THE COURT OF APPEAL

Record no. 2015/103

BETWEEN CIARAN CULKIN APPELLANT

AND

SLIGO COUNTY COUNCIL RESPONDENT

Outline Submission on Behalf of the Irish Human Rights and Equality Commission

Introduction

1. The Irish Human Rights and Equality Commission was established pursuant to the Irish Human Rights and Equality Commission Act 2014 [hereinafter "the 2014 Act"]. The functions of the Commission which are set out in section 10 of the 2014 Act, include the protection and promotion of human rights and equality.[1] It may apply for liberty to appear as amicus curiae in proceedings that are before the court that involve or are concerned with the human rights or equality rights of any person and to appear as such an Amicus Curiae on foot of such liberty being granted (which liberty the court is empowered to grant in its absolute discretion).

2. The Commission may grant legal assistance (pursuant to section 10(f) in accordance with section 40 of the 2014 Act) to persons seeking to vindicate their rights by the referral of complaints of discrimination under the Employment Equality Acts 1998-2015 [hereinafter "the EEA"]. It regularly grants such assistance and has knowledge and experience in relation to the enforcement of such claims under the EEA.

3. The Amicus Curiae seeks in this submission to identify relevant jurisprudence and interpretative principles that may assist this Honourable Court in the proper determination of the substantive matters before coming before the Court on this appeal.

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[1] Section 10(1) (a), (b), (c) and (e).

Issue before the Court

4. This case relates to whether it is permissible for the Plaintiff/ Appellant to pursue complaints before the Workplace Relations Commission pursuant to section 77 of the EEA to full investigation, and also be permitted to pursue a personal injuries claim, where it is alleged that both claims arise from the same set of alleged facts. At issue in this appeal is the proper interpretation of section 101 of the EEA. Section 101 of the EEA in relevant part provides:

"**101.**—(1) If an individual has instituted proceedings for damages at common law in respect of a failure, by an employer or any other person, to comply with an equal remuneration term or an equality clause, then, if the hearing of the case has begun, the individual may not seek redress (or exercise any other power) under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be.

(2) Where an individual has referred a case to the Director under *section 77 (1)* and either a settlement has been reached by mediation or the Director has begun an investigation under *section 79* , the individual-

(a) shall not be entitled to recover damages at common law in respect of the case, and

(b) where he or she was dismissed before so referring the case, shall not be entitled to seek redress (or to exercise, or continue to exercise, any other power) under the Unfair Dismissals Acts 1977 to 1983 in respect of the dismissal, unless the Director, having completed the investigation and in an appropriate case, directs otherwise and so notifies the complainant and the respondent."

5.The section is clearly designed to prevent double recovery arising from the same wrongful act, namely discriminatory treatment but what this Court is asked to decide is whether it goes further and has the effect of preventing personal injuries claims from being taken in respect of other wrongs separate and distinct from the statutory

discrimination case arising from the same events, an interpretation preferred in the High Court which has had the effect of precluding the possibility of distinct claims arising from the same events even where they are not improperly duplicative.

The decision of this Court on the question of statutory interpretation arising has potentially far reaching implications in a manner which impacts on the very effectiveness of the EEA in prohibiting discrimination. The Amicus Curiae does not adopt a position in respect of the dispute inter partes and did not have sight of either the EEA complaint or the High Court pleadings in this case in making its decision to seek liberty to intervene. Thus, the Amicus Curiae is concerned not with the extent to which the claims in this case advanced separately under the EEA and by way of Personal Injuries Summons are in fact the same claim. Instead, the Amicus Curiae is concerned that the interpretation of section 101 adopted and formulated by this Court, which will in turn become binding on the Workplace Relations Commission, the Labour Court and the High Court in other cases, has due regard to the social and remedial purpose of the EEA and the obligations on the State to provide accessible and effective remedies in respect of certain discriminatory conduct.

Decision under Appeal

6. In giving a wide interpretation to the exclusion of an entitlement to pursue parallel action contained in section 101(2), the Learned President decided that the use of the word "case" in that section to set the parameters of the exclusion "must be taken to include the underlying facts which give rise to the complaint". This is a far reaching proposition which has been identified as resulting in a potential for the exclusion being too widely applied. After all, as Ryan points out in his recently published article, *Parallel Proceedings in Employment Law* [2015] DULJ 219 at p. 227, "*a great many separate and distinct cases will have the same underlying facts, but this does not necessarily render their pursuit improperly duplicative*."

