

THE HIGH COURT

[2022] IEHC 632

[Record No. 2020/211 CA]

BETWEEN

MARY MUNNELLY

PLAINTIFF/APPELLANT

AND

MARGARET HASSETT, TIMOTHY CREMEN AND CITY LEARNING LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 17th day of November, 2022.

Introduction.

1. The plaintiff was at one time employed by the third named defendant. There is a dispute between the parties as to whether she was employed as a telesales executive or as a sales executive. There is also a dispute as to whether she was an employee of the company, or was employed as an independent contractor.
2. The first named defendant is the managing director of the third defendant. The second defendant is also a director of the third defendant.
3. The present application concerns an appeal by the plaintiff against an order that was made in the Circuit Court striking out the within proceedings, which the plaintiff had brought against all three defendants claiming damages for alleged bullying and harassment of her by the first defendant during the time that she worked with the third defendant; together with a claim that she was constructively dismissed from her position of employment due the fact that she had to leave same as a result of the alleged actions of the first defendant. She has claimed that she suffered PTSD as a result of these actions, and that she suffered loss of earnings due to the fact that she had to leave her job; which was compounded by the fact that she was given an incorrect reference, which described her as a "telesales executive", rather than as a "sales executive".
4. In the Circuit Court an application was successfully brought by the defendants that the plaintiff's action against them should be struck out on the basis that (a) the plaintiff had raised the same issues in previous proceedings which she had brought against the third defendant, as the sole defendant, which proceedings had been dismissed after a full hearing by the President of the Circuit Court and as such, the present proceedings offended against the rule in *Henderson v. Henderson* and (b) that as the present action constituted a claim for damages for personal injury, allegedly caused by the wrongdoing of the defendants, it was necessary for the plaintiff to obtain an authorisation from PIAB prior to instituting the present proceedings, as provided for in s. 12 of the Personal Injury Assessment Board Act, 2003 (hereinafter "the 2003 Act"); and that as the plaintiff had not done so, her proceedings must be struck out against all the defendants.

5. It was accepted that as the appeal from the order of the Circuit Court was a de novo hearing, the burden of proof rested on the defendants/respondents to establish that the plaintiff's action against them ought to be struck out.

Background

6. In order to properly understand the issues that arise for determination in this application, it is necessary to set out in brief terms the plaintiff's account of the history of her employment by the third defendant and the issues that were pleaded in her first set of proceedings against that company. However, it should be noted that all of the plaintiff's allegations of wrongdoing on the part of the defendants are strenuously denied by the defendants. In particular, the first defendant denies that she ever engaged in any bullying or harassment of the plaintiff. It is also denied that the plaintiff was ever employed by the company as an employee; but rather, was at all times employed as an independent contractor, in the capacity of a telesales executive.
7. The plaintiff's account is that she had worked for a number of years in a boys' school. It is common case that after leaving that position of employment, she became friendly with the first defendant, who lived close to her house. The plaintiff stated that she was initially offered employment for three days per week as a telesales executive. The plaintiff provided invoices in respect of the hours that she worked for the company in this capacity. She stated that in the period September 2012 to October 2014, she was to work three days a week for the company. Thereafter, she began working four days per week.
8. The plaintiff stated that in or about April 2013, when the first defendant had returned from a trip to the US, a vacancy arose on the sales staff, upon the departure of a Mr. Cronin from that position. The plaintiff states that she was called to a meeting with the first defendant in Insomnia café, which was also attended by Mr. Richard Kingston, who was also employed by the company. She was offered the position of sales executive. The plaintiff stated that she accepted the offer and took up that position at that time.
9. The plaintiff stated that as evidence of her having the role of sales executive, an arrangement was made whereby she would be given an electronic signature for use on emails on company business. This described her as a "sales executive". In addition, she stated that she was given a business card, which described her in similar terms. The plaintiff produced copies of emails showing her electronic signature and a copy of her company business card.
10. The plaintiff stated that when she was dealing with customers of the company and when she went with other more senior employees of the company on business trips abroad, she was always introduced as being a "sales executive". She stated that on occasion, she was held out as being the "customer relations manager" of the company.
11. The plaintiff stated that over the years that she worked with the company, she witnessed instances of bizarre behaviour on the part of the first defendant towards other employees. She stated that the first defendant was very volatile and could be aggressive with employees of the company. She stated that over time this behaviour became more

pronounced. The plaintiff stated that she became the subject of outbursts by the first defendant. She stated that on one occasion, after a particularly nasty outburst, when the first defendant had wrongly accused her of not doing her work properly, she became very upset and decided that she would have to leave the company. She notified the company that she was terminating her employment, but she agreed to work one month's notice. She stated that in fact, she ended up working a two month notice period.

