Neutral Citation Number: [2007] IEHC 98

THE HIGH COURT

[2006 No. 163 SP]

IN RE THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003

BETWEEN

THE MINISTER FOR FINANCE

PLAINTIFF

AND
UNA McARDLE

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 22nd March, 2007.

The proceedings

1. In these proceedings the plaintiff employer seeks an order setting aside the determination of the Labour Court dated 4th April, 2006, disallowing the appeal of the State Laboratory and affirming the decision of the Rights Commissioner, on a complaint by the defendant employee under the Protection of Employees (Fixed-Term Work) Act 2003 (the Act). Although this is not stated on the special endorsement of claim on the special summons, these proceedings are brought under s. 15(6) of the Act, which provides that a party to proceedings before the Labour Court under that section may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive. At the hearing before this court there was a dispute as to what matters were properly before the court. Counsel for the defendant referred the court to the judgment of Finlay C.J. in *Bates v. Model Bakery Limited* [1993] 1 I.R. 359. In his judgment, the former Chief Justice was addressing the issue of the proper procedure to be adopted on an appeal to the High Court on a question of law under s. 39 of the Redundancy Payments Act 1967. What prompted his observations was that evidence had been adduced before the High Court on the appeal which had not been before the first instance and primary decision maker, the Employment Appeals Tribunal. In the passage referred to by counsel for the defendant the Chief Justice stated that the appropriate procedure is that the summons provided for by the Rules of the Superior Courts 1986 should state the decision being appealed against, the question of law which it is suggested was in error and the grounds of appeal and it should be supported only by an affidavit or affidavits exhibiting the determination of the Employment Appeals Tribunal, including any findings of fact or recital of evidence made by it, and, in effect, identifying the parties and the grounds on which the aggrieved party seeks a determination of the question of law.

2. The format of the special endorsement of claim in this case is that it contains a prayer for relief only. As I have stated, an order is sought setting aside the determination of the Labour Court. That is followed by paragraphs 2 – 9 inclusive in which declarations are sought that the Labour Court erred in law in making or failing to make certain conclusions that is to say:

> Concluding that the defendant was entitled to rely on an established civil servant with whom she was engaged on like work as a comparator for the purpose of s. 6 of the Act;
>
> Concluding that the defendant was entitled to the same conditions of employment, including pension entitlements and access to a career break, as an established civil servant;
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> Concluding that the defendant was entitled to rules and procedures for termination of her fixed-term contract during the currency of its tenure not less favourable than those applicable to the termination of the contract of employment of an established civil servant;
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> Concluding that on attaining a contract of indefinite duration the defendant was entitled to the same terms and conditions of employment, including tenure and matters ancillary and related thereto, as an established civil servant;
>
> Concluding that the defendant was subject to less favourable treatment in being denied the opportunity to participate in a competition for a permanent vacancy;
>
> Failing to conclude that the less favourable treatment of which the defendant complained, and which the plaintiff denied, was justified on objective grounds within the meaning of s. 7 of the Act;
>
> Failing to allow the appeal of the State Laboratory against the decision of the Rights Commissioner; and
>
> Determining the sum of €10,000 constituted just and equitable compensation for the breach, which was denied, of s. 10 of the Act.

3. Having regard to the manner in which the special endorsement of claim was formatted, it is necessary for the court to extrapolate the questions of law at issue and the grounds on which it is suggested they were incorrectly decided by the Labour Court from paragraphs 2 – 9.

4. The only evidence before the court is an affidavit of Pat McBride, a civil servant in the plaintiff's department, who proved that the State Laboratory is under the aegis of the Department of Finance and exhibited the decision of the Rights Commissioner referred to in the special summons, the notice of appeal against that decision to the Labour Court, the determination of the Labour Court and the written submissions on behalf of the plaintiff put before the Labour Court, including supplemental submissions submitted after the hearing in the Labour Court. In reply there was a short affidavit from the defendant's solicitor, Darach Connolly, which merely asserted that the Labour Court did not err in law.

