

## THE HIGH COURT

2005 No. 3940 P

BETWEEN

IBRAHIM AHMED

PLAINTIFF

AND  
HEALTH SERVICE EXECUTIVE

DEFENDANT

**Judgment of Miss Justice Laffoy delivered on 6th July, 2006.****The Parties**

1. The plaintiff has been a registered medical practitioner in this jurisdiction since 13th July, 1990. He became a fellow of the Royal College of Surgeons in Ireland in December, 1993. In July, 2000 he was appointed by the North Eastern Health Board as a locum consultant surgeon at Louth County Hospital, which is located in Dundalk, for a fixed term commencing on 14th August, 2000 and ending on 2nd October, 2000. He continued in the employment of the North Eastern Health Board on successive contracts of employments for fixed terms for in excess of three years. When the Protection of Employees (Fixed-Term Work) Act, 2003 (the Act of 2003) came into force, the plaintiff was a fixed-term employee of the North Eastern Health Board.

2. The defendant is a statutory corporation established by the Health Act, 2004. Since 1st January, 2005 the defendant has exercised the statutory functions formerly exercised by the North Eastern Health Board in the North Eastern Area, which, I understand, includes counties Louth, Meath, Monaghan and Cavan. In this judgment references to the defendant include the North Eastern Health Board in relation to events which occurred prior to 1st January, 2005.

3. It is the effect of the Act of 2003 on the plaintiff's employment with the defendant which is at the core of these proceedings.

**The Act of 2003**

4. The Act of 2003, which came into force on 14th July, 2003, gives effect in this jurisdiction to Council Directive 99/70/EC of 28th June, 1999 on the Framework Agreement on Fixed-Term Work (the Directive). The provision of the Act of 2003 which primarily determines the issues in these proceedings is s. 9. Sub-section (1) of s. 9 provides as follows:

"Subject to subsection (4), where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year."

5. Sub-section (3) deals with a purported contravention of sub-s. (1) and provides:

"Where any term of a fixed-term contract purports to contravene subsection (1) ... that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration."

6. It is common case that the plaintiff was a "fixed-term employee" of the defendant on 14th July, 2003 and had been since 14th August, 2000 and that one month after the coming into operation of the Act of 2003 he completed his third year of continuous employment with the defendant.

7. In order to determine the impact of s. 9 on the plaintiff's employment with the defendant, it is necessary to look at his contractual relationship with the defendant more closely.

**The plaintiff's contractual relationship with the defendant**

8. The plaintiff's initial appointment by the defendant was made by a brief letter from the acting hospital administrator of Louth County Hospital dated 26th July, 2000, in which the plaintiff was informed that it was proposed to appoint him –

"... to the post of Locum Consultant Surgeon at the Louth County Hospital, Dublin Road, Dundalk from 9.00 a.m. Monday 14th August, 2000 until 9.00 a.m. Monday 2nd October, 2000."

9. The first renewal of the plaintiff's contract was by letter dated 13th September, 2000 from the hospital administrator, which merely informed the plaintiff that his "temporary contract as a Locum Consultant Surgeon" had been extended for a further three-month period. Subsequent letters of renewal were similarly brief. After the Act of 2003 came into force, but before he had completed his third year of continuous employment with the defendant, the plaintiff was informed by letter dated 23rd July, 2003 that his contract had been extended for a further six months up to 2nd February, 2004. By letter dated 27th November, 2003, which recorded that the plaintiff's current contract would expire on 2nd February, 2004, the plaintiff was informed of a further extension of his contract to 30th June, 2004. By further letter dated 23rd January, 2004, which incorrectly stated that the plaintiff's contract would expire on 2nd February, 2004, the plaintiff was informed that his contract was extended to 1st August, 2004. There is consensus between the parties that it is at this point that s. 9(3) of the Act of 2003 impacted on the plaintiff's contractual relationship with the defendant. The effect of that provision was that the term which purported to extend the plaintiff's contract to 1st August, 2004 was of no effect and from 30th June, 2003 he was deemed to be employed under a contract of indefinite duration.

10. The plaintiff's initial appointment was as a locum within the ordinary meaning of that abbreviated version of the expression "*locum tenens*" – a person who stands in temporarily for someone else of the same profession, especially a cleric or a doctor. (cf. The New Oxford Dictionary of English, O.U.P., 1998). He was standing in for Ms. Ursula Mulcahy, who, as I understand the position, was an office holder of the post of Consultant Surgeon in Louth County Hospital and who was on administrative leave when the plaintiff was initially appointed. During the currency of the plaintiff's fixed-term employment Ms. Mulcahy retired from her post. It is not clear on the evidence when precisely this occurred, but it occurred before October, 2003 because one of the posts mentioned in the advertisement of October, 2003 referred to later had been occupied by her. After her retirement the plaintiff continued to perform his duties as consultant surgeon as he had done previously.

11. The terms and conditions of employment of consultants who are appointed to permanent positions within the health service are governed by what is colloquially referred to as the Consultants' Common Contract. Although this was not expressly agreed between the plaintiff and the defendant in advance of, or during, his employment, the provisions of the Consultants' Common Contract in

relation to remuneration, expenses, reimbursement of professional indemnity insurance premia while that arrangement lasted, annual leave and such like were applied by the defendant to the plaintiff during the currency of his successive contracts with the defendant. The provisions in relation to engaging in private practice were also applied to him until they were effectively withdrawn during the last quarter of 2004. The plaintiff accepted the application of the provisions to him, although he has never at any time been tendered, and has not executed, a contract in writing in his favour in the terms of the Consultants' Common Contract.

12. It is clear on the evidence that the defendant obtained approval from Comhairle na nOspideal to the plaintiff's appointment as a locum consultant surgeon to cover the absence of Ms. Mulcahy. The plaintiff was registered with the Voluntary Health Insurance Board (VHI) with effect from August, 2000 and was assigned a VHI code number. The defendant notified VHI of the renewal of his contract as it occurred. In March, 2004, following the retirement of Ms. Mulcahy, VHI sought confirmation from the defendant that the plaintiff was still occupying the post and sought a copy of the letter from Comhairle na nOspideal confirming that his temporary post was approved. By letter dated 9th April, 2004 the defendant notified VHI that the plaintiff was still "occupying the post of General Surgeon in Louth County Hospital and his contract has been extended to the end of June, 2004".

