THE COURT OF APPEAL

CIVIL

High Court Record Number 2018 No. 210 MCA
Court of Appeal Record Number: 2022/67

Costello J. **Neutral Citation Number [2022] IECA 225**

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACTS 1998 TO 2011
AND IN THE MATTER OF THE EQUALITY ACT 2004
AND IN THE MATTER OF THE WORKPLACE RELATIONS ACT 2015

BETWEEN/

OLUMIDE SMITH

PLAINTIFF/
APPELLANT

- AND –

CISCO SYSTEMS INTERNET WORKING (IRELAND) LIMITED

DEFENDANT/
RESPONDENT

- AND –

High Court Record Number 2013 No. 210 MCA

BETWEEN

OLUMIDE SMITH **PLAINTIFF/**
APPELLANT

-AND-

CISCO SYSTEMS INTERNETWORKING (IRELAND) LIMITED
RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 13th day of October 2022

1. The appellant, Mr. Smith, complained to an adjudication officer under the Employment and Equality Acts 1998 – 2015 alleging that his former employer, the respondent, had discriminated against him on grounds of race in relation to pay and other matters, including dismissal and promotion. The adjudication officer decided that a number of the complaints of discrimination had not been made within the time specified in the Acts and thus were out of time. The appellant appealed the decision of the adjudication officer to the Labour Court and the Labour Court decided that it must first consider whether an act or acts of discrimination occurred within the cognisable period for the complaint before it could consider whether events outside of that period could be considered to be part of a continuum or regime of discrimination and within the jurisdiction of the court. The Labour Court held against the appellant and the appellant appealed to the High Court on a point of law pursuant to s.90(1) of the Acts. On the 13th November, 2020 Meenan J. held that the appellant had identified no points of law as would permit the High Court to uphold his appeal and accordingly dismissed his appeal. The appellant has appealed the decision of the High Court and the appeal is listed for hearing on 14th November ,2022.

2. Prior to the trial of his statutory appeal by Meenan J., the appellant applied for an Order for discovery which was refused by the High Court (Noonan J.) on the 23rd January, 2019. Mr. Smith did not appeal this decision within the time provided for under the Rules of Court and his action was heard and determined the following year, as I have stated. By a Notice of Motion issued on 20th April, 2022 he sought an Order of the Court of Appeal extending the time in which to appeal the Order of Noonan J. This motion is listed for hearing on the 17th October, 2022.

3. In advance of the hearing of the appeal and the application to extend time in which to appeal the decision of Noonan J., the appellant issued two motions seeking leave to adduce

new evidence. Before considering the application, it is important to consider the nature of the proceedings the subject matter of the appeal and the application for an extension of time in which to appeal.

4. Section 90(1) of the Acts provides:

> *"Where a determination is made by the Labour Court on an appeal under this Part, either of the parties may appeal to the High Court on a point of law."*

The jurisdiction of the High Court in hearing an appeal on a point of law and this Court on hearing an appeal from the decision of the High Court is well established and has been considered by a number of authorities. McKechnie J., siting in the High Court, in *Deely v. Information Commissioner* [2001] 3 IR 439 confirmed that where there is an appeal on a point of law only:

> *"In accordance with established principles, [the court is] confined as to its remit, in the manner following:-*
>
> *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
>
> *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
>
> *(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
>
> *(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision…."*

Significantly, the circumstances under which the court on an appeal limited to a point of law may interfere with findings of fact are clearly limited. This means that evidence adduced before the High Court – as opposed to the Labour Court – plays a very limited role in the resolution of the appeal, *a fortiori*, an appeal from the High Court to this Court. The High

Court is predominantly concerned with whether the Labour Court has misinterpreted the law in reaching its decision or, having correctly identified the law, has misapplied it. The focus is upon the decision of the Labour Court based on the evidence adduced before the Labour Court. It is not a rehearing of the facts and issues before the Labour Court. Specifically the High Court does not consider material or evidence relevant to the substance of the complaint before the Labour Court which was not before the Labour Court. It does not make or interfere with findings of fact, other than as set out in *Deely*.

