Neutral Citation [2012] IEHC 217

THE HIGH COURT

[2012 No. 4221P]

BETWEEN

ANITA KIRWAN, AUDREY GIRALDI, DAVID WILLIAMS, HELEN GREENE, ANN McNERNEY AND MARGARET MOLONEY

PLAINTIFFS

AND

THE MENTAL HEALTH COMMISSION

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 28th day of May, 2012.

1. Factual background

1.1 The defendant is a statutory body which was established pursuant to the Mental Health Act 2001 (the Act of 2001). It has statutory responsibility for appointing Mental Health Tribunals to review the involuntary admission of patients pursuant to admissions orders or renewal orders as required by the Act of 2001 and, when so required by the defendant, to make decisions on other matters provided for in the Act of 2001.

1.2 Up to and including 30th April, 2012 each oft e plaintiffs was a member of a panel of Mental Health Tribunal clerks established by the defendant. The way the system operated was that a member of the panel who as assigned as a clerk to a particular Mental Health Tribunal performed function somewhat akin to the functions performed by a court registrar.

1.3 On the application to which this judgment relates, which is an application for an interlocutory injunction in the terms which I will outline later, the contractual relationship between each of the plaintiffs and the defendant has been comprehensively outlined in the grounding affidavit of the fourth defendant (Ms. Greene) sworn on 27th April, 2012 and the documents exhibited therein. The contractual relationship of the remainder of the plaintiffs with the defendant is based on similar facts and documentation.

1.4 Ms. Greene acted as clerk to various Mental Health Tribunals over the five and a half year period from 1st November, 2006 to 30th April, 2012 under five successive contracts with the defendant, each contract being described as a "Contract for Service".

1.5 The first contract was dated 11th October, 2006 (the 2006 Contract) and was executed by Ms. Greene and by an officer on behalf of the defendant. By way of background, having recited the Act of2001 and the defendant's functions thereunder, it was recited that the defendant "shall establish and maintain panels of Mental Health Tribunal Clerks who satisfy the required criteria and are willing to provide their services in accordance with the provisions of the [Act of 2001] and the Contract for Service set out herein.". Under the heading "Tenure", Clause 4.1 provided that Ms. Greene "shall hold office for a period not exceeding three years commencing 1st November, 2006 and ending 31st October, 2009". It was further provided that she was appointed for an initial trial period of twelve months after which time confirmation of the appointment would be issued, subject to satisfactory performance. That happened and Ms. Greene served for the full term of three years. It was also provided that she should be eligible for re-appointment on the expiration of the term by effluxion of time.

1.6 Clause 5 of the 2006 Contract, which was headed "Contract for Service", provided as follows:

> "Nothing in this Contract for Service shall give rise to, or be construed as giving rise to, a relationship of employer and employee between the [defendant] and [Ms. Greene]".

As one would expect, it contained provisions in relation to confidentiality, ethics in public office, training, mode of payment, expenses, indemnity and suchlike. As regards fees, it was provided in Clause 11 that there would be a standard scale of fees, as set out in Schedule 1, which would be payable on a per case basis. There was a provision entitling the defendant to remove Ms. Greene from the panel. There were also provisions in relation to the quality of services to be provided by Ms. Greene and the services to be provided were outlined in Schedule 2.

1.7 Clause 16 of the 2006 Contract, on which particular reliance has been placed by the plaintiffs, dealt with taxation. Clause 16.1 provided:

> "The fees paid to Mental Health Tribunal Clerks are chargeable to tax under Schedule 'E' and subject to deductions of tax, and where appropriate PRSI and the Health Contribution, at source under the PAYE system."

Clause 16.2 stated that the defendant was obliged to comply with the PAYE and PRSI regulations and set out certain steps to be taken by Ms. Greene. Clause 16.3 provided:

> "For the avoidance of doubt, notwithstanding the tax treatment of the Mental Health Tribunal Clerk by the Office of the Revenue Commissioners, no employment relationship exists between the Mental Health Tribunal Clerk and the [defendant] in respect of the duration of the ... term."

1.8 There was a typical "entire agreement" clause in the 2006 Contract. Further, it was provided that the validity, construction and performance of the contract should be governed by Irish law.

