THE HIGH COURT

[2023] IEHC 122

[Record No. 2020/123MCA]

BETWEEN

DEIRDRE MORGAN

APPELLANT

AND

THE LABOUR COURT

RESPONDENT

AND

KILDARE AND WICKLOW EDUCATION AND TRAINING BOARD AND THE MINISTER FOR EDUCATION AND SKILLS

NOTICE PARTIES

RULING of Ms. Justice Siobhán Phelan, delivered on the 1st of March, 2023.

INTRODUCTION

1. This matter comes before me for a ruling on an application for leave to issue a motion pursuant to the terms of an *Isaac Wunder Order*. The Appellant seeks leave to apply for an order pursuant to s. 97(2)(b) of the Employment Equality Act, 1998 (as amended) [hereinafter "the 1998 Act"].

BACKGROUND

2. The leave of the Court to issue proceedings is required by reason of the judgment ([2022] IEHC 361) of the High Court (Ferriter J.) delivered on the 1st of June, 2022 and the consequential orders made on the 28th of June, 2022 in proceedings bearing the record number cited on the application which is now before me.

3. By reason of the judgment and orders subsequently made on the 28th of June, 2022, the Appellant was restrained from instituting any further proceedings concerning any matter relating to the Appellant's term of employment with Kildare and Wicklow Education and Training Board [hereinafter "the Board"] (including any matter related to the suspension of termination of her contract of employment), her term of employment and her pension and gratuity entitlements, without prior leave of a Judge of the High Court (the Minister for Education and Skills [hereinafter "the Minister"] and the Board having been put on notice of any such application for leave). Further orders were made striking out then extant proceedings between the Appellant, the Labour Court and the Board (specifically including proceedings bearing record 2021/404S and 2021/00033) pursuant to the inherent jurisdiction of the Court. The matter of costs stood adjourned.

4. Separate written judgments were also delivered on the 1st of June, 2022 in respect of four other sets of proceedings taken by the Appellant in respect of her former employment, namely:

I. *Morgan v. the Minister for Education and Skills* [2022] IEHCC 360 in which Ferriter J. refused leave finding that an application for leave to seek relief by way of judicial review was an abuse of process as an inappropriate attempt to seek to litigate the question of her removal as an art teacher which had been the subject of a final and binding determination by the Labour Court and the High Court and was also "*hopelessly out of time*" and dismissed the proceedings.

II. *Morgan v. Minister for Education and Skills & Ors.* [2022] IEHC 362 in which Ferriter J. determined that two separate statutory appeals on a point of law from determinations of the Labour Court dating to February, 2021 (the Labour Court in turn dismissing appeals from the WRC) dismissing a claim that she had been discriminated against contrary to s. 77 of the Employment Equality Act, 1998 (as amended) and s. 81E Pensions Act, 1990 (which claims were also considered to be *res judicata* having been the subject of earlier findings) should be dismissed.

III. *Morgan v. Minister for Education and Skills* [2022] IEHC 363 in which Ferriter J. refused leave to proceed by way of judicial review on the basis that the proceedings were an improper attempt to seek to re-open the circumstances of the Appellant's removal as an art teacher in 2015 and represented another attempt in her long running campaign of "*legally vexatious complaints and proceedings against the Respondents*".

He further held that no arguable grounds were raised to challenge the decision that the Applicant did not meet the criteria for injury gratuity in circumstances where she had not been injured during the course of her work. Proceedings were dismissed.

5. Subsequent orders were made on the 13th of October, 2022 (perfected on the 20th of October, 2022) removing the Minister for Education and Skills, the Department of Justice and Equality and the Irish Human Rights and Equality Commission from the within proceedings. On the 24th of October, 2022, having afforded the parties an opportunity to make submissions, the High Court (Ferriter J.) made final orders refusing the relief sought by the Appellant and dismissing the proceedings in their entirety (orders were perfected in early November, 2022). Costs were ordered against the Appellant in favour of the Board and the Minister, said costs to be adjudicated in default of agreement and subject to a stay of execution in the event of an appeal. The Appellant has appealed and appeals are pending before the Court of Appeal and an application for leave to appeal to the Supreme Court in one case is also awaiting determination.

