

**THE HIGH COURT
JUDICIAL REVIEW**

[2019 No. 335 J.R.]

BETWEEN

JENNIFER WALSH

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

AND

HEALTH INFORMATION AND QUALITY AUTHORITY

NOTICE PARTY

Ex tempore JUDGMENT of Mr. Justice Meenan delivered on the 29th day of January, 2020

Background

1. In setting out the background to this application, I can do no better than refer to the affidavit of the applicant which grounded the application for judicial review before the court in May, 2019. The applicant was born on 14 August 1984, is prelingually and profoundly deaf, suffers from Klippel-Fiel Syndrome, has significant physical disabilities, impaired fine control of her hands, uses a wheelchair and has a limited ability to walk with assistance. These matters are starkly set out in her affidavit in which she deposes: -

"3. I am an adult with disabilities.

4. I am deaf.

5. I have a condition called Klippel-Fiel syndrome.

6. I use a wheelchair for daily living because of my physical disabilities.

...

9. My natural language is Irish sign language.

...

14. I love my family. We get on well together.

15. From the time I was a child my family cared for me. It was a happy time.

16. When I was eight years old I went to St. Marys School for the deaf. I was there until I was 21 years of age.

17. I was very happy at St. Marys. I had friends. I could communicate in my own language. I did lots of things every day. I was part of the deaf community and I loved it.

18. When I left school in 2005 I was separated from my friends and my community.

19. I was put into intellectual disability services that were not suitable for me. I had no one to communicate with in my own language.
20. I was trapped. I was alone.
- ...
36. After my family got me a solicitor I was told that I was going to Camphill. I visited it. There is nobody there who communicates in my language. I would be sharing a house with a woman in her fifties with mental health difficulties. The carers there were nice people. They were going to learn a bit of signing.
37. Camphill is the same for me as the nursing home.
38. Dr. du Feu who knows me from Dublin came to see me in the nursing home. She brought me back to the deaf community in Cabra for a visit. I loved it there. I met my old teacher, my special needs assistant, and my friends. I was welcomed back. I could communicate with people again. I did lots of things there. I did activities. I went to Mass. I had my meals. I came out of the dark. I was happy again. I did not want to leave.
39. Going back to the nursing home was really hard.
40. I do not want to be alone anymore.
41. This has to stop.
- ..."

It also should be said that in her affidavit, the applicant deposes to financial hardship suffered by her parents and the sacrifices that were made by her family to ensure that she received the appropriate level of care.

2. Leave was granted (Noonan J.) on 30 May 2019. The Statement of Grounds sets out some 44 grounds of relief. These consist of fourteen separate orders for *mandamus*, six injunctions, three orders for *certiorari* and eight declaratory orders. In addition, the applicant seeks damages under the following headings: -
 - (i) Breach of constitutional rights;
 - (ii) False imprisonment;
 - (iii) Negligence and breach of duty (including breach of statutory duty);
 - (iv) Intentional reckless infliction of emotional suffering;
 - (v) Breach of her fundamental rights under European Law; and
 - (vi) Damages under the European Convention on Human Rights Act, 2003.

The applicant also seeks aggravated and/or exemplary damages.

3. Noonan J. directed the delivery of a "*points of claim*" and a "*points of defence*". The points of claim effectively repeated the various reliefs set out in the Statement of Grounds.
4. The application before the court by the respondent is for a modular trial, that is: that issues concerning liability (including the various reliefs sought by way of judicial review) be tried in a first module and, if necessary, that damages be tried in a second module. This application was opposed by the applicant.

Principles to be applied

5. The principles which the court should apply on an application such as this are set out by Clarke J. (as he then was) in *Cork Plastics (Manufacturing) v. Ineos Compound U.K. Limited* [2008] IEHC 93 and were repeated by Clarke J. in *Weaving Macro Fixed Income v. PNC Global Investments* [2012] 4 I.R. 681. At p. 693 of the judgment, Clarke J. stated:
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"25. In *Cork Plastics (Manufacturing) v. Ineos Compound UK Ltd* [2008] IEHC 93, (Unreported, High Court, Clarke J., 7th March, 2008) I acknowledged at para. 3.1, p. 6 that the default position is for "a single trial of all issues at the same time", but then went on to consider when it was appropriate to depart from this general rule. After identifying at para. 3.4, p. 7 "the complexity and length of the likely trial" as the most obvious factor to be taken into account, I then enumerated a number of other potentially relevant factors at pp. 9 - 12: -

'3.9 ...

