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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PATRICK CARRAGHER

Plaintiff/Appellant:

-v-

FRANK DAWSON, COUNCIL FOR CATHOLIC MAINTAINED SCHOOLS AND THE VERY REVEREND T RAFFERTY AS NOMINEE OF THE BOARD OF GOVERNORS OF SAINT RONAN'S PRIMARY SCHOOL

Defendants/Respondents:

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Before: Gillen LJ, Stephens LJ and Maguire J

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is a plaintiff's appeal against the amount of an award made by Mrs Justice Keegan in a stress at work case which confined damages to an approximate three year exacerbation period from January 2008 to December 2010 and excluded a claim for substantial financial loss following the termination of his employment on 31 August 2011. Mr Simpson QC and Michael Potter appeared on behalf of the appellant. Mr Ringland QC and Mr Neil Phillips appeared on behalf of the respondents. We are grateful to counsel for their assistance.

Background facts

[2] In 1980 Patrick Carragher ("the appellant") now 58 (DOB 3 March 1959) started his career as a teacher at St Patrick's Primary School, Newry, County Down. In 1994 he took up employment as a maths teacher at St Ronan's Primary School, Newry. In 2000 Frank Dawson ("the first defendant") was appointed as Principal of St Ronan's. The appellant's employment was with the Council for Catholic Maintained Schools ("the second defendant"). The Board of Governors of St Ronan's Primary School ("the third defendants") had management and oversight

responsibility in relation to St Ronan's. We will refer to all three defendants as "the respondents."

[3] On 13 September 2010 the appellant commenced proceedings against the respondents claiming that as a result of, for instance, the negligence of the respondents over the period 2000 to August 2011 he had been caused to suffer stress at work as a result of which he had developed significant physical and mental health difficulties including a chronic depressive illness and he had lost his job. The respondents denied liability and relied on a limitation defence in relation to all events prior to 13 September 2007. The action came on for hearing before Mrs Justice Keegan in relation to all issues. At an early stage of the trial the judge was informed that the parties had agreed that an appropriate approach to the evidence was that it should be heard as follows:

(a) All of the witnesses who were to be called to give evidence would be heard by the judge apart from the forensic accountants.

(b) Once judgment had been delivered on all issues the trial judge would hear from the forensic accountants if any relevant accountancy evidence could not be agreed.

[4] The judge agreed with that approach. This was not a split trial with the issue of liability being first determined and then with all issues in relation to the amount of damages being determined at a later date. Rather the only evidence which was to be heard at a later stage was accountancy evidence so that the court could be informed as to the calculation of loss of earnings it being recognised that there was no point in putting forward a whole series of different calculations based on different periods off work or based on the proposition that the respondents' breaches of duty had caused or contributed to the appellant losing his job when the precise periods had not been determined and the question as to whether any fault on behalf of the respondents had caused or contributed to the appellant losing his job had also not been determined. We recognise the sense in this approach. However, we consider that there is an obligation on counsel to commit to writing the exact nature of their proposal including specifying by name the witness or witnesses who it is suggested can be called at a subsequent stage and the precise nature of the evidence which each of those witnesses will be permitted to give at the subsequent stage. That written proposal should then be made available to the judge for her consideration. Where appropriate, unless there is such a written proposal, the judge should refuse to agree with the result that the matter would proceed in the ordinary way with all the evidence being called.

[5] At the trial the case advanced by the appellant was stated by the learned judge to have been that the respondents:

> "failed to ensure a safe system of work particularly in the period December 2007 until April 2009."

The learned judge also stated that it:

> "was argued that this failure reactivated the plaintiff's depressive illness and ultimately led to his medical retirement in August 2011."

Also at trial counsel on behalf of the appellant accepted that any event which occurred prior to 13 September 2007 was statute barred so that it would have relevance only as potential context.

[6] In relation to all the issues the learned judge heard evidence from the appellant over a number of days, from two other teachers namely Ms Keely and Ms Hutchinson, from Dr Brian Mangan, consultant psychiatrist called on behalf of the appellant and Dr Brian Fleming, consultant psychiatrist called on behalf of the respondents, together with evidence from Mr Dawson. The learned judge also considered the appellant's general practitioner's notes and records together with the medical report of Dr Helen Harbinson dated 6 October 2007 and a report prepared by Dr John Simpson, consultant psychiatrist dated 8 March 2011.