5. The jurisdiction of the Court of Appeal to admit new evidence is set out in Order 86A, rule 4 which provides:

> *"Subject to the provisions of the Constitution and of statute:*
>
> *(a) the Court of Appeal has on appeal full discretionary power to receive further evidence on questions of fact, and may receive such evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner,*
>
> *(b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought,*
>
> *(c) on any appeal from a final judgment or order, further evidence (save as to matters subsequent as mentioned in paragraph (b)) may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by motion on notice setting out the special grounds)"*

6. Thus the appellant from a final judgment or Order (as in this case) must establish special grounds to entitle him to adduce new evidence for the purposes of his appeal. The leading case on the point is *Murphy v. Minister for Defence* [1991] 2 IR 161. Finlay CJ. held that:

> *"1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;*
>
> *2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;*
>
> *3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."*

7. Hogan J., speaking in this Court in *Student Transport Scheme Limited v. Minister for Education and Skills* [2015] IECA 303 held that the three criteria identified in *Murphy* are cumulative so that any prospective party wishing to adduce additional evidence must satisfy all three criteria. Secondly he emphasised that the principles "*serve important policy goals associated with legal certainty and the necessity for finality, not only in litigation as such, but also in respect of the process of evidence gathering."* He referred to the requirement of a party to demonstrate the existence of *"special grounds"* as striking a balance *"between the need to protect the orderly administration of appellate justice in the interests of finality and certainty on the one hand and the need to accommodate exceptional or unusual cases in the interests of fairness on the other."*

8. It is thus clear that the appellant must identify the evidence which he wishes to adduce for the hearing of the appeal and the evidence must be relevant to the issues to be determined upon the appeal. The evidence must have been in existence prior to the trial in the High Court. The evidence must have been such that it could not with reasonable diligence have been adduced in the High Court i.e. if the litigant, acting with reasonable diligence, could have procured the evidence but failed to do so, this is fatal to the application. The appellant must explain in his affidavit why, notwithstanding the fact that the evidence was in existence, he did not adduce it in the High Court, and the explanation must be such as satisfies the

reasonable diligence threshold established in *Murphy.* The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive. Finally, the evidence must be apparently credible.

9. The appellant swore a grounding affidavit on the 21st July, 2022 and he referred in that affidavit to extracts from an affidavit he swore on the 20th April, 2022 and 2nd June, 2022. He also referred to his written submissions in the appeal and the written submissions in respect of the application for an extension of time in which to appeal the decision of the High Court. At the hearing of the motion, I repeatedly requested that the appellant identify the evidence which he sought to adduce for the hearing of his appeal as opposed to assertions and complaints on his part concerning the conduct of the proceedings and other separate proceedings before the High Court. Despite this, the appellant singularly failed to identify any evidence which meets the test in *Murphy v. Minister for Defence.* Quite clearly written submissions prepared in support of an appeal are neither evidence nor, self-evidently, were they in existence prior to the trial of the action. The same applies in respect of affidavits sworn in April and June 2022. This means that even if the material were to be treated as evidence for the purpose of the application (which it is not), he cannot satisfy the first limb of the test in *Murphy*. Furthermore, there is no explanation forthcoming purporting to explain why the alleged evidence was not adduced before the Labour Court or, on appeal, before the High Court, so he cannot meet the reasonable diligence threshold.