1.9 The second contract given by the defendant to Ms. Greene was dated 11th November, 2009. It was also executed by Ms. Greene and by an officer of the defendant. The term was one year commencing on 1st November, 2009 and ending on 31st October, 2010.

Subject to that variation, it was in similar terms to the first 2006 Contract.

1.10 The third contract was preceded by a letter dated 21st October, 2010 from the defendant to Ms. Greene, in which it was stated that the defendant was reviewing the then current arrangements for the provision of services provided by the panel of clerks and it was expected that the review would take some months and that the plaintiff would be informed of the outcome once the review was completed. In the meantime, Ms. Greene was offered an extension of her "contract for services for a period ending on 30th April, 2011", which she accepted. The third contract, which was undated, was executed by Ms. Greene and an officer of the defendant and, subject to setting out the term as the "period commencing 1st November, 2010 and ending 30th April, 2011", it was in the same terms as the 2006 Contract and the second contract.

1.11 Prior to the expiration of the term of the third contract, by letter dated 13th April, 2011 the defendant informed Ms. Greene that the review of the clerking arrangements was ongoing. She was offered another six month period and she accepted it. She was informed that the defendant had "updated the content and format of the contract" and, in particular, her attention was drawn to the fact that "the fees and processes for re-claiming expenses, etc." had been altered. The fourth contract was dated 25th April, 2011 (the 2011 Contract) and it was executed by an authorised signatory on behalf of the defendant and by the plaintiff. It recited that the defendant was then currently reviewing its clerking arrangements and had decided to extend the current clerking arrangements for a period of up to six months. The term, subject to the provisions relating to early termination, was expressed to be for the period starting on 1st May, 2011 and ending no later than 31st October, 2011, but there was provision that either party might terminate on one month's prior written notice to the other.

1.12 There were provisions in the 2011 Contract which had not been in the earlier contract. However, it was stipulated once again that the contract was a "contract for services" and that Ms. Greene was not an employee or a commercial agent of the defendant. It was provided that the appointment of Ms. Greene to perform services would be "non-exclusive"; the defendant would be entitled to engage third parties to provide services the same, or substantially the same, as the services to be provided by Ms. Greene; and Ms. Greene would be free to undertake employment with a third party. It was also provided that Ms. Greene was not obliged to accept any particular assignment to provide services. While, in substance, the provisions in the 2011 Contract in relation to taxation were similar to the provisions in the earlier contracts, the wording was slightly different: Clause 12.1 provided:

> "Notwithstanding the status of [Ms. Greene] as an independent contractor engaged under a contract for services, pursuant to applicable to Revenue rules and guidelines the Fees are chargeable to income tax under Schedule E and subject to deductions of income tax, income levies and where appropriate social insurance contributions at source under the PAYE system."

1.13 The jurisdiction clause was varied in the 2011 Contract. Clause 15.1, to which the plaintiffs attached significance, provided:

> "This agreement shall be governed by the laws of Ireland and the parties hereby submit to the exclusive jurisdiction of the Courts of Ireland."

1.14 Before the half-year term of the 2011 Contract expired, by letter dated 6th October, 2011 the defendant offered the plaintiff a new contract for a further six month period. The letter stated:

> "Due to the current economic climate, and the pressures this places on the public finances, the [defendant] is obliged to seek cost savings wherever possible from contractors and organisations that provide services to us. The [defendant] has conducted a review of administrative support requirements to mental health tribunals. As a result of this, the level of service required from the mental health tribunal clerk has been significantly reduced. This has also led to an adjustment in the fees which will be paid for the service."

A copy of "the new contract for service" was enclosed.

1.15 The fifth contract was dated 6th October, 2011 and it was signed by Ms. Greene and an authorised signatory on behalf of the defendant. It was in similar terms to the 2011 Contract, although it omitted the recital in relation to the review. The term thereof was expressed to be a period starting on 1st November, 2011 and ending no later that 30th April, 2012.

