

**APPROVED**

**[2024] IEHC 262**



THE HIGH COURT  
CIRCUIT APPEAL

2023 76 CA

IN THE MATTER OF THE UNFAIR DISMISSALS ACTS 1977 TO 2007

BETWEEN

AGNIESZKA NOWAK

PLAINTIFF

AND

INTESA SANPAOLO LIFE DAC

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 9 May 2024**

## **INTRODUCTION**

1. The within proceedings take the form of a statutory claim for unfair dismissal. It should be noted that the claim was made prior to the commencement of the provisions of the Workplace Relations Act 2015. Accordingly, the claim falls to be determined by reference to the Unfair Dismissals Act 1977 as it stood prior to its amendment by the Workplace Relations Act 2015. The procedure thus

NO REDACTION REQUIRED

involved a right of appeal to the Employment Appeals Tribunal (“*EAT*”), with a further right of appeal to the Circuit Court and thereafter to the High Court.

2. This judgment is delivered in respect of an appeal against a decision of the Circuit Court to dismiss the appeal to that court on the grounds that the appeal was frivolous and vexatious. In contrast to the position now pertaining under the Workplace Relations Act 2015, the appeal to the High Court is not confined to an appeal on a point of law: see paragraph 11 below.

### **PROCEDURAL HISTORY**

3. The procedural history is protracted. The plaintiff’s claim for unfair dismissal was, initially, dismissed by the Employment Appeals Tribunal on jurisdictional grounds on 2 February 2017. Following an appeal to the Circuit Court and thereafter to the High Court, the matter was remitted to the *EAT* for a second hearing. This hearing took place over three days in January and March 2019. The outcome of this hearing before the *EAT* was that the plaintiff’s claim for unfair dismissal was rejected on the merits. The plaintiff then invoked her statutory right of appeal to the Circuit Court.
4. The progress of the appeal before the Circuit Court was delayed as a result of the restrictions on court sittings introduced as part of the public health measures taken in response to the Coronavirus pandemic. The appeal was eventually re-entered before the Circuit Court in 2022. It appears that this was done by the Circuit Court Office of its own volition, rather than on the application of either party. At all events, the appeal was listed on 9 February 2022 and struck out for non-attendance.

5. It has since been accepted by the Circuit Court Office that the appeal should not have been struck out in circumstances where the plaintiff had not been given proper notice that the appeal would be listed on 9 February 2022. Having identified this error, the Circuit Court Office wrote to the plaintiff and informed her that her motion to reinstate the appeal would be listed on 27 July 2022 and that there was no need for her to attend on that occasion.
6. It seems that the plaintiff's motion to reinstate the appeal prompted a countermotion on behalf of the defendant employer. More specifically, the defendant issued a motion seeking to have the appeal dismissed as frivolous and vexatious and on the grounds of delay. The motion also sought an order restricting the plaintiff from instituting further proceedings without the leave of the court (a so-called *Isaac Wunder* order) and security for costs. This motion was grounded on an affidavit which made complaint that the plaintiff had been involved in other litigation involving the Data Protection Commissioner and the Residential Tenancies Board, respectively.
7. This motion was heard and determined on 19 April 2023 by the Circuit Court (His Honour Judge O'Connor). An order was made dismissing the appeal on the grounds that the appeal was frivolous and vexatious. The other reliefs in the motion do not appear to have been pursued. Thereafter, the plaintiff filed an appeal to the High Court.
8. The appeal from the Circuit Court came on for hearing before me on 18 April 2024. At the outset, counsel on behalf of the defendant confirmed that his client was no longer opposing the appeal. This concession was well made. None of the complaints advanced in the affidavit grounding the defendant's motion are capable of justifying the striking out of the appeal proceedings. The fact that the

plaintiff had pursued other litigation involving *different* parties does not render the appeal against the Employment Appeals Tribunal's decision frivolous or vexatious. The delay in the disposition of the claim for unfair dismissal is not the fault of the plaintiff. Rather, the slow progress is attributable, first, to the time lost in correcting the initial jurisdictional error on the part of the EAT; and, secondly, to the restrictions on court sittings introduced as part of the public health measures taken in response to the Coronavirus pandemic.

