APPROVED **[2021] IEHC 348**

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 589 JR

BETWEEN

N. HAKAN ERDOGAN

APPLICANT

AND

WORKPLACE RELATIONS COMMISSION

RESPONDENT

ECOMM MERCHANT SOLUTIONS LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 July 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application for leave to apply for judicial review. The proceedings seek to challenge a decision to dismiss a complaint made pursuant to the Employment Equality Act 1998. The complaint was dismissed by the Workplace Relations Commission as having been made outside the six month time-limit prescribed. The first-instance decision of the Workplace Relations Commission has

since been appealed to the Labour Court. These judicial review proceedings have been taken in parallel to that statutory appeal.

2. By order dated 16 November 2020, the High Court (Meenan J.) directed that the application for leave to apply for judicial review be heard on notice.

3. Although the Workplace Relations Commission has been named in the proceedings as respondent, the Commission has explained in open correspondence dated 20 January 2021 that it does not propose to participate in the proceedings. Instead, the *legitimus contradictor* to the proceedings is the notice party, eCOMM Merchant Solutions Ltd. The notice party is the Applicant's former employer ("***the Employer***"). The Employer opposes the application for leave, principally on the ground that the Applicant's pending appeal to the Labour Court represents an adequate alternative remedy to judicial review.

PROCEDURAL HISTORY

4. The Applicant had been employed by eCOMM Merchant Solutions Ltd between 25 November 2015 and 14 February 2017. The Applicant is aggrieved by the manner in which his former employer purported to dismiss him. The Applicant has sought to agitate his grievance by making various claims and complaints to the Workplace Relations Commission.

5. Initially, the Applicant pursued a claim for unfair dismissal. This claim had been filed on 26 March 2017. It seems that the claim had been part-heard before the Workplace Relations Commission on 15 January 2018. However, the Applicant withdrew the claim prior to the hearing being resumed.

6. The Applicant made two further claims on 11 January 2018 and 15 January 2018, respectively. The first claim was made pursuant to the Industrial Relations Act 1969; the

second pursuant to the Equal Status Act 2000. These two claims have since been withdrawn.

7. The Applicant next filed a complaint under Part VII of the Employment Equality Act 1998. It is the adjudication upon this latter complaint which forms the subject-matter of these judicial review proceedings.

8. The complaint was made to the Director General of the Workplace Relations Commission on 24 May 2018 (Ref. CA-00019406). In this complaint, the Applicant claims that he was discriminated against during his employment, and dismissed by acts of discrimination and victimisation. Much of the complaint relates to events alleged to have occurred during the course of the Applicant's employment, and, latterly, in the conduct of the disciplinary process leading up to his dismissal.

9. The Employer raised an objection that the complaint to the Workplace Relations Commission had been made outside the six month time-limit prescribed. It will be recalled that the Applicant's employment had terminated on 14 February 2017. The Employer submits that the latest date from which the six month time-limit should be reckoned is the date upon which it had filed its response to the unfair dismissal claim (19 April 2017). The complaint under the Employment Equality Act 1998 was not filed for another year (24 May 2018).

10. It should be explained that the period within which a complaint is to be made is extended where the delay is due to any "misrepresentation" by the respondent to the claim. See section 77(6) of the Employment Equality Act 1998 (as amended) as follows.

> "Where a delay by a complainant in referring a case under this section is due to any misrepresentation by the respondent, subsection (5)(a) shall be construed as if the references to the date of occurrence of the discrimination or victimisation were references to the date on which the misrepresentation came to the complainant's notice."

11. The Applicant seeks to rely upon this provision. The Applicant contends that certain information had only come to his attention, for the first time, at the hearing in respect of his unfair dismissal claim on 15 January 2018. More specifically, the Applicant insists that minutes of meetings, which were produced by the Employer at the hearing in respect of his claim for unfair dismissal, were "false" and "forged". It is alleged that these minutes were prepared *ex post facto* and had not been taken at the time of the internal disciplinary process. It is also alleged that certain witnesses on behalf of the Employer told lies as to the precise circumstances of the dismissal. The Applicant then seeks to rely on this alleged misconduct as constituting a "misrepresentation" for the purpose of calculating the time-limit.