Remedial Statute

7. The long title of the EEA 1998 states that it is "*An Act to make further provision for the promotion of equality between employed persons*." The Equality Act

2004 amends the 1998 Act "*for the purposes of making further and better provision in relation to equality of treatment in the workplace*" and thus it is a remedial statute. Its objectives are very similar to those of the Equal Status Act,[2] which was recently accepted by O'Malley J. in ***G v. Department of Social Protection,***[3] having regard to the objectives of the Equal Status Acts, as being a "remedial" statute when she stated "*it must be acknowledged to be a remedial statute*". She added:

> *"It follows that it must be liberally construed. As described in Dodd on Statutory Interpretation in Ireland (2008 Tottel) at paragraph 6.52: "'Remedial social statutes' and legislation of a paternal character favour a purposive interpretation and are said to be construed as widely and liberally as can fairly be done within the constitutional limits of the courts' interpretive role. This formula has been repeated in a number of cases ..Remedial social statutes are enactments which seek to put right a social wrong and provide some means to achieve a particular social result."*

8. Accordingly, the provisions of the EEA should be given a liberal and purposive interpretation in accordance with the principles set out above and as enunciated by Walsh J. in the case of ***Bank of Ireland v. Purcell***.[4] Borrowing from the words of McGuinness J. in ***Western Health Board v. KM***,[5] a remedial social statute should be approached in a purposive manner and should be construed as widely and liberally as fairly can be done in furtherance of the aim of the legislation, in this instance the promotion of equality between employed persons.

EEA and the Proper Transposition of EU Anti-Discrimination Directives

9. The EEA implements a number of EU anti-discrimination Directives. The Equality Act 2004 amended the Employment Equality Act 1998 to give effect to three

[2] The long title of the Equal Status Act 2000 as amended is "An Act to promote equality and prohibit types of discrimination harassment and related behavior in connection with the provision of services, property.."

[3] [2015] IEHC 419

[4] [1989] I.R. 327

[5] [2002] 2 IR 493

EU Council Directives, the Race Directive,[6] the Framework Employment Directive[7] which prohibits discrimination on grounds of religion or belief, disability, age and sexual orientation[8], and the Recast Gender Employment Directive.[9] The Directives contain provisions prohibiting discrimination on specified grounds, harassment and victimisation. There are also provisions on the burden of proof applicable in such claims and remedies.

10. Member States are required to ensure that judicial or administrative procedures are available to persons who consider themselves wronged by the failure to provide the principle of equal treatment to them (see, for example, Article 9 of the Framework Directive which provides that Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended). Sanctions must be effective, proportionate and dissuasive (see Article 17 of the Framework Directive which requires Member States to lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive to take all measures necessary to ensure that they are applied. The sanctions, which it is stated may comprise the payment of compensation to the victim, “must be effective, proportionate and dissuasive”).

11. The scope of all three Directives extend to all aspects of employment covered by the EEA and the majority of the discriminatory grounds contained in the EEA and the grounds at issue in the within case.

12. EU caselaw implementing the Anti- discrimination Directives have reiterated on numerous occasions the importance of remedies which must be effective proportionate and dissuasive. The ECJ has held that procedural rules applicable in determining disputes concerning infringements of rights derived from EU law cannot

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[6] 2000/43/EC which lays down a framework for combating discrimination on the grounds of racial or ethnic origin.

[7] 2000/78/EC

[8] Articles 3(1) b and 5

[9] 2002/73/EC

make the exercise of Union law rights excessively difficult or impossible to pursue. The principle of effectiveness requires courts and tribunal to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective protection of an individual's rights under community law.

13. The grounds relied on in the within case by the Appellant appear from the judgement of the High Court to be the discriminatory grounds of age and disability. It is significant that the judgement in the High Court in this regard makes no reference to the Framework Employment Directive or how the provisions of the EEA must be interpreted having regard to EU law.