13. More than a year before the purported renewal of the plaintiff's fixed-term contract from 30th June, 2004 took effect by operation of law as a contract of indefinite duration proposals were being considered for the reorganisation of the delivery of general surgical services in County Louth. In April, 2003 the three permanent consultant general surgeons based in Our Lady of Lourdes Hospital, Drogheda put forward a proposal for a single department of general surgery for County Louth at the Drogheda and Dundalk hospital sites with six consultant surgeons with varying specialty interests, each of whom would provide surgical services in both hospitals. The proposal, and its subsequent implementation, was not merely concerned with the deployment of consultant surgeons within County Louth but it was concerned with surgical support by non-consultant hospital doctors, infrastructure, such as the provision of a second operating theatre at Dundalk, necessary complementary manpower, such as the appointment of a third consultant anaesthetist at Dundalk, and such like. The proposal was supported by the Royal College of Surgeons, which uses Our Lady of Lourdes Hospital as a training hospital, and Comhairle na nOspideal, which gave approval for the additional consultant posts. On 4th May, 2004 the defendant issued a press statement announcing that, with effect from 1st July, 2004, surgical services at Drogheda and Dundalk were being reorganised. The plaintiff's evidence was that he first heard of the reorganisation as a result of media reports. The reorganisation came into force on 1st July, 2004 but is not yet fully operational.

14. In October, 2003 the Local Appointments Commissioners, the statutory body which at that time was charged with the selection of candidates for appointment to consultant posts with health boards, advertised three posts for consultant general surgeons with the North Eastern Health Board, two with a special interest in gastro-intestinal surgery and one with a special interest in paediatric surgery. The plaintiff, who had been carrying out gastrointestinal surgery at Dundalk, applied for a post with a special interest in gastrointestinal surgery, but he was not successful. In my view, that outcome has no bearing on the determination of the issues with which the court is concerned in these proceedings.

15. The last formal written notification which the plaintiff received from the hospital administration extending his contract was the letter dated 23rd January, 2004. As I have stated, after 30th June, 2004 by operation of law the plaintiff was employed on a contract of indefinite duration. It is clear from the evidence that the position of the defendant's management as of early July, 2004 was that the plaintiff's contract would continue until 14th December, 2004 when it would terminate and he would be replaced by a permanent consultant surgeon who had been appointed through the Local Appointment Commissioners selection process. By letter dated 21st September, 2004, the plaintiff wrote to management of the defendant referring to the Act of 2003 and indicating that he wished to avail of his right to be given a contract of indefinite duration (i.e. permanent).

16. During September, 2004 the plaintiff was undoubtedly employed by the defendant on a contract of indefinite duration by operation of law. This was not immediately recognised by the defendant. In fact, by letter dated 22nd October, 2004, the management of the defendant informed the plaintiff that he would "finish as Temporary Consultant Surgeon at Louth County Hospital" on 14th December, 2004, the cessation of his position being necessary to enable the full-time consultant surgeon to commence as of 15th December, 2004. It was noted that the plaintiff would like to remain in the employment of the defendant, notwithstanding the termination of his temporary consultant position, this would be discussed and he would be reverted to as soon as possible. Shortly afterwards, management apprised the plaintiff of the timetable for allocation of non-consultant surgical personnel at Louth County Hospital which was to come into effect on 8th November, 2004. The plaintiff was instructed to stop taking on new referrals at his clinic and to work towards the closure of his clinical work due to the fact that his contract would terminate on 14th December, 2004.

17. At that stage, the plaintiff instructed his solicitor, who wrote to the defendant on his behalf on 9th November, 2004 indicating that any attempt to terminate his employment would be strenuously opposed. The substantive response to this letter was a letter dated 1st December, 2004 from the defendant's solicitors. In this letter it was stated that the defendant intended to offer the plaintiff the position of consultant surgeon within its service, at the same time recognising his continuity of service with the defendant. His position would not be terminated on 14th December, 2004 and he would remain at Louth County Hospital until 31st December, 2004. On his return from leave in mid-January, 2005 he would be employed by the defendant as a consultant surgeon on an ongoing basis, but the location of his employment would be a matter for discussion but might not be at Louth County Hospital. The position adopted by the plaintiff in response, and maintained by him thereafter, was that he had, by operation of law, a contract of employment of indefinite duration as a consultant surgeon at Louth County Hospital.

18. On his return from leave in January, 2005 the plaintiff was not allowed by the defendant to return to Louth County Hospital. In fact, he has not worked for the defendant in the North Eastern Area since then. He has, however, remained an employee of the defendant and has been paid the appropriate basic remuneration under the Consultants' Common Contract since January, 2005. By reason of not being permitted to work on a long-term basis at Louth County Hospital or any other hospital site under the aegis of the defendant, he has been deprived of the entitlement to engage in private practice which he previously enjoyed, which was on the terms stipulated in the Consultants' Common Contract. However, he has taken up short-term assignments as a locum surgeon both within and outside the jurisdiction with a view to mitigating his loss.

19. Since December, 2004 the plaintiff has resisted a number of attempts by the defendant to post him to positions which he considered did not accord with his contractual entitlement. At the hearing of these proceedings various factual matters were explored: why a particular approach was adopted by the defendant in relation to the plaintiff's position at a particular time; whether there was a divergence of views between management and the consultants as to how the predicament which the plaintiff presented should be addressed; whether there were alternative arrangements which the defendant could have made in relation to its surgical consultant manpower which would have properly accommodated the plaintiff; and whether other personnel in a similar position to the defendant were treated differently to the defendant. While these matters may be relevant to the remedy to which the plaintiff is entitled, if the defendant is in breach of the plaintiff's contract. They are not relevant to the issue of the defendant's contractual liability to the plaintiff. At this juncture, by agreement of the parties, I am only concerned with determining the plaintiff's contractual terms and whether the defendant is in breach. Accordingly, I do not consider it necessary to express any view on those matters. All I

consider it necessary to do is to outline how the defendant proposed posting the plaintiff.