10. The only matter identified by the appellant which could possibly amount to evidence are screenshots of a website of an entity described as relationship science where originally he was described as the managing director of Cisco IronPort systems LLC and where later he is described as the former managing director of Cisco IronPort systems LLC. The appellant failed to identify the publisher of this information, other than to say it was a business partner of the respondent. It is not a party to the proceedings or a subsidiary of the

respondent. He did not identify the date of the alleged publications. He did not apparently deny the correctness of the description though he did say that it was *"used to infect my employment and income process since 02-July-2013 through to 12-Jun-2014 till present"*. This publication, even if it existed prior to the date of the trial of the action, or indeed the hearing before the Labour Court, is not such which, if given, would probably have an important influence on the result of the case for the very reason that the High Court, and the Court of Appeal on appeal, do not re-hear the substance of the appellant's complaint: the appeal is limited to an appeal on a point of law therefore even if for the sake of argument it is accepted that the appellant met the first of the criteria established in *Murphy v. Minister for Defence,* he cannot satisfy the second criterion and therefore has failed to establish special grounds within the meaning of Order 86A, rule 4(c).

11. The appellant's application is unfortunately founded on a fundamental misconception as to the nature of a statutory appeal on a point of law to the High Court and secondly on an appeal to this Court from a decision of the High Court. It is also based upon a misunderstanding of what constitutes evidence. This is exemplified in para. 11 of his grounding affidavit where he states as follows:

> *"I say that the Court of Appeal is a Court of Facts and I say further that, pursuant to Article 8.1, Article 8.2 and Article 8.5 of Directive 2000/43, the Court of Appeal is required to and should act as a competent national authority of competent jurisdiction in relation to:*
>
> *(a) The investigation and establishment of the Findings of Primary Facts;*
>
> *(b) The use of an unbiased and impartial Findings of Primary Facts upon which the inferences that are proper from the Facts can be drawn from the Findings of Primary Facts;*

(c) making reasonable Conclusions upon which an unbiased, impartial, independent, competent and reasoned Decision is issued via the application of the rule of law pursuant to the said Acts 1998 to 2011 proceedings.

(d) the application of Due Care and Due Diligence to the Due Process and Due Procedure upon which to establish the Findings of Primary Facts that inferences that are [sic] proper can and should be drawn from the Primary Facts, in order to arrive at reasonable, unbiased and impartial Conclusions that shall result in the issue of a fair and reasoned Decision;

(e) The application of the principles of fair procedures, equal treatment, equality of arms, adversarial Proceedings, fair Trial and reasoned Decision to its Due Process;

(f) granting effective access to justice and access to effective remedy which all prior decision makers denied me on the ground of racial or ethnic origin."

12. The application as constituted for leave to adduce new evidence is misconceived and without merit and fails to satisfy the requirements of Order 86A, rule 4(c) or to meet the threshold test established in *Murphy v. The Minister for Defence.* For these reasons I refuse the application to adduce new evidence in the hearing of the appeal against the decision of the 13th November 2020.

13. The second application is to admit new evidence in respect of the motion seeking to extend time in which to appeal the decision of the High Court to refuse to order discovery. If the court extends the time for the appeal, it will be an appeal in respect of an interlocutory order. An appellant who appeals an interlocutory order is entitled to adduce further evidence without obtaining special leave. This means that, if he is permitted to appeal the order refusing him discovery, he may adduce additional evidence without obtaining leave of the court. However at the hearing of the application to extend the time to appeal the decision of Noonan J., the Court will be concerned with whether the appellant has an arguable ground

of appeal, whether he formed the intention to appeal within the time allowed by the Rules of Court and whether his failure to appeal was due to something akin to an error on his part in relation to the time for appealing the decision, so whether the material is relevant to these issues will fall to the court to assess.

14. I am aware that the books in respect of the motion to extend the time to appeal the decision to refuse to order discovery filed by the appellant include the papers filed in support of the application for leave to adduce new evidence. It is not necessary for this court to make an order permitting the appellant so to do. The weight to be attributed to the evidence is a matter for the panel assigned to hear the appeal.

15. For these reasons I refuse to permit the appellant to adduce fresh evidence in relation to the substantive appeal and I make no order in respect of the motion to extend time to appeal the decision of 23 January 2019.

16. I will rule on the issue of costs on 14 October 2022.