THE HIGH COURT

[2005 No. 548 P]

BETWEEN

GEOFFREY EVANS

PLAINTIFF

AND
IRFB SERVICES (IRELAND) LIMITED

DEFENDANT

Judgment of Mr. Justice Clarke delivered 11th April, 2005.

1. The plaintiff is employed by the defendant company as Head of Rugby Development. The defendant company is an operating company of the International Rugby Board ("the IRB") which is the worldwide governing body for Rugby Union and is charged with the governance and development of rugby worldwide. The IRB is made up of constituent members from 113 rugby playing countries. Amongst other things the board is the law making body for rugby and organises the Rugby World Cup tournament which is played for every four years by the leading rugby nations. The IRB is managed by a council which is representative of the member countries while its day to day activities are managed through two principal operating entities being the defendant company and a separate company called Rugby World Cup Limited.

2. Following a distinguished career as both an international rugby player for Wales and as a senior rugby administrator (in a variety of honorary positions), the Plaintiff was approached in mid 2001 by the then chairman of the defendant company the late Vernon Pugh QC. At that time the plaintiff was employed as Head of the Department of Applied Science in South Bank University London. The post involved him being in charge of 45 academic staff, 40 research students together with having responsibility for administrative and technical staff and a substantial undergraduate department. The post was permanent and pensionable and at the time carried with it a total remuneration of STG£55,000 per annum.

3. Following discussions the plaintiff was persuaded by Mr. Pugh to apply for a vacancy for a post then known as "game development manager" with the defendant company. Despite an initial reluctance the plaintiff applied for and was appointed to the post.

4. The only contemporary documentation concerning his appointment is to be found in a letter dated 17th June, 2001 from Mr. Pugh confirming the defendants offer of the position of Game Development Manager. Insofar as material to these proceedings the letter provided as follows:-

> "1. Term
>
> (a) 5 years, commencing September 1st 2001
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> 5. Responsibilities
>
> As per attached job description
>
> 6. Termination
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> As per standard IRB conditions, namely, gross misconduct and similar liable to summary dismissal; serious misconduct and/or dereliction of responsibilities and/or repeated failures or inability to perform the obligations of the post satisfactorily, following such due notice and standard employment procedure."

5. It should also be noted that the letter concluded by indicating that Mr. Pugh would ask a Darren Bailey "to draft a full form employment contract for your consideration."

6. On the evidence before me it does not appear that any such draft contract was in fact produced but the plaintiff nonetheless took up duties and carried them out without, it would appear, any difficulties arising, until the latter part of 2004.

7. The above brief account is by way of background to the dispute which has now arisen between the parties and which has given rise to the current application for interlocutory relief. It is common case that in the latter part of 2004 the defendant became engaged in the consideration of a plan to reorganise its structures. While there is some dispute between the parties (which is not capable of resolution at this interlocutory application) as to just how far reaching that reorganisation actually is, it seems to me to be clear, on all the evidence, that it can reasonably be characterised as significant. The difficulty which has arisen in respect of the plaintiff's position stems from the fact that one of the areas which is most significantly affected by the reorganisation is the area in which his post lies. It is also common case that in the period between his original appointment and the emergence of disputes between the parties the plaintiff's post had been altered to some extent not least in its redesignation as head of game development. A principal feature of the proposed reorganisation involved the amalgamation of that department with the tournament's department to form a new rugby department.

8. While there are also disputes between the parties (again, not capable of resolution on an interlocutory hearing) as to the precise circumstances and terms in which the plaintiff was informed of the reorganisation and his position in relation to it there seems little doubt but that both parties at least contemplated the possibility of the plaintiff departing from the employ of the defendant. The Defendants case is that it entered into such negotiations with the Plaintiff on the basis that its chief executive, Mr. Mike Miller, was of the view that the plaintiff might not be happy to work within the new structures and in particular might be unhappy about the fact that it had been determined that on an interim basis the head of the new rugby department would be the former head of the tournament department Mr. Mark Egan. While it is clear, therefore, that the defendant contemplated the possibility of negotiating a severance on the part of the plaintiff and would have been prepared so to do provided appropriate terms could be agreed, it is by no means clear that the defendant was necessarily determined that the plaintiff should leave its employment.

