APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/95

Collins J.
Binchy J.
Allen J.

Neutral Citation Number [2022] IECA 238

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACTS, 1998 TO 2011

BETWEEN

OLUMIDE SMITH

APPLICANT

AND

CISCO SYSTEMS INTERNETWORKING (IRELAND) LIMITED

RESPONDENT

EX TEMPORE judgment of Mr. Justice Allen delivered on the 17th day of October, 2022

1. This is an application by Mr. Olumide Smith for an order extending the time for an appeal against a judgment and order of the High Court (Noonan J.) made on 23rd January, 2019. The order of the High Court was perfected on the same day that judgment was pronounced.

2. The application now before the court is made on foot of a notice of motion issued on 20th April, 2022. Mr. Smith is a litigant in person. The title to the notice of motion describes Mr. Smith as *"Appellant/Plaintiff"* and the respondent as *"Respondent/Defendant"*. Because the application is for an extension of time for an appeal, Mr. Smith is strictly speaking the applicant, and Cisco Systems Interworking (Ireland) Limited is the respondent: but nothing turns on that.

3. In advance of the hearing of the application Mr. Smith filed two very large books of copy documents and authorities which he appears to have prepared as composite books for the purposes of hearings scheduled for 7th October, 2022, 17th October, 2022 and 14th November, 2022. I will refer to no more of the material than is relevant to the application which was scheduled for hearing, and heard, on 17th October, 2022.

4. Mr. Smith was employed by the respondent, Cisco Systems (Interworking) Ireland Limited *("Cisco")* from January, 2008 until July, 2013 as a software quality assurance engineer. According to his letter of offer of employment dated 11th December, 2007, the position offered was *"Software/QA Engineer II grade level 6."* Mr. Smith's employment was terminated in July, 2013.

5. On 28th November, 2013 Mr. Smith made a claim under the Employment Equality Acts for redress in respect of discrimination and victimisation on grounds of race. His complaint was that during the currency of his employment by Cisco he was discriminated against on the race ground as regards remuneration and promotion and that he was ultimately dismissed on grounds of race. On 18th February, 2016 the Adjudication Officer rejected the complaint.

6. On 4th March, 2016 Mr. Smith – as he was entitled to do – appealed to the Labour Court. Following a hearing on 16th January, 2018 and 27th February, 2018, the Labour Court issued its determination on 26th April, 2018. The determination of the Labour Court was that

Mr. Smith had not been discriminated against on grounds of race, that his appeal failed, and the decision of the Adjudication Officer was affirmed.

7. As far as pay was concerned, the case made by Mr. Smith to the Labour Court was that he had not been remunerated at the same rate as seven identified colleagues of a different race to him who, on his case, had been employed by Cisco to do like work. Cisco submitted evidence of the remuneration of Mr. Smith throughout his employment and of the earnings of three of the comparators who had been employed at the same grade as Mr. Smith and who it acknowledged were comparable, which was said to show, and which the Labour Court found did show, that Mr. Smith's remuneration exceeded that of his comparators. Cisco did not submit evidence of the remuneration of the other comparators relied on by Mr. Smith on the basis that they had never been employed at Mr. Smith's grade and were not, in Cisco's view, relevant comparators.

8. By s. 90 of the Employment Equality Act, 1988, as substituted by the Equality Act, 2004, Mr. Smith had a right of appeal to the High Court against the determination of the Labour Court but that right of appeal is limited to a point of law.

9. By originating notice of motion issued on 14th May, 2018 – which I will call Mr. Smith's main motion – Mr. Smith applied to the High Court for an order rescinding the findings, conclusion and determination of the Labour Court and a variety of orders for compensation, reinstatement and damages. That application was grounded on a long affidavit of Mr. Smith sworn on 14th May, 2018. In the title to both the notice of motion and the grounding affidavit, Mr. Smith identified himself as plaintiff rather than as appellant. For the avoidance of doubt, the identification does not go to the substance of the application but it shows, perhaps, a misunderstanding on the part of Mr. Smith as to the nature of the application.

10. By a further notice of motion issued on 5th November, 2018 – which I will call Mr. Smith's discovery motion – Mr. Smith applied for orders directed to establishing the salary ranges applied to five of Cisco's employment grade levels and the salaries applied to fifteen named employees of Cisco – amongst whom were the seven employees identified by Mr. Smith in the proceedings before the Labour Court as comparable – between the date of Mr. Smith's letter of offer of employment and the date of his dismissal.

11. The discovery motion was grounded on a short affidavit of Mr. Smith sworn on the same day which referred to a number of provisions of the United Nations Universal Declaration of Human Rights and several paragraphs in Mr. Smith's affidavit of 14th May, 2018 and in which Mr. Smith deposed:-

> *"17. I say that throughout the said employment period till present, the defendant has continuously and persistently concealed and denied the precise salary band of annual incomes in relation to the equal pay aspect of my claim of discrimination and/or victimisation pursuant to [ss. 19(1) and 29(1) of the Employment Equality Acts 1998 and 2004] …*
>
> *19. I say that the Labour Court's disproportionate failure <u>to conduct a discovery to independently and impartially</u> ascertain the precise salary band of annual incomes which the defendant has continuously and persistently concealed and denied till present in relation to the said employment period represents:*
>
> *(a) an abuse of my human rights, human dignity and constitutional rights;*
>
> *(b) a failure to act independently and impartially as a competent national authority;*
>
> *(c) an abuse of the Labour Court's authority; and*
>
> *(d) a miscarriage of justice."* (Emphasis original.)