1.16 By letter dated 17th February, 2012 the defendant informed Ms. Greene that her contract would not be renewed after its expiry on 30th April, 2012 because of pressure on public finances. She was requested to return all materials, documents and records issued and created by her in the performance of the clerking service to the defendant within seven days of the 30th April, 2012. At the time that letter was dispatched, there were twenty five clerks on the panel and none of their contracts were renewed when their existing contracts expired on 30th April, 2012.

1.17 Correspondence between the plaintiffs' solicitors, on behalf of the plaintiffs, including Ms. Greene and the defendant commenced on 4th April, 2012. In a letter of that date to the Chief Executive of the defendant, the case was made that Ms. Greene had been working for the defendant as a tribunal clerk since 1st November, 2006. She was taxed under Schedule E. It was contended that there was overwhelming evidence that she had at all material times been an employee of the defendant. It was further contended that she was entitled to a contract of indefinite duration under the Protection of Employees (Fixed-Term Work) Act 2003 (the Act of2003). The defendant was asked to acknowledge her status as an employee and her entitlement to a contract of indefinite duration and to confirm that she would be allowed work and be paid pending determination of a hearing before a Rights Commissioner or the High Court. In the absence of a satisfactory response, injunction proceedings in this Court were threatened. The substantive response to that letter was a letter dated 16th April, 2012 from the defendant's solicitors, which rejected the contention that Ms. Greene was an employee and asserted that she had been engaged by the defendant as an independent contractor under a Contract for Service, citing various provisions of the contract to which I have already referred. While it was recognised that it was the plaintiffs' prerogative to bring claims before a Rights Commissioner, it was stated that such claims would be fully defended.

1.18 In mid-April 2012 applications were lodged on behalf of all of the plaintiffs to the Rights Commissioner service claiming that they were entitled to contracts of indefinite duration under the Act of2003. The applications are still pending.

1.19 The position which the defendant has adopted on the application before the Court is that the plaintiffs have not been replaced by anyone and that any administrative duties which were formerly carried out by the clerks on the panel are now being carried out by the members of the Mental Health Tribunal hearing a case. The decision not to renew the plaintiffs' contracts was made for the purpose of saving costs. It is not the intention of the defendant to award any person the work previously undertaken by the plaintiffs.

2. The proceedings and the application

2.1 These proceedings were initiated by a plenary summons which issued on 27th April, 2012. On the same day the plaintiffs were granted leave to issue a notice of motion returnable for 30th April, 2012 in which interlocutory injunctions are sought restraining the defendant from -

> (i) terminating the plaintiffs' employment with the defendant or from treating the plaintiffs other than as continuing to work for the defendant as Mental Health Tribunal clerks;
>
> (ii) giving effect or purporting to give effect to the purported notice of termination of the plaintiffs' contracts contained in the letter of 17th February, 2012;
>
> (iii) taking any steps to replace the plaintiffs or to allocate their work to other persons or, alternatively, taking any such steps pending the determination of the claims lodged by the plaintiffs with the Rights Commissioner or the trial of the action; and
>
> (iv) from abolishing or failing to acknowledge the panel of Mental Health Tribunal clerks of which the plaintiffs are members.

The plaintiffs also sought directions as to whether, having regard to Clause 15 of the 2011 Contract between the parties, which is quoted at para. 1.13 above, the plaintiffs should advance the part of their claim under the Act of 2003 in the High Court or before the Rights Commissioner.

2.2 The plaintiffs' application was grounded on Ms. Greene's affidavit sworn on 27th April, 2012 in which she clearly outlined the factual reality of the manner in which she worked for five and a half years as a Mental Health Tribunal Clerk. She did so obviously with the objective of demonstrating that she complied with the test laid down by the Supreme Court in *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] I.R. 34 for distinguishing a contract of service or employee status from a contract for services or independent contractor status, namely, that she was performing the services for the defendant and not for herself. The plaintiffs' case, as founded on the facts set out in Ms. Greene's affidavit, is that all of the plaintiffs were employees of the defendant and that their contracts were transmuted into contracts of indefinite duration by operation of the Act of 2003. Ms. Greene exhibited various communications she received from the Revenue Commissioners, including forms P 60 for each year from 2007 to and including 2010, in which she was described as an employee of the defendant and which contained a certificate of the pay she received and the PAYE tax and the PRSI deductions made from her pay.