9. Having regard to the defendant's concession, I indicated, at the hearing on 18 April 2024, that the appeal would be allowed, and a costs order made in favour of the plaintiff. I further indicated that I would issue a written judgment setting out my decision in detail. This is done to ensure that both parties understand the precise basis upon which the appeal has been allowed.
10. For completeness, it should be recorded that the plaintiff complains that the Circuit Court should not have allowed the defendant to issue its counter-motion. It is said that the only matter which was properly before the Circuit Court was the plaintiff's own motion to reinstate the appeal proceedings. It is not necessary for me to resolve this procedural dispute. This is because, as explained above, I have concluded that the counter-motion should have been refused on the merits. It makes no practical difference to the outcome of the appeal whether the counter-motion is regarded as having been refused because it was improperly issued or having been refused on the merits. On either analysis, the plaintiff is successful and her substantive appeal from the decision of the Employment Appeals Tribunal will now be heard by the Circuit Court.

## NEXT STEPS IN THE PROCEEDINGS

11. The outcome of the appeal to the High Court is that the order striking out the appeal to the Circuit Court as frivolous and vexatious should be set aside. It is next necessary to consider whether the claim for unfair dismissal should be remitted to the Circuit Court for hearing, or whether, alternatively, the High Court should now hear the substantive appeal itself, i.e. the appeal against the Employment Appeals Tribunal's decision. It will be recalled that, in the case of claims made *prior* to the Workplace Relations Act 2015, there is a full right of appeal to the High Court by virtue of section 38 of the Courts of Justice Act 1936. See *Commissioners of Irish Lights v. Sugg*, High Court, Morris J., 13 January 1994; [1994] E.L.R. 97 and *JVC Europe Ltd v. Panisi* [2011] IEHC 279.
12. The resolution of this question turns on the proper characterisation of the decision made by the Circuit Court. The Circuit Court did not embark upon a hearing of the appeal. Rather, the decision to strike out the appeal was made on a procedural motion issued by the defendant. The Circuit Court has not, therefore, exercised its appellate jurisdiction under the Unfair Dismissals Act 1977. The circumstances of the present case can be distinguished from those at issue in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26, [2021] 2 I.R. 381. There, the Supreme Court held that the appropriate procedure where the Circuit Court has exhausted its jurisdiction is for the matter to be heard before the High Court. This does not arise in the present case where, as already indicated, the decision was made pursuant to a procedural motion and did not entail a full hearing of the appeal from the Employment Appeals Tribunal.

## CONCLUSION AND FORM OF ORDER

13. For the reasons explained, the Circuit Court order of 19 April 2023 striking out the appeal will be set aside, and, in lieu thereof, an order made remitting the plaintiff's appeal against the decision of the Employment Appeals Tribunal to the Circuit Court for full hearing. The separate costs order made by the Circuit Court on the same date is also set aside.
14. As to the costs of the appeal, the default position under Section 169 of the Legal Services Regulation Act 2015 is that a party who has been entirely successful in proceedings is entitled to recover their allowable costs against the other side. This principle applies, by analogy, to interlocutory applications by virtue of the recast Order 99 of the Rules of the Superior Courts. The plaintiff has been successful in having her substantive appeal reinstated and remitted to the Circuit Court. In principle, therefore, the plaintiff is entitled to recover her costs in relation to both motions, namely her own motion to reinstate the appeal and the defendant's countermotion to strike out the appeal. The costs include the costs before the Circuit Court and the High Court. In circumstances where the plaintiff is a litigant in person and did not incur the costs of professional legal representation, she is entitled to recover such outlay and other out-of-pocket expenses as are properly allowable in accordance with the general principles governing legal costs (*Dawson v. Irish Brokers Association* [2002] IESC 36, [2002] 2 I.L.R.M. 210). In default of agreement, the costs are to be "taxed", i.e. measured, by the County Registrar pursuant to Order 61, rule 12 RSC.
15. To avoid any further delay in these proceedings, the High Court registrar is requested to draw up a copy of the order and to furnish same to the parties

without the necessity of either side having to bespeak a copy of same from the Central Office.

*Appearances*

The plaintiff appeared as a litigant in person  
Frank Beatty SC and Frank Crean for the defendant instructed by Jacob and Twomey Solicitors LLP