

THE HIGH COURT

[2008 No. 5379 P]

BETWEEN

PATRICK FENNELL

PLAINTIFF

AND

MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Mr. Justice Meenan delivered on the 28th day of April, 2020**

**Background**

1. This is an application on the part of the defendants seeking that the plaintiff's claim be struck out on the basis that it is statute barred pursuant to the provisions of s. 3 of the Statute of Limitations (Amendment) Act, 1991 (the "Act of 1991"), as amended by s. 7 of the Civil Liability and Courts Act, 2004.
2. In his personal injury summons, the plaintiff claims that he was subjected to bullying and harassment, discrimination and stress in the workplace, which he alleges commenced in September, 1983. The matters which the plaintiff complains of appear to have been ongoing over a number of years. The plaintiff stated that he availed of a formal complaint procedure and sought a "redress of wrongs".
3. The personal injury summons was issued on 3 July 2008, the plaintiff having received an authorisation from the Personal Injuries Assessment Board. A Defence was delivered on 2 September 2009 but the issue of the Statute of Limitations was not pleaded until an amended Defence was delivered nearly five years later in May, 2013.

**Application before the Court**

4. In their Notice of Motion, the defendants seek: -

"...An order pursuant to the inherent and/or equitable jurisdiction of this Honourable Court dismissing the plaintiff's claim on the grounds that it is bound to fail, the proceedings having been commenced at a time outside the period prescribed under s. 3 of the Statute of Limitations (Amendment) Act, 1991..."

**Relevant statutory provisions**

5. Section 2 of the Act of 1991 provides: -

- "2. (1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured...) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:
  - (a) that the person alleged to have been injured had been injured,
  - (b) that the injury in question was significant,
  - (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty..."

And s. 3, as amended, provides: -

"3. (1) An action... claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty... shall not be brought after the expiration of two years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

**Consideration of issue**

6. Clearly, in order to avoid a finding that his claim is statute barred, the plaintiff will have to rely on the provisions of s. 2 of the Act of 1991. The dates of the acts complained of and the date of the issue of the proceedings make this clear. The matter was heard before this Court on affidavit evidence alone.

7. In the course of his replying affidavit, the plaintiff referred to a letter sent by his Solicitors to the defendants, dated 14 November 2007, which states, *inter alia*: -

"In particular, we refer to a report from Comdt. P. Diskin dated the 14th July, 2006, a copy of which has been furnished to our client. The report is extensive, and in summary, our client complains of bullying, harassment and intimidation of him which was ongoing for a considerable time, and which was not addressed, or adequately addressed, by his superiors at the time, as a consequence of which our client has suffered humiliation, embarrassment, and has suffered depression for which he required medical attention..."

and: -

"It is only with the furnishing to our client of the report of Comdt. Diskin that our client became fully informed on these matters and he has now sought legal advice."

The plaintiff states that it was only after this report had been furnished to him that he "*obtained legal advice and became aware that I had a cause of action against the defendants or one or other of them*" (para. 4 of plaintiff's affidavit). Thus, the plaintiff maintains that it was this report that gave him the requisite knowledge so as to start time running. The defendants do not accept this to be the case. This is the state of the evidence.

8. I do not think that a court could reach a conclusion either in favour of the plaintiff or the defendants without having heard oral evidence on the matter. The plaintiff will have to give evidence as to what his state of knowledge was at the relevant time and, should he so wish, all other evidence. As against this, the defendants are entitled to have an opportunity to cross-examine the plaintiff and any other witnesses the plaintiff may choose to rely upon and also to call their own evidence which, in turn, may be subject to cross-examination by the plaintiff. It is only after this process has been gone through that the Court may validly reach a conclusion. In support of this, I refer to *Brandley v. Dean T/A Hubert Dean & Associates & Anor.* [2014] IEHC 610, where Barr J. stated: -

"I am of opinion that where there is a factual dispute between the parties, such as to when the actual damage occurred to the property, such dispute cannot be determined on affidavit evidence. It will be necessary for the court to hear oral evidence from the parties and from their expert witnesses prior to reaching any conclusion on the Statute of Limitations point."

9. More recently, the Court of Appeal in *Coughlan v. The Minister for Defence & Anor.* [2020] IECA 53 reversed a decision of the High Court which had determined the plaintiff's "*date of knowledge*" solely on affidavit evidence. Noonan J. stated: -

"It is relatively unusual for 'date of knowledge' issues to be determined without the benefit of oral evidence. The date of knowledge of any particular plaintiff will normally have a significant subjective element rendering it necessary in most cases for the plaintiff to give evidence *viva voce* and be subject to cross examination. When there is a live issue about what the plaintiff knew and when he or she knew it, it is in the normal way difficult to see how this can be resolved by the Court on affidavit, save perhaps in the clearest of cases..."

**Conclusion**

10. The plaintiff's "*date of knowledge*" for the purposes of the Act of 1991 will have to be determined by oral evidence. The burden of proof will be on the plaintiff to satisfy the Court that he only acquired the requisite no earlier than two years prior to the commencement of the proceedings. This can be tried by way of a preliminary issue where both the plaintiff and the defendants will be entitled to call what evidence they wish. I will hear counsel as to the consequential orders that arise.