THE HIGH COURT

[2022] IEHC 362

[2021/37 MCA]

BETWEEN

DEIRDRE MORGAN

APPELLANT

AND

THE LABOUR COURT

RESPONDENT

AND

KILDARE AND WICKLOW EDUCATION AND TRAINING BOARD

NOTICE PARTY

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JUDGMENT of Mr. Justice Cian Ferriter delivered on the 1st day of June 2022

Introduction

1. These two appeals are appeals on a point of law from determinations of the Labour Court dated 9 February 2021. The Labour Court in its determinations dismissed appeals from a decision of an adjudication officer (AO) of the Workplace Relations Commission (WRC) dated 23 October 2019. The AO's decision dismissed complaints lodged by the appellant with the WRC to the effect that the notice party (KWETB) had discriminated against her contrary to s.77 Employment Equality Act 1988 as amended ("s.77") and contrary to s.81E Pensions Act 1990 as amended ("s.81E").

2. S.77 addresses, *inter alia,* claims by persons who claim to have been discriminated against or subjected to victimisation in the course of their employment or who claim to have been dismissed in circumstances amounting to discrimination or victimisation.

3. S.81E addresses claims by persons who claim not to be receiving, or not to have received, equal pension treatment in accordance with the provisions of the Pensions Act or to have been penalised in circumstances amounting to victimisation.

The Appellant's complaints

4. The appellant's complaints as lodged with the WRC on 15 April 2019 were as follows:

> *"My complaint here of 15th April 2019 follows on almost 6 months in time from an earlier complaint I made against Kildare and Wicklow ETB dated 6th November 2018 under the Employment Equality Acts and the Pensions Act.*
>
> *2) In the hearing of that earlier complaint which took place in February, the KWETB asserted that my complaint was out of time because my employment had been terminated in 2015. This worried me and I wrote to the KWETB seeking clarification on this assertion. As it has not responded and as this matter has already been discussed at the Labour Court in 2018 it can only mean that that their assertion that my contract has terminated was incorrect and was just a defence tactic as opposed to being the legal position. Otherwise, if it is a retrospective termination of my contract then it has been done in reaction to my complaint to the WRC dated 6th November* [2018] *and it is therefore*

victimisation. (the Employment Equality act even protects terminated workers at section 2). It also protects prospective employees and those removed from office and in contract.

3) Since July/Aug 2017 I am unable to access the injury allowance/gratuity of my pension or to get any information on how to access it. I seek this in order to get treatment for severe stress at the Equality Tribunal in 2012 when my school principal who was a barrister tested my evidence that I was feeling victimised by him and the VEC.

In recent years I have been getting worse not better. I have been getting lost and having accidents. I am caring for a drug/alcohol dependent adult on my own at present for work and I find I am not able to deal with certain aggressive sexual acts. I am not coping generally. I have also been very upset in recent days because the teaching council sent me a survey seeking my input in its social media guidelines. Adult Male X and others had abused a female child at the school where I taught last and they uploaded a video of the female child being abused to Facebook. The Sexual Harassment by Adult male X was referred by Co Wicklow WEC to the Equality Tribunal in December 2009 in response to a complaint I made against it in March 2009.

I would like the injury allowance to get treatment for my stress. I believe that not giving me access to the injury allowance or any information on it is the opposite of appropriate measures as per section 16 of the Employment Equality Act and Article 5 of Council Directive 2000/78/EC Equal Treatment in Employment where it states "advance in employment". I was 46 when I first made my request I will be 48 in a few weeks time. All things being normal I should be healthy and be in my prime as a teacher. Year after year my students results were among the best if not "the" best in the school. The reason why my students did so well was because I asserted a high standard of sexual respect contrary to my principal.

4) I retired from teaching on 20th November 2018. I have no pension because it is being held up because of ex gratia payments that the Minister made to

KWETB. Those ex gratia payments and the resulting hold up to my pension which they are causing is current live victimisation contrary to the orders of Equality Officer O'Doherty in 2012.

5) The KWETB knows from my written submission to the Labour Court and the hearing that took place in 2018 at the court that I do not want to retire and that I want to get better and return to teaching.

6) Overarchingly there is a regime/practice of female teacher early retirement/resignation. 37.5 female teachers of Abbey CC has to retire early on ill health or resignation due to the principal's treatment of them (actual or perceived) this is gender discrimination. This compares with no males. I am the latest female to go under this regime. My comparator is Neilus Young for gender and disability.

7) The Minister for Education has been acting with victimisation towards me and discrimination for years. The KWETB are vicariously liable for the Minister and they have procured the victimisation and discrimination by the Minister contrary to the orders of the Equality Officer.

8) This complaint is not res Judicata because the Adjudication Officer was dealing only with a complaint up to 6th November 2018. My complaint is of what happened to me from November to today, it is not out of time as explained above."