Canons of Interpretation Applicable to Measures Transposing EU Law

14. The doctrine of indirect effect obliges national courts and tribunals to interpret their domestic law, as far as possible, in light of the wording and purpose of a Directive so as to achieve the result envisaged by the Directive. In an oft-quoted passage of the Judgment the ECJ stated: -

> *"It is for the national Court to apply the legislation for the adoption of a Directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law".*

15. The ECJ later significantly expanded the scope of this obligation in ***Marleasing SA v La Comercial Internacional De Alimentacion SA***.[10]

16. In this case the Court said that national courts were obliged to interpret national law, "*as far as possible*" so as to achieve the result envisaged by the Directive. However it went on to rule that the Spanish Court was actually precluded from interpreting national law in a way that did not comply with the provisions of the Directive. In terms of its practical application this dictum means that a provision of a Directive can supplant a conflicting provision of national legislation or it can be used to give a provision of national law a meaning consistent with EU law, which the provision would not otherwise bear.

[10] [1990] ECR 4135

17. After **Marleasing**, the Irish Courts used the schematic or teleological approach in interpreting national legislation so to bring it within the purpose of relevant Directives. In ***Nathan v Bailey Gibson***[11] the Supreme Court interpreted Sections 2 and 3 of the Irish Employment Equality Act 1977 in accordance with the Equal Treatment Directive. In that case Hamilton CJ referred to the decision in ***Marleasing*** as "*a far-reaching application of the general rule on interpretation which itself is not open to challenge*".

Equivalent and Effective Remedies

18. The CJEU has imposed two limitations on the procedural autonomy of the Member State with regard to remedies and enforcement. Firstly the national procedural rules cannot be less favourable than those relating to similar action of a domestic nature. This "equivalence" principle requires that national procedural rules should apply without a distinction to actions alleging infringement of Community law and to similar domestic actions. For example, in ***Levez***[12]an employee was seeking damages for arrears in payment under equal pay. The UK industrial tribunal applied a two year time limit to her even though her employer's deception had played a role in the delay in commencing her action. The CJEU noted that the rule at issue applied solely to claims for equal pay, whereas claims based on similar rights under domestic law were not so limited.

"*Community law precludes the application of a rule of national law which limits an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted, even when another remedy is available, if the latter is likely to entail procedural rules or other conditions which are less favourable than those applicable to similar domestic actions. It is for the national court to determine whether that is the case."*

[11] [1998] 2 IR 162

[12] Levez v Jennings Ltd (C-326/960[1998] ECR I- 7835

19. This begs the question as to whether the interpretation adopted by the Learned President in the High Court results in less favourable treatment of a claim under the EEA in vindication of rights protected under EU law than of similar domestic actions in breach of the doctrine of equivalence. A review of other Employment Protective Measures suggests that this is the case.

Duplicate Claims and Other Employment Protective Measures

20. The effect of the decision of the High Court in ***Cunningham***, as followed in this case, is that a claimant is placed at his or her election at a very early stage between pursuing different causes of action in different fora. The Amicus is unaware of any other equivalent employee protective statute where the claimant has to choose between either enforcing the statutory claim and a personal injuries action arising out of the same facts. The Maternity Protection Act 1994 (as amended) which provides rights to return to work after maternity leave or to suitable alternative work contains no such prohibition. Similarly a person who brings a claim for unfair dismissal is not prohibited from bringing a personal injury claim arising out of the same facts. It is acknowledged that section 15 of the Unfair Dismissals Act 1977 prohibits an employee from pursuing both a claim for unfair dismissal under the Act and a claim for wrongful dismissal at common law but, as found in the seminal decision in ***Parsons v. Iarnrod Eireann***, there is no impediment to the Plaintiff pursuing parallel proceedings in respect of "other free standing relief which he can claim at law or in equity".[13] Likewise, in ***Quigley v. Complex Tooling and Moulding Ltd*** the Court found

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[13]See Barrington J. in ***Parsons v Iarnrod Eireann*** [1997] 2 IR 523, 530. In ***Parsons*** the claimant brought proceedings for unfair dismissal and issued proceedings in the High Court for a number of reliefs and in particular damages for wrongful and/or unfair dismissal. In its defence to the High Court proceedings the employer raised an objection seeking to have the claim struck out as it contravened Section 15 (2) of the Unfair Dismissal Act 1977 (as amended). The High Court allowed the objection and struck out the proceedings. On appeal to the Supreme Court, Barrington J noted:

