Neutral Citation Number: [2011] IEHC 130

THE HIGH COURT

2003 858 P

BETWEEN

PAUL CARUANA

PLAINTIFF

AND

FRUIT OF THE LOOM INTERNATIONAL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered the 30th day of March 2011

By a plenary summons issued on the 21st January, 2003, the plaintiff claimed damages against the defendant for personal injury, loss and damage alleged to have been suffered by him as a result of negligence, breach of contract, and, breach of duty including statutory duty on the part of the defendant, its servants or agents. By a statement of claim delivered on the 20th October, 2005, this was identified as stress at work occasioned by the failure of the defendant to maintain a relationship of trust and confidence with the plaintiff and, in causing or permitting him to be, verbally abused, subjected to unfair questioning, undermined at work, discriminated against in staff rostering, shift work and overtime, accused of incompetence in the course of his work and, deprived of his recognition as shop steward.

By a defence delivered on the 10th May, 2007, it was pleaded at para. 3 thereof that the plaintiff was estopped and precluded by the terms of a "Discharge Form" dated the 30th April, 2004, from initiating and prosecuting these proceedings. By order of this Court made on the 17th July, 2009, the court directed that the following issue be determined by way of a preliminary issue in the proceedings, that is:-

> "Whether the plaintiff is entitled to take action against the defendant on the basis of the Form of Discharge which was signed by both parties on the 30th day of April, 2004."

This Discharge Form in writing, (hereinafter referred to as the "agreement"), dated the 30th April, 2004, was executed by the plaintiff in the presence of Mr. Sean Reilly, the Donegal Area Branch Secretary of S.I.P.T.U., and of a shop steward of that Trade Union. It was executed on behalf of the defendant company, his former employers, by the Manufacturing Director and the Personnel Manager in the presence of Mr. Peter Murphy, Solicitor of the Irish Business Employers Confederation and, of the Regional Director of that Confederation. In the negotiations which concluded in the execution of this agreement the plaintiff was represented by Mr. Reilly and the defendant was represented by Mr. Murphy. The text of the written agreement was in its entirety the work of Mr. Murphy.

By the terms of the agreement the several sums of money agreed to be paid to the plaintiff by the defendant were agreed and stated to be:-

> "In full and final settlement of all claims of every nature, type and kind whatsoever and howsoever arising in respect of and from both my former employment and the termination thereof by reason of redundancy . . . including my abovementioned two employment claims, both under statute and at common law, in all respects and for all purposes, with the exception of my two outstanding employer liability claims for personal injuries against [the defendant]."

The plaintiff claims that the present action, in which he claims damages, including aggravated and additionally or alternatively punitive damages for personal injury, loss and damage alleged to have been suffered by him by reason of alleged breach of contract, negligence, breach of duty of care, and breach of statutory duty on the part of the defendants, is one of these two excepted claims. The defendant, on the contrary, asserts that it is not and claims that during the course of the negotiations leading up to the agreement, in the drafting of the agreement, at the time of its execution and for six months thereafter they were entirely unaware of this claim. The evidence established that though a plenary summons making this claim was issued on the 21st January, 2003, it had not been served on the defendant at the date of the agreement, nor had the defendant been notified in any way of this claim. The defendant claims that the "two outstanding employer liability claims for personal injuries" referred to in the agreement are two work related personal injury claims made by solicitors for the plaintiff by a letter dated the 25th October, 2001 and by a letter dated the 10th December, 2002. The plaintiff claims that the "two outstanding employer liability claims for personal injuries" referred to in the agreement are the claim made on the 10th December, 2002 and the stress at work claim made in the present proceedings.

The negotiations which resulted in the agreement being drawn up and executed took place immediately prior to and with the consent of the Tribunal, during a scheduled hearing of a claim by the plaintiff for unfair dismissal and failure by the defendant to give minimum notice of termination, conducted before a panel of the Employment Appeals Tribunal sitting at the Courthouse, Letterkenny on the 30th April, 2004. These negotiations were conducted solely between Mr. Murphy, a Solicitor specialising in employment law and Mr. Reilly a very experienced trade union official. Both men were well acquainted and each had a high regard for the skill, knowledge and integrity of the other.