The Act

5. The Act, which came into force on 14th July, 2003, gives effect in this jurisdiction to Council Directive 99/70/EC of 28th June, 1999 on the Framework Agreement on Fixed-Term Work (the Directive).

6. Section 6(1) of the Act provides that, subject to subs. (2) and subs. (5), which is not relevant, a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable permanent employee. The significance of that provision can only be appreciated by reference to the specific meanings which are ascribed to the terms used in it in the definition section, s. 2. First, the definition of "employee" specifically provides that, for the purposes of the Act, a person holding office under, or in the service of, the State (including a civil servant within the meaning of the Civil Service Regulation Act 1956) shall be deemed to be an employee employed by the State or Government, as the case may be. Secondly, the expression

"fixed-term employee" is defined as meaning a person having a contract of employment where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event. Thirdly, the expression "a permanent employee" is defined as meaning an employee who is not a fixed-term employee. Fourthly, "conditions of employment" are defined as including -

> "conditions in respect of remuneration and matters relating thereto (and, in relation to any pension scheme or arrangement, includes conditions for membership of the scheme or arrangement and entitlement to rights thereunder and conditions related to the making of contributions to the scheme or arrangement)."

7. Finally, the expression "comparable permanent employee" is to be read in accordance with s. 5.

8. The elements in s. 5 which are relevant for present purposes are that it is provided in subs. (1) that an employee is a comparable permanent employee in relation to a fixed-term employee if -

> "the permanent employee and the relevant fixed-term employee are employed by the same employer or associated employers and one of the conditions referred to in subs. (2) is satisfied in respect of those employees…"

9. One of the conditions stipulated in subs. (2) is that -

> "both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work…"

10. The Labour Court used the term "like work" as shorthand for the effect of s. 5(2). I propose to adopt the same approach.

11. Section 7, which deals with objective grounds for less favourable treatment, provides in subs. (1) that a ground shall not be regarded as an objective ground for the purposes of any provision of Part 2 (sections 5 – 13) -

> "unless it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed-term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose."

12. In essence, sub-s. (2) provides that what would otherwise be a discriminatory contractual term shall be regarded as justified on objective grounds if the overall "package" of terms of the fixed-term employee is at least as favourable as the overall "package" of the comparable permanent employee.

13. Section 8 requires that a fixed-term employee be furnished with a written statement of the objective condition determining the contract both at the commencement of the employment and on renewal of the fixed-term contract. In the case of the latter, the employee must be informed of the objective grounds justifying the renewal and the failure to offer a contract of indefinite duration at the latest by the date of the renewal.

14. Although it was submitted on behalf of the plaintiff that s. 9 is not relevant to the issues before the court, which is a topic to which I will return, in order to understand how those issues evolved, it is necessary to refer to it at this juncture. Subsection (1) provides that, where on or after the passing of the Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed-term of no longer than one year. Subsection (3) provides that where any term of a fixed-term contract purports to contravene subs. (1), the term shall have no effect and the contract shall be deemed to be a contract of indefinite duration.

15. Section 10 deals with information on employment and training opportunities. Subsection (1) of s. 10, which is in issue here, provides as follows:

> "An employer shall inform a fixed-term employee in relation to vacancies which become available to ensure that he or she shall have the same opportunity to secure a permanent position as other employees."

16. The provisions in relation to enforcement are contained in Part 3 of the Act. Section 14 provides for complaints to a rights commissioner, who may, *inter alia*, declare whether the complaint was or was not well founded, require the employer to comply with the relevant provision, and require the employer to pay to the employee compensation of such amount, if any, as is just and equitable having regard to all the circumstances, but not exceeding two years remuneration in respect of the employee's employment. Section 15 provides for an appeal from a decision of a rights commissioner to the Labour Court.

