THE HIGH COURT

[2023] IEHC 761

[Record No. 2023 / 131/ IA]

BETWEEN:

DEIRDRE MORGAN

APPLICANT

AND

THE HIGH COURT

RESPONDENT

RULING (NO. 2) OF Ms. Justice Siobhán Phelan, delivered on the 31st of July, 2023 on an Isaac Wunder application.

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 leave to proceed by way of judicial review in respect of orders made by the High Court in 2022.

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.

3. This is the second application for leave to proceed in accordance with the terms of the *Isaac Wunder* Order that I have been required to consider. In March of this year, I ruled on the Applicant's application for leave to apply for an order pursuant to s. 97(2)(b) of the Employment Equality Act, 1998 (as amended). My ruling on that application bears neutral citation [2023] IEHC 122.

BACKGROUND

4. The background to the Applicant's litigation involving the Kildare and Wicklow Education and Training Board [hereinafter "the Board"] and the Minister for Education and Skills [hereinafter "the Minister"] and the previous judgments of the High Court together with the principles which govern an application of this nature are set out in my previous ruling and I do not propose to repeat them here but refer to my previous ruling for same.

5. Since my ruling in March, 2023 less than four months ago, it appears that the Applicant's appeal has been heard before the Court of Appeal (decision pending) and a determination refusing her leave to appeal has been made by the Supreme Court ([2023] IESCDET 48). The long background to the Applicant's proceedings arising from her employment was succinctly summarised by the Supreme Court in its Determination refusing leave to appeal. Specifically, the Supreme Court note that on the 20th of August, 2010 the Applicant made a complaint of sexual harassment against a student in her school to her employer, the VEC (now the Board) which sought further information which was not provided. The VEC notified the Applicant that they wished to conduct a risk assessment and she was excused from her duties with immediate effect, which was stated to be solely in the interests of personal health and safety.

6. The Supreme Court further record that the Applicant's complaint of sexual harassment was withdrawn on the 15th of November, 2010, a finding which the Applicant disputes in her oral submissions on this application, it being her position before me that her complaint was *res integra*. She maintains that the withdrawal of an appeal by her did not amount to a withdrawal of the allegation.

7. In their summary of the background, the Supreme Court record that a result of the investigator's report into the matter, the VEC wrote to the Applicant stating that it was considering instituting disciplinary proceedings against her arising out of the matters reported. At that point, the Applicant lodged a complaint with the Rights Commissioner under s. 27 of the Health, Safety and Welfare at Work Act, 2005 contending that she had been penalised because she did certain protected acts. The Rights Commissioner dismissed the complaints. The Applicant then appealed that decision to the Labour Court. The matter came before the Labour Court in 2012 and was adjourned. Seven years later in 2019, the Applicant sought to

re-enter the hearing of her appeal before the Labour Court, and despite objection by the employer, she was permitted to do so by the Labour Court.

8. As noted by the Supreme Court in their summary of the background for the purpose of their Determination, after an oral hearing, the Labour Court in turn upheld the Rights Commissioner's decision dismissing the complaint. The Applicant then appealed the Labour Court's decision to the High Court, pursuant to s. 46 of the Workplace Relations Act, 2015 which permits an appeal to the High Court on a point of law and furthermore, provides that the decision of the High Court in relation thereto shall be final and conclusive.

9. On the 22nd of March, 2022 Ferriter J. delivered a judgment dismissing the appeal holding that there was no point of law arising from the appeal and consequently there had been no error of law on the part of the Labour Court. He also dismissed several other separate applications as more fully set out in the individual judgments he delivered and identified by reference to their citation numbers in my previous ruling [2023] IEHC 122.

10. It is against this background that the Applicant now seeks to challenge an earlier judgment of the High Court on a statutory appeal. Even though she has been refused leave to appeal by the Supreme Court against the findings of the High Court and her several appeals have been heard by the Court of Appeal, she now seeks to proceed by way of judicial review based on an asserted unfairness in the process adopted by that Court. This application is made on notice to the Board and the Minister. The Chief State Solicitor's office maintained a watching brief on the application and the Board elected not to participate during the hearing which occurred with the assistance of remote technology on the 31st of July, 2023.

INTENDED PROCEEDINGS

11. Once an *Isaac Wunder* Order has been made, a litigant will not be permitted to institute proceedings against the same defendant without the leave of the court. The Appellant maintains that her intended proceedings are not covered by the said order because they are proposed against the High Court and not the Minister or the Board. The fallacy of this contention is manifest, however, from the Affidavit filed to ground this application and the draft Statement of Grounds provided. It is the judgment made in the case involving the Minister

and the Board which the Applicant seeks to revisit making it undeniable that the *Isaac Wunder* order applies to this application.

