[2019] IEHC 823

THE HIGH COURT

[2019 No. 95 JR]

BETWEEN

AIMEE SCOTT

APPLICANT

AND

THE DATA PROTECTION COMMISSIONER

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 5th day of December, 2019

Introduction

1. This is an application by the respondent grounded on a notice of motion issued on 13th August, 2019, seeking to have the applicant's application in these judicial review proceedings struck out on the basis that the proceedings are now moot. The respondent argues that they have become moot in the following circumstances: by an Order of Noonan J. made on 25th February, 2019, the applicant was given liberty to seek an order of *mandamus* by way of judicial review, directing the respondent to issue decisions in respect of two complaints which had been lodged with it by the applicant. The respondent submits that those decisions were issued by it on 18th April, 2019, and 20th May, 2019. Accordingly, it is submitted that as the object of the relief sought by the applicant in these proceedings, being the issuance of the two decisions by the respondent, has been obtained, these proceedings are now moot.

2. The applicant resists this application on a number of grounds, which can be summarised as follows: that by failing to investigate certain matters and by failing to obtain sight of certain documents held by a third party prior to issuing its decisions, the respondent has not in fact issued any substantive decision on the issues raised in the complaints lodged by the applicant and accordingly, it is appropriate for these proceedings to continue.

3. That is an extremely brief summary of the key points made by each of the parties. Unfortunately, the facts of this case are somewhat more complex and it will be necessary to refer to these in some detail in the next portion of the judgment.

Background

4. On 5th January, 2016, the applicant commenced employment with her former employer, Mason Technology Limited (hereinafter referred to as "*Mason*"). According to a response furnished by that company to enquiries made by the respondent, the company maintains that prior to the commencement of the applicant's employment with them, they had been made aware that the applicant had a disability. They further stated that upon commencement of the applicant's employment with them, she brought to their attention, via a letter or report which she had submitted from her GP, that she also had a further condition which required specialist equipment and arrangements in the office. Due to the Christmas period which preceded the commencement of her employment, the applicant had not done a pre-employment medical with the company doctor prior to commencing with the company. The company stated that in order to ensure that the necessary arrangements were put in place to enable the applicant to carry out her work in safety,

Mason furnished a copy of the applicant's GP's report to a specialist occupational health firm known as Medmark.

5. For some reason that is unknown to the Court, the applicant was dismissed by Mason on 7th March, 2016.

6. Subsequent to her dismissal, the applicant requested production of certain documents from Mason, which she alleged constituted her personal data. When certain of the documents requested were not forthcoming from her former employer, the applicant lodged complaints with the respondent.

7. On 24th March, 2017, the plaintiff lodged a complaint against Mason with the respondent to the effect that Mason had "*disclosed to Medmark Occupation Healthcare a confidential medical report from my GP regarding my fitness to work, without my permission to do so.*" It was further alleged that Mason instructed Medmark to contact the applicant's GP and discuss the content of that report without her knowledge or permission. This complaint was given reference number 3/17/849 by the respondent (hereinafter referred to as "*the medical disclosure complaint*").

8. On 12th November, 2017, the applicant lodged a complaint with the respondent in respect of certain disclosures made by Mason of the plaintiff's personal data to IBEC and in particular, she complained about a refusal by Mason to furnish certain documents based on legal professional privilege. That complaint was given reference number 3/17/662 (hereinafter referred to as the "*IBEC communications complaint*").