12. The Applicant had summarised his arguments in this regard as follows in a written submission to the Workplace Relations Commission dated 30 May 2018.

> "15.01.2018 The Respondent attended to the WRC Hearing and provided the evidence for the first time. It became clear that the respondent lied about the evidence during disciplinary process, and systemically breached and manipulated the disciplinary processes with mala fide. This now indicates that the Respondent acts are highly motivated by a much stronger issue, which is above any type of financial consequences, ethical or logical restrictions, respondent's own dignity, and above Irish law. It became clear that respondents actions are act of discrimination and victimization by lying to the Workplace Commission Adjudication Officer.
>
> As clearly seen, The Respondent's discriminatory action during my employment cannot be identified before 15.01.2018, as the Respondent run whole disciplinary process with mala fide, systemically lied about the evidence in order to hide its act of discrimination and victimization.
>
> This is clear misrepresentation, and 15.01.2018 is the date which the misrepresentation came to my notice. This point was included to Employment Equality Act specifically for such cases.
>
> This falls under Point 6 of the act.
> The date of the event 15.01.2018 is the time limit."

13. The Applicant makes a further series of allegations in this written submission to the effect that members of the Employer's staff told lies at the hearing on 15 January 2018 in respect of the circumstances of the Applicant's dismissal.

14. The Director General of the Workplace Relations Commission assigned an adjudication officer to determine the Applicant's complaint under the Employment Equality Act 1998. A hearing in this regard subsequently took place before the adjudication officer on 5 December 2018. The adjudication officer indicated to the parties that he intended to address the time-limit objection as a preliminary issue.

15. The adjudication officer published his decision on 28 May 2019. In brief, the Applicant's complaint was dismissed on the basis that it had been submitted out of time, and that the Applicant had failed to provide any evidence of "misrepresentation" on the part of the Employer.

16. On 26 June 2019, the Applicant lodged an appeal with the Labour Court against the adjudication officer's decision. A number of weeks thereafter, the Applicant instituted these judicial review proceedings on 16 August 2019. The requisite application for leave to apply for judicial review was not, however, moved before a judge of the High Court until 2 November 2020. By order dated 16 November 2020, the High Court (Meenan J.) directed that the application for leave be heard on notice. The application for leave ultimately came on for hearing before me on 14 June 2021.

GROUNDS OF JUDICIAL REVIEW

17. The grounds of judicial review are advanced under three broad headings as follows. First, it is alleged that there was a breach of the requirement "to hear the other side". The allegation here appears to be that, notwithstanding that the hearing before the adjudication officer had been directed to the preliminary issue of the six month time-

limit, the impugned decision goes further and addresses the underlying merits of the complaint. Secondly, it is alleged that the decision is "unreasonable" in the sense that it offends against fundamental reason and common sense. This ground is directed to the underlying merits of the impugned decision. Thirdly, it is alleged that there had been a breach of the rule against bias. It is alleged that the adjudication officer made certain remarks during the course of the hearing which implied that he had predetermined the matter.

18. These grounds have been elaborated upon in the two supplemental affidavits filed by the Applicant on 8 March 2021 and 12 May 2021, respectively.

DISCUSSION AND DECISION

19. The principal issue for determination on this application for leave to apply for judicial review is whether the statutory appeal pending before the Labour Court represents an adequate alternative remedy. The approach to be taken in addressing such an issue is well established and is summarised in the following passage from *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 (at 509).

> "The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities referred to shows that this is in effect the real consideration."

20. This passage has been approved of by the Supreme Court in a number of judgments including, in the employment law context, *O'Donnell v. Tipperary (South Riding) County Council* [2005] IESC 18; [2005] 2 I.R. 483. The Supreme Court in *O'Donnell* identified the following factors as relevant (at paragraph 20 of the judgment).