2.3 The replying affidavit was sworn by Patricia Gilheaney, the Chief Executive of the defendant, on 4th May, 2012. That affidavit deliberately did not address the factual basis on which the plaintiffs contend that their contracts should be construed as contracts of employment rather than contracts for services, a contention which the defendant disputes, on the basis that the issue would have to be determined at a full hearing or, alternatively, pursuant to the claims to the Rights Commissioner, and not this interlocutory stage. Therefore, the factual focus of Ms. Gilheaney's affidavit was on the issue of the adequacy of damages as a remedy for the plaintiffs, and where the balance of convenience lies in relation to granting or refusing interlocutory relief. Ms. Gilheaney asserted that damages would be an adequate remedy for the plaintiffs, if a remedy is merited, and that it would be very easy to calculate any damages to which the plaintiffs would become entitled, because a record of the number and location of each case heard by a Mental Health Tribunal between now and the determination of the proceedings would be available as a matter of course. She also contended that injunctive relief in the terms sought would cause "great prejudice" to the operation and functioning of the Mental Health Tribunals in that arrangements already made would be disrupted. Further, she averred that, as the plaintiffs are six only of the twenty five clerks whose contracts expired on 30th April, 2012, some hearings would have a clerk and others would not, as a result of which there would be confusion and uncertainty as the rota could not operate as it had up to 30th April, 2012, which is hardly the most convincing basis for the assertion that the balance of convenience lies against granting an injunction.

2.4 In response to Ms. Gilheaney's affidavit each of the plaintiffs swore an affidavit addressing the financial impact of the expiration of his or her contract on 30th April, 2012, from which it is clear that the cessation of the income which each had received from the defendant for five and a half years up to 30th April, 2012 is resulting in financial hardship for the plaintiffs and will continue to do so until their claims have been resolved. The criticism of the plaintiffs' for failure to set out reasons why they believed damages would not be an adequate remedy earlier in Ms. Gilheaney's final affidavit sworn on 9th May, 2012, in my view, is wholly unwarranted.

2.5 In addition to not addressing the factual basis for the treatment of the plaintiffs as chargeable to tax under Schedule E, notwithstanding that the defendant contends that they were retained under contracts for services, the defendant has chosen not to address an issue raised by the plaintiffs in their affidavits dealing with the question of the adequacy of damages. That issue is whether the plaintiffs are eligible for Job Seekers' Allowance under the Social Protection code. For example, Ms. Greene in her affidavit sworn on 8th May, 2012 has averred that she has major doubts about her eligibility for Job Seekers' Allowance. Moreover, at the time of swearing that affidavit she had not received a Form P45 or a Form P 60 for 2011 from the defendant, which she averred would make applying for Job Seekers' Allowance more difficult. She also averred that she believed that there was an issue over the PRSI records for the clerks, which to her knowledge had not been rectified. None of those matters was addressed by the defendant. Ms. Greene also averred that, apart from her doubt about her eligibility, she would find it difficult to declare on an application for Job Seekers' Allowance, as is required, that she is actively seeking work because she hopes to be successful in her claim to be reinstated as a clerk with the defendant.

2.6 While the defendant may have considered it tactically advantageous not to address either the taxation or the eligibility for Job Seekers' Allowance issues at this juncture, it is surprising that, in resisting an application invoking the Court's equitable jurisdiction, the defendant, which is a public body, did not see fit to attempt to allay the concerns of the plaintiffs and, indeed, the concern which was inevitably going to be raised for the Court, as a result of the allegations of the plaintiffs, from whose pay PRSI contributions had been deducted for five and a half years, that they may be ineligible for Job Seekers' Allowance. Having said that, the outcome of the plaintiffs' application, for the reasons set out below, turns on the core issue which the Court has to address, not

on whether damages are an adequate remedy for the plaintiffs, or whether the balance of convenience lies in favour of or against the grant of an interlocutory injunction.