[7] On 4 October 2016 Mrs Justice Keegan gave a detailed 46 page judgment. We summarise the facts as found by the learned judge as follows:

(a) In the period 1994 to 2000 the appellant was content with his working environment.

(b) In 2000 Mr Dawson became Principal of St Ronan's and although at the outset there were no particular problems, issues gradually arose between him and the appellant.

(c) In 2003 the appellant resigned from his post as a physical education co-ordinator as he felt that as a result of Mr Dawson's new management style he could not continue in that post.

(d) Between November 2003 and March 2004 the appellant was on sick leave due to stress though the appellant did not mention this "to the doctors" that is to either Dr Mangan or Dr Fleming.

(e) Between March 2004 and August 2006 no specific issues were raised by the appellant as to his working environment.

(f) In August 2006 Mr Dawson sent correspondence to all the teachers in relation to a proposed new method of teaching mathematics in the

school so that only one level of Heinemann textbook would be used for any particular year without the flexibility of being able to use a level appropriate for instance to a lower year. The rationale was to redress a perceived issue of cramming a huge amount of work when the children arrived at P6 and P7.

(g) The appellant raised issues with this proposed new method of teaching as did other teachers. In the event the new system was not introduced until 10 January 2007. However, the plaintiff continued to complain about the entire philosophy behind the introduction of this policy which he considered to be a radical change.

(h) On 24 January 2007 there was an incident which led Mr Dawson to start a grievance procedure against the appellant. Mr Dawson alleged that the appellant refused to comply with a reasonable directive to implement the school's mathematics policy and had used foul language and threatening behaviour towards him.

(i) On 15 March 2007 the sub-committee of the Board of Governors found that the charge of a failure to carry out a reasonable directive given by the Principal was not proven and that it could not make any determination on whether or not the plaintiff used foul language or acted in a threatening manner towards the Principal.

(j) Between April 2007 and December 2007 the appellant was on sick leave having developed a depressive illness.

(k) On 6 October 2007 Dr Helen Harbinson, consultant psychiatrist, provided to the respondents a medical report on the plaintiff's health, fitness to teach and ability to provide a regular and sustained service. She stated that in April 2007 "in response to difficulties at work" the appellant had developed a depressive illness. She stated that the appellant was presently fit to return to teaching and that hopefully he would not find himself again in situations which make him feel frustrated and helpless in a way he did before. She advised that frustration and helplessness are well recognised causes of depression.

(l) On 23 November 2007 the plaintiff's general practitioner wrote in relation to the plaintiff that:

> "his symptoms clearly relate to as yet unresolved matters arising at work. He will be at risk of relapse if he is expected to return to work without this issue being addressed."

On the basis of that letter attempts were made to secure the appellant's return to work in a manner which did not result in a relapse including a return to work meeting held on 14 December 2007. At that meeting it was agreed, amongst other matters, that the Principal would contact the Southern Board to see if any training could be accessed for the appellant.

(m) Just before Christmas 2007 the appellant returned to work and there then followed a period where he tried to secure what he considered had been agreed at the meeting on 14 December 2007. On 16 November 2008 the appellant stated that the one condition that was impacting on his health at that moment was the refusal to bring him up to date with professional training days to assist him in the execution of his professional duties as a teacher.

(n) On 28 June 2008 the appellant commenced a grievance procedure against Mr Dawson alleging that he had been bullied and harassed. This complaint eventually went to an Appeal Panel and then to an Independent Appeal Panel. Most of the appellant's complaints, particularly those dealing with discrimination, were not made out. However, the Independent Appeal Panel stated that "in the case of a teacher returning to work after a prolonged illness the Board of Governors and the Principal has a responsibility to provide a programme of support and training. There is also a need to monitor and evaluate the success of such support." It also held that the Principal should have been more proactive in arranging training and monitoring and evaluating the appellant's return to work in 2008 and advising the Board of Governors accordingly. The Independent Appeal Panel also criticised the nine month delay in the completion of the Appeal Panel's investigation and report which it considered to be completely unacceptable. It indicated that the internal appeal should take normally up to 30 working days and that delay had led to frustration for the appellant and may well have contributed to the deterioration in his health. The Independent Appeal Panel also stated that it was incumbent on the Board of Governors to be proactive in the rehabilitation of teachers returning from long term illness. They should ensure that the Principal is vigilant in establishing a programme of support and training to facilitate the return to work.