12. Mr. Smith's discovery motion was heard by Noonan J. on 29th January, 2019 and, for the reasons given in a concise *ex tempore* judgment, refused. The judge observed that Mr.

Smith's substantive appeal was an appeal on a point of law. He noted in passing that the notice of motion of 14th May, 2018 did not – as required by O. 84C, r. 2(3) – identify any point of law but that, he said, was something that might need to be dealt with on another day. The judge said that Mr. Smith's documents and submissions suggested that he believed that the High Court could embark on a *de novo* hearing of his complaint, in which belief, he said, Mr. Smith was mistaken. The judge noted that one element of the case which Mr. Smith had made to the Labour Court was that he had been discriminated on the grounds of race in relation to his pay and that it appeared from the determination that the Labour Court had concluded that there was no evidence to support that contention. It appeared to the judge that Mr. Smith hoped to remedy that deficit by seeking discovery in relation to the salaries of a number of other identified employees of Cisco, which, he said, showed a fundamental misconception on the part of Mr. Smith as to the jurisdiction of the High Court. The appeal from the Labour Court being an appeal on a point of law, it followed by definition that the High Court could not consider new evidence. Since the information which Mr. Smith was attempting to gather could not be put into evidence on the appeal, it followed that the discovery sought was not relevant. For those reasons, Mr. Smith's discovery motion was dismissed and the judge went on to fix 2nd April, 2019 as the date for hearing of the substantive application.

13. It appears that the hearing of the substantive motion did not in the event proceed on 2nd April, 2019 but it was eventually heard on 30th June, 2020 by Meenan J., who delivered a reserved judgment on 13th November, 2020 [2020] IEHC 714. For the reasons given in his written judgment, Meenan J. concluded that Mr. Smith's notice of motion did not identify any point of law which would justify the court in upholding his appeal and he dismissed the appeal. That judgment and order are the subject of a separate appeal to this court which is listed for hearing on 14th November, 2022.

14. The application now before the court was grounded on an affidavit of Mr. Smith sworn on 20th April, 2022. Mr. Smith referred to several provisions of the Universal Declaration of Human Rights, some other litigation in which Cisco was said to have been involved, and some parts of his affidavit of 14th May, 2018. He set out extensive quotations from a number of documents and judicial decisions and gave an account of a difficulty with the papers which were before the High Court. By the way, the transcript of the hearing before Noonan J. shows that there was a deficiency in the books which had been lodged, which was immediately resolved by the judge being provided with the missing pages.

15. In his affidavit grounding this motion, Mr. Smith asserted that the judge treated him with disproportionate bias and partiality on the ground of race or ethnic origin. That is a wholly baseless assertion and ought never to have been made. There was also a baseless assertion that the High Court had tampered with his book of evidence.

16. Without rehearsing all of the detail, the substance of Mr. Smith's case appears to be that the High Court failed to conduct a discovery to independently and impartially ascertain the precise salary band of annual incomes.

17. As to why the judgment of 23rd January, 2019 had not been appealed within the time allowed, Mr. Smith deposed that:-

> *"I say that since this protracted proceedings commenced starting from the lodgement of the complaint on 12-Nov-2013, I have had no equality of arms; and in particular, I have had a profound personal difficulty that this Honourable Court is aware of which caused a delay in appealing the High Court Order dated 23-Jan-2019."*

18. I pause here to make a number of observations. First, there is no indication of what the asserted profound personal difficulty might have been. Secondly, Mr. Smith does not say when he decided to appeal. Thirdly, Mr. Smith ignores the fact that in the time between the

judgment on the discovery motion which he would now appeal and the time he issued his motion for an extension of time the substantive appeal was heard and determined and an appeal lodged – in time – against that decision.

19. In a supplemental affidavit sworn on 2nd June, 2022, Mr. Smith elaborated on the personal difficulties to which he had referred in his earlier affidavit. Those difficulties were difficulties said to have been encountered in protracted family law proceedings which ran concurrently with his litigation against Cisco *"... competing and exhausting [his] resources and capacity."* At para. 25 of his affidavit of 2nd June, 2022 Mr. Smith identified in seven pages a number of events in his family law proceedings between July, 2012 and July, 2019. In that time, apart from the family law proceedings proper, Mr. Smith was involved in litigation against the Legal Aid Board, The Office of the Ombudsman, a company said to have been associated with Cisco, and a prospective landlord. In his oral submissions, Mr. Smith argued that the burden of this litigation had affected his capacity to run his case against Cisco simultaneously and that the urgency of the family law proceedings had taken the whole of his attention.

