APPROVED **[2024] IEHC 263**

THE HIGH COURT

2016 960 P
2017 8786 P

BETWEEN

AGNIESZKA NOWAK

PLAINTIFF

AND

INTESA SANPAOLO LIFE DAC

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 9 May 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to strike out two sets of High Court proceedings on the grounds of inordinate and inexcusable delay. The proceedings each take the form of a claim for wrongful dismissal. In brief, the Plaintiff contends that the purported termination by the defendant company of her contract of employment in August/September 2015 was unlawful. The

Plaintiff contends, in particular, that the purported termination was invalid because it was not carried out by a *director* of the defendant company.

2. The reliefs sought in the statement of claim delivered in the proceedings include, *inter alia*, a claim for €200,000; a declaration that the (purported) termination of the Plaintiff's employment was invalid and that the Plaintiff's employment continues to date; and an order directing the Defendant to reinstate the Plaintiff to her previous role. (It is also alleged in the 2017 proceedings that the Defendant breached the Plaintiff's right to privacy). The claim for damages has been increased to €250,000 in an amended statement of claim delivered on 11 December 2023.

3. The Plaintiff has, in parallel to the two sets of High Court proceedings, sought statutory redress in respect of the purported termination of her contract of employment. First, the Plaintiff made a claim pursuant to the Employment Equality Act 1998. This claim was ultimately unsuccessful. Secondly, the Plaintiff made a claim pursuant to the Unfair Dismissals Acts 1977 to 2007. (This claim was made prior to the coming into force of the Workplace Relations Act 2015). This claim for unfair dismissal is still pending. For the reasons explained in a related judgment delivered by me today, the statutory claim is to be remitted to the Circuit Court for hearing: *Nowak v. Intesa Sanpaolo Life* [2024] IEHC 262.

4. It will be necessary to consider the interaction between the two sets of High Court proceedings and the claim for unfair dismissal as part of the assessment of the application to strike out the former proceedings on the grounds of delay.

CHRONOLOGY

August/September 2015	Purported termination of employment
3 February 2016	Plenary summons (1) issued
4 February 2016	Defendant enters appearance
26 February 2016	Plaintiff writes to say proceedings to be discontinued
29 September 2017	Plenary summons (2) issued
22 September 2018	Plenary summons (2) served on defendant
8 October 2018	Defendant enters appearance
2 November 2018	Defendant's solicitor requests statement of claim
12 July 2023	Defendant files motion to strike out proceedings
1 September 2023	Statement of claim delivered
11 October 2023	Amended statement of claim
11 December 2023	Further amended statement of claim

LEGAL PRINCIPLES GOVERNING APPLICATION TO DISMISS

5. The principles governing an application to dismiss proceedings on the basis of inordinate and inexcusable delay are well established. The leading judgment remains that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("*Primor*"). The Supreme Court summarised the position thus (at pages 475/76 of the reported judgment):

> "The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:–
>
> (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution

thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives 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,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

6. As appears, a court must consider three issues in sequence: (1) has there been inordinate delay; (2) has the delay been inexcusable; and (3) if the answer to the first two questions is in the affirmative, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed.

7. The principles governing an application to dismiss on the grounds of delay have been considered more recently by the Court of Appeal in *Cave Projects Ltd v. Kelly* [2022] IECA 245. Collins J. reiterated that an order dismissing proceedings should only be made in circumstances where there has been significant delay, and where, as a consequence of that delay, the court is satisfied that the balance of justice is clearly against allowing the claim to proceed. The nature of the assessment to be carried out is described as follows (at paragraph 36):

> "The court's assessment of the balance of justice does not involve a free-floating inquiry divorced from the delay that has been established. The nature and extent of the delay is a critical consideration in the balance of justice. Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between *that* delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim. A defendant cannot rely on matters which do not result from the plaintiff's delay."

8. The need for expedition in litigation is addressed as follows (at paragraph 37):

> "It is entirely appropriate that the culture of '*endless indulgence*' of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the *Primor* test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially

> depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant."

9. These, then, are the principles to be applied in assessing the application to dismiss these proceedings.

ORDER 27 RSC AND TWENTY-EIGHT DAY LETTER

10. The Plaintiff contends that the application to dismiss the proceedings is irregular by reason of the fact that the Defendant did not comply with the requirements of Order 27 of the Rules of the Superior Courts. Order 27, rule 2 provides, insofar as relevant, as follows:

> "(1) No notice of motion to dismiss the action for want of prosecution in actions claiming unliquidated damages in tort or contract may be served, unless the defendant has at least 28 days prior to the service of such notice, written to the plaintiff giving him notice of his intention to serve a notice of motion to dismiss the plaintiff's claim and at the same time consenting to the late delivery of statement of claim within 28 days of the date of the letter.
>
> (2) If no statement of claim is delivered within the said period the defendant shall be at liberty to serve a notice of motion to dismiss the action, with costs, for want of prosecution."