"*Section 15 of the Unfair Dismissal Act [1977] provides that the worker must choose between suing for damages at common law and a claim for relief under the…Act. Subsection 2 accordingly provides that if he claims relief under the Act of 1977 he is not entitled to claim damages at common law while subsection 3 provided that where proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of an employee, the employee shall not be entitled to redress under the Unfair Dismissal Act 1977 in respect of the same dismissal". He continued at p. 530 in respect of the particular case and the manner*

that when an employee had acquired a common law cause of action prior to his dismissal, this cause of action preceded, and was independent of, his subsequent dismissal and the statutory rights flowing therefrom and that the basis of the plaintiff's cause of action in the then current plenary proceedings was not his dismissal, the manner of his dismissal or any implied principles of fairness surrounding his dismissal, but was a claim founded in negligence, breach of duty and breach of contract and had arisen out of the conduct of the defendant during the course of the plaintiff's employment and was thereby a separate and distinct cause of action to any statutory claim he might have for unfair dismissal.

The Statutory Prohibition on Duplication of Statutory Remedies and Common Law Remedies

21. The position as stated in ***Parsons*** and in ***Quigley*** is not surprising. Unlike the High Court which is vested with unlimited jurisdiction under Articles 34 and 37 of the Constitution, the Workplace Relations Commission or Labour Court hearing a complaint under the EEA, in accordance with Article 37 of the Constitution, is exercising a limited jurisdiction which is circumscribed by statute. To borrow from the words of Laffoy J. in ***Ahmed v. Health Service Executive*** *[2007] 2 I.R. 106*, when considering the question of the jurisdiction of a Rights Commissioner and, on appeal, the Labour Court under the Act of 2003 and explaining that jurisdiction as follows at para. 30:-

> *"The jurisdiction conferred on a rights commissioner and on the Labour Court on appeal by the Act of 2003 is to adjudicate on an employee's complaint that his employer has contravened one or more of the provisions of the Act of 2003 and to deal with the complaint in the manner stipulated in ss. 14(2) or 15(l)(b), as the case may be."*

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in which it was pleaded that "if the plaintiff loses his right to sue for damages at common law the heart has gone out of his claim and there is no other free standing relief which he can claim at law or in equity". In **Quigley v Complex Tooling and Moulding Limited** [2009] 1 I.R. 349 Lavan J found that "*where the facts of a….High Court claim were independent of the subsequent dismissal, therefore a claim might be pursued at the Tribunal*".

It follows that any claim for discrimination or bullying or harassment which does not lie under the EEA properly falls outside the jurisdiction of the Tribunal and this has a bearing on the extent to which a common law action can properly be seen as a duplicate action. Any issue of duplication only arises where the complaint pursued in the different fora is the same complaint and the same remedies are available.

The right to pursue separate remedies in different fora, so long as it does not amount to double compensation for the same injury or in essence the same cause of action resulting in issue estoppel, has been recently acknowledged in ***Boyle v. An Post.***[14]

22. In that case An Post claimed that Mr Boyle's claim in plenary proceedings in which he sought injunctive relief centred on an alleged breach of the Unfair Dismissals Acts and that he should not be allowed to litigate such grievances before the High Court at common law. The court did not accept this line of contention. To preserve his position under the Unfair Dismissals Acts it was noted that Mr. Boyle had not sought any damages for wrongful dismissal in the plenary proceedings. The Court stated that:

"*the position as regards the relationship between (a) an action for wrongful dismissal and (b) the remedies available under the Unfair Dismissals Acts, remains as stated by Barrington J., for the Supreme Court, in Parsons v. Iarnród Éireann [1997] 2 I.R. 523 , 529 …. An Post may contend, it might even be right, that Mr Boyle's best option was and remains to bring a complaint before the Employment Appeals Tribunal; and it is entitled to that belief. But Mr Boyle has entitlements too; among them is his entitlement to bring what is an arguable claim of wrongful dismissal before the court and to seek related reliefs such as those now sought in the within application. In general, one must tilt with one's opponents where they seek to joust, and not in an arena of one's choosing: here the court does not accept any contentions by An Post that the appropriate forum for the dispute between the parties necessarily lies elsewhere and/or that the within proceedings ought not to have been commenced.*"

[14] Boyle v an Post [2015] IEHC 589.

23. Similarly section 13 of the Protected Disclosures Act 2014 establishes a right of action in tort for a person suffering detriment because of making a protected disclosure. A person cannot pursue the tort action and a claim for unfair dismissal. However there is no prohibition on the employee pursuing other claims at common law.