9. Equally from the perspective of the plaintiff while it is clear that he entered into negotiations which might have led to his departure on agreed terms it is not clear that he, at any time, necessarily gave up hope of being able to continue in his existing position most especially if terms which he found acceptable for his departure could not be negotiated. Whether the plaintiff's contention that the defendant was determined to remove him from his position or the defendants contention that the plaintiff has maintained these proceedings solely to enhance a severance package are correct are both matters that can only be determined after a full trial.

10. It is in those circumstances that the plaintiff's case needs to be evaluated on the basis of the now well established principles concerning the grant of an interlocutory injunction.

11. It is therefore necessary for me to consider three matters:-

> (a) has the plaintiff made out a fair case to be tried.
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> (b) if so would damages be an adequate remedy in the event that such a case was ultimately successful and
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> (c) in the event that damages would not be an adequate remedy where does the balance of convenience lie?

12. I deal with each in turn.

Fair case to be tried
13. At its simplest the plaintiff's case is that he has a fixed term contract of employment for a period of five years and that he is entitled, for that period, to carry out duties similar to those set out in his initial job description as varied in the intervening period.

14. With that proposition the defendant takes issue on two fronts which need to be considered in turn.

(a) The Fixed Term
15. The defendant denies that the plaintiff's contract of employment was for a fixed term. However in the light of the clear statement in the letter from Mr. Pugh which is referred to above it seems to me that the plaintiff has well met the standard of fair case. While is it correct to note, as urged by counsel for the defendant, that the letter in its terms contemplated a more detailed contract, it is, to say the least, arguable that in the light of the fact that no such contract was proffered prior to the plaintiff taking up employment, any additional normal terms that might be implied into the contract of employment above and beyond those contained in the letter could not be such as would be inconsistent with the express terms set out in that letter. In those circumstances I am satisfied that the plaintiff has made out a fair case to be tried that his contract of employment is one which cannot be terminated within the original five year period save for the misconduct or non performance reasons set out in paragraph 6 and referred to above.

(b) Duties
16. A more difficult question arises in relation to the extent to which the alteration in the plaintiff's duties which would occur on the proposed appointment on a permanent basis of a head of the rugby department may amount to a breach of the plaintiff's contract of employment. In *Garrahy v. Bord na gCon* (2003) ELR 274 O'Higgins J. dealt with an application for an interlocutory injunction in circumstances where the defendant proposed filling a permanent appointment which, he was satisfied, involved functions which overlapped to a large extent with the functions being carried out by the plaintiff in those proceedings on a part time basis. In applying the judgment of Kelly J. in *Rafferty v. Bus Eireann* [1997] 2 I.R. 424 the court held that the basic job description constitutes a condition of service. Thus the basic description may be distinguished from a change in work practice. Obviously the extent to which alterations in the duties and responsibilities of an employee may constitute a change in a basic condition of service as opposed to a change in work practice is one of degree which needs to be considered in all the circumstances of the case. On the basis of *Garrahy* and *Rafferty* I am satisfied that it is at least arguable that a sufficiently radical alteration in the duties and responsibilities of an employee may amount to a breach of contract. Obviously there may be circumstances where express contractual terms affect the entitlements of the parties in that regard. However here it is at least arguable that the letter confirming the plaintiff's appointment which annexed a detailed job description and made no reference to variation confirms rather than overrides the position identified in *Garrahy* and in *Rafferty*.

