Neutral Citation: [2015] IEHC 611

THE HIGH COURT

[2014 No. 202 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 15 (6) OF THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT, 2003

BETWEEN

HEALTH SERVICE EXECUTIVE

APPELLANT

AND

MARY DOHERTY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 9th day of October, 2015.

Introduction.

1. By originating notice of motion dated the 3rd of June, 2014, the appellant ("the HSE") brings the above appeal pursuant to s.15 (6) of the Protection of Employees (Fixed-Term Work) Act 2003 on a point of law against the determination of the Labour Court of the 23rd of April, 2014, whereby the Labour Court found that the respondent ("Dr. Doherty") was employed by the HSE pursuant to a contract of indefinite duration and directed her reinstatement with effect from the 1st of June, 2013.

Background Facts.

2. Dr. Doherty is a consultant anaesthetist who was employed continuously by the HSE over a five year period from the 9th of June, 2008, until the 31st of May, 2013, on a series of fixed-term contracts. Details of these contracts, as found by the Labour Court, are set out, in tabular form, in its determination.

3. The first contract was in writing and was signed by Dr. Doherty on the 1st of July, 2008, some weeks after the commencement of her employment. This contract was stated to be:-

> "for the purpose of providing temporary consultant anaesthetic services in the post of consultant anaesthetist, vacant as a result of Dr. Deirdre Lohan's special leave. Your contract of employment will terminate on the return to work of Dr. Lohan."

4. During the currency of the latter contract, Dr. Lohan advised the HSE that she intended to return to work on Monday the 23rd of March, 2009, and as a result, the HSE wrote to Dr. Doherty stating that her employment would end on Friday the 20th of March, 2009. Dr. Lohan did not in fact return to work on that date and consequently the HSE asked Dr. Doherty to stay on for a further six months until the 20th of September, 2009. In fact Dr. Lohan resigned on the 12th of April, 2009.

5. It would appear that Dr. Doherty continued to work beyond the 20th of September, 2009, but it was not until the 4th of June, 2010, some eight and a half months later, that the HSE wrote to Dr. Doherty referring to the extension of her contract, for a period of twelve months, to the 20th of September 2010.

6. As before, the 20th of September, 2010, came and went and Dr. Doherty continued in her employment with the HSE. On the 25th of May 2011, eight months into the fourth contract, the HSE wrote to Dr. Doherty referring to an extension of her contract, for a period slightly in excess of twelve months, to the 30th of September, 2011. In this letter, the HSE said:-

> "This contract is temporary in nature and is for the fixed-term period from the 20th of September, 2010, to the 30th of September, 2011, replacing Dr. Deirdre Lohan who resigned. This post will be filled on a permanent basis by the PAS (Public Appointments Service). You are not being offered a contract of indefinite duration as we are proceeding to fill this post through the Public Appointments Service (PAS)."

7. Subsequent to the expiry of the fourth contract on the 30th of September, 2011, as before, Dr. Doherty continued her work and was written to by the HSE on the 13th of October 2011, offering her an extension of her contract from the 1st of October 2011 to the 31st of March 2012, a period of six months. It was stated in this letter:-

> "This post will be filled on a permanent basis by the PAS (Public Appointments Service). You are not being offered permanent employment as all permanent employment consultant posts in the HSE are filled by the PAS".

8. Around the commencement of this contract, the HSE's director of human resources issued an instruction which required that all consultants employed by the HSE be registered in the specialist division of the register of medical practitioners maintained by the Irish Medical Council on foot of a previous circular issued in 2009. Dr. Doherty was written to on the 29th of November, 2011, referring to this instruction and the necessity for registration. Dr. Doherty applied for registration but it had not yet come through by the 31st of March, 2012, when it appears to have been anticipated that she would continue for a further period. Some discussions ensued between the HSE and Dr. Doherty, the result of which was that she was given a very short extension on her contract to the 5th of April, 2012, a period of five days, to allow the registration to be completed, which it duly was.