THE APPLICATION

6. Leave is sought by the Appellant to bring an application by Notice of Motion bearing the record number of proceedings which have been the subject of a number of orders including a final order dismissing the proceedings. It is recalled in that the within proceedings originated as an appeal on a point of law against a determination of the Labour Court on the 1st of April, 2020. In an *ex tempore* judgment delivered on the 22nd of March 2022, Ferriter J. dismissed the appeal on the grounds that the Appellant had failed to identify any error of law in the determination of the Labour Court. By Notice of Motion dated the 23rd of October 2021 in these proceedings, the Board sought reliefs against the Appellant to restrict the Appellant from bringing any further proceedings against the Board. Despite opportunity to do so, the Appellant did not file an affidavit in response to the motion. In a written judgment delivered on the 1st of June 2022 and an order perfected on the 28th of June 2022, Ferriter J. acceded to the application of the Board. The Appellant has appealed that Order to the Court of Appeal and that appeal (along with several others) will be heard in the Court of Appeal on the 27th of April, 2023.

7. The intended application is an application pursuant to s. 97(2)(b) of the 1998 Act. Although the intended Notice of Motion is dated the 15th of July, 2022, the Central Office did not issue it because of the terms of the Isaac Wunder Order. The application was brought to my attention by the High Court Registrar dealing with the matter when it was forwarded to her by email in December, 2022 following my assignment by Barniville P. for the purpose of dealing with applications pursuant to the terms of the *Isaac Wunder Order* made in this case.

8. In the grounding affidavit the Appellant claims that she requires the order sought under s. 97(2)(b) of the 1998 Act to defend herself "*from attack made by the legal teams*" on behalf of the Board and the Minister for Education and Skills in this case 2020/123 MCA and four other cases which she describes as interrelated and travelling together bearing record numbers 2021/36 MCA, 2021/38 MCA, 2020/787 JR and 2021/103 JR. She says that disclosure is required due to "*assertions that cover up their ongoing discrimination and which degrade and belittle my well-founded complaints against them."* The grounding affidavit indicates a wish that the orders would be made before making final orders in these cases. The affidavit does not refer to any particular information which the Appellant has been prevented from disclosing and for which consent to disclose is sought. The Appellant further refers to her state of ill-health in support of her application.

9. Despite the fact that final orders have been made and the proceedings in respect of which the leave of the court is sought have been dismissed by the High Court and are now under appeal, it appears that the Appellant seeks to maintain a further application under s. 97(2)(b) of the 1998 Act before the High Court despite having refused to move her application when invited to do so by Ferriter J. in March, 2022. Separately, she is pursuing a similar application before the Court of Appeal by way of motion returnable before the Court of Appeal on Friday 24th of February, 2023. In her email forwarding the application to the Registrar the Appellant claims that she needs to disclose information for six appeals she has made to the Court of Appeal and one to the Supreme Court in respect of these cases. It is understood that the application for leave to appeal which awaits determination by the Supreme Court is against the *ex tempore* judgment in March, 2022 ruling in respect of the appeal on a point of law against a determination made by the Labour Court which was originally the subject of the proceedings

in whose record number the current application is brought and the order perfected in respect of that judgment on the 4th of November, 2022.

SUBMISSIONS

10. The Board and the Minister having been put on notice of the application for leave to issue the Notice of Motion in accordance with the previous Orders of Ferriter J., the Registrar communicated with all parties on my behalf in early February, 2023, giving all three parties (the Appellant, the Board and the Minister) a period of 14 days within which to make written submissions. In being afforded the facility to make submissions, the parties were advised that the relevant principles identified by me to guide my decision were understood to be those set out in *Kenny v. Trinity College Dublin* [2008] IEHC 320 and *Riordan v. Ireland (No.5)* [2001] 4 I.R. 463. It was indicated that there was no requirement to further rehearse these principles, unless it were contended that these cases are wrongly decided or there was better authority. It was, however, indicated that if the parties elected to put in submissions, issues which might arise from the terms of the application included:

I. Whether the High Court has jurisdiction to make orders in a case which stands dismissed, albeit under appeal?

   And

II. Whether s. 97 of the Employment Equality Act, 1998 could be construed as precluding the Appellant from putting information before the Court relevant to her proceedings such that an application under s. 97(2)(b) might have been necessary in this case?

