

THE HIGH COURT

[2023] IEHC 670

[Record No. 2017/4013P]

BETWEEN

EUGENE PIDGEON

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE DUBLIN MIDDLESEX REGION

DEFENDANT

JUDGMENT of Ms Justice Bolger delivered on the 30th day of November 2023

1. This is the defendant's application to dismiss the plaintiff's proceedings for delay. The plaintiff's proceedings were issued by way of personal injuries summons dated 5 May 2017 following on from a letter of claim dated 9 April 2015. Essentially, no steps have been taken in those proceedings since that time apart from a Notice of Intention to Proceed, dated 25 October 2021, which was followed shortly thereafter by this motion.

2. It is important to consider the precise claim made by the plaintiff in these proceedings along with the plaintiff's complaint to the Data Protection Commissioner which he relies on to excuse the delay that has occurred. The plaintiff's claim is for personal injuries that he said he sustained as a result of bullying and stress in the workplace and the defendant's failure to take adequate regard of the grievances he had raised. The plaintiff cites two incidents in his pleadings. The first occurred in or around May 2014 when he says a member of the defendant's staff said he should be careful going into the patients' area because he was "*high risk*". The second incident is undated but refers to a complaint the defendant received from a parent in relation to the interaction between the plaintiff and her son, a complaint which the plaintiff says was without foundation but, nevertheless, he says the defendant failed to investigate the complaint. The plaintiff expressly pleads at para. 8 of his personal injuries summons that the attitude of the defendant's staff and the manner and mode of its handling of the complaint caused him considerable distress, personal injury loss and damage. He pleads at para. 9 that he was subjected to excessive strain in his

employment with the defendant by reason of the defendant's handling of the complaint and by the defendant allowing other members of staff to refer to him as "*high risk*" in the context of working with children. The plaintiff pleads a number of particulars of negligence, including that the defendant failed to manage the complaint made about him, failed to take the requisite or any remedial action on foot of his complaints and allowed an untrue and unfounded allegation which they failed to properly or at all investigate to become public knowledge.

3. Whilst not referred to in the personal injuries summons, the plaintiff's replying affidavit grounding this motion states that the complaint file was closed pursuant to a letter dated 18 December 2014 which recommended that he be offered an apology, that staff receive training and that he be granted a consultation with human resources in relation to sick leave periods. However, he says he was not satisfied that the apology and the report of 18 December 2014 comprehensively disposed of his concerns as a result of which he issued the within proceedings on 5 May 2017.

4. Between the letter of claim of 9 April 2015 and the personal injuries summons of 5 May 2017, the plaintiff lodged a complaint with the Data Protection Commissioner on 7 November 2016. He says that complaint is highly pertinent to his proceedings, albeit the proceedings made no mention of the complaint and do not plead any breach or make any reference to the Data Protection Acts 1988 - 2018, as amended. He says he needed the Data Protection Commissioner's decision in order to progress the proceedings, but it is clear that he never shared that view with the defendant or advised the defendant why he was taking no steps to progress his proceedings.

5. In May 2018, the parties attended an unsuccessful mediation. From that time, the defendant says they heard nothing from the plaintiff until they received a notice of change of solicitor on 12 August 2021, at which stage they had formed the view that the proceedings were not being progressed and they had closed their file. Subsequent to the defendant's filing of the within motion, the plaintiff apparently instituted separate proceedings in May 2022 claiming a breach of the Data Protection Acts apparently arising from the decision of the Data Protection Commissioner of 31 May 2021 which found the defendant had breached its obligations to the plaintiff under s. 2(1)(b) and s. 6(1) of the Data Protection Acts. That decision of the Data Protection Commissioner is quite detailed and refers to the Commissioner's "*extensive engagement*" with the defendant. The involvement of the plaintiff

seems to have been more limited in that the decision only refers to the plaintiff's first contact with their office on 7 November 2016, further information that was furnished on 15 October 2017 and a letter from the office to the plaintiff on 23 November 2017 in response to which the plaintiff provided further documents. Far more recent and potentially more involved engagement with the defendant is mentioned in the Commissioner's decision, including a letter sent to the defendant on 29 March 2018 after which the Commissioner "*engaged extensively with the HSE for the purpose of this investigation*". The Commissioner's Office wrote to the defendant on 26 March 2020 and an email was received from the Director of Nursing of Midland Regional Hospital, Tullamore on 11 March 2021, which included a statement that the plaintiff's High Court proceedings against the defendant had not been closed or withdrawn.