12. The plaintiff stated that during this period, she managed to successfully conclude a lucrative contract for the company to provide education facilities to a government agency. However, just before the agreement was concluded, the plaintiff stated that the first defendant sent emails to the contact person in the government agency, indicating that the plaintiff would not be working for the rest of that week, or the following week, and that any queries in relation to the final contract should be sent to another employee of the company. The plaintiff stated they she found this particularly upsetting.
13. The plaintiff stated that she was given a reference by the first defendant. She had been asked by the first defendant to provide a draft of the reference. The plaintiff had done so. However, when she got the reference from the company, it incorrectly stated as follows in the first paragraph:

"Mary Munnelly was retained by City Learning from September 2012 as a part time telesales consultant and continued in this role until May 2015".

14. The plaintiff stated that despite requests made of the first defendant to correct the reference, by putting in her correct job description as "sales executive", the first defendant refused to do so. The plaintiff stated that as a result of the incorrect job description in her reference, she has been severely impeded in obtaining alternative employment as a sales executive; on account of which, she has suffered loss of earnings, which is continuing.

The previous Circuit Court proceedings

15. By an ordinary civil bill issued on 2nd March, 2016 bearing the title "Mary Munnelly, plaintiff, v. City Learning Ltd, defendant", the plaintiff brought proceedings against the company, alleging that she had been bullied and harassed by the managing director of the defendant company, being Ms. Margaret Hassett. She also made a complaint in relation to the content of the reference that was furnished to her. It was pleaded that as a result of the alleged defamation contained in the reference, the plaintiff suffered damage to her good name and reputation.
16. By order of the Circuit Court dated 30th April, 2018, the plaintiff was given liberty to amend her civil bill in that action. In the amended civil bill, the plaintiff gave considerably more detail in relation to the alleged bullying and harassment of her by the first defendant. She also gave more details in relation to the drafting and content of the reference that was furnished to her by Ms. Hassett on behalf of the company. The plaintiff further pleaded that the company, through Ms. Hassett, had engaged in the tort of deceit, by representing that the plaintiff was a sales executive employed by the company, when

in fact they maintained that she was only employed as a part time telesales executive. The plaintiff alleged that she had been defamed by the publication of emails to the representative of the government agency, with whom she was engaged in negotiations, representing that she was not available for work to answer queries at that time and that she was defamed by the content of the reference, by describing her as a telesales executive, rather than a sales executive.

17. A full defence was filed on behalf of the company to the plaintiff's amended civil bill. The action came on for hearing before Groarke P. on 28th November, 2018. Having heard oral evidence from the plaintiff, from Ms. Hassett and from another witness, the learned Circuit Court judge ordered that the plaintiff's proceedings should be dismissed, with no order as to costs. The plaintiff did not appeal that order.
18. In an affidavit sworn by Ms. Hassett on 24th September, 2019 in the present proceedings, an account is given of the decision made by Groarke P. at the hearing of the first action. Ms. Hassett stated as follows at para. 5:

"On that date, the plaintiff unsuccessfully maintained proceedings for defamation and constructive dismissal against the third defendant arising out of the same circumstances as are before this honourable court in these proceedings. After a full hearing and having taken my oral evidence and that of the plaintiff, Groarke P., as he then was, dismissed the plaintiff's claim in its entirety. He stated that he was making no finding on whether the work reference provided to the plaintiff was a good work reference, whether she was entitled to a work reference, what her job description was, whether she was an employee, or in relation to her allegations of bullying and harassment. The third defendant made no application for the costs of the proceedings. As is apparent from the amended civil bill, the plaintiff relied on the same set of facts to advance her claim as she seeks to rely on in the within proceedings. I am advised by counsel that the significance of these facts will be addressed by legal submission at the hearing of this application."

