

THE HIGH COURT

2010 91 CA

IN THE MATTER OF SECTION 77(3) OF THE EMPLOYMENT EQUALITY ACT 1998, AS AMENDED BY THE EQUALITY ACT 2004

BETWEEN

BARBARA WHOOLEY

PLAINTIFF

AND

MILLIPORE IRELAND BV AND MILLIPORE CORPORATION

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 23rd July, 2010

1. Introduction

1.1 The plaintiff ("Ms. Whooley") is an employee of the first named defendant ("Millipore Ireland"). She commenced proceedings in the Circuit Court claiming various reliefs arising out of what she alleges was "unlawful direct and indirect discrimination by reason of her gender, marital status and family status".

1.2 The second named defendant ("Millipore Corporation") is the parent company of Millipore Ireland. It is asserted in the Civil Bill filed on behalf of Ms. Whooley that Millipore Corporation "at all material times controlled, directed and instructed" Millipore Ireland in relation to the matters in issue. Furthermore, it is said that Millipore Corporation assumed "onto itself through the actions of its servants or agents, as particularised heretofore, the power and authority to deal" with Ms. Whooley's situation.

1.3 The proceedings are grounded, as the title implies, in the employment equality legislation as provided for in the Employment Equality Act 1998 ("the 1998 Act") as amended.

1.4 Millipore Corporation took the view that the proceedings as against it were ill founded on the basis that, it is argued, proceedings under the 1998 Act lie only against an employer, and the employer, in the sense in which that term is used in the 1998 Act, is said to be Millipore Ireland. In those circumstances Millipore Corporation brought an application before the Circuit Court seeking to have the proceedings as against it dismissed.

1.5 That application was heard in the Cork Circuit before O'Donoghue J., who made an order on the 21st April of this year dismissing that application. Millipore Corporation has appealed that dismissal. This judgment is directed towards the issues which arose on that appeal. I, therefore, turn to the issues.

2. The Issues

2.1 It should first be recalled that the application which Millipore Corporation brought was an application seeking the dismissal of Ms. Whooley's claim as against Millipore Corporation on the grounds that Millipore Corporation "is not the plaintiff's employer within the meaning of the Employment Equality Acts 1998 to 2004 and accordingly, is not a proper party to the within proceedings".

2.2 The determination of O'Donoghue J. was not, therefore, one arrived at after a trial of the action but rather one which arose on a preliminary motion. It follows that it would only have been appropriate for O'Donoghue J. to dismiss Ms. Whooley's claim against Millipore Corporation if there were no legitimate factual bases on which it was possible that Ms. Whooley might succeed against Millipore Corporation. Put in the reverse way, unless it was clear that no claim could be maintained against Millipore Corporation under the 1998 Act as amended, then it would necessarily follow that the proceedings should go to trial.

2.3 The real issue, therefore, is as to whether the 1998 Act as amended is clear in its terms and confines claims of the type which Ms. Whooley seeks to bring in these proceedings to claims against the relevant employee's employer. If that is so, then it follows that Ms. Whooley cannot have a claim against Millipore Corporation for it was accepted by the parties at the appeal hearing before me that Millipore Ireland is Ms. Whooley's employer in the sense in which that term is used in the 1998 Act. It follows that, if a claim under the provisions invoked of the 1998 Act can only be made as against an employer, then the joinder of Millipore Corporation is misconceived and the claims as against Millipore Corporation should be dismissed from these proceedings. The issue is, therefore, a net one and turns on whether it is clear that a claim of the type brought can only be maintained as against an employer.

2.4 It should also be noted that a separate point concerning jurisdiction and service relating to Millipore Corporation, although referred to in the papers, was not proceeded with.

2.5 As the claim is brought under a statutory regime it is appropriate to start by setting out the relevant provisions of the 1998 Act.

3. The 1998 Act

3.1 The following provisions of the 1998 Act seem to me to be relevant.

3.2 First, the definition section, s. 2(1)(e), defines both employee and employer in the following terms:-

"employee", subject to subsection (3), means a person who has entered into or works under (or, where the employment has ceased, entered into or worked under) a contract of employment and, where the context admits, includes a member or former member of a regulatory body, but, so far as regards access to employment, does not include a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons.

"employer", subject to subsection (3), means, in relation to an employee, the person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment;"

3.3 Under the heading "discrimination", s. 8 provides as follows:-

"8.—(1) In relation to—

- (a) access to employment,
- (b) conditions of employment,
- (c) training or experience for or in relation to employment,
- (d) promotion or re-grading, or
- (e) classification of posts,

an employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker.