20. What happened was as follows:

(1) After two months without any posting, by letter dated 11th March, 2005 the defendant gave what was in effect a direction to the plaintiff to undertake a six-month contract from 1st April, 2005 for a consultant surgeon which was available in Monaghan General Hospital. The plaintiff was informed that at the conclusion of the contract his position would be reviewed, but his employment would be on a continuing basis. The plaintiff's response, through his solicitor, was that this direction did not meet his entitlement. He did not accept that it was necessary to relocate him within the North Eastern Area and he did not accept that he could be compelled or required to undertake short-term contracts at Monaghan General Hospital or elsewhere. It was at that stage, 31st March, 2005, that the defendant, through its solicitors, adopted the position that the terms of the plaintiff's contract of indefinite duration were those of the Consultants' Common Contract under which he was employed in the defendant's North Eastern Area, and that, therefore, he did not have a right to remain at Louth County Hospital. Clause 8.1 of that contract, which I will quote later, was not expressly invoked nor, in my view, was it invoked by implication. It was indicated that the plaintiff was required to comply with the direction contained in the letter of 11th March, 2005 and that, following the conclusion of the requirement at Monaghan Hospital, he might "again be relocated in accordance with the Consultants' Common Contract". The plaintiff did not go to Monaghan.

(2) By letter dated 30th May, 2005, the defendant apprised the plaintiff that there was a need for a consultant surgeon at Cavan General Hospital, the position to commence on 7th June, 2005 and to be "available until further notice". The plaintiff was requested to confirm "by immediate return [his] confirmation of start date". The plaintiff maintained the position that he was entitled to be employed as a permanent consultant based at Louth County Hospital. He did not take up the position in Cavan.

(3) Section 14(1) of the Act of 2003 provides that an employee may present a complaint to a rights commissioner that his employer has contravened a provision of the Act of 2003. The plaintiff brought such a complaint on 26th January, 2005 that he had been removed and denied his entitlement to his permanent consultant surgeon position at Louth County Hospital. The complaint was heard by the Rights Commissioner on 18th May, 2005 and the hearing was resumed on 10th June, 2005. The Rights Commissioner gave her decision on 11th August, 2005. She found, on the basis of the evidence presented, that the plaintiff's complaint was well founded. Under the heading of "Redress" she gave the following direction:

"While the respondent confirmed, in March, 2005, that the complainant has been employed on a contract of indefinite duration with effect 30th June, 2004 and that the terms of that contract are the Consultants' Common Contract I require the respondent to confirm in writing to the complainant that with effect 30th June, 2004 he has been employed on a contract of indefinite duration i.e. on a permanent and pensionable basis under the same terms and conditions of employment as other permanent and pensionable consultants."

Following the decision of the Rights Commissioner, on 30th August, 2005 the plaintiff's solicitor wrote to the defendant's solicitors indicating that the plaintiff would be attending at Dundalk Hospital the following week on 7th September, 2005 to resume his duties which would be on the identical terms and conditions as he was previously employed, including theatre rota, outpatients clinic, endoscopy and on-call duties, in December, 2004. On 6th September, 2005 the defendant's management informed the plaintiff that he should not commence duty on the ground that the defendant's interpretation of the Rights Commissioner's decision was at variance with the plaintiff's. On 30th September, 2005 the defendant wrote to the plaintiff in the precise terms which the Rights Commissioner had directed, namely, that from 30th June, 2004 the plaintiff had been employed "on a contract of indefinite duration i.e., on a permanent and pensionable basis under the same terms and conditions of employment as other permanent and pensionable consultants". It was stated that the plaintiff would be contacted "shortly regarding a position within the HSE in accordance with your contractual terms".

(4) It was not until 9th November, 2005 that the plaintiff was told what his position within the defendant's organisation in accordance with his contractual terms would be. By letter of that date he was informed as follows:

"... you will be employed by the HSE in the North Eastern Area attached to the Joint Department of Surgery at Louth Meath Hospital Group. Your role will be to provide ongoing locum cover to six consultant surgeons in the Joint Department of Surgery. You are required to report to duty on Monday, 21st November, 2005 to the Group General Manager's Office, Our Lady of Lourdes Hospital, Drogheda. As was confirmed ..., you are employed on a contract of indefinite duration i.e. on a permanent and pensionable basis."

Once again, Clause 8(1) was neither expressly nor, in my view, impliedly invoked. The plaintiff's response, through his solicitors, was that the position he was being allocated to was a completely different and inferior position to the one he carried out previously and was unacceptable to him. The plaintiff remained ready, willing and able to return to work as a consultant surgeon at Louth County Hospital on the same terms and conditions as he enjoyed when his contract first became a contract of indefinite duration. It was intimated that the plaintiff intended instituting legal proceedings.

(5) These proceedings were instituted by plenary summons which issued on 23rd November, 2005.

21. Broadly speaking, the defendant has not moved from the position evinced in the letter of 9th November, 2005. However, in these proceedings, the defendant has sought to justify adopting that position, both historically and currently, on the basis of Clause 8.1 of the Consultants' Common Contract, which deals with work location, although prior to the initiation of these proceedings Clause 8.1 was not invoked. Clause 8.1 provides as follows:

"You will be based at [location indicated in Comhairle letter of approval]. You will be required to conduct clinics and out patient work as appropriate to your specialty both at your base and at [designated specific locations of the clinics and out patient work]; these locations may be changed by [employing authority] but they will not be outside the area served by [the hospital or hospital group] for your specialty without your consent, nor will the overall duration or frequency be changed without your consent. The location, frequency and duration will not be changed by you except with the approval

of [the employing authority]. You will not be transferred from [the hospital or hospital group] without your consent unless major changes take place in the character of the work being carried out there, in which case arrangements will be made to offer you an appropriate alternative appointment, including an option to change category of appointment without competition, in another hospital. In such a case, removal expenses calculated in accordance with the Removal Expenses Scheme for health boards and local authorities will be paid, if claimed."

22. With one qualification, the plaintiff has not moved from the position he adopted in response to the letter of 9th November, 2005. It was argued on his behalf that Clause 8.1 is inconsistent with the express terms of his contract by operation of law and does not apply to him. Alternatively, if it does apply, it was argued that there have been no "major changes ... in the character of the work" being carried out in Louth County Hospital, so that the portion of Clause 8.1 which empowers the employer to transfer the employee consultant without his consent, does not come into play at all in these proceedings. The one qualification is that counsel for the plaintiff made it clear that, if the court were to find that Clause 8.1 applies to the plaintiff's contract, and if, as a matter of fact, the defendant is entitled to invoke the power to transfer the plaintiff without his consent, an appropriate alternative appointment would be acceptable to the plaintiff. However, the plaintiff asserts that he has not received an offer of an appropriate alternative appointment to date.