The present proceedings

19. On 15th March, 2019, the plaintiff issued the present proceedings by ordinary civil bill under the title "Mary Munnely, plaintiff, v. Margaret Hassett, Timothy Cremen and City Learning Ltd, defendants". In her civil bill, the plaintiff again set out extensive details in relation to her employment history with the third defendant. She again alleged that she had been employed as a sales executive for a large portion of the time that she was employed by the company. She also made extensive complaint in almost identical terms to her previous proceedings, in relation to the alleged bullying and harassment carried out by the first defendant of her and other employees. The plaintiff alleged that this treatment of her by the first defendant caused her much embarrassment, humiliation and upset.
20. The plaintiff went on to describe in detail the incident which had allegedly occurred on 26th March, 2015, where she was allegedly berated publicly by the first defendant for her alleged shortcomings in carrying out her duties. The plaintiff alleged that she was very

upset as a result of this incident. She subsequently informed Ms. Hassett and the company that she could no longer work with the company.

21. The plaintiff made complaint in relation to the emails that had been sent to the representative of the government agency, with whom she had been negotiating a contract on behalf of the company.
22. The plaintiff also made complaint in relation to the description of her job as contained in the reference that was furnished to her. She stated that as a result of the inaccurate description of her role with the company, her ability to earn a livelihood had suffered immensely. She stated that she has been unable to apply for any position as a sales executive, due to the inaccurate reference from the company. The plaintiff further alleged that she had suffered post-traumatic stress disorder, anxiety and loss of livelihood as a result of the actions of the first defendant.
23. The plaintiff pleaded that the defendants had wrongfully refused to correct the reference that they had furnished to her. It was pleaded that as a result, the plaintiff had suffered post-traumatic stress disorder and huge financial hardship, as a result of not being able to look for a similar sales executive job, without the benefit of an accurate reference from the defendants. The plaintiff claimed damages under a number of headings.
24. On 22nd May, 2019, a full defence was filed on behalf of the defendants. This denied all allegations of wrongdoing made against the defendants and each of them. The defence also contained a preliminary objection that, as the plaintiff's claim in the proceedings was one for damages for personal injuries, it came within the terms of the 2003 Act; and as the plaintiff had not obtained an authorisation prior to instituting her proceedings, as required by s. 12 of that Act, the proceedings were not maintainable against the defendants.
25. On 26th September, 2019, the defendants brought a motion returnable before the Circuit Court on 18th November, 2019 seeking to have the plaintiff's action struck out against all of the defendants on the grounds that the present proceedings offended against the rule in *Henderson v. Henderson*, as far as the third defendant was concerned, and that as against all defendants, the proceedings should not be allowed to continue, due to the fact that the plaintiff had not obtained an authorisation from PIAB prior to instituting her proceedings. That application was successful on both grounds before the Circuit Court. In the present application, the plaintiff has appealed that order to the High Court.

Submissions on behalf of the Defendants

26. At the hearing of the appeal, Mr. Slein BL submitted that there were two primary grounds on which the present proceedings ought to be struck out against all of the defendants. First, as far as the third defendant was concerned the proceedings offended against the rule in *Henderson v. Henderson*, which provided that where a person had instituted proceedings against a defendant arising out of a set of circumstances, he or she was obliged to include all claims arising out of that set of circumstances in the one set of proceedings. It was submitted that a plaintiff was not entitled to split his claims arising

out of the same set of circumstances among different sets of proceedings against the same defendant.

