Neutral Citation Number: [2007] IEHC 312

THE HIGH COURT

2005 No. 3940 P

BETWEEN

IBRAHIM AHMED

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 29th August, 2007.

Liability

1. The issue of the liability of the defendant to the plaintiff was dealt with in my judgment in this matter delivered on 6th July, 2006 ([2006] IEHC 245). I summarised my conclusions on liability as follows:

> "By operation of the [Protection of Employees (Fixed-Term Work) Act, 2003] the plaintiff has been employed by the defendant as a consultant surgeon on a contract of indefinite duration since 30th June, 2004 on the terms of the Consultants' Common Contract, including Clause 8.1 which empowers the defendant to transfer the plaintiff from his original work location, Louth County Hospital, without his consent if major changes have taken place in the character of the work being carried out in Louth County Hospital and provided an offer of an appropriate alternative appointment is made to him in another hospital. By virtue of the reorganisation of surgical services in Our Lady of Lourdes Hospital and Louth County Hospital there has been a major change in the character of the work being carried out in Louth County Hospital. The defendant has not allowed the plaintiff to engage in either public or private practice at Louth County Hospital since he returned from leave in January, 2005 and has failed to make an offer of an appropriate alternative appointment to him. The defendant has been in breach of the plaintiff's contract of employment since January, 2005."

2. At the end of my judgment I urged the parties to endeavour to achieve an agreed solution to the outstanding issues because I was of the view that, because of the complexity of infrastructural, organisational and practical considerations in the provision of surgical services, such a solution was more likely to be in the interest of all interested parties than a remedy provided by the court. Unfortunately, that has not been achieved. The matter was re-listed for hearing and heard over four days commencing on 10th July, 2007 and concluding on 18th July, 2007.

Issues which remain to be determined

3. The issues which remain to be determined are the following:

> (a) Whether the defendant's breach of its contract with the plaintiff has continued since July, 2006 and still continues, as the plaintiff contends, or whether it has been remedied, as the defendant contends and, if so, when?
>
> (b) If the defendant's breach is continuing, whether the plaintiff is entitled to an order directing the defendant to make an offer of an alternative appropriate appointment to the plaintiff?
>
> (c) The quantification of the damages to which the plaintiff is entitled for the defendant's breach.

Progress since July, 2006

4. The historical position as of July, 2006 was that in a letter dated 1st December, 2004 from its solicitors, the defendant acknowledged that the plaintiff was entitled to be employed by the defendant as a consultant surgeon on an ongoing basis, but not necessarily at Louth County Hospital where he had served on a series of fixed-term contracts from August, 2000. Subsequently, the defendant made three successive offers of appointments to the plaintiff, which I considered in my judgment. I concluded that none of them met the requirement of an offer of an appropriate alternative employment within the meaning of clause 8.1 of the Consultants' Common Contract. I found that to constitute an appropriate alternative appointment, an appointment would have to accommodate the plaintiff's entitlement to engage in private practice.

5. The position as of July, 2006 was that the plaintiff had continued to be paid his basic salary under the Consultants' Common Contract since January, 2005, but he had not fulfilled the duties required of him under his contract since January, 2005. That situation prevailed until February, 2007.

6. Following the judgment on liability, on 12th July, 2006 the defendant's solicitors wrote to the plaintiff's solicitors offering the plaintiff a permanent surgical post at Our Lady's Hospital, Navan (Navan Hospital), pointing out that the position was not a post approved by Comhairle na nOspideal. It was stated that the plaintiff would have access to facilities for private practice identical to those enjoyed by the two other permanent consultants in Navan Hospital and would be employed in accordance with the terms of the Consultants' Common Contract. It was stated that the permanent position was available with immediate effect. The plaintiff had two major concerns in relation to the offer. First, the fact that it was not a "Comhairle approved" post meant that it would not be recognised by VHI, a topic which was an issue in the earlier round of these proceedings. The second was the potential impact of changes which had taken place and which were likely to take place in the future in relation to the provision of surgical services at Navan Hospital. The position of the defendant was that the process to have the post approved was in hand and application was being prepared for submission to the appropriate organ, the National Hospitals Office, a section of the defendant in which the functions formerly carried out by Comhairle na nOspideal now reside. As regards VHI recognition, that was a matter for the VHI, although by mid-September, 2006 the defendant was in a position to inform the plaintiff that the position of consultants employed on contracts of indefinite duration by virtue of the Act of 2003 was to be considered by the board of VHI. In relation to the changes that might occur at Navan Hospital, the defendant's position was that, while no guarantees could be given, the defendant was confident that any changes that might be made in respect of delivery of surgical services in Navan Hospital would be to the advantage of the plaintiff in the event that he should take up the position.

