Neutral Citation Number: [2006] IEHC 358

THE HIGH COURT

2006 No. 4977 P

BETWEEN

KURT NAUJOKS

PLAINTIFF

AND

NATIONAL INSTITUTION OF BIOPROCESSING RESEARCH AND TRAINING LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 14th November, 2006.

The application

1. These proceedings were commenced by plenary summons which issued on 24th October, 2006. On this application the plaintiff seeks interlocutory injunctions in the following terms:

> (a) restraining the defendant from removing the plaintiff from his post as Chief Executive Officer (CEO) of the defendant and, if necessary, directing his restoration to that post forthwith;
>
> (b) restraining the defendant from dismissing the plaintiff from his employment as CEO and/or from giving effect to any purported termination and/or any purported resignation;
>
> (c) ordering that the defendant pay to the plaintiff all salary to include arrears of salary and all other emoluments as same fall due; and
>
> (d) restraining the defendant from appointing any other person other than the plaintiff to the position of CEO of the defendant.

The factual background

2. The defendant is a company limited by guarantee which was incorporated on 12th January, 2006, with the primary object of establishing and operating a national institute of international excellence of bioprocessing for research, training and education to be located at Belfield in Dublin. The Institute, which came into existence at the beginning of this year, is the result of a process started by IDA Ireland in 2004 when it invited proposals from academic institutes in relation to the establishment and management of a research and training institute that would work with the biopharmaceutical industry in Ireland in overcoming skill shortages and bioprocessing technology challenges. The successful tenderer was a consortium led by University College Dublin (UCD).

3. The articles of association of the defendant provide that its affairs shall be managed by a board (the Board) consisting of eleven members, to be appointed as follows:

> (a) one nominee each of the founding institutions (Dublin City University, Dublin University, Institute of Technology, Sligo and UCD);
>
> (b) five nominees of the Minister for Enterprise, Trade and Employment;
>
> (c) one nominee of the Minister for Education and Science; and
>
> (d) the CEO.

4. The defendant is a German national, who was appointed CEO of the defendant in January, 2006. His first involvement with the project goes back to September, 2004 when he was retained as a consultant to UCD to produce a tender on behalf of the UCD-led consortium in response to the invitation from IDA Ireland, which tender was ultimately successful. Thereafter he was involved in negotiating the agreement entered into between the UCD consortium and IDA Ireland for the purposes of establishing the Institute.

5. The terms of the plaintiff's employment as CEO of the defendant were set out in a written agreement dated 10th February, 2006 made between the defendant and the plaintiff (the Service Agreement). The provisions of the Service Agreement which have been referred to on this application are the following:

> · Clause 2.3, which provided that the Service Agreement should continue in force for a term of five years, unless terminated earlier by either party in accordance with the provisions of Clause 13 or unless extended by mutual agreement in writing of the parties.
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> · Clause 13, which provided for both termination on notice and summary termination. In relation to termination on notice, Clause 13.1 provided that either party might terminate by giving to the other no less then six months' prior written notice in accordance with the provisions of Clause 15.6 Clause 15.6 dealt with the mode of service of notices. Clause 13.2 provided that the Service Agreement might be terminated forthwith by the defendant by written notice to the CEO in the event of any of the nine circumstances outlined having arisen. Those circumstances encompassed breach of the plaintiff's obligations under the Agreement, failure to discharge his duties properly, incapacity, dishonesty and so forth.
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> · Clause 2.5, which provided that on notice being served for any reason by any party to terminate, the defendant should be entitled to make payment to the plaintiff in lieu of notice, in which case the plaintiff's employment would terminate with immediate effect.
>
> · Clause 5.2, which provided that during the continuance of the plaintiff's employment, including any period after notice of termination had been served by either party, there should be no obligation on the defendant to require the plaintiff to work or perform any duties and that, if the defendant should give written notice to the plaintiff that it required the plaintiff not to work or perform any duties for any given period, then during that period the plaintiff should not, without written permission, be entitled to access to the defendant's premises, but should continue to receive his full remuneration

and other benefits.

· Clause 15.8, which provided that the Service Agreement contained whole agreement between the parties, superseded all previous agreements (if any) and that each party acknowledged that no representation or warranty was being relied on except those contained therein.

· Clause 15.12, in which the plaintiff acknowledged that he had taken legal advice on the Service Agreement and understood the effect and implications thereof.