27. It was submitted that when one looked at the matters complained of in the plaintiff's amended civil bill in her first action and the matters complained of in her civil bill in the present action, it was clear that she was making identical complaints across the two sets of proceedings. Insofar as the third defendant was a defendant in both sets of proceedings, it was an abuse of process for the plaintiff to attempt to relitigate the same issues in a second set of proceedings against the same defendant. In this regard, counsel relied on the decision of Hedigan J. in *Cunningham v. Intel Ireland Ltd* [2013] IEHC 207, where the court had ruled that it was inappropriate for a plaintiff to attempt to draw an "artificial distinction" between two sets of proceedings, so as to effectively relitigate the same set of circumstances against the same defendant.
28. Counsel also referred to the decision in *Fox v. McDonald & Ors* [2017] IECA 189, where the plaintiff was suing in relation to the alleged invalid appointment of a receiver by a bank and to restrain what he alleged were going to be sales at an undervalue of the properties over which he had given security to the bank for various loans. The plaintiff had instituted similar proceedings against the bank and the receiver, which had been dismissed.
29. Delivering the judgment of the court, Irvine J. (as she then was) held that the central legal issue in the proceedings before the court, had already been determined in an earlier action and in such circumstances, the proceedings were an abuse of process. She stated that it was in the public interest that there should be finality in litigation.
30. Counsel's second submission related to all of the defendants. It was submitted that the plaintiff's action in the present proceedings was clearly seeking damages for personal injuries. He pointed to the clear reference to PTSD in the civil bill. It was submitted that in these circumstances the action came within the terms of the 2003 Act. As such, they fell foul of the provisions of s. 12 (1) which provided that unless and until an application was made to the board under s. 11 in relation to a relevant claim, and then only when the bringing of proceedings was authorised under the Act, "*no proceedings may be brought in respect of that claim*".
31. It was submitted that it was not disputed that the plaintiff had not obtained an authorisation prior to the institution of the present proceedings. As such, it was submitted that the proceedings must be struck out, as the defendant had clearly raised in its defence the fact that no authorisation had been obtained by the plaintiff. In this regard, counsel referred to the decision in *Clarke v. O'Gorman* [2014] 3 IR 340.

Submissions made by the plaintiff

32. The plaintiff submitted that the actions of the first defendant, which had been taken on behalf of the third defendant, in holding the plaintiff out as being a "sales executive", when in fact the first and third defendants maintained that she was a "telesales executive", constituted a fraud perpetrated by the first and third named defendants. It

was submitted that once there was fraud involved in a case, the rule in *Henderson v. Henderson* did not apply.

33. In this regard, the plaintiff referred to the decision of the United Kingdom Supreme Court in *Takhar v. Gracefield Developments Ltd* [2019] UKSC 13, where a judgment had been obtained by the defendant respondents in previous proceedings based on a written contract. Subsequent to those proceedings, the plaintiff had obtained the services of a handwriting expert, who had furnished a report stating that in his expert opinion, her signature had been forged on that document. The court held that where it was alleged that the initial judgment had been obtained by fraud, it was open to the plaintiff to bring subsequent proceedings attempting to set aside that judgment and to effectively relitigate the matter.
34. The plaintiff further submitted that her claim for loss of earnings in the present proceedings arose out of the incorrect description of her role with the company, as a result of which, she had not been able to obtain alternative employment as a sales executive; accordingly, it was submitted that her action was more than just an action seeking damages for personal injuries.

Conclusions

The rule in *Henderson v. Henderson*

35. It will be useful to begin by setting out the basis of the rule in *Henderson v. Henderson*.
36. In *Henderson v. Henderson* (1843) 3 Hare 100, Wigram VC stated as follows at p.115: -

"I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward the whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."
37. In *AA v. The Medical Council* [2003] 4 IR 302, Hardiman J. accepted the approach of Bingham L.J. in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1, where he stated that it would be wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in a later proceeding necessarily abusive. He stated that that would be to adopt too dogmatic an approach to what should be a broad merit-based judgment, which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the

crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue, which could have been raised before. As one could not comprehensively list all possible forms of abuse, so one could not formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