9. When no decision was forthcoming from the respondent in respect of either of these complaints, the applicant made an application to Noonan J. on 25th February, 2019, seeking leave to seek judicial review by way of an order of *mandamus* directing the respondent to issue its decisions in respect of these two complaints. In an "*amended*" statement of grounds, which was unstamped but was dated 18th February, 2019, the reliefs sought by the applicant in these judicial review proceedings were stated in the following terms:

> *"1. It is submitted that the unjustified delay by the Respondent in dealing with the Complainant's data protection complaints (complaints reference 3/17/662 and 3/17/849) by implication amounts or is tantamount to a refusal in its effect. The complainant treats the delay as refusal and seeks an order of mandamus seeking to compel the respondent to complete its investigations and enforce compliance with the 'Act' (the Data Protection Act 1988 – 2003) the complainant seeks an order of mandamus seeking the respondent to accord her complaints with some priority and complete its investigations within a reasonable timeframe and prior to her upcoming work place relations' hearing. Additionally, the complainant seeks an order of mandamus seeking to compel the respondent to issue a decision in relation to complaints referenced 3/17/662 and 3/17/849, on completion of said investigations."*

10. It is not necessary to set out the remainder of the Statement of Grounds herein. It will suffice to note that the applicant complained therein of an unjustifiable and unreasonable delay on the part of the respondent in carrying out its investigations and furnishing its decisions in respect of her two identified complaints. On the basis of that alleged unreasonable delay, she sought an order of *mandamus* directing the respondent to furnish the two decisions. The application was moved by the applicant in person.

11. By Order dated 25th February, 2019, Noonan J. granted the applicant liberty to apply by way of application for judicial review for the reliefs set forth at paragraph 1 in her Statement of Grounds on the grounds set forth at paragraph 2 therein. The Order further provided that the applicant was to serve an originating notice of motion within seven days of the perfection of the Order, which was to be returnable for 30th April, 2019.

12. By notice of motion dated 29th February, 2019, the applicant indicated that on 30th April, 2019, she would apply to the Court for an order of *mandamus* seeking to compel the respondent to enforce compliance with the Data Protection Acts 1988 – 2003, to accord her complaints some priority and to complete its investigation within a reasonable timeframe and in any case prior to her upcoming workplace relations' hearing. It further indicated that the applicant was going to apply to the Court for an order of *mandamus* seeking to compel the respondent to issue a decision in relation to each of the referred complaints on completion of the said investigations and in any case prior to her upcoming workplace relations' hearing.

13. On 18th April, 2019, the respondent issued her decision in respect of the medical disclosure complaint (reference 3/17/849). On 20th May, 2019, the respondent issued her decision in respect of the IBEC communications complaint (reference 3/17/662).

14. The applicant had a number of issues with the decisions given by the respondent. In relation to the medical disclosure issue (reference 849) the applicant maintained that the respondent was wrong to have accepted the explanation given by Mason that they had furnished a copy of the report furnished by her GP to Medmark because the company doctor was not sufficiently qualified in occupational health matters and for that reason they needed advice from a specialist firm as to the necessary workplace equipment and arrangements that should be provided to the applicant to enable her to carry out the demands of her work in safety.

15. The applicant wishes to make the case that the respondent should not have relied upon that explanation from Mason, as to the inadequacy of the qualifications or experience of the company doctor, because on the website of the clinic where the company doctor practices, it is stated that he holds a Higher Diploma in Occupational Medicine since 1995. In these circumstances, the applicant makes the case that the respondent was wrong to have accepted the explanation given by Mason, without checking or further investigating the qualifications actually held by the company doctor.

16. Insofar as it may be relevant, it is only fair to point out that the respondent replied to correspondence wherein that complaint was raised by the applicant, by stating that it was

not the function of the respondent to investigate the qualifications or the suitability of the qualifications of a medical doctor to furnish an employer with advice in relation to health and safety matters.

