Neutral Citation Number: [2009] IEHC 524

THE HIGH COURT

2008 1066 P

BETWEEN

DONAL McCARTHY

PLAINTIFF

AND

BREEO FOODS LIMITED, REOX HOLDINGS PLC AND DAIRYGOLD COOPERATIVE SOCIETY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Hanna delivered on the 27th day of November, 2009.

The plaintiff describes himself in the statement of claim as a managing director and employee of the defendants or either *(sic)* of them. He resides at Dromard, Clover Hill, Mallow, in the County of Cork. The defendants are component parts of the Dairygold group with the second named defendant being a holding company. The plaintiff alleges that, in or around May 2000, he entered into a contract of employment with the third named defendant for the position of site manager at Mallow, Co. Cork. He was subsequently requested by the third named defendant (and agreed to so do), to transfer his employment from the third named defendant to the second named defendant in or around June, 2006, as managing director of the first named defendant. He was thereafter employed by the second named defendant pursuant to a contract of employment in the position of managing director.

I think it important that I indicate the approach which I adopted in the hearing of these proceedings. In the plenary summons which the plaintiff issued on 8th February, 2008, the following reliefs were claimed:-

1. A declaration that he is and continues to be the Managing Director of the first named Defendant company, (hereinafter referred to as "Reox").

2. A declaration that the plaintiff is entitled to payment of salary, annual bonus, payments under third named defendants First Executive Incentive Plant and payments under Reox's Put and Call Option Agreement of the 29th day of May 2006.

3. A declaration that the purported termination of the plaintiff's aforementioned employment as embarked upon by the defendants on or about the 23rd day of November 2007 is without efficacy in that it was unwarranted and in breach of the tenets of natural justice.

4. A declaration that the plaintiff has a legitimate expectation to payments of monies pursuant to the Put and Call Option Agreement of the 29th day of May 2006.

5. A declaration that the defendants have acted *mala fides* in the selection for redundancy and treatment of the plaintiff.

6. A declaration that the defendants have been guilty of contrivance and *mala fides* in relation to the purported selection of the plaintiff for redundancy and failure to re-deploy him, which selection in reality was for the purpose of excluding the plaintiff from the said First Executive Incentive Plan and the Put and Call Option Agreement of the 29th day of May 2006.

7. A declaration that the exclusion of the plaintiff from the said First Executive Incentive Plan and the Put and Call Option Agreement of the 29th day of May, 2006 is wrongful and in breach of contract and furthermore is as a result of *mala fides* and self interest on the part of the executives of the defendants and will lead to enhanced sums for those persons who will now remain a part of the said Plan and Agreement.

8. An injunction restraining the defendants, or any of them, their servants or agents, from appointing or purporting to appoint any person other than the plaintiff to the plaintiff's position as Managing Director or from assigning the plaintiff's functions and duties to any person other than the plaintiff.

9. An injunction restraining the defendants, or any of them, their servants or agents, from giving effect to the purported termination of the plaintiff's employment.

10. An injunction restraining the defendants, or any of them, their servants or agents, from treating the plaintiff as other than continuing to be employed by the defendants.

11. An injunction requiring the defendants to pay the plaintiff's salary, bonus entitlements and payments under the Incentive Plans and Put and Call Option Agreement as they fall due until the trial of the action or until such further order as this Honourable Court may deem meet.

12. An injunction requiring the defendants to fund the preservation of the plaintiff's pension entitlements, life assurance and death in service benefits as maintained on the plaintiff's behalf by the defendants including an order requiring the continuing funding of same by the defendants to the trial of the action.

13. An order, if necessary, directing the defendants to make available an appropriate alternative position to permit

access to the Fund and Bonus.

14. Damages for breach of contract and/or negligence and/or breach of duty.

15. Damages for deceit and/or negligent misstatement and/or negligent misrepresentation and /or breach of warranty and/or contrivance.

