

BETWEEN

INTERNATIONAL TRANSPORT WORKERS' FEDERATION

PLAINTIFF

AND

MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND ATTORNEY GENERAL

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on 7th day of December, 2018

**Form of Interlocutory Injunction Sought**

1. The plaintiff applies for an interlocutory injunction restraining the first named defendant ("the Minister") *"from granting and/or reviewing any further permissions under the Atypical Working Scheme for Non-EEA crew in the Irish Fishing Fleet ["the Atypical Scheme"] which are conditional on an employee remaining in the employment of a particular employer or being in employment on a particular vessel pending the determination of the proceedings"*. The application is effectively for an interlocutory mandatory injunction requiring the Minister to alter the Atypical Scheme pending the determination of these proceedings.

2. The plaintiff is an international federation of transport workers' unions with a dedicated section for the fishing industry. Two Irish registered unions are identified as "affiliated" to the plaintiff but those Unions are not parties to these proceedings. The lack of standing of the plaintiff to bring an application by way of judicial review seeking similar relief was mentioned by Counsel for the defendants. While undoubtedly the locus standi of the plaintiff will be a significant issue for the plenary hearing, the Court at this stage will concentrate on the urgency alleged on behalf of migrants who may become subject to human trafficking. This should not encourage parties who do not have locus standi to bring interlocutory injunction applications to protect third parties in the way adopted by the plaintiff.

3. The Irish Human Rights and Equality Commission ("the Commission") was given liberty by order of Barniville J. on 15th October, 2018, to intervene as amicus curiae in these proceedings. It was represented at the hearing of this interlocutory application which was heard over three days. The Court understands the Commission to advocate the importance of the issues raised as opposed to supporting the application for interlocutory relief. Partly on account of that intervention, the Court moves onto the main assessment for this type of application. The Commission will be represented at the plenary trial. It, like the other parties, agreed to case management in order to ready the claims for an early trial date.

4. The plaintiff submits that the Atypical Scheme which requires an employee to remain in the employment of a particular employer or to be employed on a particular vessel contributes *"to a real and immediate risk of trafficking and/or severe labour exploitation"* of migrant fishermen despite the availability, existence and ongoing pursuit of enforcement measures by or on behalf of the defendants to combat human trafficking and failures to comply with labour, health and safety laws. The plaintiff emphasises that An Garda Síochána ("the Gardaí") is presently investigating whether fifteen former participants in the Atypical Scheme were actually trafficked.

**Trafficking**

5. Section 4 of the Criminal Law (Human Trafficking) Act 2008 ("2008 Act") sets out how it is a criminal offence to traffic another person. It does not necessarily mean that the offence of coercing, threatening, abducting or using force against the trafficked person must occur outside the jurisdiction. However one looks at the situation, it is clear that evidence of trafficking can be prosecuted. The plaintiff claims that the contracts of employment required under the Atypical Scheme contributes substantially if not causes trafficking in the Irish fishing industry.

**Deponents as to Fact**

6. Three fishermen born in Egypt and one born in the Philippines swore affidavits on 12th June, 2018, in support of the application wherein:-

(a) One confirms his status as an undocumented immigrant from 2008 until April 2016 when he got permission under the Atypical Scheme. In May 2017, he went to Ken Fleming (one of two employees of the plaintiff based in Ireland) who made an application to the Garda National Immigration Bureau ("GNIB") for identification of that deponent as a suspected victim of trafficking in human beings ("suspected victim") on 27th September, 2017. Thereafter, this particular deponent has had a temporary residence permit while maintaining his belief that he has been a victim of an offence under s. 4 of the 2008 Act.

(b) The second fisherman, having learnt of others from his country *"working as fishermen in Ireland ... were making good money"*, travelled to Ireland in the summer of 2013. He gave up the fishing to work as a kitchen porter until April 2016, due to the *"hard and unstable work"* in fishing. He then identifies the specific motor fishing vessel ("MFV") on which he worked and a person who offered him a contract of employment in June 2016 to obtain a permission to work under the Atypical Scheme. He complains that as a share fisherman, he suffered an injury which required hospitalisation and prompted his return to his home country. He returned later in 2016 and describes illegal and aggressive actions undertaken by a named individual. He brought a case to the Workplace Relations Commission ("WRC") in March 2017. On 28th July, 2017, he made an application through his solicitors to the GNIB for identification as a suspected victim. On 28th September, 2017, he was granted a temporary residence permission which was renewed on 16th April, 2018.