23. There is no lack of clarity or ambiguity on the evidence as to what the position of the plaintiff would be as regards being able to avail of the provisions of the Consultants' Common Contract which entitle a consultant to engage in private practice, if he were to accede to performing the role assigned by the defendant to him in the letter of 9th November, 2005. The evidence is that he would not be recognised by VHI, the largest private medical insurer in the State. While he might be able to generate some private practice, specifically related to initial out patient consultations, he would not have dedicated theatre facilities of his own nor dedicated diagnostic facilities, so that his ability to generate private practice would be limited.

24. In concluding this outline of the history of the plaintiff's contractual relationship with the defendant, I think it is only fair to the plaintiff to record that I consider that he has been treated by the defendant in a shoddy manner, both before and in the conduct of these proceedings. In its response to an application by the plaintiff for an interlocutory injunction at an early stage in these proceedings it was alleged by the defendant that the plaintiff had been guilty of insubordination in not complying with the defendant's directions which I have referred to earlier and that this was a disciplinary matter which the defendant would be forced to address. Failure to obey a lawful instruction and to turn up for work was pleaded by the defendant in its defence as constituting negligence, including contributory negligence, on the part of the plaintiff. However, in the course of the hearing, the defendant, properly in my view, withdrew those allegations and apologised to the plaintiff for making them.

#### **The proceedings: objection in point of law**

25. Prior to the initiation of these proceedings the plaintiff appealed to the Labour Court from the decision of the Rights Commissioner under s. 15 of the Act of 2003. That appeal, which relates to some, not all, of the findings and determinations of the Rights Commissioner, stands adjourned pending the outcome of these proceedings. However, the defendant has taken an objection in point of law to these proceedings, contending that the plaintiff is estopped from bringing them where he has invoked the statutory scheme for relief provided for in the Act of 2003.

26. In summary, the reliefs claimed by the plaintiff, in addition to costs, in these proceedings are the following:

- (a) a declaration that the plaintiff is entitled to be employed by the defendant as a consultant surgeon based at Louth County Hospital on a permanent and pensionable basis;
- (b) various injunctions, both prohibitory and mandatory, formulated in a manner designed to enforce the contractual entitlements which the plaintiff contends for and, in particular, his entitlement to be based at Louth County Hospital and to engage in private practice;
- (c) orders directing the defendant to pay to the plaintiff monies forgone by him in the events which have happened, for example, in respect of overtime and "on-call" allowance;
- (d) damages for breach of the plaintiff's existing contract of employment;
- (e) damages in tort for alleged negligence and breach of duty and libel;
- (f) aggravated and/or exemplary damages; and
- (g) pre-judgment interest at the court rate of interest.

27. While I have quoted an extract from the decision of the Rights Commissioner earlier, I have done so for the purpose of putting in its proper context the letter of 30th September, 2004 from the defendant to the plaintiff. It is important to emphasise that in these proceedings the court is not concerned with whether the decision of the Rights Commissioner was correct on the evidence presented to her or in law. These proceedings are separate proceedings which fall to be determined in accordance with the evidence adduced before the court and the submissions made, if the defendant's objection in point of law is not well founded. Having said that, there is undoubtedly an overlap between what the Rights Commissioner decided and what the court has been asked to decide in these proceedings. The Rights Commissioner directed the defendant to pay compensation to the plaintiff in the sum of €5,000 in respect of loss of "on-call allowance". She also directed the defendant to pay the plaintiff compensation in the sum of €15,000 in respect of the defendant's breaches of the Act of 2003. Further, she found, or at any rate it is the plaintiff's perception that her decision could be interpreted as including a finding, that the Consultants' Common Contract in its entirety, including Clause 8.1, applies to the contract between the defendant and the plaintiff. The plaintiff has appealed to the Labour Court against that finding or apparent finding.

28. In answer to the defendant's objection in point of law, it was submitted on behalf of the plaintiff that the jurisdiction of a rights commissioner under the Act of 2003 is strictly limited to complaints that the employer has contravened a provision of that Act, which on the facts of this case is limited to the question whether the defendant acknowledged the indefinite duration, that is to say, the permanency of the plaintiff's contract by operation of law. The jurisdiction conferred by the Act of 2003 does not extend to adjudicating on whether the employer breached some other term of the contract of employment, for example, a term in relation to work location, it was submitted. Indeed, in this regard, the position adopted by the plaintiff before the court was the same as the position which had been adopted by the defendant before the Rights Commissioner, in that the defendant had argued before the Rights Commissioner that the manner in which the contract was to be interpreted was not a matter for her and that the limit of her jurisdiction was merely to determine whether the contract was one of indefinite duration. It was also submitted on behalf of the plaintiff that, if the legislature had intended to oust or restrict the jurisdiction of the court to deal with issues arising from the

application of the Act of 2003 to a contract of employment, that would have required a clear statutory provision. Section 15 of the Unfair Dismissals Act, 1977 (the Act of 1977) was cited as the type of provision which might have been, but was not, employed by the Oireachtas to limit an employee's choice of redress.

29. Of the authorities relied on by the defendant in support of its objection in point of law, those which appear on first impression to be of more relevance than others involved an attempt by an applicant to pursue a remedy by way of judicial review in circumstances in which a remedy by way of statutory appeal was open to, or being pursued by, the applicant. The most recent of the authorities is the decision of the Supreme Court in *O'Donnell v. Tipperary (South Riding) County Council* [2005] I.E.S.C. 18, in which judgment was delivered on 18th March, 2005. That case concerned an application for an order of *certiorari* quashing a decision of the respondent taken on 3rd October, 2000 to terminate the applicant's contract of employment as Station Officer of Clonmel Fire Station. In addition to initiating the judicial review proceedings, the applicant had brought an appeal to the Employment Appeals Tribunal under the Unfair Dismissals code, where a hearing had taken place over two days. However, the appeal had been adjourned when the Tribunal became aware that the applicant was pursuing relief by way of judicial review. One of the issues which arose was the effect of the availability of the alternative remedy of appeal on the application for judicial review. In dealing with this issue, Denham J. in her judgment quoted with approval the following passage from the judgment of the High Court (Barron J.) in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 at p. 549 on the common law relating to the discretion to be exercised by a court where there is an application for judicial review in circumstances where there is an alternative remedy:

"The real question to be determined where an appeal lies is the relative merits of an appeal against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities shows that this is in effect the real consideration."