11. Submissions were received from all three parties. Both the Board and the refer to the fact that the Appellant was afforded the opportunity to move her application for an order under s. 97(2)(b) of the Employment Equality Act, 1998 permitting her to disclose information but she declined to do so. The Minister has referred me to the transcript of the 22nd of March, 2022 (p. 55 to 58) from which it is clear that Ferriter J. repeatedly invited the Appellant to address him on her application for an order under s. 97(b) of the 1998 Act but she declined to do so ultimately causing the judge to treat the application as withdrawn. The Board and the Minister both submit that the Notice of Motion which the Appellant has sought leave from this Court to issue is affected by the doctrine of *functus officio*.

12. By email dated the 8th of February, 2023, the Appellant advised the Registrar that she had brought an application pursuant to Order 86A of the Rules of the Superior Courts, 1986 before the Court of Appeal the previous day. She indicated that the matter was listed for the morning of the 24th of February, 2023 (Court of Appeal, Case Number: 2022/110, being the Appellant's appeal of the striking out and *Isaac Wunder Orders* made by Judge Ferriter in these proceedings).

13. I understand from the Board's submissions that by Notice of Motion filed in the Court on Appeal on 7th of February, 2023, the Appellant has sought relief under Order 86A Rule 4(c) of the Rules of the Superior Courts 1986 seeking to adduce evidence that was not before the High Court in respect of the appeal. In submissions filed on behalf of the Board I am advised that in the application before the Court of Appeal, the Appellant seeks to rely on the following evidence:

(a) An unidentified A4 document.

(b) Further "*evidence with the A4 that I had not put before the High Court*".

(c) "[*A]s much evidence as is necessary*" in order "*to deal diligently with the many facets of the unexpected issues and angles adopted by Mr. Justice Ferriter*".

14. From the Board's submissions it appears that in her Affidavit before the Court of Appeal (sworn on 7th of February, 2023), the Appellant states that she is seeking special leave "*to disclose an A4 page*" and that she "*applied to the High Court on 18th November 2021 to disclose this page under section 97(2) as being a key piece of evidence."*

15. Complaint is made by way of submission that the Appellant is vague and unclear in her application as to the nature of the information she wishes to introduce and its' relevance. It is a matter of some concern arising from submissions on behalf of the Minister that in an email to the Chief State Solicitors in January 2023, the Appellant stated that her application was not limited to an exact court case and that she was seeking consent to disclose information to as many [unspecified] persons and bodies in Ireland and abroad "*as needs be*." This is a significant enlargement on the purpose of the application as presented to me. From their

submissions the Board suggest that the position was somewhat clearer in the previous motion dated 18th of November, 2021 (which was not pursued before Ferriter J.) as the evidence the Appellant sought to adduce in that application was identified as "*information that Equality Officer Mr. Gary O'Doherty references in his decision DEC-E2012-027 of my complaint reference EE170/2009*".

16. The Board points out that the said complaint was made by the Appellant on the 11th of March, 2009 whereby she alleged, *inter alia,* discrimination and harassment on the grounds of gender contrary to section 6(2)(a) of the 1998 Act. The Board confirm in their submissions that the Equality Officer determined that the Appellant had failed to establish a *prima facie* case of discrimination on the grounds of gender. In the course of that hearing in 2012, the Equality Officer apparently refused a request made by the Appellant to introduce certain evidence at the hearing, and it would appear, presuming that both applications were mooted by the Appellant under s. 97(2)(b) relate to the same documentation, that this is the information which the Appellant now seeks to adduce in evidence. However, I understand from the submissions received that the decision of the Equality Officer was made on the 13th of March, 2012 (DECE2012-027) and was not appealed. It should be noted that the Appellant has not denied that the information she seeks leave to introduce is the material identified by the Board in their submissions.

17. Following delivery of submissions on behalf of the Board and the Minister received in accordance with my direction, the Appellant sought permission to put in further submissions. While I did not consider the necessity for a further submission to arise, the Appellant was afforded a short number of days for a final submission in recognition of her status as a lay litigant. By email dated the 27th of February 2023, she submitted a copy letter dating to December, 2009 relating to a complaint then before the Equality Tribunal and bearing the record number of that complaint. It is clear from the record number cited in the letter that it is the same matter which was referred to by the Board in their submissions as having been determined on the basis that the Appellant had failed to establish a *prima facie* case of discrimination on the grounds of gender. The Appellant confirmed by email that the letter was the document she sought to produce in evidence and suggested that it was sensitive and important. She informed the Registrar by email that she had not copied it to the other parties in the absence of a court order.