The facts in relation to the defendant's employment

17. The defendant commenced employment in the State Laboratory in her capacity as a laboratory technician in March, 2000 on a fixed-term contract for one year. The purpose of her employment was to assist in the analysis of samples of drivers suspected to have been under the influence of drugs. Her contract was renewed on an annual basis thereafter until 21st March, 2004. At that point, as was accepted before the Rights Commissioner, her contract was not managed appropriately. It was not until 31st May, 2005, that she was furnished with a renewed contract, which, in the language of the Labour Court, purported to be in respect of the period from 22nd March, 2004 until 21st March, 2005. As was recorded in the determination of the Labour Court, the plaintiff accepted that the contract furnished on the 21st May, 2004 did not comply with the requirements of s. 8 of the Act and that the defendant became entitled to a contract of indefinite duration with effect from 22nd March, 2004. The plaintiff contended in this Court that it did not appeal the decision of the Rights Commissioner awarding the plaintiff €4,000 in respect of contraventions of ss. 8 and 9 of the Act. Therefore, the plaintiff contended that the provisions of ss. 8 and 9 were not in issue before this Court. The plaintiff asserted that the position in relation to the defendant's employment was that she had been employed on a contract of indefinite duration since 22nd March, 2004, but it did not accept that that was a consequence of the effect of s. 9(3).

18. As appears from the Rights Commissioner's determination, the defendant's trade union, IMPACT, was informed by letter dated 8th July, 2004 from the plaintiff's department that the defendant was governed by the same terms of employment as other permanent employees in respect of "annual leave, sick leave, pay, hours of attendance etc.". The terms of the defendant's employment which remained at issue and were the subject of the complaint to the Rights Commissioner were pension, access to career breaks and tenure. Apparently, the defendant claimed before the Rights Commissioner that she was entitled to a contract of indefinite duration from July, 2004.

19. An issue also arose in relation to a vacancy for a permanent position. On 7th October, 2004, a circular issued internally in the State Laboratory inviting applicants for appointment as a chemist. The defendant had the service and academic qualifications stipulated for eligibility for the competition. However, she was informed by letter of 4th November, 2004, that applications for the position were invited from "established (i.e. permanent) officers only". She was informed that her status remained "unestablished" pending the outcome of a hearing in relation to the Act, in the Labour Court. On that basis her application for the appointment was deemed inadmissible.

The defendant's complaint
20. The defendant made her complaint to the Rights Commissioner on 10th January, 2005, alleging contraventions of ss. 6, 8, 9 and 10 of the Act. The plaintiff contended that the issues which arose under ss. 8 and 9 are not before this court. The issues raised under s. 6 in relation to terms and conditions concerned pension, access to career breaks and tenure. The issue raised in relation to s. 10 was the fact that the defendant was precluded from applying for the appointment to the permanent position as a chemist.

21. The complaint was heard by the Rights Commissioner on 24th April, 2005 and she issued her written decision on 20th September, 2005. That decision was appealed to the Labour Court on 4th November, 2005. The hearing before the Labour Court took place on 23rd February, 2006. The Labour Court gave its determination on 4th April, 2006.

Issues before this Court
22. The issues raised on the endorsement of claim on the special summons mirror the approach which the Labour Court adopted in its consideration of the issues before it. From considering the endorsement of claim and the determination of the Labour Court side by side it appears that the issues for this Court are whether the Labour Court, in reaching its conclusions on the following questions, took an erroneous view of the law:

1. As regards s. 6 of the Act, whether:

   (a) the defendant was entitled to rely on an established civil servant with whom she was engaged on like work as an appropriate comparator; and

   (b) whether the defendant was entitled to the same conditions of employment as an established civil servant, including -

      (i) pension entitlements,

      (ii) access to career break, and

      (iii) tenure, in the sense that she was entitled to rules and procedures for termination of her fixed term contract not less favourable than those applicable to an established civil servant.

2. The meaning of the term "a contract of indefinite duration" for the purposes of s. 9 of the Act and whether, as regards tenure, it means that the defendant, in the words of the Rights Commissioner, which were adopted by the Labour Court, –

   "… has an expectation that subject to the normal date of retirement in the employment, she will be retained in employment and will not be dismissed without there being any good reason such as misconduct or unfitness for her position, or other compelling or unavoidable circumstance… dismissal [being] achieved by the application of the relevant Statute as the case may be by reference to the comparable permanent employee, in this case, an established civil servant."

