Neutral Citation Number: [2013] IEHC 459

THE HIGH COURT

[2013 No. 608 J.R.]

BETWEEN

VINCENT GORMLEY AND JAMES SCOTT

APPLICANTS

AND

MINISTER FOR AGRICULTURE, FOOD AND MARINE

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 14th day of October, 2013

1. This is an application pursuant to O. 44, r. 3 of the Rules of the Superior Courts seeking to leave to issue a motion to commit the Minister for Agriculture, Food and the Marine for contempt of court. The applicants contend that the Minister has breached an undertaking given to this Court on 30th July, 2013, in the course of judicial review proceedings to the effect that no appointments would be made to particular posts then being advertised by the Department.

2. These judicial review proceedings arise in the following way. The applicants are both technical agricultural officers who are employed by the Department in Co. Galway. Both applicants hold a BSc in Rural Development and the second applicant holds a Masters qualification in rural environmental conservation and management. While both applicants were informally advised that their present posts were surplus to requirements in July 2009, they were only formally advised of this by letter dated March 15th, 2011.

3. The Public Service Agreement 2010 – 2014 ("the Croke Park Agreement") provides for mechanisms whereby surplus staff within a given Department may be deployed within the civil service. Staff so redeployed are generally entitled to priority under the terms of that Agreement save where special skills are required. For various reasons, however, the applicants were not in fact so redeployed.

4. In November 2012 the Department sought applications for seven posts of Assistant Agricultural Inspectors ("AAI") by way of open competition. The application form required that applicants hold an honours degree in Agricultural Science or its equivalent. Although the applicants maintain that their degree qualifications must be regarded as equivalent for this purpose, they were rejected by letter dated 30th January 2013 on the ground that they did not satisfy "the essential requirements" as outlined in the application form.

5. The applicants were naturally disappointed with this and arranged for their trade union to engage with the Department regarding their status and redeployment. To this end there was much correspondence and several meetings took place between the parties. One practical suggestion which was made was that the Department was holding internal competitions for these positions to which the applicants might also apply. Such a competition was advertised on 12th April, 2013, and interviews for these positions were held on 3rd July, 2013. But for the undertaking tendered in these proceedings, seven candidates would have been selected for the internal competition panel.

6. The applicants had – very understandably from their perspective – applied for these internal posts. They were crestfallen to learn by letter dated 24th June, 2013, that they were again deemed ineligible for these positions. A critical feature of the proceedings is the claim advanced by the applicants that their exclusion from the internal competition on this ground is unfair and arbitrary.

7. While a conciliation conference of this dispute was scheduled before the Labour Relations Committee on 19th August, 2013, nevertheless by mid-July, however, the patience of the applicants was wearing somewhat thin when it transpired that the Minister would not give any assurances regarding the maintenance of the status quo pending the outcome of the conciliation process. The applicants' solicitor accordingly wrote on 19th July, 2003, in the following terms:

> "We are instructed that the Department has not confirmed that it will not take any further step in relation to the [agricultural inspector] competitions. Consequently, our clients apprehend that the Department is continuing to take steps in relation to [these] competitions and that the relevant posts will be filled in advance of the Conciliation Conference scheduled for the 19th August 2013. In the light of that apprehension on the part of our clients, we have been instructed to seek you urgent confirmation that the Department will maintain the status quo, will not take any further step in relation to [these] competitions and will not fill the relevant posts pending the outcome of the LRC conciliation process."

8. There was no response to this particular request and the present proceedings were accordingly commenced. For the avoidance of any possible doubt, I should, perhaps, make clear that the merits of these judicial review proceedings will have to be determined at a later date.

9. We can now come to the most significant development of all. On the 30th July, 2013, counsel for the Minister gave an undertaking to this Court and it is this undertaking which is said to have been breached. The undertaking was in the terms of paragraph 4 of the applicants' notice of motion seeking interlocutory relief. By this undertaking the Minister was prevented until 18th September, 2013:

> "…from selecting or appointing [a] person or persons to the AAI posts advertised pursuant to the internal competition for such posts advertised on 12th April, 2013, or otherwise."

10. It is not disputed but that the Minister subsequently appointed three persons from the external competition panel in the period covered by the undertaking. The Minister contends, however, that the undertaking was understood to relate to appointments from the internal panel only, so that the undertaking did not apply to appointments from the external panel.

