Neutral Citation Number: [2009] IEHC 145

THE HIGH COURT

2007 2148 P

BETWEEN

PATRICK McMAHON

PLAINTIFF

AND

IRISH ROAD HAULAGE ASSOCIATION

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 24th day of March, 2009

The factual background

The defendant is a company limited by guarantee not having a share capital, which was incorporated on 13th July, 1973. Its primary object, as stated in its memorandum of association, is to organise, represent and protect the road transport industry and the business of road hauliers in the State or abroad. The articles of association of the defendant provide that its business shall be managed by the Council which consists of the officers of the defendant who are *ex officio* members, and members who are appointed by the Regional Divisions and the County Branches of the defendant which are established by the Council in accordance with the articles of association. As I understand it, in 2006 the Council comprised in the region of 40 to 45 officers and representatives. In 2006 the only provision in the articles of association for the expulsion of a member of the defendant was Article (11) which provided as follows:

> "If the conduct of any member is such as shall in the opinion of the Council be injurious to the character or interests of the Association or render him unfit to remain a member of the Association the Council may expel such member."

The plaintiff has been engaged in the business of road haulage since 1964. His business has expanded over the years and he now has operations in Dublin and in Counties Clare and Westmeath, as well as at Ellesmere Port in England. He became a member of the defendant in or about 1974 or 1975. In June 2006 the plaintiff was the Chairman of the Dublin County Branch and he was a representative of his County Branch on the Council.

The events which gave rise to these proceedings occurred at a Council meeting of the defendant which was held in Portlaoise on 28th June, 2006. It is clear on the evidence that there was a history of tension between the plaintiff and the then President of the defendant, Vincent Caulfield, arising out of the election of the President in 2005, which the plaintiff had also contested. Although the plaintiff, in evidence, stated that he held no animosity towards Mr. Caulfield, he maintained that the election of Mr. Caulfield as President had been improper, and, indeed, the first letter from the plaintiff's solicitor to the defendant arising out of the events of 28th June, 2006 stated the plaintiff's position that Mr. Caulfield had not been properly elected. However, that point was not pursued by the plaintiff in these proceedings.

There was also evidence of tension at branch level between the plaintiff and other members of the Dublin County Branch, in particular, Mr. Liam Brewer.

The controversy which provoked the events at the Council meeting in Portlaoise was a letter written on 21st June, 2006 by the plaintiff to the Director of Services & County Engineer of Clare County Council (the County Engineer) complaining that roadworks in the Ennis area were being carried out in a manner which was dangerous to the public. The letter was written on letter heading which referred to "Dublin Branch I.R.H.A." and named the officers of the Dublin Branch. The letter purported to be written on behalf of the Dublin Branch and stated that the Dublin branch would hold the addressee "responsible for all damage or injury that may happen to the public". On 26th June, 2006, the County Engineer wrote to the Chief Executive of the defendant complaining about the conduct of the plaintiff and the content of his letter and references contained in it to identified employees of Clare County Council. The County Engineer sought clarification whether the plaintiff was representing the defendant in writing the letter.

The meeting of the Council in Portlaoise on 28th June, 2006 was attended by about 35 members of the Council. The plaintiff attended. At the meeting, Mr. Caulfield read out the plaintiff's letter to Clare County Council. Mr. Eugene Drennan, who has been a member of the defendant for 30 years, and who was at the meeting and who gave evidence on behalf of the plaintiff, testified that the members present felt that the letter had brought the defendant into disrepute. Mr. Brewer, who also testified, proposed a motion to expel the plaintiff from the defendant. His evidence was that he thought the plaintiff was out of control and was damaging the defendant. The motion was seconded. There was then a discussion on the motion. The plaintiff's evidence was that he was not allowed to speak to the motion. I am satisfied that that was not what happened. Mr. Drennan's evidence was that the plaintiff was allowed to speak, that he got up a number of times but he was slow on delivery and he did not get out what he wanted to say. The motion was put to a vote and was carried. Following a query from a member of the Council, it was put to a vote a second time and carried a second time.

By letter dated 26th October, 2006, the plaintiff's solicitor wrote to Mr. Caulfield, as president of the defendant, alleging that the removal of the plaintiff from membership of the defendant on 28th June, 2006 was unlawful and alleging that he had suffered stress, trauma, humiliation, anxiety and loss in both his personal and professional life. It was suggested that the plaintiff be invited to attend the meeting of the Council the following month on a "without prejudice" basis as to any action the plaintiff might wish to take against the defendant. There was no response to that letter. Following a reminder dated 6th December, 2006 from the plaintiff's solicitor, Mr. Caulfield wrote on behalf of the defendant that there was no substance in the complaints in the letter of 26th October, and that the defendant did not propose to engage in further correspondence with the plaintiff or his solicitor.