7. The defendant's offer to the plaintiff of an appointment at Navan Hospital remained open throughout 2006. The position adopted by the plaintiff was that he was entitled to be satisfied that the offer constituted an offer of an "appropriate alternative appointment" and he was not prepared to accept the offer until the VHI issue had been resolved. Through September to December, 2006 there was intensive correspondence between the plaintiff's solicitors and the defendant's solicitors as to what the offer would entail in practical

terms. The defendant's solicitors, in their letter of 9th October, 2006, reiterated that a position at Navan Hospital was available immediately. It would involve the plaintiff taking on the full "on-call" consultants' rota. From commencement, facilities would be available for elective surgery, endoscopies, out-patients and other sessions. It was the defendant's intention that there would be a degree of equality between the plaintiff and the other two consultant surgeons at Navan in relation to the provision of supporting services. It was acknowledged, however, that the recent review that had been carried out of surgical services in the North East would have significant implications for surgical services across the region. The immediate impact on Navan Hospital was that complex cases would not be dealt with in Navan Hospital, but would be transferred to Our Lady of Lourdes Hospital (Drogheda Hospital). It was pointed out that the change would also impact on the other consultant surgeons at Navan Hospital. Having regard to the nature of the relief to which the plaintiff claims he is entitled, I think it is instructive to note how the defendant envisaged matters progressing, as evidenced by the following passage from the letter:

> "It is not possible at this time to set up the precise sessions which Mr. Ahmed will take up in Navan and Drogheda. This will be discussed with Mr. Ahmed as soon as he indicates when he will commence. There will be a commitment to carry out both elective and on-call activity at Navan. Thereafter, Mr. Ahmed will have access to regional hospital facilities to carry out the more complex cases as indicated above. This is a matter of ongoing negotiation between not only management and the clinical staff but between the clinicians themselves. Again, Mr. Ahmed is being treated no differently to any other surgeon attached to surgical services in the region including the consultant surgeons at Navan Hospital. The delivery of surgical services in the region is the subject of change as evidenced by the reports previously supplied to you. As to the future of surgical services in the region and its direction, it will be up to the newly appointed Surgical Services Clinical Network which is headed by Professor Peter Gillen to work out the final detail in relation to all matters. Again, this is the same situation which pertains to all other surgeons working within the region."

8. Apart from the correspondence between the solicitors, during this period there were a number of meetings between the plaintiff and management personnel of the defendant with a view to resolving the issues between the parties. One issue which was resolved was the issue of the plaintiff's pension entitlements, it being agreed that the plaintiff was a member of the relevant superannuation scheme from June, 2004.

9. By December, 2006 the plaintiff's position remained that, not only had the VHI issue to be resolved before he would accept the offer of the appointment at Navan Hospital, but he also required to know, as far as practicable, what precise sessions it was intended he would take up in Navan and Drogheda and he asserted that he was entitled to have details of the number, location and nature of the sessions which he would be asked to undertake and he was entitled to know whether the same would include both elective and on-call matters. The defendant took a different view, asserting that every possible arrangement could not be put in place, as the plaintiff required, until he indicated acceptance of the offer.

10. In mid-December, 2006 the plaintiff offered to take up the position at Navan Hospital on a "without prejudice" basis for a three-month period commencing on 8th January, 2007. This was acceptable to the defendant. However, it transpired that the position had been occupied by a locum and the locum contract had been extended in the absence of a prior commitment from the plaintiff. As a result, the plaintiff commenced at Navan Hospital on 5th February, 2007. Since the expiration of the three month period the plaintiff has continued in the position on the same basis. Since 5th February, 2007 he has received remuneration in accordance with the Consultants' Common Contract, including on-call payments.

11. Prior to February, 2007 the VHI had decided to amend its doctor registration procedures and recognise a consultant on a contract of indefinite duration by virtue of the Act of 2003. However, a requirement imposed by VHI is that a copy of the Consultants' "Public Hospital Contract" be submitted. That particular requirement has not been fulfilled in the case of the plaintiff as yet, because the plaintiff has not been prepared to execute the contract furnished to him. Claims which the plaintiff has submitted to VHI have not been discharged pending execution.

12. At the end of April, 2007 the defendant furnished a contract in the form of the Consultants' Common Contract to the plaintiff for execution. The contract offered the plaintiff an appointment of consultant surgeon on a category 1 basis under HSE Dublin North East from a date to be specified, which I understand is intended to be the date of acceptance. The contract stipulates that the plaintiff has a weekly commitment of 11 (equivalent to 33 hours) sessions at Navan Hospital. Clause 8.1, which was in issue in the earlier round of these proceedings and which is quoted in the judgment of 6th July, 2006 is included and completed as follows: the Navan site of Hospital Network 3 is inserted as the "location indicated in Comhairle letter of approval". Hospital Network 3 means the defendant's hospitals at Navan, Cavan, Dundalk, Drogheda and Monaghan. No "designated specific locations of the clinics and out-patient work" other than base (i.e. Navan Hospital) are specified. Hospital Network 3 is inserted for "the hospital or hospital group", so that the plaintiff's work location cannot be changed outside the area served by the hospital network group without his consent, unless major changes take place in the character of the work carried on there and he is offered an appropriate alternative appointment. The standard provision (clause 8.3) that the plaintiff may engage in private practice in accordance with the terms of the attached Memorandum of Agreement is included. The duties attached to the position are as set out in appendix 1, the principal duty being to practise as a consultant general surgeon under HSE Dublin North East and, in particular, to attend at Navan Hospital for 11 sessions at such times as may be determined by the Network Manager and in emergencies as required. The clinical duties involve participating in a 1 in 3 on-call rota based at Navan Hospital and to provide for the care of elective and emergency surgical admissions there.