Both men told the court that they were agreed on the 30th April, 2004, that so far as humanly possible every "I" should be dotted and every "T" crossed in the agreement because of the very troubled and eventful history of the plaintiff's employment with the defendant. Between August 1997 and December 2002, no less than ten incidents involving alleged personal injury to the plaintiff were recorded in the defendant's Incident Log. In addition, the plaintiff had successfully challenged three disciplinary decisions against him by the defendant before a Rights Commissioner. It was therefore their mutual intention to effect a total settlement of all issues between the plaintiff and the defendant with the sole exception of outstanding employers' liability claims for personal injuries by the plaintiff against the defendant. It is pertinent to record that because a number of the consultation rooms in the Courthouse at Letterkenny were occupied on the morning by other litigants, the plaintiff throughout the negotiations remained at the Courthouse, but the representatives of the defendant had to find accommodation at a nearby hotel.

I find on the evidence that Mr. Murphy told Mr. Reilly that the plaintiff had made three claims only against the defendant for damages for personal injury which he claimed he had suffered in the course of his employment with the defendant. I am satisfied that letters of claim had been received by the defendant from firms of solicitors representing the plaintiff dated, 15th February, 2000, (alleged injury to the plaintiff's lower back), 25th October, 2001, (alleged further back injury) and, 10th December, 2002, (alleged chest injury involving a fork-lift truck). I find on the evidence that Mr. Murphy was at great pains to ensure that these were the only claims made by the plaintiff against the defendant as of the 30th April, 2004, and were the only claims of which they were or ought to have been aware.

Mr. Murphy produced in evidence a witness list and chronology of events which he had prepared for use at the hearing of the plaintiff's unfair dismissal claim before the Employment Appeals Tribunal. This list clearly identifies the three claims made out of the ten recorded incidents and gives the date and brief details of each of these ten incidents. Mr. Murphy could not recall in evidence whether or not he had shown this list to Mr. Reilly. I am satisfied on the balance of probabilities that he did not. Mr. Reilly had no recollection of ever having seen this list and it is somewhat improbable that Mr. Murphy would have shown his proofs to Mr. Reilly to no benefit at a time when the case might still have proceeded before the Employment Appeals Tribunal panel.

I am satisfied and I so find that Mr. Reilly asked Mr. Murphy if the plaintiff had any claims for work related injuries because if so these would have to be excluded from the terms of any settlement. Mr. Reilly told the court that his remit was to deal only with employment related issues: personal injuries claims were matters for the plaintiff's own solicitors or solicitors nominated under the Union Civil Legal Aid Scheme and he had no interest in them other than a concern to ensure that any outstanding claims for personal injuries would be excluded from any settlement. Mr. Reilly told the court and I accept his evidence that he did not know if the plaintiff in fact had any such claims, when he asked the question of Mr. Murphy. It was Mr. Murphy's recollection that he had informed Mr. Reilly of both the dates and the details of the three claims made by the solicitors on behalf of the plaintiff against the defendant. However, I am satisfied that with respect to the provision of details of these three claims, his recollection is incorrect. I am fully satisfied that this error is entirely due to the passage of time and, to the probable assumption that he told Mr. Reilly everything that appears in the chronology regarding these three claims on behalf of the plaintiff. I found Mr. Murphy and Mr. Reilly both to be forthright, truthful and careful witnesses. Mr. Reilly told the Court that when he was appointed to Public Office on the 1st November, 2007, he had disposed of all files more than three years old. He had only become aware of the current problem on the 21st October, 2009.

I am however satisfied that Mr. Murphy is correct in his recollection that he did inform Mr. Reilly of the dates of each of these three claims and pointed out that the defendant regarded the oldest claim of these three claims as outside the time limit and therefore statute barred. Mr. Reilly in evidence was prepared to accept this and, accepted that Mr. Murphy had made it clear to him that the other two identified claims were the only other personal injury claims by the plaintiff against the defendant. I accept Mr. Reilly's evidence that he was not at all interested in the details of these claims and accepted what Mr. Murphy said. I accept Mr. Murphy's evidence that because of the sensitivity of the matter he had been particularly careful to secure the agreement of the representatives of the defendant to the exclusion of these two claims from any agreement.