17. The applicant also had a difficulty with the decision reached by the respondent in relation to the communications which Mason had had with IBEC (reference 662). In this regard, the applicant had two areas of complaint. Firstly, she stated that the respondent was incorrect in its decision wherein it found that Mason was justified in withholding certain documentation on the ground that that documentation was covered by legal professional privilege. In that regard, Mason had argued that as a member of IBEC, it was entitled to have access to legal advice from the IBEC in-house lawyer. They stated that insofar as there were communications from IBEC to them from the in-house lawyer, that was covered by legal professional privilege. Having carried out a comprehensive review of the documentation and of the law in relation to legal professional privilege, the respondent came to the conclusion at paragraph 56 of her decision that certain emails were covered by legal advice privilege and therefore the personal data contained within those documents was validly withheld by Mason pursuant to section 5(1)(g) of the Acts. However, in relation to certain other emails which were authored by the HR Executive of IBEC and which were only copied to the solicitor, they were held not to be covered by legal professional privilege and had to be furnished to the applicant. The applicant maintained that as the solicitor concerned was only an in-house solicitor retained by IBEC, legal professional privilege did not apply and accordingly she maintained that the respondent's decision was incorrect in this regard.

18. Her second area of complaint was in relation to the acceptance by the respondent of the assertion by Mason that the company had sought advice from IBEC in relation to the company's responsibility to provide a safe working environment and that that had been done by way of a verbal telephone conversation and a face to face meeting with IBEC. Mason had stated that no data was created on foot of these interactions with IBEC. The applicant maintained that the respondent was wrong to have accepted that assertion at face value (see paragraph 27 of the decision).

19. In subsequent affidavits, the applicant made the case that IBEC had admitted to her that it had documents arising out of its interaction with Mason in the period January – March 2016. The applicant maintained that the respondent ought to have obtained copies of that documentation before reaching its decision, and further maintained that Mason as the "*Data Controller*" would have been in a position to obtain that documentation from IBEC as it was a "*Data Processor*" within the meaning of the Acts and therefore Mason should have obtained it and produced it to her.

20. In each of the decisions issued by the respondent, the applicant was informed that she had a statutory right of appeal pursuant to section 26 of the Acts, which could be exercised within 21 days of receipt of the decision.

21. The applicant did lodge an appeal against the decision made by the respondent that Mason could rely on legal professional privilege in respect of certain of the

communications from IBEC (reference 662). On 25th November, 2019, the applicant made an application to the Circuit Court to expand her grounds of appeal so as to include therein the issue that Mason should obtain those documents held by IBEC and should produce them to the applicant. The Court was informed that the respondent would not oppose that application. The Court is not aware of the exact outcome of that application.

22. The applicant has also lodged a separate complaint with the respondent concerning the refusal by IBEC to release documentation and data to her. The respondent has indicated that within that complaint, the applicant can seek production of all documents held by IBEC which concern her.

23. Finally, all of this arises out of the initial request by the applicant made of her former employer, Mason, for production of documentation, which she alleges is necessary to enable her to properly put her case before the Workplace Relations' Commission which is due to hear her unfair dismissals case against Mason on 12th December, 2019.

The Present Application

24. As already noted, by notice of motion dated 13th August, 2019, the respondent has brought the present application seeking to have the applicant's claim against her struck out on grounds that the applicant's claim is now moot, having regard to the fact that she is seeking in these proceedings an order of *mandamus* directing the respondent to issue decisions in respect of her two identified complaints and in view of the fact that the respondent issued those decisions on 18th April, 2019, and 20th May, 2019.

25. Ms. Neil B.L. submitted on behalf of the respondent that having regard to the reliefs set out by the applicant in her amended statement of grounds and in respect of which she was given liberty to seek an order of *mandamus* by way of judicial review, it was very clear that the relief she was seeking was production of decisions by the respondent on her two identified complaints. The applicant claimed that she was entitled to such an order on the basis of unjustifiable delay on the part of the respondent in issuing decisions in those matters. That was the only relief sought. It was submitted that insofar as the applicant now seeks to impugn those decisions on various grounds, those could not have been the grounds on which she was given liberty to seek judicial review for the simple reason that the decisions in question had not issued at the time that she was granted leave to seek judicial review on 25th February, 2019.

26. It was further submitted that in view of the fact that the totality of the relief sought by the applicant in these proceedings, being the issuance of the two decisions by the respondent, had since come to pass, the proceedings were now entirely moot.