3. As regards s. 10(1), whether the defendant was subjected to less favourable treatment by being precluded from applying for the appointment as chemist and, if so, whether €10,000 represented just and equitable compensation for the contravention of s. 10(1).

4. As regards s.7, whether any less favourable treatment found to exist was justified on objective grounds.

Issues not properly before the court?
23. A number of issues were canvassed by the plaintiff on this appeal which counsel for the defendant contended were not properly before this Court.

24. First, it was submitted on behalf of the plaintiff that the defendant's complaint to the Rights Commissioner was out of time. A time issue did arise before the Rights Commissioner, but it arose in this way. Before the Rights Commissioner the defendant contended that she was entitled to rely on the principle of direct effect in relation to the Directive. The Rights Commissioner in her decision held that the principle of direct effect was applicable. However, she held that the beginning of the limitation period within which the defendant could bring a complaint on the basis of that principle was the date on which the Act came into force, that is to say, 14th July, 2003. More than six months had elapsed from that date when the defendant presented her complaint. Therefore, she was outside the time limit prescribed in s. 14(3) of the Act. The Rights Commissioner held that the defendant was not entitled to an extension of time under s. 14(4). Therefore, she denied the plaintiff's complaint insofar as it was based on the principle of direct effect.

25. The plaintiff's appeal to the Labour Court included a ground that the Rights Commissioner erred in law in determining that she had jurisdiction to decide whether the Directive had "direct effect". That ground of appeal was not pursued before the Labour Court, there being no cross appeal by the defendant on the time bar finding of the Rights Commissioner. Accordingly, the Labour Court did not have to consider, and made no determination on, whether the defendant's complaint was out of time.

26. In my view, that issue is not properly before the court.

27. Secondly, a more fundamental submission made on behalf of the plaintiff was that the Rights Commissioner had no jurisdiction to entertain the complaint as at the date it was lodged because at that point in time the defendant was not employed on a fixed-term contract but had obtained the benefit of a contract of indefinite duration with effect from March, 2004. It was submitted that, given that the defendant had ceased to be employed on a fixed-term contract since March, 2004, no contravention of the Act could have been committed within the six months preceding the presentation of her complaint on 10th January, 2005. Put another way, the

plaintiff's argument was that the defendant had no locus standi to rely either on the Directive or the Act after 22nd March, 2004 because she had ceased to be a fixed-term worker.

28. As a matter of fact, the position when the defendant presented her claim to the Rights Commissioner was that she was in the employment of the State Laboratory on foot of the document which was issued on 31st May, 2004, which, as the Labour Court recorded, purported to be in respect of the period from 22nd March, 2004 until 21st March, 2005, which she had executed. It is true that at the hearing before the Rights Commissioner the concession was made by the plaintiff that the defendant was employed under a contract of indefinite duration which had commenced in March, 2004, although counsel for the defendant told the court that that concession was only made two days before the hearing. It is reasonable to infer that it was the complaint which provoked the concession. Accordingly, there can be no question but that the Rights Commissioner had jurisdiction to entertain the complaint as of 10th January, 2005.

29. More importantly, no case appears to have been made before the Rights Commissioner that her jurisdiction was spent once the concession was made on the basis that issues in relation to the terms and conditions of a contract of indefinite duration are not within the ambit of the Act. Nor was that case made before the Labour Court. Counsel for the defendant submitted that it is not open to an appellant on an appeal on a point of law from a determination of the Labour Court under s. 15(6) of the Act to present arguments as to the legal position which were not addressed to the Labour Court, citing two authorities on appeals from the Information Commissioner: the decision of this Court (McKechnie J.) delivered on 11th May, 2001 in *Deely v. The Information Commissioner*; and the decision of this Court (Smyth J.) delivered on 31st May, 2005 in *South Western Area Health Board v. Information Commissioner*. In my view, that submission must be correct in point of principle, at any rate where the legal issue is whether the first instance decision maker (in this case the Rights Commissioner) or the appellate decision maker (in this case the Labour Court) had jurisdiction to make the relevant decision. Accordingly, I consider that the lack of *locus standi* ground is not properly before the court.