16. Damages for loss of the plaintiff's legitimate expectations.

17. Damages for breach of the mutual duty of trust and fidelity as between the plaintiff and the defendants.

18. Damages for misrepresentation and negligent misstatement to include punitive and/or exemplary damages.

19. The taking of an account of all monies due to the plaintiff in order for the payment of all monies so due.

20. Interest pursuant to Statute.

21. Further and other relief.

22. Costs.

As can be seen, the plaintiff was seeking what could rightly be described as somewhat radical reliefs in the context of a case related to the termination of the plaintiff's employment. An attempt had been made to have the case admitted to the Commercial Court list notwithstanding the provisions of Order 63A, r. 4a (viii) which excludes proceedings in respect of any service provided under a contract of employment. This application was unsuccessful and the matter remained and came before me in the Chancery list. On the first day of the proceedings counsel for the defendants, Mr. Shipsey, S.C., complained that the relief sought was, in effect, unknown to the law and that the action was not founded in law. This was, he argued, a wrongful dismissal claim and the plaintiff was attempting to stray far beyond the constraints of potential reliefs available to him at common law. Notwithstanding the protestations to the contrary of Mr. Nesbitt, S.C. and in the absence of any persuasive authority to the contrary, I made an initial ruling in this matter accepting Mr. Shipsey's argument that this was, indeed, a wrongful dismissal claim. Breach of contract, *inter alia*, had been pleaded though it must be said that much of the pleadings were taken up with matters other than that. Certainly, nothing in the statement of claim specifies the amount of notice to which the plaintiff claimed that he was entitled. The substantive element of the claim advanced by the plaintiff is well described in the plaintiff's solicitor's certificate setting out the reasons why the matter should be listed in the Commercial Court list.

> "1. The proceedings seek, *inter alia*, declaratory and injunctive relief and damages for breach of contract, negligence, breach of duty, deceit, negligent misstatement, negligent misrepresentation, breach of warranty, contrivance, loss of the plaintiff's legitimate expectations and damages for breach of the duty of trust and fidelity, following on the purported redundancy of the plaintiff in or around the 23rd of November 2007 as a result of which the plaintiff is to be excluded from the defendant's First Executive Incentive Plan and from the Put and Call Option Agreement of the 29th day of May 2006, which exclusion will lead to enhanced benefits for those persons who will now benefit from the said Plan and Agreement and for substantial benefit for the defendants or any of them.
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> 2. The plaintiff claims that he had a legitimate expectation that he would receive significant monies pursuant to the said Put and Call Agreement on condition that he did not resign from his employment with the second named defendant and a legitimate expectation that the second named defendant would not unreasonably and/or unlawfully purport to terminate his employment in a manner that might deprive the plaintiff of his entitlements pursuant to the said agreement to the benefit of other persons covered by the First Executive Incentive Plan or the said Agreement or otherwise.
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> 3. In the circumstances, the proceedings come under the definition of "commercial proceedings" under Order 63A, r. 1a (i) being proceedings in respect of a claim (not being a claim for damages for personal injury) arising from or relating to a business document, business contract or business dispute where the value of the claim is not less than €1 million.
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> 4. In addition and/or in the alternative, the proceedings are appropriate to be adopted into the Commercial Court List under Order 63A, r. 1a (ii) being proceedings in respect of any claim (not being a claim for personal injuries) arising from or relating to the determination of any question of construction arising in respect of a business document or business contract where the value of the transaction the subject matter thereof is not less than €1 million.
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> 5. Finally, there is an urgency to the matter in that the proceeds of the First Executive Incentive Plan are due to be distributed amongst those left remaining and to the exclusion of the plaintiff in or around March 2008 and the plaintiff will be left in financial difficulties as a result of being excluded therefrom. On the basis of the said urgency, even if this Honourable Court is not satisfied that the matter comes within Order 63A, r. 1a (i) and Order 63A, r. 1a (ii), I would respectfully request this Honourable Court to exercise its discretion to admit the within proceedings to the Commercial List pursuant to Order 63A, r. 1b."