I accept Mr. Reilly's evidence that he went back to the plaintiff in the room where he was and said to him. "I have been told by Mr. Murphy that there are two outstanding claims: I presume you know what they are". To this the plaintiff had replied, "Yes I do, there's the bullying and harassment complaint and there's the complaint about a fork-lift accident". This was also the evidence of the plaintiff himself. I am satisfied and I so find that because Mr. Reilly and Mr. Murphy had not discussed the nature of the two claims, this description by the plaintiff conveyed no indication of any dissention on the part of the plaintiff to Mr. Reilly. I find that the plaintiff's response in fact confirmed in the mind of Mr. Reilly that what Mr. Murphy had said to him was correct and that the two claims identified by Mr. Murphy by date were the only outstanding employer liability claims for personal injuries by the plaintiff against the defendant. Mr. Reilly told the court that he had no further discussion with the plaintiff about this matter. He returned to Mr. Murphy and I accept Mr. Murphy's evidence that he said to him "That's fine, that's agreed, those two are excluded".

I am satisfied that there was absolute consensus *ad idem* between Mr. Reilly and Mr. Murphy that the only two personal injury claims outstanding by the plaintiff against the defendant which would require to be excluded from the settlement and discharge were the two that had been identified by Mr. Murphy by date. I am satisfied that the agreement was drafted by Mr. Murphy to reflect, and did accurately reflect this consensus. I am satisfied that both Mr. Reilly and Mr. Murphy intended to agree and did agree that the claims to be excluded from the operation of the agreement were the two claims for personal injury made respectively on the 25th October, 2001 and the 10th December, 2002.

If Mr. Reilly was mistaken as to what two outstanding claims had been identified by the plaintiff this was not in any way caused or contributed to by any misrepresentation or concealment on the part of Mr. Murphy. If there was any mistake in communication in this matter, it occurred solely as between the plaintiff and Mr. Reilly. I am satisfied that Mr. Reilly did not know that one of the claims mentioned by the plaintiff as outstanding was not one of the two outstanding personal injury claims identified by Mr. Murphy and, was not even known to the defendant. Mr. Murphy did not know and could not reasonably have known that Mr. Reilly was mistaken in his belief that the plaintiff had acknowledged that the two outstanding employers liability personal injury claims identified by Mr. Murphy were the only such claims outstanding and, could not reasonably have suspected that Mr. Reilly's intention to enter into the agreement was based on incorrect facts. Mr. Murphy certainly did not contribute in any way to this misunderstanding on the part of Mr. Reilly. Responsibility for that in my judgment was the fault of the plaintiff himself and of no one else.

When Mr. Reilly said the plaintiff, "I have been told by Mr. Murphy that there are two outstanding claims", the plaintiff must have known that Mr. Murphy could only have been referring to claims of which the defendant was then aware. I am satisfied on the evidence that the plaintiff was fully aware that three and only three personal injury claims were known to the defendant. I find on the evidence that the plaintiff knew that proceedings had been issued on his behalf against the defendant claiming damages for personal injuries for what he described as bullying and harassment in the course of his employment, but that these proceedings had not been served on the defendant nor had any letter of claim been sent to the defendant by his solicitors. In November 2004 an application had to be made to the Court to renew the plenary summons issued on the 21st January, 2003. I am prepared to accept the evidence of the plaintiff that he regarded the oldest of the three notified claims, - the claim of 15th February, 2000, which Mr. Murphy and Mr. Reilly had agreed was time barred, - as a "dud" because of seemingly insuperable problems regarding medical evidence. Though a general operative with the defendant the plaintiff was a S.I.P.T.U. shop steward and the history of his employment and dealings with the defendant demonstrates that he was possessed of an alert and resourceful mind.

