

THE HIGH COURT

[2022] IEHC 60
[2016/4217P]

BETWEEN

PHILOMENA HENNESSY

PLAINTIFF

AND

**LADBROKES PAYMENTS (IRELAND) LIMITED
AND LADBROKES (IRELAND)**

DEFENDANTS

DECISION of Ms. Justice Bolger delivered on the 3rd day of February, 2022

1. The plaintiff was employed by the defendant as a customer service manager from 22 April 1998 until her employment terminated by reason of redundancy on 11 August 2015 at which time she signed a compromise waiver agreement dated 17 July 2015 (hereinafter referred to as 'the waiver agreement'). Some eight months after signing that agreement the plaintiff lodged an application with PIAB on 6 April 2016. A personal injury summons was issued on 12 May 2016 in which the plaintiff claimed that she was repeatedly required to engage in repetitive movements and/or to work in awkward and unsuitable conditions during her employment by reason of the defendant's negligence and/or breach of duty which caused her personal injuries. The particulars of injuries stated that she developed pain in her right shoulder in 2009 and set out her treatment and further symptoms from then until February 2016.
2. In this interlocutory application the defendant seeks to dismiss the proceedings on three separate grounds:
 - (1) That the proceedings are bound to fail because the plaintiff signed the waiver agreement waiving any right of action against the defendants.
 - (2) That the proceedings are bound to fail as being statute barred.
 - (3) That the proceedings should be dismissed for want of prosecution pursuant to O.36, r.12 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of this Court on the basis of the plaintiff's inordinate and inexcusable delay in the commencement and conduct of the proceedings and/or the real risk of an unfair trial arising therefrom.

I set out below the submissions of the parties and my decision in relation to each of the defendant's applications.

The Waiver Agreement

3. The defendant contends that the waiver agreement of 17 July 2015 precluded the plaintiff from issuing or pursuing these proceedings as the plaintiff waived any cause of action she may have had against the defendant. The defendant describes this as providing them with an unanswerable defence to the proceedings.
4. The relevant extracts from the agreement are as follows:

Clause 4.2 that "the Employee will not commence or pursue any proceedings or claim of any nature whatsoever against the Company, any Group Company and their respective present and former officers, shareholders, agents and employees in relation to the Employee's employment and its termination."

Clause 5.2 that "the Employee has signed this Agreement having full knowledge of the Employee's legal rights and having taken independent legal advice as to its terms and effect. The Employee further confirms that the Employee had entered into this Agreement without any coercion of any description."

Clause 5.3 that the employee warrants that she "is not aware of any facts or circumstances which might give rise to any claim by the Employee against the Company including a personal injury claim other than those claims that the Employee expressly raised in open correspondence with the Company or the Company's advisor acting on its behalf. The Employee acknowledges that the Company acted in reliance on these warranties when entering into this Agreement."

5. The plaintiff sought discovery from the defendant of, inter alia, documents relating to the agreement and any negotiation of it. In the defendant's affidavit of discovery sworn on 31 March 2021, a copy of the agreement is exhibited and in part one of the second schedule to the affidavit it is stated that there are no documents that were in the deponent's possession but are not now. Therefore the only document that the defendant has ever had in relation to the waiver agreement and any negotiations leading to same is the waiver agreement itself and the defendant never had any documentation pertaining to any pre-agreement negotiations between the plaintiff and the defendant.
6. The plaintiff in her replying affidavit says that she did not take legal advice as to the term or effect of the agreement and was not advised to do so, describes the agreement as having been put to her on a "take it or leave it" basis and says that she was informed that if she did not sign the document, that another employee would be offered redundancy instead of her. She said she felt under pressure to sign the document as she was keen to leave her employment with the defendant as she was having a stressful time at work. This version of events seems to me to be consistent with the absence of any documentation relating to any negotiations leading to the agreement i.e. that she was presented with the document on the basis that if she did not sign it, she would not secure the redundancy that being made available to her. In those circumstances it is difficult to understand how the defendant could have contended, as it purported to do at Clause 5.2 of the agreement, that the plaintiff had taken independent legal advice as to the agreement's terms and effect. Not only was the plaintiff not advised by the defendant to take independent legal advice but she was not offered or given any opportunity to do so. Instead the defendant stated in the agreement that she had taken legal advice, when in fact she had not.
7. The defendant seeks to excuse what seems to me to be an untrue statement in the waiver agreement, on the basis that any obligation they may have had to advise their employee to take legal advice fell away when the employee signed a document saying

that she had done so. The defendant contends that the plaintiff must take responsibility to read and have some understanding of the document and that she is bound by what she signed. The defendant relies on the decisions of this Court in *ACC v. Kelly* [2011] IEHC 7 and *Quinn v. IRBC* [2011] IEHC 470, in which borrowers who had given no thought to what they were signing, were found to be bound by the mortgage agreement (*Quinn*) and where a person who signs an agreement without understanding its terms and without taking advice was required to accept the consequences (*Kelly*).