These proceedings were initiated by a plenary summons which issued on 30th March, 2007.

The case on the pleadings

The case as pleaded in the plaintiff's statement of claim delivered on 30th March, 2007, on its face, has two separate elements. The first is the assertion that the purported removal of the plaintiff as a member of the defendant on 28th June, 2006 was invalid and of no effect, in that it was a breach of the plaintiff's right to fair procedures as guaranteed by Article 40.3 of the Constitution. The second element, which is expressed to be without prejudice and in addition to that assertion, is the plea that it was an express or an implied term of the contract whereby the plaintiff was accepted as a member of the defendant that his membership would not be terminated save on the plaintiff being given due notice of the reason for his termination and an opportunity to present his case and to advance reasons as to why his membership should not be terminated. Accordingly, his purported removal was a breach of the terms of his contract. The plaintiff claims a declaration that his purported removal was invalid and contrary to his entitlement to basic fairness of procedures pursuant to Article 40.3. He claims injunctive relief, which is no longer relevant. He also claims damages "for the purported removal of the plaintiff as a member" of the defendant.

In its defence delivered on 23rd August, 2007, the defendant admitted the plaintiff's claim and stated that a lodgement had been made to meet the plaintiff's claim for damages.

Almost a year after the delivery of the defence, the defendant sent a letter of apology to the plaintiff, which was dated 12th June, 2008. Referring to the motion passed on 28th June, 2006, the letter stated as follows:

> "The Association and Council acknowledge that your expulsion was wrongful and wish to unequivocally apologise to you for the offence that may have been caused to you personally and professionally as a result. For the record, it is acknowledged and confirmed that you have at all times been and remain a full member of the Association and that your membership has not lapsed at any time."

It was stated that a notice to that effect would be published in the July edition of the defendant's trade magazine, "Knights of the Road". That publication is circulated as an insert in a magazine known as "Fleet". In the July/August edition of the publication, the apology was included in a page headed "Head Office … News in brief from". The apology repeated the text which I have just quoted, which was preceded by an acknowledgement that the plaintiff had been wrongfully removed from the defendant at the meeting on 28th June, 2006. The evidence of Mr. Brewer was that the people who were present at the meeting were circulated with "Fleet" and the insert.

In response to a request for particulars of the plaintiff's claim for damages, in replies delivered on 10th July, 2008 the plaintiff "attempted to quantify the loss and damage suffered by him in monetary terms" and claimed for seven categories of damage in sums aggregating €26,000, the largest being a claim for €15,000 for alleged damage to his good name. As regards the other categories, for example, he claimed the sum of €3,000 for "loss of the position of Chairman of the Dublin County Branch", and €3,000 for "financial loss in respect of his being unable to promote his business as a haulier within the framework" of the defendant. Counsel for the plaintiff conceded, properly in my view, that the figures in the replies are "fairly arbitrary" and not items of special damage.

When the matter came on for hearing on 27th February, 2009, the Court's only function was to assess the damages to which the plaintiff is entitled.

Claim for damages: cause of action

Counsel for the plaintiff submitted that the basis on which the plaintiff is entitled to be compensated is that there was a breach of his constitutional right to fair procedures. For the Court to make a declaration to that effect was not sufficient. The Court should award a fair and reasonable level of compensation, it was submitted.

Counsel for the defendant submitted that the plaintiff's claim is a claim in contract. The relationship between the parties was a contractual one, although subject to an implied term that the plaintiff would be afforded fair procedures. It was acknowledged by the defendant that there was a breach of contract. However, the breach had been remedied by the apology and the acknowledgement that the plaintiff was, and still is, a member of the defendant. The declaration sought by the plaintiff met the justice of the case and, if there was to be an award of damages, it should be for a nominal sum only.

In my view, the plaintiff's cause of action is for breach of contract and the damages to which he is entitled fall to be measured by reference to the principles applicable to awarding damages for breach of contract. Although what I consider to be the core legal issue, namely, identifying the cause of action for which the defendant is answerable, was not canvassed in any depth at the hearing, I have come to that conclusion for the following reasons.

