APPROVED **[2023] IEHC 295**

THE HIGH COURT

2010 No. 7478 P

BETWEEN

CATHERINE SHEEHAN

PLAINTIFF

AND

CORK COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 7 June 2023

INTRODUCTION

1. This court delivered a reserved judgment on 13 February 2023 dismissing the within proceedings for inordinate and inexcusable delay: *Sheehan v. Cork County Council* [2023] IEHC 46 ("*the principal judgment*"). The principal judgment was delivered subsequent to a hearing on 30 January 2023. This supplemental judgment is delivered in respect of an application by the plaintiff to have the principal judgment set aside and the matter remitted for hearing by a different judge.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. The principal judgment was delivered on 13 February 2023. Thereafter, the proceedings were listed on 28 February 2023 to address the allocation of legal costs. On that date, the plaintiff indicated that she was seeking to set aside the principal judgment. The application to set aside the principal judgment had, initially, been premised on an allegation that the plaintiff had not been provided, at the hearing of the application to dismiss, with all of the materials relevant to the chronology of events in the proceedings. Accordingly, I made the following directions with a view to identifying, first, the specific documents which the plaintiff says she did not have at the time of the hearing; and, secondly, the nature of the additional submissions which the plaintiff *would have made* had those documents been available to her. The defendant was directed to provide the plaintiff with a tabbed, indexed booklet containing a full set of the pleadings in the proceedings. The plaintiff elected to collect this booklet from the defendant's solicitors directly rather than have same sent to her by registered post. The plaintiff was directed to file a written submission, within four weeks, explaining what additional arguments the plaintiff would have made at the hearing if the (supposedly) missing documents had been available to her.

3. In the event, the plaintiff chose not to file such a submission. Instead, she sent an email in the following terms to the court via the registrar on 23 March 2023:

> "Further to my verbal request to you on 28th February, 2023 in your courtroom that you do not publish your judgement from the hearing held on 30th January, 2023, due to the rules of court not being adhered to, I again repeat my request.
>
> On the 28th February you directed the legal representatives of Cork County Council to provide a copy of what they had submitted to you prior to the January 30th hearing to me, to allow me to submit essay on the arguments I would have

> made on 30th January if I had been provided with this documentation prior to hearing, but I respectfully submit that you cannot unring the bell and I do not want, in any way, to legitimize a flawed hearing where Cork County Council were allowed full access to you prior to hearing, whereas I was on the 30th January handing you supporting documents from my Affidavit submitted the year prior.
>
> Socrates said 'Four things belong to a judge: to listen courteously, to answer wisely, to consider soberly and to decide impartially'.
>
> Our constitution includes:
>
> Article 40.3.2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
>
> and that is all I have tried to achieve since March 2006."

4. The proceedings were listed before me again on 17 April 2023. On that occasion, I gave the plaintiff a further opportunity to file a written submission along the lines directed on 28 February 2023. A period of four weeks was allowed in this regard. A written submission was received by post within this period and has since been placed on the court file. This written submission consists largely of a summary of case law in relation to the jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay. Much of the case law cited is from an online publication by Beauchamp Solicitors: "*Commercial Law Practitioner – Dismissing legal proceedings by reason of delay*" (5 July 2016). The written submission also refers to a number of more recent judgments including, most relevantly, a judgment on delay in a bullying case, *Naudziunas v. OKR Group* [2020] IEHC 566. A judgment of the Ontario Superior Court is also cited: *Peakovic v. Ford Motor Company of Canada*, 2019 ONSC 6763.

5. The written submission was accompanied by a second document headed up "*Individual Consequences of Being Exposed to Workplace Bullying (Mikkelsen, E.G. et al.)*". This document sets out a number of extracts which refer to (1) psychological distress; (2) physiological stress reactions; (3) physical health problems; and (4) social and economic consequences related to workplace bullying. No attempt has been made in the document to relate this material to the factual circumstances of the present case. It is not suggested, for example, that the plaintiff had been incapable of making proper submissions at the hearing on 30 January 2023.

6. The proceedings were listed before me again on 18 May 2023. On that occasion, the plaintiff submitted that she had not been prepared "*in a legal sense*" for the hearing on the application to dismiss on 30 January 2023. The plaintiff further submitted that she did not have an opportunity to present case law at that hearing and invited me now to consider the case law cited in her written submission. More generally, the plaintiff raised an objection that she had not been afforded a means of redress whereby her complaints about her treatment in the workplace could be addressed. The plaintiff referred to her right to a good name and her right to a fair disciplinary hearing.

