THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 104

Record No. 2015/103

Peart J.
Irvine J.
Hogan J.

BETWEEN/

CIARÁN CULKIN

PLAINTIFF / APPELLANT

- AND -

SLIGO COUNTY COUNCIL

DEFENDANT/ RESPONDENT

- AND -

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

AMICUS CURIAE

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 29th day of March 2017

1. Few issues have dominated our law of civil procedure over the last two decades or so as have those arising from a multiplicity of litigation. The law reports from this recent period are teeming with examples of where the courts have been obliged to wrestle with issues of res judicata, issue estoppel *per rem judicatam*, the rule in *Henderson v. Henderson* and abuse of process.

2. This appeal presents a slightly different version of this problem of the multiplicity of litigation in different fora: can a plaintiff present a complaint of discrimination in the workplace before the Equality Tribunal on the grounds of harassment, victimisation and exclusion from the body of workplace and then, in the event that this complaint should prove unsuccessful, ultimately sue the employer for personal injuries arising out of the same alleged set of facts? In the High Court Kearns P. considered that this multiplicity of litigation was per se abusive and violated the rule in *Henderson v. Henderson*. He accordingly struck out the personal injuries proceedings as an abuse of process: see *Culkin v. Sligo County Council* [2015] IEHC 45. The plaintiff, Mr. Culkin, now appeals to this Court against that decision. Before exploring these issues it is, however, first necessary to set out the background to the litigation.

3. Mr. Culkin is a retired engineer who was employed by Sligo County Council ("the Council") in various capacities over a period of 39 years. He had first commenced work with the Council as an apprentice technician in 1970. He attained two diplomas in engineering during the course of his employment, together with an undergraduate engineering degree. Mr. Culkin was promoted a number of times until he reached the rank of Senior Executive Technician. The plaintiff contends that he began experiencing difficulties at work in or around 1996 when a new supervisor was appointed.

4. His case against the Council was that he was subjected to bullying, victimisation and isolation at work. It was thus claimed that information regarding training courses and opportunities was deliberately withheld from him; that malicious rumours were spread about him; that he was ordered to perform tasks below his level of competence; that he was excluded and isolated socially; that he was denied pay increments and promotion opportunities; that his opinions and views were neglected despite his experience, and that he was generally treated with hostility. The plaintiff alleged that this behaviour has left him suffering with a number of psychological and physiological symptoms.

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

6. The plaintiff also pursued a personal injuries case in addition to his equality complaint. He accordingly obtained an authorisation from the Personal Injuries Assessment Board in relation to his High Court proceedings on the 19th November 2010 and a personal injuries summons against the Council issued on the 2nd February 2011.

7. The plaintiff's case before the Equality Tribunal was heard on the 25th July 2012, 9th April 2013, 10th April 2013, 26th June 2013 and 21st July 2014. Mr. John Moran, Senior Executive Officer in the defendant Council, has stated on affidavit that a preliminary submission was made to the Equality Tribunal expressing the Council's view that the matters before the Tribunal were the same as those being pursued in the High Court proceedings and that the plaintiff was precluded from pursuing both claims.

8. Mr. Moran averred that rather than seeking to have the matter before the Tribunal adjourned however, the plaintiff requested that the Equality Officer nonetheless continue to hear the case. This may well be so, but it should also be noted that this issue does not appear to feature in the decision of the Tribunal dated 14th August 2014. In any event, this issue is fundamentally an issue of law

and is governed by the interaction of the relevant statutory provisions (namely ss. 77 and 101 of the Employment Equality Act 1998) with standard legal principles such as res judicata and the rule in *Henderson v. Henderson*.

The relevant statutory provisions
9. It is next necessary to examine the relevant statutory provisions. The procedure for making a complaint to the Equality Tribunal is governed by the Employment Equality Act 1998, as amended ("the 1998 Act"). Section 77(1) of the 1998 Act provides:

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

10. Section 101 of the 1998 Act addresses the question of alternative avenues of redress and provides as follows:

Section 101

> "(1) If an individual has instituted proceedings for damages at common law in respect of a failure, by an employer or any other person, to comply with an equal remuneration term or an equality clause, then, if the hearing of the case has begun, the individual may not seek redress (or exercise any other power) under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be.
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> (2) Where an individual has referred a case to the Director under section 77(1) and either a settlement has been reached by mediation or the Director has begun an investigation under section 79, the individual:-
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> (a) shall not be entitled to recover damages at common law in respect of the case, and
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> (b) where he or she was dismissed before so referring the case, shall not be entitled to seek redress (or to exercise, or continue to exercise, any other power) under the Unfair Dismissals Acts 1977 to 1993 in respect of the dismissal,
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> unless the Director, having completed the investigation and in an appropriate case, directs otherwise and so notifies the complainant and the respondent."