9. The 5th of April, 2012, came and went without any formal arrangement having been entered into by the HSE with Dr. Doherty for the continuation of her employment. None the less she worked on as before without any formal written agreement until some ten and a half months later when she received a letter dated the 15th of February, 2013, from the HSE.

10. This document is entitled "letter of offer to specific purpose relief consultants". It was addressed to Dr. Doherty at her home in

County Meath and was in the following terms:-

> "Dear Doctor Doherty,
>
> As was advised in previous correspondence your temporary contract ceased on the 31st of March, 2012.
>
> I now write to offer you a revised specified purpose contract for the fixed term period 1st April, 2012, to 31st May, 2013, inclusive. You will be employed in a temporary capacity on this fixed term contract, effective from the 1st April, 2012. Your employment will cease on 31st May, 2013. The terms and conditions of your employment are as per consultant contract 2008 at 29th November, 2012 (copy attached)."

11. The letter went on to say that the HSE reserved the right to terminate the contract prior to cesser "of the above purpose" when giving appropriate notice and that the Unfair Dismissals Act would not apply to her dismissal, consisting only of the expiry of "the purpose specified above." In fact the letter specified no purpose.

12. The letter, which is unsigned, gives no indication as to from whom it emanated other than that the address of the sender is identified at the head of the letter as the administration department of Our Lady's Hospital in Navan, County Meath. The letter concludes with a blank space for the signature of the relevant consultant and employer after the words:-

> "I have read consultant's contract 2008 at 29th of November, 2012. I hereby accept the offer of the temporary consultant anaesthetist contract type B, in accordance with the terms and conditions specified in consultant contract 2008 at 29th November, 2012, with effect from 1st April, 2012, to 31st May, 2013, inclusive."

13. This document was not signed by the Dr. Doherty who, some days later, received a further letter dated the 19th of February, 2013, again emanating from the administration department of Our Lady's Hospital, Navan, County Meath, but this time signed by Ms. Deirdre Dinneen, Group Medical Manpower Manager. This letter is entitled "RE: EXTENSION OF CONTRACT" and is in the following terms:-

> "Dear Doctor Doherty,
>
> I refer to previous correspondence in relation to your appointment as temporary consultant anaesthetist under the Health Service Executive based in the Department of Medicine. As was advised your temporary contract ceased on 31st March, 2012. The permanent appointment is imminent and is subject to the revised salary scales for new entrant medical consultants from October, 2012. Please be advised that this new salary scale shall apply from your next pay date.
>
> In the interim I wish to offer you an extension to your temporary contract for the fixed term period 1st of April, 2012, to 31st May, 2013, inclusive. You will be employed in a temporary capacity on this fixed term contract until the permanent appointment is finalised. Your temporary consultant employment will cease 31st May, 2013.
>
> The terms and conditions of the consultant contract 2008, at 29th November, 2012, shall apply.
>
> Yours sincerely".

14. The HSE terminated Dr. Doherty's employment on the 31st of May, 2013.

15. A week before this, and presumably as a result of having been told that her contract would not be renewed, Dr. Doherty made a complaint to a Rights Commissioner the substance of which was that the HSE had failed to provide her with a written statement of the objective grounds justifying the renewal of her fixed term contracts for a period in excess of four years and as a result, she was now entitled to a contract of indefinite duration. The Rights Commissioner found against Dr. Doherty, holding that there had been no breach of s.9 of the Act and consequently Dr. Doherty was not entitled to a contract of indefinite duration. Dr. Doherty appealed to the Labour Court.

The Labour Court's determination.

16. The Labour Court delivered its determination on the 23rd of April, 2014, in which it reversed the decision of the Rights Commissioner finding that Dr. Doherty was entitled to a contract of indefinite duration by operation of law and directing her reinstatement with effect from the 1st of June, 2013. The Labour Court's determination, running to some nine pages, sets out details of the complaint, the background and Dr. Doherty's employment history referring to the various contracts and correspondence detailed above.