27. Counsel submitted that it was well established in Irish Law that if proceedings became moot due to intervening events subsequent to the issuance of the proceedings, it was appropriate for the Court to dismiss the proceedings once they had become moot. Counsel referred to the judgment of Clarke J. (as he then was) in *P.V (a minor) v. The Courts Service* [2009] 4 I.R. 264, where the learned Judge having reviewed both Irish

and international case law on the issue of mootness, summarised the position in the following terms at paragraphs 20 and 21:

> *"[20] It is clear from the above authorities that the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it can not, in the words of Murray C.J. in O'Brien v. Personal Injuries Assessment Board [2006] IESC 62, [2007] 1 I.R. 328, be "purely hypothetical or academic". In addition there may be circumstances where it may be appropriate to nonetheless determine issues even though such issues may, strictly speaking, be moot. For example, the types of issues with which the Supreme Court was concerned in O'Brien v. Personal Injuries Assessment Board [2006] IESC 62 stemmed from a situation where the same issue was likely to arise for the respondent in very many cases, and where the respondent was faced with an adverse judgment of this court from which it sought to appeal. While the issue might have become irrelevant to the applicant in that case (given that his personal injury litigation had gone beyond the stage of the Personal Injuries Assessment Board), it was still very much alive from the perspective of the respondent. Likewise there may be cases, such as those identified in the American jurisprudence, where, in practical terms, it may be impossible to have a final determination on important legal issues unless the courts (and in particular appellate courts) are prepared to relax a strict application of a mootness rule.*
>
> *[21] However, it is clear that the cases where the court should depart from the general rule should be limited and the discretion to entertain moot proceedings should be sparingly exercised having regard, as the Supreme Court of Canada noted in Borowski v. Canada (Attorney General) [1989] 1 S.C.R. 342, to the underlying rationale of the mootness rule in the first place."*

28. Counsel submitted that while there were occasions where proceedings may be permitted to be continued notwithstanding that they appeared to have become moot in respect of the relief sought by the individual plaintiff or applicant, some of which circumstances had been identified by Clarke J. at paragraph 20 of his judgment, it was submitted that no such considerations arose in the present case. The decisions here were entirely individual to this applicant. No purpose would be served by allowing the proceedings to continue in view of the fact that the decisions sought had in fact issued in the interim.

29. Counsel stated that there was a second ground on which the Court should dismiss the applicant's proceedings at this stage. This was due to the fact that there was a statutory right of appeal provided to the applicant in respect of any decisions issued by the respondent. This was provided for in section 26 of the Acts. The applicant had been informed of the existence of this right of appeal in each of the decisions that had issued to her. Counsel submitted that it was established in Irish Law that a person with a right to a statutory appeal must pursue that appeal, rather than initiate judicial review proceedings. Counsel referred to the decision of Clarke J. (as he then was) in *EMI Records (Ireland)*

Limited v. Data Protection Commissioner [2013] 2 I.R. 669, wherein at paragraphs 34 et seq. the learned Judge reviewed the question of whether judicial review proceedings were maintainable where a statutory right of appeal to a different forum was available. The current position in Irish Law was summarised by the learned Judge as follows at paragraphs 41 – 43:

"[41] Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan v. Financial Services Ombudsman [2010] IEHC 407, (Unreport-ed, High Court, Hogan J., 1st November, 2010), that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned.

[42] However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. As pointed out by Hogan J. in Koczan v. Financial Services Ombudsman [2010] IEHC 407, (Unreported, High Court, Hogan J., 1st November, 2010), that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all the issues. Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriv-ing them of their entitlement to two hearings.

[43] However these and any other examples must be seen as excep-tions to the general rule. In addition, the conduct of the party seeking to question the initial decision is a factor although not, as Barron J. pointed out in McGoldrick v. An Bord Pleanála [1997] 1 I.R. 497, necessarily a decisive one."