8. Had the plaintiff taken legal advice (as the agreement claims she did) then the defendant may have been entitled to rely on the waiver contained in the agreement. Absent such advice, the question arises whether the defendant was required to take proactive steps to advise its employee of the benefit of such advice and/or ensure that she did take it or if she chose not to, that she understood any compromise of her entitlements that may be included in that agreement.
9. There is case law on the compromise of statutory claims in an employment agreement but the plaintiff's claim for damages for personal injuries is not such a claim. In a relatively recent decision of this Court on the enforceability of an employee contracting out of the statutory protection otherwise provided for under the Unfair Dismissals Act 1977 (*Board of Management of Malahide Community School v. Conaty* [2019] IEHC 486) Simons J found that an employee who had signed a contract in 2015 waiving her statutory rights pursuant to the Unfair Dismissals Act, had not in fact waived those statutory rights in the absence of informed consent. Significantly for the purpose of this application, at para. 76 of his judgment he stated the following: -

"Alternatively, lest I be incorrect in my interpretation of section 2(2)(b), I am satisfied that, as a matter of contract law, an employer who requests an employee to agree to inferior terms and conditions, *which involve the loss of statutory rights*, is required to explain the precise legal effect of those changes to the employee. This implied term is part of the implied obligation of mutual trust and confidence between an employer and employee. It is also necessary to reflect the unequal bargaining power between an employer and employee."
10. The defendant seeks to distinguish Simons J's comments as obiter given that the case before him involved a statutory claim. Nevertheless, I find his comments persuasive, particularly as his conclusions are premised on an implied contractual entitlement located in the implied obligation of mutual trust and confidence between an employer and employee. The existence of the implied obligation of mutual trust and confidence is well established in Irish law. Given the existence of that implied duty of mutual trust and confidence, I do not accept the defendant's contention that the case law on mortgage agreements (such as *Kelly* and *Quinn*) in which the courts have confirmed that a borrower is bound by what they have signed, whether they took or were advised to take independent legal advice, can necessarily be applied to an agreement between an employer and an employee to waive the employee's legal rights and causes of action that would otherwise be available to them, whether in statute contract or in tort.

11. In those circumstances I do not consider the bare existence of the waiver agreement on which the defendant seeks to rely, means that the plaintiff's claim is bound to fail. The plaintiff's claim that she was pressurised into signing the agreement could have implications for the enforceability of the waiver she entered into. I therefore consider it appropriate for this aspect of the defendant's application to be heard as a preliminary issue by the trial judge, with the benefit of whatever evidence either party wishes to call. The defendant has raised concern about the availability of a witness whom they believe was involved in the drawing up of the waiver agreement but I consider that issue further below in assessing the extent of any prejudice caused by delays in this case.