38. In *Arklow Holidays Limited v. An Bord Pleanála* [2012] 2 IR 99, Finnegan J. noted that the rule in *Henderson v. Henderson* had been applied in the public law area as well as in the area of private law. He stated that it was understandable that it should be applicable in the public law area. It was not just individuals who must be protected from a multiplicity of suits.
39. Finnegan J. went on to note that there could be special circumstances that exist in any given case which may require the non-application of the rule in *Henderson v. Henderson*. However, he stated that from the cases, it was clear that negligence or inadvertence or accident would not necessarily excuse non-compliance with the rule. It was not possible to attempt to define what may amount to a special circumstance and each case must be considered on its facts and circumstances. Also relevant in deciding whether to excuse non-compliance with a duty to bring forward the whole of one's case, was prejudice suffered by the defendant or respondent. In public law litigation, prejudice to the wider public may also be relevant.
40. An example of where the rule in *Henderson v. Henderson* was not applied, arose in *SM v. Ireland* [2007] 3 IR 283. In that case there were a number of features which took the case out of the normal operation of the rule. While the plaintiff had previously challenged his criminal prosecution for offences of indecent assault on a number of complainants contrary to s.62 of the Offences Against the Person Act 1861, on the grounds of delay, which application had been refused; the court held that he was not prevented by the rule in *Henderson v. Henderson* from subsequently raising an issue as to the constitutional validity of s.62 of the 1861 Act. That was due to a number of factors: the defendants had delayed in seeking to have the proceedings struck out for breach of the rule, until two weeks prior to the commencement date for the plaintiff's trial; additional charges had been laid against him subsequent to the hearing of his judicial review proceedings, meaning that he could not have challenged the constitutional validity of the section in relation to those charges, as they had not been laid at the time of his earlier proceedings. The court held that the plaintiff's proceedings raised a discreet constitutional point, which could not sensibly have been raised as part of the earlier judicial review proceedings.
41. In *Cunningham v. Intel Ireland Ltd*, Hedigan J. gave the following pithy explanation of the rationale for the rule in *Henderson v. Henderson* at para. 8:

"Thus all matters and issues arising from the same set of facts or circumstances must be litigated in the one set of proceedings save for special circumstances. This is a rule that is of benefit to both plaintiffs and defendants, to the courts themselves and thus to the public interest."

42. In that case, the plaintiff had brought a claim under the Equality Acts before the Equality Tribunal, which had been rejected. She had an appeal pending before the Labour Court. She then instituted legal proceedings arising out of the same alleged mistreatment of her upon her return to work following maternity leave. Hedigan J. held that her attempt to create an "artificial distinction" between two sets of proceedings would not enable her to maintain the second legal action against her employer. He stated as follows at para. 10:

"Thus, it is clear from her own pleadings and submissions in the two sets of proceedings that both her employment claim and her personal injury claim arise out of the same matters, i.e. alleged mistreatment in her working environment. This she alleges commenced on the announcement of her pregnancy, continued through her commencement of maternity leave, through that leave and culminated in her dissatisfaction with the way she was treated on her return to work. The plaintiff in issuing these personal injury proceedings after her employment equality complaints, in my view, drew an artificial distinction which does not stand up to analysis."

43. In *Fox v. McDonald & Ors*, Irvine J., then rejecting the plaintiff's appeal against the dismissal of his proceedings as being frivolous, vexatious and an abuse of process and also offending against the rule in *Henderson v. Henderson*, gave the following reasons as to why the courts insist on finality in litigation at para. 26:

"It is in the public interest that there should be finality in litigation. A defendant or defendants should not be put to the expense of having to defend for a second time claims which they successfully defended in an earlier proceedings. The financial and often times reputational damage to a defendant of permitting a plaintiff to make for a second time a claim for negligence and or breach of contract which the court had earlier dismissed should not be underestimated. At the same time the court must exercise its jurisdiction to dismiss a claim as an abuse of process or as bound to fail sparingly and only in exceptional circumstances. This claim falls into that category."

Do the present proceedings against the third defendant offend the rule in *Henderson v. Henderson*?

44. It is against that legal background, that one must examine whether the action should be struck out against the third defendant, as being an abuse of process and as offending the rule in *Henderson v. Henderson*, due to the plaintiff's earlier action against the company.
45. While the amended civil bill in the first set of proceedings raised a number of issues that the plaintiff seeks to raise in the present action, it appears that for whatever reason, when the first action was heard in the Circuit Court, Groarke P. only dealt with the plaintiff's claim that she had been defamed (a) in the series of emails sent at the time that the contract with the government agency was being concluded, and (b) that the reference provided to her on departing from the job was defamatory of her, due to the misdescription of her role with the company. The learned Circuit Court judge rejected these assertions. He dismissed the action with no order as to costs.

