[2025] IEHC 7

THE HIGH COURT

RECORD NO. [2010/6926P]

BETWEEN

ION LAZARENCO

PLAINTIFF

AND

BUS ÁTHA CLIATH – DUBLIN BUS

DEFENDANT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 9th day of January, 2025

1. This judgment concerns an application by the defendant brought by notice of motion dated the 27 March 2023. The proceedings are a personal injuries action which were commenced on the 20 July 2010. The proceedings concern matters that are alleged to have occurred between 2005 and 2008, during the time when the plaintiff was a bus driver employed by the defendant. The defendant seeks orders (a) pursuant to O. 19 r. 27 striking out part of the plaintiffs claim as against the defendant because the claim previously was made before the Equality Tribunal, and (b) pursuant to O. 122 r. 11 dismissing the plaintiff's claim for want of prosecution.

2. In the personal injuries summons, the plaintiff complains of two specific incidents, on the 28 May 2008 and the 26 November 2008, in which he claims to have sustained personal

injuries. The first incident arose from an attempt to carry out repairs to a panel on the back of the bus, when he slipped and injured himself. The second incident involved a situation where the plaintiff was attempting to deal with aggressive and unruly passengers who then assaulted him.

3. In addition to those two discrete incidents, the plaintiff also alleges that between August 2005 and August 2009 he was subjected to a number of incidents of racial abuse, racial discrimination, discrimination and unfavourable treatment generally amounting to harassment and bullying. The personal injuries summons describes approximately ten incidents during the period in question. While many of the incidents involve different personnel within Dublin Bus, it would be fair to say that a large number involve, either directly or indirectly, his then manager. I will describe that manager as "Mr. S". As will be explained, the defendant has asserted that Mr. S, who is not a party to the proceedings, is elderly and suffers from a number of medical issues and this is the primary reason why they say that the balance of justice favours striking out the proceedings.

4. The plaintiff was authorised to issue the proceedings by the Personal Injuries Assessment Board on the 15 September 2009 and the personal injuries summons is dated the 20 July 2010. It should be noted that at para. 11 of the personal injuries summons, the plaintiff also notes that *"the plaintiff has also referred the incidents of racial abuse and discrimination, unfavourable treatment, bullying and harassment to the Equality Tribunal and these proceedings are brought without prejudice to such referral."*

CHRONOLOGY

5. The following is a chronology of the events involved in the case.

2005 to 2009	The incidents alleged to give rise to the proceedings.
15 September 2009	PIAB authorisation issued.
20 July 2010	The plaintiff issues a personal injuries summons.
10 August 2010	The defendant enters an appearance.
23 September 2010	The defendant serves a notice for particulars.
26 October 2010	The plaintiff serves replies to particulars.
12 November 2010	The defendant serves notice of change of name of solicitor.
11 January 2011	The defendant delivers its defence.
24 March 2011	The defendant files an affidavit of verification for the defence.
11 April 2011	The plaintiff files his affidavit of verification for the personal injuries summons.
23 May 2014	Plaintiff serves request for voluntary discovery.
30 June 2014	Plaintiff serves notice for particulars.
8 October 2014	Plaintiff issues notice of motion seeking discovery.
17 November 2014	Defendant provides replies to particulars.
17 November 2014	Order for discovery made.
21 September 2015	Plaintiff issues notice of motion to strike out the defence for failing to comply with discovery.
4 November 2015	Defendant provides affidavit of discovery.
11 December 2015	Plaintiff's motion is struck out with costs.
5 December 2016	Notice to produce served by plaintiff.

5 December 2016	Notice of trial served by plaintiff.
6 December 2016	Correspondence seeking plaintiff's medical file
14 September 2017	Plaintiff serves notice for particulars and request for inspection.
12 February 2018	Plaintiff's motion to compel replies.
12 March 2018	Order compelling replies.
15 March 2018	Defendant serves replies.
17 May 2018	Plaintiff writes asking for mediation – no reply by defendant.
25 October 2018	Plaintiff writes asking for mediation – no reply by defendant.
13 November 2018	Plaintiff issues motion for discovery re medical file.
13 November 2018	Plaintiff issues motion for inspection.
13 December 2018	Order made by Master of High Court for inspection.
21 January 2019	Order for discovery re medical file.
8 February 2019	Joint inspection carried out by engineers.
20 March 2019	Defendant serves affidavit of discovery re medical file.
25 October 2019	Plaintiff writes asking for mediation.
18 December 2019	Plaintiff writes asking for mediation.
19 August 2020	Plaintiff writes asking for mediation.
28 May 2021	Defendant writes refusing mediation.
22 December 2022	Plaintiff serves schedule of witnesses and reports.
29 March 2023	Plaintiff issues a motion to strike out the defence for failing to comply with S.I. 391/1998.
17 April 2023	Defendant issues motion to strike out plaintiffs claim.