17. The determination then goes on to give details of the position adopted by each party before the Labour Court. It was noted that on Dr. Doherty's behalf, it was argued that Dr. Doherty was not in fact undertaking the work for which Dr. Lohan had been employed as Dr. Doherty worked in a different area. She argued that her contracts were not tied to the process of filling the permanent vacancy created by the resignation of Dr. Lohan. She submitted that were that so, her contract would have terminated by the occurrence of the event, i.e. the filling of the permanent post, whereas they were for specific periods ending on specific dates unconnected with that event.

18. The Labour Court noted the HSE's arguments to the effect that Dr. Doherty was at all times aware that she was temporarily covering a post that was to be filled by way of public competition through the Public Appointments Service. The HSE argued that this amounted to objective justification under s.9 (4) of the Act and relied in particular on the decision of Hedigan J. in HSE v. Umar [2011] IEHC 146 in which the High Court ruled that the practice of using fixed term contracts to fill a vacancy, pending the filling of the post in a permanent capacity, is a legitimate aim corresponding to a real need of the employer. The HSE argued that the decision in Umar was on all fours with Dr. Doherty's case.

19. The Labour Court then went on to analyse the law both in terms of the relevant statutory provisions and a number of judgments of both the High Court and the Court of Justice of the European Union.

20. In the final two pages of the determination, the Labour Court records its findings. It noted that, in order to make out a defence under s.9 (4) of the Act, the employer must make out each and every element and must show that there are objective grounds justifying the renewal. It accepted the proposition that the filling of a vacant consultant position in a public hospital is a legitimate need of the employer and reliance on an open competition in order to secure the best available candidate is an appropriate way to achieve that end. It noted that the decision of the High Court in Russell v Mount Temple Comprehensive School [2009] IEHC 533

required it to examine the objective grounds as they existed of the impugned contract of employment. It said:-

> "The complainant commenced employment with the respondent on the 9th of June, 2008. She acquired a contract of employment by way of letter dated 15th February, 2013, covering the period 1st April, 2012, to 31st May, 2013. This contract had the effect of bringing the complainants employment within the scope of s.9 (2) of the Act. Accordingly, it is the content of this contract that must be examined to determine the extent to which s.9 (4) can be relied upon by the respondent."

21. The Labour Court detailed the terms of the letter of the 15th of February 2013 and continued on the final page:-

> "Nowhere in the contract does it make reference to the filling of the permanent consultant post. Neither does it make the termination of the complainant's contract to [sic] the filling of such a post. Indeed the contract is silent in respect of such matters.
>
> The respondent seeks to rely on the wording of the contracts to argue that it complied with s.8 (2) of the Act. If so, the wording of the contract is of no assistance to it in this case. Section 8 (2) requires that written notice of the objective grounds for renewing a fixed term contract of employment is given to the worker before it is renewed. In this case that could not have been complied with as the letter of 15th February was issued some ten months after the contract commenced. More importantly the letter contains no reference to objective grounds or any grounds at all for renewing the fixed term contract of employment.
>
> The respondents sent the complainant a further letter dated 19th February that purports to be a further contract of employment covering the period 1st April, 2012, to 31st May, 2013. It purports to be a fixed term contract until the permanent appointment is finalised. It states that the complainant's employment will cease on 31st May, 2013.
>
> There is no evidence before the court that the complainant accepted this revised contract of employment. Accordingly, the court concludes that at the time this contract was sent to the complainant the offer of 15th February had been received and accepted and the contract of indefinite duration by operation of law had become effective. The contract offer of 19th February was in fact based on the premise that the complainant was working with that contract since April, 2012. In fact she had been subject to contract since 15th February which had been converted to a contract of indefinite duration by operation of law.
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> Determination.
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> The court finds that the complaint is well founded.
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> The court orders the respondent to reinstate the complainant to the post she held under the contract dated the 15th February, 2013, with effect from 1st June, 2013."

The Statutory Framework.