> "In assessing the nature of the alternative right of appeal and judicial review, there are a number of relevant factors. Included in these factors are the following. Firstly, the fact that the applicant has already commenced this alternative remedy and that there has been a hearing of the matter over two days. This appeal now stands adjourned pending this judicial review. While these appeal steps are not a determinative factor, in the circumstances they are a weighty factor. Secondly, the issues which the applicant raises relate to natural justice and to fairness, which relate to the merits of the case also, which issues may be addressed and determined by the Employment Appeals Tribunal. Thirdly, the matters raised do not relate to net issues such as points of law or jurisdiction. Fourthly, the essence of the issue raised relates to evidence as to the allegedly fraudulent actions of the applicant and this may be dealt with fully by an appeal before the Employment Appeals Tribunal, rather than as a review of procedure. It is manifestly a matter for an appeal process rather than a review of procedure. Fifthly, the applicant seeks reinstatement of his post and he referred to the low statistical figures for reinstatement by the Employment Appeals Tribunal. I have considered this as a factor but I do not give it a heavy weighting given that the tribunal has the jurisdiction to hear an appeal and to reinstate and the applicant may present his full case on the appeal. Sixthly, there is a right of appeal from the Employment Appeals Tribunal to the Circuit Court, then to the High Court and, on a point of law, to this court."

21. These factors have an obvious resonance with the present case. In particular, the inappropriateness of addressing allegations of fraud by way of the judicial review procedure has a parallel in these proceedings.

22. In assessing the adequacy or otherwise of the statutory appeal, it is relevant to note the following aspects of the decision-making structures provided for under the Workplace Relations Act 2015 (as applied to an appeal under the Employment Equality Act 1998). First, the appeal before the Labour Court is a *de novo* appeal. Secondly, the procedure before the Labour Court is more formal than that at first-instance and entails procedural safeguards which are not statutorily required before an adjudication officer. (cf. *Zalewski v. Adjudication Officer* [2021] IESC 24). In particular, the Labour Court has statutory jurisdiction to hear evidence on oath and to allow for the cross-examination of witnesses. (Section 21 of the Industrial Relations Act 1946). There is a right of appeal

against the determination of the Labour Court to the High Court on a point of law pursuant to section 90 of the Employment Equality Act 1998.

23. These procedural requirements are especially relevant in considering the second plank of the Applicant's case (summarised under the previous heading). This is because those grounds are directed to the underlying merits of the adjudication officer's decision. The Applicant alleges that the Employer had produced fabricated evidence at the hearing in respect of his claim for unfair dismissal. This allegation is refuted by the Employer. The factual dispute between the parties cannot properly be resolved in judicial review proceedings. The Labour Court is much better positioned to address the controversy. The Labour Court has full jurisdiction to address the issue, and has procedural mechanisms available to it to hear evidence on oath and to allow cross-examination.

24. Similarly, insofar as the first plank of the Applicant's case is concerned, this is not something which justifies an application for judicial review. The nature of the allegations made by the Applicant are such that it is not possible to treat the underlying merits of his claim as hermetically sealed from the time-limit point. This is because the Applicant seeks to rely on alleged misconduct on the part of the Employer as constituting a "misrepresentation" for the purpose of section 77(6) of the Employment Equality Act 1998.

25. The position in respect of the third plank of the Applicant's case is more nuanced. In principle, it is open to a party to argue that a statutory appeal does not constitute an adequate alternative remedy in circumstances where the objection made is that the decision of first-instance is tainted by bias. In particular, it can be argued that the party is entitled to a two-stage process and that a fundamental flaw at first-instance cannot be fully remedied by an appeal. (cf. *Stefan v. Minister for Justice* [2001] IESC 92; [2001] 4 I.R. 203).

26. No such considerations arise on the facts of the present case however. This is because the Applicant's case does not involve an allegation of bias in the strict sense. It is well established that bias must be *external* to the decision-making process. No external factor has been identified in the present case. There is no suggestion that the adjudication officer had any conflict of interest. It is not suggested, for example, that the adjudication officer had any prior relationship with either of the parties to the dispute. Rather, the Applicant's contention is that bias should be *inferred* from certain comments allegedly made by the adjudication officer during the course of the hearing.