30. It was submitted by counsel on behalf of the respondent that in this case none of the exceptions which would justify a departure from the general rule applied in this case. Accordingly, the Court should dismiss the applicant's claim herein on the grounds that the applicant had a statutory right of appeal if she was dissatisfied in any way with the decisions issued by the respondent. Indeed, she had exercised that right of appeal in respect of one of the decisions, being the IBEC communications decision (reference 662). It was submitted that where such remedy existed and where the applicant was aware of the remedy, it was appropriate for the Court to exercise its discretion to decline the relief sought by way of judicial review.

31. In response to the submissions made on behalf of the respondent, the applicant submitted that the issue had not become moot by reason of the issuance of the decisions by the respondent in April and May 2019. This was due to the fact that Noonan J. had directed the respondent to issue those decisions, but the decisions which had in fact issued from the respondent did not deal with the issues raised in the complaints which had been lodged by the applicant. In particular, because the respondent had not seen the documentation held by IBEC, but had instead acted on the word of Mason as set out at paragraph 27 of the its decision (reference 662), it could not be said to have actually made a decision on the matter.

32. It was submitted that because the respondent had taken the assertion made by Mason that no data was created as a result of its interaction with IBEC, she had failed to properly investigate the matter and therefore had not issued the applicant with a decision on this issue. Accordingly, it could not be argued that the issue was moot by virtue of the issuance of the decision in respect of complaint bearing reference number 662.

33. The applicant further submitted that by agreeing to the expansion of her grounds of appeal in respect of the appeal which she had lodged against the IBEC communications decision (reference 662) in the Circuit Court, the respondent had only done so because she had failed to obtain the documents, which she ought to have done. The applicant further submitted that by failing to obtain the documents from IBEC, the respondent had not been in a position to properly decide whether the applicant was entitled to have sight of them. Accordingly, she had not obtained a decision on her entitlement to see the documentation and data.

34. The applicant stated that she was making the case that the respondent had not investigated her complaint properly. In this regard she submitted that the respondent had wrongly accepted the word of Mason as set out at paragraph 27 of the decision and had not investigated that fact to see if the assertion was correct. In such circumstances, she had not issued a decision on the matter. The applicant submitted that it was not sufficient that the respondent had acknowledged that within the complaint that she had lodged directly against IBEC, the question of whether she was entitled to view all the documentation held by it, would be decided. The shortcomings in relation to the respondent's decision in relation to her complaint concerning the IBEC communications, could not be rectified by including it in some other complaint lodged by her.

35. The applicant submitted that the respondent had failed to make a valid decision on the IBEC papers because they had failed to obtain those papers and make a decision based on sight of the papers as to whether their production to the applicant was warranted; accordingly, the issue was still live. In these circumstances, it was submitted that the issues in the case were not moot by virtue of the decisions issued by the respondent.

36. In response to those submissions, Ms. Neil B.L. submitted that the applicant was under a misapprehension that an Order had been made by Noonan J. on 25th February, 2019, that the respondent should issue the decisions sought by the applicant. No such Order had been made by him. All he had done was grant the applicant leave to seek judicial

review by way of an order of *mandamus* against the respondent. There had been no determination made against the respondent one way or the other.

37. Counsel submitted that insofar as the applicant may have complaints or issues with the decisions issued by the respondent, the appropriate remedy for her was to proceed by way of an appeal pursuant to section 26 of the Acts. It was not permissible to try to shoehorn those complaints, which only arose subsequent to the issue of the decisions by the respondent, when no such grounds were included in her amended statement of grounds, nor could they have been as the decisions had not issued at the time that that amended statement of grounds was issued, nor had any application been made to extend the grounds set out in her amended statement of grounds; nor could any such application be made at this stage, as she was out of time to challenge the decisions which had actually issued by the respondent. In summary, counsel submitted that the issues before the Court in these proceedings were now entirely moot, having regard to the fact that the respondent had issued her decisions in April and May 2019.

Conclusions

38. The issues before the Court on this application are quite straightforward. The applicant lodged complaints with the respondent in 2017. When she did not get a decision from the respondent in respect of two of these complaints, she brought these judicial review proceedings seeking an order of mandamus to compel the respondent to provide the decisions in respect of those complaints.