7. Judgment on the application to set aside the principal judgment was reserved until today.

EXCEPTIONAL JURISDICTION TO REVISIT WRITTEN JUDGMENT

8. The Supreme Court held in *In the matter of Greendale Developments Ltd (No. 3)* [2000] 2 I.R. 514 that there is an exceptional jurisdiction to reopen a final judgment. The principles governing this exceptional jurisdiction have been most

recently considered by the Supreme Court in *Student Transport Scheme Ltd v. Minister for Education and Skills* [2021] IESC 35. The nature of the jurisdiction is summarised as follows (at paragraph 2.13 of the judgment):

> "There is, therefore, a clear and consistent line of authority on this topic. A high weight has to be attached to the principle of finality. The reason behind this is clear. Where proceedings have reached an end, the parties are entitled to expect that they will not have to continue to litigate the issues which have been finally determined. However, there may be exceptional circumstances where a failure to reopen may itself amount to a clear and significant breach of the fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice, such that the decision sought to be reopened can properly be considered to be a nullity and not merely arguably in error. Where such a situation arises through no fault of the party concerned, then it follows that the limited jurisdiction to reopen the case can be exercised."

9. The Supreme Court in *Student Transport Scheme Ltd v. Minister for Education and Skills* endorsed the following two principles which are of immediate relevance to the present proceedings. First, the party seeking to have a final order set aside must clearly establish a fundamental denial of justice against which no other remedy, such as an appeal, is available (*L.P. v. M.P.* [2001] IESC 76, [2002] 1 I.R. 219 (at page 229 of the reported judgment)). Secondly, the exceptional jurisdiction does not exist to allow a party to re-argue an issue already determined (*Murphy v. Gilligan* [2017] IESC 3 (at paragraph 138)).

10. Much of the case law on the jurisdiction to revisit a written judgment is concerned with appellate courts, rather than courts of first instance. This is because a party who is dissatisfied with a judgment of first instance will typically have a right of appeal against that decision. This right of appeal will generally provide a party, who is aggrieved by a first instance judgment, with an effective

remedy. The grounds upon which a judgment may be appealed are much broader than the grounds upon which a court of first instance can revisit its own judgment.

11. It is only at appellate stage that the jurisdiction to revisit a written judgment assumes an especial significance. This is because an application to revisit the written judgment may be the only avenue open to a party dissatisfied with a decision of an appellate court. In practice, such applications are rare, and even more rarely successful.

12. The Court of Appeal has confirmed, in *Bailey v. Commissioner of An Garda Síochána* [2018] IECA 63, that a court of first instance has jurisdiction, prior to the order envisaged by the judgment having been drawn up and perfected, to revisit an issue decided in a written judgment. The Court of Appeal posited the following test. The High Court, if asked to revisit an issue already decided in a written judgment, must be satisfied that there are "*exceptional circumstances*" or "*strong reasons*" which warrant it doing so. The principle of legal certainty and the public interest in the finality of litigation dictate that such a jurisdiction must be exercised sparingly. The Court of Appeal went on to explain that these considerations apply with even greater force to the decision of an appellate court, which is normally to be regarded as final and conclusive.

13. A very useful summary of the principles is to be found in the judgment of the High Court (McDonald J.) in *HKR Middle East Architects Engineering LL v. English* [2021] IEHC 376.

14. The following considerations appear to me to be relevant to an application to revisit a decision of first instance in respect of which there is an unrestricted right of appeal. The judge who is asked to revisit their own judgment should have

regard to the fact that, on most occasions, the appropriate avenue of redress for a person aggrieved by a judgment is to exercise their right of appeal. The parties to litigation are entitled to assume that, absent an appeal, a written judgment, which has been approved by the judge and has been published, is conclusive.

15. A party who is dissatisfied with a written judgment should not normally be entitled to reagitate their proceedings before the court of first instance. Were this to be allowed to happen, it would, in effect, insert an additional layer of judicial decision-making, whereby a party would seek to have the judgment revisited by the trial judge, as a prelude to an appeal if unsuccessful. This would add to delay and involve the parties incurring further costs. The proceedings would, in effect, be subject to three hearings: (i) the initial hearing; (ii) the hearing of the application to the court of first instance to reopen its judgment; and (iii) the hearing of the appeal.