18. Having considered the document which is a short letter apparently authored by the Appellant's then employer enclosing submissions to the Equality Tribunal (which submissions the Appellant says are not relevant and have not been provided) and raising an issue regarding the protection of the identity of parties because of an asserted belief on the part of the letter's author that the complaint before the Equality Tribunal was made for the purpose of damaging the reputation of the Appellant's then employer, I fail to see how it can assist the Appellant. The Appellant has not adequately explained in what way this document could be important or relevant and no significance was obvious to me from its contents.

19. In grounding this application, however, the Appellant referred to "*assertions that cover up their ongoing discrimination and which degrade and belittle my well-founded complaints"* as being the reason she wished to introduce further information. It may be that the Appellant wishes to argue that a request made long ago that the Equality Tribunal protect the identity of a respondent to a complaint, which complaint was considered by her former employer to be motivated by a desire to cause reputational harm, to be evidence of a "cover-up" of ongoing discrimination. Far more telling in my view, however, is the fact as I understand it that the particular complaint was determined on the basis of no *prima facie* evidence of discrimination. This places the Appellant's contentions that her complaints of discrimination were degraded and belittled and her reliance on this letter in context. I fail to see that anything turns on the letter in question.

20. Noting that the particular case referred to in the record number cited long pre-dated the within proceedings, I was unwilling to direct that the correspondence be circulated to the Minister and the Board because it would further delay finalisation of this matter, could result in a further exchange of unnecessary submissions and might be construed by the Appellant as this Court giving her permission to produce documentation when my conclusion as set out hereinafter is that her application for leave to seek an order under s. 97(2)(b) of the 1998 Act should be refused. For these reasons I did not consider it necessary or useful to take any further action in relation to the letter before ruling on this matter. I did not share it with the other parties. I do not consider their interests to be affected by the document in a manner which would require affording them an opportunity to consider it or make submissions in relation to it for the purpose of this ruling.

APPLICABLE LEGAL PRINCIPLES ON APPLICATION FOR LEAVE TO ISSUE PROCEEDINGS WHERE AN ISAAC WUNDER ORDER EXISTS

21. In *Kenny v. Trinity College Dublin* [2008] IEHC 320, Clarke J. made it clear that there is normally no impediment to a party commencing frivolous and vexatious proceedings. Once commenced such proceedings are, of course, subject to a jurisdiction to strike out as being frivolous or vexatious or having no prospect of success or being an abuse of court process. However, once an *Isaac Wunder Order* has been made, a Plaintiff will not be permitted to institute proceedings against the same defendant without the leave of the court. Clarke J. explained the purpose of the jurisdiction of the Court to make an *Isaac Wunder Order* in the following terms in *Kenny* (at para. 2.4):

> *"It is clear, of course, that the whole purpose of the jurisdiction of the court to make an Isaac Wunder order is to protect persons from being the subject of frivolous or vexatious litigation. Obviously any proceedings which are frivolous or vexatious can be struck out. However, in the ordinary way there is nothing to prevent a litigant from commencing frivolous and vexatious proceedings and placing a burden on the defendant concerned to consider those proceedings and, if thought appropriate, to bring an application before the court seeking to have the proceedings struck out. However, where a party has abused the process of the court, by means of bringing a number of frivolous or vexatious proceedings, the court has a jurisdiction to make an Isaac Wunder order so as to give the defendant in such circumstances the added protection of precluding the plaintiff from maintaining proceedings against that defendant without court leave. It would, of course, be wholly inappropriate to prevent a party who is the subject of such an order from having an opportunity to persuade the court that whatever may have been the past history of litigation between the parties, new proceedings were contemplated which were not frivolous and vexatious and which should, therefore, proceed."*

22. Accordingly, as subsequently noted in *SP v UG* [2016] IEHC 693 (Abbott J.) (in the context of family law proceedings) the existence of an *Isaac* Wunder Order is not an absolute bar to litigation.