The High Court judgment
11. In his judgment Kearns P. placed particular emphasis on the earlier judgment of Hedigan J. in *Cunningham v. Intel Ireland Ltd.* [2013] IEHC 107, [2013] ELR 233. In *Cunningham*, the plaintiff had instituted a claim for discrimination against the defendant in relation to access to employment, promotion and re-grading, conditions of employment, and harassment. The Equality Tribunal rejected the complaint and, as in the present case, an appeal to the Labour Court was pending at the time of the application before Hedigan J. It was claimed that the same events caused the alleged personal injury and the defendant objected to having to defend the same claim in two sets of proceedings. Hedigan J. stated that all matters and issues arising from the same set of facts or circumstances must be litigated in the one set of proceedings save for special circumstances. The judge held:

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

12. Having referred with approval to the reasoning in *Cunningham*, Kearns P. proceeded to state:

> "I have carefully considered the relevant statutory provisions and the submissions of both parties and am satisfied that the plaintiff's personal injuries proceedings must be dismissed. The rule in *Henderson v Henderson* is well established and is frequently applied as part of the policy of the courts to avoid double litigation of the same issues, as considered by the Supreme Court in *A.A. v. Medical Council* [2003] 4 I.R. 302. This rule is in the interests of all parties to a case, who should not be expected to prosecute or defend the same proceedings repeatedly, and to the public, who have an interest in ensuring that court time is not wasted.
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> The plaintiff in these proceedings issued a complaint before the Equality Tribunal on the 10th September 2009. His EE1 form details the nature of the bullying he was allegedly subjected to and he was afforded a four day hearing before the Tribunal. At the outset of the Tribunal hearing, following a preliminary submission by the defendant, the option of pursuing his Equality Tribunal complaint or his common law claim was made clear to the plaintiff and he opted to pursue a remedy before the Tribunal. I am satisfied that the plaintiff is now estopped from resiling from this position after having had his claim rejected by the Tribunal.
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> To allow the plaintiff to proceed with his common law claim would be to breach the rule in *Henderson v. Henderson* and, in

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

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

The scope of the rule in Henderson v. Henderson

13. In the light of the judgment of Kearns P. it is necessary next to re-consider the modern application of the rule in *Henderson v. Henderson*. The general approach of the courts to the issue of a multiplicity of proceedings has been, broadly speaking, to adopt a merits-based approach. In other words, doctrines designed to prevent a multiplicity of proceedings and thereby ensuring the administration of justice is not abused – such as the rule in *Henderson v. Henderson* – are applied flexibly and not by reference to some inexorable and unforgiving logic. The courts have generally fought shy of adopting an ex ante, automatic exclusion of any second set of proceedings and much will depend upon whether the second proceedings raise questions which might sensibly and reasonably have been raised in the first proceedings.

14. All of this is illustrated by the judgment of Kearns J. for the Supreme Court in *SM v. Ireland (No.1)* [2007] IESC 11, [2007] 3 I.R. 383. As this is probably the leading contemporary decision on the essentially non-automatic nature of the rule in *Henderson v. Henderson*, it may be convenient to set out the Court's reasoning at a little length. In SM the plaintiff had originally been charged with a set of sexual offences under s. 62 of the Offences against the Person Act 1861. He then sought an order of prohibition restraining the prosecution on the grounds of undue delay, but these judicial review proceedings did not succeed. Some time later the plaintiff was then charged with a second tranche of s. 62 offences in relation to different complainants. At that point the plaintiff sought to challenge the constitutionality of s. 62 of the 1861 Act, but was later met with the objection that he had thereby breached the rule in *Henderson v. Henderson* in that he might have – but did not – raise this constitutional question in the first judicial review proceedings.

15. While this argument initially prevailed in the High Court, the Supreme Court disagreed. Kearns J. observed that the issue of the constitutionality of the section could not have been challenged in the judicial review proceedings. In any event, no proceedings had been issued by the plaintiff concerning the second tranche of s. 62 offences which concerned other complainants.