The position of the Minister for Agriculture and Food

11. While the motion for committal seeks relief against the Minister for Agriculture, Food and the Marine, it quickly became clear during

the course of the hearing that it would be inappropriate even to consider granting such relief in the present case, at least in that unqualified form. It is only fair that I should emphasise that the actual present office-holder, Mr. Simon Coveney T.D., had no personal involvement in the appointments made in respect of this competition or in respect of any of the decisions which are the subject matter of these proceedings.

12. It is true that by virtue of s. 2 of the Ministers and Secretaries Act 1924 the Minister is a corporation sole so that he is legally answerable for all the actions of the entire cohort of civil servants working in his Department. It is equally clear that the Minister as an individual member of the Government is responsible to Dáil Eireann (Article 28.4.1) and as a member of that Government must also take collective responsibility "for the Departments of State administered by the members of the Government" (Article 28.4.2). But to a large extent these are legal fictions created by the Constitution and the law to ensure that the executive branch and its civil service will be *politically responsible* to the Dáil, thus preserving a key element of democratic responsibility. In addition, by deeming the Minister to be a corporation sole, legal continuity is preserved and there is, furthermore, a legal person answerable at law "for a wrongful act done by him as such Minister, or by his orders or direction" : see *Carolan v. Minister for Defence* [1927] I.R. 62, 69, *per* Sullivan P.

13. But legal fictions can sometimes hinder precise analysis as well as obscuring real facts. The office holder, Mr. Coveney, knew nothing of these events and the theory of the law makes the Minister responsible only for the purposes of democratic accountability and civil liability. Thus, the Minister could not dispense with his constitutional duty and obligation to account to the Dáil for the actions of his civil servants even though he might have had no personal knowledge of the events. Nor would the Minister's own personal knowledge be generally relevant to the question of whether the Minister was legally responsible for some wrongful act giving rise to civil liability.

14. But such are the limits of this legal fiction and it can have no real application where it is sought to make the office holder criminally responsible for the actions of his Department. Here it may be recalled that criminal responsibility is normally personal to the individual and as the Supreme Court made clear in *Re Article 26 and the Employment Equality Bill 1997* [1997 2 I.R. 321, 373, *per* Hamilton C.J., the Oireachtas cannot constitutionally ascribe criminal liability on some imputed or vicarious basis save where the offences are essentially regulatory in nature and are designed to ensure that a licence holder complies with appropriate standards in relation to environmental and consumer protection. It is quite clear that deliberate contempt of court – such as is in effect alleged here – is of a quite different order to the type of technical, regulatory offence contemplated in the *Employment Equality Bill* reference.

15. Here the applicants freely admit that the Minister had no personal involvement in the filling of the posts. In these circumstances, there could be no question of granting the leave to issue contempt proceedings against the Minister *personally*. It is, of course, true to say that the rule of law must prevail and the members of the executive are not – and could not be allowed to be – above the law in an appropriate case. But it may be suggested that for the most part a declaration to the effect that the Minister (or his or her officials) have breached a court order will generally suffice and that mechanisms to deploy the remedies of attachment and committal should generally be reserved for the rarest of cases.

16. For all the reasons I have endeavoured to set out, it would be inappropriate to grant leave on the facts of this case either as against the Minister personally or in his corporate persona as a corporation sole.

Whether there was an actual breach of the undertaking

17. It is clear on the evidence that there was a fundamental misunderstanding between the parties. The applicants considered that the undertaking extended to all appointments, whether external or internal. From their perspective this was perfectly understandable given that the undertaking extended to the advertised internal positions, but was also expressed to apply "or otherwise". They naturally construed the undertaking as extending to all appointments to AAI posts, irrespective of whether the competition was an internal competition or a completely open competition.

18. For their part, however, the officials in the Department had a completely different understanding of the issue. The applicants had not challenged their exclusion from the external competition and, hence, the undertaking was not understood as extending to external competitions as this would have seemed pointless. A further consideration was that the appointment process for the external posts – which was handled by the Public Appointments Commission – was already underway and it was not within the Department's power to halt this process, at least at this juncture. I think it clear from the evidence that the Department would never have contemplated even giving an undertaking had it been understood that it extended to the appointment of the persons selected from the open external competition.

19. In many ways this case bears a striking similarity to *Mespil Ltd v. Capaldi* [1986] ILRM 373. In that case both the plaintiff company and a related company had sued the defendants in two separate, but related, proceedings. One of those actions was compromised by a hastily drafted agreement, the terms of which were not fully reduced to writing as between counsel. It later transpired that one of the parties considered the settlement had resolved all the proceedings between the parties, whereas as the other party considered that it was a full and final settlement only of one set of proceedings.