23. The test for leave where a party is subject to an *Isaac Wunder Order* was considered in *Riordan v. Ireland* (No.5) [2001] 4 I.R. 463. In that case Ó'Caoimh J. considered an application to grant leave to commence proceedings in circumstances where there was already in being an *Isaac Wunder Order* against the plaintiff concerned in the following terms (p. 468):

> *"In the instant case I am asked simply on the basis of a draft plenary summons and without the benefit of any accompanying draft statement of claim to assess whether the intended plaintiff should be given leave to commence these proceedings. In these circumstances I invited oral submissions from the intended plaintiff in support of his claim. It is necessary for this Court to assess the draft plenary summons to see whether the claims sought to be litigated are vexatious or frivolous or otherwise. I have, however, heard the intended plaintiff in regard to the basis upon which he seeks to advance these claims."*

24. From *Riordan,* it is clear that before granting leave, the court must examine the nature of the intended proceedings to determine if they are *vexatious.*

25. What amounts to vexatiousness was addressed by Lavery J. in his decision of *Keaveney v. Geraghty* [1965] I.R. 551 where the test for vexatiousness was expressed as follows:

> *"Does any one who has acquainted himself with the facts as alleged in the pleadings, and having regard to the opportunity given by the learned Judge to supplement these facts, think it possible that the action is maintainable?"*

26. In *Riordan,* Ó' Caoimh J. applied the test of whether the proceedings could succeed and whether a reasonable person could reasonably be excepted to obtain the relief they seek. Ó' Caoimh J. also stated that the court, in assessing if the proceedings are vexatious, may consider the:

> "…*whole history of the matter and is not confined to a consideration as to whether the proceedings disclose a cause of action*."

27. Further, the court may:

"assess *whether they have been brought without any reasonable ground… or have been habitually and persistently without reasonable ground.*"

28. This test is an objective one according to Auld LJ in *AG v Morrriss* (Queen's Bench Division, unreported, Auld L.J. and Smedley J., 14th April, 1997) where he stated:

"The test is not the state of mind in which the potential subject of the order brings the proceedings, but whether the court, looking at them individually and cumulatively, objectively [sic] regards them as being vexatious in the sense of being brought without any reasonable ground and having been brought habitually and persistently without any reasonable ground.

29. Citing the Canadian case of *Re Lang Michener and Fabian*, High Court of Ontario, (1987) 37 D.L.R. (4th) 685 at 691 in his decision in *Riordan* O'Caoimh J. identified the following as tending to show that a proceeding was vexatious:

"(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;

(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the cost of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

30. The decision of the High Court in *Riordan* was affirmed by the Supreme Court (Keane C.J.) on the 19th of October, 2001.

31. The test as enunciated in *Riordan* was considered by Clarke J. in *Kenny* where he elaborated as follows (para. 2.5):

> *"The test, as identified by Ó Caoimh J. in Riordan, is as to whether, on the basis of the information available at the early stage of an application for leave, it can be said that the proceedings contemplated are frivolous or vexatious. It is also clear, in that context, that it is open to the court to seek to explore, at least to some extent, the basis on which the party would seek to advance their claim with a view to assessing whether any such claim might be regarded as being frivolous or vexatious."*

32. In *Kenny*, the plaintiff instituted proceedings by plenary summons which came within the scope of the *Isaac Wunder Order* granted approximately 2.5 years prior to the proceedings. Clarke J. stated that it would be wholly inappropriate to prevent a party who is the subject of such an order from having an opportunity to persuade the court that new proceedings were contemplated which were not frivolous and vexatious and which should be allowed to proceed. Clarke J. asserted that by preventing a party from having access to the courts, this amounts to *"a significant step*" and that he would take care to afford the Plaintiff every reasonable opportunity to attempt to persuade the court that the claim he wished to put forward was sustainable.

33. A Court in making an *Isaac Wunder Order* and in determining an application for leave to bring further proceedings notwithstanding the existence of an *Isaac Wunder Order* must be mindful of the fundamental importance of the constitutional right of access to the Courts. The purpose and effect of the *Isaac Wunder Order* is not to prevent a party from bringing an otherwise stateable claim. The *Isaac Wunder Order* is not intended and should not operate to prevent such claims. The purpose of the *Isaac Wunder Order* is to protect the court process and persons required to defend wholly unmeritorious proceedings from abuse. Leave should be granted where a basis for a sustainable claim is demonstrated but, where I am satisfied that intended proceedings are merely a further step in a chain of frivolous and vexatious litigation, it is appropriate to refuse leave.