6. In September of this year certain issues arose between the plaintiff, as CEO of the defendant, and the head of a research team employed by the defendant. It is the plaintiff's case that these issues arose out of his commitment to ensure compliance with the best standards of corporate governance. The defendant attributes these issues to the plaintiff's management style, which, it has been asserted, created difficulties in the workplace to the extent that the plaintiff ultimately lost the confidence of the Board of the defendant. It is not necessary, for the purposes of determining this application, to make any determination as to what has given rise to those issues, but they are the context for what happened on 12th October, 2006 and subsequently.

7. It is common case that a meeting of the Board of the defendant took place on 12th October, 2006 and that the plaintiff was in attendance, as was the Chairman of the Board, Joseph Gantly. The termination of the plaintiff's employment was not an agenda item for that meeting and notice was not given that it was business to be transacted at the meeting in accordance with regulation 50 of the articles of association. The defendant's version of what took place at that meeting, which is material to this application, is set out in the affidavit of Mr. Gantly sworn on 1st November, 2006. He averred that at a particular stage he asked the plaintiff to leave the meeting and wait for him in the next room while the meeting continued with the non-executive directors. A unanimous decision was then made to terminate the plaintiff's employment with the defendant as a result of the Board's loss of confidence in him as the CEO. There is no other evidence of the Board's deliberations and there is no evidence that they considered the terms of the Service Agreement. Mr. Gantly was requested by his fellow Board members to communicate the Board's decision immediately to the plaintiff. He stepped out of the meeting and informed the plaintiff, who was waiting in the next room, of the decision.

8. Mr. Gantly averred that he informed the plaintiff that the Board had decided to terminate his employment and that his services were no longer required because the Board had lost confidence in him. If he was prepared to resign, the Board was prepared to pay him six months' salary in lieu of notice and to make a further *ex gratia* payment of six months' salary. Mr. Gantly further averred that when he put this proposal to the plaintiff, the plaintiff replied "O.K.", but stated that he had some relationships which he needed to "close off" prior to any final termination date being agreed. Mr. Gantly emphasised in his affidavit that he made it clear to the plaintiff that the termination would be with immediate effect, subject to him being facilitated if he chose to resign, in terms of contacting colleagues or other third parties. Mr. Gantly also averred that, specifically, the plaintiff asked him what would happen if he chose to resign and he was told that he could take a week off to allow him to determine the extent of the relations that required to be closed off professionally, if that was what he wished. Mr. Gantly emphasised again in his affidavit that he made it absolutely clear to the plaintiff at that meeting that the decision had been made to terminate his employment and it was a choice for him as to whether or not he wished to opt to resign or to have his employment terminated. In either event, Mr. Gantly averred that he made it clear that the plaintiff's employment with the defendant was terminated.

9. Mr. Gantly's evidence is that his understanding on 12th October, 2006 was that the plaintiff accepted the proposal that he should resign and that he confirmed that he wished to avail of Mr. Gantly's suggestion that he take one week's holidays to facilitate his departure. As a result of that understanding Mr. Gantly sent a e-mail to the plaintiff on 13th October, 2006, which reflected his understanding.

10. As to the reason for the action which was taken against the plaintiff, Mr. Gantly has averred in his affidavit that the plaintiff's employment "was not terminated by reason of misconduct". He has further averred that he specifically told the plaintiff on 12th October, 2006 that there was no reflection in the decision of the Board upon him as a scientist, but that rather the Board felt his general style of management to be unsuitable to the manner in which it felt the Institute needed to operate.

11. In the e-mail of 13th October, 2006 to the plaintiff Mr. Gantly set out his understanding of the outcome of the meeting on the previous day as follows: that the plaintiff had agreed to resign as CEO with effect from 23rd October following; in consideration of this, and in full and final settlement of any claim he might have, the defendant would pay him a sum equivalent to twelve months' salary, inclusive of notice entitlement; and, at his own request, the plaintiff would spend the period between then and the termination date on holiday. In a letter of the same date in response to Mr. Gantly, the plaintiff's solicitors set out his position as to what happened on the previous day. He had not agreed to resign as CEO, nor had he agreed any form of settlement, nor did he agree to spend the period to the alleged termination on holiday. It was stated that the plaintiff did not accept that the defendant was entitled to terminate his employment and he threatened injunction proceedings to restrain termination of his employment.