30. Apart from the considerations outlined above, the position is that neither the time bar ground nor the locus standi ground was raised on the endorsement of claim on the special summons.

Section 6: conditions of employment

31. The Labour Court summarised the combined effect of sub-ss. (1) and (2) of s. 5 as being that a comparable permanent employee for the purposes of the Act is a permanent employee employed by the same employer as the complainant, who is engaged in like work with the complainant. The Labour Court followed the decision of this Court (O'Sullivan J.) in *Wilton v. Steel Company of Ireland* [1999] E.L.R. 1, where it was held that, for the purposes of the Anti-discrimination (Pay) Act, 1974, an employee is entitled to choose his or her comparator. *Apropos* of the position of the defendant, the Labour Court stated that it was accepted that she was engaged at all material times in doing the same job as permanent civil servants who were designated as established, and it was also accepted that there were no other civil servants employed by the plaintiff engaged in like work with her, who were designated unestablished. The Labour Court found that the defendant and a number of established civil servants performed the same work under the same or similar conditions and each was interchangeable with the other in relation to work. Therefore, the Labour Court found that the established civil servants were comparable permanent employees in relation to the defendant within the meaning of s. 5. On that basis, the Labour Court concluded that the defendant, as a fixed-term employee, was entitled to the same conditions of employment as her nominated comparators who were established civil servants (except, of course, in relation to the duration of her contract).

32. In this Court, counsel for the plaintiff did not dispute that the defendant was entitled to choose her comparator, but it was submitted that she had to choose a comparator for the purposes of the Act. He submitted that the difference in treatment between the defendant and her chosen comparator of which she complained was not due to her fixed-term status, but to her status as an unestablished civil servant. It was submitted that the discrimination of which she complained was not within the ambit of the Act. I note from the written submissions which the plaintiff put before the Labour Court (para. 3.2) that the plaintiff relied on submissions which had been made to it previously in an appeal on a decision of a rights commissioner in relation to complaints under the Act by 91 IMPACT members against various government departments (the 91 Claimants case). Those submissions were not put before this Court, although the Labour Court made it clear in its determination that it took full account of the submissions made in the earlier case.

33. Counsel for the defendant submitted that the Labour Court was correct in holding that she was entitled to select as a comparator an established civil servant working in the State Laboratory. In relation to the application of s. 5 to her, para. (1)(a) was complied with, in that she and her comparator had a common employer and the Labour Court had found as a fact, and there was no appeal against the finding, that she complied with para. (a) of sub-s. (2). It was submitted that in the Act comparability is defined not by reference to status but by reference to having the same employer and being engaged in like work. Therefore, it was submitted that the plaintiff's contention that the Labour Court fell into error was misconceived.

34. I can see no error of law in the conclusion of the Labour Court that an established civil servant in the State Laboratory, who was engaged in like work with the defendant was a "comparable permanent employee" for the purposes of s. 6 because, on the basis of the unchallenged findings of fact made by the Labour Court, such person fulfilled the criteria set out in s. 5 for a comparable permanent employee vis-à-vis the defendant as a fixed-term employee. The Act expressly provides that the term "employee" includes an established civil servant. However, I emphasise that the finding made by the Labour Court was for the purposes of identifying the minimum conditions of employment to which the defendant was entitled as a fixed-term employee in accordance with s. 6. The two specific terms in issue under s. 6 were pension arrangements and access to a career break. As the Labour Court pointed out, the expression "conditions of employment" covers matters relating to pension arrangements. The Labour Court found that, for the purposes of s. 6, the defendant was, at all material times, entitled to the same pension arrangements as those applicable to an established civil servant, being a comparable permanent employee. In my view, the Labour Court did not take an incorrect view of the law in reaching that conclusion. As regards access to a career break, in the summary of its findings, the Labour Court stated that the defendant, as a fixed-term employee, was entitled to the same access to a career break as a comparable permanent employee being an established civil servant. Again, it does not seem to me that the Labour Court took a wrong view of the law in reaching that conclusion, although I would surmise that the implementation of that finding in relation to a fixed-term employee would have practical implications. In any event, it would appear to be a moot issue, in the sense that there was no evidence that the defendant sought and was refused a career break.