20. In these circumstances the Supreme Court held that the settlement was a nullity by reason of mutual mistake. While fully acknowledging the different context to the undertaking given in these proceedings to this Court, the words of Henchy J. nevertheless have a clear resonance and importance for the present case as well. He first said:

> "No blame is to be attributed to the two and able and experienced counsel in question who, in the limited time available to them on the morning of the hearing, sought to achieve a binding settlement in accordance with their respective instructions. But, not having time to reduce the terms of settlement to full and unambiguous written expression, the heads of settlement which they authenticated with their signatures were not sufficiently specific to exclude ambiguity. The result was that the two counsel left court that day, each with a genuine but opposite belief as to what the settlement had achieved."

21. One may pause here to observe that exactly the same may be said of the present case. The applicants understood that the undertaking extended to both internal and external competitions, whereas the Department understood that the undertaking extended to internal competitions only.

22. Henchy J. went on then to articulate a principle which also has relevance to the present case in as much as the undertaking in the present case was, in effect, a contractual agreement offered to the court:

> "It is of the essence of an enforceable simple contract that there be consensus *ad idem*, expressed in an offer and

> an acceptance. Such a consensus cannot be said to exist unless there is a correspondence between the offer and the acceptance. If the offer is made by the person in a fundamentally different sense from that which is tendered by the offeror and the circumstances are objectively such as to justify such an acceptance, there cannot be said to be the meeting of minds which is essential for an enforceable contract. In those circumstances the alleged contract is a nullity."

23. Having articulated this principle, Henchy J. then went on:-

> "applying these principles to the present case, it is clear that the form of the written consent, viewed in terms of its wording and of the negotiations leading up to it, was capable of justifying the opinion of counsel for the defendants that the settlement was adequate to cover all outstanding complaints between the parties."

24. One might also pause here to say that that is certainly true in the present case. Counsel for the applicants could perfectly reasonably have considered the words "or otherwise" to cover not only the situation of the appointment of internal candidates but also the appointment of external candidates by reason of open competition. The position of the other party must, of course, also be considered. On this point, Henchy J., having examined the position of the defendants in *Mespil,* then said:

> "It is also to be said, on an objective consideration of the relevant circumstances, that counsel for the plaintiffs is justified in thinking that the settlement is limited to matters in dispute in the two actions then being settled. In those circumstances of latent ambiguity and mutual misunderstanding it must be held there was no real agreement between the parties. The two counsel who negotiated the settlement were understandably at crossed purposes. The result was that the written agreement expressed in the written consent was in fact no agreement. There was a fundamental misunderstanding as to the basis of the settlement. It is clear the defendants would not have agreed to make the payments required by the settlement if they knew that the plaintiff could seek to oust them from the premises by means of other proceedings. It is equally clear that counsel for the plaintiffs would not have signed the settlement if he knew it would be treated by the defendants as an absolution of them from all complaints by the plaintiffs. Objectively viewed, the situation justified the misapprehension on each side. The result is that, for want of correspondence between offer and acceptance, the unenforceable contract was made. The alleged settlement whether in the interpretation of the plaintiffs or in that of the defendants must be held to be a nullity."

25. These principles also clearly apply to the present case as well. While just as in *Mespil*, no blame can be attributed to either party, it is plain that the parties were entirely at cross-purposes so far as the appointment of external candidates is concerned. In these circumstances, applying the principles articulated in *Mespil,* the undertaking must be adjudged to be a nullity so far as the external competition is concerned.

Conclusions

26. It follows, therefore, that there has been no breach of any unenforceable undertaking in the present case because, for the reasons I have ventured to set out, there was no mutual agreement regarding the scope of the undertaking. The parties were at cross purposes with regard to the scope of their agreement. It follows, accordingly, beyond the commitment not to appoint candidates from the internal competition (on which the parties were in fact agreed and which was in fact honoured), as there was no true understanding so far as any possible wider application to the external competition, the undertaking was rendered a nullity by reference to the *Mespil* principles.

27. It is only fair to say in conclusion that while neither party are to blame for this misunderstanding, the applicants were also within their rights to object to what occurred. I accordingly propose that this consideration will be reflected, to some degree at least, in any order for costs which I am later called upon to make.