THE HIGH COURT

[2021] IEHC 200

[Record No. 2018/6667 P]

BETWEEN

IRENE NOLAN

PLAINTIFF

AND

BOARD OF MANAGEMENT OF ST. MARY'S DIOCESAN SCHOOL

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered electronically on the 18th day of March, 2021

Introduction

1. This is an application brought on behalf of the defendant to set aside an order made in the High Court on 18th November, 2019, renewing the personal injury summons in this case for a further period of three months. It was submitted on behalf of the defendant that the plaintiff had not established that there were special circumstances which justified the delay in serving the summons from the date on which it was issued on 23rd July, 2018, to the time when the application for renewal of the summons was made on 18th November, 2019.

2. Put at its most basic level, the argument put forward on behalf of the plaintiff to justify that delay, was in the following terms: the proceedings concern an allegation of bullying and harassment allegedly perpetrated on the plaintiff in her position as an art teacher in the defendant's school. It is alleged that the plaintiff was subjected to systematic and prolonged bullying and harassment by four named teachers. The plaintiff's solicitor has stated on affidavit that he made the decision not to serve the personal injury summons after it had issued on 23rd July, 2018, due to the fact that the plaintiff was engaged in a multiplicity of disputes with the school at that time and had also submitted an application for early retirement on ill-health grounds to the Department of Education. In these circumstances, the plaintiff's solicitor felt that as the plaintiff's mental state was very poor and as she was very vulnerable at that time, it was not appropriate to serve the summons on the defendant, as that would have been too much for the plaintiff. The plaintiff's solicitor was of the view that the plaintiff was simply not capable of dealing with a further set of proceedings in July 2018, or in the months thereafter.

3. The plaintiff's solicitor has stated that it was only in October 2019, when he and the plaintiff had had the opportunity to consult with counsel expert in judicial review matters, to decide upon whether it was open to the plaintiff to challenge a review decision of an officer in the Department of Education refusing her application for early retirement, and upon receiving advices from counsel that such proceedings were unlikely to be successful and should not be pursued; that the plaintiff's solicitor formed the opinion that as those proceedings would not be instituted, it was appropriate to serve the personal injury summons.

4. The application to renew the summons was made on 18th November, 2019. Service thereof was effected on the defendant on 4th December, 2019. It is alleged that in all the circumstances, the decision made by the plaintiff's solicitor was reasonable and therefore

the making of the order renewing the summons was justified and ought not to be set aside.

5. In response, the defendant argues that once a plaintiff has decided to institute proceedings claiming damages from a defendant, it is not appropriate for the plaintiff's solicitor to reach a decision that the summons should not be served within the one year provided for under the Rules, on the basis that to do so would expose her to additional stress and on that basis to reach the decision that it was appropriate to allow the summons to lapse after one year and to delay a further four months before seeking to renew same. It was submitted that that did not amount to special circumstances as required under O.8 of the RSC.

6. Given the reason put forward by the plaintiff's solicitor for his decision not to serve the personal injury summons within one year, it is necessary to set out the background to these proceedings in some detail and in particular to focus on the circumstances that pertained in July 2018 and in the sixteen months thereafter.

Background

7. The plaintiff is 56 years of age and was at all material times employed as an art teacher in the defendant's school. The court is unaware when she commenced that employment.

8. In her personal injury summons, the plaintiff alleges that from 30th April, 2008 to approximately October, 2017, she was subjected to bullying and harassment at the hands of four identified teachers in the school. In her summons the plaintiff has set out with great particularity the dates on which the alleged bullying and harassment arose and the nature of the conduct alleged on each occasion.

9. The plaintiff was absent from work from some time in 2011 until 25th August, 2014 due to a hand injury. This was in the nature of a repetitive strain injury. According to the application form which the plaintiff lodged with PIAB in relation to the subject matter of these proceedings, she had issued proceedings against the defendant in relation to the hand injury, which were settled at some time prior to December 2017, when she lodged her present application with PIAB.

10. In her personal injury summons, the plaintiff complains that the bullying and harassment of her continued at the hands of the four identified colleagues on her return to work in 2014 and continued thereafter until in or about October 2017. The last date in respect of which complaint is made in the summons is an incident that is alleged to have occurred on 24th October, 2017.

11. On 16th October, 2014, the plaintiff had attended an interview for the post of Assistant Principal in the school. She alleges that the post should have been given to her, because she was the most senior person to apply for it. However, the post was given to another teacher. It is not clear whether proceedings actually issued in respect of this discreet issue, but it would appear that proceedings of some sort were certainly threatened, because in argument at the bar, Mr. Kilfeather SC on behalf of the plaintiff indicated that

a dispute which had arisen between the parties in relation to the plaintiff's application for the post of Assistant Principal, had been settled on the basis that she would withdraw any such claim and in return, the defendant would support an application that she had made to the Department of Education for early retirement on ill-health grounds.