11. The Plaintiff contends that the failure on the part of the Defendant to send a letter in advance of the motion renders the application inadmissible. This contention overlooks the crucial distinction between (i) an application to dismiss for want of prosecution pursuant to the Rules of the Superior Courts, and (ii) an

application pursuant to the High Court's inherent jurisdiction to dismiss proceedings by reason of inordinate and inexcusable delay.

12. It is common practice for a defendant to invoke both forms of jurisdiction when seeking to have proceedings dismissed. Indeed, this is the course adopted by the defendant in the present case. The notice of motion refers, variously, to Order 27, Order 122 and the inherent jurisdiction. Crucially, however, the requirement under Order 27 to send a twenty-eight day letter is only relevant to an application to dismiss for want of prosecution pursuant to the Rules of the Superior Courts. There is no equivalent obligation where an application is made pursuant to the High Court's inherent jurisdiction to dismiss proceedings on the grounds of inordinate and inexcusable delay. The relief sought in this regard in the Defendant's notice of motion is not affected by the omission to send a twenty-eight day letter. The belated delivery of a statement of claim will not save a case in which there has already been inordinate and inexcusable delay.

(1). IS DELAY INORDINATE?

13. The two sets of High Court proceedings were instituted on 3 February 2016, and 29 September 2017, respectively. The Defendant entered an appearance to each case promptly and requested the delivery of a statement of claim. This request was not complied with in a timely manner. No statement of claim was delivered until 1 September 2023, a number of weeks *after* the motion to dismiss was issued on 12 July 2023. A delay of six or seven years in delivering a statement of claim is inordinate.

14. The Plaintiff has made the point that the limitation period governing a claim for breach of contract is six years. It is said, therefore, that the Plaintiff should not

be criticised for delay in circumstances where she would have been entitled to defer instituting the proceedings until a date in 2021. (It will be recalled that the purported termination of the Plaintiff's contract of employment occurred in August/September 2015).

15. With respect, this submission is incorrect. It is well established in the case law that, in circumstances where a plenary summons is issued close to the expiration of the limitation period, there is then an onus on a plaintiff to proceed with greater diligence or with more expedition than had they commenced the proceedings at an earlier date. A late start makes it all the more incumbent on a plaintiff to proceed with all due speed, and a pace which might have been excusable if the action had been started sooner may be inexcusable in light of the time that has already passed before the plenary summons issued. It follows, therefore, that had the Plaintiff delayed issuing these proceedings until shortly before the expiration of the six year limitation period in 2021, a failure to deliver a statement of claim until September 2023 would have represented an inordinate delay. Put shortly, a two year delay would be inordinate having regard to the late start.

(2). IS DELAY INEXCUSABLE?

16. The principal excuse advanced by the Plaintiff in justification of the delay relates to the existence of the parallel statutory claim for unfair dismissal. The Plaintiff, in her written legal submissions of 27 November 2023, asserts at §18 that it had been essential to await the Circuit Court's decision regarding its jurisdiction to hear the unfair dismissals appeal and whether there was an effective and valid

termination of the contract of employment, prior to the High Court proceedings being progressed further.

17. The Plaintiff, in an affidavit filed in the context of the appeal from the Circuit Court, has averred as follows:

> "[…] In this appeal the Court, at the outset must decide whether the termination of the contract by the Chief Financial Officer was valid and effective. If the Court decides it has no jurisdiction because the case falls outside the remit of the Unfair Dismissals Acts, then breach of contract proceedings (issued and put on hold pending the determination under the Unfair Dismissals Acts) will be reactivated. This aspect was raised before the Employment Appeal Tribunal but it took light approach to it. The EAT's determination is entirely wrong on jurisdiction and on merits."

18. As appears, the Plaintiff's strategy has been to "*put on hold*" the two sets of High Court proceedings pending the determination of the claim for statutory redress under the Unfair Dismissals Acts 1977 to 2007.

19. With respect, such a strategy cannot justify the delay in progressing the High Court proceedings. A litigant who institutes High Court proceedings is expected to pursue them with reasonable expedition. It is not legitimate for a litigant to seek to "*hedge their bets*" by instituting and then parking High Court proceedings as a form of insurance in the event that a statutory claim does not succeed. This is especially so given that the Plaintiff's stance before the Employment Appeals Tribunal had been that the tribunal does not have jurisdiction to entertain her claim. Put otherwise, the Plaintiff seeks to justify her failure to progress the High Court proceedings by reference to a statutory claim, made by her, which she insists is inadmissible and should be dismissed by the Employment Appeals Tribunal on jurisdictional grounds. Such a stance is internally inconsistent. The Plaintiff is the claimant in the statutory claim and,

as such, she can withdraw the claim unilaterally if she believes that the Employment Appeals Tribunal does not have jurisdiction.