(o) In April 2009 the appellant took sick leave and did not return to work. This ultimately led to his medical retirement on 31 August 2011.

(p) The appellant started a second complaint on 13 September 2010. This complaint was dismissed by the Panel, by the Appeal Panel and by the Independent Appeal Panel.

[8] The appellant contended at trial that the respondents knew that he had been off work for an extended period of time between April and December 2007 with a depressive illness and that they knew that he was at a risk of a relapse of that depressive illness if unresolved matters arising at work remained outstanding. The appellant contended that various steps were agreed to be taken by the respondents at the return to work meeting on 14 December 2007 but in the event they were not taken. He alleged that this amounted to a breach of duty. In the alternative that quite irrespective of what was or was not agreed at the return to work meeting the respondents had a responsibility to provide support and training to him and also had a duty to monitor and evaluate the success of such support after his return to work so that there was a failure on the part of all three respondents in that respect.

[9] In the judgment of 4 October 2016 the learned judge considered other factors that caused stress to the appellant. She found that:

(a) The appellant was consumed by extraneous issues which formed part of his grievance.

(b) There were a number of work related conflicts and that the second grievance brought by the appellant caused stress to him and he acted unreasonably in embarking upon that grievance.

(c) The appellant "consistently came back to the fact that he objected to the Heinemann text changes and he was upset by the Principal taking a grievance against him."

(d) The appellant informed Dr Mangan that he had no previous psychiatric history but that there were relevant entries in his general practitioner's notes and records that established that in 2002 he struggled with the death of his father and was thinking a lot about death and "couldn't cope with work." In 2004 he reported to his general practitioner that he was stressed out "on-going poor sleep – got palpations today after meeting – re also parent teachers meetings re transfer procedure all week."

(e) The diagnosis of the appellant's wife towards the end of 2011 with breast cancer and her subsequent treatment was a contributory cause of the appellant's mood disturbance and according to Dr Fleming placed a significant degree of stress on the appellant.

(f) The appellant has a difficult relationship with his brother which was a cause of stress.

(g) The appellant's presentation prior to Dr Fleming's report of 26 January 2016 was due to data protection breaches which the appellant said he had experienced.

(h) The appellant pursued many unmeritorious claims through the grievance procedure which were not made out and which prolonged the grievance process and that many of the appellant's grievances were dismissed.

[10] In the judgment of 4 October 2016 the learned judge made a number of findings in relation to the medical evidence. She found that:

(a) That the appellant did have a psychiatrically vulnerable personality.

(b) The appellant did not suffer from a lifelong depressive illness (the diagnosis of Dr Mangan) but rather from a chronic depressive adjustment disorder which had distilled into bouts of depressive illness which were time limited so that there were also periods where symptomology was not so stark (the diagnosis of Dr Fleming).

(c) That the appellant's underlying illness was subject to relapse or deterioration at future times of stress.

[11] In her judgment of 4 October 2016 the learned judge found that the respondents owed a duty of care to the appellant, that psychiatric injury was foreseeable after his return to work in December 2007 and that the respondents were liable in negligence on the basis that they failed to provide suitable supports and training for the appellant, failed to monitor his ability to cope following his return to work, and failed to deal with his first grievance procedure in a timely fashion. The learned judge also held that steps by the respondents in relation to training and support and prompt dealing with grievances would have been likely to have done some good to the plaintiff.

[12] The learned judge concluded that the respondents were liable for an exacerbation of the appellant's pre-existing condition. She determined that the period of exacerbation was for some three years from January 2008 until December 2010. She stated that the appellant "should only recover damages for the limited period of exacerbation" which she had identified.