13. In a letter dated 1st May, 2007 the plaintiff's solicitors, on his behalf, have intimated that the plaintiff considers that the post at Navan Hospital is not an appropriate alternative appointment on a number of grounds, that to which the plaintiff has attached most significance being that the plaintiff is only entitled to engage in a curtailed range of surgery at Navan Hospital. The plaintiff contends that failure to make provision to enable him to carry out major surgery is in breach of the representations contained in the letter dated 9th October, 2006, which I have quoted earlier, and is a breach of contract. In the letter of 1st May, 2007 the plaintiff's solicitors intimated that he was prepared to stay on as a surgeon at Navan Hospital on a temporary and without prejudice basis, in mitigation of his losses, pending the resolution of the proceedings.

14. Prior to the plaintiff taking up his position at Navan Hospital a review of surgical cases had been carried out by Royal College of Surgeons in Ireland (RCSI) which furnished a report which outlined certain guidelines. In a letter dated 20th February, 2007 to Mr. Christopher Lyons, the Hospital Network Manager, Professor David Bouchier-Hayes of RCSI, indicated that the approach outlined in the report, broadly speaking that no major surgery should be performed, should continue to be the practice at Navan Hospital. In a memorandum of 21st March, 2007 to the three surgeons at Navan Hospital, including the plaintiff, Mr. Lyons referred to the letter of 20th February, 2007 and the recommendation contained in it and recorded his understanding that the recommendation was being adhered to on a voluntary basis. Mr. Lyons stated that patients who presented whose needs mandated immediate major surgical intervention should, in non-immediate life threatening situations, be stabilised and transferred either to Connolly Hospital, Blanchardstown or Drogheda Hospital or in some instances to the relevant tertiary centre in Dublin. Mr. Lyons also stated that the

defendant was currently having negotiations to ensure that the three surgeons at Navan Hospital should have continued access to theatre facilities to carry out major surgery, which was stated to be "in keeping with the current professional contracts". The addressees of the memorandum were encouraged to engage with the relevant Clinical Network chaired by Professor Peter Gillen.

15. Arising out of the letter of 21st March, 2007, the plaintiff wrote to Mr. Lyons on 10th April, 2007 indicating that in his case confinement to intermediate level surgery was not on a voluntary basis. The plaintiff complained that his relocation to Navan did not constitute an appropriate alternative appointment to his appointment in Dundalk, which had not involved any restriction on carrying out major surgical procedures. The plaintiff suggested that his appointment to Navan could be made "like for like" by either allowing him to perform elective and emergency major surgery in Navan or by offering him operating sessions in Drogheda to carry out major procedures. Mr. Lyons responded on 30th April, 2007 to the effect that it was to be assumed that his letter of 21st March, 2007 constituted a directive which was to be adhered to by all three surgeons at Navan Hospital, the one exception to the restriction on major emergency or elective surgery being where an immediate life threatening situation presented. Mr. Lyons stated that he had discussed the matter with Professor Gillen who had assured him that, as they moved towards the implementation of the joint department of surgery across the Louth/Meath hospitals, there would be an opportunity for the plaintiff to carry out major surgery at Drogheda Hospital. It was suggested that the plaintiff discuss the matter with Professor Gillen.

16. In fact, the plaintiff had been pursuing the matter with Professor Gillen and had met him and had been in correspondence with him. In a letter of 9th March, 2007 Professor Gillen had informed the plaintiff that he was not in a position to offer him fixed sessions at Drogheda Hospital at that time. However, he did say that they were working towards a situation where, with extra resources available, all members of a joint department of surgery would have access to theatre sessions for major work. In the interim, Professor Gillen was prepared to co-operate with the plaintiff on a case by case basis. While the plaintiff had some further contact with Professor Gillen, nothing came of it. Professor Gillen was not called as a witness. However, my understanding is that he is currently not in a position to facilitate the plaintiff in relation to performing major surgery at Drogheda Hospital on the basis that the patient is admitted under the plaintiff's care. Moreover, whatever plans there are for a joint surgery department across the Louth/Meath hospitals and for extending operating theatre facilities at Drogheda Hospital in the future are dependent on resources being made available.

17. Immediately prior to the resumed hearing the plaintiff pursued with Mr. Lyons whether and when he would get an opportunity to perform major complex surgery either at Drogheda Hospital or elsewhere. Mr. Lyons responded by letter dated 5th July, 2007. He stated that the previous week the surgical team at Cavan Hospital had agreed to be the second hospital to take complex referrals, after Drogheda Hospital, from Navan Hospital. Mr. Lyons stated that this would facilitate the plaintiff going to Cavan Hospital to operate on his own complex cases, stating that it was anticipated that this would provide the plaintiff with "access to a full-day operating session on an as required basis (subject to caseload requirements)". The only witness called on behalf of the defendant was Ms. Bridget Clarke, the Co-ordinator of Surgery for Cavan and Monaghan Hospital Group. Ms. Clarke's evidence was that, subject to agreement with the consultant surgeons in Cavan Hospital, the offer contained in the letter of 5th July, 2007 could be implemented in that there is adequate theatre capacity, anaesthetic cover, theatre staffing and intensive care staffing at Cavan Hospital. However, what emerged from the cross-examination of Ms. Clarke was that the agreement referred to in Mr. Lyons' letter that Cavan Hospital was to back up Drogheda Hospital in taking referrals of complex cases from Navan was, to put it at its highest, tentative. Ms. Clarke acknowledged that it would take a "few months", even with the best will and intention on the part of all involved, to structure the plaintiff's access to operating facilities in Cavan Hospital. It is not possible to conclude on the state of the evidence whether that the best will and intention will be forthcoming or not.