(3). BALANCE OF JUSTICE

20. Given my finding that there has been inordinate and inexcusable delay in the prosecution of these proceedings, it is necessary next to consider whether the balance of justice is in favour of or against allowing the proceedings to go to full trial. The type of factors to be considered in this regard have been enumerated by the Supreme Court in the passages from *Primor* cited at paragraph 5 above. As appears, the range of factors to be weighed in the balance is broad. The exercise is not confined to a consideration of the effect of the delay upon a defendant's ability to defend the proceedings. It can also include factors external to the defence of the proceedings, such as, for example, reputational damage caused by the prolonged existence of the proceedings.

21. As recently emphasised by the Court of Appeal in *Cave Projects Ltd v. Kelly* [2022] IECA 245, where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim.

22. To summarise: the balance of justice requires the court to consider a range of matters. It is not simply an exercise in weighing (i) the potential loss to the plaintiff of an opportunity to pursue a claim, against (ii) the ability of the defendant to defend the proceedings notwithstanding the delay. Other factors including, relevantly, the conduct of the respective parties and the constitutional

imperative of reasonable expedition in litigation must be assessed as part of the *Primor* test.

23. The onus is upon the Defendant, as the moving party, to demonstrate that prejudice has been caused by the delay (*Gibbons v. N6 Construction Ltd* [2022] IECA 112 (at paragraphs 80 and 119)). The only prejudice asserted by the Defendant is that stated in the grounding affidavit sworn by its solicitor:

> "On the issue of prejudice, my client is experiencing and will experience prejudice by reason of the Plaintiffs continued litigation against it. At this remove the key personnel who worked with the Plaintiff and who are relevant to her claims have left the employment of the Defendant and have moved on. Understandably they do not want to have anything to do with this litigation. The business does not have the corporate memory to deal with the Plaintiff's proceedings at this remove."

24. This asserted prejudice has to be assessed by reference to the procedural history. Crucially, this is a case where the events giving rise to the claim have *already* been the subject of a formal hearing. More specifically, there has been a full hearing before the Employment Appeals Tribunal over three days in January and March 2019. This is not a situation where, for example, witnesses are asked, for the first time, to give a formal account of events many years after they occurred. Rather, the relevant witnesses gave oral evidence at a hearing held within three and a half years of the index events. If there is any inconsistency in the evidence given in the High Court proceedings, this can be put to the relevant witness and the High Court invited to draw the appropriate inferences.

25. Counsel on behalf of the Defendant, in response to a direct question from the bench, confirmed that each of the three witnesses who had given oral evidence on behalf of the Defendant before the Employment Appeals Tribunal in 2019 is

still available to give evidence. Indeed, the principal protagonist, Massimo Camusso, is still employed within the parent company.

26. It should also be explained that even if the application to dismiss the High Court proceedings were to be successful, there would still be a further hearing, by way of appeal, in respect of the statutory claim before the Circuit Court.

27. In assessing prejudice, it is appropriate to have regard to the likelihood of there being extensive contemporaneous documentation recording the events leading up to the purported termination of the Plaintiff's contract of employment. It is apparent from the narrative set out in the (second) decision of the Employment Appeals Tribunal that the disciplinary proceedings over the period May to September 2015 generated significant paperwork. There is reference to extensive email correspondence and to written reports. The likely existence of such contemporaneous documentation recording the events mitigates against any potential prejudice.

ELECTION BETWEEN REMEDIES

28. For completeness, it should be recorded that counsel on behalf of the Defendant sought to rely, in his oral submissions, on the provision of the Unfair Dismissals Act 1977 which requires an employee to elect between remedies. Sub-section 15(2) of the Act (as amended by the Unfair Dismissals (Amendment) Act 1993) reads as follows:

> "Where a recommendation has been made by a rights commissioner in respect of a claim by an employee for redress under this Act or the hearing of a claim by the [Employment Appeals Tribunal] has commenced, the employee shall not be entitled to recover damages at common law for wrongful dismissal in respect of the dismissal concerned."