Access to the Courts

24. Further the ECJ has emphasised the importance of access to the Courts for the vindication of EU law rights, identifying it as a fundamental right guaranteed under the ECHR and the Charter of Fundamental Rights.[15] Chapter III of the Charter prohibits any discrimination on a broad range of specified grounds which extend beyond the nine specified grounds contained in the EEA. Article 47 of the Charter establishes a right to an effective remedy.

25. The impact of the ***Culkin*** judgment is that claimants must be advised before the investigation of a claim under the EEA commences, that they must choose between pursuing a claim under the EEA or a claim at common law for personal injuries. Since the introduction of the Workplace Relations Act 2015, the Workplace Relations Commission has committed to providing hearings within 3 months of the lodging of claims, including claims under the EEA. Early hearings of such claims means that a personal injury claim may not even have crystalised by the date of the hearing of the claim under the EEA and /or the claimant may be unaware of the extent and value of such a personal injury claim by the date of the hearing of the claim. This is likely to have a significant chilling effect on the bringing of claims under the EEA and constitutes a serious impediment to the enforcement of EU derived anti-discrimination rights. Further it deprives the legislation of an important element of its effectiveness and reduces the protection, which it is intended to guarantee. If too broadly applied, the interpretation of section 101(2) favoured by the Learned High Court Judge may have the effect of curtailing access to justice rights of individuals who may have a legitimate

[15] EU Law Text Cases and materials, Craig and De Burca, p236

entitlement to pursue more than one set of proceedings even where those proceedings arise from the same facts.

26. In this regard it is submitted that the EEA must be interpreted in such a way as to afford the Complainant an effective and meaningful remedy, without having to choose between a claim under the EEA and a personal injury claim or being required to or abandon or forfeit a claim for personal injuries at a very early stage, or at all. An interpretation of section 101 in such a way as to require a claimant to choose between a claim under the EEA and a personal injury claim does not constitute an effective or equivalent remedy.

Ouster of a Constitutional Right

27. Any statutory provision which excludes or limits the right of access to the courts would of necessity have to be clear and unambiguous. ***Stokes v Christian Brothers High School Clonmel,***[16] concerned the interpretation of section 28(3) of the Equal Status Act 2000 as amended and whether it provided for a right of appeal from the High Court to the Supreme Court on a point of law. Clarke J referred to Walsh J in the ***People (AG) v. Conmey*** where he stated with reference to the appellate jurisdiction of the Supreme Court that:

"any particular provision seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous. The appellate jurisdiction of this Court from decisions of the High Court flows directly from the Constitution and any diminution of that jurisdiction would be a matter of such great importance that it would have to be shown to fall clearly within the provisions of the Constitution and within the limitations imposed by the Constitution upon any such legislative action." [17]

28. Clarke J also referred to the observations of Geoghegan J. in ***A.B. v. Minister for Justice, Equality and Law Reform*** [18]:

"It would seem to be clear from the authorities, however, that an exclusion or regulation of the right to appeal to the Supreme Court need not be

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[16] [2015] IESC 13

[17] [1975]IR 341 at 360.

[18] [2002] I IR 296 at 316

expressed. It is a matter of construction of the relevant statutory provision in each case, but there must not be any lack of clarity or ambiguity."

Clarke J concluded:

"However, as is clear from the authorities to which I have referred, the constitutional status of the right of appeal to this Court is such that an exception to that right requires clear and unambiguous wording. On balance, I have come to the view that the wording of subsection (3) is insufficient to meet that high constitutional test. It is not free from ambiguity."

29. These comments are apposite to the interpretation of a claim which concerns the constitutionally protected right of access to the Court.

An Alternative Interpretation of Section 101 of the EEA

30. There is an interpretation of section 101 of the EEA using the ordinary language of section 101, which does not inhibit or reduce in any way the protection that is afforded in the legislation or deprive a claimant of an entitlement to pursue a claim for personal injuries at common law in the manner which results from the interpretation favoured by the Learned former President.