(2) For the purposes of this Act, neither an employer nor a provider of agency work shall be taken to discriminate against an agency worker unless (on one of the discriminatory grounds) that agency worker is treated less favourably than another agency worker is, has been or would be treated.

(3) In subsections (4) to (8), references to an employee include references to an agency worker and, in relation to such a worker, references to the employer include references to the provider of agency work.

(4) A person who is an employer shall not, in relation to employees or employment—

- (a) have rules or instructions which would result in discrimination against an employee or class of employees in relation to any of the matters specified in paragraphs (b) to (e) of subsection (1), or
- (b) otherwise apply or operate a practice which results or would be likely to result in any such discrimination.

(5) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or prospective employee in relation to access to employment if the employer discriminates against the employee or prospective employee—

- (a) in any arrangements the employer makes for the purpose of deciding to whom employment should be offered, or
- (b) by specifying, in respect of one person or class of persons, entry requirements for employment which are not specified in respect of other persons or classes of persons, where the circumstances in which both such persons or classes would be employed are not materially different.

(6) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or prospective employee in relation to conditions of employment if, on any of the discriminatory grounds, the employer does not offer or afford to that employee or prospective employee or to a class of persons of whom he or she is one—

- (a) the same terms of employment (other than remuneration and pension rights),
- (b) the same working conditions, and
- (c) the same treatment in relation to overtime, shift work, short time, transfers, lay-offs, redundancies, dismissals and disciplinary measures,

as the employer offers or affords to another person or class of persons, where the circumstances in which both such persons or classes are or would be employed are not materially different.

(7) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee in relation to training or experience for, or in relation to, employment if, on any of the discriminatory grounds, the employer refuses to offer or afford to that employee the same opportunities or facilities for employment counselling, training (whether on or off the job) and work experience as the employer offers or affords to other employees, where the circumstances in which that employee and those other employees are employed are not materially different.

(8) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee in relation to promotion if, on any of the discriminatory grounds—

- (a) the employer refuses or deliberately omits to offer or afford the employee access to opportunities for promotion in circumstances in which another eligible and qualified person is offered or afforded such access, or
- (b) the employer does not in those circumstances offer or afford the employee access in the same way to those opportunities."

3.4 It is also of some relevance to note the provisions of s. 14A which deals with harassment in the following terms:-

"(1) For the purposes of this Act, where –

(a) an employee (in this section referred to as "victim") is harassed or sexually harassed either at a place where the employee is employed (in this section referred to as "the workplace") or otherwise in the course of his or her employment by a person who is –

(i) employed at that place by the same employer,

(ii) the victim's employer, or

(iii) a client, customer or other business contact of the victim's employer and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, or

(b) without prejudice to the generality of paragraph (a) –

(i) such harassment has occurred and

(ii) either

(I) the victim is treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or

(II) it could reasonably be anticipated that he or she would be so treated,

the harassment or sexual harassment constituted discrimination by the victim's employer in relation to the victim's conditions of employment.

(2) If harassment or sexual harassment of the victim by a person other than his or her employer would but for this subsection, be regarded as discrimination by the employer under subsection (1), it is a defence for the employer to prove that the employer took such steps as are reasonably practicable –

(a) in a case where subsection (1)(a) applied (whether or not subsection 1(b) also applies), to prevent the person from harassing or sexually harassing the victim or any class of persons which includes the victim and

(b) in a case where subsection 1(b) applies, to prevent the victim from being treated differently in the workplace or otherwise in the course of the victim's employment and, if so far as any such treatment has occurred, to reverse its effects.

(3) A person's rejection of, or submission to, harassment or sexual harassment may not be used by an employer as a basis for a decision affecting that person.

(4) The reference in subsection (1)(a)(iii) to a client, customer or other business contact of the victim's employer includes a reference to any other person with whom the employer might reasonably expect the victim to come into contact in the workplace or otherwise in the course of his or her employment.

(5) In this section "employee" includes an individual who is –

(a) seeking or using any service provided by an employment agency."

3.5 Section 15 provides for the liability of employers and principals in the following terms:-

"(1) Anything done by a person in the course of his or her employment shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that person's employer, whether or not it was done with the employer's knowledge or approval.

(2) Anything done by a person as agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any proceedings brought under this Act, be treated for the purposes of this Act as done also by that other person.

(3) In proceedings brought under this Act against an employer in respect of an act alleged to have been done by an employee of the employer, it shall be a defence for the employer to prove that the employer took such steps as were reasonably practicable to prevent the employee—

(a) from doing that act, or

(b) from doing in the course of his or her employment acts of that description."