16. Kearns J. then continued thus:

> "Ultimately, the key issue in the case is to consider whether the order granting dismissal of the plaintiffs claim for abuse of process is justified by application the rule in *Henderson v. Henderson* (1843) 3 Hare 100. As already noted, the rule in *Henderson v. Henderson* effectively means that a litigant may not make a case in legal proceedings which might have been but was not brought forward in previous litigation. In that case Wigram V. C. formulated that principle as follows at pp 114 and 115:-
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> > "In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

17. Kearns J. then continued thus:

> "The purpose of the rule is to uphold an important principle of public policy which demands, in the interests of justice, that defendants are not exposed to successive suits where one would do. However, it is equally clear on the authorities that the rule in *Henderson v. Henderson* must not be applied in a rigid or mechanical manner so as to deprive the court of any discretion to hold otherwise in an appropriate case….It follows, therefore, that a limitation such as that provided for by the rule in *Henderson v. Henderson* should not be blindly or invariably applied, particularly where there are special circumstances in the case which would suggest that the imposition of the limitation would be either unfair, excessive or disproportionate. Thus in *Landers v. Director of Public Prosecutions* [2004] 2 I.R. 363 the rule in *Henderson v. Henderson* was not applied in circumstances where the applicant, who had been charged with road traffic offences, brought judicial review proceedings in which an order was granted restraining the District Judge from further conducting the trial of the applicant. No order was sought prohibiting the prosecution of the applicant and, on being informed that the charges against him would be heard before another District Court Judge, the applicant issued fresh judicial review proceedings seeking an order to restrain the respondent from further prosecuting him. The respondent contended that the applicant was not entitled to prohibition by reason of his failure to seek it in the first set of judicial review proceedings, but this contention was rejected on the basis that the applicant and his advisors could not reasonably have anticipated that the Director of Public Prosecutions would seek to prosecute afresh having regard to existing jurisprudence in relation to an unconstitutional first hearing in the District Court."

18. Kearns J. noted that by contrast:

> "In …*A. A. v Medical Council* [2003] 4 I.R. 302 no reason was ever advanced as to why the point ultimately taken (*i.e.*, the absence of legal aid) had not been raised in the earlier proceedings. There had been no change of circumstances in the intervening period insofar as the applicant was concerned. The applicant's financial position had not worsened in the interval: he was impecunious at all material times."

19. Kearns J. then concluded:

> "It seems to me that in the instant case the defendants have failed to put forward any evidence or reasoning to support a case of abuse or misuse of process based on any collateral attack of a decision made in the prior judicial review proceedings. ….The current plenary proceedings…. raise a discrete constitutional point which could not "sensibly" have been raised as part of the judicial review proceedings. An explanation, albeit not the most meritorious, has been offered as to why the point was not adverted to at an earlier time. However, that does not lead inexorably to a conclusion that the raising of the constitutional issue at a later time was an abuse of process. Nor can the present proceedings be characterised as dishonest or tantamount to the unjust harassment of any party. The defendants themselves have merely contended that the plaintiff could have raised his constitutional point either in the judicial review or in parallel plenary proceedings brought at the same time. Unlike the A.A. case, there were changed circumstances operating in the plaintiff's case, because eight additional charges involving different complainants were added to those which were the subject matter of the judicial review. There has been no litigation of any sort to date in relation to the second tranche of charges. Secondly, the parties to the present proceedings are not the same, given that the Director of Public Prosecutions was the opposing party in the judicial review proceedings but is not a party to the plenary proceedings. Furthermore, the plaintiff is not here seeking to reopen the same subject of litigation. He is not seeking to challenge a related procedural defect which might, and which should have been argued in the context of his delay type judicial review in 1998. What the plaintiff seeks to achieve in the present proceedings is a discrete and distinct subject of litigation, namely, that of seeking to have the statutory sentencing regime as set out in s. 62 of the Offences Against the Persons Act 1861 declared unconstitutional. The dicta of Barrington J in *Riordan v. An Taoiseach (No. 2)* [1999] 4 I.R.332 make it clear that this was not a relief to be appropriately claimed in the judicial review proceedings. Finally, any case on the 'parallel proceedings' argument seems to me to have the fatal flaw that such proceedings could not address charges not yet in being at the time of the judicial review proceedings and in respect of which no legal proceedings were ever brought. In another case, however, that argument might well prove conclusive in favour of a defendant."