[13] The appellant had sought a finding that his medical retirement on 31 August 2011 was caused by or contributed to by the negligence of the respondents. The learned judge did not make any finding to that effect.

[14] The learned judge did not assess either general or special damages in her judgment of 4 October 2016. She did this for two reasons. First there had been no

evidence enabling her to calculate any loss of earnings during the period of exacerbation. Second so that the parties would have an opportunity of agreeing the amount of general damages.

[15] After judgment was delivered the appellant changed his solicitor and Mr Simpson QC was brought into the case on his behalf. Then by a summons dated 6 January 2017 the appellant applied to the learned judge for an order permitting the appellant to recall Dr Mangan, to call the appellant's general practitioner who was not called at the hearing, and to call Mr Black, a forensic accountant. The reason advanced by the appellant was that in the judgment of 4 October 2016 there had been no determination as to whether the three year exacerbation period had caused or contributed to the medical retirement of the appellant in April 2011. It was suggested that given the issue had not been determined the parties should be at liberty to call evidence in relation to it.

[16] On 23 January 2017 the learned judge declined to accede to that application. She gave a number of reasons in an ex tempore judgment including that she had effectively determined causation having heard substantial medical evidence, having heard the plaintiff and the defendant and the witnesses of the plaintiff over a number of days. The learned judge went on to state that:

> "It seems to me that the core of this is that clarification may be required in the matter of my reasoning because it doesn't appear to have been evident as to what the position was regarding future loss and if that's the case, it's fine to bring that type of issue to my attention. And for the avoidance of doubt, it seems that I should say exactly what my intention was with this judgment having heard the evidence in the case. And in doing so, I point again to the fact that I found two breaches, I found exacerbation over a limited period from January 2008 to December 2010. I anticipated that counsel would have to consider the effects upon the plaintiff during that period which involved a substantial period when the plaintiff could still work and a short period when he couldn't work and that will be reflected in a quantum hearing. It seems to me that some general damages follow. I am willing to consider whether there is any special loss in that period and hear submissions about that but I did not intend to give an impression that future loss would flow from the breaches I have determined.

> It seems to me that that conclusion should be apparent from the last section of my judgment, in particular, in setting the period which is a relatively long period of exacerbation. I took into account the independent report and the last section of it which does refer to the plaintiff's own contribution to the end of his career. I took into account as is evident, the initiation of this second grievance which I describe in the judgment as unreasonable conduct. It is clear to me that the delay in providing the training, the training issue and the delay regarding the grievance, was not material or did not cause, sorry, the medical retirement.
>
> Sadly, in my estimation, that's attributable to the plaintiff and I have relied and I do rely on the plaintiff's own evidence and my observation of him in evidence because effectively, the plaintiff was not satisfied, notwithstanding the independent report, it seems to me in his evidence that he goes back to a dissatisfaction with the issue of the Heinemann procedure and then he raises many other extraneous issues. That is why in paragraph [134], I specifically limited damages to the period I said and not beyond. And I provided that period right up to December 2010 which actually goes beyond the period the defendant itself was dealing with the complaints in the plaintiff's favour because the independent report made clear the issues from an independent provider or the plaintiff at that stage could have been at no doubt regarding the defendant's liability and his own regarding the loss of his career."

[17] On 7 February 2017 the learned judge assessed the amount of general damages at £15,000 and special damages for loss of earnings during the three year period at £21,777.00.

The grounds of appeal

[18] Mr Simpson, on behalf of the appellant identified the principal issues in this appeal as:

(a) whether the conclusion of the Learned Trial Judge to confine the award of damages to a 3-year period was correct;

(b) whether the Learned Trial Judge ought, after promulgating her initial judgment, to have granted the Plaintiff's application to call medical evidence to inform the Learned Trial Judge (i) as to whether, on the balance of probabilities, the exacerbation for 3 years caused or materially contributed to the medical retirement of the plaintiff, which occurred in August 2011 and (ii) whether, on the balance of probabilities, the exacerbation, superimposed on the pre-existing condition is causing or materially contributing to the continuing inability of the plaintiff to work as a teacher;

(c) in the circumstances, whether the Learned Trial Judge's award adequately compensates the Plaintiff for the injuries caused or contributed to by the Defendants' negligence.