12. In the early part of 2016, the plaintiff made a formal complaint of bullying in relation to one of the teachers, who was subsequently identified in her personal injury summons. That matter was dealt with under the school's internal grievance procedure. An independent investigator was appointed, who issued a report on 10th May, 2016, in which she held that the vast majority of the plaintiff's 26 complaints in relation to the particular teacher were upheld. Her conclusion in the matter was in the following terms:-

> *"The Investigator's conclusion is that the behaviour set out in the complaint and in accordance with the findings as set out above, did target Ms. Nolan, were unprovoked, unwelcome, persistent and intimidatory and was largely psychological and subtle in nature. It includes 'unwanted physical contact' and constituted subjecting Ms. Nolan to 'constant sneering'.*
>
> *It is therefore concluded that Ms. Nolan's complaints as set out under 'facts established' and 'findings on balance of probability' above fall within the definition of bullying and harassment as defined in the relevant policies and are therefore upheld […] All that is relevant here is whether or not Mr. [name redacted] by his behaviour and actions, bullied or harassed Ms. Nolan and in that regard the Investigator concludes that he did. The matter of any action or outcomes on foot of this conclusion and the report as a whole, lies with the Board of Management."*

13. It is part of the plaintiff's case that, notwithstanding the content of that report, the defendant failed to take any adequate measures to address the bullying that had been found in the report, or to prevent a continuation of the bullying and harassment on the part of that particular teacher, or the other teachers named in the personal injury summons.

14. On 7th December, 2017, the plaintiff submitted an application form to PIAB seeking damages for *"breach of contract, negligence and breach of duty arising from bullying and harassment in the workplace giving rise to personal injury*". In that form, the plaintiff outlined that she had first sought medical attention as a result of the matters complained of on 3rd October, 2017. She submitted a medical report from her GP. In the portion of the form dealing with previous claims, she identified that proceedings had issued in relation to the hand injury and that such proceedings had "*recently settled".* She also stated that she had a "*case ongoing against McDonalds*". No further details were given.

15. It is not clear what response was received from the defendant to the lodgement of the claim before PIAB. However, given that an authorisation issued from PIAB on 3rd January, 2018, it is reasonable to assume that the defendant had not accepted that liability would not be in issue between the parties; therefore, PIAB would have lacked jurisdiction to assess damages.

16. While it is not clear from the PIAB form, it appears that the plaintiff had consulted with a solicitor in Cork prior to the submission of that claim. It is also clear that in the months thereafter, that solicitor arranged for a junior counsel to draft the personal injury summons that was ultimately issued in July 2018. However, before that, in May 2018, the plaintiff changed solicitor to her present solicitor, whose office is based much closer to where the plaintiff resides.

17. In May 2018, the plaintiff was certified unfit for her work as a teacher. She remains unfit for work to the present time.

18. In his affidavit sworn on 2nd September, 2020, the plaintiff's present solicitor, Mr. Anthony Donagher, stated that a decision was made to issue the personal injury summons that had been drafted by the counsel who had been retained by the plaintiff's previous solicitor, so as to protect the plaintiff's interests with reference to the statute of limitations, as some of the plaintiff's complaints in the personal injury summons were historical, although the matters of which she complained had continued up to the dates specified therein. Accordingly, the personal injury summons issued on 23rd July, 2018.

19. It appears that there were also disciplinary proceedings brought against the plaintiff within the defendant's disciplinary procedures. Unfortunately, the court has not been given any clear details of the nature of these proceedings.

20. In the affidavit sworn by Ms. Laura Prenderville on behalf of the defendant on 23rd February, 2020, she stated at para. 7 thereof, that on 16th August, 2018 the plaintiff issued further proceedings against the defendant, which proceedings had not yet been served on the defendant. This was dealt with by Mr. Donagher in his affidavit sworn on 2nd September, 2020 at para. 7, wherein he stated that in relation to the proceedings that had been referred to by Ms. Prenderville, it had been necessary for the plaintiff to consult with counsel for the purpose of advising as to the possibility of bringing proceedings in relation to that matter. However, such proceedings were not able to be advanced, as it transpired that their intended subject was, in a manner, *res judicata*. Mr. Donagher went on to state that those proceedings were not directly related to the present proceedings, but were nonetheless a significant distraction and a further source of distress for the plaintiff, which further mitigated against the progression of her personal injury proceedings at that time. It is not clear when the plaintiff received the advices of counsel in relation to those proceedings issued against the defendant.

21. Ms. Prenderville went on at para. 8 of her affidavit to state that the plaintiff had been involved in a dispute with the defendant which resulted in the signing of confidential terms of agreement on 22nd August, 2018. A copy of the terms of agreement were furnished to the defendant's solicitor under cover of letter of 24th August, 2018. As that correspondence had been furnished on a "*without prejudice*" basis, Ms. Prenderville did not feel that it was appropriate to refer to it, or exhibit it, in her affidavit.