- 3.10. A third and potentially relevant factor, concerns cases where there are a range of approaches to the calculation of damages depending on the basis upon which liability may be established. In many simple (and even some not so simple) cases the question of the approach to the calculation of damages will be fairly clear if liability is established. However, that will not always be the case. Where there are a range of bases upon which liability may be, in whole or in part, established, and where the whole approach to the proper calculation of damages may differ significantly dependent on how liability is made out and the way in which various issues of defence raised may be resolved, then there is an added downside to the unitary trial. The unitary trial will require the plaintiff to present its evidence on quantum against a whole range of theoretical possibilities. In such a case the advantage of a modular trial is that, assuming liability to be established, the basis of the court's approach to damages will also be clear and the parties will be absolved from the necessity of addressing all of the other theoretical bases upon which damages might have been calculated in the event that liability was established in some other way, or aspects of the defence on liability (or, indeed, causation in an appropriate case) might have been successful.

..."

6. The foregoing may also apply to a case, such as this, where there are numerous grounds of relief, in addition to damages being sought. There can be no doubt but that this is a complex case. Not only have orders by way of judicial review been sought on various grounds, damages have also been sought under a number of different headings. In addition, aggravated and/or exemplary damages are claimed. The factor referred to by Clarke J., as to deciding on what basis (if any) damages and other reliefs may be awarded, points to directing a modular trial. I am going to direct a modular trial whereby:
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- (i) The first module will deal with the applicant's entitlement, if any, to orders for *mandamus*, injunctions, *certiorari*, declaratory orders and damages (including the issue of aggravated and/or exemplary damages) under the various headings claimed; and
 - (ii) The second module will deal with the assessment of damages, should such arise.
7. In reaching my decision I have had to strike a balance of justice between the parties. In doing so, I have had regard to the affidavit of Joanelle O'Cleirigh, Solicitor on behalf of the applicant. At para. 18 of her affidavit, Ms. O'Cleirigh sets out the various grounds upon which this application is opposed.
8. Sub-paragraphs (a) to (d) refer to the practical arrangements that will have to be put in place to accommodate the applicant in the giving of her oral evidence. It seems to me that these practical arraignments will have to be put in place, be it a unitary or a modular trial.
9. At sub-paras. (e), (f) and (h), concern is raised as to a potential unfairness in requiring both the applicant and Dr. du Feu (who will also require the same practical arrangements as the applicant does in the giving of her evidence) to attend both modules. I am satisfied that this concern can be answered by directing that both the applicant and Dr. du Feu can give all their evidence in the course of the hearing of the first module, but without prejudice of their entitlement to give evidence at the second module, should they so wish.
10. I think the point can be made that it may well be the case that the areas covered by the first module cover much of the applicant's claim so that, in effect, what I am directing is very close to a unitary trial. Also, if some or all of the issues in the first module are determined in favour of the applicant, it may well be that agreement will be reached between the parties without the necessity for a second module. A determination of the issues in the first module would facilitate this.

Future proceedings

11. Earlier in this ruling I referred to the extensive grounds upon which the applicant seeks relief. In my view, it would be very much in the interests of the parties if the number of reliefs being sought could be reduced. For example, it may well be the case that if one particular order, or orders, of *mandamus* were granted then the others sought would have to logically follow. This would be of great assistance to the court that will ultimately

hear this application and should reduce the length of the time of trial. The reliefs sought should be reduced so that a number of "core" remedies are identified and these are proceeded with.

Mediation

12. I am sure that the parties in the proceedings, who are represented by skilled and experienced lawyers, have considered mediation. I would just wish to add a few observations of my own on this. Firstly, the court may grant the reliefs sought, but I think it is reasonable to point out that there may well be a reluctance on the part of a court to make orders that require supervision. Secondly, a resolution that was achieved by mediation may have much greater flexibility and may achieve a more satisfactory outcome for what undoubtedly is a most difficult and complex case. Thirdly, a mediation setting, as opposed to a courtroom setting, may be more appropriate and helpful to resolving the various issues.

Conclusion

13. By reason of the foregoing, I am directing a modular trial: -

- (a) The first module will deal with the applicant's entitlement, if any, to orders for *mandamus*, injunctions, *certiorari*, declaratory orders and damages (including any entitlement to aggravated and/or exemplary damages) under the headings claimed;
- (b) The second module will deal with the assessment of damages, if any; and
- (c) Both the applicant and Dr. du Feu may give the entirety of their evidence in the course of the hearing of the first module without prejudice to their entitlement to give evidence in the course of the second module, should they so wish.