

No. 1

O. 58, r. 15



SUPREME COURT

Record No:

### Application for Leave to Appeal

#### Part I

*The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court*

1. Date of Filing: 5 March 2019
2. Title of the Proceedings:

Agnieszka Nowak

-v-

The Labour Court

Intesa Sanpaolo Life DAC (Notice Party)

3. Name of Applicant: Agnieszka Nowak  
What was the applicant's role in the original case: Applicant

4. Decision of Court of Appeal (where applicable):

Record No: 2018 418 JR

Date of Order: 25 February 2019

Perfection Date: 25 February 2019

Date of Judgment: N/A

Names of Judges: Peart J, Edwards J, Whelan J.

5. **Decision of the High Court:**

Record No:

Date of Order:

Perfection Date:

Date of Judgment:

Names of Judge(s):

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

Yes  No

6. **Extension of Time:**

Yes  No

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

7. **Matter of general public importance:**

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/A

  
  
  
  
  
  
  
  
  
  

Word count -

**8. Interests of Justice:**

*If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.*

*This section should contain no more than 300 words and the word count should appear at the end of the text.*

1. At the leave stage of the application for judicial review the Court of Appeal (hereinafter “ the Court’ ) or the High Court should have assessed whether I had 1) a sufficient interest in an impugned decision; 2) had arguable case; and 3) reasonable grounds to succeed. However, it analysed grounds (upon which judicial review is sought) without further information (on affidavit) from the Labour Court. The Court erroneously ultimately rejected all grounds for judicial review.
2. It seems that the Court advocated for the Labour Court. For instance, the Court, while making its *ex-parte* judgment, justified the lack of the signature on face of the received determination of the Labour Court by reasoning (without prior knowledge of the internal procedures) that a copy determination was sent by the Labour Court. Elsewhere, the Court justified the absence of the witnesses (who were requested by me to attend the hearing in the Labour Court however not subpoenaed by the Labour Court), by suggesting that a *prima facie* case was not made out.
3. If leave is refused, the determination, which was the product of an unfair hearing (for the reasons presented in the grounds of appeal), will stand. A right to a fair trial is one of rights as envisaged in the EU Convention on Human Rights which was not guaranteed in the Labour Court.
4. In its determination the Labour Court included the information which was not given during the sworn testimony and the Court failed to take it into consideration while deciding whether to grant leave.
5. The lower courts failed to recognise solid grounds for judicial review.
6. The Court accepted an incorrect application of section 85A (1) of the Employment Equality Act 1998 (as amended) in Labour Court’s decision making process.

Word count – 296

**9. Exceptional Circumstances: Article 34.5.4:**

*Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.*

*This section should contain no more than 300 words and the word count should appear at the end of the text.*

N/A

Word count -

**10. Grounds of Appeal**

*Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.*

**11. Priority Hearing:**

Yes  No

*If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.*

*This section should contain no more than 100 words and the word count should appear at the end of the text.*

The proceedings were instigated for the first time in 2015 by filing a claim under the Equality Employment Act 1998 (as amended). In general a refusal of an ex-parte application by the High Court is appealed by way of an expedited appeal to the Court of Appeal. Therefore this appeal should be heard by the Supreme Court as a priority.

Word count – 60

**12. Reference to CJEU:**

*If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.*

## Appendix

### Notice of Appeal

1. Title of the Proceedings:

Agnieszka Nowak

-v-

The Labour Court

Intesa Sanpaolo Life DAC (Notice Party)

2. Grounds of Appeal:

*Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.*

1. The Court of Appeal erred in refusing leave to apply for judicial review as explained below.
2. The Court engaged into an analysis of issues without full knowledge of the procedures which should have been explained by the Labour Court on affidavit. For example, the Court justified the fact that the determination I received bears no signature by reasoning that a copy determination was sent by the Labour Court. Apparently, it failed to apprehend that the absence of the signature could reveal further significant error in the decision making process once full judicial review is conducted and sworn evidence adduced.
3. The Court failed to recognize the unfairness of the hearing in the Labour Court despite it was submitted to it that:-
  - a) The Secretary failed to do her duty to subpoena witnesses on my behalf going before the Division of the Labor Court which was in breach of their internal procedures. Therefore my witnesses could not give evidence. The Court of Appeal opined that the absence of the requested witnesses resulted from the provisions of section 85A(1) of the 1998 Act (as amended) and the associated tests to the effect that the onus is on the complainant to establish facts of significance to raise a presumption of discrimination (which would allow the burden of proof be shifted on to the respondent). The Court of Appeal concluded that the witnesses did not give evidence because *a prima facie* case was not made out ignoring the fact they did not even attend the hearing. Absence of the witnesses, who should have been subpoenaed by the Secretary of the Labour Court, would suggest that respondent (my employer) knew in advance the outcome of the hearing.
  - b) As there was no sworn evidence adduced on behalf of my employer it impaired the fairness of the appeal and adversely affected the entire determination. If the sworn evidence was given it could lead to the different conclusion.

4. The Court of the Appeal upheld the misapplication of section 85A (1) of the 1998 Act by the Labour Court which states that “*where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary*”. The Labour Court in its determination to disallow the appeal because there was no facts of sufficient significance which raised a presumption of discrimination ignored, for example, the following evidence before it:-
  - a) In relation to the alleged unlawful discrimination in conditions of employment the Labour Court disregarded the amendment to the employment contract dated 9 November 2012 which stated as follows:

*“We operate a flexi-time system which provides employees with a degree of flexibility in relation to their start and finish times, the details of which are set out in our Employee Handbook. You are not at present covered by the flexi-time system although the company reserves the right to change same at its discretion”.*
  - b) In relation to the alleged unlawful discrimination pursuant to section 77(1)(c) of the 1998 Act (as amended) in response to request for information pursuant to section 76 of the 1998 Act the respondent supplied to the Court payroll information in the form of the extract from the company’s Excel spreadsheets and other internal system (Time Management System) as part of the Booklet of Appeal. Those data were never confirmed in the sworn testimony. What is striking the Labour Court, however, referred to that information in its determination. Moreover, the Labour Court failed to recognise my objection on the correctness and legitimacy of the information provided by the Respondent because it appeared to be engineered. Moreover, my witnesses were not subpoenaed as requested, therefore, no evidence could have been adduced in relation to the equal pay claim.
5. On the other side, if the *prima facie case* was not made out the Labour Court would not proceed to my cross examination by the representative of the respondent. Therefore, as my cross examination was conducted a *prima facie case* was made out and the burden of proof (pursuant to section 85A (1) of the 1998 Act which states that “*where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary*”) was shifted onto the respondent to prove to the contrary. Thus the evidence from the respondent should have been heard.
6. The determination was not validated by the signature of the Chairman of the Division of the Labour Court. The lack of signature invalidates the contents of the said determination or makes it ineffective in its entirety. The unsigned document has no legal effect.

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

1. An Order granting leave to apply for judicial review of the Determination of the Labour Court on reliefs and grounds as contained in the Statement required to ground application for judicial review or other grounds as the Court may think fit and just.