17. It is therefore necessary to assess whether what is proposed might, arguably, amount to a sufficiently radical alteration in the terms of the plaintiff's employment so as to render it a breach of his contract of employment. I have come to the view that there is an arguable case to that effect. Most particularly the position of the plaintiff under the job description annexed to Mr. Pugh's letter was one which involved him at a very senior level reporting directly to the Chief Executive. In the manner in which his employment had evolved he was, prior to the events giving rise to these proceedings, one of a number of heads of department who did report directly to the Chief Executive. It would not seem that he would have a position of the same importance or status in the reorganised structure. In those circumstances it seems to me to be arguable that what is proposed amounts to a sufficiently radical alteration in his work conditions as to amount to a breach of his contract of employment.

18. In all the circumstances I am therefore satisfied that the plaintiff has made out a fair case to be tried to the effect that the proposed alteration of his role within the defendant company amounts to a breach of his contract of employment.

Damages an adequate remedy
19. The next matter that needs to be considered is as to whether damages would be an adequate remedy for the plaintiff in the event that he ultimately succeeds in persuading the court at trial that the defendant has acted (or intends to act), in breach of his contract of employment. As was pointed out by Kelly J. in *Reynolds v. Molocco* [1999] 2 I.R. 203 at p. 203 in commenting on the well established principles for the granting of interlocutory injunctions:-

> "These principles have a wide but not universal application. In a small number of cases special rules, which are not encompassed by these principles, apply. One such type of case arises in the field of contracts of employment. Normally courts will not grant an injunction to restrain breaches of a covenant in a contract of employment if that would amount to indirect specific performance of such contract or would perpetuate a relationship based on mutual trust which no longer exists."

20. While the court was, in *Reynolds*, concerned with a defamation action the above comments are nonetheless representative of the law. However notwithstanding the above O'Higgins J., in *Garrahy*, noted that the great majority of the cases upon which the above principle is based concern wrongful dismissal and may not, therefore be such as preclude the court in an appropriate case from granting an injunction at an interlocutory stage restraining the appointment of a person to a position. On that basis O'Higgins J. went on to make such an order in *Garrahy* and also placed reliance upon the making of a similar order by Macken J. in *Lonergan v. Salter-Townsend* (2000) ELR 15. As pointed out by O'Higgins J. in *Garrahy* the rationale for the distinction is that a significant part of the reluctance of the courts to grant orders in the wrongful dismissal cases concerned the inability of a court to supervise what would amount to a specific performance of a contract of employment. No such difficulty arises in relation to restraining the appointment of a person to a post where such appointment might have the effect of breaching an existing employee's contract of employment by giving rise to a sufficiently radical alteration in work practices and conditions.

21. It is difficult, on the facts of this case, to see how damages would be an adequate remedy. It is not contended that the plaintiff

will be deprived of full remuneration as per his contract of employment. He will not be at any direct financial loss. If he succeeds in his case he will have established to the satisfaction of the court that he has, in breach of his contract of his employment, been deprived of being able to carry out a job which broadly corresponds with the job specified in his contract of employment. As was pointed out by Taylor J. in *Hughes v. London Borough of Southwark* (1988) IRLR 55 in such circumstances a plaintiff may establish to the satisfaction of a court that he had suffered loss of job satisfaction and distress at being taken away from what might properly be regarded as important work which at common law could not be compensated by damages.

22. Applying the above principles to the facts of this case it does not seem to me that the plaintiff is entitled to any order at an interlocutory stage which would amount to an indirect order of specific performance in respect of his contract of employment. The height of his entitlement, subject to the question of the balance of convenience, must necessarily, be for an order in terms similar to that granted in *Garrahy* which would preclude or limit the making of an appointment to the job of head of the rugby department pending the trial of the action. It is now necessary to turn to the balance of convenience.

Balance of convenience

23. I should first look to the circumstances that would pertain in the event that the plaintiff was not granted an interlocutory injunction at this stage but ultimately succeeded in persuading the court at the trial of the action that the defendant had acted in breach of contract in the manner contended for and that the court should intervene in a manner other than the award of damages. I was informed at the hearing that the process of recruitment for the new post of head of rugby is at an advanced stage. Indeed the closing date for applications has passed between the hearing of argument in this case on this day last week and today. I am also informed that, having regard to the worldwide role of the defendant company and the IRB, the advertising for, and likely applications from, persons in respect of the position will be spread throughout the major rugby playing nations. While it may, therefore, take some little time for the selection process to be completed there is, nonetheless, a significant risk that by the time this matter comes on for hearing an appointment will have been made.