6. The defendant's affidavit grounding their motion to dismiss these proceedings asserts that the plaintiff's delay in progressing his proceedings has been inordinate and is inexcusable. They identify general prejudice in asserting that the delay "*has prejudiced the defendant in its defence of these proceeding so that a fair trial of these proceedings is no longer possible*". No further detail was provided to the court as to the nature of the prejudice the defendant has suffered or precisely why a fair trial of the proceedings is no longer possible. In my recent decision in *John Padden v. Michael McDarby & ors* [2023] IEHC 596, I set out the following at para. 6 as the up to date position on the law on dismissal of proceedings on grounds of delay, as stated by Collins J. in *Cave Projects Ltd. v. Gilhooley & ors* [2022] IECA 245: -

- (i) The burden of proof rests on the defendant.
- (ii) An order dismissing a claim is a far reaching one.
- (iii) There must be a causal connection between the inordinate and inexcusable delay and the matters relied on to establish that the balance of justice favours dismissal.
- (iv) A defendant is also responsible for the timely progress of the litigation.
- (v) Professional defendants do not enjoy any privileged status.
- (vi) General prejudice may suffice but prejudice is not to be presumed.
- (vii) The dismissal of a claim is an option of last resort for where permitting a claim to proceed would result in some real and tangible injustice to the defendant.

7. The plaintiff in these proceedings, in addition to seeking to excuse the delay by reference to the processing of his Data Protection complaint and in arguing that the balance of justice favours allowing the proceedings to continue, asserted that O. 1, r. 11(2) requires a defendant bringing an application such as this to have filed a defence and, in effect, that the court cannot dismiss proceedings on grounds of delay where a defence has not been filed. I do not consider the rule bears that meaning or that there is any such requirement prior to bringing a motion to dismiss proceedings on grounds of inordinate and inexcusable delay.

8. I therefore proceed to consider the defendant's application by reference to the *Primor* test, *i.e.* was the delay inordinate, was the delay excusable and if it was, does the balance of justice favour dismissing the proceedings or allowing them to continue.

(i) Was the delay inordinate?

9. These proceedings were issued by way of a personal injuries summons on 5 May 2017 within time, when the factual incidents on which the plaintiff relies had occurred three years previously. Thereafter, no substantive steps were taken in the proceedings until this motion was issued in November 2021, over four years since the summons, over six and a half years since the letter of claim and over seven years since the incidents of alleged negligence and breach of duty.

10. The delay in this case has been inordinate.

(ii) Is the delay excusable?

11. The plaintiff relies in part on the defendant's failure to file a defence. I do not consider that excuses the plaintiff's inordinate delay in progressing his proceedings. The defendant says that, following on the unsuccessful mediation of May 2018, they were waiting for the plaintiff to progress his proceedings by calling on them to file a defence. A failure to file a defence in circumstances where there was no correspondence or motion for judgment in default of defence cannot excuse this plaintiff's delay in progressing their proceedings. Support for this approach can be found in the decisions of *Anglo-Irish Beef Processors Ltd. v. Montgomery* [2002] IESC 60, *Granahan v. Mercury Engineering* [2015] IECA 58 and *Millerick v. Minister for Finance* [2016] IECA 206.

12. The plaintiff relies heavily on his complaint to the Data Protection Commissioner which was ongoing between 2016 and 2021, a delay that does not seem to have been due to the plaintiff or the defendant. The plaintiff says he needed the decision of the Data

Protection Commissioner in order to progress his pleadings. It is not entirely clear to me how this is so, given that the proceedings do not even mention a breach of the Data Protection Acts but, even if the plaintiff was correct, it is not open to him to put his proceedings on hold by reference to other proceedings that are ongoing in the absence of any engagement or agreement with the defendant, *i.e.* informing the defendant that he needed the decision of the Data Protection Commissioner before he could progress the proceedings. I make no finding as to whether or not the plaintiff was entitled to delay progressing his pleadings pending the outcome of the Data Protection Commissioner's decision, but he certainly cannot rely on the ongoing investigation to excuse his delay where he did not even engage with the defendant to advise them of his view that he needed to await the outcome of his complaint before he could progress his proceedings against them. Clear support for this approach can be found in the decision of Clarke J. in *Rodenhuis & Verloop BV v. HDS Energy Ltd.* [2010] IEHC 465 at para. 3.4 where the plaintiff's delay in progressing proceedings was not excused by parallel proceedings in the absence of any agreement with the defendant:

