THE HIGH COURT

[2001 No. 17142 P.]

BETWEEN

JAMES BREEN

PLAINTIFF

AND

WEXFORD COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 29th day of January, 2019

1. In this bullying and harassment claim, the motion currently before the court is one brought by the defendant to dismiss the claim on the grounds of delay. It is the third such motion to have been brought by the defendant.

Facts and relevant Chronology

2. The plaintiff was employed by the defendant as a general operative. In his statement of claim, he alleges that he was subjected to various acts of bullying, harassment and intimidation over a two year period between July 1999 and June 2001. He claims that during this time, he was bullied by his supervisor, Ms. Carol Walsh, against whom he makes very serious allegations. As is typical of such claims, the plaintiff's complaints relate to a series of events which he says cumulatively caused him to suffer personal injuries. He further pleads that he repeatedly sought to bring these issues to the attention of the defendant's management but was effectively ignored.

3. The plenary summons herein was issued on the 22nd November, 2001. Nothing further was done by the plaintiff to progress the case for the best part of two years when a motion to dismiss for want of prosecution was issued by the defendant on the 19th August, 2003. This resulted in the delivery of the statement of claim on the 7th October, 2003.

4. In response to the statement of claim, the defendant's solicitor served a notice for particulars on the 12th January, 2004. Having taken two years to deliver a statement of claim, it took the plaintiff a further two years to reply to the notice for particulars on the 17th January, 2006. The defendants complained that the particulars were inadequate, a complaint apparently accepted by the plaintiff who delivered further particulars in response over four years later on the 23rd March, 2010. Accordingly, it took six years for the plaintiff to furnish a proper reply to the notice for particulars. Following receipt of these particulars, the defendant delivered its defence on the 20th July, 2011 explicitly pleading, *inter alia*, that the plaintiff was guilty of gross and unreasonable delay in the progress of the case which had prejudiced the defendant who would seek to have the claim dismissed on that ground.

5. Following receipt of the defence, a notice of trial was served by the plaintiff on the 27th October, 2011 but no steps were taken to set the matter down or obtain a date for trial. Consequently, a second motion to dismiss the proceedings was issued by the defendant in January 2012 which was heard by this court (Charleton J.) in October 2012.

6. Charleton J. gave judgment ex tempore and there is no written note available of that judgment. However, in the affidavit grounding this application sworn by the defendant's solicitor, Jonathan Cullen, Mr. Cullen avers that the court accepted that the plaintiff had been guilty of both inordinate and inexcusable delay but that the balance of justice "just about" lay in favour of allowing the plaintiff's action to proceed but only on terms. Mr. Cullen's evidence in that regard is not in dispute.

7. Those terms were that the plaintiff was required to give an undertaking to prosecute the claim indicated in his replying affidavit as follows:

> "I am willing to undertake to this Honourable Court that there will be no further delay on the part of your deponent and that the case will be called on for hearing at the earliest opportunity, once the defendant has provided documents sought, whether in response to my request made pursuant to the Data Protection Act, or in response to my request for discovery."

8. An order for discovery was made on the 5th November, 2012 and the defendant furnished its affidavit on foot of that order to the plaintiff's solicitors on the 10th April, 2013. By letter of the 19th June, 2013, the plaintiff's solicitors complained that the discovery did not comply with the order. Some further documents were discovered by the defendant and sent to the plaintiff's solicitors on the 13th February, 2014. By letter of the 6th March, 2014, the defendant's solicitors made clear that they considered that their client had complied with the order for discovery. This was disputed by the plaintiff's solicitors who made a further request for discovery on the 6th June, 2014 which was refused on the 19th June, 2014, the defendant's solicitors again reiterating that they did not agree with the plaintiff's solicitor's interpretation of the original order for discovery.

9. It was not until the 19th February, 2015 that a motion for further and better discovery was issued by the plaintiff, almost two and half years after the order of Charleton J. Further discovery, presumably based on the new request, was ordered by the Master on the 20th March, 2015 and the affidavit of discovery was provided by the defendant's solicitors to the plaintiff's solicitors on the 18th August, 2015. Very little appears to have happened thereafter as between the parties apart from some inconsequential correspondence about calling the case on and yet again raising issues about discovery until finally, the within motion was issued on the 16th May, 2018. At the time this motion was issued, more than five and a half years had elapsed since Charleton J. made his order.

Discussion

10. This court has, as noted, already determined that up until 2012, the delays that have occurred in this case were both inordinate and inexcusable. It is not difficult to understand why the court reached that conclusion having regard to the timeline I have set out above.

