**THE HIGH COURT**

**[2017 No. 9140 P.]**

**BETWEEN**

**DR. PAUL QUIGLEY**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**JUDGMENT of Mr. Justice Paul Gilligan delivered on the 26th day of October, 2017**

1. The plaintiff is a medical doctor who commenced employment with the defendant in 1998. He is engaged as a general practitioner specialising in substance abuse [GPSSA] and works in North Dublin. The plaintiff attained the age of 65 years on the 19th day of October, 2017. On the 22nd day of September, 2017 Mr. Cassidy the general manager of the Social Inclusion and Addiction Service of the HSE wrote to the plaintiff to inform him that his employment would terminate with effect from the 19th October, 2017 and his last day of service would be on the 18th day of October, 2017 by reason of the plaintiff reaching the purported maximum retirement age of 65 years of age.

2. The plaintiff contends that the defendant is not entitled to terminate his employment on the basis of retirement on the day of his 65th birthday and in this application he essentially seeks an injunction restraining the purported termination of his employment pending the determination of the proceedings.

3. In the prayer for relief in the plenary summons, the plaintiff seeks a multitude of reliefs by way of declarations and injunctions including inter alia declarations pursuant to s. 30 of the Employment Equality Acts 1998 – 2016, declarations that the defendants are in breach of s. 34(4) of the Employment Equality Acts 1998 – 2016 and/or Council Directive establishing a General Framework for Equal Treatment in Employment and Education and/or Article 14 of the European Convention on Human Rights. Further the plaintiff seeks an injunction restraining the defendant from acting in breach of the plaintiff's rights pursuant to the Employment Equality Acts 1998 – 2016, Council Directive establishing a General Framework for Equal Treatment in Employment and Education and the European Convention on Human Rights.

4. The plaintiff is challenging the termination of his employment on the basis that it is invalid as his contract of employment is not subject to a maximum retirement age and there is no provision implied, contractual or otherwise which prevents him continuing in employment having achieved the age of 65 years and that the imposition of a compulsory retirement age without justification is unlawful discrimination on grounds of age contrary to the plaintiff's rights pursuant to inter alia European law.

5. I have the benefit of extensive affidavits as sworn on behalf of both parties and of extensive written and oral submissions which I have considered.

6. The plaintiff's case is that he is entitled to remain on in the employment of the defendant for as long as he wishes and is medically fit to undertake his duty of employment.

7. The plaintiff commenced his employment with the defendant in 1998 as a GPSSA with the defendant's Social Inclusion Addiction Service then known as the Drugs/AIDS Service and he was furnished with a temporary six month contract.

8. Approximately some two and half years after the period set out in his temporary contract of employment had expired the Irish Medical Organisation negotiated a dedicated contract for doctor's specialising in addiction services/substance abuse who were then employed in what was known as the Drugs/AIDS Service. The plaintiff contends that this contract was for doctors specialising in addiction services as employed by the defendant. It is of some significance that this contract of employment contained no reference to a retirement age but explicitly sets out that the contract was to be of indefinite duration.

9. This contract refers specifically to the general practitioner involved being part of a multi-disciplinary team to provide treatment for addiction to patients who presently were or are subsequently referred to the HSE with substance abuse problems and a variety of principal duties are contained therein. An hourly rate of pay was fixed as were a number of other matters, but in particular at para. 12 the tenure of the contract was for an indefinite period. If the contract was to be terminated by the Chief Executive for reasons in accordance with employee protection legislation it would require one months notice. In the case of suspected misconduct, the doctor may be suspended from work immediately with full pay pending investigation of the situation.

10. The plaintiff is quite clear that the 2001 negotiations were for the purpose of formalising the terms and conditions of, *inter alia*, his employment. The plaintiff accepts that he was furnished with a written contract of employment in 2001 as agreed between his employers and the IMO and he has to concede that he never signed this contract due to concerns he had with the job description and security of working hours. Subsequently there was a mediation relating to the plaintiff's grievances and eventually it was agreed and accepted by the parties that the plaintiff was entitled to the same terms and conditions of employment as his colleagues who signed the contract of employment. Subsequently, in a letter of the 6th December, 2006, from the defendant, it was specifically stated that the Health Service Executive considered that the plaintiff was operating to all the provisions of the revised employment contract of 2001 in line with his colleagues. It also appears that all general practitioners working with the HSE are, in fact, permanent officers.

11. The IMO negotiated contract of 2001 appears on its face to relate to general medical practitioners who specialise in the treatment of substance abuse problems and specifically states that the employment agreement is a continuation of employment already in existence.

