

## THE HIGH COURT

[2003 No. 10725 P.]

PATRICK JOSEPH MCGARRY

PLAINTIFF

AND

**JOHN MCGUINNESS, COLM Ó TUATHALÁIN, GEORGE MCLAUGHLIN, SEAMUS FARRELLY, JAMES GALLAGHER, SHEILA SMYTH, ANTHONY BURKE, JOHN (HENRY) MCLOUGHLIN, JAMES BRADLEY, BERNARD MCGUINNESS, PAUL FIORENTINI, MINISTER FOR EDUCATION AND SCIENCE, IRELAND AND ATTORNEY GENERAL**

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 14th day of June, 2018

**Introduction**

1. These are applications on behalf of the first to eleventh named defendants ("first group of defendants") and the twelfth to fourteenth named defendants ("the second group of defendants") to strike out the proceedings of the plaintiff on the grounds of inordinate and inexcusable delay arising from the commencement and the prosecution of these proceedings. The applications were heard on Friday, 1st June, 2018.

**Background**

2. The plaintiff, who described himself as "*a part-time teacher*" in his replying affidavit sworn on 10th July, 2017, exhibited a letter from the salaries section of the Department of Education and Science dated 26th March, 2009, which confirmed that he was then currently employed as a fixed-term, regular, part-time teacher in St. Mary's Secondary School, Ballina, Co. Mayo, having held the position since 1st September, 2006.

3. The statement of claim delivered on 11th December, 2003, referred to the appointment of the plaintiff as teacher in two Leaving Certificate subjects (Agricultural Science and Biology), at Cardonagh Community School, Co. Donegal ("Cardonagh School") which was later sanctioned by the defendant Minister on 3rd September, 1980. Suffice to say that the plaintiff alleges that he attributes his alleged unlawful suspension with and without pay and subsequent termination of employment to his union activity and his allegations about accountability and the veracity of pupil rolls submitted to the defendant Minister in the 1990s. The statement of claim and replies to particulars dated 19th March, 2009, give details of alleged harassment, undermining and breaches of statutory rights of the plaintiff including his request for arbitration in 1997.

4. Ultimately, following the plaintiff's refusal to teach a Junior Certificate Science class assigned to him in September 1998, the Board of Management voted to suspend the plaintiff and the plaintiff was informed of that decision by letter dated 9th October, 1998.

5. The plaintiff engaged solicitors who threatened legal proceedings but no action was actually taken at that stage. Over the following years, attempts were made to resolve the issue while the plaintiff remained suspended with pay.

6. This Court was told about the involvement of the late Johnny Bracken, Principal Officer with the defendant Minister's department, who specifically sought the plaintiff's consent to carry out an inquiry into the issues in dispute. The plaintiff wanted a sworn inquiry and this request was not granted.

7. On 29th May, 2001, the school's Board of Management considered his suspension and his refusal to teach the classes and voted to convert the suspension to a suspension without pay. Two of those board members (Seamus Farrelly and Jim Gallagher) are now deceased.

8. On 14th May, 2002, the Board of Management voted to terminate the plaintiff's employment which was communicated to him by letter dated 15th May, 2002.

9. The significant dates and events can be summarised without controversy as follows:-

03.09.1980 Appointment of plaintiff as a teacher.

02.09.1998 The plaintiff refused to teach classes assigned to him.

07.10.1998 The plaintiff was suspended with pay.

16.10.1998 The plaintiff's solicitor threatened litigation.

29.05.2001 The plaintiff was suspended without pay.

14.05.2002 A decision was made to terminate the plaintiff's employment.

07.04.2003 The plaintiff's application for judicial review seeking declarations, some of which were similar to the declarations sought in these proceedings, was refused.

**Judicial Review Leave Refused**

10. On 1st June, 2018, I allowed the plaintiff to reply to replying submissions for the defendant applicants which is not the practice of this Court. During this reply, the plaintiff mentioned the judicial review application bearing record number [2003 No. 293 J.R.] between the plaintiff as applicant and "*Board of Management of Carndonagh Community School, John McGuinness (Chairperson), Colm Ó Tuathaláin, Fr. George McLaughlin, Fr. Séamus Farrelly, Jim Gallagher, Sheila Smyth, Anthony Burke, John H. McLaughlin, J.P. Bradley, Bernard McGuinness, Paul Fiorentini, Minister for Education and Science, Ireland and Attorney General*". At the back of the bulky book of copy judicial review application papers ("JR papers"), which the plaintiff handed into Court when requested, is a perfected order made on 7th April, 2003, by Mr. Justice O'Donovan refusing the plaintiff's application for leave to apply by way of an application for judicial review for reliefs including at least, two declarations similar to the declarations sought in these proceedings.

11. The plaintiff in his 28-page grounding affidavit sworn on 3rd March, 2003, a copy of which is contained in the JR papers, averred, *inter alia*, that:-

- (i) Cardonagh School was one of the largest community schools in the State;
- (ii) the Board of Management for Cardonagh School did not have a deed of trust;
- (iii) the plaintiff was chairman of the TUI branch in Cardonagh School and the TUI executive had indicated that it was notifying the Public Accounts Committee of Dáil Éireann about inconsistencies and irregularities in returns to the Department of Education stretching back to the early 1990s; and
- (iv) the decisions relating to his suspensions and ultimate removal were "opaque" (my word to summarise the complaints).