22. However, as noted earlier, the plaintiff's counsel indicated in the course of the hearing that at some state, her grievance at not been awarded the position of Assistant Principal

in the school, was compromised on the basis that she would withdraw any such claim and in return the defendant would support her application to the Department of Education for early retirement on ill-health grounds. It may be that those terms of agreement also incorporated the agreement that had been reached in relation to the disciplinary issue. Unfortunately, the affidavits are not at all clear on those matters.

23. It is not clear from the affidavits exactly when the plaintiff first applied for early retirement on ill-health grounds. It may be that the decision to apply for early retirement was part and parcel of the threatened disciplinary proceedings, because Mr. Donagher stated as follows at para. 6 of his second affidavit:-

> *"Your deponent, as aforesaid, dealt firstly with the immediate threatened disciplinary proceedings. It was ultimately agreed with the defendant that in circumstances where the plaintiff was off work on sickness leave that the proposed disciplinary proceedings would not, at that time, take place. Following further discussions, a decision was taken that the plaintiff would apply for early retirement due to ill-health. A positive decision in this regard would have significantly affected any loss of earnings claim that the plaintiff advances in these proceedings and accordingly the matters were directly related. Your deponent took the view that it was preferable to conclude the application for early retirement prior to progressing these proceedings as a measure of attempting to limit the scope of this litigation and also to protect the emotional health of the plaintiff, your deponent's client."*

24. Whatever the genesis of her application for early retirement, that application was refused at first instance. An appeal was brought against that decision. That appeal was also unsuccessful. It appears that the plaintiff and her solicitor then consulted counsel in relation to the possibility of bringing judicial review proceedings in relation to that refusal. However, counsel advised that it was necessary to exhaust all internal remedies. It transpired that there was one further internal procedure available to the plaintiff. She sought a review of the decision that had been given in her case.

25. Mr. Donagher stated that the final review decision was made by the Department of Education on 22nd July, 2019 and was communicated to him by email on 23rd July, 2019. The review decision upheld the refusal that had been made at the earlier appeal.

26. On receipt of that communication, Mr. Donagher stated that he sought a consultation with counsel in relation to the possibility of bringing judicial review proceedings in relation to the refusal of her application for early retirement by the Department of Education. A consultation was arranged for the commencement of the new legal year in October 2019. Following the consultation with counsel, it was decided that no judicial review proceedings would be initiated on behalf of the plaintiff. Mr. Donagher stated that the reasoning for that decision was not only legal, but also on the basis that the plaintiff would endure further processes and proceedings and the costs associated therewith.

27. When the decision had been reached not to institute any judicial review application in relation to the refusal of early retirement, the plaintiff's solicitor formed the view that it

was appropriate to proceed with the plaintiff's personal injury proceedings. To that end, he issued an *ex parte* docket on 7th November, 2019, seeking an order from the court pursuant to O.8 of the Rules of the Superior Courts to renew the summons for a further period of three months. That application was grounded on an affidavit sworn by Mr. Donagher on 6th November, 2019. The application was heard by Murphy J on 18th November, 2019. She acceded to the request made on behalf of the plaintiff and renewed the summons for a further period of three months from that date. Somewhat curiously, the reason stated in the order as justifying the extension of time was stated as follows:-

> *"In circumstances where delay occurred as a result of a change in solicitors."*

28. The order made by Murphy J also gave the plaintiff liberty to amend the personal injury summons that had issued on 23rd July, 2018. The amendments to the summons were minor in nature; they merely clarified certain aspects of events that were alleged to have occurred on given dates. They did not materially alter either the nature of the claim, or the particulars thereof, as contained in the original summons.

29. The personal injury summons was served directly on the defendant on 4th December, 2019.

The special circumstances put forward on behalf of the plaintiff

30. In his affidavit sworn on 6th November, 2019, for the purposes of the *ex parte* application, Mr. Donagher explained why the personal injury summons had not been served within the time prescribed by the rules:-

> *"6. I say that an application was made by the plaintiff to the Department of Education seeking early retirement due to ill-health. I say that this application required submission of reports and the plaintiff had to attend for examination by doctors appointed by the Department. I say that this was a very stressful procedure for the plaintiff and your deponent took the decision not to serve the personal injury summons herein to avoid adding to the stress the plaintiff was under in having to deal with two separate matters.*
>
> *7. I say that the application process was completed in August 2019 and the plaintiff wishes to pursue the action in respect of her claim for personal injuries".*

