

Between:**CAROL FOX****Plaintiff****– and –****CHERRY ORCHARD HOSPITAL AND THE HEALTH SERVICE EXECUTIVE****Defendants****JUDGMENT of Mr Justice Max Barrett delivered on 3rd May, 2019.**

1. Ms Fox was a care-worker employed by the defendants at Cherry Orchard Hospital between January and October 2008. She claims that she was subjected to bullying and harassment during her employment and that she had no choice but to resign. The defendants come to court seeking (1) an order pursuant to O.122, r.11 RSC, dismissing Ms Fox's claim for want of prosecution, and (2) in the alternative, an order dismissing Ms Fox's claim for want of prosecution on grounds of inordinate and/or inexcusable delay. The hearing focused on item (2) and this is so clearly a case on which the defendants fall to succeed by reference to same that the court does not consider item (1).

2. The following chronology of relevant events has been prepared by the solicitors for the defendants and is respectfully adopted by the court:

Jan-Oct 2008 Period of alleged bullying and harassment.

05.10.2008 Date of alleged wrongful dismissal/resignation

23.07.2010 Pre-action letter of plaintiff's solicitors.

18.08.2010 PIAB letter acknowledging completed application of 16.08.2010.

18.08.2010 PIAB authorisation.

03.11.2010 Defendants' notice for particulars.

13.04.2011 Plaintiff's replies to particulars.

15.08.2011 Defence delivered.

26.03.2012 Plaintiff's Notice for Particulars and Reply to Defence.

21.05.2012 Defendants' voluntary discovery request.

02.11.2012 Defendants' motion for discovery issues.

21.01.2013 Order for plaintiff to make discovery.

11.02.2013 Plaintiff's notice of appeal to Supreme Court.

12.05.2014 Certificate of readiness by plaintiff.

15.01.2015 First listing in Court of Appeal following transfer.

21.01.2015 Defendants' motion to adduce new evidence

23.03.2015 Order of Court of Appeal varying High Court order.

20.04.2015 Perfection of Order of Court of Appeal.

02.11.2015 Plaintiff's affidavit of discovery.

30.07.2018 Notice of Trial issued by plaintiff.

31.07.2018 Receipt of letter serving notice of trial.

03.08.2018 Solicitors for plaintiff notify intention to seek hearing-date.

17.08.2018 Solicitors for defendants reply.

28.09.2018 Further correspondence from solicitors for defendant.

23.10.2018 Solicitors for plaintiff reply.

06.11.2018 Further correspondence from solicitors for defendant.

3. The law as to strike-out for inordinate and inexcusable delay has been considered at length by the appellate courts in recent years. As good a summary as any of the applicable principles is to be found in the relatively recent judgment of the Court of Appeal in *Farrell v. Arborlane Ltd and ors* [2016] IECA 224, para 20. The court proceeds by reference to those principles.

4. **Inordinate delay?** Has there been inordinate delay on Ms Fox's part? Up to when the order of the Court of Appeal was perfected, the court's answer is 'no'. Thereafter there was some delay in the delivery of the affidavit of discovery (due in June; sworn in November). There was then entirely inordinate delay in the progress of the proceedings with nothing being done until July 2018. (There was a medical examination of the Ms Fox in April 2016 done at her own behest; the defendants took no step in this regard, e.g., in terms of arranging an examination, agreeing a joint expert or seeking information of documents. Moreover, for Ms Fox to submit to such an examination was not a step in the proceedings). All of the foregoing comes in the context of proceedings to which there was something of a late start, the notice of intended proceedings coming two years after the alleged events leading to same. In short, the court is confronted with a case where there has been inordinate delay by Ms Fox.

5. **Inexcusable Delay?** No good excuse has been offered for the inactivity from November 2015 to July 2018. Nor does the court see any excuse to present.

Delay in obtaining date from GP.

6. Ms Fox claims that some of the delay presenting was due to a (remarkable) 13 months spent by her and her lawyers between February 2016 and March 2017 seeking to elicit from Ms Fox's GP when the plaintiff first attended for treatment as a result of symptoms attributable to the alleged workplace bullying. It is contended that the need to obtain this detail sprang from a plea in the Defence; however, that Defence was delivered in August 2011, 4½ years prior to the initial approach being made to the GP. Additionally, when one looks to the to-ing and fro-ing with the GP (and even allowing time for the GP or his staff to reply/react) there is further delay presenting on the part of the plaintiff, due largely to on-again/off-again engagement with the GP:

17.02.2016 Solicitors enquire of GP as to date of first attendance.

4+ months

30.06.2016 Solicitors enquire of GP as to date of first attendance.

1+ months

10.08.2016 Solicitors enquire of GP as to date of first attendance.

18.08.2016 GP's surgery contact solicitors.

5+ months

01.02.2017 Solicitors ring GP's surgery.

15.02.2017 Solicitors ring GP's surgery.

16.02.2017 GP's surgery ring solicitors and explain difficulty with records.

3 weeks

09.03.2017 Ms Fox contacts GP's surgery and is told date of first attendance.

7. When one adds up the delay presenting above, a period of months-long delay presents. The first and third periods (4+ months and 5+ months are especially notable, there being no good reason for the entirety of such periods of delay). Moreover, no reason has been offered as to why the GP records were not previously been taken up in circumstances where the plaintiff knew from January 2013 that some form of discovery would require to be undertaken.

Delay in getting professional's report.

8. Ms Fox also claims that there was delay in engaging an expert. However, the evidence shows that she sought to engage an expert in 2013 and then did not take up the matter again until January 2018, a remarkably long period of unexplained delay. Any difficulties encountered in 2018 regarding the engagement of an expert could have been avoided or mitigated if she had sought sometime in the prior 4+ years to engage an expert.

9. **Balance of justice?** Counsel for the defendants has identified 13 witnesses of fact whose involvement may be required at trial. Those witnesses will be asked to testify to events back in 2008. It is difficult to see how their memories of matters from 11 or so years ago could remain fully intact, with the result that the defendants may (almost certainly will) be hindered in challenging such factual evidence as the plaintiff may present at trial. Moreover, the court is mindful of the unfairness that presents for healthcare professionals in having allegations of improper/inappropriate conduct hanging over them from as long ago as 2008. There is too the fact that a hearing date will now not come on until, at the earliest, sometime later in 2019. To the extent that complaint is made that the defendants did not complain of delay sooner or seek to issue a motion to dismiss earlier, two points might be made: (1) these are Ms Fox's proceedings and so it is up to her to prosecute with all appropriate speed; and (2) there has in any event been no culpable delay on the part of the defendants.

CONCLUSION

10. For the reasons outlined above, the court will grant an order dismissing Ms Fox's claim for want of prosecution on the grounds of inordinate and inexcusable delay.