DECISION

34. This case differs from that of *Riordan* and *Kenny* in that the application is moved in proceedings which have already been determined in the High Court. The application does not relate to a new set of proceedings. Accordingly, a fundamental question arises as to whether the High Court retains any jurisdiction to make the order sought in the application for which leave to issue is requested in respect of proceedings which are no longer before the High Court. I note, however, that the Appellant has also intimated that if the making of the order in proceedings which have been finally determined in the High Court presents a difficulty which militates against the grant of leave to apply under s. 97(2)(b) of the 1998 Act, she could simply bring fresh proceedings for the purpose of seeking an order. For this reason and lest I am wrong in my conclusion which is further explained below that the High Court is *functus officio* in the within proceedings, I have decided that it is also appropriate to consider the legal premise for the application under s. 97(2)(b) and the purpose of the application in deciding on whether this is a matter in respect of which leave to issue proceedings ought properly be granted or refused.

Jurisdiction of the High Court - Is the High Court Functus Officio?

35. It is clear from extracts from the transcript furnished with the submissions helpfully provided that Ferriter J. gave the Appellant an opportunity to move an application in relation to section 97(2) of the 1998 Act. As appears from the transcript of the hearing on 22nd of March 2022, the Appellant did not wish to proceed with the motion. Following a number of requests made by the Court as to whether the Appellant wished to proceed with the motion, the Court noted that:

> *"[i]'m going to proceed on the basis that you're not pursuing the application which was the subject of the motion which I've made reference to".*

36. The Appellant appealed the Order of Ferriter J. in dismissing these proceedings and the matter is now firmly within the jurisdiction of the Court of Appeal and the Supreme Court for determination, the High Court having delivered final judgment and orders having been made and perfected. In *Danske Bank AS v. Macken* [2017] IECA 117, Hogan J. outlined the public interest in the finality of a judicial determination as follows (para. 11):

"There is a clear public interest in the finality of a judicial determination, subject only to an appeal. It is, moreover, generally understood and accepted that where a High Court judge has pronounced judgment in a given matter, that judgment is final and the only remedy open to the disappointed litigant is to appeal. This point is so firmly embedded in our system of civil procedure that it is actually difficult to find direct authority on the point."

37. In *U v. Minister for Justice, Equality and Law Reform* [2011] IERHGC [2011] 1 IR 749, Hogan J. again observed that:

"In my view, however, these proceedings are no longer current before me. I accept that the order still remains to be perfected and, as we have noted, the issues of costs and a certificate remain outstanding. But the proceedings so far as they concern the validity of the deportation order have been disposed of by this Court and they cannot be said to be current in any real or meaningful sense. It follows, therefore, that I have no jurisdiction to permit an amendment at this juncture which would bear on the validity of the deportation order given that I am functus officio on that issue."

38. It is clear that once the Order of the High Court was made on the 28th of June, 2022, the High Court was *functus officio*. Given that the High Court is now *functus officio*, the question of leave to adduce new evidence is squarely a matter for the appellate court. While the appellate court has a discretionary power to admit further evidence, such further evidence may be admitted on appeal only where special grounds are advanced and with the leave of the Court. In circumstances where the Appellant wishes to adduce evidence in her appeal which was not before the High Court, the appropriate step is to issue a motion before the Court of Appeal pursuant to Order 86A, Rule 4 of the Rules of the Superior Courts 1986. Although s. 97(2)(b) of the 1998 Act provides in express terms for an application to the Circuit or High Court, both the Court of Appeal and the Supreme Court may on any appeal in civil proceedings exercise or perform all the powers and duties of the High Court below and may make any order which ought to have been given or made and may make any further or other order as the case requires. The effect of the final orders is to bring to an end the proceedings before the High Court. The High Court cannot at this stage properly re-open proceedings which have been finally determined. Even if there were no *Isaac Wunder Order* in place, I could not entertain an application of the type contemplated in respect of proceedings which have concluded. On the

basis that there is an *Isaac Wunder Order*, I am satisfied that I should not grant leave to the Appellant to issue her intended Notice of Motion. I am satisfied that the High Court has no further function in relation to the Appellant's proceedings and that for this reason her intended application should not be entertained by the High Court and cannot succeed.

Did Section 97(2) of the 1998 Act operate to preclude disclosure of information to the Court in these proceedings?