31. In his affidavit sworn for the purposes of this application, Mr. Donagher elaborated on his reasons for not serving the summons within the time allowed. He noted that the plaintiff had been certified as being unfit for work from 14th May, 2018 and had remained unfit for work since that time. He stated that she had been subjected to significant bullying and harassment from the time that she had returned to work in 2014 and up to the date of her certification on sick leave in May 2018. He stated that the plaintiff had been somewhat exhausted by the process and had been distraught in consultation with him when explaining the various aspects of her case. Of particular relevance was her

application for early retirement, which, if granted, would have significantly alleviated her loss of earnings situation. He stated as follows at para. 6:-

> *"6. Your deponent, as aforesaid, dealt firstly with the immediate threatened disciplinary proceedings. It was ultimately agreed with the defendant that in circumstances where the plaintiff was off work on sickness leave that the proposed disciplinary proceedings would not, at that time, take place. Following further discussions, a decision was taken that the plaintiff would apply for early retirement due to ill-health. A positive decision in this regard would have significantly affected any loss of earnings claim that the plaintiff advances in these proceedings and accordingly the matters were directly related. Your deponent took the view that it was preferable to conclude the application for early retirement prior to progressing these proceedings as a measure of attempting to limit the scope of this litigation and also to protect the emotional health of the plaintiff, your deponent's client."*

32. Mr. Donagher went on to outline how it was only following the consultation with counsel in October 2019, that a decision was reached that there was no benefit in pursuing a judicial review application in relation to the refusal of the application for early retirement by the Department of Education. Once that had been determined, it was decided that the personal injury action could be put in train.

33. The following portion of his affidavit gave rise to some dispute at the hearing, as to whether Mr. Donagher had reached his decision not to serve the summons due to a mistaken view of the law. He stated as follows in relation to the consultation in October 2019 with the counsel in relation to the judicial review issue:-

> *"Obviously, this was the end of the legal year and your deponent secured a consultation with counsel in the proposed judicial review matter, for the commencement of the new legal year in October 2019. Your deponent quite wrongly understood that I should not properly bring a motion to renew the summons during the long vacation. Following consultation with counsel it was decided that no judicial review proceedings would be initiated and this avenue was abandoned. The reasoning for this was not only legal, but also that the plaintiff would endure further processes and proceedings and the costs associated therewith."*

34. In argument before this Court, counsel for the defendant submitted that it was clear from that portion of the affidavit that the plaintiff's solicitor had delayed bringing his application to renew the summons after July 2019, due to the erroneous belief that he could not bring such an application during the long vacation. In response, Mr. Kilfeather SC on behalf of the plaintiff, submitted that that was a misinterpretation of that portion of the affidavit. He submitted that it was clear that the plaintiff's solicitor had deferred seeking to have the personal injury summons renewed, until he had received advices from counsel in relation to the possibility of bringing judicial review proceedings in relation to the refusal of the plaintiff's application for early retirement. That consultation with counsel had only occurred in October 2019, so there was no question that any mistaken

impression that he may have had about the possibility of bringing the application to renew the personal injuries summons during the long vacation, had had any bearing on the actions that he took.

35. Mr. Donagher further elaborated on his reasons at paras. 12 and 13 of his second affidavit in the following terms:-

> *"12. I say and believe and urge upon the court that there was every good reason justifying the non-service of the summons during the relevant period as your deponent was concerned that the plaintiff was overwhelmed by the multitude of fora in which she was involved and was during this entire period on sick leave and suffering from significant distress and anxiety. It is also the case that a general delay did occur in circumstances of the change of solicitor, particularly in circumstances where your deponent had to address the plaintiff's files ab initio, engage counsel in respect of each aspect of proceedings and proposed proceedings at that time and to advise the plaintiff in respect of the various aspects of her ongoing situation.*
>
> *13. I say that the defendant (per the affidavit under reply) is critical of your deponent's decision making process as regards the non-service of the summons within its initial 12-month validity period. I say that whether that criticism is justified or otherwise, your deponent took the decision in what I believed were the best interests of the plaintiff, your deponent's client and in circumstances where I was acutely aware of her extreme levels of anxiety and distress and in an attempt, (rightly or wrongly) to protect her from further stressors until other matters had been finalised."*

36. The above extracts constitute the essential reasons put forward by Mr. Donagher as to why he did not serve the personal injury summons within the period allowed and why he delayed until 7th November, 2019, when he issued the *ex parte* docket.

Submissions on behalf of the defendant

37. It was submitted on behalf of the defendant that the appropriate legal test as to what would constitute "*special circumstances*" as required by O.8, had been set down by the Court of Appeal in *Murphy v. Health Service Executive* [2021] IECA 3 and in particular, at paras. 69 – 78 of the judgment delivered by Haughton J.