THE CURRENT APPLICATION

6. The defendant's application was grounded on an affidavit sworn on the 30 March 2023 by Mr. Hugh Hannon, a solicitor for the defendant. In his affidavit, Mr. Hannon avers that by that point over seventeen years had passed since the date when the first incident of bullying and associated behaviour allegedly occurred, and he stated that many of the alleged perpetrators *"have long retired from the defendant's employment, some are in poor health and it has not yet been ascertained if all are alive."*

7. The affidavit goes on to describe the fact that proceedings were instituted by the plaintiff relating to his claims of bullying and harassment before the Equality Tribunal. Mr. Hannon states that the matter was part heard by the Tribunal on the 21 March 2012. It was listed for a further three days of hearings commencing on the 22 May 2012, but the plaintiff's solicitor withdrew the claim in its entirety without prejudice to any other proceedings against the defendant. In that regard Mr. Hannon exhibited a letter dated the 22 May 2012 from the Equality Tribunal in which the Equality Officer states that the plaintiff's legal representative has confirmed that her client had decided to withdraw his complaint from the Tribunal. As a result, the Tribunal considered the matter concluded, the case file was closed and no further action was to be taken. By reference to the terms, according to Mr. Hannon's affidavit, of s. 101 of the Employment Equality Act, 1998 as amended, this meant that the plaintiff was not entitled to maintain this bullying and harassment claims in the personal injuries proceedings and therefore the only matters that should properly be before the court are the two allegations of harm causing personal injuries which dated from the 26 May 2008 and the 26 November 2008.

8. Mr. Hannon then states that the entire proceedings should be struck out in any event because of the inordinate and inexcusable delay in prosecuting the case which he stated resulted in *"severe disadvantage to the Defendant in calling witnesses to defend its position and refute allegations made by the Plaintiff."* Aside from those averments, which are set out in very terse terms in a nine-paragraph affidavit, Mr. Hannon provides no further detail to assist the court in its adjudication on this motion. On its own, the grounding affidavit does not reach the threshold of proof required to strike out a claim for reasons of delay.

9. Mr. Hannon's affidavit was replied to by an affidavit sworn by the solicitor acting for the plaintiff, Mr. Brian Robinson, which was sworn on the 13 February 2024. Mr. Robinson makes the argument that the plaintiff had served a schedule of witnesses and expert reports on the defendant's solicitors in December 2022 and that the defendant's motion was issued in response to the plaintiff's consequent notice of motion dated the 23 March 2023 seeking to strike out the defendant's defence by reason of the failure of the defendant to comply with the provisions of S.I. no. 391/1998. Mr Robinson complains that this is the latest in a long sequence of incidents in the proceedings where the defendant has chosen to ignore correspondence and failed to fulfil its obligations under the Rules of the Superior Courts. Mr. Robinson asserts that the defendant itself has been guilty of repeated and unexplained delays in discharging its obligations.

10. Mr. Robinson then describes a series of matters that arose in the conduct of the case which, he says, constitutes the basis upon which the court ought to refuse the application.

11. In relation to discovery, Mr. Robinson states that the plaintiff first sought voluntary discovery on the 23 May 2014. Despite several written reminders the defendant did not agree

to make discovery, and it was necessary to issue a notice of motion on the 9 October 2014. An order was made by the High Court on the 17 November 2014 directing the defendant to make discovery within twelve weeks, on or before the 9 February 2015. The defendant failed to make the discovery and after several written reminders it was necessary to issue a motion to strike out the defence for failing to comply with the discovery order, leading to a position where the defendant's affidavit ultimately was only sworn on the 4 November 2015, nine months after the time specified in the order.

12. Mr. Robinson then goes on to complain that the plaintiff considered the discovery furnished by the defendant to be defective. In that regard he wrote on the 6 December 2016 (over a year after receipt of discovery) identifying what he considered to be the difficulties with the discovery. There was correspondence between the parties which did not reach an agreement and the plaintiff issued a motion for further and better discovery on the 13 November 2018. An order was made on the 19 January 2019, and the defendant belatedly complied with that order by making discovery on the 28 March 2019. Mr. Robinson points out that that was two years and three months after discovery was first requested.