20. The reasoning of the Supreme Court in *SM* is very instructive so far as the present case is concerned. That decision not only stresses the non-automatic nature of the rule in *Henderson v. Henderson*, but it also focuses on the type of *relief* which might sensibly have been sought and obtained in the first set of proceedings. This, of course, was the background to *Henderso*n itself precisely because in that case the claim in relation to the account of the intestate's estate had already been determined by the Newfoundland Supreme Court. The English courts then ruled in respect of a second set of proceedings that, absent special circumstances, the matter could not then be re-opened before them. This, of course, is what Wigram V.C. had in mind when he spoke of the rule applying to prevent the parties "to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not…"

21. The rule in *Henderson v. Henderson* is thus closely linked with the doctrine of issue estoppel and estoppel *per rem judicatam*. In fact, the rule might be said to represent a potentially wider application of both of these doctrines in that it captures both the strategic withholding of claims which might have been usefully brought forward in the first set of proceedings (along with the negligent failure to do just that) as well as subsequent litigation which amounts either to a direct or collateral attack on the earlier judgment.

22. Nevertheless, as I have already stated, the focus of *Henderson* is on the relief which might have been obtained in the first proceedings. This is why the rule is not automatically applicable in the special case of separate claims which are required to be made under a statutory scheme on the one hand (such as in the present case) and regular personal injuries claims on the other, even if both claims arise from the same set of underlying facts. To repeat once again, the *Henderson* rule requires that the plaintiff must have been able to have brought forward the claim in the second proceedings in the first proceedings.

23. This is where I fear that both Kearns P. in the present case and Hedigan J. in *Cunningham* have, with respect, fallen into error. Even if he had wanted to, the plaintiff could not have combined a common law claim for personal injuries along with the statutory claim for discrimination in the one set of proceedings. Just as the Equality Tribunal had no jurisdiction to entertain the common law claim, the High Court had no first instance jurisdiction to adjudicate upon the statutory claim for discrimination or harassment under the 1998 Act.

24. The discrimination and harassment claim before the Tribunal must, in any event, be linked to one or more of the nine specific grounds identified in s. 6(2) of the 1998 Act, namely, gender, civil status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. The corollary of this is that the Tribunal has no jurisdiction under the 1998 Act to deal with a claim for free standing claim for discrimination or harassment which is independent of these specific statutory grounds. Putting this another way, while the Tribunal has jurisdiction to deal with a harassment claim which was linked with the gender of the claimant, it would, for example, have no such jurisdiction where the claim simply was that the victim had been harassed by a fellow employee who just happened to dislike him or her.

25. It follows, therefore, that the discrimination claim and the personal injuries claim are different claims, with different time-limits and different rules as to both liability and quantum. As Ryan has put it, the identification of "the ambit of the two (or more) sets of proceedings pursued by a litigant, and, in particular, whether that ambit overlaps impermissibly, would appear to be central to the determination of whether Henderson….precludes the bringing of further claims": "Parallel Proceedings in Employment Law: An Analysis of the High Court Judgments in *Cunningham* and *Culkin*" (2015) 38 *Dublin University Law Journal* 219, 224. In that sense, therefore, it was simply not possible for the plaintiff to have brought forward his "whole case" before the Tribunal in the sense envisaged by Wigram V.C. in *Henderson* simply because that statutory body would have had no jurisdiction to entertain a workplace personal injuries claim.

Conclusions on the *Henderson v. Henderson* issue

26. It follows, therefore, that I consider that Kearns P. was in error inasmuch as he applied what in effect was an ex ante and automatic application of the rule *in Henderson v. Henderson* so as to bar the present personal injuries claim *in limine*. That, admittedly, is not to say that the plaintiff can proceed entirely unhindered to pursue his personal injuries claim against the Council. It may be, for example, that the trial judge hearing the personal injuries case would conclude that that case should ultimately fail because it amounted in substance to a collateral attack on the earlier Tribunal decision. But that is not at all the same thing as saying that the claim should be struck out *in limine* on *Henderson v. Henderson* grounds.

Section 101 of the 1998 Act

27. One may, in any event, arrive at this conclusion independently by reference to the language of the 1998 Act itself. Section 101 of the 1998 Act addresses the issue of complementary remedies.