22. The provisions of the Act insofar as relevant to these proceedings are as follows:-

> "7.—(1) A ground shall not be regarded as an objective ground for the purposes of any provision of this Part unless it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose.
>
> (2) Where, as regards any term of his or her contract, a fixed-term employee is treated by his or her employer in a less favourable manner than a comparable permanent employee, the treatment in question shall (for the purposes of section 6 (2)) be regarded as justified on objective grounds, if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.
>
> 8.—(1) Where an employee is employed on a fixed-term contract the fixed-term employee shall be informed in writing as soon as practicable by the employer of the objective condition determining the contract whether it is—
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> (a) arriving at a specific date,
>
> (b) completing a specific task, or
>
> (c) the occurrence of a specific event.
>
> (2) Where an employer proposes to renew a fixed-term contract, the fixed-term employee shall be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration, at the latest by the date of the renewal.
>
> (3) A written statement under subsection (1) or (2) is admissible as evidence in any proceedings under this Act.
>
> (4) If it appears to a rights commissioner or the Labour Court in any proceedings under this Act—
>
> (a) that an employer omitted to provide a written statement, or
>
> (b) that a written statement is evasive or equivocal,
>
> the rights commissioner or the Labour Court may draw any inference he or she or it consider just and equitable in the circumstances.
>
> 9.—(1) 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.

(2) Subject to subsection (4), where after the passing of this Act a fixed-term employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts and the date of the first such contract is subsequent to the date on which this Act is passed, the aggregate duration of such contracts shall not exceed 4 years.

(3) Where any term of a fixed-term contract purports to contravene subsection (1) or (2) that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.

(4) Subsections (1) to (3) shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal.

(5) The First Schedule to the Minimum Notice and Terms of Employment Acts 1973 to 2001 shall apply for the purpose of ascertaining the period of service of an employee and whether that service has been continuous."

The Arguments.

23. The HSE in its originating notice of motion sets out seventeen grounds upon which it says the Labour Court erred in law in arriving at its determination. In support of its appeal, the HSE filed a number of affidavits dealing with factual matters and the history of Dr. Doherty's employment. In particular, it was alleged in these affidavits that the document of the 15th of February, 2013, was sent out in error by the HSE and should in fact have been accompanied by the subsequent letter of the 19th of February, 2013. Counsel for the HSE, Mr. O'Donnell S.C., submitted that the Labour Court had in arriving at its determination effectively ignored the course of dealing with the parties and the prior correspondence which demonstrated clearly the continuing objective justification for the renewal of Dr. Doherty's fixed-term contract in April, 2012. He submitted that this case could not be distinguished from the decision of this court in Umar which was on all fours with it. In confining itself to examining the terms of the document of the 15th of February, 2013, to the exclusion of all that had gone before it, the Labour Court fell into clear error.

24. Counsel submitted that precisely the same circumstances, i.e. the need for temporary cover pending the appointment of a permanent consultant to the post, had been held to constitute objective grounds justifying the renewal within the meaning of s.9 (4). Reliance was also placed on the judgment of Baker J. in HSE v. Sallam [2014] IEHC 298. The Labour Court had effectively ignored the contents of the subsequent letter of the 19th of February, 2015, where there was no evidence to support the conclusion that the terms of the earlier letter had in fact been accepted by Dr. Doherty. The objective condition was always operating in the mind of the HSE and it could not lose it by the mistaken dispatch of the letter of the 15th of February, 2013. This could not form a basis for the Labour Court's finding that a contract of indefinite duration had come into effect by operation of law.

25. The essence of Dr. Doherty's case is that all of the so called errors of law made by the Labour Court were in reality findings of fact with which this court cannot interfere on appeal. An appeal to the High Court under s.15 (6) was confined to pure questions of law but the HSE had failed to clearly identify what such questions were.

26. Ms. Bolger S.C. on behalf of Dr. Doherty contended that the reality of this case is that the HSE seek to rerun issues of fact before this court and this is clearly impermissible. She pointed in particular to the fact that although the HSE now allege that the document of the 15th of February, 2013, was sent out in error and ought to have been accompanied by the document of the 19th of February, 2013. Curiously described as a covering letter, this case had never in fact been made before the Labour Court and was entirely new.