12. The initial response to the plaintiff's solicitor's letter was a holding letter dated 16th October, 2006 from the defendant's solicitors, stating that Mr. Gantly was then travelling to China. The substantive response was dated 18th October, 2006. Mr. Gantly's version of what happened on 12th October, 2006 was set out in that letter and the defendant's position was stated as follows:

> "Consequent upon the above, the position now is that our client considers your client's employment with it to be terminated, and you may take this letter of confirmation of this. Accordingly, the Institute will make arrangements to pay your client in lieu of the six months' notice of termination to which he is entitled, in accordance with Clauses 2.5 and 13.1 of the Service Agreement, and issue him with his P45 just as soon as possible, and we would be obliged if, in the interim, you could advise your client to vacate our client's premises immediately, subject to him taking a reasonable period of time to arrange for the removal of any personal effects which may be located therein. Needless to say, and in the circumstances where our client is perfectly entitled to dismiss your client upon the giving to him of contractual notice, or payment in lieu thereof, the Institute will not be giving any of the undertakings sought by you …"

13. The option that the plaintiff might resign was left open until close of business on 20th October, 2006.

14. The plaintiff continued to attend at the defendant's premises, despite being informed by letter of 19th October, 2006 from the defendant's solicitors that, if he were to appear for work on Friday, 20th October, 2006, he would be asked to leave the premises. He did attend and was asked to leave. On 23rd October, 2006 Mr. Gantly wrote to the plaintiff confirming that the defendant considered that his employment had been terminated as of 12th October, 2006. The plaintiff was required to vacate the premises with immediate effect. On the same day Mr. Gantly notified all of the members of the Board and the defendant's employees that the plaintiff's position as CEO had been terminated and that he was no longer employed in that or in any other capacity.

15. To round off this outline of the factual background, it is necessary to advert to two further matters.

16. First, the defendant has not put before the court any evidence of the decision made by the Board on 12th October, 2006 other than what is recorded in Mr. Gantly's affidavit. In particular, it is not clear whether the decision of the Board was recorded in the minutes of the meeting. If it was, the minute has not been put in evidence.

17. Secondly, although this is disputed by the defendant, the plaintiff has averred that it was at all times represented to him that the Institute would be under his stewardship for a period of at least five years. Further, in his most recent affidavit, sworn on 3rd November, 2006, the plaintiff averred that he always believed that his contract was for five years and that he was told by the solicitors for the defendant, and relied on their advice to him,that the contract was for five years and could only be terminated if any of the events provided for in Clause 13.2 occurred. It is only fair to the defendant to record that this application proceeded without the defendant having had an opportunity to specifically address on affidavit the averments made in the plaintiff's affidavit of 3rd November, 2006.

The law

18. Both sides approached this case on the basis that the principles identified by the Supreme Court in *Campus Oil v. Minister for Industry* (No. 2) [1983] I.R. 88 as being applicable to the issue whether an interlocutory injunction should be granted or not apply to this application: whether there is a fair issue to be tried; whether damages would be an adequate remedy for the party seeking the injunction, if he was successful at the trial of the action; and whether the balance of convenience favours the grant or refusal of an injunction at the interlocutory stage. However, counsel for the plaintiff accepted that to establish an entitlement to mandatory relief the plaintiff had to discharge the onus recognised by the Supreme Court in *Maha Lingam v. Health Service Executive*, in which Fennelly J. delivered an *ex tempore* judgment on 4th October, 2005. Having stated that, in substance, the plaintiff in that case was seeking a mandatory interlocutory injunction, Fennelly J. stated:

> "… 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."

19. Counsel for the plaintiff relied on a line of authority in which this Court has addressed the maintenance of the status quo pending the trial of an action by granting interlocutory relief to an employee which may take a variety of forms: directing payment of the employee's salary and emoluments; prohibiting the implementation of the termination of the employment; and prohibiting the filling of the employee's position. In particular, counsel for the plaintiff relied on the decision of Keane J. in *Shortt v. Data Packaging Limited* [1994] E.L.R. 251 and the decision of Costello P. in *Phelan v. Bic* (Ireland) Limited [1997] E.L.R. 208.