Continuing breach?

18. The starting point in considering whether the plaintiff's contention that the defendant's breach of contract is continuing is the finding in the judgment of 6th July, 2006 that the plaintiff is employed by the defendant as a consultant surgeon on a contract of indefinite duration and has been since 30th June, 2004 on the terms of the Consultants' Common Contract, including clause 8.1. That position came about by operation of law. It would obviously be convenient if the plaintiff's contractual entitlements were in the form of a personalised version of the Consultants' Common Contract executed by the defendant and the plaintiff. For instance, it would satisfy the requirement of VHI and it is clearly in the interest of the plaintiff that that requirement be complied with. However, the nub of this matter is that clause 8.1 has governed the entitlement of the defendant to relocate the plaintiff since the contract of indefinite duration came into existence and, as I have found, subject to making an offer of an appropriate alternative appointment, the defendant is entitled to relocate the plaintiff. The principal basis on which the plaintiff contended that a permanent appointment in Navan Hospital is not an appropriate alternative appointment was that it did not allow him engage in major surgery as he had done in Louth County Hospital. It was submitted on his behalf that the defendant had accepted in principle his right to an appointment through which he could be involved in major surgery as was evidenced by its conduct, starting with the letter of 9th October, 2006 and culminating in the statement in the memorandum of 21st March, 2007 that such involvement was "in keeping with the current professional contracts". The argument advanced on behalf of the defendant was that the Consultants' Common Contract does not oblige the defendant to offer a consultant any particular kind of operating facilities, whether for minor, intermediate or complex surgery, and there is no contractual obligation on the defendant to ensure that the plaintiff can carry out complex surgery. The explanation of the representations made by the defendant to the plaintiff of its intention to facilitate him to carry out major surgery since 9th October, 2006 given to the court on behalf of the defendant was that it wishes to deploy the plaintiff to the best advantage, although not pursuant to any contractual obligation.

19. What is an "appropriate alternative appointment" within the meaning of clause 8.1 must be ascertained by reference to the totality of the rights and obligations created by the Consultants' Common Contract. I consider that the submission made on behalf of the defendant that the structure of the contract envisages the defendant having ultimate responsibility and discretion as to deployment of its resources and of its consultants is correct, but I would add that decisions as to the deployment of consultants must not infringe the contractual rights of the consultants. As regards the rights of a consultant whom the defendant is entitled to relocate in accordance with clause 8.1, the plaintiff's case seems to be that an alternative appointment is not appropriate unless it mirrors in every respect the appointment formerly held. That construction, in my view, is not open on clause 8.1 which is part of a collective agreement which, as I understand the position, has universal application in relation to the employment of permanent consultants across the public health sector, because it would preclude the flexibility which is necessary to make the contract work, having regard to the complex nature of the provision of State funded public health services. Indeed, flexibility is apparent on the face of the provision, albeit flexibility which appears to be to the advantage of the consultant, in that it envisages the option to change category of appointment without competition.

20. I am satisfied that an appointment in accordance with the terms set out in the personalised form of the Consultants' Common Contract furnished by the defendant to the plaintiff at the end of April, 2007 is an appropriate alternative appointment in accordance with clause 8.1 and fulfils the defendant's contractual obligations to the plaintiff. The terms and conditions which will apply to the plaintiff as a category 1 consultant under that contract are the very same terms and conditions which apply to every category 1 consultant in the HSE Dublin North East Region. Unlike the appointments proffered by the defendant to the plaintiff prior to the

judgment of 6th July, 2006, it is a permanent appointment in a specific hospital which involves on-call and elective responsibilities and enables the plaintiff to carry out private practice as permitted under the Consultants' Common Contract and to be registered with VHI. The fact that major surgery is not carried out at the hospital in question, in my view, does not prevent the appointment being an appropriate alternative to the appointment the plaintiff formerly had. When the intended reorganisation of surgical services within Hospital Network 3 is implemented, it is to be hoped that the plaintiff's desire to be involved in major surgery will be met. However, in my view, the plaintiff does not have a contractual entitlement to insist on such involvement now.

21. As to when the defendant ceased to be in breach of the plaintiff's contract, I find that that occurred at the beginning of February, 2007, when the circumstances were such that the plaintiff could take up the appointment in Navan Hospital on full remuneration and with the ability to engage in private practice on the basis that he would be registered with VHI.