39. The applicant was granted leave by the High Court to seek an order of mandamus by way of judicial review to have the respondent issue decisions in respect of the two complaints bearing reference numbers 849 and 662. That was not an Order that the respondent should do anything. It was an Order giving the applicant liberty to bring judicial review proceedings against the respondent

40. On 18th April, 2019, and 20th May, 2019, the respondent issued two comprehensive reasoned decisions, in respect of each complaint. The respondent found for the applicant on certain aspects in each complaint and against the applicant on other aspects in each complaint.

41. The applicant was not happy with certain determinations made by the respondent in each decision. She wishes to have those matters in respect of which she is dissatisfied, explored in the present proceedings. However, no application has been made to extend the grounds on which she seeks judicial review as set out in her amended statement of grounds dated 18th February, 2019. Nor has she been granted leave to seek judicial review on any such grounds.

42. These proceedings are solely based on the amended statement of grounds dated 18th February, 2019, wherein the only complaint made by the applicant is in relation to the delay on the part of the respondent in furnishing her with a decision on each of the complaints which had been lodged by her with the respondent. The only substantive

relief sought was an order of *mandamus* compelling the respondent to provide its decision on each complaint.

43. That has been done by the respondent by the issuance of the decisions on 18th April, 2019, in respect of complaint bearing reference number 849, and on 20th May, 2019, in respect of complaint bearing reference number 662. In these circumstances, I am satisfied that the proceedings are now moot.

44. Having regard to the principles laid down in *P.V. (a minor) v. The Courts Service* [2009] 4 I.R. 264, the Court is satisfied that as the issues in these proceedings are now entirely moot, it is appropriate to dismiss the applicant's claim against the respondent herein.

45. Insofar as the applicant may have criticisms in respect of the decisions issued to her by the respondent, the appropriate course of action for her was to appeal the decisions pursuant to section 26 of the Acts. The applicant has done that in respect of the decision concerning complaint reference number 662. Insofar as she wishes to challenge the decision in respect of complaint bearing reference number 849, she will have to either seek an extension of time within which to lodge an appeal pursuant to section 26, or make a separate application for leave to proceed by way of judicial review against that decision.

46. In relation to the subsidiary argument put forward on behalf of the respondent, to the effect that the Court should not grant the remedy sought of an order of *mandamus* against the respondent, because the Court should exercise its discretion not to grant such remedy having regard to the existence of a statutory appeal and having regard to the principles laid down in the case law as summarised by Clarke J. (as he then was) in *EMI Records (Ireland) Limited v. The Data Protection Commissioner* [2013] 2 I.R. 669; the Court is of the view that it would be inappropriate to make a determination on the matter for a number of reasons: firstly, no such relief has been sought in the respondent's notice of motion; secondly, the Court must be mindful that the applicant is a lay litigant and so it must be extra vigilant not to have her caught unawares by having to face a submission for relief which was not mentioned in the notice of motion, nor in the grounding affidavit sworn by Mr. O'Dwyer, but was only referred to in the submissions of counsel.

47. Thirdly, this is an interlocutory application seeking to strike out the applicant's claim on grounds of mootness; the question of whether the Court should decline to exercise its discretion to grant the remedy of an order of *mandamus* due to the existence of a statutory right of appeal, while undoubtedly a significant issue to be determined, the Court is of the view that in this case it is one that more properly falls to be considered at the substantive hearing, rather than as an interlocutory matter in advance of the hearing. The reason for that is that even within the *EMI* decision, it is recognised that there are circumstances where it is appropriate to allow a party to pursue judicial review proceedings, notwithstanding the existence of a statutory right of appeal: see paragraph 42 of the judgment of Clarke J. For these reasons, the Court declines to make any decision on this subordinate ground.

48. Accordingly, for the reasons set out herein, the Court dismisses the applicant's claim against the respondent, same having become moot.