46. However, it is clear from the affidavits sworn by the first defendant in the present application, that the Circuit Court judge in the first action did not deal with the question of whether the work reference provided to the plaintiff was a good work reference; whether she was entitled to a work reference; what her job description was; whether she was an employee; or in relation to her allegations of bullying and harassment.
47. In these circumstances, the court is satisfied that it is not frivolous, vexatious, or an abuse of process for the plaintiff to raise these issues again in the present action, because, while they were raised in her earlier proceedings, it is common case that she did not get any judgment or ruling on these issues.
48. The plaintiff enjoys a constitutional right of access to the courts. This means that she is entitled to bring proceedings complaining about alleged wrongdoing on the part of the named defendants. She is entitled to obtain a fair hearing in relation to her complaints. She is entitled to a decision on the complaints that she made against the named defendants.
49. It is common case, that in the first set of proceedings, the plaintiff did not get a decision on a number of the issues raised by her in her amended civil bill. In these circumstances, the court is satisfied that it is not frivolous, vexatious or an abuse of the process of the court, nor in breach of the rule in *Henderson v. Henderson*, for the plaintiff to ventilate the same issues in a subsequent set of proceedings. It would be frivolous and vexatious to do so, if she had got a decision on those issues in the previous proceedings; but, having regard to the averments made by Ms. Hassett in her affidavit, it is clear that the plaintiff did not get any decision on those issues. Thus, there is no question of the plaintiff relitigating these issues, because she did not get a decision on them.
50. Accordingly, the court holds that the plaintiff is only prohibited by the rule in *Henderson v. Henderson* from raising any argument that she was defamed by the third defendant in either the emails or the reference.
51. In the course of her submission, the plaintiff referred to the interesting case of *Takhar v. Gracefield Developments Ltd*, as authority for the proposition that where a judgment had been obtained by means of fraud, it was open to a plaintiff to bring fresh proceedings to set aside that judgment and to relitigate the central issues between the parties. While that is certainly the import of that decision, it does not avail the plaintiff in this case. While she may be of the view that the defendants acted fraudulently in holding her out as a sales executive, when they in fact maintained she was only a telesales executive, that was an issue that was clearly put before Groarke P. in the earlier set of proceedings. He found that there was no defamation of the plaintiff in either the emails sent to the representative of the government agency, or in the reference furnished to the plaintiff. Accordingly, there is no basis on which it can be argued, much less has there been any evidence produced, to suggest that the judgment that was obtained in the first proceedings, was procured by a fraud perpetrated on the court by the defendants.

52. The fact that the reference that was furnished to the plaintiff was found not to be defamatory, does not mean that the court found it to be accurate. A defamatory statement is one which is both untrue and would cause right-thinking members of society to think less of the person named or referred to in the statement. To say that a person was employed as a "telesales executive" would not cause people to think less of that person, if they were in fact employed as a "sales executive". However, that is quite different to what the plaintiff is alleging in these proceedings. Her case in the present action is that because she was misdescribed in the reference, she has suffered a loss of earnings, due to the fact that she cannot rely on the reference to enable her to get a job with an alternative employer as a sales executive . That issue was not decided, or ruled upon by the learned Circuit Court judge in the first set of proceedings.

Must the proceedings be struck out for non-compliance with s. 12 of the 2003 Act?

53. The relevant provisions of s. 12 of the 2003 Act provides as follows:

"12.—(1) Unless and until an application is made to the Board under section 11 in relation to the relevant claim and then only when the bringing of those proceedings is authorised under section 14, 17, 32 or 36, rules under section 46(3) or section 49 and subject to those sections or rules, no proceedings may be brought in respect of that claim..."

54. The definition of what constitutes a "civil action" is set out in s. 4 of the 2003 Act. It provides that a "civil action" means an action intended to be pursued for the purpose of recovering damages in respect of a wrong for:

"(a) personal injuries, or

(b) both such injuries and damages to property (but only if both have been caused by the same wrong),

but does not include-

(i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is bona fide intended, and not for the purpose of circumventing the operation of s. 3, to claim damages or other relief in respect of any other cause of action..."

55. The same section provides that the term "personal injuries" shall have same meaning as in the Civil Liability Act, 1961; which provides that "personal injury" includes any disease and any impairment of a person's physical or mental condition, and "injured" shall be construed accordingly.