13. In addition, Mr. Robinson describes a difficulty that arose in relation to the inspection of the bus which had been the subject of the incident in May 2008. On the 14 September 2017 the plaintiff solicitors sought inspection facilities in relation to the bus. There was no response to the request and reminders, and a further motion issued on behalf of the plaintiff on the 13 November 2018. An order was made by the Master of the High Court on the 13 December 2018 and the inspection was to occur on the 8 February 2019. On the 5 February 2019, the defendant's solicitors wrote to inform the plaintiff that the bus in question had been disposed of in March 2010 and that all similar type buses had been disposed by the defendant in

September 2011. In those premises, inspection facilities were arranged in relation to another type of bus. The plaintiff complains that this information was only disclosed seventeen months after the written request seeking inspection which was first made on the 14 September 2017.

14. Mr. Robinson also complains about the approach of the defendant to providing particulars. In that regard on the 30 June 2014 the plaintiff had issued a notice for particulars. The plaintiff's solicitor considers that this was only partially replied to on the 17 November 2014 and despite a letter sent on the 14 September 2017 (nearly three years later) it was necessary to issue a motion to compel replies to particulars on the 12 February 2018. The replies sought eventually were provided on the 15 March 2018.

15. Mr. Robinson also complains about the failure of the defendant to reply to letters seeking mediation, an issue that was raised first by the plaintiff's solicitor on the 17 May 2018, and in respect of which the defendants only replied substantively on the 28 May 2021 when they stated that they would not engage in mediation. Mr. Robinson states that there are least 30 instances of letters sent by his firm to the defendant's solicitors which were not replied to.

16. In relation to the complaint about the submission of a complaint to the Equality Tribunal, Mr. Robinson states that the defence, which was delivered on the 11 January 2011, makes no reference whatsoever to the claim before the Equality Tribunal or otherwise seeks to impugn the efforts of the plaintiff to raise the issue in these proceedings.

17. In relation to the question of balance of justice or the question of prejudice, Mr. Robinson (correctly in my view) observed that Mr. Hannon had not identified any particular prejudice. He also complained that Mr. Hannon did not explain why in correspondence dated

the 28 May 2021 the defendant indicated *"that the only way to proceed with this case now is to ask the Court to allow the case to proceed directly to the hearing"* but then proceeded to issue the motion herein.

18. Following Mr. Robinson's affidavit, a further affidavit was sworn by Mr. Hannon on the 15 March 2024. In this affidavit, in response to the claim that the defendant's motion herein was brought strategically in response to an application initiated by the plaintiff, Mr. Hannon avers that prior to receiving the plaintiff's notice of motion he had already instructed counsel to prepare the papers leading to this application, and he exhibits correspondence to demonstrate that fact.

19. In relation to the difficulties concerning discovery, he noted that the main outstanding issue in discovery related to obtaining the plaintiff's medical file from the chief medical officer of CIÉ. The delay, according to Mr. Hannon, was caused by the inaction on the plaintiff's side in failing to provide a signed authority in proper format which would allow the chief medical officer to release the files.

20. With regard to the question of inspection, Mr. Hannon points out that the first request for an inspection was made some nine years after the alleged accident. In relation to the delay that occurred in failing to reply to the correspondence which was sent on the 14 September 2017, the solicitor who at the time was dealing with the file was out of the office dealing with illness.

21. With regard to the issuing of replies to the notice for particulars, Mr. Hannon noted that there was a delay between November 2014 and September 2017 on the part of the plaintiff in

seeking further details or further and better particulars on foot of the responses that initially were provided. However, no explanation is given for the delay between the 14 September 2017 when those particulars were sought and the reply to the notice for particulars being delivered on the 15 May 2018.

22. Similarly, no real explanation is given regarding the failure to respond to the letter seeking mediation save that when Mr. Hannon took over the file in 2021 and sought instructions it became apparent that mediation was not a proper route for the case as far as his client was concerned.