39. Section 97(2) of the 1998 Act which has been prayed in aid by the Appellant in bringing this application provides that no information furnished to, or otherwise acquired by, the Labour Court, the Director General of the Workplace Relations Commission or any other person in the course of or for the purposes of any investigation, mediation or hearing under that part of the 1998 Act shall be published or otherwise disclosed except—

> (*a*) for the purposes of such an investigation, mediation or hearing,
>
> (*b*) on the order of the High Court or the Circuit Court,
>
> (c) with the consent of the person furnishing the information and of any other person to whom the information may relate,
>
> (d) in a decision of the Director General of the Workplace Relations Commission or a determination of the Labour Court which is published or made available under section 89 and to which the disclosure of the information is relevant, or
>
> (e) for the purposes of an application under section 96.

40. It is an offence to disclose information in contravention of s. 97(2).

41. Reading s. 97(2) together with the balance of s. 97, it seems to me that s. 97(2) does not operate to preclude the disclosure of information in court proceedings arising in respect of an investigation, mediation or hearing. Section 97(1) expressly permits the disclosure of information for the purposes of any investigation, mediation or hearing under Part VII of the Act (the Part of the Act which deals with remedies and enforcement) to the Labour Court, the Director, an Equality Mediation Officer or "*any other person entitled to obtain it*". The

statutory right of appeal to the High Court which has been exercised by the Appellant on several occasions (including the appeal in this case and one further appeal which were determined by Ferriter J. by the terms of judgments delivered on 1st of June, 2022) in respect of a decision of the Labour Court, is clearly one such remedy and comes within the ambit of s. 97(1). A party to a hearing under Part VII is permitted to rely on evidence for the purposes of a hearing under "*this Part*". Section 90 (included in the Part) provides for an appeal to the High Court on a point of law. Accordingly, it is unclear what impediment the Appellant apprehended to arise in respect of the evidence she wished to adduce, were it relevant to her proceedings under Part VII of the 1998 Act. Any attempt to abuse s. 97(1) of the 1998 Act by introducing improper material is a matter for the Court hearing the case.

42. On a proper interpretation of the provision, it seems to me that it was never necessary for the Appellant to obtain an order under s. 97(2)(b) of the 1998 Act to introduce affidavit evidence relating to "*assertions that cover up their ongoing discrimination and which degrade and belittle my well-founded complaints against them*" if this evidence was relevant to her proceedings under Part VII of the 1998 Act. The purpose of s. 97(2) of the 1998 Act is to preclude unlawful dissemination of private or confidential information to persons who are not entitled to receive it.

Frivolous and Vexatious and Improper Purpose

43. Quite apart from my view that this court is *functus officio* and my reading of s. 97 of the 1998 Act as not operating to preclude the Appellant from adducing relevant information in proceedings under Part VII of the 1998 Act, I also find it impossible to accept as *bona fide* or well-founded the Appellant's application. I note that the motion dated 15th of July 2022 is vague, unclear and imprecise as to what document is in question. This is significant insofar as it is relevant to the Appellant's *bona fides* in bringing this application late and when the proceedings have already been determined. In her application as presented the Appellant does not identify what information she would wish to disclose and has been prevented from disclosing because of the terms of s. 97 of the 1998 Act. Greater clarity would be expected if this were a *bona fide* attempt to introduce relevant information.

44. Indeed, it appears that the Appellant has not been consistent when corresponding with the parties and the Court in relation to the documentation she seeks to introduce. I note that for her part the Minister had indicated consent to the production in the evidence in proceedings of the material which the Appellant seeks to rely on to obviate the necessity for an application under s. 97(2) of the 1998 Act (albeit in circumstances where the Minister had no knowledge of what the evidence contained) but has sought to pin down what this information is. In response the Appellant appears not to have been willing to clearly identify what information she wished to adduce in evidence and appeared to seek an open or *carte blanche* consent. It is unclear whether consent was sought from the Board but I understand their position to be that the document is not relevant.