31. Section 101(1) of the EEA identifies the nature of the common law action which results in duplicate protection for rights protected under the EEA by express reference to common law proceedings for failure to comply with an equal remuneration term or an equality clause. This would appear to be the type of common law case which is precluded under section 101(2) where a case has been pursued under section 77 of the EEA. Sections 20 and 21 of the EEA imply terms as to equal remuneration for men and women and a gender equality clause into a person's contract of employment. There are similar provisions in ss 29 and 30, implying terms into the contract of employment as to equal remuneration and equal treatment on the other grounds:

> *"Thus the Employment Equality Acts and arguably the Pensions Acts, provide the basis of a claim of breach of contract at common law. The fact that an individual can institute proceedings at common law in respect of a failure of an employer or any other person to comply with an equal*

remuneration term or equality clause is recognised in s101 of the Employment Equality Acts."[19]

32. The option of pursuing a discrimination claim at common law is not often exercised[20] but remains a viable alternative to pursuing a claim to the Equality Tribunal:

> *"In some cases, particularly for those on a low wage, effective and proportionate compensation for the injury suffered by the employee would exceed the cap on compensation of two years' salary which can be awarded by the Equality Tribunal. An action for breach of the equal treatment provisions implied into the contract of employment, if brought in the Circuit Court or the High Court might provide for the award of a more just level of compensation and would also allow a court to award costs*[21]*."*

33. The purpose of section 101 is to prohibit a claimant in bringing a claim of discrimination at common law and a statutory claim of discrimination under the EEA. The 'case" referred to in section 101(2) and 101(2)(a) means the discrimination case linked to a prohibited ground under the Act. Indeed, it is clear from the language of section 101(1) that what was intended to be precluded was the bringing of separate proceedings for damages at common law in respect of a failure "*to comply with an equal remuneration term or an equality clause*". When the Learned Trial Judge stated with reference to the statutory nature of the case under the EEA that there is no entitlement to recover damages at common law in respect of such cases, he failed to address the possibility of a claim for damages for failure to comply with an equal remuneration term or equality clause which are expressly identified as the types of claims intended to be captured by section 101(1). Not alone is this narrower interpretation of what is intended by section 101(2) logically open on the plain language of the section read as a whole but it is also consistent with the approach of the Legislature in precluding by the terms of section 15 of the UDA the bringing of a

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[19] Employment Equality Law, Bolger, Bruton and Kimber p 737

[20] In Butler v. Four Star Pizza, Circuit Court unreported, Judge Spain, March 2 [1995].

[21] Employment Equality Law, Bolger, Bruton and Kimber p 737-8

claim for wrongful dismissal under the common law where one has already availed of the statutory remedy for essentially the same wrong.

34. Section 101(2), a measure designed to prevent duplication, should not operate to preclude the bringing of an action that could not properly have been brought under the EEA in any event such as an action for bullying and harassment falling outside the ambit of the EEA and a Tribunal convened to deal with a complaint under the EEA has no jurisdiction to require a claimant, as a condition of proceeding to hearing, that they abandon any claim other than the claim under the EEA which may properly be brought arising from the same events. Were a Tribunal to exceed its jurisdiction by unlawfully putting a claimant at his or her election in circumstances where the claimant does not share the interpretation posited whereby the election is required, this cannot have the effect of estopping the claimant from thereafter pursuing an action on the basis of his interpretation of the section.

Thereafter, it is a matter of law as to whether the second claim is permissible under section 101(2) of the Act. Were the intended effect of section 101(2) of the Act to allow the Tribunal to put a claimant on their election by choosing a narrow statutory remedy or a wider, common law remedy, clear and unambiguous language would have been required not least in light of the resulting interference with a right of access to the courts. Curiously, in proffering the view that section 101(2) would be redundant were it interpreted as excluding only the equality case on the stated basis that there is no entitlement to recover damages at common law in respect of equality claims, the Learned President makes no reference to the fact that the equality case has a common law equivalence in the form of the action for breach of a remuneration term or equality clause. Section 101(2) is not "redundant" where it has the effect of requiring a claimant to elect between a discrimination claim under the EEA and the similar common law discrimination claim based on a breach of a remuneration clause or equality clause.