30. Denham J. analysed the relevant factors in the case before her. She considered that while the steps which had been taken in the appeal to the Tribunal were not a determinative factor they were weighty. She considered that the issues which were raised by the applicant were more appropriate to be determined by an appeal on the merits than a review procedure. She also took into account that there was a right of appeal from the Tribunal to the Circuit Court, and from thence to the High Court and ultimately on a point of law to the Supreme Court. Applying the principles enunciated in the passage from the judgment of Mr. Justice Barron, she found that the appropriate remedy was the appeal to the Tribunal, which had the ability to deal with the questions raised and the principles of fairness. The decision of the High Court in that case that the matter should continue before the Tribunal was affirmed by the Supreme Court.

31. In my view, in the context of the defendant's objection in point of law, the significant feature of *O'Donnell v. Tipperary (South Riding) County Council* is that the remedy which the applicant sought to pursue in court, *certiorari*, is a discretionary remedy. The question which has to be addressed here is what is the position if a plaintiff wishes to pursue in court a legal remedy in respect of which the court does not have a discretion, for example, damages for breach of contract or tort, in circumstances where a statutory remedy is also provided. The oft cited decision of the Supreme Court in *Parsons v. Iarnród Éireann* [1997] 2 I.R. 523 illustrates how that issue might arise. The plaintiff in that case was dismissed by the defendant, his employer, for alleged misconduct. Initially he sought redress by pursuing a claim to a rights commissioner under the Act of 1977. The matter came before a rights commissioner who recommended that he should proceed to the next stage of the defendant's internal disciplinary proceedings, an *ad misericordiam* meeting, which duly took place without prejudice to the rights of either party. However, the plaintiff's dismissal was confirmed. Subsequently he instituted proceedings for declaratory orders that the decision to dismiss him was null and void and of no effect, that the *ad misericordiam* meeting and the decision to affirm his dismissal were null and void and of no effect, a mandatory injunction compelling the defendant to reinstate him and for damages, including damages for breach of contract and for wrongful and/or unfair dismissal. The defendant raised a preliminary objection that the plaintiff's proceedings contravened the provisions of s. 15(2) of the Act of 1977 and should be struck out. The first two subsections of s. 15 provide as follows:

"(1) Nothing in this Act, apart from this section, shall prejudice the right of a person to recover damages at common law for wrongful dismissal.

(2) Where an employee gives a notice in writing under s. 8(2) of this Act in respect of a dismissal to a rights commissioner or the Tribunal, he shall not be entitled to recover damages at common law for wrongful dismissal in respect of that dismissal."

32. In setting out his conclusions on the application of s. 15 in the Supreme Court, Barrington J., with whom the other two judges agreed, stated as follows (at p. 529):

"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 far reaching relief of reinstatement in his previous employment. It does not limit the worker's rights; it extends them. At the same time, section 15 ... 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 of 1977, he is not entitled to recover damages at common law; while sub-section (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 Dismissals Act, 1977, in respect of the same dismissal.

The traditional relief at common law for unfair dismissal was a claim for damages. The plaintiff may also have been entitled to declarations in certain circumstances, for instance, that there was an implied term in his contract entitling him to fair procedures before he was dismissed. But such declarations were in aid of his common law remedy and had no independent existence apart from it. If the plaintiff loses his right to sue for damages at common law the heart has gone out of his claim and there is no other free standing relief which he can claim at law or in equity."

33. On the foregoing basis the Supreme Court upheld the decision of the High Court that, having pursued his statutory claim, the plaintiff could not have recourse to common law.

34. Turning now to the Act of 2003, as I have already stated, s. 14(1) provides that an employee may present a complaint to a rights commissioner that his or her employer has contravened any provision of the Act of 2003. Where such a complaint is presented, sub-s. (2) of s. 14 provides that the decision of the rights commissioner shall do one or more of the following:

- (a) declare whether the complaint was or was not well founded;
- (b) require the employer to comply with the relevant provision;
- (c) require the employer to re-instate or re-engage the employee (including on a contract of indefinite duration);
- (d) require the employer to pay to the employee compensation of such amount (if any) as is just and equitable but there is a cap on the compensation in that it must not exceed two years' remuneration in respect of the employee's employment.

35. Section 15 of the Act of 2003 provides for an appeal from a decision of a rights commissioner to the Labour Court and sub-s. (1) of s. 15 provides that on such appeal the Labour Court shall make a written determination in relation to the appeal affirming, varying or setting aside the decision.

36. Section 18 of the Act of 2003 recognises the possibility of an overlap between the remedy provided for in the Act of 2003 and other statutory remedies available to an employee. First, it provides that, if penalisation of an employee, in contravention of s. 13(1), constitutes a dismissal of the employee within the meaning of the Act of 1977 and amendments thereof, relief may not be granted to the employee under both Acts, that is to say, the Act of 2003 and the Act of 1977, as amended. Further, it provides that, if an individual who is a fixed-term employee under the Act of 2003 is also a part-time employee under the Protection of Employees (Part-Time Work) Act, 2001 (the Act of 2001), he or she may obtain relief under either the Act of 2003 or the Act of 2001, but not under both. Significantly, the Act of 2003 does not contain a provision similar to s. 15 of the Act of 1977, which puts an employee on election as to whether to pursue the statutory remedy provided for in s. 14 or a common law remedy.

37. The jurisdiction conferred on a rights commissioner and on the Labour Court on appeal by the Act of 2003 is to adjudicate on an employee's complaint that his employer has contravened one or more of the provisions of the Act of 2003 and to deal with the complaint in the manner stipulated in s. 14(2) or s. 15(1)(b), as the case may be. The agreed impact of the Act of 2003 on the plaintiff's contract is that since 30th June, 2004 the plaintiff has been employed on a contract of indefinite duration. That was acknowledged for the first time by the defendant in unambiguous and unequivocal terms only after the initiation of the complaint adjudicated on by the Rights Commissioner in the letter dated 31st March, 2005 from the defendant's solicitors to the plaintiff's solicitors. The current dispute between the parties centres not on the direct effect of s. 9(3) on the plaintiff's contract of employment with the defendant, which relates to its duration, but on the implementation of the other terms of the contract in the circumstances which have prevailed since 30th June, 2004. In my view, it would be inappropriate to express any view on whether the Rights Commissioner had, or the Labour Court on the pending appeal has, jurisdiction to adjudicate on the current dispute, relating as it does not to the duration of the plaintiff's contract of employment but to the implementation of the other terms of his contract in circumstances where he remains an employee of the defendant. The appropriate forum for determination of the issue of the extent of the jurisdiction conferred by the Act of 2003 on the Rights Commissioner and the Labour Court is the Labour Court or the High Court on an appeal on a point of law from the Labour Court.