38. It was submitted by Mr. Buckley SC on behalf of the defendant, that it was clear from the affidavits sworn by Mr. Donagher that there were essentially two distinct periods of delay, each of which had their own individual reason, which allegedly justified the non-service of the summons in that period. The first period was the initial period of one year from date of issuance of the personal injury summons. The reason given by the plaintiff's solicitor for not serving the summons during that period, was that he felt that the plaintiff was in an extremely vulnerable mental state at that time, due to the fact that she was either pursuing, or was involved in, various different proceedings before different fora. He felt that it would only add unduly to her mental distress, if he were to serve the personal

injury proceedings that had been instituted on her behalf, by issuance of the personal injury summons on 23rd July, 2018.

39. It was submitted that it was not appropriate for a plaintiff's solicitor to simply take it on himself to decide that it would be unduly stressful for his client for him to serve the proceedings which she had obviously instructed him should be issued on her behalf. It was submitted that no medical evidence had been put before the court which would establish as a matter of fact, that it would have been injurious to her mental health for the proceedings to have been served on the defendant during that period.

40. It was submitted that O.8, r.1(4) RSC provided that the court could renew the summons for a period of three months "*where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order*". It was submitted that the test that there should be "*special circumstances*" was a high threshold that had to be met. It had been accepted in the Murphy case that it was a higher test than that of "*good reason*": see para. 71.

41. Counsel further submitted that the use of the word "*special*" meant that, while the bar was not raised to the level of "*extraordinary*", it nonetheless suggested that some fact or circumstance that was beyond the ordinary, needed to be present: see at para. 72 of the judgment. It was submitted that in this case, the matters pleaded in the personal injury summons did not go beyond the usual type of matters that would be pleaded in a bullying and harassment case.

42. In relation to the second period of delay, which was the period between 23rd July, 2019 and either the lodging of the *ex parte* docket on 7th November, 2019, or the moving of the application on 18th November, 2019; it was clear that that period had arisen due to a mistaken view on the part of the plaintiff's solicitor that he could not bring an application to renew the summons during the long vacation. Counsel submitted that that was clearly stated in Mr. Donagher's second affidavit. It was submitted that the law was clear that a mistake on the part of a legal advisor could not be a ground for renewing a summons: see *Moynihan v. Dairygold Cooperative Society Limited* [2006] IEHC 318 and the *Murphy* decision at para. 77.

43. It was further submitted that even were the court to accept what had been urged on behalf of the plaintiff's solicitor, that his decision to hold off seeking to renew the summons was not due to any mistaken impression on his part in relation to his capacity to bring such application during the long vacation; but was due to his decision to hold off serving the summons until a final decision had been taken in relation to whether judicial review proceedings would be brought against an unconnected third party, in relation to the refusal of the plaintiff's application for early retirement; that still did not excuse his deliberate failure to serve the personal injury summons, or seek its renewal in the sixteen months after its issuance.

44. It was submitted that if the court were to look at the issue of prejudice to the respective parties, while the defendant could not point to any specific prejudice, the court was

entitled to have regard to the fact that as this was a witness action, the earliest events in respect of which complaint was made by the plaintiff in the personal injury summons stretched back to 2008. It was submitted that the court was entitled to have regard to the general prejudice that is suffered by a party who is called on to defend a case based on oral evidence, when the defendant and/or his or her witnesses are asked to deal with events that are alleged to have occurred in excess of twelve years prior to the time when the action would be heard. It was submitted that it was well established at law, that a person's ability to counter allegations in respect of certain events diminishes greatly over time. The court was entitled to have regard to the fact that the defendant would suffer a general prejudice in this regard.

45. While it was argued that the plaintiff may suffer hardship if the application to renew the summons were not granted, because her action would then be statute barred; it was well established that the mere fact that a plaintiff's action would be statute barred if the summons were not renewed, could not of itself constitute a special circumstance such as to bring the application within the provisions of O.8: see *Whelan v. HSE* (Kelly J. Unreported, High Court, 31st May, 2017) and *Brereton v. National Maternity Hospital* [2020] IEHC 172.

46. In summary, Mr. Buckley SC submitted that the central question for the court to determine was whether there were special circumstances to justify not serving the summons within one year, or up to the time that the application was made to renew it in November 2019. It was submitted that where that was due to a deliberate decision made by the plaintiff's solicitor, on the basis that to serve his client's proceedings on the defendant could in some way expose the plaintiff to additional stress, could not possibly amount to a special circumstance as envisaged by the provisions of O.8 of the rules. Accordingly, it was submitted that the court should set aside the renewal of the summons in this case.

Submissions on behalf of the plaintiff

47. Mr. Kilfeather SC agreed that the relevant principles governing this application were those set down by the Court of Appeal in *Murphy v. HSE*. He submitted that it was clear from that decision that whether there were special circumstances in a given case had to be decided on the facts of the particular case before the court: see para. 70. It was further submitted that what was necessary was that the plaintiff should be able to point to some fact or circumstance that was beyond the ordinary, or the usual in order to justify a renewal of the summons: see para. 72.