35. The Labour Court considered the topic of tenure in the context of s. 6 and, accordingly, in the context of the conditions governing the termination of the employment of the fixed-term employee during the fixed term. It stated that, if the grounds upon which a fixed-term employee's contract can be terminated during its tenure are a condition of employment they must, in accordance with s. 6, be no less favourable than those applicable in the case of a comparable permanent employee. Having considered the terms of the defendant's contract, which is not before this Court, it found that the circumstances in which the defendant's fixed-term contract of employment could be terminated during its tenure formed part of her conditions of employment, and, on that basis, it held

that such conditions could not be less favourable than those applicable in the case of an established civil servant. I find it unnecessary to express any view on those findings because they are postulated on a situation which is entirely hypothetical and moot. The reality of the situation is that the defendant's last fixed-term contract terminated by effluxion of time on the basis of the plaintiff's concession on 21st March, 2004, following which it is conceded that she was employed on a contract of indefinite duration. The question of the termination of the defendant's fixed-term contract during its tenure did not, and cannot now, arise.

Section 9: contract of indefinite duration

36. In this Court it was submitted on behalf of the plaintiff that the jurisdiction of the Rights Commissioner and, presumably, the appellate jurisdiction of the Labour Court, did not extend to determining the content of a contract of indefinite duration to which an employee is entitled. That case was not made before the Labour Court. The case made before the Labour Court was that the Rights Commissioner had erred in defining a contract of indefinite duration in the manner she did and in determining, in effect, that the defendant enjoyed tenure on the same basis and subject to the same procedure as established civil servants. That was the position adopted in the plaintiff's written submissions before the Labour Court, where the written submissions in the 91 Claimants case were relied on. The plaintiff's contention before the Labour Court was that the contract of indefinite duration to which the plaintiff was entitled was precisely that under which she was employed as a fixed-term employee save that it no longer provided for determination by reference to objective conditions, such as reaching a specific date. The plaintiff accepted that the Labour Court could seek the assistance of the European Court of Justice on the definition of "a contract of indefinite duration", if it considered that it required it.

37. In its analysis of the meaning of the expression "contract of indefinite duration" in sub-s. (3) of s. 9, the Labour Court pointed out that the expression is to be found in the Framework Agreement, as well as in the Act. Therefore, s. 2(3), which provides that a word or expression that is used in the Act and is also used in the Framework Agreement has, unless the contrary intention appears, the same meaning in the Act as in the Framework Agreement, comes into play. The Labour Court rejected submissions made on behalf of the plaintiff that a contract of indefinite duration is terminable on reasonable notice in reliance on a number of decisions of this Court (*Walsh v. Dublin Health Authority* (1964) 98 I.L.T.R. 82; *Dooley v. Great Southern Hotel* [2001] E.L.R. 340; and *Sheehy v. Ryan* [2004] 15 E.L.R. 87), stating that they were decisions which were concerned with what constitutes a permanent position at common law and therefore could not be relied upon in interpreting an expression which must have a uniform Community-wide meaning.