22. I have some additional observations to make arising out of the submissions made on behalf of the parties.

23. In the recent past, the hospitals in Co. Louth and Co. Meath (Drogheda, Dundalk and Navan Hospitals) have formed one group and the hospitals in Co. Cavan and Co. Monaghan (Cavan and Monaghan Hospitals) have formed another group. In my view, the approach adopted by the defendant in identifying the plaintiff's work location and base in completing clause 8.1 and assigning the plaintiff to Hospital Network 3, rather than the Louth/Monaghan group, is reasonable having regard to the situation which prevails currently in relation to the provision of surgical services in the area served by Hospital Network 3 and the changes which are mooted.

24. Counsel for the defendant submitted that, insofar as the plaintiff has a grievance arising from the application of the Consultants' Common Contract to him he has the benefit of the grievance and dispute procedures therein provided for. It was suggested that the plaintiff could invoke those procedures to deal with his complaint in relation to access to major surgery. Counsel for the defendant went further and submitted that the plaintiff is obliged to use the procedures to resolve issues such as deployment in connection with major surgery, rather than have resort to court. That point was not pleaded in these proceedings, although in the proceedings before the Rights Commissioner, in its supplemental written submissions, the defendant made the point that it was accepted that the plaintiff was employed on a contract of indefinite duration since June, 2004 in accordance with the provisions of the Consultants' Common Contract and that the manner in which that contract was to be interpreted was a matter between the parties and, failing agreement, should be dealt with in accordance with internal mechanisms and was not a matter for the Rights Commissioner. For the pragmatic reason that, in general, it is improbable that the court could grant a useful remedy to the plaintiff confident that it was not impacting unfairly on the rights of others in the types of situation which the grievance and disputes procedure is designed to deal with, for example, the nature of the surgery to be carried out by a consultant in a particular hospital, in my view, the appropriate course is to avail of the internal mechanisms.

25. Following on from that last comment, notwithstanding that I find that there is not a continuing breach of contract on the part of the defendant, lest I am wrong in that conclusion, I propose considering whether the court could make an order of the type sought by the plaintiff, that is to say, an order directing the defendant to make an offer of an appropriate alternative appointment to him.

Mandatory order to enforce term of Consultants' Common Contract

26. If the court were to make an order directing the defendant to make an offer of an appropriate alternative appointment to the plaintiff in compliance with clause 8.1, in effect the court would be ordering specific performance of a term of a contract of employment. In support of his submission that, if the defendant's breach is a continuing breach, the court should make such an order, counsel for the plaintiff referred to the following passage in Farrell on Irish Law of Specific Performance (Butterworths, 1994) at para. 1.20:

> "The traditional view has been that specific performance of a contract for services will not be decreed on the ground that the court cannot oversee the performance of the services. It has been said that a contract of hiring and service is of so personal and confidential a character that the court refuses to entertain jurisdiction on such contracts. The rule has been described by an Irish judge as 'not rigid'. If there is no reason for the court to oversee the performance of the services the rule is not applicable. In England the 'so-called rule' that contracts for personal services or involving continuous performance of services will not be specifically enforced has been described as 'plainly not absolute and without exception'. In general, no doubt, the 'inconvenience and mischief' of decreeing specific performance of most contracts of personal services or for the continuous performance of services will greatly outweigh the advantages and specific performance will be refused. Possibly it will be less difficult to get specific performance of an agreement to procure the provision of services than one which requires the performance of personal services or any continuous series of acts."

27. The Irish authority referred to in that quotation was a decision of this Court (McWilliam J.) in *Lift Manufacturers v. Irish Life* [1979] I.L.R.M. 277. The issue in that case as to whether a specific performance would be granted of a sub-contract for supply and installation of lifts in a major development being constructed in Dublin to be entered into between the main contractor and the plaintiff arose in the context of an application for an interlocutory injunction by the plaintiff restraining the second defendant, the main contractor, from making a new nomination of sub-contractor pending the plaintiff's action for specific performance. The application for an interlocutory injunction was opposed by the defendants on the ground that there was no foundation for the action because specific performance of a contract for services cannot be decreed. In relation to that objection, McWilliam J. stated that the authorities to which he had been referred indicated that the rule is "not rigid" and that where there is a genuine claim an injunction may be granted. He continued as follows (at p. 280):

> "The basis for the rule is that the court cannot oversee the performance of the services and it seems to me that, where there does not appear to be any reason for the court to oversee such performance, the rule is not applicable."

28. The first of the English authorities referred to by Farrell, the decision of Megarry J. in *C.H. Giles & Co. Ltd. v. Morris & Ors.* [1972] 1 All E.R. 960, highlighted the distinction between an order to perform a contract for services and an order to procure the execution of such a contract. Megarry J. stated (at p. 967) that the mere fact that the contract to be made is one of which the court would not grant a decree for specific performance is not a ground for refusing to decree that the contract be entered into. That was a factor which he took into account in making his decision determining that the defendants were in contempt of court for disobedience to an order for specific performance. On a more general note, he made the following observations to which Farrell alludes (at p. 968):

> "One day, perhaps, the courts will look again at the so-called rule that contracts for personal services or involving the continuous performance of services will not be specifically enforced. Such a rule is plainly not absolute and without exception, nor do I think that it can be based on any narrow consideration such as difficulties of constant superintendence by the court. Mandatory injunctions are by no means unknown, and there is normally no question of the court having to send its officers to supervise the performance of the order of the court. Prohibitory injunctions are common, and again there is no direct supervision by the court. Performance of each type of injunction is normally secured

