She contends this amounted to breach of contract and negligence which had psychological consequences. Further, she states that she suffered financial loss by way of loss of earnings by reason of the fact that she had been suspended from the 17th October, 2008 without pay. The plaintiffs case is that this cause of action is entirely separate and distinct from the Employment Appeals Tribunal claim concerning the financial loss resulting from the dismissal.

59. The plaintiff says that the matters pleaded refer to conduct during the continuation of her employment and in no way refer to the manner of her dismissal; that the facts and circumstances pre-date her date of dismissal by over eighteen months at the earliest stage, and six months at the latest date. She says that the employment appeal proceedings refer to the actual dismissal, how it came about, and whether the employer's actions were reasonable or not in the context of her resignation. I accept the proposition that *this* plaintiff, on *these* facts, may proceed before the Employment Appeals Tribunal, and, on separate aspects of the facts in the High Court.

60. I find support for the proposition that the plaintiff may (if the case is made out on evidence) recover damages for mental distress, for breach of implied terms of trust and confidence in a breach of contract proceedings (see *Pickering v. Microsoft Ireland Operators Ltd.* [2006] 17 ELR 65; *Berber v. Dunnes Stores* [2009] IESC 10) (Unreported, Supreme Court,Ii11 February, 2009). This aspect of the notice of motion must fail.

How the case will be managed
61. But the defendant company is entitled to know precisely what case it has to face and where. It will be necessary for this court to case manage the balance of the pleadings in these proceedings and to have sight of the documentation to be submitted to the Employment Appeals Tribunal. The High Court damages claim will be stayed until the final determination in the Employment Appeals Tribunal. That Tribunal claim will deal (and deal only), with the issue of financial loss caused by the plaintiffs dismissal (if so found). It will be necessary then for the statement of claim in these proceedings to be re-drafted so as specifically to identify issues ultimately to be placed before this court and "sanitised" so as to preclude the possibility of any overlap of claims. The plaintiff is not entitled to pursue a wrongful dismissal claim in the High Court in any guise.

Are the pleadings in accordance with the Rules of Court?
62. I move then to consider a third general issue viz - whether the statement of claim accords with the Rules of the Superior Courts ("RSC").

63. The effect of Order 19, rules 1 and 3, and Order 20 of the RSC is that a statement of claim should contain a statement of the *facts* relied on by the plaintiff as a relief which is claimed. The cause of action relied on must be clearly identified. Order 19, rule 3 lays down the fundamental principle that pleadings shall "contain, *and contain only*, a statement in a *summary form of the material facts* on which the party pleading relies for his claim or defence as the case may be, but *not the evidence by which they are to be proved ...".*

64. Material facts are those which constitute the cause of action; that is those which identify the case which must be proved by the plaintiff in order to succeed in the claim. Pleadings must not contain an unnecessary or extraneous matter. In general, therefore, a statement of claim should not include the *evidence* by which the material facts constituting the cause of action are to be proved. As in the case of all demarcation lines, the distinction is not always easy to draw. The observations which here follow should not be taken as being in any way critical of those who drafted the pleadings, in that, frequently, a plaintiff will be criticised for providing too little information rather than too much. In simple terms the litmus test is established by asking two simple questions. First, what is the plaintiffs case? This should be pleaded in the statement of claim. Second, how will the case be proved? That should not be pleaded in the statement of claim itself, but may well be provided in particulars. Under the rules, pleadings which unnecessarily set out *evidence* by which the material facts are to be proved may be struck out.

65. It is true that in certain forms of case the rules provide exceptionally that particulars of certain matters may be pleaded. This is for the purpose of further defining the issues between the parties and to prevent either party being taken by surprise. Personal injury claims are now one example of this exception. However, the exercise of such exceptions does not derogate from the general principle of pleading. A statement of claim should not be an "affidavit" in its format or content.

66. Order 19, rule 27 RSC deals with the question of what are termed 'unnecessary' or 'scandalous' pleadings. It provides that a court may at any stage strike out or amend any matter in an indorsement of claim which is deemed to be "unnecessary or scandalous" or which may tend to "prejudice, embarrass or delay the fair trial of the action". In general, pleadings which come under these descriptions will contain either irrelevant material, or allegations about parties in the case which have nothing to do with the dispute (see generally *Consolidated Superior Court Rules,* P.J. Breen, Ed. (Round Hall Sweet and Maxwell) and Delaney and McGrath, *Civil Procedure in the Superior Courts* (Round Hall, Dublin 2010, Chapter 5).

67. Having identified the relevant general principles, it is necessary to consider whether the statement of claim in its present form accords with Orders 19 and 20.

68. The defendant's first complaint is that not all the terms of the contract between the plaintiff and the defendant have been pleaded. Specifically, in the section headed "Particulars of Harassment and Intimidation and Stress Inducing events", there is reference to alleged oral or written variations to the original employment contract. These are said to have been subsequently negotiated between the plaintiff and the owners of the defendant company. Reference is made to alleged assurances to the plaintiff by the owners of the company regarding the terms of Mr. Ryan's appointment of Chief Executive. It is said, broadly, that it was agreed that any position made available to Mr. Ryan would not rank above the plaintiff, and that no such appointment would be made without the plaintiffs consent. Further than that however, the statement of claim itself does not go. The consequence of this is that the full nature of the alleged representations by the owners is not pleaded, thus the full ambit of the express or implied terms of the contract or other alleged representations said to have existed at the date of alleged breach or discharge of the contract have not been identified. Having considered the contents of the statement of claim I find myself in agreement of the defendant's submission on this point. The full terms of any alleged variation or representation should be set out. This is a "first question" issue, what precisely is the plaintiffs case? More specifically, what were the terms of the contract? The statement of claim should be amended to address this question fully.

69. A second issue arises in relation to the same section of particulars. In short, the section containing the aforementioned particulars stretch over some twenty-seven unnumbered paragraphs, that section of the statement of claim contains a great deal of narrative of events identifying persons at meetings, contents of emails, what was said and the plaintiffs reaction to these things. This section of the statement of claim goes over five folio pages.

70. I must conclude that such narrative transgresses the boundary line into evidence, the impugned portion of the statement of claim seeks to identify *how* the claim will be proved. Thus it goes to the "second question", and identified earlier is impermissible.

71. While I have no doubt that the same material will, as a matter of high probability, be set out in a reply to particulars I do not think that it appropriately lies within the framework of a statement of claim. It would inevitably beget a defence suffering from similar frailties. It is, to that extent, "embarrassing", in that it renders the task of pleading excessively onerous and would militate against identifying the true issues in the case. I will direct that the statement of claim will be amended by deletion of this section in its present form.

Are the proceedings vexatious or an abuse of process?
72. It follows from the findings in this decision that I do not consider the proceedings to be inherently frivolous or vexatious, or are such as must inherently fail because of procedural or statutory infirmity. For the same reasons, it follows that the claim does not come within the description of on abuse of process (see generally *Lac v. Chevron* [1995] 1 ILRM 161; *Riordan v. Ireland* (No.5) [2001] 4 I.R. 263).

Decision
73. The court will stay these proceedings until the outcome of the Employment Appeals Tribunal claim which will deal with the question of financial loss (if any) arising from the plaintiff's dismissal, (if this is established). For the purposes of any High Court claim, the statement of claim must be amended as directed; and specifically to plead the outcome of the Tribunal hearing, to set out such award and specifically to ensure there is no question of pursuing overlapping heads of loss.