23. The remainder of his affidavit was directed towards the question of prejudice. In that regard, Mr. Hannon places emphasises on the position of Mr. S who was the plaintiff's manager at that time. According to Mr. Hannon, Mr. S transferred to Irish Rail in 2012 and *"arising out of a period of sick leave was ultimately, following the exhaustion of a sick leave entitlements, approved by the Chief Medical Officer for an Income Continuance Scheme which began payments in 2022. The Income Continuance Scheme is operated by an insurance company whose own medical adviser must approve an applicant for income continuance payments. I emailed the CMO of Iarnrod Eireann to ask her if she would furnish advice in relation to Mr.*[S]*'s condition and I advised her that this was in respect of a possible High Court hearing."*

24. He then exhibits the correspondence received from Dr. McCarthy, the CMO of Iarnód Éireann, and states that it appears from that advice that *"Mr.* [S] *suffers from two serious health conditions. One impacts upon his stamina, speech, motor (gross and fine), mobility and cognitive skills and is exacerbated by stress. The other involves treatment which has adversely affected his ability to communicate."* Mr. Hannon notes that Dr. McCarthy states that Mr. S is

likely to struggle both physically and psychologically with participation in court proceedings. Following on from that Mr. Hannon states that it was evident that Mr. S's ability to give evidence has been seriously compromised.

25. He then goes on to note that of the ten Dublin Bus employees against whom the plaintiff has made allegations and one additional necessary witness, just three remain working at Dublin Bus. He notes that one of the identified employees left the company in 2007 and his current whereabouts are unknown. Another two employees retired in 2009 at the normal retirement age of 65 and that they are both aged about 80 years old and, so far, are not contactable. He states that he has been advised by human resource managers at Dublin Bus that efforts are still ongoing to ascertain the whereabouts or circumstances of the other named employees in the company. As discussed later, Mr. Hannon does not explain when the defendant started the process of tracing witnesses, and the inference is that this occurred in or around 2023.

26. In relation to the position of Mr. S, he exhibited a letter dated the 8 March 2024 from the Chief Medical Officer of Iarnód Éireann. That letter was the subject of commentary from counsel for the plaintiff, who identified a number of asserted deficits in the letter. According to that analysis, when the letter is considered, it is striking that insofar as a neurological condition is identified which is said to affect Mr. S's cognitive skills, those matters are not described and no detail is provided, and there is no mention of any difficulties with his memory. It is also noted that the Chief Medical Officer is not the treating doctor. According to the plaintiff's counsel, there is no clarity as to the full implications of the ailments affecting Mr. S.

27. It seems to me that what is clear from the report is that Iarnód Éireann is satisfied that Mr. S has two serious underlying health complaints. The first is a chronic progressive

degenerative neurological condition which affects him in a number of ways, and he remains under specialist hospital care and treatment and has not stabilised. Secondly, he is under regular active surveillance for a separate serious health complaint – albeit also not identified – but where it is stated that the treatment provided for the condition has also impacted on his physical ability to communicate. A general observation is made by Dr. McCarthy that people with Mr. S's neurological condition experience higher levels of stress response and that the stress response causes a deterioration in the motor and non-motor symptoms of their disease. While the letter does not state in clear terms that Mr. S would be unable to participate in court proceedings it does conclude with the observation that *"Mr.* [S] *is likely to struggle both physically and psychologically with the process. He has difficulties with communication/speech."* However, there is no suggestion that his memory is impaired, or significantly, that his recollection of the events described by the plaintiff is impaired.

28. Arising from the foregoing, the plaintiff's argument was that this evidence is suggestive that from the prospective of the defendant a trial would be more difficult but certainly not impossible, and that arrangements always can be made to ensure that hearings are structured in a way that assist a witness who has medical complaints.

THE EQUALITY TRIBUNAL ARGUMENT

29. As noted above, the court has been provided with very little material regarding this claim. There was no substantive evidence from any person on behalf of the defendant who played an actual role in that proceeding. The court was not shown any pleadings or materials prepared for that claim. The most that was put before the court in respect of this matter was the

letter referred to above from the Equality Officer in which the defendant was informed that the claim was being withdrawn.

30. In its written submissions, the defendant stated that it was no longer relying on section 101 of the Employment Equality Act 1998 as amended, but instead was making a *Henderson v. Henderson* abuse of process type assertion. Over and above the fact that, as pointed out by the plaintiff, the abuse of process claim was not raised by the defendant between the service of the personal injuries summons and the issue of this motion, I consider that this argument cannot succeed on the state of the evidence before the court in this application.