27. It is only in exceptional cases that it is legitimate to establish objective bias based on statements made during the course of a hearing. Normal interventions, including debate and argument, and even the expression of strong, though necessarily provisional, views on the subject-matter of the dispute, will not normally be considered to justify a finding of bias. (*O'Callaghan v. Mahon* [2007] IESC 17; [2008] 2 I.R. 514).

28. I have carefully considered the comments attributed to the adjudication officer by the Applicant (as pleaded in the statement of grounds). There is nothing exceptionable about the comments purportedly made, and certainly nothing which supports an inference of bias. An adjudication officer is entitled to ensure that a hearing progresses expeditiously, by asking the parties to confine themselves to the relevant issues. An adjudication officer is also entitled to put questions to the parties.

29. I am satisfied, therefore, that this is not a case where judicial review is necessary in order to vindicate a deficiency in the hearing at first-instance.

CONCLUSION

30. Judicial review proceedings before the High Court are concerned with the legality of the decision-making process, and only allow for merits-based review in the exceptional

circumstances identified by the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

31. The case sought to be advanced by the Applicant in these judicial review proceedings is that the adjudication officer erred in deciding that the complaint to the Director of the Workplace Relations Commission had been made outside the six month time-limit. More specifically, it is alleged that the time-limit should not be taken as having begun to run until 15 January 2018, i.e. the date of the hearing into the (separate) claim under the Unfair Dismissals Act 1977. It is alleged that the Employer had fabricated certain documentation (namely, minutes of meetings) and that this only came to the attention of the Applicant at the hearing on 15 January 2018. This is said to constitute a "misrepresentation" for the purpose of section 77(6) of the Employment Equality Act 1998. The Employer refutes these allegations in full.

32. The proper forum for the resolution of this factual dispute between the parties is the Labour Court, for all of the reasons explained earlier.

33. The application for leave to apply for judicial review will, therefore, be dismissed. This brings these High Court proceedings to an end.

34. Insofar as the costs of these proceedings are concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

35. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order.

36. My provisional view is that it would not be appropriate to make a costs order against the Applicant for the following reasons. These proceedings have been dismissed on the application for leave to apply for judicial review. Under Order 84 of the Rules of the Superior Courts, an application for leave is normally heard on an *ex parte* basis, i.e. the respondent and notice parties are not represented before the court. If an *ex parte* application for leave is refused, then an unsuccessful applicant does not incur any costs liability to the other side for the obvious reason that the other parties will not have incurred any costs associated with the leave application. In the present case, the High Court directed that the leave application be on notice. This was done for entirely understandable reasons, including the fact that the paperwork put before the court by the Applicant was very limited and did not disclose the full extent of the procedural history. The subsequent participation of the Employer ensured that all relevant information was put before the court.

37. Nevertheless, I tend to the provisional view that the balance of justice probably requires that each party bear its own costs, rather than that the costs of the *inter partes* hearing be visited upon the Applicant. The Applicant does not have the benefit of legal representation but rather appears as a litigant in person. The judicial review proceedings, although misconceived, were brought in good faith and it seems appropriate that some leniency should be shown to the Applicant in terms of his potential costs liability.

38. In reaching this provisional view, I am mindful that by bringing these judicial review proceedings, the Applicant chose to diverge from the statutory regime. The scheme of

the Employment Equality Act 1998 is that claims for discrimination and victimisation should not generally result in a complainant being exposed to liability for significant legal costs. It is certainly arguable that a party who chooses to forgo the protection of the statutory regime, and is unsuccessful, should suffer the costs consequences of having done so. Had these proceedings gone to full hearing and had the Employer incurred significant costs, I would have been minded to make a costs order against the Applicant. However, in circumstances where the proceedings have been brought to an end at a very early stage, on the basis of a short hearing, I lean to the view that the proportionate order is that each party bears its own costs.

39. If either party contends that a different form of costs order should be made, then written legal submissions are to be filed within 14 days of today's date.

Appearances

The Applicant represented himself
Kevin D'Arcy for the notice party instructed by Brady McGreevy Solicitors

Approved Gerrit Simms