27. Counsel submitted that significant curial deference was due to the Labour Court by this court in matters within its own area of expertise. There are many authorities to this effect. It was argued that the Labour Court's determination that Dr. Doherty's contract was governed by the terms of the document of the 15th of February, 2013, was a finding of fact which could not be disturbed in a statutory appeal of this nature.

Discussion.

28. I think it appropriate to deal first with the case made by the HSE that the document of the 15th of February, 2013, was sent to Dr. Doherty mistakenly without what is alleged to have been the "covering" letter of the 19th of February, 2013. It is clear from the terms of the document of the 15th of February, 2013, that it purports to be a letter and as such, it is not clear to me how it is suggested that it required a further "covering" letter to accompany it. Be that as it may however, I cannot see how this court can entertain a submission based on evidence never put before the Labour Court. This Court is confined to considering points of law only and whether an identifiable error of law was made by the Labour Court in reaching its determination. Such an error cannot be said to arise from what is, in my view, an impermissible attempt to introduce matters that could never have been considered by the Labour Court.

29. It is well settled that as a general rule, this court on appeal cannot revisit findings of fact made by the Labour Court, unless they can be shown to have been unsupported by any evidence or are irrational or unreasonable in the light of the evidence before the Labour Court. In *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1999] 1 I.R. 34, Keane J. (as he then was) in the Supreme Court referred with approval to the words of Carroll J. in the High Court (at p.44):

> "In an appeal on a question of law the court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law) the court should confine itself to considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law."

30. There are many cases in recent years in which this principle of curial deference has been stated. In *Ryanair v. Flynn* [2000] 3 I.R. 240, Kearns J. (as he then was) said (at p. 265):-

> "The appropriateness of exercising judicial restraint in relation to the decisions of expert administrative tribunals has, as the cases cited by counsel for the respondents show, been recognised in a significant number of cases in Ireland, so that there is nothing novel or new in the application of the principle in judicial review. Even where appeals from, rather than judicial review of, decisions of such tribunals take place, the court, in my view, should be extremely reluctant to

substitute its view for that of a specialist body and that was the view taken by this court in *M. & J. Gleeson & Co. v. Competition Authority* [1999] 1 I.L.R.M. 401, and by Macken J. in *Orange Communications Ltd. v. Director of Telecommunications* [1999] 2 I.L.R.M. 81."

31. This theme was revisited by Kearns P. in the recent decision in *Earagail Eisc Teoranta v. Ann Marie Doherty and Others* [2015] IEHC 347 where he said:

> "…the Court is required to have regard to the doctrine of curial deference when considering appeals from the decisions expert administrative Tribunals and quasi-judicial bodies as set out by Hamilton C.J. in Henry Denny & Sons . This Court must confine itself to a consideration of a point of law only and may only interfere with a finding of fact when it is entirely unsustainable based on the information before the Tribunal."

32. Similar sentiments were expressed by O'Sullivan J. in *Mulcahy v. Minister for Justice Equality and Law Reform and Another* [2002] 13 ELR 12 where he said (at p. 17_:-

> "The fact that one may disagree with the conclusion or strongly disagree with it, is, in law neither here nor there. It is the Labour Court and no-one else which is charged under our law with carrying out this quasi judicial function and it is only if their conclusion is so abhorrent to logic and common sense or involves an error of law that the High Court will interfere with it."

33. The central feature of the Labour Court's determination in this case is that it came to the view that Dr. Doherty's contractual relationship was governed by the document of the 15th of February, 2013, and not by the later document of the 19th of February, 2013. In so holding however, the Labour Court expressly recognised that the existence of objective grounds justifying the renewal of a fixed term contract was to be judged at the commencement of the impugned contract in accordance with the decision of the High Court in *Russell*. The HSE contends that the evidence in this regard was all one way and ought only to have led to one conclusion. The HSE claims that this evidence was ignored by the Labour Court.