12. I consider it would be reasonable if it was known throughout the HSE that the medical doctors signing up to this agreement would have their employment terminated by reason of retirement on their 65th birthday that this factor would have been set out instead of which it is quite clear that the contract was for an indefinite period.

13. While there has been some argument as regards the meaning of indefinite period, for the purpose of this application it is

reasonable to come to the conclusion that an indefinite period meant a period until some other form of agreement was negotiated and entered into to alter the status of the indefinite period or alternatively the contract would run for as long as the medical doctor could provide medical services to patients seeking medical assistance from the HSE in respect of persons suffering from substance abuse.

14. This view albeit solely for the purpose of this application appears to be reinforced by the fact that at all times in the background were the provisions of the Health Act 1970 and particularly s. 19 thereof which provided for a person who is a permanent officer of a Health Board to cease to be a permanent officer on his attaining the age of 65 years or in a case where a higher age is fixed by order of the Minister on his attaining that age.

15. While the particular wording of s. 19 of the Health Act 1970 may be the subject of further legal argument the reality of the situation is that there is no reference to the Health Act 1970 in the 2001 Agreement.

16. Subsequently but after the 2001 Agreement was arrived at, the provisions of s. 19 of the Health Act 1970 were amended by the Public Service Superannuation (Miscellaneous Provisions) Act 2004 which made provisions for inter alia the abolition of retirement ages for new entrants to the public service being public servants whose employment commenced after the 1st of April, 2004.

17. Section 19 of the Act of 1970 was amended in the following terms:-

> "A person who is a permanent officer of a health board should cease to be a permanent officer on attaining the age of 65 years, or where a higher age is fixed by order of the Minister, on the person attaining that age: but where the person is a new entrant (within the meaning of the *Public Service Superannuation (Miscellaneous Provisions) Act 2004*) appointed on or after the 1st of April 2004, the requirement to cease to be a permanent officer on grounds of age shall not apply."

18. It is contended on the defendant's behalf that the situation is accordingly entirely clear and had to be clear to the plaintiff at all times that the retirement age applicable to him in his position as a permanent officer was 65 years of age. As of the introduction into law of the Public Service Superannuation (Miscellaneous Provisions) Act 2004 the plaintiff was working pursuant to the 2001 Contract and after the introduction of the 2004 Act in a letter of the 6th December, 2006 the defendant herein was clearly stating that the Health Service Executive considered that Dr. Quigley was operating to all the provisions of the revised employment contract of 2001 in line with his colleagues.

19. It is not necessarily the situation that permanent officers employed with the HSE all retired at the age of 65. Certainly some did, some who were due to retire at 65 could have their period of employment extended by order of the Minister and persons entering employment after the introduction of the Act of 2004 where not bound by a retirement age of 65. This thus brought about a situation after 2004 where an employee being a permanent officer could be in a situation where he had to retire at 65 but the Minister could extend the employment beyond the age of 65 or as a "new entrant you could be employed up to age 70". Clearly on a wider basis people employed in a variety of sections probably would not have known what the specific situation was applying to their fellow workers, but Dr. Quigley was in a different situation in that he was aware of who was working with him back in 2001 because at that stage in respect of the Health Service Executive Dublin North-East there was an employment agreement agreed to for G.P.'s specialising in substance abuse and that is the area of work in which the plaintiff remained up to the present time.

20. The affidavit evidence presented before the Court for the purpose of this application contains averments by Dr. Cathal O'Suilliobhain whose is a medical practitioner employed continuously in the HSE Addiction Service since 1994. He is aged 67. He was a member of the IMO Medical Group which negotiated the contract of employment for GPSSA's and G.P. Coordinators in 2001 and he avers that the contract did not provide for any maximum retirement age nor does he recall any discussion of any type regarding a maximum retirement age during the negotiations and that it was not envisaged at the time of the drafting and finalisation of the contract with which he was personally involved that a retirement age would apply to doctors within the HSE's Addiction Services including those in the position of GPSSA's.

21. He also avers that he is not aware of any GPSSA employed by the HSE being required to retire at the age of 65. Particularly in his case it was never raised with him by the HSE that he might retire at the age of 65. He avers he is aware of other employees within the HSE in the role of officer grade but not GPSSA's having retired upon reaching the age of 65. Furthermore, his own employment has continued to the current time and there has been no suggestion made to him that he may have to retire.