The AO's Decision

5. The AO ruled on the appellant's complaints as follows:

"*I am satisfied that, in removing her from office, the Minister's intention was to dismiss the complainant from a job as a teacher with the ETB and that this is what occurred on June 15, 2015. I find that there is no substance to the complainant's contention that she was dismissed on February 10, 2019 at the hearing at the WRC or, that this was the first occasion on which she was*

informed that she was dismissed. The complainant was professionally represented by her trade union and legally represented by her solicitor at the enquiry that resulted in her dismissal and I do not accept that she is not aware that her point with the ETB was terminated in June 2015."

6. The AO went on to state:

> "*having been dismissed in June 2015, in September 2016, the complainant submitted a complaint to the WRC against this respondent on the ground of discrimination. The AO decided that the complaint was out of time. In November 2018, she submitted similar complaints against the same respondent…in which the adjudication officer decided that these complaints were also out of time. During the period that complaints were submitted against the ETB, the complainant brought complaints against the Department of Education grounded on the same facts."*

7. The AO referenced the principle of *res judicata* and the case of *Henderson v Henderson*. She stated that:

> "*in the case under consideration here, I find that the complainant has bought forward no new information, but rather has sought to construe what occurred on June 15, 2015 as something other than a dismissal. I accept that, for any person, a decision by the employer to dismiss them is very painful and even traumatic. However, it is my view that the complainant's position in respect of her dismissal as set out at this hearing does not stand up*."

8. The AO then concluded:

> "*the complainant was dismissed in June 15, 2015 and not on February 10, 2019. I have also concluded that the complainant's allegation of discriminatory dismissal has been adjudicated upon already by the WRC and the Labour Court. As matters have already been heard, considered and decided upon, the principle of res judicata applies and I decide therefore that this complaint is dismissed".*

9. In respect of her complaint that she had been prevented from getting a gratuity payment under the pension scheme, having set out the appellant's case, the AO summarised the Minister's case as follows:

> *"Summary of Respondent's Case:*
>
> *In August 2017, the complainant applied for a pension under section 23 of Statutory Instrument 292 2015, the Educational and Training Board Teachers' Superannuation Scheme. On the advice of the ETB, the complainant applied for and was granted an ill health early retirement pension and a lump sum payment with effect from June 6th 2018. However, the complainant claims that she is entitled to a different pension benefit, known as an "injury gratuity." At the hearing, the Pensions Officer said that they have made enquires to the Department of Education and Skills to seek confirmation that the way the ETB has treated the complainant in respect of her pension entitlement is correct. The ETB's position is that there has been no breach of the Pensions Act in respect of their treatment of the complainant's application for a pension.*
>
> *Findings and Conclusions:*
>
> *I have considered the complainant's complaint that she has been prevented from accessing an injury gratuity that may be available under her ETB's Teachers' Pension Scheme. The complainant is currently in receipt of an ill-health retirement pension and I am satisfied therefore that she is in receipt of a benefit that will provide a regular income for her future. I note that the ETB has made enquires with the Department of Education and Skills to determine if this ill health early retirement pension is appropriate benefit for her and I expect a response will be issued to the complainant about this reasonably soon.*
>
> *At the hearing the complainant made no allegation of discrimination or victimisation in respect of her pension benefit."*

10. The AO concluded that she "*found no evidence that the complainant has been discriminated against, penalised or victimised in respect of entitlements under the ETB*

Teachers Superannuation scheme. I decide therefore, that her complaint under the Pensions Act 1990-2015 is not upheld."

The Labour Court's Determinations

11. The appellant appealed the AO's decision to the Labour Court. On 9 February 2021, the Labour Court delivered separate determinations on the s.77 and s.81E matters.

s.77 complaint determination

12. In its determination of the s.77 matter, delivered on 9 February 2021, the Labour Court stated that "*the complainant lodged a claim with the WRC on 15 April 2019. The cognisable period for the purpose of the act therefore is 16 November 2018 to 15 April 2019… With the consent of the parties the court proceeded to hear the parties on the preliminary issue of whether or not there was prima facie an infringement of the act and whether or not this occurred within the cognisable period."*

13. The Labour Court determined that:

> "*having carefully considered the incidents identified by the complainant and the respondent's response to same* [it[*has found that the complainant had not made out a prima facie case and therefore a claim could not succeed. The court noted that the complainant's employment ceased in June 2015 almost 4 years earlier. However, as the court has decided that the complainant has not raised an instance of discrimination within the cognisable period, the Court does not need to consider the locus standi of the complainant to make a complaint under the act*".

s.81E complaint determination

14. In its determination of the s.81E matter, delivered separately on 9 February 2021, the Labour Court stated:

"*the complainant's submission is in effect that she wanted to get a gratuity from her pension scheme and not a pension. The complainant is seeking to have the court find under this piece of legislation that she should be given the injury gratuity despite not meeting the requirements for same. The complainant completed the forms for the granting of an ill health retirement pension and participated in the process to achieve same. When her initial application was rejected the complainant successfully appealed that decision. The complainant was granted the pension that she had submitted an application for. The court finds that the complainant has not identified any breaches of the act and that her complaint is misconceived*."