The substantive claim made in the proceedings in relation to the LTIP was abandoned during the course of the hearing. The defendants argue that with such an abandonment nothing remains in the case. However, having ruled that I was going to treat this case as a wrongful dismissal case (which, after all, was the result of Mr. Shipsey's application) both parties proceeded with the case on that basis and addressed all material issues in evidence. I afforded Mr. Nesbitt, S.C., on behalf of the plaintiff an opportunity to amend his pleadings, something which he did not take up. However, there is no doubt that the case proceeded on that basis. The plaintiff pleaded, *inter alia*, breach of contract and it is through that prism that I viewed the case. In so doing, I believe I am acting in accordance with the law. In *Sheehy v. Ryan* [2008] IEHC 14, Geoghegan J. states:-

> "The trial judge then says that the position at common law is that an employer is entitled to dismiss an employee for any reason or for no reason on giving reasonable notice. I would slightly qualify that by saying that it does depend on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal, that clearly is the position."

The plaintiff's claim is that by a letter dated 23rd November, 2007, he was wrongfully dismissed. The plaintiff joined the Dairygold group in the year 2000 when he was in his forties as a site manager at the third defendant's Mallow plant. His starting salary was IR£50,000 per annum. Over the succeeding years he was promoted within the group. He transferred his employment from the third defendant to the holding company, Reox Holdings plc, in June 2006 and ultimately, managed the first named defendant, a company located in Holland. His managerial duties were retained by Mr. Henchy, the Chief Executive Officer (CEO) of the group of companies. The first named defendant company had been performing below par and the plaintiff, with his undoubted skills (evidenced by his promotion and to a finishing salary of €207,000 p.a.) was put in to mend matters. The plaintiff says he believed this to be a temporary assignment or secondment (although he agrees the word secondment was never used) and the defendants are of the view this was not the case - that he was put in that position to do the job effectively for as long as it took. Mr. Henchy, the Chief Executive Officer of the Group, described the Dutch operation as "bleeding". The reason the plaintiff was sent to Holland was that the legacy business was performing poorly and, further, Mr. Henchy said that the group was intent on investing a large amount of money in the Dutch enterprise and wanted a senior management in place. He did not recall any reference to the assignment being temporary or to any period such as six or nine months.

Weighing heavily on the plaintiff at this time was the traumatic break up of his marriage. His relationship with his son was clearly very precious to him and he had to return to Ireland at the weekends to spend time with him. During the week his working day would last fifteen or sixteen hours and his labours would carry on into the weekend over the mobile phone.

The plaintiff, around the middle of 2007, was then commissioned to work on the possibility of further expanding the defendants markets, described as a "third horizon project". This was with a view to expanding into the Russian market. He subsequently learned that his position as Managing Director of the Group had been filled. He says that it was his understanding that the job would be kept open for him or an equivalent job made available. Again, this is hotly contested by the defendants. When he returned home he was informed that, in effect, his position as head of the "third horizon project" no longer existed and that he was now redundant. After various discussions involving the plaintiff, the CEO and a Mr. Kennedy, the acting human resources manager, the plaintiff had his employment terminated by the letter of 23rd November 2007, aforesaid.

The plaintiff maintains that he was entitled to at least six months if not twelve months notice. The defendants, on the other hand, say that the period of notice was four weeks in accordance with the Minimum Notice and Terms of Employments Acts 1973/1994 as stipulated in the contract in the year 2000. Mr. Henchy himself had agreed a one year period of notice when he became CEO but this appears to have been something of a one off arrangement when he was "headhunted". Mr. Henchy was supported in his view as to the appropriate period of notice for Mr. McCarthy by Mr. Gerry Kennedy who was the then Acting Head of Human Resources. If the plaintiff is correct in what he asserts then, in addition to his entitlement to an increased termination payment, certain implications may arise with regard to the "kicking in" of a certain employee incentive payment scheme.

Further, the plaintiff's entitlement to bonus payments for the final fifteen months of his contract of employment was also contested. He had been paid a bonus every year since he joined the Group, initially at 10% of salary. He said that no targets were set for the bonus during the period he was working out of the country and he was never told why he was not paid it. The CEO, on the other hand, said that a system operated whereby Division Heads got no bonus if they achieved 90% of the budgeted operating profit, at 100% of same they got 90% or 70% of bonus. At 110% they got the full bonus.