### **Procedural Chronology**

12. The following is a chronological summary of the progress of these proceedings:-

23.09.2003 Issue of plenary summons.

11.12.2003 Delivery of statement of claim.

05.02.2004 Appearance on behalf of the first group of defendants save for the second named defendant who was not on the date of the issue of the summons a member of the Board of Management.

07.04.2004 The solicitors for the said first group of defendants (save for the second named defendant) delivered a request for particulars.

06.01.2005 The plaintiff's solicitors furnished replies to the said request.

07.02.2005 A defence was delivered on behalf of the first group of defendants save for the second named defendant.

10.06.2005 A notice for further and better particulars was served on behalf of the first group of defendants save for the second named defendant.

23.01.2006 Replies were delivered to the said notice.

27.03.2006 An order was made by Peart J. (then in the High Court) renewing the summons.

14.06.2006 An appearance was entered on behalf of the second group of defendants.

05.07.2007 A defence was delivered on behalf of the second group of defendants together with a request for particulars.

07.04.2008 An appearance was entered on behalf of the second named defendant by the solicitors on record for the first group of defendants.

14.05.2008 A defence along similar lines to that delivered on behalf of the first group of defendants on 7th February, 2005, was delivered on behalf of the second named defendants.

29.05.2008 The proceedings were assigned setting down number C5 4096 DN according to the website maintained by the Courts Service.

27.01.2010 A notice of intention to proceed was filed on behalf of the plaintiff.

26.08.2011 The Courts Service wrote to the plaintiff's solicitors noting that the proceedings had remained uncertified which suggested that the matter was no longer live. It advised that the notice of trial would be struck out in the event of no further communication from the plaintiff's solicitor by 15th September, 2011.

01.10.2012 The plaintiff wrote to the then President of the High Court complaining about his legal representatives. He took advice from another firm of solicitors in Co. Mayo who sent letters to his previous solicitors in Donegal who remained on record. He concluded his submission to the President of the High Court by alleging that the conduct of his solicitors in Donegal brought "*dishonour to the integrity of the legal system*" and asked for an investigation into the status of his case.

08.11.2012 A notice of intention to proceed was filed on behalf of the plaintiff.

29.11.2016 The solicitors on record for the plaintiff were permitted to come off record.

13.03.2017 A further notice of intention to proceed was filed by the plaintiff himself.

03.07.2017 The notice of motion on behalf of the first group of defendants before this Court now was issued followed by a similar notice of motion issued on behalf of the second group of defendants on 17th October, 2017.

### **First Period of Delay**

13. The period prior to the commencement of the proceedings from the suspension in 1998 and the termination of employment in 2002 is considerable given the nature of the grievances of the plaintiff. I accept the submission made on behalf of the defendants that *Ó Domhnaill v. Merrick* [1984] I.R. 151; [1985] ILRM 40, established the principle that this Court may take into account significant pre-commencement delay. The plaintiff effectively has not explained the delay other than seeking to attribute same to efforts made by him to avoid litigation or the difficulties which he had in advancing matters with his then solicitors. This Court is also attentive to the defendant's submission that any claim concerning the notice for termination of his employment could have been dealt with by the then Employment Appeals Tribunal as provided for by the legislature.

### **Responsibility for own Solicitors**

14. The plaintiff expressed his understanding of the law that he bears responsibility for whatever omissions he seeks to attribute to his solicitors by reason of the authorities stretching back to *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and more recently summed up by Ní Raifeartaigh J. in *McAndrew v. Egan* [2017] IEHC 346 as follows:-

*"A number of authorities have indicated a reluctance to find sufficient excuse in the fact that delay can be attributed to a plaintiff's legal advisers. These authorities demonstrate the general rule that responsibility will rest with the plaintiff for failure to expedite matters in such circumstances, although the personal blameworthiness of the plaintiff is a matter which may be considered in the exercise of a court's discretion..." (para. 20)*

15. In summary, the plaintiff failed to satisfy this Court that it should exercise its discretion in any way other than to fix him with the delays which he blames on his previous solicitors. The plaintiff is an articulate, educated and intelligent person who can assert and present his case as demonstrated on 1st June, 2018. He has offered no justifiable explanation as to why he did not retain new solicitors. He did indeed refer to his engagement of solicitors in Co. Mayo to request details from his previous solicitors in Donegal at some stage in 2012. The Court can appreciate that costs and risk may be part of the reticence to pursue a private or public orientated grievance with the assistance of solicitors and counsel. Nevertheless, there is an onus on litigants to recognise the necessity for the administration of justice *"within a reasonable time"*, which is a phrase used in Article 6 of the European Convention on Human Rights.