16. There will, however, be limited circumstances in which it may be appropriate to invite a court of first instance to review its own judgment. Perhaps paradoxically, an application to reopen a judgment may be appropriate where the alleged error falls at either end of a spectrum of significance. If the error is minor and relates to a matter peripheral to the rationale of the judgment—such as, say, a mistake in the narration of events—then this is something which might legitimately be corrected by way of revision of the judgment. If the error is obvious and is very serious, and would inevitably result in a successful appeal and a remittal to the court of first instance for rehearing, then again there might be something to be said for the judgment being revisited by the court of first instance. The parties might, for example, have failed to bring a crucial statutory provision or a relevant precedent to the attention of the judge at the initial

hearing, only to do so post-judgment. It might be preferable for the court of first instance to reopen the judgment to ensure that all relevant legal principles have been addressed.

17. Between these two extremes, however, an aggrieved party will normally be expected to avail of their right of appeal rather than seek to have the judgment revisited by the court of first instance.

18. It should be emphasised that the placing of limitations on the jurisdiction of a court of first instance to reopen its own judgment is not informed by a naïve belief that judges do not make mistakes. As explained by O'Donnell J. in *Nash v. Director of Public Prosecutions* [2017] IESC 51 (at paragraphs 6 and 7), errors can and do occur. The limitations on the jurisdiction to reopen a first instance judgment are not designed to deny an aggrieved party a remedy; rather they simply restrict that remedy, in most cases, to a right of appeal. The rationale for so doing is that parties to litigation are entitled to assume that a written judgment, which has been approved by the judge and has been published, is conclusive, subject only to the invocation of a right of appeal within time.

DISCUSSION

19. The plaintiff's application to set aside the principal judgment had, initially, been advanced on the basis that she had been taken by surprise by the documentation relied upon by the defendant. More specifically, the plaintiff alleged that the application to dismiss her proceedings had been determined by reference to documents which were not available to her at the time of the hearing on 30 January 2023.

20. The plaintiff has since been asked to identify, by reference to a full set of pleadings provided to her, which specific documents she says were not available. The plaintiff has declined to do this. Notwithstanding this lack of cooperation on the part of the plaintiff, the court has carried out its own review of the state of the papers as of the hearing on 30 January 2023. The position is as follows.

21. On 12 May 2022, the application to dismiss the proceedings had been assigned a hearing date by the judge in charge of the Non-Jury List. The motion was scheduled for a one hour hearing on Monday 30 January 2023. As is standard practice, the moving party was required to lodge papers in the List Room on the Thursday preceding the scheduled hearing date. This practice ensures that the judge assigned to hear the matter has an opportunity to read the papers in advance. This results in an efficient use of court time, and a consequent saving of costs for the parties. Time is not expended unnecessarily at the hearing on the reading aloud of the papers.

22. The defendant duly lodged a booklet of pleadings in the List Room. Unfortunately, the booklet was incomplete and omitted the defendant's notice of motion and grounding affidavit. Importantly, the affidavit which the plaintiff had filed in response to the motion had been included.

23. Upon reviewing the lodged booklet of pleadings, on the Friday preceding the hearing, it became apparent to me that the papers were incomplete. I arranged, therefore, to take up the case file from the Central Office of the High Court. This ensured that I was able to read a complete set of motion papers in advance of the hearing. The case file includes documents filed by both sides during the course of the proceedings, commencing with the personal injuries summons which sets out the plaintiff's claim in detail.

24. At the outset of the hearing on 30 January 2023, counsel for the defendant explained that there was a further difficulty with the booklet of pleadings which had been lodged. The booklet contained, in error, a notice which indicated that a tender had been made. Generally, the trial judge would not know that a tender had been made until *after* the proceedings had been heard and determined, at which stage the existence of a tender might be relevant to the allocation of legal costs. As it happened, I had not read the notice of tender. Nevertheless, I expressly stated that if either party would prefer that a different judge should hear the motion to dismiss the proceedings, I would arrange for the matter to be transferred to another judge for immediate hearing. Both sides confirmed that they were content for me to hear the motion notwithstanding the erroneous inclusion of the notice of tender. I arranged for the (unread) notice of tender to be removed from the papers before me.

25. Counsel on behalf of the defendant then handed in a core booklet which contained the motion papers in the application to dismiss, together with the motion papers in an earlier application by the plaintiff's solicitor to come off record. An order allowing the plaintiff's solicitor to come off record had been made, without objection, on 21 March 2022.