(c) The third fisherman came to Ireland in June 2015 as an undocumented immigrant. He worked on two MFVs for single trips as a share fisherman. He then identified a trawler and its owner before explaining how that owner failed to honour a contract of employment which he executed in April 2016. He continued to outline how he was threatened with the cancellation of his contract after asserting his rights. He was told that he would be returned to his home country. He makes very serious allegations which, if proven and prosecuted will lead to convictions meriting severe sanctions including imprisonment. He also made an application to the GNIB and has been granted a temporary residence permission. He was interviewed by the Garda National Protective Services Bureau ("GNPSB") in April 2018.

(d) The fourth fisherman arrived in Ireland in November 2014, and was initially employed as a share fisherman. In May 2016, a named individual *"induced"* him to sign a contract of employment to obtain a permission under the Atypical Scheme. He identifies serious breaches of labour law requirements and directions he was given which amounted to breaches of fishery control laws. He says that he is owed €20,000 and that his solicitor has engaged with the GNPSB after advising him in relation to his rights.

**Edel McGinley**

7. Ms. McGinley is the Director of the Migrant Rights Centre Ireland ("MRCI") which has a record of investigation and advocacy on behalf of exploited migrant workers *"across a range of sectors such as domestic work, restaurant work, in car washes, in circuses and in the mushroom sector"* with *"... specific expertise on issues concerning non-EEA migrant fishermen working in the Irish Fishing Fleet"*. The MRCI *"is also the lead organisation in Ireland dealing with the crimes of human trafficking for labour exploitation and forced labour"*.

8. The affidavit sworn by Ms. McGinley on 18th June, 2018, referred to research, an exposé by The Guardian newspaper and her conclusions which include that:-

(i) the Atypical Scheme encourages paid discrimination;

(ii) there is a lack of coordination between the Marine Survey Office ("MSO"), the WRC and the Health and Safety Authority ("HSA"); and

(iii) the Atypical Scheme should be wound down and replaced due to it reinforcing exploitation instead of tackling it.

9. Suffice to say that Ms. McGinley and the MRCI are very exercised about unscrupulous employers in Ireland who exploit migrant workers. She presents an awful picture of human misery caused by Irish employers which reminds one of work camps in eras of evil in previous centuries.

#### **Ken Fleming**

10. Mr. Fleming in his three affidavits sworn in June, July and September 2018, repeatedly bolstered his plea for urgent interlocutory relief on the grounds that *"it defies reason and consciousness that the [Minister] should continue to grant permissions under the scheme while at the same time he is being told by senior gardai that they have reasonable grounds to believe that many migrant fishermen participating in the scheme have been subject to human trafficking, one of the most serious crimes in Irish law"*.

#### **Defendants**

11. Affidavits in reply were sworn by Mr. Brendan Hogan, the Regional Manager in the Inspection and Enforcement Services of the WRC, Ms. Deirdre Kelleher, Assistant Principal Officer in the Department of Agriculture, Food and the Marine, Mr. David Delaney, a Principal Officer in the Department of the Minister and Mr. Brian Hogan who is Chief Surveyor with the MSO.

12. Counsel for the plaintiff acknowledges that no complaint is made by the plaintiff against the measures undertaken by An Garda Síochána. Furthermore, the functions and exercise of powers by the WRC, the MSO and the HSA are not in controversy at this stage.

13. In the context of the plaintiff's plea for the temporary removal of the impugned condition under the Atypical Scheme, Mr. Brendan Hogan's two affidavits set out details of the enforcement mechanisms and includes an instructive table of inspections undertaken by the WRC. He avers that the granting of an interlocutory injunction will result in the Atypical Scheme not being implemented and will actually place non-EEA fishermen in far greater danger and risk of exploitation because:-

(i) WRC inspectors will have no power to inspect or enforce employment rights or employment permit laws where the non-EEA workers are self-employed share fishermen;

(ii) all future third country nationals in the sector could be the subject of deportation orders;

(iii) the WRC does not have a mechanism to combat labour exploitation of non-EEA nationals who are self-employed share fishermen; and

(iv) it is *"likely"* that suspension of the Atypical Scheme will have an impact on cases currently before the courts in relation to breaches of basic employment rights and employment permit laws.