38. Assuming, purely for the purposes of considering the arguments for and against the defendant's objection in point of law, that the Rights Commissioner had, and the Labour Court has, such jurisdiction, I am not satisfied that the plaintiff is estopped from bringing these proceedings having invoked the statutory redress scheme embodied in the Act of 2003. No statutory provision has been pointed to which ousts the common law jurisdiction of the court. Moreover, no statutory provision has been pointed to on the lines of s. 15 of the Act of 1977 which puts an employee to his election at the initiation stage between pursuing the statutory redress available under the Act of 2003 and his remedies at common law and limits him to that choice thereafter. Given that the legislature has not taken away or limited the plaintiff's right of access to the court to enforce his common law rights, as it might have done, I cannot see how, by presenting his claim to the Rights Commissioner, the plaintiff is estopped from pursuing his common law rights.

39. Moreover, in my view, the position of the plaintiff, who is seeking to enforce private law rights in plenary proceedings, is not analogous to that of an applicant who seeks to pursue a public law remedy, such as certiorari, which is a discretionary remedy by way of the judicial review process. However, even if I am wrong in that last conclusion, given the probably unique complexities of the terms of retainer of consultants by the defendant, I am of the view that the common law remedies which the plaintiff seeks, which are being pursued in a process which is a full hearing on the merits, are more appropriate, in that they are more likely to achieve a result which accords with fairness and justice to both contracting parties, than the statutory remedies available under the Act of 2003, which would appear to comprehend much less complex contractual arrangements.

40. Accordingly, I hold that the defendant's objection in point of law is not well founded.

#### **Other lines of defence**

41. Before identifying and dealing with the real issues in this case, I propose disposing of a number of other lines of defence advanced by the defendant in its legal submissions, although none of these matters was pleaded as a defence.

42. First, the defendant submitted that it was, and remains, constrained in the manner in which it may assign the plaintiff to a post by the statutory provisions which govern the appointment of permanent consultants. The statutory provisions invoked are the provisions of the Local Authorities (Officers and Employees) Act, 1926 (the Act of 1926) which regulate selection of persons for appointment to certain offices to which the Act applies. In the past, in general, selection was by means of a competitive examination conducted by the Local Appointments Commission until its dissolution by the Public Service Management (Recruitment and Appointments) Act, 2004 (the Act of 2004). Currently, recruitment for appointment to positions in the defendant's organisation to which the Act of 1926 applies is subject to that Act and the subsequent amendments thereof, including the provisions of the Act of 2004 amending it, and it is regulated by the Commission for Public Service Appointments established by the Act of 2004. There is inherent in the defendant's submission the proposition that, by seeking to enforce his rights under s. 9 of the Act of 2003, the plaintiff is seeking to compel the defendant to circumvent the provisions of the Act of 1926, as amended by the Act of 2004, or, alternatively, the proposition that it is a necessary corollary to the enforcement of the plaintiff's right that such circumvention would occur and that such circumvention would be *ultra vires* the powers of the defendant. In my view, neither proposition is correct. The plaintiff is not seeking to be appointed to an office the filling of which is governed by the Act of 1926. The defendant must comply with the provisions of the Act of 2003 and such compliance falls outside the ambit of the Act of 1926. That, it seems to me, is a sufficient answer to this point without having to go into the minutiae of the provisions of the Act of 1926, as amended. However, I would add that Clause 8(1) of the Consultants' Common Contract suggests that the defendant has power to make an appointment in circumstances where a consultant is being transferred without his or her consent "without competition".

43. Secondly, in its written submission the defendant has advanced an argument that the Directive has not been properly transposed into Irish law because the Act of 2003 did not reserve to the defendant the discretion to determine the circumstances in which it is

appropriate to confer an employee with a contract of indefinite duration. This argument, which it seems to me is a peculiar argument for an emanation of the State to advance, is wholly misconceived. The authority upon which the defendant relied, the opinion of Advocate General Kokott delivered on 27th October, 2005 in a reference to the European Court of Justice from a court of first instance in Greece, *Konstantinos Adeneler and Others* (case C-212/04), emphasises the breadth of discretion given to Member States in giving effect to the Directive. Member States are not obliged to convert fixed-term employment relationships into relationships of indefinite duration. If they do so, such conversion does not necessarily have to take place in all circumstances. In this jurisdiction the Oireachtas excluded certain types of contract from the scope of the Act of 2003: a contract where the employee is a member of the Defence Forces, or a trainee Garda Síochána, or a nurse in training (s. 17). The Oireachtas did not exercise its discretion to exclude consultants employed by the defendant from the operation of the Act of 2003. That was permissible under the Directive and was its prerogative. The defendant is bound by the Act of 2003 as enacted by the Oireachtas.

44. Thirdly, the defendant asserted that the plaintiff had repudiated an entitlement to employment on the terms of the Consultants' Common Contract in his evidence. Therefore, it was submitted, the court does not have to determine whether the terms of that contract, including Clause 8.1, applies to the plaintiff. I reject that submission. Since 31st March, 2005 the defendant's case has been that the terms and conditions of the plaintiff's employment are governed by the Consultants' Common Contract and that is the basis of the defendant's case as pleaded. Accordingly, I propose considering later the applicability of the Consultants' Common Contract to the plaintiff. At this juncture, I wish to comment on submissions made by the defendant that certain ramifications flowed from the plaintiff's repudiation as asserted by the defendant. It was submitted that, on the authority of the decision of this Court (Carroll J.) in *Sheehy v. Ryan* [2004] 15 E.L.R. 87, the plaintiff's contract could be terminated with notice for good or no reason. It was further submitted that the plaintiff could be made redundant pursuant to the Redundancy Payments Act, 1967, as amended. Insofar as those submissions require to be answered, the answer is that the plaintiff's contract of employment subsists. Neither the issue of termination nor the issue of redundancy arises in these proceedings, nor does the application of s. 13 of the Act of 2003 which prohibits the penalisation of an employee by an employer by dismissal or any unfair treatment, including selection for redundancy. Submissions in relation to termination and redundancy are "red herrings".

### **The issues**

45. The starting point in identifying the issues in this case is the agreed position of the parties that the plaintiff, by operation of s. 9(3) of the Act of 2003, has a contract of employment as a consultant surgeon with the defendant of indefinite duration. The issues which fall to be dealt with in determining the liability of the defendant in contract to the plaintiff, which is what the court has to determine at this juncture by agreement of the parties, are the following:

- (1) What are the terms of the plaintiff's contract of employment apart from the duration of the contract, which is governed by s. 9(3)?
- (2) Has there been a breach by the defendant of any of those terms?