Statute of limitations

12. The plaintiff in her personal injury summons sets out that she developed pain in her right shoulder in 2009. The defendant contends that the plaintiff had knowledge of an injury sustained due to alleged work practices prior to 5 February 2014 (being two years before issuing her application to PIAB) and that the proceedings are therefore statute barred. The defendant relies on the plaintiff's attendances with her GP in 2011, a referral to an orthopaedic surgeon in November 2011, treatment of injections to both her shoulders at that time, a referral to a rheumatologist in February 2013, MRI scans at that time showing bilateral rotor cuffs tendinopathy and her complaint that she continued to suffer symptoms and continued to attend rheumatology services at that time. The defendant places particular emphasis on a letter from her then consultant rheumatologist Dr. Anjun, to her GP, Dr. Twomey dated 9 January 2014 in which Dr. Anjun says that the plaintiff described her symptoms as being "worse at night and after working long hours in a bookshop". The defendant relies heavily on this statement as evidence of the plaintiff having attributed her complaints to the workplace at that time. The plaintiff disputes that this statement by Dr. Anjun confirms that she believed she had sustained injuries due to her working conditions at that time. The plaintiff argues that her date of knowledge must be determined by the court based on evidence. She seeks to rely on an alleged change in her working conditions in around early 2014 which she claims led to a deterioration in her symptoms such that she required surgery in September 2015 and further surgery in January 2016.
13. The plaintiff's date of knowledge is to be determined, in accordance with s.2(1) of the 1991 Statute of Limitations Amendment Act, by *inter alia*, when she knew that the injury was significant and/or was attributable in whole or in part to the act or omission alleged to constitute negligence or breach of duty.
14. The plaintiff undoubtedly has had medical issues with her shoulders since 2009. These have necessitated a number of consultations with her GP, a referral in 2011 to a consultant, a referral in 2013 to another consultant and administration of pain injections. Nevertheless, she says she did not realise that her injuries were significant until some time after February 2014 and relies in particular on the fact that it was not until 2015 that she was advised that she required surgery. She highlights that she never took time off from work until she had to undergo surgery. There is evidence from the medical notes of her then consultant rheumatologist, Dr. Anjun in a letter of 10 April 2014 that her

shoulder impingements movements “have improved dramatically with local steroid injection and she has much better range of movement in both shoulders now”.

15. While the extent of medical assistance sought by the plaintiff since 2009 could be consistent with a significant injury, I do not think the issue can be fairly determined without evidence, whether from the plaintiff and/or possibly from her doctors. In particular I do not consider that the doctor to doctor letter between Dr. Anjun and Dr. Clooney of January 2014 constitutes sufficiently clear evidence, for the purpose of this application to dismiss, that the plaintiff attributed her complaints to her workplace at that time. Dr. Anjun claims that she said her symptoms were worse after a long day. He also says she reported them as being worse at night but that does not equate to evidence that she attributed her injuries to nightfall. Even if I am wrong on this, I do not consider it appropriate to strike out the proceedings on the basis of a finding of fact that the plaintiff attributed her complaint to the workplace in January 2014 by reference to a doctor to doctor letter. Any such finding would require evidence to be adduced and, if necessary, challenged.
16. In those circumstances it is my view that the defendant’s application that the proceedings should be dismissed as statute barred should be determined by the trial judge as a preliminary issue.

Delay

17. The defendant claims that the proceedings should be dismissed for want of prosecution and/or inordinate and inexcusable delay in the commencement and conduct of the proceedings.
18. The defendant’s grounding affidavit summarises, at para. 62, the procedural steps and *inter partes* correspondence in these proceedings to date. At para. 53 of their legal submissions, there is a helpful table setting out the four separate periods of time during which they claim the plaintiff took no steps without any obvious justification or excuse. Some of those delays occurred during covid lockdown but the plaintiff does not seek to place any particular reliance on that as justification for her inaction.
19. The jurisprudence on delay is well established by the decisions of the Supreme Court in *Rainsford v. Limerick Corporation* [1995] 2 IRM 561 and *O’Domhnaill v. Merrick* [1984] IR 151.
20. The defendant relies on the following periods of delay: -
 - (i) Seven years from 2009 when she first experienced shoulder pain to when she issued her proceedings in 2016.
 - (ii) Twelve months between February 2017 to February 2018.
 - (iii) Fifteen months between March 2018 to June 2019.
 - (iv) Twelve months from June 2019 to June 2020.

21. In relation to the first period of delay, I note that the plaintiff has confirmed in her submissions that she does not attribute all and any symptoms which affected her shoulders from 2009 onwards to her workplace nor does she seek to be compensated for injuries dating back to that time or to any specific time. She emphasises her plea at para. 7(1) of the indorsement of claim that the defendants required her to

“continue working under conditions which placed her at further risk of injury notwithstanding previous injury and further notwithstanding complaints made by the plaintiff.”

22. In relation to the period of delay at ii, iii and iv, the plaintiff does not seek to excuse the delays but contends that they were not inordinate periods of delay, though her counsel fairly concedes that they were “suboptimal”.

23. I am not satisfied that the periods of delay on which the defendant now seeks to rely were inordinate. However, if I am wrong on that, I am further of the view that it is not in the interests of justice to dismiss the proceedings for delay as I do not consider any of those periods of delay have given rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant (as required by the decision of *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459).