11. Having received the court's indulgence in 2012 and avoided having the claim dismissed only by giving the undertaking to which I have referred, one would have thought the plaintiff would have grasped the opportunity given him with both hands. Regrettably, it seems to me that this did not occur. The plaintiff seeks to attribute blame to the defendant for this in failing, he says, to make

discovery properly in the intervening years, leading to his pursuit of that issue. He says consequently that he was not in breach of his undertaking not to delay further with the calling on of the case once the defendant had provided the documents sought in response to his request for discovery.

12. It seems to me that as far as the defendant was concerned, it complied with the order in April 2013. If the plaintiff was not happy with that, in the light of all that had gone before, it behoved him to comply with his undertaking by moving swiftly to bring the matter to the court's attention knowing as he did that there was a dispute about what the order meant. The plaintiff was not entitled to sit on his hands and subsequently claim that he was right to do so simply because further documents were subsequently discovered, on whatever basis, by the defendant. Yet it took almost a further two years for the motion for discovery to issue and only then on foot of a new request for discovery which the plaintiff seeks to excuse as a type of belt and braces approach in case the court took a view different to the plaintiff in respect of the meaning of the order.

13. Perhaps even more extraordinarily, having got the discovery sought in August 2015, the plaintiff really did nothing of consequence with a view to getting the case on for trial over the ensuing almost three year period until this motion issued. Whatever excuse the plaintiff may have made about discovery preventing him getting on with the case, and I do not believe it to be a good excuse, that was removed from the equation by, at the latest, August 2015. Thereafter, if not indeed significantly earlier, the plaintiff was obliged by the terms of his undertaking to the court given in 2012 to call the case on for hearing at the earliest opportunity. Plainly, he failed to do that and to honour his undertaking to the court by a very wide margin.

14. In the light of the foregoing, I am satisfied that the delay of five and a half years between the court's judgment in October 2012 and the issuing of this motion in May 2018 is by any standards both inordinate and inexcusable. That delay becomes even more inordinate and inexcusable when viewed in the light of the overall delays that have occurred in this case. A period of some sixteen and a half years has been allowed to elapse between the issuing of the summons and the issuing of this motion. As the foregoing demonstrates, the overwhelming majority of that enormous delay has been the responsibility of the plaintiff.

15. The law on dismissal for delay is by now so well settled by so many cases that it is unnecessary and otiose to address it in this judgment. As the jurisprudence on culpable delay commencing with *Primor Plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 and the myriad judgments that have followed it show, once inordinate and inexcusable delay has been established, the court must then consider where the balance of justice lies. As I have said already, bullying cases more often than not concern multiple events occurring over a protracted period of time as between the plaintiff and the defendant, its servants or agents. Such events are frequently numerous and in the present case cover a two year period.

16. The evidence concerning how these events unfolded will be almost exclusively, if not indeed entirely, oral from the witnesses present when the alleged events occurred. If the present case proceeded to trial, the witnesses would be required to give evidence of their recollections of events that by then will have likely been eighteen to twenty years in the past. Delays of far less than that have been held in many cases to give rise to presumptive prejudice against the defendant, even where, as here, the witnesses are still alive and available.

17. Even were it the case that these witnesses had made statements of their recollections at an early juncture in the proceedings, and there is no evidence of that here, that of itself cannot address the issue of prejudice where the detail of the plaintiff's evidence will of course be unknown until he gives it and the defence witnesses will then be relying on recollection to counter it. In my opinion, that has to be viewed as a source of significant prejudice to the defendant, even if the defendant cannot in terms point to any particular prejudice beyond that.

18. I am satisfied that the authorities also establish that even where a defendant in a case such as this does not establish actual prejudice arising by, for example, the death of a witness, moderate prejudice of the presumptive kind to which I have referred may be regarded as sufficient to tip the balance in favour of the defendant. Indeed the very fact that such serious allegations are left hanging over identified individuals, such as Ms. Walsh, without resolution for such a long time is in itself a source of ongoing prejudice to the defendant. Asking witnesses to call to mind a range of events occurring over a protracted period some two decades later is, to use the oft quoted phrase, putting justice to the hazard.

19. In recent times, the Irish courts have been ever more conscious of their obligations under the European Convention on Human Rights, in particular Article 6, and that parties are entitled to have their rights vindicated within a reasonable time. The time when delays of the magnitude that have occurred here were tolerated has long passed.

20. Therefore, even in the absence of the plaintiff's undertaking, I would be minded to dismiss the case but when one factors the plaintiff's manifest failure to comply with his undertaking into the equation, in my view the balance of justice falls firmly in favour of the dismissal of this action.