3. The core issue

3.1 Since the decision of the Supreme Court in *Maha Lingham v. Health Service Executive* [2006] 17 ELR 137, it has been accepted that, where a plaintiff employee is seeking a mandatory interlocutory injunction against his employer, it is necessary for the plaintiff "to show at least that he has a strong case that he is likely to succeed at the hearing of the action" (per Fennelly J.). Moreover, where the plaintiff employee "seeks to prevent a dismissal or a process leading to dismissal, as a matter of common law and in whatever terms the claim is couched, the employee concerned is seeking what is, in substance, a mandatory injunction" (per Clarke J. in *Bergin v. Galway Clinic Doughiska Ltd*. [2008] 2 I.R. 205 at p. 214), so that it is necessary for the plaintiff employee to establish a strong case in order to obtain interlocutory relief. As I understand the position adopted by counsel for the plaintiffs, it was accepted that the plaintiffs must demonstrate that they have a strong case that they are likely to succeed at the hearing of the action and their contention was that they have done so.

3.2 Broadly speaking, there are two elements in the plaintiffs' claim. The first is that, irrespective of the terminology used in the various contracts and documentation which I have outlined earlier, applying the test laid down in the *Henry Denny* case, from the outset they were employees of the defendant and not independent contractors acting under contracts for services. The second is that they are still employees of the defendant, because either their contracts have not been properly terminated at common law or, alternatively, they are entitled to the protection of the Act of 2003 and are now employed under contracts of indefinite duration.

3.3 As regards the second element of their case, namely, that the plaintiffs as employees are entitled to protection of the Act of 2003, a similar case was made by the plaintiff/appellant in the *Maha Lingham* case, who had been employed by way of successive temporary appointments as a temporary consultant surgeon in Cork University Hospital from 1994 until 2005, when he was given three months notice that his employment would terminate on 31st May, 2005. It was rejected by the Supreme Court. Fennelly J., in delivering judgment ex tempore in the Supreme Court, stated:

> "In addition, the plaintiff/appellant relies on the implementation of the Act of 2003 . . .. However, having looked at that Act the court cannot see that it significantly alters the matter. It is unnecessary to go into it except that the general policy of the Directive and the Act seems to be to protect employees who are employed on short term fixed-term contracts and who have been employed on such basis for a certain minimum number of years, either three or four years, and accepting for the sake of the purpose of the present case, that the plaintiff is employed under such a contract of employment, the question would be whether he could make out a case to justify the grant of an interlocutory injunction. There are two major obstacles in the place of the plaintiff/appellant in this context; first that is that the implementing Act, the 2003 Act, contains, like the Unfair Dismissals Act, its own statutory scheme of enforcement and it does not appear to be envisaged by the Act that it was intended to confer independent rights at common law or to modify in general the terms of contracts of employment to be enforced by the common law courts; and the second is that in any event the general provisions and policy of the Act and of the Directive seems to be to put persons who were in such short term contracts in the same position as if they were persons who were on fixed long-term contracts but in neither event does it appear to interfere with the ordinary right and obligation of the employer to terminate the contract on the giving of reasonable notice and for that reason the matter comes back within the general ambit, therefore, of the sort of remedy that would be available to the plaintiff/appellant for the termination of the contract."

As regards the last observation, Fennelly J. had earlier set out the common law position in relation to a contract of employment - that a contract of employment may be terminated by an employer on giving reasonable notice of termination. The Supreme Court in the *Maha Lingham* case held that the plaintiff/appellant had not made out a case for the grant of an interlocutory injunction because he had not met the first leg of the test showing that he had a strong case that he was likely to succeed at the hearing of the action. This Court is bound by that decision.

3.4 A similar approach was adopted more recently in the High Court by Hogan J. in *McGrath v. Athlone Institute of Technology* [2011] IEHC 254. There the plaintiff, who had been employed by the defendant pursuant to a series of fixed-term contracts, was contending that, by operation of s. 9 of the Act of2003, he was entitled to the benefit of a contract of indefinite duration. The defendant in that case had raised an objection that the Court had no jurisdiction whatever in relation to the Act of 2003. In his judgment (at para. 14), Hogan J. stated that the High Court does not enjoy first instance jurisdiction to grant declaratory relief regarding an applicant's entitlements under the Act of 2003. In other words, this Court does not have jurisdiction to deal at first instance with substantive claims founded on the application of the Act of 2003, which is the view I reached when dealing with the substantive action in *O'Domhnaill v. Health Service Executive* [2011] IEHC 421.