24. In those circumstances the potential damage to the plaintiff is that the form of relief to which, on one view, he might be confined, that is to say an order restraining the appointment of someone to take over a significant portion of his role, would no longer be available to him. It may well be that for the reasons set out above he would not be able to obtain an order from the court directing the duties which he was to carry out. Furthermore the appointment of an individual to the post would confer upon that individual their own contractual rights which would have to be taken into account. In those circumstances it is clear that there would be a potentially significant disadvantage to the plaintiff should he succeed in the proceedings but fail to obtain an interlocutory injunction.

25. There are, however, also significant factors on the other side. On the evidence I am satisfied that the defendant is engaged in a significant reorganisation of its structures and that the plaintiff had, in the past, broadly accepted the necessity for such restructuring. I am also satisfied that the restructuring has already advanced to a significant degree so that any attempt to undue that restructuring would affect the conditions of employment and work practices of a significant number of the employees of the defendant company and would also be likely, therefore, to lead to dissatisfaction on the part of such employees with a consequentional effect on the ability of the defendant company to carry out its role.

26. It is also necessary to have regard to the defendants International position. It has already announced the structural changes and commenced the recruitment process which will obviously involve persons from a large number of countries. A termination of that process at this critical stage has the potential to have a significant effect on the ability of the defendant company to recruit the best candidate for the job. It is therefore clear that there is a significant potential detriment to the defendant in the event that it is required by order of the court either to undo the structural reforms or, at a minimum, place on hold the recruitment process and allow the existing interim position in which Mr. Egan operates as acting head of the rugby department to continue. Having regard to the fact that there is significant detriment on both sides it seems to me that it is necessary to consider whether there is any form of injunction which might meet, to the greatest possible extent, the legitimate concerns as to detriment of both parties. I have come to the view that there is.

27. I have given consideration to the situation that would pertain in the event that the plaintiff was granted an injunction pending the trial of the action which precluded the defendant from making any appointment to the post of head of the rugby department save on terms that preserved, in the event of the plaintiff being successful, his contractual entitlements.

28. From the perspective of the plaintiff it seems to me that the granting of such an injunction would go no little way towards meeting his reasonable requirements. Any person who was appointed to the job would be so appointed on express terms which preserved the plaintiff's entitlements, if any, to the extent that he might persuade the court that he had them and that they were enforceable.

29. Similarly such an order would not really act to the significant detriment of the defendant. As long as these proceedings are in being the defendant will have to operate on the basis that the plaintiff may be successful and that in that event the court may make orders which would have the effect of interfering, to some extent, with the contractual position which would need to be put in place for the successful candidate. In such circumstances it seems most unlikely that the defendant could make an appointment without at least informing the successful candidate of the existence of the proceedings and the potential consequences of various possible outcomes to same. It does not seem to me, therefore, that the making of an order of the type which I have indicated would act as a significant detriment to the defendant particularly if the action can be made ready for trial at the earliest possible date.

30. In those circumstances I am, therefore, satisfied that in respect of an order of the type indicated the balance of convenience would lie in favour of the granting of same. However having regard to the serious disruption that the making of any more onerous order would have on the conduct of the defendants operations I am not satisfied that the balance of convenience would favour the granting of any such more extensive order.

31. I will hear the parties as to the precise terms of the order which I should make. I will also hear the parties as to the putting in place of a regime to ensure that the full hearing of this matter can be disposed of in the earliest possible time. Clearly if the full trial of the action can come on for hearing before the natural expiry of the period required to conduct the appointment process then no detriment will occur to any party. As this is the most desirable situation I would propose imposing strict terms to ensure an early trial.