29. As appears, the effect of this sub-section is that an employee, who pursues a statutory claim for unfair dismissal to the point of an adjudication, is precluded thereafter from recovering damages at common law for wrongful dismissal. In principle, an employer who is confronted with parallel court proceedings seeking to recover damages might apply to have same struck out by reference to section 15. More specifically, an employer could seek to have the court proceedings struck out on the basis that the employee was precluded, by virtue of their having pursued a statutory claim for unfair dismissal, from pursuing a parallel claim for damages before the courts.

30. It should be emphasised, however, that no such application has yet been brought against the Plaintiff. The only basis upon which the Defendant has, to date, sought to have the two sets of High Court proceedings struck out is on the grounds of inordinate and inexcusable delay. In circumstances where no reference had been made to section 15 of the Unfair Dismissals Act 1977 in either the motion or the written legal submissions, it would be inappropriate to indulge the Defendant by allowing it to reorient its application at the hearing of same. This is especially so where the Plaintiff is a litigant in person: it would be unfair to expect a litigant without the benefit of professional legal representation to have to respond on the hoof to a point raised for the very first time in oral argument. (It should be acknowledged that counsel presenting the oral argument had only recently come into the case and had not settled the written legal submissions).

31. Counsel on behalf of the Defendant sought to sidestep this difficulty by suggesting that, even though not forming an express part of the strike out application, the provisions of section 15 were nevertheless relevant to an

assessment of the balance of justice for the purposes of the *Primor* test. More specifically, it was submitted that the Plaintiff would not suffer any actual prejudice were the proceedings to be struck out in circumstances where, or so it is alleged, the proceedings are inadmissible under section 15.

32. Notwithstanding the ingenuity of the argument, I cannot agree that it would be appropriate to have even indirect regard to the provisions of section 15. The onus is upon the Defendant to establish that the delay has caused it prejudice. It is only once such prejudice has been established that it then becomes necessary to consider the countervailing prejudice to the Plaintiff were the proceedings to be struck out. As already discussed, the Defendant has not established any material prejudice on its part. Accordingly, it is unnecessary to enter upon a detailed consideration of the prejudice, if any, which would be caused to the Plaintiff were the proceedings to be struck out. It would be potentially unfair to embark upon a detailed consideration of the meaning and effect of section 15 of the Unfair Dismissals Act 1977 in circumstances where, by virtue of it not having been raised previously, the Plaintiff has not had an opportunity to address same. Suffice it to say that the implications, if any, of the section for the present case are not clear-cut. For example, an issue may arise as to whether the claim advanced by the Plaintiff in these proceedings is properly characterised as a claim for damages exclusively. Whereas a sum of €250,000 is sought by way of damages, there are a number of other additional reliefs sought including an order for reinstatement.

33. In summary, the implications, if any, of section 15 of the Unfair Dismissals Act 1977 have not been addressed in this judgment.

CONCLUSION AND PROPOSED FORM OF ORDER

34. For the reasons explained, the Defendant has failed to establish that the delay in progressing the two sets of High Court proceedings has caused it material prejudice such as would justify an order dismissing the proceedings on the grounds of inordinate and inexcusable delay. Accordingly, the reliefs sought in the two notices of motion are refused.

35. As to costs, my *provisional* view is that the Plaintiff, having been successful in resisting the application to have the High Court proceedings dismissed, is entitled to recover her allowable expenses as against the Defendant in respect of each of the two motions. In circumstances where the Plaintiff is a litigant in person and did not incur the costs of professional legal representation, such costs would be confined to such outlay and other out-of-pocket expenses as are properly allowable in accordance with the general principles governing legal costs (*Dawson v. Irish Brokers Association* [2002] IESC 36, [2002] 2 I.L.R.M. 210). In default of agreement, the costs are to be measured under Part 10 of the Legal Services Regulation Act 2015.

36. The Plaintiff had issued motions seeking to enter judgment in default of defence. These motions have been adjourned generally pending the determination of the Defendant's application to strike out the proceedings. That application has now been determined against the Defendant. Accordingly, the Defendant should deliver a defence to the proceedings.

37. Subject to hearing any submissions to the contrary, I propose to make the following case management directions: (1) an order consolidating the two sets of High Court proceedings; (2) an order deeming the (second amended) statement of claim of 11 December 2023 as having been validly delivered in the

consolidated proceedings; and (3) an order directing the Defendant to deliver a defence to the consolidated proceedings by 10 June 2024. The Plaintiff is to have the costs of the motions for judgment in default.

38. If either party wishes to contend for a different form of order than those proposed, then that party should file short written legal submissions (no more than 2,000 words) by 10 June 2024. In the event that submissions are filed, the other side will have two weeks thereafter to reply.

Appearances

The plaintiff appeared as a litigant in person
Frank Beatty SC and Frank Crean for the defendant instructed by Jacob and Twomey Solicitors LLP