3.6 Finally, it is important to note the provisions of section 77. That section is entitled "The forum for seeking redress" and is, in material part, in the following terms:-

"(1) A person who claims –

(a) to have been discriminated against or subjected to victimisation,

(b) to have been dismissed in circumstances amounting to discrimination or victimisation,

(c) not to be receiving remuneration in accordance with an equal remuneration term,

(d) not be receiving a benefit under an equality clause,

may, subject to subsection (3) to (9), seek redress by referring the case to the Director.

(2) [...]

(3) If the grounds for such a claim arise –

(a) Under Part III or

(b) in any other circumstances (including circumstances amounting to victimisation) to which the Equal Pay Directive or the Equal Treatment Directive is relevant, then, subject to subsections (4) to (9), the person making the claim may seek redress by referring the case to the Circuit Court instead of the Director.”

3.7 Against the background of the relevant provisions of the 1998 Act, it is necessary to analyse the interaction of the various sections which are material to the issue which I have to decide.

4. Analysis of Legislation

4.1 As noted earlier, it is accepted by both sides that Ms. Whooley is an employee of Millipore Ireland within the definition contained in s. 2 of the 1998 Act, which I have already cited. It follows that Millipore Ireland is her employer for the purposes of the 1998 Act.

4.2 Next it is necessary to note the obligations which arise in respect of discrimination under s. 8 of the 1998 Act. Section 8(1) precludes an employer from discriminating against employees or prospective employees. The more detailed rules set out in subs. (4) to (8) each refer to employers.

4.3 It should be noted in passing that there are, also, references to employment agencies, which reference has no application to the facts of this case but clearly might be relevant in a case where such an agency was involved. However, for the purposes of this case it should be noted that each of the obligations imposed on a party under s. 8 are imposed on what is described as the employer and not any other party.

4.4 It is also illustrative to note that the provisions of s. 14A of the 1998 Act concerning harassment which are couched in somewhat different terms. Section 14A(1) is designed to deem certain matters to be discrimination in relation to the victims' conditions of employment. With that in mind, actions taken by co-employees, the employer, clients, customers or other business contacts can give rise to deemed discrimination where there is a difference in treatment or it could reasonably be anticipated that there would be a difference in treatment of the employee concerned. There is a saver under subs. (2) where the employer can establish that reasonable steps, as defined in the section, were taken to prevent the complained of action.

4.5 However, it is clear that the net effect of the occurrence of actions, as set out in s. 14A of the 1998 Act, is that, in the absence of the employer being able to raise a defence of the type to which I have referred, the relevant employer is deemed to have discriminated in relation to the victims' conditions of employment.

4.6 Thus, there can be discrimination where that discrimination directly contravenes the obligations placed on an employer under s. 8, or where it is deemed to be discrimination in relation to the victim's conditions of employment by virtue of the provisions of section 14A.

4.7 The important point to note, however, is that all of the obligations under s. 8 and the deemed discrimination under s. 14A are expressed to be obligations of or discrimination by an employer. Employer clearly means employer in the sense in which that term is used in the 1998 Act generally as defined.

4.8 It is next necessary to consider s. 15 which makes it clear that employers are vicariously liable for the actions of their employees, whether or not any relevant act was done with the knowledge or approval of the employer concerned. There is, however, a saver under s. 15(3) in respect of a situation where the employer proves that all steps reasonably practicable were taken to prevent the relevant employee from taking the action concerned.

4.9 Having analysed those sections, it is next necessary to turn to s. 77 on which Ms. Whooley rests her case. The title of s. 77 refers to "The Forum for Seeking Redress". The section does refer in general terms to persons who may claim to have been discriminated against or victimised, or dealt with otherwise than in accordance with the Act, to refer the matter to the Director of the Equality Tribunal or, in the cases specified in subs. (3), to the Circuit Court. It is accepted by the parties that subs. (3) applies to the facts of this case so that the Circuit Court has, at the level of principle, jurisdiction.

4.10 However, it does not seem to me that s. 77 creates any rights or obligations. Rather, as its title implies, it defines the appropriate forum in which a person who claims a right arising elsewhere in the Act can seek to have that right vindicated. Section 77 is simply designed to enable either the Director of Corporate Enforcement or the Circuit Court to deal with claims. In that context it is also important to note that subs. (4) of s. 77 contains a definition of "respondent" in the following terms:-

"4(c) "the respondent" means the person who is alleged to have discriminated against the complainant or as the case may be, who is responsible for providing the remuneration to which the equal remuneration term relates or who is responsible for providing the benefit under the equality clause or who is alleged to be responsible for the victimisation."