31. It is true that, subject to the considerations identified by the Court of Appeal in *Culkin v. Sligo County Council* [2017] 2 IR 326, it is potentially arguable that a plaintiff cannot pursue essentially the same claims in a statutory adjudication and a later set of court proceedings. However, this application is not concerned with the theoretical basis for such an argument, but with the evidential issues that must ground any such application.

32. As noted by the Supreme Court in *Munnelly v Hassett* [2023] IESC 29, the usual approach to such a claim involves two phases. The first phase requires the court to conduct "*as forensic an exercise as possible to determine what was pleaded and determined in the first set of proceedings, what could have been raised in those proceedings, and what has been raised in the subsequent proceedings. This should involve a precise, and if necessary rigorous analysis of the pleadings and order of the Court."* The difficulty here is that the court is not able to conduct the necessary first phase of the required analysis. It is not at all clear what was pleaded, and there was no determination of the claim as it was withdrawn. The defendant simply has not put sufficient material before the court to allow me to conduct the type of

forensic exercise identified by the Supreme Court. In the premises, I will not strike out the plaintiff's claim or part of the claim on that basis. This leads to the more substantive delay issues.

DELAY ISSUES

33. The legal principles to be applied in matters of this nature are well established at a general level. As discussed in more detail below, the general principles have been discussed and addressed in many cases subsequent to *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459. Nevertheless, the essential gravamen remains that the burden is on the defendant to establish all three limbs of the test set out in *Primor*, which can be summarised as follows:

a. The defendants must establish that the delay on the part of the plaintiff in prosecuting the claim has been inordinate.

b. If that is established, the defendants must establish that the delay has been inexcusable.

c. If it is established that the delay has been both inordinate and inexcusable, the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the case proceeding.

34. This application primarily engages the limb of the *Primor* test concerning the balance of justice. A number of aspects of that limb have been considered by the Court of Appeal in recent years. For the purposes of this application two matters were particularly important: (a) the precise nature of the prejudice that could lead to a decision to strike out proceedings, and (b) how to take account, in that regard, of issues caused by the defendant's own conduct.

35. In *Beggan v. Deegan & Others* [2024] IECA 4 (*Beggan*), the Court of Appeal considered the proposition derived from *Primor* that moderate prejudice may suffice to dismiss a claim even if a fair trial is still possible. In that regard, Noonan J observed:

> "*18. … It seems clear therefore, that under Primor, a case may be dismissed even though a fair trial is still possible. One would have thought that for a plaintiff to suffer the draconian remedy of having their case dismissed, notwithstanding that a fair trial is still available, the level of prejudice suffered by the defendant as a result of delay, even if described as "moderate", must be significant enough to make it unfair to the defendant for a trial to proceed.*
>
> *19. This is recognised in Primor where Hamilton C.J. held that one of the factors relevant to the assessment of the balance of justice was "whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action." As Collins J. put it in Cave, proceedings should not be dismissed unless it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant – at p. 37.*
>
> *20. Of the types of prejudice that may suffice, clearly fair trial prejudice is the most important. Thus, a defendant may not be able to establish a real risk of an unfair trial, but nonetheless show that it has become more difficult to defend the claim and it would be unfair to ask the defendant to bear that additional burden, a burden caused by the plaintiff's default."* [emphasis added]

36. The Court in *Beggan* noted that aside from specific prejudice caused by issues such as the unavailability of witnesses, general prejudice can flow from delay. An important consideration was the effect of delay on the memories of potential witnesses, and that this

generalised prejudice can take on particular significance in a case that is likely to be dependent on oral evidence of recollection.

37. In terms of the treatment of issues that in and of themselves may not lead to a prospect of an unfair trial, they remain factors that can and should be placed on the scales. Ultimately, what has to be shown is that when all relevant factors are considered and weighed the court should be satisfied that the defendant has established sufficient prejudice "*make it unfair to call on the defendant to meet the case at trial. If such unfairness is not established, it is difficult to see how the balance of justice could favour dismissal*." (see para 25 of *Beggan*).

38. The second issue is the question of the defendant's conduct. The point made by the Court of Appeal in *Beggan* is that while it may be unfair to visit the consequences of a plaintiff's delay on the defendant, it is not necessarily unfair to ask the defendant to bear the consequences of its own delay. At paragraphs 26 onwards in his judgment, Noonan J considered cases such as *Flynn v Minister for Justice* [2017] IECA 178, *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2012] IESC 50, *Cave Projects v. Kelly* [2022] IECA 245 and *McCarthy v The Commissioner of An Garda Síochána and Ors* [2023] IECA 224. These were relied upon in considering the variety of ways in which the defendant can be held responsible – or required to share responsibility – for delay.