3.5 However, in the *McGrath* case, Hogan J. took a different view in relation to the jurisdiction of the Court where the applicant applies to the Court for an order in aid of what he hopes will be a favourable Labour Court decision, because the Labour Court enjoys no jurisdiction to grant interim or interlocutory relief. Dealing with the jurisdiction of this Court in such a situation, Hogan J. stated (at para. 18):

> "If, nevertheless, the plaintiff were to be left with the decision of an administrative agency whose efficacy was otherwise wholly undermined if no interim relief could be given by this Court, then in such exceptional cases, this Court must be deemed to enjoy such a jurisdiction, not least by reason of the obligation placed on the judicial organ of the State by the terms of Article 40.3.1 of the Constitution to ensure that legal rights can be appropriately vindicated ....

3.6 In considering whether the *McGrath* case was an appropriate case in which to grant interlocutory relief, Hogan J. identified the critical question as whether the defendant could terminate Mr. McGrath's employment, even if the Labour Court were to hold that Mr. McGrath had a contract of indefinite duration. He answered that question as follows (at para. 20):

> "The starting point, of course, is that it is clear that at common law, subject to appropriate contractual terms to the contrary, an employer can dismiss for any reason or no reason on giving reasonable notice, even in the case of a permanent employee. Any lingering doubts on this point were dispelled by the Supreme Court's decisions in both *Maha Lingham* ... and *Sheehy v. Ryan* ... [2008] 4 I.R. 258. Some may think that this situation is unsatisfactory, but if so, change in this area is a matter for the Oireachtas. Indeed, it may be observed that the Oireachtas did legislate in this general area via the Unfair Dismissals Acts 1977-2005, but in so doing it was careful to leave unchanged the common law in relation to the termination of employment contracts. It was, moreover, for this very reason that in *Nolan v. Emo Oil Services Ltd*. [2009] IEHC 15 Laffoy J. expressed her unwillingness to extend the common law 'in parallel to the statutory code in relation to unfair dismissal and redundancy [as this would] end up supplanting part of the code'."

Because of the decision of the Supreme Court in *Sheehy v Ryan*, which was given in the context of an appeal in relation to the hearing of the substantive action, not an interlocutory application, Hogan J. concluded that the possibility of an injunction insofar as it concerned the contractual claim of Mr. McGrath was ruled out. Moreover, even if the decision of the Labour Court were favourable to Mr. McGrath, Hogan J. concluded that that would not significantly ameliorate his position so far as seeking an injunction was concerned, because even a declaration of permanent employee status would not entitle him to an injunction. Accordingly, the application for an interlocutory injunction was refused.

3.7 In this case, assuming for present purposes that the plaintiffs succeed in establishing that they were from the outset employees of the defendant and not independent contractors, and, if the Rights Commissioner holds that they were entitled to and held under contracts of indefinite duration from, say, 1st November, 2010, on the authority of the decision of the Supreme Court in the *Maha Lingham* case, the plaintiffs have not made out a strong case that their contracts did not terminate on 30th April, 2012. I have reached that conclusion notwithstanding that the plaintiffs' position is, superficially at least, distinguishable on the facts from both the *Maha Lingham* case and the *McGrath* case. In each of those cases notices of termination had been given by the employer and no issue arose as to the adequacy of the notice, whereas in this case, on the assumption that the contracts, which the defendant contends were contracts for services, were due to terminate by expiry of the term, the defendant gave the plaintiffs approximately ten weeks notice in the letter of 17th February, 2012 that it was enforcing that termination. If the plaintiffs do succeed before the Rights Commissioner on both elements of their claims, so that it is established that they have been employees holding under contracts of indefinite duration, the remedies to which they will be entitled will be one or more of the remedies provided for ins. 14 of the Act of 2003, which include the requirement that the employer reinstate or re-engage the employee (including on a contract of indefinite duration). This Court will have no role in relation to the awarding, or enforcement, of such remedies.