Extensive negotiations took place between the plaintiff and the CEO and, subsequently and more intensely, with Mr. Kennedy. I do not intend to dwell upon the detail of the discussions even though much evidence was given in relation to it. Clearly, the plaintiff found the experience traumatic in the extreme and wished, quite properly and understandably, to maximise his departure package having realised that his employment was at an end. Mr. Kennedy undoubtedly went some way beyond his employer's homebase position in a bid to secure agreement. This is commerce at work. It would be unfair of me, in the ordinary run of things, to set too much store by the postures adopted in the heat of negotiation. I do not propose to do so.

Material Law
It is already noted, I have ruled that this matter should proceed as an action for damages at common law for wrongful dismissal. The plaintiff had available to him an alternative remedy under the Unfair Dismissals legislation. That procedure exists independently of the common law remedy and is exclusive of it. The relationship between the action for wrongful dismissal and the statutory provisions was considered by the Supreme Court in *Parsons v. Iarnród Éireann* [1997] 2 I.R. 523 at p. 529, where Barrington J. said:-

> *"This is not a case of the ouster of the jurisdiction of the High Court. The jurisdiction of the High Court remains the same. What the Unfair Dismissals Act 1977 does is to give to the worker who feels that he has been unfairly dismissed, an additional remedy which may carry with it the very far-reaching relief of reinstatement in his previous employment. It does not limit the worker's rights; it extends them. At the same time, s. 15 of the Unfair Dismissals Act 1977, provides that the worker must choose between suing for damages at common law and claiming relief under the new act. Sub-section 2 accordingly provides that if he claims relief under the act, he is not entitled to recover damages at common law; while sub-s. 3 provides 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, in respect of the same dismissal."*

The scope of the remedy available to the plaintiff in an action for wrongful dismissal is stated thus by McLachlin J. in *Wallace v. United Grain Growers Ltd* [1997] 152 D.L.R. (4th) 1 at 39:-

> *"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for*

> *dismissal… A "wrongful dismissal" action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given."*

This view has been approved in this jurisdiction and most recently in *Sheehy v. Ryan & Moriarty* [2008] I.E.H.C. 14.

If a plaintiff establishes a wrongful dismissal, the scope of the damages available to him are circumscribed by law. He is entitled to recover the financial or pecuniary loss which his employer's act of wrongful dismissal has visited upon him. It has long been established that the dismissed employee cannot, for example, recover damages for his hurt feelings. (See *Addis v. Gramophone* [1909] A.C. 488). Therefore, no matter how hurt or upset the plaintiff was from his perception of the manner in which he was treated by the defendants (and without forecasting my findings below, I have little doubt that he was) he cannot be compensated for that. Thus, the successful plaintiff is entitled to be compensated to such extent as would put him (or her) in a situation similar to that which would have obtained had the contract been performed in due course. This contrasts with a plaintiff who has been subjected to a tort and is well described thus by Geoghegan J. in *Doran v. Delaney (No.2)* [1999] 1 I.R. 303 at p. 308:-

> *"If a party to a contract breaks that contract the other party is entitled to be compensated on the basis of what he has lost by reason of the contract not being performed. On the other hand the measure of damages appropriate for the tort of negligence is the loss sustained by reason of the breach of duty or in other words in the case of say negligent misrepresentation the plaintiff must be restored to the position he would have been in if the misrepresentation had not been made."*

Findings

One must bear in mind that the onus of proof rests with the plaintiff. Firstly, as regards the alleged secondment of the plaintiff to the position in Holland, I am not convinced that this was intended to be purely a temporary move in the sense advanced by the plaintiff. In this regard, I prefer the evidence of Mr. Henchy, namely that the plaintiff was appointed Managing Director of Breeo Ltd. to fix a company which, as Mr. Henchy put it, was bleeding. I feel it is more likely that Mr. McCarthy was to stay *in situ* until he had done the job in question. It is quite conceivable that the conversation between him and Mr. Henchy may have referred to an estimated time line for doing the job in question. It cannot be doubted that Mr. McCarthy was very mindful of his unfortunate familial circumstances and this, perhaps has slightly coloured his recollection. However, I am not persuaded that it was intended that he should automatically be brought back after five or six months and put in his original position, the duties of which Mr. Kenny had taken over.