39. The situation is not restricted to what can be described as '*procedurally culpable delay*' but includes acquiescence and implicit encouragement. Litigation is a '*two way street*' and the defendant can take on a risk by deciding to '*let sleeping dogs lie*'. As Collins J. in put it in *Cave Projects* (at para. 36):

> "*The authorities increasingly emphasise that defendants also bear a responsibility in terms of ensuring the timely progress of litigation: see, for instance, the decision of the Supreme Court in [Comcast]. The precise contours of that responsibility have yet to be definitively mapped but, it is clear at least that any "culpable delay" on the part of a defendant — delay arising from procedural default on its part — will weigh against dismissal*."

40. The Court of Appeal also considered the issues in *Padden v. McDarby* [2024] IECA 207, where the Court emphasised the point made by Collins J. in *Cave Projects* that the onus is on the applicant to establish all three limbs of the *Primor* test.

41. In the context of considering the balance of justice, the Court reiterated the observation of Collins J. at pages 28 and 29 of *Cave Projects* that a defendant cannot rely on matters which do not result from the plaintiff's delay and that "*the authorities increasingly emphasise that defendants also bear a responsibility in terms of ensuring the timely progress of litigation".*

42. In *Padden*, Noonan J. reiterated what he had said in *Beggan v. Deegan*:

> "*24. It seems to me that a fundamental consideration in the calibration of the balance of justice is a determination of whether the prejudice alleged, assuming it to be sufficient to warrant dismissal, is prejudice solely caused by culpable delay on the part of the plaintiff. It is axiomatic that if the prejudice of which the defendants complain is of their own making, they can hardly be heard to rely upon it irrespective of what delay has occurred."* [emphasis added]

43. In that case, which concerned a professional negligence claim, the court noted that once the defendant apprehended a real prospect of being sued by the plaintiff, it "*then became incumbent upon the defendants to begin assembling such evidence as they felt they would require to defend a claim which they now say includes evidence from gardaí who attended at the scene of the incident*." In those premises, the failure of the defendants to seek to gather evidence until a far later stage was not a matter for which the plaintiff should be held responsible.

DISCUSSION

44. There is little doubt in this case that there has been inordinate delay. The case was commenced in July 2010 and the case remained in a pre-trial phase up to the issue of this motion in March 2023. The case is not very complex and does not agitate issues that call for extensive pre-trial work. The defendant highlighted three periods of inactivity that it submits justify a finding that the delay is inexcusable. These are:

(a) The period between April 2011 and May 2014,

(b) The period between December 2015 and December 2016, and

(c) The period between March 2019 and December 2022.

45. I agree that the plaintiff has not provided a satisfactory excuse for the overall delay in this case or for the specific delays that occurred. It is correct to observe that the plaintiff encountered significant difficulties in securing cooperation and procedural compliance from the defendant, but even so there were significant and unacceptable periods of inactivity which were not explained in a satisfactory manner. There is no reasonable explanation for the delay between the receipt of the defence in January 2011 and the service of a notice for particulars by the plaintiff in June 2014. Likewise, if the plaintiff considered that either the discovery made

by the defendant or its replies to particulars were inadequate there was no reason why such a significant period of time was allowed to elapse in responding to those inadequacies. I do not consider that it was reasonable for the plaintiff to wait until November 2018 to issue a motion seeking inspection in relation to events that occurred in 2005. It was hardly surprising that the bus in question was not available to be inspected given that timeline, although obviously the defendant could have drawn that to the attention of the plaintiff far more promptly. Similarly, the period between the final receipt of discovery from the defendant in March 2019 and the sending by the plaintiff of a witness schedule in December 2022 is not explained.

46. In those premises, clearly substantial periods of the delay in this case are both inexcusable and attributable to the plaintiff. There are many procedural steps that can be taken by a plaintiff in response to a failure by a defendant to take procedural steps or to progress their side of the litigation. Hence, even though the defendant at times was entirely dilatory in its approach to this litigation the plaintiff has not been able to persuade the court that his delays are excusable.