Henderson v Henderson

35. The common law doctrine in ***Henderson v Henderson*** should not be used to defeat reduce or inhibit the enforcement of anti-discrimination measures. The

doctrine was developed in a very different context.[22] Without prejudice to this contention the doctrine in ***Henderson v Henderson*** does not apply in the circumstances arising here as a claim under the EEA is radically different to initiation of proceedings for personal injuries at common law and the two ought not properly be considered to be the same. The Claimant could never advance every claim open to him under the common law under the EEA as the jurisdiction created by the EEA is a limited, statutory jurisdiction and the EEA is not a court of "*competent jurisdiction*" (in the sense employed by Wigram VC) in respect of all causes of action which might be brought forward in the manner contemplated by Wigram VC in his judgment in ***Henderson*** and it is simply not possible for the claimant to bring forward its "whole case" where the same events give rise to causes of action in addition to the EEA claim. The differences between a claim under the EEA and a common law action for personal injuries include:

A. A claim under the EEA for discrimination or harassment must be grounded on one of the nine specified grounds identified in section 6(2) of the EEA, namely gender, civil status, family status, sexual orientation, religion, age, disability, race, membership of the Traveller community. A complainant cannot complain or succeed in a claim in respect of less favourable treatment or harassment which is not based on one of the discriminatory grounds. The EEA does not provide a forum for dealing with claims of bullying or harassment that is not linked to one of the discriminatory grounds no matter how egregious the behaviour is, thus it is not possible to bring complaints other than those strictly falling within the jurisdiction prescribed by the EEA before a Tribunal or the Labour Court on appeal.

B. The EEA prohibits discrimination on any of the nine discriminatory grounds. Discrimination is specifically defined in section 6. It occurs where a person is treated less favourably than another person is has been or would be treated in a comparable situation on any of the specified grounds. There are a number of hurdles which have to be met. There has to be less favourable treatment (as opposed to different treatment). The less favourable treatment has to be on

[22] see more fully Ryan, *Parallel Proceedings in Employment Law*, [2015] DULJ 219 in relation to the origins of the doctrine

one of the discriminatory grounds. The claimant has to identify a comparator.[23] Further the comparator has to be in a comparable situation. While there is no defence to a claim of direct discrimination there are a number of general exemptions which apply to all of the nine grounds and a number of ground specific exemption as well. Although the EEA prohibits harassment at section 14(a), it provides that references to harassment are to any form of unwanted conduct related to any of the discriminatory grounds.

C. The redress provisions are also different. The maximum compensation which a claimant may obtain as compensation for under sub section 1(c) of 82 is 104 times the amount of the weekly remuneration (where the claimant was in receipt of remuneration at the date of reference of the claim or if earlier the date of dismissal) or €40,000 or in any other case €13,000. The Equality officer may make award of equal renumeration, reinstatement and re-egagement.

D. The Equality officer also has the power to make non-financial awards reflecting the anti-discrimination purpose of the legislation. The Equality officer may make an order "*that a person or persons specified in the order take a course of action*".[24] The Equality officer in *Sheehy Skeffington v. NUIG* ordered the university in addition to €70,000 compensation, to promote the claimant to the position of senior lecturer and carry out a review of its policies and procedures in relation to promotion to senior lecturer and to make a report to the IHREC on this review.

36. It can be seen that a claim under the EEA is radically different to that of a claim at common law for personal injuries. It can also be seen that a claimant may not succeed in a claim for discrimination and yet have a valid claim for personal injuries at common law.

Conclusion

[23] In certain situations a hypothetical comparator will be allowed.

[24] Section 82(1) e

37. The approach of the Courts in the line of authority from ***Parsons***, ***Quigley*** and most recently ***Boyle***, is difficult to reconcile with the decisions of the High Court in ***Cunningham*** and ***Culkin*** in respect of the EEA. It is not clear from the judgments in relation to the EEA that the mischief that section 101 is designed to prevent is separate litigation before two different fora in respect of what is, in essence, the same cause of action and the judgments appear to go beyond this. In neither judgment does the Court allow for a situation where the events complained of constitute bullying and harassment but ultimately not discriminatory treatment on one of the prohibited grounds or harassment associated with discrimination on one of the prohibited grounds.

38. It is the view of the Amicus Curiae that the approach adopted by the High Court in ***Culkin*** (following the decision in ***Cunningham***) is not necessarily one mandated by the language of section 101 of the EEA and results in a potential barrier to the effective protection against discrimination mandated by the requirements of EU law, thereby triggering careful scrutiny of the proper interpretation of the section in line with the requirements of EU law.

39. Properly interpreted section 101 of the EEA operates to prevent double claiming of damages arising from discriminatory treatment in employment on one of the prohibited grounds identified in the EEA but does not preclude the bringing of separate proceedings in respect of different causes of action arising from the same events.

12th of January, 2016

Siobhan Phelan SC

Eilis Barry BL

[Word count: 6,419 (inclusive of footnotes)]