22. Deirdre Dowdall is a general practitioner specialising in substance abuse. She has been employed by the HSE since 1997. She has worked alongside the plaintiff and currently works at a different location prescribing and treating patients suffering from addiction use.

23. Dr. Dowdall avers that since commencing her work in Addiction Services in 1997 she has never known of any colleague being forced or told to retire at age 65 and that retirement has never been an issue within addiction services until the plaintiff informed her of his recent correspondence.

24. Dr. Dowdall avers that the plaintiff is an expert on addiction issues, an academic leader amongst his peers and a highly regarded medical practitioner in his field of expertise not only in Ireland but also internationally.

25. Dr. Dowdall concludes her affidavit by stating that in her view the plaintiff is being treated differently to any other colleagues within addiction services and she has never known of any one being obliged to retire at age 65.

26. Bernard Boylan a medical practitioner specialising in substance abuse (GPSSA) has been employed by the defendant since December, 1999. Dr. Boylan avers that he is not aware of any GPSSA or G.P. Coordinator colleague being subjected to a requirement to retire at age 65 and he further avers that Dr. O'Suilliobhain as already referred to herein and Dr. Margaret Bourke are both working past the age of 65 and continue to do so.

27. A further aspect which runs through the various affidavits from the plaintiff's fellow medical colleagues is that his retirement would be a great loss to the services provided by the defendant.

28. The averments of these three doctors are not traversed in any significant material way.

29. I note from the affidavit of Donal Cassidy, general manager of Social Inclusion and Addiction Services, Dublin North City and County that in his view the characterisation by the plaintiff of the defendants' provision of addiction services as an entirely distinct and separate division of the defendant is wrong and a further aspect of concern is the plaintiff bringing any age discrimination claim before this Court as opposed to the Workplace Relations Commission.

30. I particularly note Mr. Cassidy's reference to the plaintiff being a permanent officer of the defendant and that as such having been appointed prior to the 1st April, 2004 he is subject to a retirement age of 65.

31. I note in particular Mr. Cassidy's averment that in 2001 the plaintiff's employment was with the Northern Area Health Board which was one of the predecessor bodies of the defendant and his averment that the terms of employment for permanent officers of the Northern Area Health Board who were employed in 2001 contain a retirement age of 65.

32. If that is the case, then Dr. O'Suilliobhain's averment in his affidavit is to the effect that he was actually involved in the negotiations at the time and there was no mention whatsoever of a retirement age of 65 so it does appear that if that was such a clear cut fact those persons conducting the negotiations on behalf of the Northern Area Health Board did not consider it appropriate to make the 2001 Contract subject to the terms of employment for permanent officers of the Northern Area Health Board or to insert any clause that the contract was for an indefinite period up to a retirement age of 65.

33. Further Mr. Cassidy relies on the Public Service Superannuation (Miscellaneous Provisions) Act 2004, as already referred to herein and this may be a matter for the trial judge but as already indicated herein the defendant has always taken the view that the plaintiff was subject to the terms and conditions of the 2001 Agreement and it has never been indicated to him anywhere on the basis of the affidavit evidence available that he was put on notice that his contractual indefinite period of employment was limited in some way.

34. The averment of Mr. Cassidy as set out at para. 29 is perhaps the most relevant as he sought information from his colleagues on the number of HSE staff who have retired at age 65 in the last number of years for the purpose of supporting the defendants' alternative argument that the plaintiff ought to have been aware that his retirement age is 65. This Court fully accepts as Mr. Cassidy says that he had to complete this affidavit under pressure of time but the salient fact is surely that the information on the number of HSE staff who were employed in 2001 and who have retired are those persons who were the subject matter of the Health Service Executive Dublin/North-East Employment agreement in 2001 – for G.P.'s specialising in substance abuse which provided for a tenure for an indefinite period such as Dr. O'Suilliobhain and Dr. Bourke.

35. A further issue that arises is that the plaintiff avers that in fact from 2001 through until a letter of the 22nd September, 2017 it was never brought to his attention by his employer the defendant herein that he would be retiring at the age of 65 and thus the only notice that he received from his employers being that of the letter of the 22nd September, 2017, amounted to approximately three weeks notice after nineteen years service.

36. The defendants maintain that the amending Act of 2004 supersedes the plaintiff's position and that he is bound by what is contained therein and further that the plaintiff's entrance into the Superannuation Scheme made it clear to the plaintiff that a member who is not a new entrant may not continue in membership after he or she has attained the age of 65 and that in the HSE Superannuation Scheme information booklet the minimum retirement age was clearly set out for public servants who entered the public service on or before the 31st March, 2004, as 60 years (in most cases) and a maximum retirement age of 65 years.