> by the realisation of the person enjoined that he is liable to be punished for contempt if evidence of his disobedience to the order is put before the court; and if the injunction is prohibitory, actual committal will usually, so long as it continues, make disobedience impossible. If instead the order is for specific performance of a contract for personal services, a similar machinery of enforcement could be employed, again without their being any question of supervision by any officer of the court. The reasons why the court is reluctant to decree specific performance of a contract for personal services (and I would regard it as a strong reluctance rather than a rule) are, I think, more complex and more firmly bottomed on human nature. If a singer contracts to sing, there could no doubt be proceedings for committal if, ordered to sing, the singer remained obstinately dumb. But if instead the singer sang flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal itself as a most unsatisfactory weapon; for who could say whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasions would be vain; and so the order will not be made. However, not all contracts of personal service or for the continuous performance of services are as dependent as this on matters of opinion and judgment, nor do all such contracts involve the same degree of daily impact of person on person. In general, no doubt, the inconvenience and mischief of decreeing specific performance of most such contracts will greatly outweigh the advantages, and specific performance will be refused. But I do not think that it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance. Of course, a requirement for the continuous performance of services has the disadvantage that repeated breaches may engender repeated applications to the court for enforcement. But so may many injunctions; and the prospects of repetition, although an important consideration, ought not to be allowed to negative a right. As is so often the case in equity, the matter is one of the balance of advantage and disadvantage in relation to the particular obligations in question; the fact that the balance will usually lie on one side does not turn this probability into a rule. The present case, of course, is a fortiori, since the contract of which specific performance has been decreed requires not the performance of personal services or any continuous series of acts, but merely procuring the execution of an agreement which contains a provision for such services or acts."

29. The authority cited by Farrell for the last sentence in the above quotation is *Posner v. Scott Lewis* [1986] 3 All E.R. 513. In that case in the English High Court Mervyn Davies J. ordered specific performance of a covenant by the landlord in leases of flats in a block of flats to employ a resident porter to keep the communal areas clean, to be responsible for central heating and boilers, and to collect rubbish from the flats. On the issue before him, Mervyn Davies J., having referred to various authorities including the passage from the decision of Megarry J. which I have quoted above, stated that the order contemplated in the case before him was in the a *fortiori* class referred to by Megarry J. in the last sentence in the above quotation. He continued (at p. 520):

> "Whether or not an order for specific performance should be made seems to me to depend on the following considerations:
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> (a) is there is sufficient definition of what has to be done in order to comply with the order of the court;
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> (b) will enforcing compliance involve superintendence by the court to an unacceptable degree; and
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> (c) what are the respective prejudices or hardships that will be suffered by the parties if the order is made or not made?"

30. Counsel for the defendant submitted that there is no precedent for making an order of the type sought. While there have been cases in which the courts have granted interlocutory orders restraining dismissal, directing the payment of remuneration and so forth pending the trial of the action, he submitted that there is no case in which a mandatory order was made in a substantive action requiring an employer to reinstate an employee. He submitted that the same should apply to an application for a permanent mandatory order to redress a breach of a term of an employment contract.

31. To illustrate the applicable principles, counsel for the defendant referred to dissenting judgment of Stamp L.J. in *Hill v. C.A. Parsons & Co. Ltd*. [1971] 3 All E.R. 1345. Stamp L.J. (at p. 1356) reviewed the law on whether a contract for personal services could be enforced by specific performance. He stated that by 1851 it had become a principle of the court exercising the equitable remedy of specific performance to refuse it where what was sought to be specifically performed was a contract for personal services. He then referred to the oft-cited case of Lumley v. Wagner, which involved an employee who had not only agreed to perform services for the employer but also, in effect, not to perform them for another. The negative part of the obligation was enforced by granting an injunction. He stated that the decision was much criticised and, when an attempt was made later in *Whitewood Chemical Company v. Hardman* [1891] 2 Ch. 416 to place reliance on it as an exception to the general rule, Linley L.J. took the view that, for an injunction to be granted in the case of an agreement for personal services, it was for the plaintiff to show that the case fell within some recognised exception to the general rule that the court will not decree specific performance of such a contract. Having stated that no authority had been cited throwing the slightest doubt on the statement of principle laid down by Linley L.J., Stamp L.J. continued (at p. 1357):

> "I would be far from holding that in a changed and changing world there can be no new exception to the general rule or that in changed circumstances Linley L.J.'s statement should be slavishly followed. But the consequences of ordering an employer or employee to perform the contract of service can hardly ever be foreseen and the injustice which may stem from such an order may only become apparent after the order has been made. The courts in determining whether to grant or withhold an order for performance of that which has been agreed to be done will not exercise its discretion where the order will be nugatory, uncertain or as a practical matter impossible to enforce. Nowhere could these considerations be more compelling than where an employee asks for an order of his employer to continue to employ him."