First, counsel for the defendant was correct in submitting that in June 2006 the relationship between the plaintiff and the defendant was a contractual relationship. Section 25 of the Companies Act 1963 provides that, upon registration, the memorandum and articles of association of a company take on the status of a contract under seal and it is a contract which may be enforced by the company against its members and by the members against the company.

Secondly, as the defendant acknowledged in this case, the contract constituted by the articles of association and, in particular, the terms thereof in relation to the expulsion of a member of the company must be construed on the basis that there is implied therein an entitlement on the part of a member of the company to fair procedures when an issue as to the termination of his membership arises. The authority for this proposition is the decision of the Supreme Court in *Glover v. B.L.N. Limited* [1973] I.R. 388. In that case, which involved an action by an office-holder arising out of his summary dismissal for alleged misconduct, in his judgment Walsh J. stated (at p. 425):

> "The Constitution was relied upon; in particular Article 40, s. 3, of the Constitution. This Court in *In re Haughey* held that that provision of the Constitution was a guarantee of fair procedures. It is not, in my opinion, necessary to discuss the full effect of this Article in the realm of private law or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures…."

In essence, therefore, the wrong committed by the defendant in this case was a breach of the implied term in the statutory contract with the plaintiff constituted by the registration of the memorandum and articles of the defendant.

Thirdly, and this is an aspect of the matter on which the authorities were not addressed at all by either side at the hearing, as the plaintiff has a common law remedy, an action for damages for breach of contract, it is not necessary for the Court to treat his action as an action for breach of constitutional rights. In the Supreme Court in *Hanrahan v. Merck Sharp & Dohme (Ireland) Limited* [1988] 1 I.L.R.M. 629, Henchy J. stated as follows (at p. 636):

> "A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskell v. Coras Iompair Eireann* [1973] I.R. 121); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right."

More recently, in *McDonnell v. Ireland* [1998] 1 I.R. 134, the Supreme Court returned to the topic of how a breach of constitutional rights which is a civil wrong is remediable. In his judgment, Barrington J. stated (at p. 148) that, if the general law provides an adequate cause of action to vindicate a constitutional right, the injured party cannot ask the Court to devise a new and different cause of action.

In this case, because of the protection afforded by the Constitution, the contract between the plaintiff and the defendant, insofar as it provided for the expulsion of the plaintiff as a member of the defendant, must be construed on the basis that proceedings to expel the plaintiff would be conducted in accordance with basic fairness of procedures. That did not happen, as the defendant admits, and, accordingly, the defendant is in breach of its contract with the plaintiff. The common law action for breach of contract is available to provide redress for the plaintiff and, in my view, he should be confined to that action. In so finding, I have not overlooked the fact that in his judgment in *McDonnell v. Ireland*, Keane J., as he then was, observed (at p. 157) that, even where a civil wrong is remediable at common law, the proceedings may be required to be brought within the constraints of a form of action other than an action in tort, most conspicuously in the case of actions for breach of contract, with significant consequences in areas such as the assessment of damages, the implication being that the action for breach of contract may not be effective to protect the constitutional right of the injured party. However, given the nature of this case and the manner in which it was presented, I do not consider it necessary or appropriate to explore that avenue.

Measure of damages in contract
No evidence was adduced that the plaintiff was damaged in his good name and reputation as a result of his purported expulsion from membership of the defendant. Nor was there any evidence that financial loss was incurred by the plaintiff either personally or professionally. So his entitlement to damages falls back on his contention that he has suffered personal distress and embarrassment.

I have no doubt, on the evidence, that the plaintiff was deeply hurt by what happened on the 28th June, 2006. I have no doubt that the hurt was exacerbated by the fact that the plaintiff's wife was terminally ill at the time and died within two or three months. However, the defendant, eventually and on the basis of appropriate legal advice, faced up to the wrong to which the plaintiff had been subjected, acknowledged his continuing membership of the defendant and apologised to him publicly. I do not accept the plaintiff's contention that the defendant did not follow up on the letter of apology. I am satisfied that, subject to compliance with the requirements of membership, such as paying the membership subscription, he has been entitled to avail of the privileges of membership of the defendant and attend meetings since June 2008. I am also satisfied that he has been notified of meetings in accordance with the procedures adopted by the defendant's executive management in relation to the generality of members.

Accordingly, it seems to me that from an objective standpoint at most the plaintiff can recover for the distress, disappointment and embarrassment which he suffered during the two year period from his purported expulsion until the defendant apologised and recognised that he was still a member of the defendant and publicised that apology and acknowledgment.