### **Second Period of Delay**

16. The plaintiff sought to excuse the delay from the delivery of the defence on behalf of the first group of defendants (save for the second named defendant) in February 2005 and from the defence on behalf of the second group of defendants in July 2007 by referring to his then held belief that he should wait for the second named defendant to deliver his defence. This excuse does not withstand scrutiny. Although the plaintiff seemed to indicate that he now understands that he could have proceeded by setting down the action for trial against the remaining defendants he pleads ignorance of that possibility prior to the 13th May, 2008, when the defence of the second named defendant was delivered. It transpires that the second named defendant was and is not required to be named as a defendant.

17. The plaintiff offers no excuse for the delay from the delivery of the defence on behalf of the second named defendants in May 2008 to having the case certified for trial. He did, indeed, file a notice of intention to proceed in November 2012.

18. Seven years, five years and four years constitute inordinate delay particularly in the context of this type of claim and taking into account the delay since the alleged causes of actions arose in 1998 and 2002, whatever about the relevance of the grievances stretching back to the early 1990s. The excuses proffered by the plaintiff are not acceptable in this age of an imperative to prosecute proceedings without undue delay. That imperative derives from the Constitution and from the European Convention on Human Rights.

### **Third Period of Delay**

19. After the notice of intention to proceed filed on 8th November, 2012, the plaintiff made a complaint about his previous solicitors to the then President of the High Court. Later, on 13th March, 2017, he filed a further notice of intention to proceed. The explanations given by the plaintiff in respect of this period are unsatisfactory. There is no doubt that this further period of delay was inordinate and exacerbated the effect of the earlier delays. As far as this Court is concerned, the delays lack justification or a proper explanation for the reasons already outlined earlier in this judgment and recognizing his status.

### **Prejudice**

20. Having established that the plaintiff is responsible whether personally or vicariously for inordinate and excusable delay, it now remains for this Court to address the issue of the balance of justice.

21. Firstly, it can be taken that the memories of witnesses relating to events in 1998 and in 2002 (some 20 and 16 years ago) have faded and there is a risk of an unfair trial. Moreover, the plaintiff, in an application which remains outstanding in the Court, seeks material dating back to 1992 (some 26 years ago) which he maintains may be relevant to the issues to be tried.

22. The Court is even more concerned about the actual and specific prejudice which was summarised as follows for the defendants:-

(i) The majority of the members of the Board who participated in the decisions concerning the employment of the plaintiff in 2002 have retired and some of them suffer from ill health.

(ii) Two of the members of the Board of Management who participated and voted in the suspension and termination decisions which the plaintiff now challenges are deceased.

(iii) The second group of defendants will have a significant disadvantage in defending allegations made by the plaintiff at the trial which has been delayed by the omissions or failures on the part of the plaintiff. Particularly, the late Mr. Johnny Bracken died on 8th December, 2016. He was the Principal Officer in the defendant Minister's department who liaised with the school and the plaintiff about the investigation into the plaintiff's complaints. The plaintiff himself acknowledges that the death of Mr. Bracken will result in prejudice as he admits at para. 66 of his affidavit sworn on 24th October, 2017, as follows:-

*"I say the advice given by Mr. Bracken over the years has been contradictory and it is a matter of prejudice to the plaintiff that Mr. Bracken is sadly not available to give evidence."*

(iv) The composition of the Board of Management of the school has regularly changed and it was known or ought to have been known by the plaintiff that this would have had an impact on the ability of the first group of defendants to defend these proceedings. Two of the defendants have died: Seamus Farrelly on 25th October, 2008 and Jim Gallagher on 16th October, 2006. The remainder of the Board members included in the list of the first group of defendants (other than for the principal and Mr. McGuinness) are no longer associated with the Board of Management.

23. This Court concludes that there is undoubted presumed and specific prejudice caused to the defendants arising from the inordinate and inexcusable delay on the part of the plaintiff prosecuting these proceedings.

24. Irvine J. for the Court of Appeal in *Granahan T/A CG Roofing and General Builders v. Mercury Engineering* [2015] IECA 58 sums up

this Court's position with the following paragraph quoting the decision of Hardiman J. in *Gilroy v. Flynn* [2005] 1 ILRM 290 at pp. 293-294:-

*"The courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued."*

*...[F]ollowing such cases as McMullen v. Ireland (ECHR 422 97/98 29th July, 2004) and the European Convention on Human Rights Act, 2003, the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal are determined within a reasonable time."*

### **Conclusion**

25. The plaintiff's sense of grievance for his own position and that of the public may remain. However, it is clear that he is responsible whether directly or vicariously for significant delays in the prosecution of these proceedings. The Court has looked at the JR papers which the plaintiff produced at the request of the Court. Those JR papers copper-fasten its view that the plaintiff has had the intelligence, ability and knowledge, whether actual or constructive, to have his grievances heard and determined within a reasonable time. It is not for this Court to make any comment on the merits of the grievances held by the plaintiff but it is indeed for this Court to determine the balance of justice. I am satisfied that the presumed and specific prejudice arising for the defendants in allowing these proceedings to proceed to trial is overwhelmingly in favour of the defendants as opposed to allowing the plaintiff air and substantiate his various allegations and grievances at this late stage. In those circumstances, I direct and order that the proceedings be struck out.