37. Further the defendants maintain that retirement at age 65 is an implied term in the plaintiff's contract of employment and in this regard as was set out in the judgment in *O'Reilly v. Irish Press* [1937] 71 ILTR 194 the court would have to be satisfied in respect of an implied term on the basis of custom and practice in an employment context that the fact would be so notorious as to be well known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties and further that it would be necessary in order to establish a custom of the kind claimed that it be shown that it was so generally known that anyone concerned should have known of it or could easily have become aware of it. As I understand the context of the various affidavits before this Court and from the submissions as made no GPSSA who was subject to the 2001 Contract has been forced to resign at age 65 and two medical doctors employed pre-2001 and working in the area of substance abuse are working on after the age of 65 and one of them at least was never approached about retiring on his 65th birthday.

38. Insofar as the defendants contend that the plaintiff's claim relies on breaches of the Employment Equality Acts 1998 – 2006 and/or the Council Directive establishing a general Framework for Equal Treatment in Employment and Education 2000/78/EC, and can only be dealt with in the Work Place Relations Commission the reality of the situation appears to be that the plaintiff can maintain these injunction proceedings arising out of the 2001 Contract aspect and the situation that has pertained for him at work up until the present time and it will clearly be a matter for the trial judge at the hearing of the action to decide on the aspects of law relating to the plaintiff's claim pursuant to the Employment Equality Acts and the Directive.

39. In my view this case raises essentially a net issue which is as to whether or not the plaintiff's employment is governed by the 2001 Contract which provides for an indefinite period of employment which for at least two of the plaintiff's fellow employees who were governed by the 2001 Contract allowed them to work on after the age of 65 in the medical field of substance abuse and both of whom appear to have worked simply on through the age of 65 and continued to do so in the treatment of substance abuse problems.

40. It is in my view of significance that no other substantive matter arises by way of complaint against the plaintiff such as a matter of discipline involving the plaintiff or that in some way he is medically unfit to carry out his duties. In fact, the opposite is the case on the basis of the affidavit evidence and insofar as in the past there may have been issues between the plaintiff and the defendant, it is specifically averred to by Mr. Cassidy that those issues have nothing to do with the plaintiff's retirement.

41. In this regard the decision of the Supreme Court in *Maha Lingam v. Health Service Executi*ve [2005] IESC 89 is relevant and it is noteworthy that the facts in that case were significantly different. It was obscure as to what exactly the basis of the plaintiff's employment was and as to whether or not the HSE in that case had actually the power to appoint the plaintiff as a temporary trauma surgeon. It is accepted that he was employed but also that there were difficulties and it was those difficulties that formed the background to the application that was before the High Court in the first instance and in particular difficulties with other surgeons, a lack of support on their part, allegations of ethnic and racial slurs against the plaintiff but none of those persons who in fact were other surgeons were present in court, either as a party or otherwise and had no opportunity to respond to the allegations as made.

42. In the letter of termination of the 28th February, 2005 the reason for termination was given on the basis of the HSE being unable to obtain approval for the continued employment of the plaintiff/appellant and in those circumstances the plaintiff was given three months notice. As set out in the judgment of Fennelly J. in the Supreme Court according to the ordinary law of employment:-

> "… the implication of an application of the present sort is that in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a *prima facie* case, and in

particular the courts have been slow to grant interlocutory injunctions to enforce contracts of employment. None of this is to deny that there had been developments in the law in recent years and it is necessary to refer very briefly to the nature of those developments. The first is that, in this jurisdiction the development can be traced to the judgment of Mr. Justice Costello in a case of *Fennelly v Assiunazioni Generali* in which an injunction was granted directing an employer to continue payment to the plaintiff, in that case pending the hearing of the action, and that type of jurisdiction was exercised in a number of subsequent cases. It is fair to say however, that there is a very strong trend in those cases to the effect that where a person has a clear right to either a particular period of notice or a reasonable notice or has a fixed period of employment, a summary dismissal or a dismissal without notice or without any adequate notice is a first step in establishing the ground for an injunction in those sort of cases. For reasons already given this is not such a case."