56. Section 3 of the 2003 Act provides that the Act applies to the following civil actions: (a) a civil action by an employee against his or her employer for negligence or breach of duty arising in the course of the employee's employment with that employer, and at sub-para.

(d) a civil action not falling within any of the preceding paragraphs (other than one arising out of the provision of any health service to a person).

57. The court is satisfied that this action comes within the exclusion provided for in s. 4(1)(b)(i) of the 2003 Act. While the civil bill in the present action refers to alleged bullying and harassment by the first defendant, as having caused the plaintiff to suffer PTSD, it is not pleaded that the plaintiff's loss of earnings were caused by her inability to work due to that condition. In other words, her claim to damages for loss of earnings, is not parasitic on her personal injuries, allegedly suffered as a result of the alleged bullying and harassment on the part of the first defendant. Thus, the loss of earnings claim in the present proceedings is not similar to that that arises in a normal personal injuries action.
58. In this case, it is clear that the plaintiff is making the case that she was effectively wrongfully dismissed by virtue of the fact that she had to leave her job due to the alleged bullying and harassment of her at the hands of the first defendant. Thus, her loss of earnings is alleged to flow not from the fact that she alleges that she has suffered PTSD, but from the fact that she left her work due to what she alleges were her intolerable working conditions in the third defendant company.
59. Furthermore, her loss of earnings are alleged to have been partly caused, or contributed to, due to the fact that she could not get work as a sales executive, because the reference which had been provided to her by the first defendant, wrongfully described her as a "telesales executive". The plaintiff maintains that the first defendant has refused to correct the reference in this regard.
60. The content of the work reference and the refusal of the first defendant to amend it, are not disputed by the defendants. In a supplemental affidavit sworn by the first defendant in the present application on 3rd December, 2019, the first defendant made the case that the plaintiff had only ever been employed by the company as a part-time telesales executive. At para. 10 of that affidavit she stated that the plaintiff had made the decision to describe her role as "sales executive" from the first day of her engagement by the third defendant, which the third defendant agreed to as it was merely a job description that had no legal effect. She stated that the job title was customary in the industry and clients of the third defendant were not led to believe that the plaintiff was an employee as a result of that description. The first defendant stated that the plaintiff's role and authority to act on behalf of the third defendant were clear to the third defendant's clients. She stated that the plaintiff was never engaged by the third defendant in a different capacity or role. At para. 17 of the same affidavit, the first defendant stood over the description given in the reference that the plaintiff had been employed by the third defendant as "*a part time telesales consultant*". Thus, there is a very clear dispute between the parties as to the role in which she was actually engaged by the company.
61. The plaintiff's claim to have been constructively dismissed and to have suffered loss of earnings due to the incorrect terms of the reference that was provided to her, are entirely separate to any claim that she makes for damages for personal injury in the form of

PTSD, allegedly suffered by her as a result of the alleged bullying and harassment at the hands of the first defendant.

62. In these circumstances, the court is satisfied that the present proceedings come within s. 4(1) (i) of the 2003 Act. Therefore, it is not a civil action coming within the terms of the 2003 Act. Accordingly, it was not necessary for the plaintiff to obtain any authorisation from PIAB prior to instituting the present proceedings.
63. For the reasons set out herein, the court will allow the plaintiff's appeal against the order of the Circuit Court made on 17th November, 2020; the court refuses the reliefs as sought by the defendants in their notice of motion dated 26th September, 2019 to strike out the plaintiff's action against the defendants.

Proposed order

64. In light of its findings herein, the court proposes to make an order in the following terms:
 - (1) Allow the plaintiff's appeal against the order of the Circuit Court made on 17th November, 2020;
 - (2) Refuse the reliefs sought by the defendants in their notice of motion dated 26th September, 2019;
 - (3) Award the costs of the hearing of the application in the Circuit Court and the costs of the hearing of the appeal to the plaintiff against the defendants jointly and severally; such costs to be adjudicated upon in default of agreement;
 - (4) The court will place a stay on the costs order pending the final determination of the action.
65. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions by email to the registrar in the event that they disagree with the terms of the order that the court proposes to make in this case.
66. The matter will be listed for mention before the court at 10.30 hours on 9th December, 2022 for the making of final orders in the matter.

