Neutral Citation No.: [2009] NIQB 44 | *Ref:* **TRE7505**

Judgment: approved by the Court for handing down | *Delivered:* **11/05/2009**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

06/2865

BETWEEN:

BRIAN McTEGGART

Plaintiff;

and

WATERWAYS IRELAND

First Defendant;

and

DEPARTMENT OF CULTURE, ARTS AND LEISURE

Second Defendant.

TREACY J

[1] By summons dated 27 March 2009 application has been made on the part of the first defendant for an order pursuant to Order 18 Rule 9 of the Rules of the Supreme Court (NI) 1980 and under the inherent jurisdiction of the court striking out the plaintiff's claim on the ground that it is vexatious, might prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the process of the court.

[2] As appears from the pleadings the plaintiff's claim is for damages for personal injuries, loss and damage allegedly sustained by him during the course of his employment with the first defendant. The plaintiff's claim is brought in negligence, breach of contract and breach of Article 3 of the Protection from Harassment (NI) Order 1997 and relates to his employment with the defendants from approximately April 2000.

[3] The plaintiff's employment with the first defendant has already been the subject of litigation by way of a claim to an employment tribunal under the Public Interest Disclosure (NI) Order 1998 – legislation protecting so called "whistleblowers," introduced some years ago. That litigation was settled, the settlement terms being set out in a "Compromise Agreement" and is dated 23 September 2007.

[4] The terms of this agreement, so far as material, provided that the first defendant would pay the plaintiff £50,000 without admission of liability and, crucially, at paragraph 3 of the Agreement provided as follows:

> "**The payment referred to in paragraph 1 above is in full and final settlement of all claims which the claimant has or may have against the respondent, it servants or agents or either of its sponsoring departments in Northern Ireland or the Republic of Ireland, their servants or agents arising out of his period of employment/secondment with Waterways Ireland between 23 February 2000 and 15 December 2004 and the termination thereof** ***save only for:***
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> **(a) The claimant's action in the High Court of Northern Ireland against Waterways Ireland, the Department of Culture, Arts and Leisure (Writ No 2006/2865) . . ." (sic).**[This being the action which the First Defendant now seeks to strike out].

[5] Paragraph 5 of the Compromise Agreement states that the claimant acknowledged that in entering into the Agreement he had received independent legal advice from his Senior Counsel and solicitor as to the terms and effect of the Agreement which is then signed by an/or on behalf of both parties.

[6] The plaintiff's High Court action had been commenced by Writ served on 16 January 2006. A very detailed statement of claim was served on 12 April 2007 subsequently amended on 9 February 2009 to include particulars of the loss and damage claimed as set out in a schedule of loss appended to the amended statement of claim. In the course of the proceedings before the tribunal the plaintiff filed a detailed witness statement dated 1 March 2007 (bundle pages 130-139). The witness statement includes a section entitled "Detriment Suffered". In an appendix (appendix 1) to this witness statement detailed information is provided regarding the "Nature of Bullying Behaviour".

[7] It is apparent (from the documents referred to in para 6 above) that there is a substantial but not complete overlap between the alleged "detriment

suffered" by the plaintiff as brought before the tribunal and the allegation which has been made in the statement of claim.

[8] Notwithstanding that the first defendant was aware from April 2007 of the scope of the allegations in the plaintiff's statement of claim (set out in considerable detail) and of the substantial factual overlap between the two sets of proceedings they were nonetheless compromised by the parties on the terms as set out above. The compromise of the tribunal proceedings in September 2007 was at a time when the plaintiff's claim in the High Court had remained, as a matter of pleading at any rate, unparticularised. That, plainly, in the light of the events happened, did not prove an obstacle to settlement of the tribunal claim.

[9] On 9 February 2009 the statement of claim was amended and the particulars of loss and damage were set out in a schedule of loss appended to the amended statement of claim. This claim is identical to that in a document entitled "Claimant's Schedule of Loss" filed before the tribunal in respect of his claim in those proceedings for financial loss.

[10] Subsequent to the provision of this amended statement of claim the first defendant in the present summons in March 2009 made the present application to strike out the plaintiff's claim.

[11] The plaintiff who was not legally represented appeared before the court with his wife as a Mackenzie friend. He had been anxious to place before the court material leading up to and surrounding the process of settlement. I think this can only have been intended to attempt to shed light on the purpose and intent behind the paragraph in the Compromise Agreement which exempted the High Court proceedings from the "full and final settlement" paragraph. Mr Ringland QC very forcefully objected to the court receiving any such information and by order of Higgins LJ a skeleton argument on behalf of the plaintiff was required to be redacted. Before me Mr Ringland objected, on a similar basis, to substantial portions of a further skeleton argument furnished by the Plaintiff. Ultimately, by agreement, as Mr Ringland's client was not prepared to waive privilege in respect of these matters the plaintiff removed, for the most part, the impugned pages.