48. It was submitted that in this case, where the plaintiff had suffered mental injury as a result of prolonged bullying and harassment at the hands of her work colleagues, resulting in her being certified unfit for work from May 2018 to date, it was reasonable for the plaintiff's solicitor to take the decision that he should hold off serving the summons due to the adverse effect that it could have had on her mental health, if she had to face a further set of proceedings at that time.

49. It was submitted that the court was entitled to have regard to the fact that this was not just a plaintiff in a single action, but was a woman who was facing various disputes and issues across a number of fora. It was submitted that the court was entitled to have regard to the nature of the injury as pleaded by the plaintiff in her personal injury summons, where it was pleaded that she had consulted with her GP as far back as 3rd October, 2017 and that she had been diagnosed as suffering from depression. She had exhibited the classic symptoms of depression. It was pleaded that she had attended counselling on several occasions. In addition, she had had some suicidal thoughts, but she had had no psychosis and no suicidal plan or intent. It was submitted that the court was also entitled to have regard to the evidence of Mr. Donagher in his affidavits, that in his opinion the plaintiff presented as being in great mental distress and was distraught at some of the consultations that he had held with her. In these circumstances, it was submitted that it was justifiable for the plaintiff's solicitor to take the decision that it was inappropriate to serve the summons in the circumstances which presented themselves in July 2018 and in the months thereafter.

50. It was pointed out that the court should look at the overall circumstances of the case. In this case, there could be no question that the defendant had suffered any real prejudice. They had been aware of the allegations that had been made against one of the teachers, because these had formed part of the independent investigation that had been carried out in 2016.

51. In addition, they had been aware of the prospect of the personal injury action, because they had been served with a copy of the Form A which the plaintiff had submitted to PIAB, along with a copy of the report from her GP. Thus, it could not be argued that the defendant was unaware of the existence of the cause of action, or the broad nature of the allegations being made by the plaintiff until it was served with the summons in December 2019.

52. It was submitted that the defendant had not pointed to any specific prejudice that it had suffered due to the delay in serving the summons beyond the period allowed under the rules. In practical terms, all that had happened was that the defendant had received the summons five months after the last date on which it could have been served under the provisions of the rules i.e. it received the summons at the beginning of December 2019, instead of at the end of July 2019.

53. It was submitted that the court was entitled to have regard to the fact that the plaintiff would suffer extreme hardship if the summons was not renewed, because that would mean that her claim against the defendant would be statute barred. That was a claim that had already been found to have considerable merit by virtue of the report furnished by the independent investigator in May 2016. In addition, not only had the plaintiff suffered considerable injuries in the form of mental injury, but she had also experienced a very significant loss of earnings, given that she had been unfit for work since May 2018 and remained unfit for work down to the present.

54. It was submitted that if one were to balance the hardship that would be suffered by the plaintiff if her summons was not renewed and as a consequence her action became statute barred, against the hardship which the defendant would suffer by having to defend the action a little bit later than might otherwise have been the case, had the summons been served some five months earlier, and in particular, having regard to the fact that all of the relevant witnesses remained available to the defendant; it was submitted that the balance of hardship was clearly far greater on the plaintiff, were her summons not be renewed, than on the defendant, if it had to defend the proceedings.

55. It was submitted that when one considered the reasons that had been put forward by Mr. Donagher for not serving the summons within the prescribed period and considered the balance of hardship to the parties and the issue as to which of the parties might suffer prejudice; was clear that the interests of justice lay in favour of allowing the renewal of the summons, as per the order made by Murphy J on 18th November, 2019.

Conclusions

56. The relevant parts of O.8, r.1, as inserted in the RSC by S.I. 482/2018, are in the following terms:-

> *"1.(1) No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons.*
>
> *(2) The Master on an application made under sub-rule (1), if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for three months from the date of such renewal inclusive.*
>
> *(3) After the expiration of twelve months, and notwithstanding that an order may have been made under sub-rule (2), application to extend time for leave to renew the summons shall be made to the Court.*
>
> *(4) The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order."*

57. In reaching its decision herein, the court has had regard to the principles laid down by the Court of Appeal in its decision in *Murphy v. HSE*, and in particular the principles set down at paras. 69 – 78 therein.

58. The first issue which the court must determine is whether there was just one period of delay, which was effectively due to the fact that the decision had been made by the plaintiff's solicitor not to serve the personal injury summons due to the fact that the plaintiff was in an extremely vulnerable state and that he decided that it was not appropriate to do so until a decision had been reached in relation to the bringing of

judicial review proceedings in relation to the refusal of the application for early retirement on ill-health grounds by the Department of Education; or whether, as alleged by the defendant, there were in fact two separate periods of delay, which had separate reasons; the first being the decision reached by the plaintiff's solicitor as outlined above for not serving the summons within the initial year, which effectively brought him up to the end of July 2019, but that thereafter his reason for not serving the summons was in fact due to a mistake on his part that he could not bring an application to renew the summons during the long vacation.