12. Broadly summarised the Applicant contends that the earlier decision of the High Court (Ferriter J.) was taken in breach of fair procedures because:

a. An email (characterised by the Applicant as a "submission") advising the Court that there had been compliance with the order of the Equality Tribunal directing payment to the Appellant in the sum of €500 had not been brought to her attention and she was not afforded an opportunity to reply to point out that she did not receive the payment because she was in hospital when it was sent, and it was sent to her home address. She was also denied the opportunity to point out that the cheque came from the Respondent's solicitor and not the Respondent and was therefore not in compliance with the order made. She further quibbles with wording used in the letter sending the cheque because she contends that it is in breach of a direction that further reference to a previous complaint should not be made in the disciplinary process; and

b. A new finding made in the judgment of the High Court (and adopted by the Supreme Court in their Determination) to the effect that the Appellant had withdrawn her sexual harassment complaint in November, 2010. She maintains that she was denied an opportunity to address this as the judge said that if she had an issue with the ruling she could "*address that elsewhere*" but as the decision on a statutory appeal is final and conclusive and the Supreme Court has refused her leave to appeal, she has been deprived of this opportunity.

13. Even though I have already refused the Applicant's application for an order under s. 97 of the Employment Equality Act, 1998 (As amended) in my previous ruling in March, 2023 and my understanding that this application was also made to the Court of Appeal, the Applicant seeks to renew this application in her intended proceedings by way of judicial review albeit it is not set out as one of the two primary bases for her application. She did not press this application in her oral arguments.

DISCUSSION AND DECISION

14. Having read the papers grounding this intended application and heard submissions from the Applicant attending remotely, I am satisfied that this application is frivolous and vexatious and arises from the Applicant's refusal to accept the final orders made against her in long running litigation. I have previously found that the High Court is *functus officio* in respect of issues with the Board and the Minister for Education arising in the proceedings already determined. I remain persuaded that this is so.

15. The Applicant has been aware that the High Court Judge considered the award in the victimisation claim to be satisfied based on communication received by him to this effect for a considerable period as he said so in his written judgment. Similarly, she is aware of a finding that she withdrew her sexual harassment claim since judgment was delivered in the High Court. She refers me to a court transcript regarding her objections to same and the judge's direction that she addresses any issues with his rulings elsewhere. By this the judge was referring to the appellate courts. As noted above, I am aware that the Applicant did in fact pursue several appeals and sought leave from the appellate courts to adduce further information. The Appellant could have sought to raise either of the issues she agitates on this application in her several appeals, including her application for leave to appeal to the Supreme Court. It is not clear to me whether she did in fact do so but what is relevant for my purposes is that she had the opportunity to do so.

16. I note the Applicant's reliance on a decision of the Supreme Court in respect of a school transport scheme (*Student Transport Scheme Ltd. v. Minister for Skills and Education* [2021] IESC 22 and subsequent judgment on 14th of June, 2021 for which no neutral citation appears on the face of the judgment). In that case Clarke C.J. said that what was really sought by the appellant was an opportunity to rerun a different case before the Supreme Court from that which had failed before the lower courts and that such a course of action is not permissible. He did not consider that the material put forward suggested that the Court of Appeal had been wrong in the conclusions reached when dismissing the appeal. Clarke J. referred to the very high threshold which applies to a party seeking to set aside a final order. Such a threshold might be met in a case where a party can demonstrate a clear and significant breach of fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice in the way the process leading to the determination was conducted.

17. In rejecting the so-called "*Greendale*" application (named after the decision in *Re Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514), Clarke CJ ruled that general accusations concerning the way in which the proceedings were conducted before the lower courts do not give rise to the proper exercise of the relevant jurisdiction in respect of a final order, judgment of determination of the Supreme Court. He further said that if there is a jurisdiction to set aside proceedings on grounds that a State authority allegedly failed to conduct those proceedings in a transparent manner and he considered there to be a "*significant doubt*" as to whether such a jurisdiction existed, an attempt to invoke such jurisdiction must be pursued by plenary proceedings.

18. The Applicant has not identified any material which demonstrates a clear and significant breach of fundamental constitutional rights of a party, going to the very root of fair and constitutional administration of justice in the way the process leading to the determination was conducted. She has had multiple hearings before the High Court and was afforded every opportunity to make submissions (both orally and in writing) by the High Court when hearing each of several substantive actions. In her oral submissions to me on this application she acknowledges that she did withdraw an appeal in which her complaint of sexual harassment was rehearsed. While her submissions to me seem contradictory, the height of the case she can make in view of this concession is that there is some confusion in the Applicant's mind as to whether this meant her complaint remained to be determined or had been abandoned by her. The Applicant had every opportunity to make the case that she had not withdrawn the application during protracted hearings before the High Court (Ferriter J.) and on appeal. She has also had opportunity to make whatever case she wished to make with reference to the conclusion that the award made by the Equality Tribunal was satisfied, a conclusion she now disputes as factually incorrect.