Submissions on behalf of the first defendant

[12] In his skeleton argument the first defendant contended that the material on which the plaintiff based his claim in the High Court was identical to that which formed the basis of his tribunal claim. In his oral presentation he accepted that the material was not identical but that there was a substantial overlap. It was submitted that the plaintiff was not entitled to claim twice in respect of the same material. He further submitted that the special damage claim contained in the tribunal proceedings was identical to that in the present

action and the plaintiff was not entitled to claim the same financial relief twice. As far as the plaintiff's claim for personal injuries was concerned he submitted that that claim could and should have been brought as part of his claim before the tribunal.

[13] In support of these submissions the court was referred to the rule in *Henderson v. Henderson* [1843] 3 HARE 100. As pointed out in *Manson v. Vooght* [1999] BPIR 376 this is a form of estoppel based on abuse of process which involved the court striking a balance between a plaintiff's right to bring before the court "genuine and legitimate claims with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed".

[14] In *Henderson and Henderson* Sir James Wigram VC stated:

> "**Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (*except under special circumstances*) permit the same parties to open the *same* subject of litigation in response of matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence, or even accident permitted part of the case. A plea of Res Judicat applies except in special cases, not only the points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."**

[15] I accept that the rule in Henderson v. Henderson has been applied in a wide variety of types of claim including employment claims and in *Talbot v. Berkshire County Council* [1994] QB 290 Lord Justice Stewart-Smith held:

> **"In my judgment there is no reason why the rule in Henderson's case should not apply in personal injury actions. Indeed there is every reason why it should. It is a salutary rule. It avoids unnecessary proceedings involving expense to the parties and waste of court time which could be available to others, it prevents stale claims being brought long after the event which is the bane of this type of litigation; it enables the defendant to know the**

> **extent of his potential liability in respect of any one event; this is important for insurance companies who have to make provision for claims and it may also affect their conduct in negotiations, their defence and any question of appeal."**

[16] The court was also referred to *Sheriff v. Klyne Tugs (Lowestoft) Limited* [1999] IRLR 481 which was said to involve a situation similar to the present. I do not accept that it is similar since crucially, unlike the present case, there was no express saving clause in respect of an extant claim.

[17] So far as the small matter of the Compromise Agreement is concerned Mr Ringland submitted that the exclusion of the present claim from its terms did not "tie the court's hands" in relation to the merits of the present application. The present application he said stands on its own merits.

Submissions of the plaintiff

[18] The plaintiff presented a number of submissions which are set out in his detailed skeleton argument and which were supplemented by helpful oral submissions. This legally unrepresented plaintiff is to be commended for the clarity and restraint of these submissions which I have found extremely helpful. I intend him no disrespect by not setting out all of these submissions in this judgment because ultimately I consider that the case turns on clause 3 of the Compromise Agreement of September 2007.

Conclusion

[19] Clause 3 of the Compromise Agreement set out above confirms that the terms of the Agreement were in full and final settlement of all relevant claims **apart from** the present High Court claim. This was an Agreement freely entered into by both parties who were represented by solicitors and junior and senior counsel on either side. The terms of Clause 3 could not, in my opinion, be clearer. The express written intention of the parties was to preserve the plaintiff's High Court claim. As I have already noted before at the time this Compromise Agreement was entered the first defendant was fully aware of the scope of the allegations which were said to underpin the claims in negligence, breach of contract and breach of Article 3 of the Protection from Harassment (NI) Order 1997. This is because they had in their possession from April 2007 (many months before the Compromise Agreement) the terms of the detailed statement of claim which was submitted in respect of the High Court claim. The fact that the loss and damage claimed in the High Court claim had not been particularised at that stage and that an amendment was permitted much later does not alter the position. The defendant signed up to the clear terms of an Agreement to preserve the High Court claim. If this application (brought well over a year after the Compromise Agreement had been signed) were to succeed the first defendant would, in my opinion, be effectively permitted to

renege on Clause 3 of the agreement. In order to achieve this objective the first defendant seeks to invoke the power of the court. This court will not lend itself to the exercise of a power the effect of which would be to undermine the express terms of a written Compromise Agreement freely entered into by the parties with the benefit of legal advice.

[20] Accordingly the application is refused.