3.8 It is neither necessary nor appropriate for the Court to express a view on the strength of the plaintiffs' case on the first element of their claim, namely, that they are employees, not independent contractors, because to do so would be expressing a view on the likely outcome of the claim before the Rights Commissioner, who has exclusive seisin of the matter by virtue of the Act of 2003.

4. Other issues

4.1 For completeness, I should observe that I consider that the conclusion I have reached is not affected by the fact that in the plenary summons the plaintiffs have sought a declaration that they "enjoy contractual rights and/or a legitimate expectation" that the defendant would maintain a panel of Mental Health Tribunal clerks. *In Holland v. Athlone Institute of Technology* [2012] ELR 1, in the High Court Hogan J. dealt with a case which was based on a factual situation similar to the factual situation in the *McGrath* case, but in which additional issues were raised. As regards the contractual position of Mr. Holland at common law, Hogan J. reached the same conclusion as he had reached in the *McGrath* case. However, one of the additional issues which arose in the *Holland* case was whether a provision of a circular issued by the Department of Education, Circular 93/007, gave rise to a legitimate expectation that persons in the position of Mr. Holland holding a contract of indefinite duration should enjoy permanency in their employment status akin to that of academics with full tenure. Hogan J. concluded that Mr. Holland had a strong case that he was likely to succeed at the hearing of the action on the application of the public law doctrine of legitimate expectation. On that ground and on that ground alone, he granted an interlocutory injunction restraining the dismissal of Mr. Holland pending the trial of the action. In reality, the plaintiffs' reliance on legitimate expectation in this case was not pursued at the hearing of this application as a basis for obtaining an interlocutory injunction and there is no factual basis on which one could conclude that there is a strong case that the plaintiffs would succeed in obtaining a declaration that they had a legitimate expectation that the panel would be maintained.

4.2 To the extent that the plaintiffs claim that, by application of the Act of 2003, they were employed by the defendant on contracts of indefinite duration from, say, 1st November, 2010, as I held in *O'Domhnaill v. HSE*, their claims fall to be resolved by the invocation of the process provided for in Part III of the Act of 2003, that is to say, in the first instance, by pursuing their applications to the Rights Commissioner and thereafter, if necessary, by pursuing an appeal to the Labour Court, and thereafter, if necessary, by way of appeal to the High Court on a point of law pursuant to s. 15(6) of the Act of 2003. The statutory exclusivity conferred on the Rights Commissioner, in the first instance, and on the Labour Court, on appeal, is not in any way affected by the provisions in Clause 15.1 of the 2011 Contract and the fifth contract entered into by Ms. Greene with the defendant quoted at para. 1.13 above. Assuming for present purposes that the contracts under which the plaintiffs were retained by the defendant were contracts of employment, in my view, Clause 15.1 cannot be read as conferring on this Court a statutory power to grant a statutory remedy, which the Oireachtas has exclusively reposed in another forum.

4.3 Finally, counsel for the plaintiffs drew attention to the fact that it is recorded in the judgment of the European Court of Justice (Grand Chamber) of 15th April 2008 on the preliminary ruling from the Irish Labour Court in *Impact v. Minister for Agriculture and Food and Ors*. Case C- 268/06 that, at the hearing in Luxembourg, Ireland had claimed that the jurisdiction given to the Rights Commissioners and the Labour Court by the Act of 2003 "is optional and therefore does not prevent individuals from bringing a single action, based partly on national law and partly on Community law, before an ordinary court" (para. 52). I suspect that this is an example, in the words of Shakespeare, that "the devil can cite Scripture for his purpose" (the Merchant of Venice). As a matter of interpretation of the Act of 2003, in my view, on the authority of the decision of the Supreme Court in the *Maha Lingham* case, relief against the contravention by an employer of an employee's entitlement under the Act of 2003 can only be pursued in the manner provided in Part III of the Act of 2003, that is to say, in the first instance, by a claim before a Rights Commissioner.

5. Order

5.1 There will be an order refusing the plaintiffs' application for an interlocutory injunction.

5.2 However, it is to be hoped that the plaintiffs will get an early hearing before the Rights Commissioner. I note that the defendant's solicitors, in their letter of 25th April, 2012, agreed to expedite the matter.