34. The Labour Court in its determination set out with some particularity the detail of all of Dr. Doherty's prior contracts and the correspondence relating to the previous renewals. It noted the arguments of the parties but in particular, the Labour Court referred to the fact that Dr. Doherty disputed that her role was tied to the filling of the permanent vacancy created by the resignation of Dr. Lohan. Thus, Dr. Doherty argued that the objective ground relied upon by the HSE was not in fact the true ground underlying the successive renewals of her contract.

35. It could not therefore be said that there was no basis upon which the Labour Court could have come to the conclusion it did. It may have accepted Dr. Doherty's submission on this point and considered that the contract of the 15th of February, 2013, was consistent with it. It might have drawn an inference pursuant to s.8 (4) that the failure to state the objective grounds was consistent with the fact that there were none having regard to all the evidence. It might have considered that the subsequent letter of the 19th of February, 2013, in fact represented a change of heart on the part of the HSE and not a mistake. It may have considered that when the evidence as a whole was taken into account, the HSE had not discharged the onus which undoubtedly lay on it of establishing the objective grounds justifying the renewal.

36. Although the Labour Court's determination is not particularly discursive on the critical issue, nonetheless, to my mind, it could not be said that its conclusion was unsustainable on the evidence or was one which no reasonable person could come to. It is of course entirely immaterial whether or not this court might have come to a different conclusion on the evidence.

37. This is consistent with the views of Baker J. in *Sallam*, also a claim by a medical consultant against the HSE that he was entitled to a contract of indefinite duration following successive renewals of fixed-term contracts for in excess of four years, where, as here, the HSE relied on the objective justification of the requirement to fill the permanent post by open competition. In the course of her judgment, Baker J. said (at p.29):

> "58. The Labour Court relied on s. 8(4) of the Act of 2003, in coming to a conclusion that the specified purpose, namely the replacement of Dr. Moore's position by a permanent post, had not been stated before the second contract was entered into, and did in fact, draw an inference that reasons were not "in contemplation of the respondent at the material times", namely at the time when the second contract was created. This is a finding of fact with which I cannot interfere but, as a matter of law, it seems to me that a failure by an employer to comply with the requirements of s. 8 of the Act of 2003 does not of itself mean that no objective justification exists, and each case must be decided on its own facts." (My emphasis).

38. The HSE submits that this case is on all fours with the previous judgment of the High Court in *Umar* and consequently the same result should ensue. It is certainly true to say that there are significant factual similarities here with *Umar*. Again this was a claim by a medical consultant against the HSE to a contract of indefinite duration following successive fixed-term renewals pending the filling of the relevant permanent post being covered by Dr. Umar. The Labour Court had purported to follow European jurisprudence in applying a purposive approach to the interpretation of s.9 of the Act by the introduction of a test of proportionality. This in turn led the Labour Court to conclude that the HSE ought to have offered Dr. Umar a permanent contract before advertising the post by open competition. This approach was held by Hedigan J. to be erroneous and an impermissible attempt to amend the statute where its meaning was clear.

39. No such considerations arise in the present case and accordingly it does not appear to me that the judgment in *Umar* is of any particular assistance to the HSE here.

Conclusions.

40. I am satisfied therefore that the determination of the Labour Court in this case that Dr. Doherty's contract with the HSE was governed by the terms of the letter of the 15th of February, 2013, is a finding of fact with which I cannot interfere. Whilst the Labour Court accepted that the filling of a vacant consultant post in a public hospital is a legitimate need of an employer as decided in *Umar*, it considered, correctly in my view, that the onus rests upon the HSE to make out each and every element of the defence provided for in s.9 (4) of the Act that there were objective grounds justifying the renewal of Dr. Doherty's fixed term contract. Clearly the Labour Court felt that the HSE had not discharged this onus and here again, this is a finding of fact with which this court cannot interfere.

41. Accordingly I must dismiss this appeal.