"While there was undoubtedly a connection between the matters, it does not appear to me that the existence of those parallel proceedings provided any legitimate basis for Rodenhuis in not progressing these proceedings or, at least at a minimum, in not raising the question of whether it might be appropriate to stay these proceedings pending a resolution of either or both of the parallel cases. It does not seem to me that it is open to a party to take the unilateral action of allowing one set of proceedings to go asleep because of the existence of another set of proceedings and then use the connection between the two sets of proceedings as an excuse for having allowed the proceedings concerned to go to sleep. If it is truly felt that it is inappropriate for some reason not to progress a set of proceedings because of the existence of other proceedings, then it is at a minimum incumbent on the party who holds that view to raise the issue in correspondence and seek to reach agreement. If agreement cannot be reached, then it is incumbent upon the party either to progress the proceedings or make some appropriate application to the court for directions. In those circumstances, I was not satisfied that the existence of the parallel proceedings provided any significant excuse for the delay."

13. In all the circumstances, I am not satisfied that the plaintiff's delay is excusable on any of the grounds on which he seeks to rely.

(iii) The balance of justice

14. In circumstances where I have found the delay to have been inordinate and inexcusable, I must proceed to assess whether the balance of justice favours dismissing the proceedings or allowing them to continue. The defendant has identified prejudice in the most general and vague terms. Whilst moderate prejudice that a defendant suffers by reason of delay can be sufficient to dismiss proceedings, on the facts of this case and particularly by reference to the content of the Data Protection Commissioner's decision, I am not satisfied that the defendant has in fact established the necessary level of prejudice at all. The defendant has had ongoing engagement with the Data Protection Commissioner since the Commissioner wrote to them in March 2018, and most recently in an email from the Director of Nursing of Midland Regional Hospital, Tullamore, of 11 March 2021, in which she confirms that she had reviewed the entries in the nursing notes which form a not insignificant part of the plaintiff's claim in these proceedings. The decision of the Data Protection Commissioner sets out in some detail what the defendant had to say about those notes. The defendant was well able to formulate a response to the plaintiff's complaint to the Data Protection Commissioner as late as March 2021 without any apparent difficulty.

15. It would appear that the plaintiff, following on the decision of the Data Protection Commissioner, issued further proceedings against the same defendant as in these proceedings. I have not had sight of those proceedings and the defendant's only knowledge of them is from their review of the High Court website, but they seem to relate to the breaches that the Data Protection Commissioner found had been perpetrated by the defendant against the plaintiff. That would suggest that, even if these proceedings were dismissed, the plaintiff will not be denied the opportunity to potentially continue with those other proceedings. However, the within proceedings are a claim for personal injuries and if they were to be dismissed, it must follow that the plaintiff will be deprived of his opportunity to seek damages for the injuries he claims to have suffered as a result of his treatment at work (as versus any claim for damages he may have pursuant to s. 7 of the Data Protection Acts). That is a significant prejudice to the plaintiff and, on balance and given the absence of similarly specific evidence of prejudice that the defendant will suffer, I consider that the prejudice the defendant may suffer as a result of the delay is outweighed by the prejudice

that the plaintiff will suffer in being denied the opportunity to seek damages for personal injury he claims to have suffered as a result of what he claims was the unlawful treatment of him by the defendant. That prejudice is not outweighed by the general prejudice the defendant has suffered as a result of the inordinate and inexcusable delay in these proceedings.

Conclusions

16. I have found the delay in this case to have been inordinate and inexcusable, but the balance of justice, particularly taking account of the defendant's ongoing and recent involvement with the plaintiff's complaint to the Data Protection Commissioner, has satisfied me that the balance of justice lies in favour of allowing the plaintiff to continue with his proceedings.

Indicative view on costs

17. As the plaintiff has succeeded in defending this motion to dismiss, my indicative view on costs in accordance with s. 169 of the Legal Services Regulation Act 2015 is that the plaintiff is entitled to his costs of this introductory application to be adjudicated upon in default of agreement, but I am also of the indicative view that a stay should be put on the execution of those costs pending the outcome of the proceedings. I will put the matter in before me at 10.30am on 14 December 2023 to allow the parties to make whatever submissions they may wish to make on costs and any other final orders to be made at this stage.

Counsel for the plaintiff: Eamonn Dornan BL

Counsel for the defendant: Damian Sheridan BL