45. The within proceedings have no connection to the 2012 or 2009 proceedings but concern an appeal of a Labour Court decision made on the 1st of April 2020. It appears that whatever information the Appellant seeks to adduce was not before the Labour Court. The parties properly stress that the Labour Court decision under challenge in these proceedings could only have been impugned by reference to the evidence and materials that were before that decision maker. As Ferriter J. found in giving *ex tempore* judgment in the Appellant's appeal in March 2022:

> *"it is a well-established principle that one can only rely in an appeal on matters which were before the decision making body from the appeal is sought to be brought."*

46. As set out above, it seems to me that in the context of the appeal herein, the Appellant was entitled to put whatever evidence she deemed appropriate before the Labour Court and then before the High Court on a point of law. It is difficult to see how evidence that was not before the Labour Court could have any relevance. The Appellant was not and would not be permitted to re-litigate a matter that she decided not to appeal in 2012 in the context of other proceedings or which has been finally determined in other proceedings. Accordingly, it has not been demonstrated by the Appellant that the information she seeks leave to introduce in these proceedings has any relevance to this case such that I should permit her to pursue an application, even presuming I had jurisdiction to do so.

47. Further, the timing of the Appellant's application now and her failure to pursue the matter when the cases were before the High Court is not consistent with a genuine litigation purpose. The fact that the Appellant suffers from ill-health as set out in her affidavit cannot explain the failure to pursue any concern she had regarding constraints on her as to evidence she could adduce at a much earlier stage. Indeed, it is clear from the written judgments delivered and the orders drawn in all five sets of proceedings determined by Ferriter J. that the Appellant was given every opportunity to present her case. The cases were listed together for hearing and took several days of court time in March ,2022 as more fully set out by Ferriter J. in his detailed written judgment in the very case in which this application is brought ([2022] IEHC 361). Not only did she have opportunities to file affidavits, but she was also afforded opportunities to prepare written submissions and to make oral submissions.

48. The refusal of the Appellant to pursue her application before Ferriter J. together with her renewed application after the proceedings had concluded and were under appeal seem to me to be consistent only with this application being a tactic deployed to delay finalisation of her cases. The timing of this application and the fact that the Appellant waited until proceedings had concluded and judgment had been delivered to move this application confirms me in my view that the application does not serve a legitimate litigation purpose.

49. Against the background of the Appellant's litigation which has been more fully set out in the judgment delivered by Ferriter J. on the 1st of June, 2022, I am satisfied that the Appellant has engaged in a practice of bringing further actions to determine issues which have already been determined by a court of competent jurisdiction even where it is obvious that an action cannot succeed, or that the action would lead to no possible good. Given that the High Court is now *functus officio* in relation to these proceedings, it is my view that no reasonable person could reasonably expect to obtain the relief sought. The timing of the within application after judgments had been delivered is most consistent with the conclusion that the within application is agitated for the improper purpose of preventing the finalisation of proceedings and not for purposes of the assertion of legitimate interests. When the timing is considered together with the evidence of the Appellant's prior practice as set out in the judgment herein delivered in June 2022, which practice has been demonstrated as being to repeatedly and unsuccessfully seek to re-open issues already determined, I am reinforced in this conclusion.

50. I am satisfied that the intended application in this case is the type of further proceeding which the *Isaac Wunder Order* made by Ferriter J. was designed to prevent. The contemplated application is frivolous and vexatious, with no reasonable prospect of success. I do not consider the Appellant to have a proper litigation purpose in seeking to pursue the motion in the High Court.

CONCLUSION

51. There are many reasons why the Appellant's application for leave should not be entertained but prime among them is the fact that the High Court is *functus officio*. The appeal which was before the High Court in these proceedings concerned an appeal on a point of law against a Labour Court decision whereby the High Court reviewed the evidence and material that was before the decision maker when making its decision. The High Court afforded the Appellant an opportunity to move a motion to adduce certain evidence, but she declined to do so. She cannot properly now seek to re-litigate the same motion. In any event, evidence that the Appellant sought to introduce before an Equality Officer in 2012 or seeks to introduce now in relation to a complaint which has finally determined for more than a decade is in any event wholly irrelevant to the appeal on a point of law in respect of a decision of another administrative body which is the subject of these proceedings.

52. Orders made by Ferriter J. dismissing these proceedings are now under appeal and the Appellant has issued a similar motion before the Court of Appeal. In circumstances where the within proceedings have concluded in the High Court but appeals are pending to the Court of Appeal and Supreme Court, any question as to leave to admit further or new evidence falls properly to be determined by those courts and is not a matter for the High Court on an application under s. 97(2)(b).

53. For all of the reasons set out above, I refuse the within application for leave to issue a motion seeking an order pursuant to s. 97(2)(b) of the 1998 Act.