59. Having considered the arguments put forward on behalf of each of the parties, the court is satisfied that it is appropriate to give the benefit of the doubt to the plaintiff's solicitor, that the operative reason for his not bringing the application to renew the summons until November 2019, was due to the fact that it was only after the consultation with the counsel considering the judicial review aspect in October 2019, when it was decided not to proceed with that action, that it became appropriate in his view to proceed with the application to renew the summons.

60. While the wording of Mr. Donagher's second affidavit and in particular his reference to a mistake on his part in relation to his capacity to bring such an application during the long vacation is difficult to understand, in light of his averment that the dominant reason for not bringing such application was due to the fact that the issue of the judicial review proceedings was still extant; nevertheless, the court accepts Mr. Donagher's evidence in this regard. Accordingly, the court must approach the matter on the basis that the plaintiff's solicitor had made a deliberate decision not to serve the summons due to the mental ill-health and general vulnerability of his client, until the issue of the judicial review proceedings had been decided upon.

61. Even allowing that as the dominant reason, the court is not satisfied that it constitutes a special circumstance which would justify a renewal of the summons in November 2019. The court accepts that this plaintiff was in a difficult and vulnerable position at the time that she instructed her present solicitor to issue proceedings on her behalf in July 2018. However, those were instructions that she presumably gave to her solicitor at that time. He was then given the longest period that is provided for under the rules for service of the summons. This meant that he had one year within which to deliver a copy of the summons to the defendant. While it understandable that the plaintiff may have been in a very fragile, or stressed condition in July 2018 and in the months thereafter, it is difficult to imagine how her level of stress could have remained at such a high degree that it was not possible to even serve the summons on the defendant during the period of one year after 23rd July, 2018.

62. In argument before the court, it was suggested that it would have caused the plaintiff undue distress to have received communications of a legal nature through her letterbox, or otherwise, while she was pursuing multiple remedies before different fora. However, when one looks at what is involved with the service of a summons and what may happen thereafter, it does not appear to the court that there was any realistic danger to the

plaintiff's mental health. Once the summons was served on the defendant, an appearance would be served on its behalf by a firm of solicitors. Thereafter, they could only communicate with the plaintiff's solicitor. They would not be able to communicate directly with the plaintiff.

63. While it is true that the usual steps that would be taken after service of a personal injury summons, would be that a notice for particulars would be raised by the defendant, which would have to be responded to by the plaintiff; in this case, the allegations had been set out with great particularity in the summons itself. Accordingly, I do not think that there would have been any great scope for a very searching notice for particulars being raised by the defendant. They would of course have raised some matters by way of a notice for particulars, but it seems to the court that these would probably have been matters, that either could have been answered directly by the plaintiff's solicitor from the instructions that he already had on file, or at most, would have involved him having a short consultation either in person, or by phone, with his client in order to provide the necessary information.

64. The other thing that was likely to happen after service of the personal injury summons, would have been that the defendant would have required the plaintiff to be medically examined by a doctor on its behalf. Unfortunately, that is just one of the normal incidents that have to be endured by a plaintiff when bringing a personal injury action. I do not think that having to go to one medical examination, presumably by a psychiatrist on behalf of the defendant, would have caused the plaintiff such distress, that her solicitor was justified in holding off serving her summons.

65. In this regard, there is considerable strength in the argument put forward on behalf of the defendant, that there was no medical evidence placed before the court which would enable it to come to a conclusion that the plaintiff's solicitor had in fact been justified in reaching the decision, that to have served the personal injury summons within the time prescribed by the rules, would have exposed his client to an unreasonable risk of further injury. There was no medical evidence placed before the court at all.

66. The only reference to her medical condition was that set out in the personal injury summons, which appears to be a paraphrasing of the report furnished by her GP in 2017. That stated that she had been suffering from depression, for which she had been attending counselling. However, there was no reference to the GP prescribing any medication, nor was there any reference of a referral to a psychiatrist, nor was there any question of inpatient treatment in a hospital.

67. In the absence of any medical evidence, the court cannot come to the conclusion that there was a factual basis for the decision reached by Mr. Donagher. While the court does not doubt his belief that to serve the summons at that time would have been injurious to his client's mental health; he is a solicitor, not a doctor.

68. Furthermore, while it is undoubtedly true that the plaintiff has at various times pursued a number of different remedies before different fora and was the subject of either

threatened or extant disciplinary procedures within her workplace, it is not at all clear that the various disputes, or applications, or disciplinary procedures, were still ongoing in 2019.

