

THE HIGH COURT

2006 30 1A

BETWEEN

DAMIEN J. BRENNAN

PLAINTIFF

AND

THE NORTH WESTERN REGIONAL TOURISM AUTHORITY LIMITED
(FORMERLY THE NORTH WEST TOURISM AUTHORITY LIMITED)

DEFENDANT

Judgment of Mr. Justice Michael Peart delivered on the 29th day of November 2007

1. When these proceedings were commenced, the defendant body was about to appoint an Acting Chief Executive due to the fact that the then Chief Executive had announced that he was suffering from a serious illness which would render him absent from his position for about three months. As the plaintiff was of the opinion that under his contract of employment he was entitled to expect that he would fulfil that role during any period of absence of the Chief executive, he sought and was granted an interim injunction to restrain the defendant body from indulging in a selection process for an Acting Chief Executive and from appointing or attempting to appoint any person other than the plaintiff to such a position.

2. By the time the application for an interlocutory injunction came on for hearing the then Chief Executive had in fact returned to his position, as his anticipated absence turned out not to be necessary. It follows that it is no longer necessary to pursue the reliefs sought in the Plenary Summons as such, but the plaintiff wishes to obtain an order for his costs of the proceedings against the defendant and therefore the matter has been heard as to the merits of the claim, since that is the only route by which his entitlement to such an order can be established. In addition to the affidavits filed by each side, this Court has heard oral evidence from the plaintiff, and on behalf of the defendant.

3. At the heart of this case is a clause which is contained in the plaintiff's Job Description which the plaintiff and the defendant signed on the 29th January 1993, and which is referred to in his letter of appointment dated 20th January 1993 and mutually signed on the 29th January 1993. The latter document states under the heading "Duties":

"Your duties and responsibilities are as already described in the Job Description for the post, which you have already received, copy attached".

4. The Job Description document contains a number of headings, two of which are relevant. Under the heading "Scope of Job" a number of matters are set forth which it is not necessary to detail. But the final section states:

"to act as Manager in the absence of RTM"

5. The letters RTM refer to Regional Tourism Manager. That position later became known as Chief Executive Officer (CEO). It can be seen therefore that the reference to acting as Manager in the absence of the RTM must be now read as being "to act as Chief Executive in the absence of the CEO".

6. Under the heading "Duties/Responsibilities", there is no reference to anything which might be involved in acting as CEO in the absence of the CEO.

7. It is the clause referred to under the heading "Scope of Job" above upon which the plaintiff rests his argument that when it was anticipated that the CEO would be absent for a three month illness due to illness, he was entitled to act in the position of Acting CEO until the CEO was in a position to return to his post, and that it was not open to the defendant to seek to appoint any person other than the plaintiff to that position, as it wished to. He also states that it has been over the years the custom and practice both in the defendant body and in other Regional Tourism Authorities that the Senior Tourist Officer would act as CEO in the absence of the CEO.

8. The defendant on the other hand maintains that the clause referred to does not mean that the plaintiff was entitled to act as CEO, but that he may be required to do so as part of his job description. Counsel for the defendant has described the clause as creating an obligation to so act if requested to do so, but not a right to be requested to do so.

9. In the background to this case is also a belief on the plaintiff's part that there is a bias against him on the part of the Chairman of the defendant body, and that the plaintiff was never part of what has been referred to as the Chairman's "team". That is denied by the defendant. But the plaintiff points to the fact that on a couple of occasions when the CEO position has become vacant he has applied for the position and has not been appointed even though he saw himself as the most senior applicant and who would have expected to have been appointed. He believes that the Chairman, who was part of the interview panel is not favourably disposed to him and that he is the reason why he has not been appointed to the position of CEO when he has applied, and why, in this particular case, the temporary position of Acting CEO was advertised instead of being given to him for the three month period under the terms of his Job Description referred to. He is also of the view that in due course when he again applies for the position of CEO he would be in a much more favourable position to do so from the position of Acting CEO, and that acting as CEO would provide him with the opportunity to prove himself in that role. But he believes that the position of Acting CEO is his contractual right.

10. I shall refer to each party's legal submissions in due course, but first wish to set out some relevant factual background based on the affidavit and oral evidence given.

11. The plaintiff was appointed to the position of Senior Tourism Officer in 1991. At the outset he was given a one year contract, and thereafter he was made permanent. As I have stated, he has unsuccessfully applied for the position of permanent CEO on two occasions, and he believes that the reason why he has not been successful is that the Chairman is not well disposed towards him. On the second occasion the person who is currently the CEO and who became ill in April 2006 was appointed, namely Mr. Paul McCloone. Apart from antipathy from the Chairman, the plaintiff also states that Mr. McCloone at times has attempted to undermine his position, and that this has resulted in the plaintiff taking his grievances to his Trade Union IMPACT. In particular the plaintiff has referred to a letter which was written by IMPACT following a meeting between that body and Mr. Cloone on the 30th January 2004. That letter purports to record five reassurances reached at that meeting in relation to certain matters about which the plaintiff was complaining. Only one of those reassurances is relevant to the plaintiff's proceedings, namely that at (4) therein which states:

"That you have no difficulty in giving effect or implementing the provisions of job specification for Senior Tourism Officer

which provides for acting as Manager in the absence of your good self..."