However, counsel for the defendant advanced a number of arguments against the entitlement of the plaintiff to general damages.

First it was the defendant's case that the plaintiff is only entitled to nominal damages, in the sense in which that expression was defined by this Court in *O'Keefe v. Kilcullen* (Unreported, High Court, O'Sullivan J., 24th June, 1998):

> "Nominal damages means a sum of money that may be spoken of but has no existence in point of quantity, the purposes of such damages being twofold, namely, to assert a right or as a 'peg' on which to hang an order for costs."

Secondly, it was suggested by counsel for the defendant that, in reality, the plaintiff is seeking aggravated damages. The plaintiff has not pleaded entitlement to aggravated damages and his claim cannot be treated on that basis.

Thirdly, counsel for the defendant submitted that, on the authority of the decision of this Court (McWilliam J.) in *Garvey v. Ireland* [1979] I.L.R.M. 266, the plaintiff was not entitled to general damages in relation to embarrassment, distress and suchlike. The plaintiff in that case was the Commissioner of An Garda Síochána when he was dismissed by the Government. He instituted proceedings in which it was determined that the dismissal was invalid for being in breach of the rules of natural justice ([1981] I.R. 75). One element of his claim for damages was a claim for general damages for loss of job satisfaction, loss of opportunity for preparing for his retirement, invasion of privacy due to the public interest in his removal from office, injury to his health and general distress aggravated by the effect which the events had upon his family. McWilliam J. referred to the decision of the House of Lords in *Addis v. Gramophone Company Limited* [1909] A.C. 488 and quoted the following passage from the opinion of Lord Loreburn (at p. 491):

> "If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed itself makes it more difficult to obtain employment."

McWilliam J. pointed out that in the *Addis* case, there was no question of a breakdown in the health of the plaintiff. He then went on to deal with the case before him and stated (at p. 268):

> "Accordingly, unless some injury was occasioned by the plaintiff as a result of the wrongful removal from office of the plaintiff which could reasonably have been foreseen by the defendants, I am of opinion that he is not entitled to any general damages under this heading. In this connection I am not satisfied that there was any injury to the health of the plaintiff in the normally accepted sense. In addition all the other matters of which he complains would have been applicable to a greater or lesser extent had he been lawfully removed from office and cannot be attributable to the unlawful nature of his removal."

On the authority of the *Garvey* case, counsel for the defendant submitted that the plaintiff is not entitled to general damages for hurt feelings which cannot have been in the reasonable contemplation of the parties.

Like *Garvey*, *Addis v. Gramophone Company Limited* was a case of wrongful dismissal. In recent years, notwithstanding the exclusionary principle established in *Addis v. Gramophone Company Limited*, our Courts have awarded damages for damage to intangible interests such as distress and disappointment in cases where the contract is principally for enjoyment or other non-economic benefit, for example, cases involving botched-up holiday arrangements and the peremptory stoppage of a post-wedding

reception (*Dinnegan v. Ryan* [2002] 3 I.R. 179, in which, in a circuit appeal, Murray J., as he then was, awarded the disappointed couple €6,000 each). Even in some termination and dismissal cases, awards have been made to cover distress. For example, in *Dooley v. Great Southern Hotels* [2001] E.L.R. 340 McCracken J. made an award of £2000 in general damages for distress and depression where fair procedures were not followed in the termination of the plaintiff's employment, although in that case there was medical evidence of an episode of depression after the termination.

This case is *sui generis* in that it involved the expulsion of the plaintiff, a businessman, from an association of his business peers in the haulage business which, on the defendant's admission, was carried out by other members wrongfully. As regards the likely impact of the wrong, it seems to me to be more akin to the holiday and special event cases than to employment cases. In his evidence, in outlining the effect of the expulsion on him, the plaintiff emphasised that he felt unable to attend truck festivals and vintage truck and car rallies after his expulsion. He felt that he was distanced from his peers. In my view, the distress and embarrassment he felt as a result of his expulsion was such as must reasonably be supposed to have been in the contemplation of the parties when the membership contract came into being as the probable result of the breach thereof. However, the wrong was substantially redressed after two years. Accordingly, I consider that the plaintiff should be awarded general damages for the distress he endured during the two year period and that the appropriate award is €7,500.

There will be a declaration in the terms sought in the statement of claim and an award of €7,500 damages.