### **The plaintiff's contractual terms**

46. I have set out the factual position in relation to the appointment of the plaintiff and the renewal of his contract and the background against which that occurred in some detail earlier in this judgment. I am satisfied on the evidence that the terms of the Consultants' Common Contract applied by necessary implication to the plaintiff's employment insofar as those terms were consistent with a fixed-term contract.

47. It was submitted on behalf of the plaintiff that, in resolving the issue of liability, the court has only to determine one term of the plaintiff's contract – the location of his workplace. I do not accept that proposition. It was also submitted that while there was implied into the plaintiff's contract of employment terms which resemble some of the terms set out in the Consultants' Common Contract, not all of the terms of that document were implied terms of the contractual relationship of the plaintiff and the defendant. In particular, it was argued that Clause 8.1 could not be implied into that relationship as it was inconsistent with the express wording of the plaintiff's contract, in that his initial letter of appointment stipulated Louth County Hospital at Dundalk, and not any other location, as his workplace. The decision of the Supreme Court in *Sweeney v. Duggan* [1997] 2 I.R. 531 was cited as authority for the proposition that a term cannot be implied into a contract if it is inconsistent with the express wording of the contract.

48. While the proposition that an implied terms must not contradict any express term of a contract cannot be gainsaid, in my view, the implication of Clause 8.1 into the plaintiff's contract does not contradict the express term of his initial letter of appointment. It is clear on the wording of Clause 8.1 that it is envisaged that the location of the workplace of the consultant would be inserted in that clause. Presumably the contract executed by Ms. Mulcahy stipulated Louth County Hospital as her workplace. At any rate, the evidence establishes that that was the only location at which she worked. However, notwithstanding that, the defendant would have been entitled to invoke Clause 8.1 against her. The plaintiff was initially appointed to stand in temporarily for Ms. Mulcahy. It cannot have been the presumed intention of the parties that the plaintiff would be in a stronger position than Ms. Mulcahy or that, if the conditions which gave rise to an entitlement on the part of the defendant to transfer her without her consent were to arise, the plaintiff, as her locum or as a temporary consultant after her retirement, would be immune from transfer. Of course, because of the short duration of the plaintiff's successive appointments, an issue as to the application of Clause 8.1 would have been unlikely to have arisen if the Act of 2003 had not intervened because, presumably, the defendant would have exercised the option of not renewing the plaintiff's contract rather than invoking Clause 8.1.

49. I consider that, in effect, what the plaintiff has sought to do is to pick and choose from the terms of the Consultants' Common Contract. That he is not entitled to do. In my view he is subject to all of the terms of the Consultants' Common Contract, including Clause 8.1, which are consistent with a contract of indefinite duration. His workplace can be changed in accordance with the provisions of Clause 8.1.

### **Breach?**

50. The defendant disputed the plaintiff's contention that the defendant is in breach of the terms of his contract on two grounds.

51. The first ground is that the defendant has paid the plaintiff his salary since December, 2004, thereby fulfilling its contractual obligation to him. The defendant is not obliged to provide work for the plaintiff, it was submitted. As authority for that last proposition, the defendant relied on the decision of the English High Court in *Collier v. Sunday Referee Publishing Company Limited* [1940] 2 K.B. 647. The defendant relied in particular on the following passage of the judgment of Asquith J. at p. 650:

"It is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my

meals out. In some exceptional cases there is an obligation to provide work. For instance, where the servant is remunerated by commission, or where (as in the case of an actor or a singer) the servant bargains, amongst other things, for publicity, and the master, by withholding work also withholds the stipulated publicity ...; but such cases are anomalous."

52. Aside from the interesting insight which it gives of a bygone era, that passage, in my view, is of no relevance to the facts of this case. It is a term of the plaintiff's contract that he is entitled to engage in private practice within the hospital in which he is employed. As a matter of contract, the defendant is in breach of its contractual obligations to the plaintiff if it precludes him from working in one of its public hospitals and excludes him from access to the facilities and infrastructure necessary to enable him to engage in private practice.

53. The second ground is that, in accordance with Clause 8.1, the defendant has assigned the plaintiff to "an appropriate alternative appointment" on more than one occasion, which the plaintiff in breach of contract has rejected. It was submitted on behalf of the plaintiff, however, correctly in my view, that, before the defendant could appoint the plaintiff to a position other than in Louth County Hospital, it would have to establish that two preconditions were fulfilled: that major changes had taken place in the character of the work being carried out in Louth County Hospital; and an offer of appropriate alternative appointment had been made to him. The plaintiff's case was that neither precondition was fulfilled.

54. The meaning of the precondition expressed as "unless major changes take place in the character of the work being carried out there" in Clause 8.1 is a question of construction in the light of the totality of the terms of the Consultants' Common Contract. The interpretation advanced on behalf of the plaintiff that, as regards surgical services, it envisages a major diminution or cessation of a particular type of surgery, for example, breast surgery, is much too narrow and, in my view, is not correct. The provision in Clause 8.1 which empowers the defendant to transfer a consultant without his consent is clearly designed to ensure that there is proper deployment of consultant manpower. While the phrase "major changes ... in the character of the work" may not be the most felicitous to describe the changes wrought in the configuration of consultant surgical manpower and specialty expertise by the reorganisation of surgical services at Drogheda and Dundalk which came into force on 1st July, 2004, I have no doubt that it does encompass what has happened at Louth County Hospital. Under the reorganisation there is no longer a post in Louth County Hospital for a consultant surgeon committed to eleven sessions there, as Ms. Mulcahy was, and as the plaintiff was, initially as her locum and subsequently after her retirement as a temporary consultant surgeon. Under the current organisational structure, six surgeons organised in three teams of two, each of which teams has a gastrointestinal specialty, have conjoined responsibility for patients in Our Lady of Lourdes Hospital and Louth County Hospital. Each surgeon has sessions in each hospital. Apart from that reorganisation there has been a major change in the character of the surgery being carried out in Louth County Hospital in that only elective surgery is carried out there now. Patients who present at Louth County Hospital through the Accident and Emergency Department who require early intervention are triaged there and are transferred to Our Lady of Lourdes Hospital where all emergency surgery for the Louth Meath Hospital Group is carried out. The evidence establishes that the reorganisation was implemented with the objective of delivering safer and better surgical services in the North-Eastern Area.