12. That letter pre-dates of course the events of April 2006 when Mr. McCloone's illness was seen by the defendant body as requiring the appointment of an Acting CEO. But the plaintiff states that what is contained in that sentence reflects the custom that the Senior Tourism Officer deputises for the CEO in his absence. He examples that after Mr. McCloone himself was appointed to the position of CEO he was unable to immediately take up that position and the plaintiff was asked to deputise for him until he could commence. The plaintiff accepts that having been asked to do so he was unable due to illness on his own part to so deputise, but points to the fact that he was asked to do so as indicating that such was normal and expected as part of his job description referred to. He states also that in the South eastern Tourism Office the Senior Tourism Officer there was automatically appointed to deputise for the CEO when the latter was ill.

13. Further difficulties arose in 2004 in relation to the plaintiff's relationship with the CEO and this resulted in further communication with IMPACT.

14. When the events to which the present proceedings occurred the plaintiff was in Japan on promotional work from the 3rd April 2006 to the 10th April 2006. Upon his return he learned that due to Mr. McCloone's illness an advertisement had appeared in which applications were sought for the position of Acting CEO for the period 18th April 2006 to the 30th June 2006. These applications were to be submitted by 12th April 2006. Upon learning about this the plaintiff spoke to Mr. McCloone on the 11th April 2006, who in turn told him that he should take the matter up with the Chairman. The plaintiff found this suggestion unusual since it was "odd" that the Chairman would take such an executive role in the matter of appointment of an Acting CEO. The plaintiff wrote to the Chairman on the 12th April 2006 stating that he expected to be appointed to act as CEO from the 18th April 2006 and asked for a meeting to discuss the advertisement. By letter of the same date the Chairman replied to the effect that the position would be filled by interview and that if the plaintiff still wished to be considered for interview for the position his application would be accepted if it was received by 1pm on the following day. The plaintiff did not submit an application, being under the belief that the position was his as of right. He was in contact again with IMPACT who wrote on the 12th April 2006 to the defendant's Human Resources Manager pointing to the reassurance already referred to, and stating that the position of the plaintiff was unambiguous and sought confirmation that the competition for the post of Acting CEO would be suspended. The plaintiff's solicitor wrote in similar terms on the 13th April 2006. In response thereto the defendant's solicitor wrote on the 17th April 2006 and, *inter alia*, stated:

"We note your reference to the job description of your client and wish to point out that this applies only to short-term absence and doesn't apply in this instance as the CEO is on long term sick leave.

In these circumstances our client is fully entitled and justified in filling the vacancy by the recruitment process currently underway."

15. It appears that there was one applicant for the position in response to the advertisement, and that was a lady who is junior to the plaintiff in the organisation, according to him, and whose position was Business Manager. She was also, according to the plaintiff, a person to whom the Chairman was very well disposed since she had been previously a Sales and Marketing Manager of a company owned by the Chairman. If it had not been for the granting of the interim injunction by this Court on the 18th April 2006 this person would have been appointed as Acting CEO for the period concerned as the only applicant for the position.

16. The Chairman in one of his replying affidavit has stated that in fact this lady's position as Business/Commercial Manager in the defendant organisation is of equal standing to that of the plaintiff, and he refers to her Job Description document and to the fact that therein it is stated at paragraph 15 thereof under the heading "General":

"... You may be asked to deputise for the Chief Executive as required and represent the RTA at designated meetings..."

17. The plaintiff points to the use of the word "asked" in this sentence, and seeks to distinguish her obligation to so deputise, if asked to do so, from the provision in his Job Description which states that he is "to act as Manager in the absence of RTM".

18. The Chairman also refers to the occasion in the year 2000 after the then CEO retired when the then Business/Commercial Manager, Michael Curley was appointed as Acting CEO pending the appointment of a successor to the CEO. He makes the point which I have already mentioned that the plaintiff never made any objection to such a situation. The plaintiff has stated that the reason for that was that due to his own illness at that time he was not in a position to act as CEO during the inter-regnum period. He refers to another period when the same person acted as CEO following the retirement of another CEO. He exhibits a copy of the letter of the letter dated 11th July 2000 whereby Mr. Curley was appointed as Acting CEO from 1st April 2000 until the 10th September 2000. That letter goes on to state that during that period he would be paid a salary appropriate to the CEO. That is something to which I shall refer in my conclusions.