It is clear that Mr. McCarthy worked extremely hard in Holland and, as he puts it, had "end to end" responsibility. It is clear that the intended result was not achieved. In that event, Mr. McCarthy was put in charge of investigating new projects with a particular view to entering the Russian market. This did not bear fruit.

When he returned to Ireland he was undoubtedly very disappointed to see that his original position had been filled. However, I am not persuaded that the defendants had agreed effectively to guarantee that he would be retained in a position or in a similar position. I am satisfied that the defendants were under an obligation to use their best efforts to accommodate him if they could. However, I find that I prefer the version of events advanced by Mr. Henchy and am of the view that the plaintiff's new horizon's project position was the one that terminated.

I now turn to the question of notice. There is no doubt that as of November 2007 when the plaintiff received his notice, the nature and responsibility attendant upon his duties had changed out of all recognition as evidenced, *inter alia*, with a very substantial increase in his salary and the far more extensive area of responsibility with which he has to engage. It is correct to say that the contract of 15th March, 2000 bears no resemblance to what the plaintiff was doing up to the end of the year 2007. In my view, its relevance to this case is purely historical marking, as it does, his entry into the defendant's organisation, but as a localised manager. His employers were obligated to furnish him with his terms and conditions of employment. This, I believe, they should have done. I am of the view that the 2000 contract was set at nought and, given the area and level of his responsibility, he is entitled to receive a reasonable period of notice from his employer. Unfortunately, there is limited evidence upon which I can draw a conclusion as to what would amount to a reasonable period of notice in all the circumstances of this case.

I am satisfied from the evidence both of the plaintiff and Mr. Kennedy that persons below the level of the plaintiff or at least some of them were entitled to six months notice. I am equally satisfied that the twelve month period of notice negotiated for Mr. Henchy by himself was a one-off. In all the circumstances, relying on such evidence as we have, I am of the view that a six month period of notice would be reasonable.

I am also satisfied, and here I expressly accept his evidence, that the plaintiff was entitled to expect and receive the relevant bonus payments covering the last fifteen months of his employment. I accept his evidence that he had been paid these to date and that no achievement parameters had been specified to him. In being sent to take up the position in Holland he knew he was taking up such a position and dealing with a potential loss-making organisation. If there had been a performance trigger to entitlement to the bonus it seems to me most unlikely that the subject would not have been broached between the plaintiff and Mr. Henchy. This was the way matters had proceeded for some years previously. Had it been within the purview of the parties that the plaintiff would suffer an almost inevitable diminution in his earnings package, I am satisfied that it would have become a major issue between him and Mr. Henchy.

I am of the view that in failing to give Mr. McCarthy reasonable notice, being a period of some six months, the defendants wrongfully dismissed him.

Award

During the course of the hearing I invited the parties to submit calculations of what would fall due to the plaintiff on his being given notice of one month, six months and twelve months. As noted above, any claim under the LTIP was abandoned during the hearing. Having regard to the above findings with regard to the requirement for six months notice, what that notice period would trigger and include, and including the bonus payment to which I have held the plaintiff was

entitled, I make an award of damages to the plaintiff in the sum of €301,479.00 made up as follows:-

Assumption 6 Month Notice Period
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A Basic Pay, Benefits and Annual Bonus

Basic Salary 103,500
Less Employee Pension Contribution 5% of Basic -5,175

Car Allowance 8,750

Annual Bonus 40% of Basic 41,400

148,475

B Notice already paid in December or Claimed at C

One months pay in lieu of notice, paid December 07 -17,250
One months pension contribution, paid December 07 863
One months car allowance, paid December 07 -1,458
One months annual bonus for December 07 (claimed at C) -6,900

123,729

C Arrears of Annual Bonus

Unpaid Annual bonus re 01.10.06 to 31.12.07 40% of Basic 103,500

D Dairygold Long Term Incentive Payment due

Dairygold LTIP re 2005 Triggered at 31.12.07 45% of 2005 Basic 74,250
One off payment

Total A + B+ C + D 301,479

E Pension adjustment to reflect continuous service to: 23-May-08