55. While I am satisfied on the evidence that the first precondition to the invocation of the provision in Clause 8.1, which empowers the defendant to transfer a consultant without his consent, has been fulfilled, in that major changes have taken place in the character of the surgical services being provided in Louth County Hospital, I am not satisfied that the plaintiff has been offered an appropriate alternative appointment. The inappropriateness of the various diktats issued to the plaintiff, which I have outlined earlier, is self-evident. A six-month posting to Monaghan General Hospital followed by a review of the plaintiff's position was not appropriate. Neither was a posting to Cavan General Hospital "until further notice". What Clause 8.1 comprehends is a permanent posting of an appropriate nature in another hospital, not a series of short-term postings at different locations, which in this case, as the plaintiff's counsel put it, are spread over several counties and two provinces.

56. The most recent direction given by the defendant following the decision of the Rights Commissioner has the effect of converting the plaintiff into a permanent locum. The defendant's position as to the effect of the Act of 2003 was put by its counsel in very plain language: it cannot elevate the plaintiff into any status above the one he formerly enjoyed; he was always a locum; his is now a locum; but he is a permanent locum. In my view, that is not a proper characterisation of the plaintiff's status, either before or after 30th June, 2004. When he was initially appointed to Louth County Hospital he was undoubtedly a locum for Ms. Mulcahy. However, after Ms. Mulcahy retired, in my view, he was temporary consultant surgeon on a series of fixed-term contracts on the terms of the Consultants' Common Contract insofar as they were consistent with the temporary fixed-term nature of his engagement, which, among other things, entitled him to engage in private practice. It is perhaps worth noting that the defendant has used the words "locum" and "temporary" interchangeably when describing the plaintiff's status in the past. Since 30th June, 2006, the plaintiff has been employed as a consultant surgeon on a contract of indefinite duration on the same terms as he had been previously employed, including his entitlement to engage in private practice. Assigning the role of providing ongoing locum cover for six consultants in the Joint Department of Surgery at Louth Meath Hospital Group is not an offer of appropriate alternative appointment within the meaning of Clause 8.1, because that role precludes the plaintiff from engaging in private practice as envisaged in the Consultants' Common Contract.

57. As I have stated earlier, during the hearing the defendant withdrew the allegation of insubordination against the plaintiff and apologised to him. The defendant maintained the position that it was not reasonable for the plaintiff to reject the posts he was directed to, particularly as he has been paid the full salary referable to the public work of a consultant. That is not a proposition to be disposed of lightly. It is regrettable that the defendant has not got real value for the salary it has paid to the plaintiff. However, taking an overview of how the plaintiff has been treated by the defendant, both before the proceedings were initiated and in the conduct of these proceedings, I have come to the conclusion that the plaintiff was justified in the stance he adopted, because it is probable that he would have been prejudiced had he adopted a different stance.

58. Accordingly, in my view, the defendant is in breach of the plaintiff's terms of employment and has been since the plaintiff returned from leave in January, 2005.

#### **Summary of conclusions on liability**

59. By operation of the Act of 2003 the plaintiff has been employed by the defendant as a consultant surgeon on a contract of indefinite duration since 30th June, 2004 on the terms of the Consultants' Common Contract, including Clause 8.1 which empowers the defendant to transfer the plaintiff from his original work location, Louth County Hospital, without his consent if major changes have taken place in the character of the work being carried out in Louth County Hospital and provided an offer of an appropriate alternative appointment is made to him in another hospital. By virtue of the reorganisation of surgical services in Our Lady of Lourdes Hospital and Louth County Hospital there has been a major change in the character of the work being carried out in Louth County Hospital. The defendant has not allowed the plaintiff to engage in either public or private practice at Louth County Hospital since he returned from leave in January, 2005 and has failed to make an offer of an appropriate alternative appointment to him. The defendant has been in



breach of the plaintiff's contract of employment since January, 2005.

#### **Going forward**

60. I am not impervious to the difficulty which the impact of the Act of 2003 on the plaintiff's employment with the defendant at the time of a radical restructuring of surgical services in the North-Eastern Area in the public interest has created for the management of the defendant. Recognising that difficulty, on a number of occasions in the course of the hearing, I urged the parties to try and resolve the issues between them without the court having to make an order. Unfortunately this did not happen.

61. As long ago as 19th April, 2004, in a letter of that date to the Group Manager of the Louth Meath Hospital Group, Mr. Finbar Lennon, who is a consultant surgeon attached to Our Lady of Lourdes Hospital and Louth County Hospital and who at the time was the medical adviser to North-Eastern Health Board Management, urged management to address the position of the plaintiff and other "long-term locum consultants" with the Group. Mr. Lennon urged that there should be an acknowledgement of management's appreciation for their work and the invaluable contribution they had given in recent years to acute hospital services in the region. Without them, he stated, the defendant would have been unable to deliver those services. He apprised management that all of the consultants believed that they had a very strong case to be retained in permanent employment and he urged that constructive efforts should be made to meet their justifiable entitlements. He cautioned that "long fingering" their frequent representations was foolish and unwise. A disquieting feature of this case is that that letter and other relevant documents were not discovered, as they should have been, until a supplemental affidavit was sworn well into the hearing as a result of the persistence of the plaintiff's legal team following a tip-off from a "whistle-blower". It is clear that the significance of the letter of 19th April, 2004 in litigation was appreciated even before these proceedings were initiated. It was recognised by management as early as 27th October, 2005 that, if it had been discovered during the proceedings before the Rights Commissioner, it would have severely undermined the defendant's defence of the plaintiff's complaint.

62. Apart from the public, there are various stakeholders which have an interest in the manner in which surgical services are organised in the North-Eastern Area, including the management of the defendant, the permanent consultant surgeons and other personnel employed by the defendant, the section of the defendant which now performs the role formerly performed by Comhairle na nOspideal, and the Royal College of Surgeons. They may have varying views as to how the predicament created by the plaintiff's position should be resolved. However, the plaintiff's contract of employment must be honoured. Having heard approximately eighteen hours of evidence and submissions over six days to date, I am of the view that, because of the complexity of infrastructural, organisational and practical considerations in the provision of surgical services, an agreed solution to the predicament is more likely to be in the interest of the plaintiff, the other stakeholders and the public than a remedy provided by the court.