19. It is important to note, as the Supreme Court does in its decisions in the School Transport Scheme case that Art. 34.5.6 of the Constitution gives rise to two separate but interlinked and complementary requirements. The first is the principle of finality. It is clear both from the text of that article, and from the analysis contained in the judgments in cases such as *Greendale* and *Bula* (Bula Ltd. v. Tara Mines Ltd. (No. 6) [2000] 4 I.R. 412) and the *Student Transport Scheme* cases themselves, that the Constitution affords very high weight to finality as a matter of principle. Thus, as Clarke J. observed in the *Student Transport Scheme*

case, ignoring or watering down the concept of finality would be a breach of a significant constitutional principle. The second is that the Constitution also gives a derived right to a person who has the benefit of a final decision of this Court. Such a person may be a plaintiff or applicant who has succeeded and has the benefit of an appropriate court order or may be a defendant or respondent who has persuaded the courts that the claim brought against them is unmeritorious. In either case, a person having the benefit of a beneficial final order of this Court is entitled, as a matter of constitutional law, to a strong presumption that the proceedings (and the issues raised in them) are at an end. Indeed, as Clarke CJ also found in the *Student Transport Scheme* case, there is a sense in which an unsuccessful *Greendale* motion operates as a breach of that derived right.

20. Furthermore, as I recently found in *Gogova v. Residential Tenancies Tribunal* [2023] IEHC 449, it is not open to an Applicant to pursue an application by way of judicial review before one High Court Judge in respect of an alleged procedural unfairness in a court of the same jurisdiction. A remedy by way of judicial review is not available in respect of the procedures adopted in the High Court. Irrespective of the terms of the *Isaac Wunder* Order and were this a normal application for leave to proceed by way of judicial review I would be obliged to refuse the application in any event. I am satisfied that the Applicant does not make an arguable case for relief by way of judicial review in respect of the decision of Ferriter J. In this regard, I note that the Applicant wished to move this application before Ferriter J. and not me, but it is manifestly clear that even if the High Court could entertain a judicial review in respect of a High Court decision, which it cannot, a Judge cannot judicially review his own decision.

21. Against the background of the Applicant's litigation (more fully set out in the judgment delivered by Ferriter J. on the 1st of June, 2022) and in view of the applicable legal principles identified by me in my ruling on the Applicant's previous application in March, 2023 bearing neutral citation [2023] IEHC 122, I must refuse leave to make the intended application. 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. As previously, I am satisfied that the within application is agitated for the improper purpose of preventing the

finalisation of proceedings taken against the Board and the Minister by the Applicant and not for purposes of the assertion of legitimate interests.

22. 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 and which I previously ruled demonstrated a practice of seeking to re-open issues already determined repeatedly and unsuccessfully, I am driven to conclude that this application is yet a further misguided attempt as part of an established pattern of behaviour. I am quite satisfied that the matters which the Applicant now seeks to agitate in fresh judicial review proceedings are not matters that can be revisited before the High Court where final judgment has been given and the matters have proceeded on appeal to a final determination. The high threshold for a successful *Greendale* application is manifestly not met and should not, in any event, be entertained in judicial review proceedings.

23. 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. However, for completeness and the avoidance of any doubt, I wish to make clear that even if there were no *Isaac Wunder* Order in place and even if the proceedings were not entirely misconceived as being against the High Court, I would refuse an application for leave to proceed by way of judicial review on an application of the test set out by the Supreme Court in its decision in *G v Director of Public Prosecutions* [1994] 1 I.R. 374.

24. In *G v Director of Public Prosecutions* Finlay C.J., with whom the other two judges agreed, required, *inter alia*, that an applicant for leave set out facts averred by affidavit which would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review and that on these facts an arguable case in law can be made that the applicant is entitled to the relief which she seeks. The aim of the leave application is to effect a screening process of litigation against public authorities and officers so as to prevent an abuse of the process or trivial or un-stateable cases proceeding, thus impeding public authorities unnecessarily. It is intended as a preliminary filtering process for which the Applicant is required to establish a *prima facie* case. For a prima facie case to be established, it must be arguable. As set out in *O.O. v Min for Justice* [2015] IESC 26 a point of law is only arguable

if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. For an applicant for leave to commence judicial review proceedings with the leave of the Court he or she must demonstrate that an argument can be made which indicates that the argument is not empty. The Applicant would fail this test on the material she has placed before the Court on this intended application were I to consider myself free to deal with it. A cheque from a solicitor on behalf of a client cannot be said to constitute a breach of the Tribunal order and the case made in this regard is untenable. Words in a solicitor's letter accompanying that cheque are not words in a disciplinary process. The place to agitate against any unsupported factual findings or the process by which they were arrived at by a judge after final orders have been made is on appeal. A remedy does not lie by way of judicial review.

CONCLUSION

25. I am satisfied that giving the Applicant leave to proceed to seek leave in judicial review proceedings on the basis she contends for on this application would constitute a breach of the Minister's and the Board's rights to finality protected under the Constitution. It would also transgress the constitutional order, comity of and hierarchy of the Courts where matters have proceeded to final determination in the High Court and have gone on appeal to the Court of Appeal and the Supreme Court. The intended application lacks any merit.

26. For all the reasons set out, this application is hereby refused.