[19] Mr Simpson relied on *Chambers v Excel Logistics* [2006] EWCA Civ 1031 as supporting the proposition that it is important that a trial judge has sufficient evidence upon which to base findings. He submitted that in the instant case the decision of the Learned Trial Judge to refuse to allow further evidence to be called deprived her of the necessary medical evidence properly to assess the issue of causation of the Plaintiff's continuing medical problems (i.e. what proportion of the continuing problems were caused or contributed to by the Defendants' negligence and what, if any, were caused or contributed to by other stressors independent of the Defendants' negligence). The decision of the Learned Trial Judge thus deprived her of the evidence necessary for the assessment of proper compensation. Relying on *Wilson v Gilroy* [2009] NICA 23 at paragraph [2] he further submitted that this Court will interfere if satisfied that the Judge acted on some wrong principle of law, misapprehended the facts or that the amount awarded was wholly erroneous. On that basis it was submitted that the appropriate remedy would be for this Court to remit the matter to the Learned Trial Judge with a direction that further medical evidence be admitted and considered.

Discussion

[20] The appellant was off work due to stress between November 2003 and March 2004. He had a depressive illness causing him to be off work again between April 2007 and December 2007 and on that basis it was clear that by April 2007 the appellant had some form of depressive illness. The respondents were not found liable for that depressive illness and indeed could not be because at trial it was accepted on behalf of the appellant that his action was statute barred for anything occurring prior to 13 September 2007. In April 2009 the appellant had an exacerbation of his depressive illness which again caused him to be absent from work. The respondents were found liable for that exacerbation. Mr Simpson accepted that this was an exacerbation case. The questions then were whether the exacerbation was time limited, if so for how long the exacerbation lasted and whether the appellant's medical retirement in August 2011 was caused or

contributed to by that exacerbation. Mr Simpson accepted that it could not be challenged that the exacerbation was time limited. He also accepted that it could not be challenged that the exacerbation was time limited to a period of three years. He also realistically accepted that there were other stressors in the life of the appellant which could have had a causative impact on the medical retirement in August 2011. There was no suggestion that the awards of both general and special damages could be faulted if in fact the breaches by the respondents did not cause or contribute to the loss of the appellant's employment.

[21] The decision in *Chambers* related to an assessment of loss of earnings due to an acceleration in the onset of back symptoms. The defendant had admitted liability for two accidents causing back injuries to Mr Chambers. However, apart from those two accidents, Mr Chambers had suffered from degeneration in a disc in his lumbar spine. The only medical evidence was in the form of a written report from a consultant orthopaedic surgeon in which it was stated that the accident injuries would have accelerated the onset of the protrusion of the disc by about three years. Mr Chambers in the three years following the accident continued to work with periods of absence as a result of the accident injuries notably in a period of three months prior to his medical retirement in 2005. The judge assessed the loss of earnings at £1,250. The issue on appeal was whether the effects of the disc degeneration would have kicked in apart from the accidents in 2005 so that the plaintiff was entitled to loss of earnings for the three years after 2005 amounting to some £60,000. The passage in the medical report on which the judge relied was equivocal and there was "scope for confusion." Auld LJ with whom Carnwarth LJ agreed, in allowing the appeal stated that the interpretation "should have been cleared up at the hearing one way or another." A new trial was ordered to assess Mr Chambers' claim for loss of earnings.

[22] We consider that *Chambers,* though instructive, has little to do with the facts of this case. By way of contrast the learned trial judge did not have an equivocal report giving rise to scope for confusion. Rather she had extensive evidence over a number of days from the appellant and from two consultant psychiatrists. She also considered the medical notes and records including the report of two other consultant psychiatrists. The issue as to whether the respondents' negligence caused or contributed to the applicant's medical retirement was clearly identified to the learned trial judge. The issue was undoubtedly a complex one but it was ultimately a matter of assessment of all the evidence including the expert evidence.