26. The digital audio recording of the hearing on 30 January 2023 confirms that a copy of this core booklet was given to the plaintiff. The plaintiff herself then handed in to the court, in loose format, copies of the exhibits to her replying affidavit. (A copy of these exhibits had been included as part of the core booklet but did not form part of the Central Office case file). During the course of the hearing, counsel for the defendant read aloud passages from his side's grounding affidavit which set out the key dates in the chronology of the proceedings.

27. Having regard to this procedural history, there is no basis for the objection, belatedly made by the plaintiff, that she was somehow taken by surprise at the hearing on 30 January 2023. In particular, there is no basis for suggesting that the plaintiff did not have the opportunity, if she had so wished, to dispute the chronology of events in the proceedings. Crucially, the affidavit grounding the application to dismiss the proceedings sets out the key dates in the chronology of the proceedings. It is apparent from the fact that the plaintiff had filed an affidavit in response to the motion on 22 March 2022 that she had been served with the motion papers and had an opportunity to reply. The plaintiff, in her replying affidavit, does not dispute the accuracy of any part of the chronology. Rather, the plaintiff expressly accepts that the delay in the proceedings has been both inordinate and inexcusable. The plaintiff repeated this acceptance in her oral submissions at the hearing on 30 January 2023.

28. The plaintiff was not put at a disadvantage by the fact that the court had reviewed the case file in advance of the hearing. The plaintiff's concerns in this regard are entirely misplaced. As explained earlier, it is standard practice in the Non-Jury List for the judge to read papers in advance. This is normally done by reference to a set of pleadings lodged by the moving party to the motion. Here, the papers lodged in the List Room by the defendant were incomplete and the court had regard to the official case file. There can be no suggestion that the content of the case file presents a partial or biased version of the proceedings. Rather, the case file includes all the pleadings and affidavits filed by each side (excluding exhibits). Here, the case file commences with the personal injuries summons, which sets out the plaintiff's claim in detail, and concludes with the plaintiff's affidavit in response to the motion to dismiss. Having read the case

file, the court was fully apprised of the plaintiff's case and of her arguments in response to the motion to dismiss.

29. The plaintiff makes a separate complaint that she did not have an opportunity, prior to the hearing on 30 January 2023, to hand in to court the exhibits to her affidavit. The plaintiff had, seemingly, asked the list judge to receive the exhibits at an earlier directions hearing. This request appears to have been based on a misunderstanding of the process. The practice is that a full set of papers is not lodged in the List Room until the week preceding the scheduled hearing date. It would not be normal for papers to be handed in, piecemeal, prior to that. At all events, the exhibits were included as part of the booklet of motion papers handed in by the defendant at the hearing on 30 January 2023, and a second set was handed in by the plaintiff herself. The exhibits were thus before me at the time I prepared my reserved judgment.

30. Despite having been afforded two opportunities to do so, the plaintiff has failed to substantiate her initial complaint that she had been taken by surprise by the documents relied upon at the hearing on 30 January 2023. Instead, the plaintiff has sought to reorient her complaint and now says that she did not have an opportunity to present case law at that hearing. To this end, the plaintiff has since filed a written submission setting out a detailed summary of case law on the dismissal of proceedings for delay.

31. No proper explanation has been provided for the failure to refer to this case law at the hearing on 30 January 2023. The hearing date had been fixed as long ago as 12 May 2022 and the plaintiff thus had a period of some eight months to prepare for the hearing. Whereas the court has sympathy for any litigant who is engaged in litigation without the benefit of professional legal representation,

ours is an adversarial system and parties are required to present their cases in a timely manner. It is apparent from the written submission belatedly produced, and from her oral submissions to the court, that the plaintiff is intelligent and resourceful. If and insofar as the plaintiff wishes to rely on, for example, the case law cited in the online publication from July 2016, no justification has been offered for not having done so before now.

32. Moreover, the plaintiff has not sought to suggest, by reference to this case law, that the principal judgment was wrongly decided. It is not said, for example, that an important precedent had been overlooked nor that the court made an error of principle. Indeed, the plaintiff does not dispute that the delay in this case was inordinate and inexcusable. The outcome of the application to dismiss turned, instead, on whether or not the balance of justice lay in favour of the dismissal of the proceedings. In this regard, the principal judgment applies the approach set out in detail by the Court of Appeal in *Cave Projects Ltd v. Kelly* [2022] IECA 245. This approach is as generous to a claimant as that in any of the earlier case law now relied upon by the plaintiff. The outcome of the application to dismiss would have been precisely the same even had this earlier case law been cited. There is nothing in that case law which is more favourable to the plaintiff than the judgment of the Court of Appeal.