32. Counsel for the defendant also referred the court to the recent decision of this Court (Clarke J.) in *Carroll v. Bus Atha Cliath* [2005] 4 I.R. 184. In that case, Clarke J. found that the defendant employer was in breach of the contract of employment of the plaintiff bus driver in not affording him access to what was described as a "universal or bogey route" for rehabilitative purposes, the plaintiff having been injured in a traffic accident and not being fit for ordinary duties. There, the plaintiff's redress for the historic breach was his claim in damages. Clarke J. examined what he described as the more complex question as to the effects of a declaration that the defendant was in breach of contract on the position into the future. Having made a declaration that the plaintiff remained, as a matter of contract between himself and the defendant, entitled to the opportunity to rehabilitate using a universal or bogey route, he went on to consider the question as to whether he should go beyond that, stating as follows (at p. 209):

> "However, a more difficult question arises as to whether I should, beyond making such a declaration, make orders which would require the defendant physically to provide the plaintiff with work. I have been referred to some limited number of authorities which suggest that, in certain limited circumstances the courts have, notwithstanding the general policy to

> the contrary, granted injunctive relief which has the effect of requiring that an employee be actually permitted to work. Many of those judgments appear to have arisen at an interlocutory stage … The extent to which there may be, notwithstanding the general policy of the courts to the contrary, a jurisdiction to make a mandatory order which would have the effect of entitling an employee to return actively to work after appropriate findings at a plenary hearing is, therefore, open to significant doubt.
>
> Even is such a jurisdiction exists, it seems to me that it could, in principle, only arise in circumstances where it was clear that no other difficulties could reasonably be expected to arise by virtue of the making of an order. I am afraid that I am not satisfied that this is such a case. Having regard to the serious breakdown in relations between the parties, evidenced, not least, by the serious accusations made in the course of these proceedings, I am not satisfied that, even if there was a limited jurisdiction in special cases, to make an order which would have as its effect the placing of a requirement upon the defendant to take the plaintiff back into active employment, it would be appropriate, in the exercise of my discretion, to make an order in this case."

33. Both the mandatory injunction and the decree of specific performance are equitable remedies. The court has a discretion whether to grant an equitable remedy. For a variety of reasons, which are referred to in the passages from the judgments quoted above, the courts have refused to exercise the discretion to compel performance of contracts of employment or the terms thereof. The type of impediment which existed in the Carroll case, a breakdown of trust and confidence, does not exist in this case. However, other impediments which I highlighted in general terms at the end of the judgment of 6th July, 2006 militate against making an order for specific performance: the complex infrastructural, organisational and practical considerations which are involved in the provision of surgical services to the public by the public body which has statutory responsibility for that function. What has emerged from the evidence as to what has transpired since that judgment was delivered illustrates with particularity the difficulties which the defendant faces in managing proper delivery of surgical services in the north-east region in terms of safety, efficiency, proper use of resources, and impact on personnel, including consultants, at a time when the manner of the provision of the services is under review and subject to change.

34. If it were the case that under clause 8.1 the plaintiff is entitled to be offered an appointment which would allow him to be involved in major surgery, I am not satisfied that, as a matter of practicality, an order compelling the making of such an appointment could be properly made and enforced. That is because I cannot see how the court could determine that it is possible for the defendant at this time to identify an opening for a general surgeon with the plaintiff's speciality on a hospital site or across two hospital sites which would allow for involvement in major surgery which could be offered to the plaintiff, having due regard to the proper exercise of the defendant's functions, the resources available to it and the totality of its responsibilities in the exercise of those functions, including its contractual duties to its consultants other than the plaintiff. In my view, the consequences of an order which, in effect, would direct the defendant to offer such appointment to the plaintiff are not foreseeable. That is in sharp contrast to the situation which prevailed in each of the cases cited in Farrell in which the court was prepared to make, or countenance the making of, an order for specific performance, where the consequences were foreseeable. To take one example, in the Lift Manufacturers case, the form of sub-contract which the plaintiff was seeking to have the main contractor enter into had been agreed. The problem which had prevented the sub-contract coming into being was delay on the part of the plaintiff in obtaining a performance bond, which was eventually obtained. The consequences of making what, in effect, would have been an order compelling the coming into existence of the sub-contract would have been anticipated by and obvious to the parties from their dealings and the impact of such consequences would have been confined to them.

35. Finally, I have no doubt that, if the court was to make an order on the lines sought, the matter would not be finally resolved without further recourse to the court. That is not determinative, but it illustrates that the court is not the appropriate forum for the resolution of the issue which remains in contention between the plaintiff and the defendant.

Damages

36. There are three elements in the plaintiff's claim for damages: compensation for the loss of income he has suffered to date and will suffer in the future as a result of the defendant's breach of contract; general damages; and aggravated and exemplary damages.