20. Counsel for the defendant argued that the facts of this case do not warrant intervention by the court at this stage. In particular, he emphasised that there was no allegation of misconduct against the plaintiff. That being the case, he submitted that the following statement of principle in the judgment of Clarke J. in *Carroll v. Bus Átha Cliath* [2005] 16 E.L.R. 149 is apposite:

> "The traditional position at common law was that a contract of employment could be terminated on reasonable notice without giving any reason. In those circumstances it was obvious that the only remedy for a breach of contract by way of dismissal was for the payment of the amount that would have been earned had the appropriate notice been given. However, it is now frequently the case that employees cannot be dismissed, as a matter of contract, save for good reason such as incapacity, stated misbehaviour, redundancy or the like. It would appear that the development of the law in relation to affording employees a certain compliance with the rules of natural justice in respect of possible dismissal derives, at least in material part, from this development. If the stated reason for seeking to dismiss an employee is an allegation of misconduct then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such dismissal. That does not alter the fact that an employer may still, if he is contractually free so to do, dismiss the employee for no reason. It simply means that where an employer is obliged to rely upon stated misconduct for a dismissal or, where not so obliged chooses to rely upon stated misconduct, the employer concerned is obliged to conduct the process leading to a determination as to whether there was such misconduct in accordance with many of the principles of natural justice."

Conclusions:

21. There are a number of strands to the plaintiff's contention that, not only has he established that there is a fair issue to be tried as to whether the defendant is entitled to terminate his contract of employment, but that he has crossed the threshold stipulated by Fennelly J. in the *Maha Lingam* case. I think it useful to preface what I have to say about those strands by calling to mind what the function of the court is on an interlocutory application such as this. The following passage from the judgment of Lord Diplock in *American Cyanamid v. Ethicon Limited* [1975] A.C. 396 was quoted with approval by Griffin J. in his judgment in the *Campus Oil* case:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

22. The first strand is the plaintiff's contention that the term of his contract is five years and that during that period it may only be terminated in accordance with Clause 13.2. While counsel for the defendant conceded that there is a fair issue to be tried on this point, he contended, pointing to the provisions of the Service Agreement, including Clauses 15.2 and 15.8, that the plaintiff has not established the kind of case which would entitle him to a mandatory injunction. In relation to this strand, I do not think that the plaintiff has discharged the onus he has assumed of showing that he has a strong case that he is likely to succeed in the action. There is a conflict of evidence as to the representations which the plaintiff alleges were made to him and there is a question of the legal status of any such representation having regard to the provisions of the Service Agreement.

23. The second strand is that the plaintiff has not been afforded fair procedures, in that he has not been given an opportunity to put forward his point of view in relation to the management issues which precipitated the action taken by the defendant on 12th October, 2006. The defendant's answer to that is that the question of fair procedures does not arise, because the defendant has not made any allegation of misconduct against the plaintiff. I have difficulty with the stance adopted by the defendant on this point. It is true that Mr. Gantly has asserted that the plaintiff's employment was not terminated by reason of misconduct. The fact remains, however, that the reason given for the determination of the plaintiff's employment is that the Board had lost confidence in his ability to manage the Institute. Insofar as the defendant has explained how the Board reached that conclusion, it has done so by disputing the plaintiff's averments as to the issues which arose in relation to the research team and its head. Mr. Gantly has averred that the

plaintiff's management style and his manner of communication with members of the research team led to "serious human resources issues" arising. The inference to be drawn is that Mr. Gantly and the non-executive directors made a judgment as to who was responsible for the "serious human resources issues" which had arisen. It seems to me that that is not far removed from making a judgment that there was a failure on the part of the plaintiff to properly discharge his duties as CEO, which would entitle the defendant to summarily dismiss the plaintiff, but subject to affording him fair procedures. On this point, I can put the matter no further than that, having regard to the facts as disclosed in the affidavits before the court, it is not an answer to the plaintiff's contention that he should have been, but was not, afforded fair procedures that it is the defendant's stated position that his contract was not terminated on the grounds of misconduct.

24. The third strand is that the action taken on 12th October, 2006 was not a valid termination of the plaintiff's employment because it was not effected in accordance with the articles of association of the defendant. The way this argument was phrased by the plaintiff was that any purported decision of the Board, whether unanimously taken or otherwise, that the plaintiff should be removed from his position was *ultra vires* the Board. My understanding of the proposition advanced is that it is the plaintiff's contention that a purported decision made by the Board members present on the day after the plaintiff left the meeting, would have been *ultra vires* insofar as it was not made in accordance with the procedural requirements of the articles of association. In my view, that proposition is correct. The question which remains is whether that happened.