69. Her personal injuries action arising out of the injury to her hand had been settled by the time that she made her application to PIAB on 7th December, 2017. It is not clear whether disciplinary proceedings were ever actually brought against the plaintiff, or were merely threatened against her, and while the various affidavits filed by the parties are somewhat unclear in this regard, it appears that the proceedings that were issued on 16th August, 2018 (but never served on the defendant), may have related to the threatened disciplinary proceedings and they may in turn have been the subject matter of the settlement that was reached on 22nd August, 2018, which seems to suggest that the disciplinary proceedings were withdrawn and in return for which the applicant would seek early retirement from the Department of Education and the school was apparently going to support her application in this regard. It is not clear whether the dispute that she had in relation to her not been given the post of Assistant Principal, ever amounted to the issuing of proceedings, or the threat of proceedings, or whether they were wrapped up into the settlement and the application for early retirement; but it seems fairly clear that that issue, along with the disciplinary issue, was resolved at some stage in 2018.

70. Thus, by 2019, it would appear that the only matters that were proceeding were her personal injury proceedings, which had not yet been served on the defendant, and her application for early retirement. In these circumstances, it would appear that as one came into the second six months of the one-year period within which the summons could have been served, the plaintiff was in fact only engaged in two active sets of proceedings, being her application for early retirement and the present proceedings. It is difficult to see how the service of the personal injury summons at that stage, in the period January to July, 2019, would have caused the plaintiff undue stress.

71. While the court can appreciate that the refusal of her application for early retirement by the Department of Education, which process was going on during 2019, and which involved her in attending medical examinations, was undoubtedly a matter of great distress and disappointment to the plaintiff; it does not justify a decision being taken by her solicitor not to serve the personal injury summons within the appropriate period, for fear that to do so might exacerbate her general mental health.

72. It is often the case that a particular plaintiff may find it very stressful to institute personal injury proceedings at a given time. For example, a mother might be involved in an RTA, in which she suffers injury, but more importantly, one or more of her children may be very seriously injured in the same accident. The fact that she may be very distressed by the injuries to her children and may be greatly involved in their care and rehabilitation, would not justify a solicitor issuing proceedings on her behalf, but then deciding that it would be too stressful for her to have those proceedings served on the defendant. Similarly, it may be the case that a plaintiff, who was involved in an accident giving rise to proceedings, may at the same time, coincidentally, be involved in very distressing

family circumstances involving the breakup of a long term relationship with a spouse or partner. The fact that the particular plaintiff may be in a very distressed or vulnerable condition at that time, due to matters that may be unconnected to the subject matter of the litigation, would not justify a decision being taken to institute proceedings on her behalf, but to refrain from serving them due to the stress that she was suffering due to these other unrelated events. Unfortunately that is just part and parcel of life. Once a plaintiff elects to institute an action against a defendant, it is incumbent on him or her to serve their proceedings within the time prescribed by the rules, unless there are special circumstances which justify the failure to do so within the time so prescribed.

73. In relation to the issue of prejudice, I do not entirely agree with the argument put forward on behalf of the plaintiff, that the defendant was well aware of the nature of these proceedings by virtue of the independent investigation and having received the application form that was submitted by her to PIAB in December 2017. One has to remember that the complaint, which was the subject matter of the independent investigation in 2016, related only to one of the four colleagues that were subsequently named in the personal injury summons.

74. There was no indication in the PIAB form that there were any other teachers involved, nor were there any particulars given of the allegations of bullying and harassment that were subsequently made in the personal injury summons. Accordingly, as of early 2018, the defendant only knew that the plaintiff had made a formal allegation against one of the teachers concerned; that allegation had been largely upheld by the independent investigator and the plaintiff had indicated in her PIAB form that she intended to bring proceedings seeking damages for personal injuries caused by bullying and harassment by some of her work colleagues. However, the defendant did not know that she would make allegations against three other colleagues, stretching back as far as 2008. In these circumstances, it cannot be said that the defendant will not have been prejudiced by virtue of the delay in notifying them of the specific allegations until service of the summons in December 2019.

75. While it is undoubtedly the fact that the plaintiff will suffer considerable hardship if the summons is not renewed, in that her action against the defendant will be statute barred; it is well settled that that of itself does not constitute a special circumstance which would justify the renewal of the summons. It is but one of the matters that must be considered by the court when considering the overall circumstances in the case: see *Whelan v. HSE* and *Brereton v. National Maternity Hospital*.

76. In conclusion, the court is satisfied that the deliberate decision that was made by the plaintiff's solicitor not to serve the summons until after the question of issuing the judicial review proceedings in relation to the early retirement decision had been resolved in October 2019, does not constitute a special circumstance which would warrant the renewal of the summons in this case. Accordingly, the court proposes to make an order setting aside the order of Murphy J made on 18th November, 2019 renewing the summons herein.

77. The parties will have 14 days within which to furnish written submissions in relation to the final order and in relation to any other matters that may arise.