

Civil servant 'bound' by WRC route after choosing it, cannot take 'tort' action

ANDY PRENDERGAST

The Court of Appeal has rejected an argument by a former civil servant who sought to take a claim of tort under the Protected Disclosures Act, having already chosen to take a claim to the WRC, with the Court confirming that once the WRC avenue was pursued it prevents the 'tort' avenue – irrespective of the outcome of the WRC process.

A WRC adjudicator, in 2021, ruled against Mr Pascal Hosford's claim against the (then) Minister for Employment Affairs and Social Protection, on a time limit issue – not on his substantive claim.

In 2022, he sought to bring a claim of tort under section 13 of the Protected Disclosures Act, on the basis that because the WRC AO did not rule on the substance of his claim, he is still free to pursue a tort claim under the PD Act. The trial judge said this raised a novel issue and did not dismiss the claim, a decision appealed by the Minister to the Court of Appeal.

The time limit for WRC is six months, while tort limit is six years

Ms Justice Hyland, in allowing the Minister's appeal, said that because of the "clear obligation" in section 13(2) of the Act, a claimant has to choose between the WRC route on the one hand, and the tortious route on the other, "without any limitation on this obligation where no substantive decision results from the election."

The plaintiff "unequivocally elected to pursue his claim by the WRC route and that election binds him irrespective of the outcome of the WRC process", the judge said.

LONG AND TORTUROUS HISTORY

Mr Hosford, who used to work in the Scope section at the Department, has taken many employment claims at the WRC, Labour Court and at the Four Courts.

The judge said it was not necessary to set out the "long and torturous history" of Mr Hosford's litigation to date, briefly summarising the background to the claims Mr Hosford has pursued, stemming from his transfer out of the Scope section which he claims was *mala fides*.

A WRC adjudicator ruled against his claim in 2021 on a time limit issue. The plaintiff did not appeal that decision to the Labour Court but issued a tort claim under the PD Act in May 2022. He says it would be "unjust" if he was deprived of the right to take this claim.

The judge noted that the decision to strike out a claim must not be taken unless it is clear that the case will not succeed, and that the jurisdiction to strike out proceedings "is to be used sparingly in clearcut cases".

'CANNOT AVAIL OF BOTH ROUTES'

The meaning and purpose of s.13(2) of the PD Act is "crystal clear", Hyland J said. "It represents a decision by the Oireachtas to establish alternate paths of redress for persons who assert harm following the making by them of a protected disclosure.

"One option is the well-trodden path of existing statutory procedures before the WRC ... This may either be in respect of a penalisation claim or an unfair dismissal claim.

“The other, entirely novel, path is to rely on the right of action in tort created by s.13(1) against the person alleged to have caused detriment.”

These differing paths “are not cumulative. A person cannot avail of both routes”, she said.

The time limit for a claim to the WRC is six months (with a further six-month extension possible) while the tort route has a six-year time limit.

The judge stressed that there “is absolutely no conditionality in respect of the election having regard to what happens to the complaint before the WRC (or indeed before the courts if the tortious route is chosen).”

Mr Hosford’s complaint was statute-barred and its substance was not determined. That is “one of the potential outcomes where a person elects to avail of the redress scheme available under the WRC architecture.”

The plaintiff “engaged wholly with the WRC mechanism and he cannot resile from that. Nothing in the legislation suggests a different outcome should prevail where the claim is determined on a preliminary procedural basis.” (*Pascal Hosford v Minister for Employment Affairs and Social Protection [2024] IECA 294*)