4.11 However, it does not seem to me that subs. (4) creates any cause of action. Rather, subs. (4) and the remaining subsections of s. 77 are designed to regulate the process by which claims can be brought. Provision is made for limitation periods and the date at which an act of discrimination or victimisation can be said to have occurred for such purposes. There are provisions for the manner in which the case is to progress once referred to the Director. There is nothing, in my view, in s. 77 which suggests that that section confers any cause of action on any party. Rather, it regulates the manner in which a cause of action otherwise arising under other provisions of the Act, are to be progressed.

4.12 It does not, therefore, in my view, seem that the question of the definition of "respondent" in s. 77(4) is of any materiality to

the issues which I have to decide. Indeed, taking s. 77(4)(c) on its own, the definition of respondent is not even confined to discrimination, victimisation or the like in the employment context. However, it is obvious that discrimination, and the other terms as used in that subsection, refer to discrimination *etc.* contrary to the obligations arising under the 1998 Act and thus refer to discrimination *etc.*, by an employer as defined. On that basis the “person” alleged to have discriminated must be an employer.

4.13 For the reasons which I have already sought to analyse, the substantive rights and obligations which are relevant to the case which Ms. Whooley wishes to bring are her rights as against her employer and the obligations of that employer. It seems to me that the wording of the 1998 Act is, therefore, clear. The claim of an employee under s. 8 or s. 14A is a claim against that employee’s employer not any other person. The fact that the individual acts which may give rise to such a claim will be done by individuals (whether the Board of a Corporate Employer or managers within the management structure of such an employer or, indeed the other persons whose actions can form part of the deemed discrimination by harassment under s. 14A) is neither here nor there. The statutory liability rests on the employer and no one else.

4.14 However, before leaving the point it is necessary to deal with one further issue raised on behalf of Ms. Whooley. It was pointed out that the evidence suggests that Millipore Ireland, as a subsidiary within the Millipore Group, operated in a not untypical group manner such that reporting structures operated across the group, with employees in one company often reporting to a more senior manager within a different company. Likewise, internal procedures (including those which would appear to have occurred arising out of Ms. Whooley’s initial complaint about the circumstances giving rise to her claim in this case) were dealt with by various persons within the group structure who are not themselves directly employed by Millipore Ireland. Clearly the precise facts are not a matter for me at this stage. It is only for me to determine at this stage whether there are any facts of that type which might, arguably, lead to Ms. Whooley having a claim under the 1998 Act as against Millipore Corporation. If that possibility remains open, then clearly a full trial is the proper place for it to be explored.

4.15 It may well be, therefore, that aspects of Ms. Whooley’s employment with Millipore Ireland involved persons who held senior managerial positions in other companies within the Millipore Group having a relatively direct managerial control over her, either in terms of her reporting obligations or in terms of those who might be involved in dealing with issues arising in the context of her employment. However, that fact does not seem to me to alter the basic architecture of the 1998 Act. The entity which is responsible to Ms. Whooley for discrimination or harassment under the 1998 Act is her employer. If her employer, as a subsidiary within a group, allows personnel from other companies within the group to have a direct role with her in the context of her employment, then her employer is responsible for those persons. If a subsidiary permits such a structure to exist, then the subsidiary must bear responsibility for that structure and any acts carried out by personnel from other companies within the group as a result of such a structure are actions for which the subsidiary employer must bear responsibility.

5. Conclusions

5.1 For the reasons which I have sought to analyse I am, therefore, satisfied that the statutory structure of the 1998 Act is clear. The entity which has responsibility for any breaches of s. 8 or s. 14A is the employer. The employer in this case is Millipore Ireland. Millipore Corporation is not an employer and does not have any liability under the 1998 Act.

5.2 Any personnel of Millipore Corporation (or indeed any other companies within the Millipore Group) who are given, with the agreement (express or implied) of Millipore Ireland, a role in relation to Ms. Whooley must be taken to be acting on behalf of Millipore Ireland and, therefore, Millipore Ireland are responsible for the acts of any such person. It was conceded by counsel on behalf of Millipore Ireland, in the course of the hearing, that Millipore Ireland accepted that it had such a responsibility for the acts of any persons within the Millipore Group who had an involvement in the events giving rise to these proceedings.

5.3 It follows that there is no stateable basis for the claim against Millipore Corporation. In those circumstances, it seems to me that I should reverse the order of the learned Circuit Judge and dismiss the proceedings as against Millipore Corporation.