15. The Labour Court accordingly dismissed the appellant's appeals on both matters.

The appellant's appeals

16. The appellant has submitted identical grounds of appeal in respect of her appeals against each of the two Labour Court determinations. These grounds of appeal are set out in her notices of motion as follows:

"1) <u>The remote communication mismatch is an error in law</u>
The Respondent conducted a remote hearing of preliminary issues into my appeals under the Employment Equality Act and Pension Act in a Virtual Courtroom using Webex. The words used by the Respondent at the Remote hearing, as heard by me, and which the Stenography Transcript recorded, and which my sister confirms she heard, all tally. However, these words are at total and complete variance to the words used in the decision that issued from the Respondent under Employment Equality Act subsequent to the online event. The decision uses words to communicate, as if it had conducted a hearing on the substantial matters rather than on preliminary ones. And communicate as if it had permitted evidence to be given, as if it had not instructed evidence to be given, or as if full submissions had been made on substantial matters.

2)<u>Important Preliminary jurisdictional issues that exist had been pointed out before the remote hearing. Breaches of jurisdiction are errors in law</u>

My written submissions to the Respondent on preliminary issues made important points of law to the Respondent in relation to its jurisdiction to act in these matters. Yet I found it impossible at the remote hearing to get the chance to speak about them. The Respondent informed me that there are other avenues. I was removed from the virtual courtroom and into the lobby. The High Court is the only avenue open at present."

Discussion

17. The appellant helpfully provided a transcript of the hearing before the Labour Court that led to the determinations in issue.

First ground of appeal

18. The substance of the appellant's first ground of appeal is that the decision "*uses words to communicate as if it had conducted the hearing of the substantial matters rather than preliminary ones*".

19. As is clear from the transcript, it was agreed at the outset of the hearing that the Labour Court was looking at preliminary issues only (transcript, page 3). The Chairperson stated "*So we're going to take the equality act first. So our understanding is that the complaint was lodged on the 15/4/2019 and therefore the cognizable period is the 16/11/2018 to the 15/4/2019. So Ms Morgan we need to hear from you as to what you say were the acts of discrimination within that period*" (transcript, page 4). The Chairperson again repeated the reference to the Labour Court dealing with preliminary issues at page 13 of the transcript.

20. I am satisfied that no error of law has been demonstrated. It was agreed that the hearing would address the preliminary issues including whether there were acts of discrimination within the cognisable period. This is what the determination the subject of the appeal in 2021/37 MCA (relating to the s.77 complaint) in fact addresses. This ground of appeal is not well founded.

21. The determination the subject of the appeal in 2021/38 MCA (relating to the s.81E complaint) in fact addresses the *substance* of the pension discrimination claim in that case. The Labour Court held that the appellant received the ill health retirement pension she applied for and that there was no discrimination involved in not giving her an injury gratuity when she did not meet the requirements for such a gratuity. I am satisfied that the findings in that determination are unimpeachable as a matter of law and no error of law arises on the first ground of appeal in respect of that determination either.

Second ground of appeal

22. The second ground of appeal essentially alleges that the appellant did not get a chance to make submissions during the course of the remote hearing. This is simply not borne out by the contents of the transcript of the hearing.

23. KWETB tendered affidavit evidence from Áine O'Sullivan, an assistant principal officer employed by KWETB who was present at the hearing on behalf of KWETB. Ms. O'Sullivan averred that she has attended numerous hearings on behalf of KWETB involving the appellant and was very familiar with how these hearings are conducted. She stated that "*the hearing before the Labour Court was conducted appropriately and fairly*". She averred that the only technical issue was when an officer with the pensions unit of the Board lost connection for a few minutes but otherwise there were no problems with the hearing. She avers to her view that "*at the hearing, the Labour Court gave the appellant every opportunity to advance her case. It was conducted fairly and in accordance with natural justice.*"

24. The applicant did not challenge Ms. O'Sullivan's evidence. That evidence is borne out by the contents of the transcript of the hearing which makes clear that the appellant was given a fair hearing and had her submissions heard in full.

25. I am satisfied that the appellant has not demonstrated any error of law in respect of the second ground of appeal lodged in respect of each of the two determinations.

Conclusion

26. At the hearing of these applications, the appellant sought to make wide-ranging submissions on matters relating to what she termed "green victimisation" and other alleged wrongs done to her. These submissions did not confine themselves to the points of law contained in the pleading. These impermissible submissions formed part of her legally vexatious campaign of grievance against the Board and the Minister, the background to which is more fully set out in a separate judgment delivered by me today in High Court proceedings record no. 2020/787 JR and 2020/37 MCA involving the same parties, which deals with applications for *Isaac Wunder*-type relief sought by the Minister and the Board against the appellant.

27. Having carefully considered the affidavit material and the submissions legitimately directed towards the points of law sought to be advanced in the appeals before me, I am quite satisfied that no error of law has been demonstrated.

28. I accordingly dismiss the two appeals.