25. Under the articles of association the management of the defendant resides in the Board. Obviously, that does not mean that all management decisions must be made by the Board. One would not expect that the Board would be involved in the employment of, say, temporary secretarial staff. However, in the absence of evidence that matters relating to the employment of the CEO, who is a director of the defendant, were properly delegated to one or more members of the Board, it must be assumed that such matters could only be decided on by the board acting in accordance with the articles of association. On the evidence before the court, it would appear that whatever decision was made in relation to the plaintiff's employment on 12th October, 2006 after the plaintiff left the meeting, it was not made in compliance with the requirements of the articles of association in relation to notice of the business to be transacted. Therefore, having been invited by both sides to assess the strength of the plaintiff's case, I conclude that, on the evidence presented, it seems more probable that whatever decision was made, and I consider it significant that the minute of the relevant resolution has not been exhibited, was not validly made than that it was.

26. Finally, in relation to this strand, I consider that the arguments put forward on behalf of the defendant on the basis of company law principles (by reference to paras. 6.08 and 6.12 of Keane on *Company Law*, 3rd Edition and Usher on *Company Law* at p. 246) were misconceived and have no bearing on the issue raised by the plaintiff, which is whether the organ which, *prima facie*, is entitled to make decisions in relation to his employment contract did so validly in accordance with the rules by which it is empowered to act.

27. The fourth strand is that the defendant did not get written notice in accordance with Clause 13.2 of the contract. In my view, the evidence presented by the defendant on its own bears out that contention. In order to effectively terminate the plaintiff's employment in accordance with Clause 13.1 what was required was that "no less than six months' prior written notice" be served in accordance with Clause 15.6. The defendant's case was that the defendant's employment was terminated on 12th October, 2006. The plaintiff got no prior written notice that his contract was to be terminated with effect from 12th October, 2006. Therefore, in my view, it was not terminated in accordance with Clause 13.2. That defect could not be, and was not, remedied retrospectively by the defendant's solicitor's letter of 18th October, 2006, which I have quoted earlier.

28. It was contended on behalf of the defendant that, even if the defendant had failed to give sufficient notice, that was a matter which was compensateable in damages and does not merit the making of an interlocutory injunction. But the position here, as I have said, on the defendant's own evidence is that the plaintiff's employment has never, in fact, been terminated in accordance with Clause 13.2, which the defendant puts forward as the basis of its entitlement to terminate. Notwithstanding that, the defendant has informed the employees of the Institute that the plaintiff's employment has been terminated and that he has been excluded from the defendant's premises. The defendant's position that it has an entitlement to terminate under Clause 13.2 is no answer to the plaintiff's claim for an interlocutory injunction, when the defendant has not properly invoked Clause 13.2 at all. As matters stand, it seems to me that the defendant must succeed at the trial of the action in his contention that he is still employed by the defendant.

29. Turning to the issues of the adequacy of damages and where the balance of convenience lies, following the line of authority relied on by the plaintiff, I do not think that damages would be an adequate remedy for the plaintiff if he were to succeed in the action. Further, I consider that the balance of convenience lies in favour of granting the injunctive relief sought by him. I consider that the plaintiff has made a strong case that he will suffer irreparable loss, both financial and reputational, because of the nature of the position at issue here, his age, his prospects of finding alternative employment, his family circumstances, the fact that he relocated from Munich to Dublin to take up his position with the defendant and the manner in which the defendant has acted since 12th October last.

30. On the basis that the usual undertaking as to damages is forthcoming from the plaintiff, I propose making orders in the terms of paras. (a) (other than an order directing the restoration of the plaintiff to his position as CEO, which I consider is unnecessary), (b), (c) and (d) of the notice of motion. For the avoidance of doubt I consider that the defendant is entitled to invoke Clause 5.2 against the plaintiff, by giving him written notice that it requires him not to work or perform any duties pending the trial of the action, in consequence of which he should not, without written permission of the defendant, be entitled to access the premises of the defendant pending the trial of the action.

Early hearing

31. Both sides are agreed that these proceedings require to be disposed of expeditiously. I will facilitate the parties in achieving that objective as best I can.