In these circumstances, "Yes I do" was a singularly inappropriate and irresponsible answer to the question, "I have been told by Mr. Murphy that there are two outstanding claims: I presume you know what they are", even though followed by a description of what they were. At the moment this question was asked by Mr. Reilly, I find that the plaintiff knew that he had in fact four claims outstanding against the defendant, - three by letters sent by solicitors and one by an issued court summons. However, the plaintiff must have known that Mr. Murphy could not have been referring to the "bullying and harassment" claim, because he knew the defendant was entirely unaware of that claim. The first time the defendant became aware of this claim was when it received a letter

dated the 11th October, 2004, from solicitors representing the plaintiff. He also knew that apart from what he described as the "dud" claim he had two remaining valid personal injury claims outstanding of which he knew the defendant was fully aware. In my judgment against such a background, his reply to Mr. Reilly was factually inaccurate and at the very best disingenuous and reckless. In cross examination Mr. Reilly accepted that he would have expected the plaintiff to have told him if the plaintiff knew that he had four claims outstanding and that if this had been the state of his knowledge, that the plaintiff had withheld information from him. Had he known that there were four claims he would have insisted that the agreement referred to "Four" outstanding claims or to "All" outstanding claims. I find that the plaintiff's reply led Mr. Reilly to believe that the plaintiff was accepting Mr. Murphy's "offer" that the two personal injury claims identified by Mr. Murphy as outstanding would be excluded from the operation of the agreement. I am satisfied that Mr. Reilly therefore fully intended to accept and did in fact accept that these two outstanding personal injury claims only should be excluded from the operation of the agreement. Mr. Murphy was not aware and there was nothing whatever which ought reasonably have made him aware that Mr. Reilly may not have shared the same intention to conclude this agreement but for the error of fact induced solely by the plaintiff's reply. No basis for any claim of unilateral mistake on the part of the plaintiff could therefore be established on the facts. If however, Mr. Reilly had accepted Mr. Murphy's "offer" knowing that the claims intended by Mr. Murphy to be excluded were different from the claims intended by the plaintiff to be excluded, in my judgment the defendant could either rescind the agreement or enforce it against the plaintiff in the terms in which Mr. Murphy had intended.

The agreement itself does not identify the claims, the subject matter of the provision excluding, "my two outstanding employer liability claims for personal injuries", from the operation of the discharge. In *Chambers v. Kelly* [1873] 7 L.R., C.L. 231, the question at issue was what was meant by the description "oak plantations" in an agreement in writing between the plaintiff owner and the defendant timber merchant. It was held by the Court of Exchequer, on appeal from the Judge of Assize that conversations between the parties in reference to the sale prior to the agreement was properly received under the parol evidence rule in order to identify the subject matter of the contract. Fitzgerald, B. (Deasy, B and Dowse B. concurring) held that, [he was] "of opinion that, for this purpose, evidence of what passed leading, in the words of the learned Judge who tried the case, "up to" the agreement, could not be excluded". Fitzgerald, B. ruled that the learned trial judge was correct in directing the jury that what the parties said they did or did not intend by what was written was irrelevant.

By reference to the evidence, to which I have already alluded in this judgment, of the facts leading up to the agreement in the instant case I am satisfied that the subject matter of the provision of the agreement excepting from the finality of the agreement, "My two outstanding employer liability claims for personal injuries against the defendant]", was the claim made for an alleged back injury by the solicitor's letter to the defendant dated the 25th October 2001, and the claim made for an alleged chest injury by the solicitor's letter dated the 10th December, 2002. The agreement is specific: it does not employ the words "any" or "all" or "whatever" or "such" or other general expressions. It is utterly improbable that the agreement was intended to mean two outstanding employer liability claims for personal injuries whatever they might be.

I find that the plaintiff is bound by this agreement which his agent Mr. Reilly fully intended to enter into on his behalf and which he himself freely executed. A further term of the agreement provides as follows:-

> "I confirm that this document has been read over and explained to me prior to my signing it, that I have taken independent advice with regard to both the meaning and effect of my signing this document from my trade Union Official Sean Reilly, . . . and that accordingly I both understand and accept the document and its contents in full."

Mr. Reilly told the court and I accept his evidence which was not challenged by the plaintiff that he carefully went over each of the terms of the agreement with the plaintiff before the latter signed the agreement.

I therefore find that the plaintiff is estopped by the terms of the agreement from prosecuting this action.