14. Mr. Delaney explains that labour exploitation of non-EEA nationals is a global problem which is not unique to Ireland. The Atypical Scheme was introduced following articles published in The Guardian newspaper and the conclusions of the Government Taskforce set up in 2015 which had the objective of finding the most beneficial way to minimise the potential for the abuse of migrant workers by unscrupulous employers. His explanation about the well-meaning intention of government policy is not disputed by the plaintiff for the purposes of this application while the effects of the policy are clearly in issue for the entirety of these proceedings.

15. Mr. Delaney continues to describe how it is not possible to vary the particular condition of the Atypical Scheme which is the subject of this interlocutory application. He does this by reference to *"a longstanding Government policy (and set down in legislation) that any non-EEA national seeking to work in the State, regardless of the industry or type of employment, must have a written offer of employment before being permitted to enter the workforce. To be directed or ordered to vary this condition of the scheme would be an unlawful fettering of ministerial discretion and government policy. It would dismantle a broader immigration policy which would have significant consequences for public policy and national security across every employment sector in the State"* (para. 25 of the affidavit sworn on 12th September, 2018).

16. Mr. Delaney also makes a very worrying point that to do anything other than to maintain the status quo pending the hearing of these proceedings will imperil the status of participants in the Atypical Scheme and those who wish to continue participating in the Atypical Scheme. In other words, many non-EEA nationals will be placed in a *"very uncertain situation with possible and immediate repatriation"*.

17. Mr. Brian Hogan of the MSO describes the ongoing monitoring, supervision and enforcement of the MSO in relation to its statutory function as the maritime transport safety regulator. The performance of the MSO's duty is not challenged by the plaintiff for the purposes of this application.

#### **Casting of the Application**

18. Mr. Lynn, S.C., in reply to the suggestion that these proceedings be fast tracked to an early plenary hearing instead of expending resources on an interlocutory hearing which cannot decide facts, said:-

*"If one more man is subjected to trafficking and severe exploitation that would violate what we say is a right under our Constitution, it is most certainly a right under the European Convention on Human Rights [(“ECHR”)] to be protected from such treatment then and that is one too many and for that reason Judge, we cannot wait for a plenary hearing."*

#### **Causation**

19. The Plaintiff submits that the interlocutory relief *"will achieve the desired protective result while interfering as little as possible in the scheme's operation pending the substantive hearing"*. Similar relief will be sought at a plenary hearing by way of *"a perpetual quia timet injunction"*, according to the Plaintiff. The Plaintiff acknowledges that it must establish at the plenary hearing *"a proven substantial risk of danger"*. The Plaintiff contends (at this interlocutory stage) that it must only show that there is a *bona fide* or serious question about the *"substantial risk of danger"*.

#### **Common Ground**

20. The following propositions are uncontroversial:-

(i) One or more of the defendants have obligations towards a suspected victim under the Constitution, the ECHR and the Council of Europe Warsaw Convention on Action Against Trafficking in Human Beings 2005, the EU Anti-Trafficking Directive (Directive 2011/36/EU) and the 2008 Act.

(ii) The following publications referred to problems with the Atypical Scheme, including the problem of trafficking:-

(a) the 82-page report of the group of experts on action against trafficking in human beings (commonly known as the "GRETA report") published after the second evaluation round by the Secretariat of the Council of Europe on 20th September, 2017 (<https://rm.coe.int/greta-2017-28-fgr-irl-en/168074b426>);

(b) the 30-page report of the Joint Oireachtas Committee on Business Enterprise and Innovation on *'The situation of non-EEA crew in the Irish Fishing Fleet under the Atypical Worker Permission Scheme'* dated November 2017, ([https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_business\\_enterprise\\_and\\_innovation/reports/2017/2017-12-14\\_report-the-situation-of-non-eea-crew-in-the-irish-fishing-fleet-under-the-atypical-worker-permission-scheme\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_business_enterprise_and_innovation/reports/2017/2017-12-14_report-the-situation-of-non-eea-crew-in-the-irish-fishing-fleet-under-the-atypical-worker-permission-scheme_en.pdf));

(c) the paper entitled *'Left High and Dry'* published by the MRCI in December 2017, (<https://www.mrci.ie/wp-content/uploads/2017/12/MRCI-FISHER-REPORT-Dec-2017-2KB.pdf>).