Conclusions

19. I have already set forth the parties' different interpretations of the relevant clause in the plaintiff's Job Description. Frank Beatty BL for the plaintiff has submitted that the clause is clear and in his client's favour, and that this is supported by the contents of the IMPACT letter dated 12th February 2004 which has already been referred to, and to the custom and practice in matters such as this. He submits that the clause creates a right to be the Acting CEO during the then anticipated absence of the CEO due to illness. He submits also that if there is an ambiguity in the meaning of that clause, it should be interpreted *contra preferentum*. In other words, since the clause is one presented to the plaintiff by the defendant when he was appointed as Senior Tourism Officer in January 1993, the ambiguity should be decided in the plaintiff's favour. In support of that submission Mr. Beatty has referred to the judgment of Kearns J. in *Collins v. McDermott*, unreported, Supreme Court, 29th March 2007. In that case, at issue was how to interpret a contractual obligation on the defendant created by a letter sent to that plaintiff by the defendant in relation to future payments to be made to him arising from an occupational injury. The letter was itself clear, but the ambiguity identified arose from an intervening event not foreseen when the letter was sent. The question arising was whether the defendant's obligations under the letter were terminated by a later occurrence not anticipated when the letter was sent.

20. In accordance with the '*contra preferentum*' principle the issue was determined in the plaintiff's favour. But those facts are significantly different to those in the present case in which in my view no ambiguity exists in the meaning to be given to the wording of the clause in issue. In my view, taking into account the facts and circumstances of this case, the clause is not ambiguous, and the '*contra preferentum*' principle has no relevance.

21. First of all I am not satisfied that the plaintiff has established that it is a custom and practice in the trade as it were that in all situations of a CEO's absence which arise, the invariable practice is that a person whose job description includes acting for the CEO during his/her absence extends to all situations of absence no matter what the length thereof. It is beyond any possible doubt that

somebody occupying the position of CEO in a body such as the defendant will of necessity be absent from the office due to the need to be out of the office, including being abroad, doing work such as tourism promotion work abroad or in other parts of this country. That is part of the work which would normally be done by such a CEO. The plaintiff has referred to such absences by the CEO. Inevitably there would be regular absences for reasons such as this, and other reasons. Inevitably also, such normal absences would need to be covered by some person, and that this would mean that for example letters may have to be signed by somebody delegated to act as CEO during these absences. That is but one simple example. Similarly other administrative decisions may have to be made in order to deal with day to day problems which may arise due to staff absenteeism. He may have to be represented at functions by way of another example from the evidence which I heard.

22. These would be tasks which someone like the plaintiff could easily do while at the same time continuing to carry out his own duties and responsibilities as the Senior Tourism Officer. It would not require him to vacate his position or give up his own duties as Senior Tourism Officer in order to plug gaps created during the temporary absences of the CEO.

23. An entirely different situation in my view presents itself when it is known in advance that there will be a prolonged and total absence of the CEO anticipated in this case to be at least three months duration due to illness. In such a situation, the person taking over the role of the CEO could not be expected to do so on a part-time basis and in addition to continuing to fulfil the duties and responsibilities of his own position. That view is confirmed by what occurred, for example, when it was necessary to have an Acting CEO put in place pending a new CEO taking up his position. I have referred to that situation already when Mr. Curley was appointed on a temporary basis before Mr. McCloone could take up his appointment in 2000. On that occasion a letter of appointment was given to Mr. Curley which set out the fact that while acting as CEO during that inter-regnum period Mr. Curley would be paid the salary appropriate to the CEO. In other words Mr. Curley was appointed to act as CEO on a full-time basis and on the appropriate salary for that position. He was not expected to absorb that extra role within his existing position. The fact that the plaintiff states that he was unable to act as CEO at that time due to his own illness is not relevant, and does not assist the plaintiff's argument.

24. Mr. Beatty has submitted that even if he is wrong about the document being construed against the defendant, he can rely upon what is contained in the letter from IMPACT dated 12th February 2004 when the defendant is recorded as recognising that the plaintiff was to act as CEO in the absence of the CEO. But as I have already stated, there is a fundamental difference between the plaintiff deputising for the CEO during periods of absence, and having a *right* as a result of that clause to assume the position of CEO on any full-time basis necessitated by a prolonged absence of that CEO. As it happens, the anticipated absence of the CEO was just less than three months. If the plaintiff's argument is correct, it would follow that if it was anticipated that the CEO was to be absent for some reason such as illness for a period of maybe a year or more, which could happen, he would be entitled, again as of right, by virtue of that clause to assume the full-time position of CEO for that period of absence. That is simply beyond what could be a reasonable understanding on anybody's part as to what the clause could be intended to mean, especially given its brevity and lack of other detail as to applicable salary, and what was to happen in relation to the plaintiff's existing duties.

25. If the plaintiff's interpretation is correct it would be extraordinary if even the plaintiff himself would not have insisted on some clause attached to that clause in which it would be provided for an enhanced salary in line with the CEO salary for the duration of the absence. As things stand, it seems to be the plaintiff's contention that no matter how long the CEO's absence is anticipated to endure, the plaintiff in addition to his own duties and responsibilities as Senior Tourism Officer would take on the role of Acting CEO for no additional remuneration. That does not make commercial or other sense in the real world, and could not be a reasonable interpretation of the disputed clause.

26. In my view, the plaintiff has failed to succeed in his claim brought in these proceedings, and therefore he is not entitled to an order for costs against the defendant.