[23] We consider that it was for the appellant to allege and to prove on the balance of probabilities that any injuries caused by the respondents' negligence caused or contributed to the appellant's medical retirement. The learned trial judge did not expressly address that issue in her judgment of 4 October 2016 but this means that there was no express finding in favour of the appellant that his medical retirement was caused or contributed to by the respondents' negligence. Whilst we agree that this issue was not expressly addressed in the judgment dated 4 October 2016 that

does not mean that it was not considered and determined. We note that the learned judge in her ex tempore judgment stated that her conclusion ought to have been apparent from the last section of her judgment. We agree that this was so. In any event the learned judge in her ex tempore judgment of 23 January 2017 made it expressly clear that her conclusion was that the breaches by the respondents did not cause or contribute to the termination of the appellant's employment but rather that all special damages should be confined to the three year period January 2008 to December 2010.

[24] The question then arises as to whether in arriving at that conclusion the learned trial judge misapprehended the facts or acted on some wrong principle of law. On the hearing of this appeal there was no suggestion that her summary of the Court of Appeal decision in the conjoined cases of *Hatton v Sutherland, Barber v Somerset County Council* and *Jones v Sandwell Metropolitan BC* [2002] EWCA Civ 76; [2002] 2 All E.R. 1, [2002] P.I.Q.R. P21, was incorrect. We do not consider that her conclusion was on some wrong principle of law.

[25] We have considered whether the learned trial judge misapprehended the facts. There was evidence supporting the proposition that the exacerbation did cause or contribute to the appellant's medical retirement. That evidence was before the learned trial judge and was contained in a report dated 17 October 2009 from Dr McGread a consultant in occupational medicine. He felt that Mr Carragher was then currently unfit for work and while he encouraged that the grievance process is brought to a close as soon as possible he could not foresee that the appellant would return to work in his current school given his perception of his relationship with his head teacher. In July 2010, some six months before the end of the exacerbation period identified by the learned trial judge, Dr McGread stated that he felt that the appellant is currently unfit to return to work in the teaching environment and on balance that it was most unlikely that he would ever return to his current place of work regardless of the outcome of the Labour Relation Agency as Dr McGread believed the level of the appellant's disgruntlement and sense of demoralisation combined with his on-going mental health, would prevent this. Dr McGread went on to state that he had considerable reservations that the appellant will ever be able to provide regular and effective service in any teaching environment in the future. He concluded by stating that it may well be an application for retirement on grounds of ill-health is now appropriate but he will leave this between the appellant and management to decide.

[26] The evidence of Dr McGread supports the proposition that during the exacerbation period medical retirement on ill health grounds could have been appropriate. However Dr McGread was not aware of the appellant's underlying condition and how it reacted adversely to other stressors. We have set out the learned judge's findings in relation to those other stressors at paragraph [9] (a) to (h) above. None of those findings was challenged as being incorrect. Furthermore, Dr McGread was unaware that the appellant must have been contemplating

bringing his second grievance during the exacerbation period and that this second grievance was found by the learned trial judge to have caused stress to the appellant and that he acted unreasonably in embarking upon that grievance. On that basis we consider that there was ample evidence upon which the learned trial judge could have arrived at the conclusion that the impact of the respondents' breach of duties did not cause or contribute to his medical retirement. We do not consider that the learned trial judge misapprehended the factual position but rather formed a judgment in relation to a complex issue based on the evidence. We also consider that she gave sufficient reasons for arriving at her conclusions in her judgments of 4 October 2016 and 23 January 2017.

[27] We also reject the submission that the learned trial judge ought, after promulgating her initial judgment, to have granted the Plaintiff's application to call medical evidence to inform her (i) as to whether, on the balance of probabilities, the exacerbation for 3 years caused or materially contributed to the medical retirement of the plaintiff, which occurred in August 2011 and (ii) whether, on the balance of probabilities, the exacerbation, superimposed on the pre-existing condition is causing or materially contributing to the continuing inability of the plaintiff to work as a teacher. We consider that there was ample evidence before the learned judge in relation to the cause of the loss of the appellant's job in August 2011, that both parties had been provided with the opportunity at the trial to call whatever evidence they wished in relation to that issue and that this was not a split trial. We do not consider that there was any need for any further evidence to be called.

Conclusion

[28] We dismiss the appeal.