(iii) Correspondence between the plaintiff and the Minister commenced on 29th March, 2018, leading to further communications from the plaintiff's solicitors to the Minister and his solicitors about progressing these proceedings to a plenary hearing.

#### **Degree of Risk**

21. Notwithstanding the third affidavit of Mr. Fleming sworn on 26th September, 2018, which highlights the basis of his belief that the Atypical Scheme can be left in place with one condition modified for all future applications, the Court is left in the position of having to evaluate the degree of risk claimed by each side because there is a clear conflict.

#### **Applying the Law**

22. The following judgments cited in submissions have particular relevance:-

- (i) *Szabo (a minor) & Ors v. ESAT Digiphone Limited, Ireland & Ors* [1998] 2 I.L.R.M. 102 ("Szabo");
- (ii) *Okunade & Ors v. Minister for Justice, Equality and Law Reform & Ors* [2012] 3 I.R. 152 ("Okunade"); and
- (iii) *Garda Representative Association v. Minister for Public Expenditure and Reform* [2014] IEHC 237 (Unreported, High Court, 7th May, 2014) ("GRA").

23. Having regard to those judgments and having had the benefit of submissions, the following is the Court's application of the law:-

- (i) Dealing with "*a hypothetical situation ... is always undesirable*" (para. 15 of GRA) relying on the judgment of McCracken J. in *Construction Industry Federation v. DCC* [2005] 2 I.R. 496.
- (ii) Like the view of Peart J. in *GRA*, I do not find the argument made on behalf of the plaintiff through Mr. Fleming's affidavits so persuasive as to topple the Atypical Scheme with its benefits for some or all of the existing and potential subjects of the Scheme. His argument that existing members and renewing applicants in the scheme can be accommodated is disputed. I am not satisfied that his suggestion can be or will be facilitated.
- (iii) I listened carefully to the argument that a potential or actual trafficked person is unlikely to come forward. The plaintiff may be trying to prevent one of the worst abuses of human rights. However, I cannot ignore the stark warnings by responsible officers of State bodies about adverse and collateral effects on those who can benefit from the protections which come with having joined the scheme. In the words of Peart J. at para. 19 of *GRA*: "*it is inescapable that the Court must reach conclusions ... by reference to a particular case and particular facts and circumstances affecting a particular ...*" participant or potential participant in the Atypical Scheme.
- (iv) The language in *Campus Oil v. Minister for Industry and Energy and Others (No. 2)* [1983] I.R. 88, is inappropriate to this application "*in that there is something most distasteful about balancing the convenience*" of those who benefit from the Atypical Scheme "*against dangers to the life and health*" of potentially trafficked people (Geoghegan J. in *Szabo*). The plaintiff, due to the fact that it must rely on speculation about effects on others, has not established to my satisfaction "*a strong case of probability that the apprehended mischief will arise*" solely or substantially as a result of the relevant Atypical Scheme condition which it wants deleted. That is not a finding of fact which is final. The reference to "*my satisfaction*" relates to the type and state of the evidence as presented for the hearing of this interlocutory application.
- (v) The application before the Court now is akin to an order sought in judicial review proceedings and this Court should assess "*where the greatest risk of injustice would lie*". In that context, having regard to:-
  - (a) the appropriate weight to be given to the orderly implementation of the Atypical Scheme which has a *prima facie* validity;
  - (b) the safeguards in place to discourage, investigate and prosecute trafficking, the extent of which was not particularly challenged at the hearing of this application;
  - (c) the interest in hearing from those actually affected by the suspension of the Atypical Scheme;
  - (d) the extent of reliance by the plaintiff on speculation and the reports of others without applying due process like procedures to those accounts;
  - (e) balancing the consequences for the plaintiff and those who it purports to represent against the consequences for those existing and future participants in the Atypical Scheme, if the scheme is ultimately found to be unlawful;
  - (f) the spending of so much time in preparing for and pursuing this interlocutory application which might have otherwise been spent on pursuing the repeated offer and facility for an early plenary hearing;
  - (g) the serious issue of the *locus standi* of the Plaintiff in pursuing these proceedings upon which this Court cannot make any binding decision at this stage;

I refuse the application for the interlocutory injunction described at para. 4 of notice of motion.