37. The plaintiff's claim for loss of income was based on the evidence of Timothy Carthy, forensic accountant. Mr. Carthy calculated the plaintiff's loss of income to 30th June, 2007 at €262,000. During 2005, 2006 and January, 2007 the plaintiff was paid his basic remuneration but not on-call payments. The figure of €262,000 includes €42,487 in respect of on-call payments, which is not in dispute. The balance of the claim represents the income which the plaintiff contends he would have earned from private practice but for the defendant's breach. The defendant did not call evidence of any alternative calculation but submitted that Mr. Carthy's calculation should have been based on the assumption that, because of the time lag in payment of health insurance claims, the plaintiff's actual income, in any tax year, did not reflect one month's earned income which would be reflected in the succeeding tax year. Mr. Carthy did an alternative calculation on the basis of that assumption and came up with a figure of €216,899 as representing the plaintiff's loss of income to 30th June, 2007. Apart from submitting that the plaintiff's loss should be calculated on the alternative basis, it was submitted on behalf of the defendant that the court should assess damages on the basis that the defendant's breach came to an end in the summer of 2006 or, at any rate, by February, 2007 when the plaintiff commenced in Navan Hospital. It was also submitted on behalf of the defendant that, in the year 2006, the plaintiff could have mitigated his loss to a greater extent than he did by taking on more locum appointments than he took on.

38. For the purposes of assessing the plaintiff's loss, the finding that the defendant's breach came to an end in February, 2007, when the plaintiff was in a position to take up the appointment in Navan on the basis that he would be able to engage in private practice and be registered with VHI, is applicable. However, in my view, the plaintiff's loss of income arising naturally from the defendant's breach continued beyond that date, although not into the future to the extent to which the plaintiff has claimed. Having regard to the state of the evidence, I find it difficult to conclude that the plaintiff did not use his best endeavours to mitigate his loss. Accordingly, I propose to award €235,000 in respect of the plaintiff's loss of income up to 30th June, 2007.

39. Mr. Carthy calculated the plaintiff's future loss of income from the defendant's breach on the assumption that he would be appointed to an appropriate alternative position at €542,000. Broadly speaking, the basis of this calculation is that it will take the plaintiff five years to gradually bring his income from his private practice to the level he would have achieved but for the defendant's breach of contract in not offering him an appropriate alternative appointment in January, 2005.

40. The only monetary compensation provided for in clause 8.1 of the Consultants' Common Contract for a non-voluntary transfer from one work location to another is payment of removal expenses. There is no provision for compensation for adverse impact on the transferred consultant's income from private practice. Having said that, the issue here is not whether the plaintiff is entitled to compensation under clause 8.1; it is whether the plaintiff has established that he will incur future loss of income by reason of the defendant's breach of contract. As I have already stated, I consider that, as a consequence of the defendant's breach, the plaintiff's

loss of income has continued beyond February, 2007. It will continue for some time into the future. However, I do not accept that the result of the methodology and calculations employed in Mr. Carthy's exercise reflects what will happen in reality. The evidence as to the plaintiff's income from private practice during his period at Dundalk Hospital suggests to me that the plaintiff should be able to built up his private practice from A&E cases and G.P. referrals to the level he might reasonably expect taking account of his primary obligation under the Consultants' Common Contract, his public practice commitment, by early 2008. On the basis of the figures provided by Mr. Carthy, I consider that the appropriate measure of damages for future (i.e. post 30th June, 2007) loss of income is €65,000.

41. While I was critical of the defendant's treatment of the plaintiff in my judgment of 6th July, 2006 and do not resile from that position, and while I accept the plaintiff's evidence as to the shock, upset, anxiety, stress, general unhappiness and general inconvenience to him and his family which his treatment by the defendant caused, I see no basis in this case for awarding general damages. Although neither side adverted to it, there is commentary on entitlement to general damages for breach of a term of a contract of employment in the judgment of Clarke J. in *Carroll v. Bus Atha Cliath* at p. 214. In my view, the primary consideration which led Clarke J. to refuse to award general damages in that case equally applies here. There is no evidence that the plaintiff suffered any clinical medical condition because of the defendant's breach of contract. It is on the basis of that consideration that I reject the plaintiff's claim for general damages.

42. In support of his contention that the plaintiff should be awarded aggravated damages or exemplary damages or both, counsel relied on the passage from the judgment of Finlay C.J. in *Conway v. Irish National Teachers' Organisation* [1991] 2 I.R. 305 at 317, which was recently applied by the Supreme Court in Sh*ortt v. The Commissioner of An Garda Síochána, Ireland and the Attorney General* [2007] IESC 9, in which it was stated that, in respect of damages in tort or for breach of a constitutional right, three headings of damages are potentially relevant in any case, ordinary compensatory damages, aggravated damages and punitive or exemplary damages, and in which each head of damages was explained. Counsel submitted, without citing any authority, that the same principle should be applicable to the award of damages for breach of contract. I do not accept that submission is correct. I cannot see, in point of principle, how aggravated or exemplary damages could be awarded for breach of a term of a contract of employment where there is no entitlement to general damages and where the relationship of employer and employee is ongoing. In any event, although I described the defendant's treatment of the plaintiff as shoddy, if the plaintiff's cause of action was one which entitled the court to consider awarding aggravated damages, the conduct of the defendant when considered in its totality, including apologising to the plaintiff, was not of the type which Finlay C.J. identified as giving rise to an entitlement to aggravated damages. Nor would there be any basis for awarding exemplary damages.

Order

43. The order of the court will provide for:

> (a) a declaration that the plaintiff has been employed by the defendant as a consultant surgeon on a contract of indefinite duration since 30th June, 2004 on the terms of the Consultants' Common Contract; and
>
> (b) €300,000 damages for breach of contract.