28. The key sub-section so far as the present case is concerned is that contained in s. 101(2)(a). This provides that where a case under s. 77(1) – which includes a case for discrimination and harassment – has been referred to the Tribunal and the case has either been settled following mediation or the Director of the Equality Tribunal has commenced an investigation under s. 79, then the claimant "shall not be entitled to recover damages at common law in respect of the case."

29. The argument here – which found favour in the High Court - is that s. 101(2)(a) should be interpreted as precluding a common law claim for personal injuries where the individual has already pursued a claim before the Tribunal. It is true that, as Kearns P. noted in his judgment, the claims before the Tribunal are entirely statutory in nature. He considered that the words of s. 101(2)(a)("…in respect of the case…") must refer to the *facts* of the underlying claim and not simply to the *relief* claimed before the Tribunal. Any other conclusion would, he thought, render these words of the sub-section effectively otiose and redundant, since a claimant could never have recovered at common law in respect of a claim of which the Tribunal had jurisdiction.

30. I agree that if the sub-section is viewed in isolation it might well lend itself to this interpretation. But I think that the section must be viewed as a whole and particularly with reference to the immediately preceding sub-section, namely, s. 101(1). Section 101(1) addresses the converse case of where a plaintiff makes a claim for damages at common law in respect of a failure "by an employer or any other person to comply with an equal remuneration or an equality clause", by providing that if then the hearing of the case has begun, the individual "may not seek redress…under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be."

31. It is, however, necessary to give s. 101 an holistic interpretation, as any endeavour to look at s. 101(2)(a) in isolation and without regard to the statutory provision which immediately precedes it may serve to give a misleading construction. As Black J. explained in The *People (Attorney General) v. Kennedy* [1946] I.R. 517, 536:

> "A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented. If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of ejusdem generis and noscitur a sociis utterly meaningless: for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning, must be given a quite different meaning when viewed in the light of its context."

32. If one applies this principle in the context of s. 101, it is plain that the phrase "entitled to recover damages at common law in respect of the case" in s. 101(2)(a) is referable back to the language of s. 101(1), *i.e.*, a claim at common law in respect of the failure to comply with an equal remuneration claim or an equality clause. Not only is this natural sequence of language for the reader of the section – because, at the risk of stating the obvious, s. 101(2)(a) comes immediately after s. 101(1) - but any other conclusion would also lead to an absurdity. It would mean, for example, that a claimant could pursue a personal injuries claim which was unrelated to a failure to comply with an equal remuneration term or an equality clause and then be free to pursue a discrimination claim before the Tribunal (s. 101(1)) but that a claimant who first pursued a discrimination claim before the Tribunal was not free to maintain a personal injuries claim before the courts (s. 101(2)(a)).

33. It is, accordingly, by checking the meaning of s. 101(2)(a) by reference to the context of s. 101(1) in the manner indicated by Black J. in *Kennedy* that the meaning of the phrase "damages at common law in respect of the case" become clear. In this context, the language of s. 101(2)(a) refers to that already described in s. 101(1), namely, a claim for damages at common law in respect of the failure to comply with an equal remuneration term or an equality clause. When viewed in the light of s. 101(1), these words in s. 101(2)(a) must, accordingly, be regarded as having the more limited meaning I have suggested and not the wider, broader meaning which found favour in the High Court. As thus construed, the construction of s. 101(1) and s. 101(2)(a) presents virtually a text-book example of the application of the interpretative principle of *noscitur a sociis* ("known by its companions").

Conclusions on the s. 101 of the 1998 Act

34. Summing up, therefore, s. 101 serves to bar complementary claims for discrimination before the Tribunal and at common law in respect of claims based on failure to comply with an equal remuneration term or an equality clause. But it has no wider meaning and, specifically, it does not bar subsequent personal injuries claims *per se* where an earlier discrimination claim before the Tribunal has failed.

Overall conclusions

35. For the reason stated, therefore, I would allow the appeal insofar as Kearns P. held that the personal injuries claim must automatically fail *in limine* as an abuse of process by reason of the plaintiff's failure to prevail before the Equality Tribunal. But, for the reasons I have also stated, it would also be open to the court of trial to determine that the personal injuries claim – or, at least, parts of the claim – should fail on the ground that it amounted in substance to a collateral attack on the decision of the Equality Tribunal.