47. The balance of justice issue in this application is finely balanced. However, I am not satisfied that the defendant has reached the threshold of demonstrating that it would be unfair to allow the trial to proceed. The delays in this case are frankly unsatisfactory and both sides bear responsibility for that delay. Insofar as prejudice flows from the delays, I am satisfied that the defendant has contributed to that prejudice not only by its approach to the litigation but by failing to take timely steps to prepare its case sooner.

48. The defendant's conduct has delayed the proceedings considerably. The plaintiff has been obliged to chase the defendant at almost every stage – albeit without particular expedition.

The defendant could not have believed reasonably that the plaintiff in any sense had abandoned his case. The plaintiff brought a number of motions – all of which appear to have been successful – to obtain full replies to particulars, finalise discovery and bring about inspection. Notices of intention to proceed were regularly served and steps were taken – sometimes tortuously - to the point that the plaintiff served its schedule of reports and witnesses and appeared ready for trial. It seems somewhat invidious for a well-resourced and experienced defendant to contribute to the dragging out of pre-trial processes, and when those processes have been exhausted, to complain about delay as a final tactic.

49. Nevertheless, the defendant now states that a fair trial cannot occur. This is because of difficulties with witnesses. I accept that inevitably there is some general prejudice in seeking to have a trial almost 20 years after the central events where the trial is almost certainly dependent on the oral evidence to be given by witnesses. However, I consider that the responsibility for that delay must be shared between the parties, and cannot be attributed solely to the plaintiff.

50. Moreover, the defendant does not seem to have taken any prompt steps to prepare for trial until very recently. There was no reasonable basis for the defendant to form a belief that this case would not go to trial. The witnesses all are or were employees whose cooperation could have been secured by the defendant at a very early stage. In fact, given that some of the issues in the case were the subject of what the defendant thought would be a full hearing before an Equality Officer in May 2012, it is telling that the defendant has not described or provided any evidence to suggest that statements were obtained from the relevant witnesses at that point. Given the absence of any satisfactory evidence from the defendant of attempts to obtain statements or otherwise clarify its position sooner, it is wholly inadequate to complain that it

encountered difficulties when it sought out witnesses in 2023. If there is prejudice to the defendant in meeting a trial at this point, there is no doubt that the defendant contributed to that prejudice by its own conduct.

51. The position of Mr. S is significant. It is clear from the pleadings that he is the main focus of the plaintiff's allegations of bullying and harassment. The evidence regarding Mr. S's medical issues highlight the problems with the wait and see approach adopted by the defendant. The defendant does not state when it first made inquiries with the CMO of Iarnród Éireann about Mr. S's situation, but the only letter exhibited is a letter dated the 8 March 2024, and this does not refer to any previous correspondence. There is no indication that any attempt was made to communicate with Mr. S directly or to obtain evidence from his treating practitioners. There is no evidence that Mr. S suffers from any memory issues. There is a reference in the letter to the condition affecting his cognitive skills, but there is no elaboration on this brief reference. Clearly the suggestion is that Mr. S would struggle with giving evidence. However, this does not equate to an inability to give evidence and there is a number of available mechanisms to ensure that he would not be discommoded if he had to give evidence. For instance, evidence could be taken on commission or the court can ensure that he has frequent breaks if he was to give evidence.

52. In the premises I have not been persuaded that the defendant has demonstrated that there is a real risk of an unfair trial. Clearly the trial will be more difficult at this point in time from the perspective of the defendant, but a difficult trial is not the same as an unfair trial. However, underpinning all of this is the inescapable fact that the defendant bears some significant responsibility for the situation in which it finds itself. The defendant contributed to the delay in the case by (a) its own failure to comply with its procedural obligations, (b) its

acquiescence in the approach adopted by the plaintiff to the litigation, and (c) in failing to protect its own interests by identifying, locating and ascertaining what evidence could be given by relevant witnesses. Ultimately, the plaintiff should not be fixed with the consequences of the defendant's actions in this regard.

53. In the premises I will refuse the relief sought by the defendant in this motion. It is incumbent on the parties to take steps to ensure that this matter is set down for trial as soon as practicable so that no further prejudice will accrue. As this judgment is being delivered electronically, I express the provisional view that the plaintiff should be entitled to his costs in defending the motion, given that the motion was unsuccessful. I would propose that there should be a stay on the costs order pending the determination of the proceedings. However, if the parties wish to agitate for a different form of costs order I will list the matter before me for short arguments at 10.30am on Wednesday, the 22 January 2025.