43. It can be safely concluded from the judgment that the test to be applied is that it is necessary for the plaintiff herein to show at least that he has a strong case, that he is likely to succeed at the hearing of the action. An observation to be made at this stage is that the plaintiff in these proceedings is not subject to any criticism nor is he making any allegation against any party other than that he is of the view flowing from the 2001 Contract that his tenure of employment as a G.P. specialising in the treatment of substance abuse problems was to run from 2001 for an indefinite period and there was no reference anywhere in that agreement to the contractual situation as between the plaintiff and the defendant and as contended for on the defendants behalf that the plaintiff was to retire at age 65. It is also the situation in this application that the plaintiff has produced a strong and clear body of evidence from three fellow employees of the defendant as regards his contention as to the position pertaining.

44. Hogan J. in *Wallace v. Irish Aviation Authority* [2012] 23 ELR 177 took the view that the court must also take into account the fact that the plaintiff seeks the protection of a key contractual protection at a time when this is necessary to protect her rights.

45. At para. 18 Hogan J. states as follows:-

> "It is, however, also necessary to look at the matter from the standpoint of the plaintiff. If an injunction were to be refused by reason of the special factors which have just been mentioned, it would mean that she was denied the benefit of a key contractual protection just at the time when such protection was vitally necessary to protect her interests. Can it be the case that under such circumstances the court must shut its eyes to the underlying merits of the claim and helplessly wash its hands of the claim for interlocutory relief simply because to do so would involve the grant of mandatory relief at an interlocutory stage or because this would involve the specific enforcement of a contract of employment?"

46. It is also necessary to give consideration to the issue of the least risk of injustice.

47. In *AIB v. Diamond* [2012] 3 I.R. 549, Clarke J. as he then was stated:-

> "It may well be the logic behind that departure from the normal rule can be found in the added risk of injustice that may arise where the court is asked not just to keep things as they were by means of a prohibitory injunction but to require someone to actively take a step which may, with the benefit of hindsight after a trial, turn out not to have been justified. The risk of injustice in the court taking such a step is obviously higher. In order to minimise the overall risk of injustice the court requires a higher level of likelihood about the strength of the plaintiff's case before being prepared to make such an order."

48. Having regard to the matters as set out herein I take the view that the plaintiff makes out a strong case which is likely to succeed on the basis that the contractual situation as of 2001 was to the effect that the period of his employment was to be for an indefinite period and that that contractual position as between the plaintiff and the HSE has never been altered by the HSE and no one else in the same position as the plaintiff who was involved in employment with the defendant in 2001 has been forced to retire at age 65 and at least two medical doctors working in the Substance Abuse area who were employed in 2001 have continued on in their employment beyond the age of 65.

49. I do not consider that damages would be an adequate remedy for the plaintiff in the circumstances because of the fact that the plaintiff has been employed with the defendant for nineteen years and the very high medical standing the plaintiff has attained both in his work for the HSE and internationally. I believe it is reasonable to come to a conclusion that if the plaintiff is no longer to attend to his patients and carry out his daily duties and to be without a salary he will suffer a loss of professional prestige and standing in respect of which monetary compensation would be inadequate. I also follow the views of Laffoy J. in *Giblin v. Irish Life and Permanent plc.* [2010] 21 ELR 173, wherein she stated:-

> "As a general proposition in the context of employment injunctions, the jurisprudence of the courts has developed over the last quarter century so that it is generally considered that the prospect of an award of damages following the trial of the action is not an adequate remedy for a successful plaintiff who has been deprived of his salary pending the trial of the action."

50. Concerning the balance of convenience I take the view that regard must be had to where the least risk of injustice lies. Unlike the situation that existed in *AIB v. Diamond* and the judgment of Clarke J., in the particular circumstances of this case I have taken the view that the plaintiff makes out a strong case which is likely to succeed. I also take into account that the plaintiff has been employed as a medical doctor with the defendant for a period of some nineteen years and is dealing on a daily basis with a multitude of patients in the no doubt difficult area of substance abuse. If the defendant was so well aware that the plaintiff was due to retire on his 65th birthday it would have been reasonable to have put in place the necessary procedures for the employment of a replacement. This in fact has not occurred and the intention now is to retain an agency doctor. The defendants make the case that they need to recruit new staff to build up expertise equivalent to the plaintiffs and have regard to the need for succession planning. The fact of the plaintiff remaining on in his employment will be to the benefit of the patients who seek his medical assistance. I am satisfied that it is clear that the balance of convenience favours the granting of the relief sought.

51. I take the view that it is appropriate that these proceedings be case managed and I will hear the submission of counsel for the parties as to the appropriate timetable in respect of the necessary steps to be carried out.

52. The order to be drawn up will note the plaintiff's undertaking as to damages.