20. The principles governing an application for an extension of time to appeal are well settled. In the leading case of *Éire Continental Trading Co., Ltd. v. Clonmel Foods, Ltd.* [1955] I.R. 170 the Supreme Court said that the granting or refusal of liberty to appeal out of time is a matter of discretion, in the exercise of which the court will consider whether the applicant had formed a *bona fide* intention to appeal within the time limited by the rules, the existence of any element of mistake, whether there is an arguable ground of appeal, and all of the other circumstances of each particular case.

21. More recently, in *Seniors Money Mortgages (Ireland) Ltd. v. Gately* [2020] 2 I.R. 441, the Supreme Court emphasised that the underlying obligation on a court on an application to extend time was to balance justice on all sides. O'Malley J. said that the

factors identified in *Éire Continental* were proper matters to be considered and the rationale underpinning them would apply to the vast majority of cases but they did not constitute a checklist according to which the applicant would either pass or fail. O'Malley J. also observed that the threshold of arguability might rise in accordance with the length of the delay.

22. In *Pepper Finance Corporation (Ireland) DAC v. Persons Unknown in Occupation of 21 Little Mary Street* [2021] IECA 277, this court emphasised that any delay on the part of the applicant in moving for an extension of time was a significant factor. In that case a delay of three months was held to be such as to require that the applicant must establish more than simply arguable grounds.

23. In *Seniors Money* O'Malley J. recalled the observation of Clarke J. in *Goode Concrete v. CRH plc* [2013] IESC 39 that it is difficult to envisage circumstances in which it could be in the interests of justice to allow an appeal to be brought outside the time if the court is not satisfied that there are arguable grounds. Even if the court were satisfied that the intention was formed within time and there were very good reasons for the delay, in the absence of arguable grounds, it would be a waste of the time of the litigants and the court to extend the time.

24. I am in no doubt where the balance of justice lies in this case. There is no evidence that Mr. Smith decided to appeal against the order of 23rd January, 2019 within the time allowed by the Rules of the Superior Courts. In response to a question from Collins J. in the course of the hearing as to where the court might find evidence of his having formed the intention to appeal within time, Mr. Smith pointed to the distraction of his other litigation, which was more or less a concession that he had been distracted by the other litigation to the point that he had not considered whether he should appeal against the order of Noonan J.

Absent evidence of an intention to appeal, it is impossible that there could have been an explanation of why the appeal was not filed in time.

25. Mr. Smith's assertion that he was, between July, 2012 and July, 2019, overwhelmed by the family law proceedings and the other litigation spawned by the family law proceedings, is difficult to reconcile with the fact that he progressed those proceedings and, in my view, quite impossible to reconcile with the plain fact that during that period he filed his appeal to the High Court against the determination of the Labour Court and his discovery motion and, on 23rd January, 2019, presented his discovery motion.

26. The insurmountable obstacle to Mr. Smith's application is that there is no arguable ground. The only proper purpose of an interlocutory or ancillary motion on Mr. Smith's appeal could be that whatever it was he asked should be done was relevant and necessary to the fair disposal of the appeal. The High Court judge was unquestionably correct in identifying that the object of the orders sought by the discovery motion was to gather factual information. The only appeal to the High Court permitted by law being an appeal on a point of law, any point of law – if any – identified in the substantive motion could only have arisen on the evidence adduced before the Labour Court. Whether on the basis of a misunderstanding on the part of Mr. Smith of the nature of the permitted appeal or otherwise, the motion for discovery was misconceived and the judge was perfectly right to dismiss it.

27. Mr. Smith, in his affidavit of 20th April, 2022 suggested that the High Court had refused his discovery motion partly on the ground that he had failed to identify a point of law. In that he is mistaken. The foundation of the judge's decision was that whether the substantive motion had identified a point of law or not – and he pointedly did not decide whether it did or not – the orders sought were directed to matters of fact which were not relevant to any appeal on a point of law.

28. In his written submission and in oral argument Mr. Smith suggested that the High Court judge had made foundational errors in finding as a fact that Mr. Smith had not raised the matter of discovery before the Labour Court which, he said, he had, and in his finding that Mr. Smith had not raised a point of law in his substantive appeal.

29. We have the transcript of the ruling of the High Court on Mr. Smith's discovery motion. As to whether the notice of appeal identified a point of law, what the judge said was that the notice of motion did not appear to him to identify any point of law but he immediately went on to say that that might be something to be dealt with on another day. The suggestion that Noonan J. found that the Labour Court had not been asked to deal with the matter of discovery is simply not made out by the transcript. What the judge said was that the Labour Court had found that there was no evidence in support the contention that Mr. Smith had been discriminated against on the grounds of race and that Mr. Smith appeared to be attempting to fill an evidential deficit.

30. In my firm view it is not even arguable that the High Court judge was wrong in the view he took of the discovery motion.

31. It follows that Mr. Smith's application to extend time must be refused.

[Collins and Binchy JJ. agreed.]