33. The only judgment relied upon by the plaintiff which might, at first blush, appear to be of possible assistance to her is that of the High Court (Humphreys J.) in *Naudziunas v. OKR Group* [2020] IEHC 566. The circumstances of that case bear some superficial resemblance to those of the present case in that both comprised a personal injuries action arising out of the alleged treatment of the respective claimants in their workplace. That is, however, the extent of any

resemblance. As appears from the judgment in that earlier case, the court held that the delay had been excusable, by reference to the fact that procedures to progress the case were ongoing and that much of the delay had been caused or contributed to by the defendants. This delay on the part of the defendants also informed the finding that the balance of justice lay against dismissing the proceedings. By contrast, it is conceded by the plaintiff in the present case that the delay is both inordinate and inexcusable. More generally, Humphreys J. makes the point, at paragraph 43 of his judgment, that the proceedings before him did not raise any strikingly novel issues of law but rather involved the application of existing jurisprudence to the facts of the particular case. Accordingly, the precedent value of *Naudziunas v. OKR Group* is limited.

34. For completeness, it should be observed that the Canadian case relied upon by the plaintiff does not advance her cause. It is apparent from the judgment in *Peakovic v. Ford Motor Company of Canada*, 2019 ONSC 6763, that issues of delay are dealt with very differently under the procedural laws of Ontario. It is expressly provided that an action is to be presumptively dismissed if it has not been set down for trial by the fifth anniversary of the commencement of the action. The claimant in that case sought to show cause why the action should not be dismissed for delay. The Ontario Superior Court held that there had been an acceptable explanation for the delay, namely that the delay had been caused by the claimant's original legal representatives; that they had misled the claimant; and that it had taken some period of time for the claimant to retain new legal representatives. The proceedings were nevertheless dismissed because the court held that the defendants would suffer non-compensable prejudice if the action were allowed to proceed as the result of the loss of relevant documents.

35. Given the radically different nature of the legal framework against which an application to dismiss proceedings falls to be determined in Ontario, the judgment is of little assistance. Moreover, there is no similarity between the circumstances of that case and those of the present case. Here, as explained in the principal judgment, it was the plaintiff herself, and not her legal representatives, who is responsible for the delay in the present proceedings. The plaintiff's legal representatives ultimately had to come off record because of the plaintiff's failure to provide instructions.

CONCLUSION AND PROPOSED FORM OF ORDER

36. For the reasons explained herein, the plaintiff has failed to establish that there are grounds for setting aside the principal judgment. In particular, the plaintiff has failed to establish that the hearing of the motion to dismiss the proceedings was unfair, still less that it involved a fundamental denial of justice against which no other remedy, such as an appeal, is available (*Student Transport Scheme Ltd v. Minister for Education and Skills* [2021] IESC 35). There is no reasonable basis for suggesting that the plaintiff was taken by surprise at the hearing of the motion to dismiss. Rather, the basis upon which the defendant was seeking to dismiss the proceedings had been clearly set out in the affidavit grounding the motion and the plaintiff had an opportunity to respond by way of her replying affidavit.

37. Insofar as the plaintiff seeks, belatedly, to rely on the case law cited in her written submission of May 2023, no justification has been offered as to why she could not have done so at the hearing on 30 January 2023. Moreover, the plaintiff has not sought to suggest, by reference to this case law, that the principal judgment

was wrongly decided. It is not said, for example, that an important precedent had been overlooked nor that the court made an error of principle.

38. Accordingly, the application to set aside the principal judgment is refused.

39. As to legal costs, the defendant had initially indicated, on 28 February 2023, that it was applying for its costs, but that it did not intend to enforce any costs order in the event that the plaintiff did not lodge an appeal. If the defendant still wishes to pursue an application for costs, it should serve and file written submissions within two weeks of the date of this judgment, i.e. by 21 June 2023. The plaintiff will have a period of two weeks thereafter to serve and file written submissions in reply, i.e. by 5 July 2023. These proceedings will be listed, for final orders, on Monday 17 July 2023 at 10.45 AM.

Appearances

The plaintiff appeared as a litigant in person
Paul Twomey for the defendant instructed by Ronan Daly Jermyn