24. There is no evidence in the defendant’s affidavit of how they will suffer serious prejudice by virtue of these delays . The defendant grounding affidavit claimed that a delay of 11 years will unavoidably affect the accuracy of witnesses’ recollections. The defendant’s counsel referred to difficulties in locating their former employee who oversaw the execution of the waiver agreement at this stage (albeit not stated on affidavit). However, the defendant has been aware of these proceedings since 2016 and does not appear to have taken any steps since then to confirm what evidence might be available to them or to secure that evidence by way of, for example, taking statements and confirming current contact details. I note that the plaintiff’s engineers conducted an inspection of the plaintiff’s former workplace on 31 January 2017 (as confirmed in correspondence from the defendant’s solicitors to the plaintiff’s solicitors of 24 January 2017) which would suggest that there was something in the workplace to be inspected at that time. There is no reference to any inspection by the defendant’s engineer. If the defendant chose not to conduct an inspection of their own at that time or any other time since the PIAB application was lodged in 2016, I do not think they can seek to rely on that as constituting prejudice in their application to dismiss for delay. Had they been able to identify an actual prejudice arising from, for example, a change in layout of the workplace prior to the PIAB notification that denied their engineer the opportunity to assess the plaintiff’s claims about the height of her work station etc, the situation might be different.

25. In addition, it seems that the defendant has delayed in bringing this application to dismiss on grounds of delay in that three of the four periods of delay on which they rely had already occurred by June 2019 but they did not issue their application until 3 March 2021, some eighteen months later. As confirmed by Finlay P in *Rainsford*, at p. 6 of his judgment,

“Delay on the part of a defendant seeking a dismissal of the action, and to some extent a failure on his part to exercise his right to apply it at any given time for the dismissal of an action for want of prosecution, may be an ingredient in the exercise by the court of its discretion.”

26. I have also had regard to the recent decision of the Supreme Court in *Mangan v Dockeray* [2020] IESC 67 where an application to dismiss proceedings for delay was unsuccessful. The proceedings, in which damages were claimed for medical negligence, were commenced in 2008 arising from the circumstances of the plaintiff’s birth in 1995. Two co-defendants were joined in 2016 and in 2017 they brought motions to have the proceedings dismissed on grounds of delay. McKechnie J reiterated the well-established case law and set out a number of points consistently made therein, including at paragraph 109 (iv):

“the existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.”

McKechnie J cited the following passage in the judgement of Cross J in *Calvart v. Stollznow* [1980] 2 NSWLR 749, which was approved by Murphy in *Hogan v. Jones* [1994] 1 ILRM 512:

“Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice.”

McKechnie J acknowledged that the overall time in that case being some 25 years since the event complained of occurred “may seem stark on its face” but he concluded that a “lengthy frontline period in and of itself may not necessarily be fatal. A more detailed examination of the circumstances, such as excusability, prejudice and the like, including where justice falls, is always essential” (at paragraph 134). He found that there was not a serious risk of an injustice being done “whereas the undoubted prejudice to the plaintiff would be enormous. In any event, there is a continuing obligation on a trial court to ensure that fair procedures and constitutional justice is always adhered to.” He therefore held that it was not justified to terminate the proceedings without a hearing on the merits at that point in time (at paragraph 146).

27. I consider a similar approach should be applied here. I do not consider that the defendant has established that the plaintiff was guilty of inordinate and unreasonable delay such as gives rise to a substantial risk of an unfair trial and/or serious prejudice to the defendant and I therefore refuse the application to dismiss for delay.
28. For the same reasons, I am not satisfied that the periods of delay are such that the court should exercise its inherent jurisdiction to dismiss or its discretion afforded by O.36, r.12(b).

Summary

29. I am not satisfied, on the basis of the affidavit evidence before me, that the plaintiff's claim is bound to fail. The plaintiff undoubtedly has hurdles to overcome including the execution of the waiver agreement and the statute of limitations. However, these are issues on which she is entitled to call evidence which may assist her in satisfying the trial judge that she is entitled to proceed. Both the issues of the waiver agreement and the statute of limitations should be dealt with by the trial judge as a preliminary issue.
30. I am not satisfied that any delay that has occurred or any prejudice the defendant seeks to have suffered as a result, is such that the proceedings should be dismissed.