38. The Labour Court explained the effect of s. 9(3) as follows:

> "That section applies to a situation where an employee is given a renewed fixed-term contract in contravention of sub-sections (1) or (2). In such a case sub-section (3) would operate so as to render void, ab initio, the term of the contract which purports to provide for its expiry by effluxion of time, or the occurrence of an event. Hence, by operation of law the offending term would be severed from the contract thus altering its character from one of definite duration, or fixed term, to one of indefinite duration. However, the remaining terms and conditions of the contract would be unaffected including terms as to pensionability and termination, which, as already observed, would have had to be aligned with those of a comparable permanent employee in accordance with section 6.
>
> In other words, the expression 'contract of indefinite duration' should be understood in contradistinction to a contract of definite duration or a fixed-term contract. The terms and conditions of a contract of indefinite duration which comes into being by operation of s. 9(3) must therefore be the same as those in the fixed-term contract from which it is derived, as modified by s. 6, in all respects other than its fixed duration. Obviously, these terms will vary from one employment to another and every case will be decided mainly on its own facts."

39. The position adopted by counsel for the plaintiff in this Court was that he did not disagree with the conclusion of the Labour Court set out in the second paragraph of the above quotation. However, he contended that s. 9(3) did not come into play in relation to the defendant and that there had been no "deeming" that a contract of employment in relation to her was a contract of indefinite duration. As I understand the reasoning behind this contention it is that, as of 22nd March, 2004, the State Laboratory could have renewed the defendant's fixed-term contract on that one occasion for a fixed term of no longer than one year under s. 9. However, by virtue of the provisions of s. 8(2) there was a statutory obligation on the State Laboratory to inform the defendant in writing at latest by 22nd March, 2004 of the objective grounds justifying the renewal on a fixed-term basis. This was not done, in contravention of the provision. Although on 31st May, 2004 the defendant was given and accepted a contract, which, as the Labour Court described it, "purported" to be in respect of the period from 22nd March, 2004 until 21st March, 2005, the legal position, as subsequently conceded by the plaintiff was that from 22nd March, 2004 the defendant had, by operation of law, a contract of indefinite duration. That contract of indefinite duration was terminable on reasonable notice. On that basis, it was contended that the Labour Court erred in law in adopting the finding of the Rights Commissioner that any dismissal of the defendant as employed under a contract of indefinite duration could only be effected in the same manner as the dismissal of her chosen comparator, an established civil servant.

40. The position adopted by counsel for the defendant in this Court was that the fact that the comparable permanent employee was an established civil servant was irrelevant, if that person was the appropriate comparator, in reliance on the decision of O'Sullivan J. in the *Wilton* case, and the decision of the Employment Appeal Tribunal in the United Kingdom in *Ainsworth v. Glass Tubes and Components Limited* [1977] I.C.R. 347, which was followed by O'Sullivan J. The defendant, understandably, did not reject the plaintiff's concession that she had a contract of indefinite duration from 22nd March, 2003. As to how her entitlement to a contract of indefinite duration from that date arose, in this Court the matter was put no further on her behalf than it was because the plaintiff had not complied with s. 8(2) of the Act.

41. In its determination the Labour Court described the meaning to be given to the expression "a contract of indefinite duration" as a central issue in the case before it. It is clear from the written submissions placed before the Labour Court that the plaintiff's legal representatives engaged in that issue before the Labour Court. In the circumstances, it seems to me that, that being the case, the plaintiff cannot be heard now to contend that it was not in issue. The only basis on which it could have been in issue was on the basis that s. 9(3) operated in relation to the defendant. Whether the Labour Court took an incorrect view of the law in defining the expression it seems to me must be approached on the assumption that when both the Rights Commissioner and the Labour Court were considering the issue the defendant held under a contract of employment of indefinite duration by virtue of s. 9(3).

42. If I have understood the analysis of the defendant's contractual position after 22nd March, 2004 as put before this Court by the plaintiff properly, I do not accept that just because the plaintiff made the concession in April, 2005 that the plaintiff had a contract of indefinite duration with effect from 22nd March, 2004, that such contract existed by operation of law independently of the Act. The judgment of Clarke J. in *Murgitroyd & Co. Ltd. v. Barry Purdy* [2005] I.E.H.C. 159, delivered on 1st June, 2005, which was relied upon by counsel for the plaintiff, in my view, is not at all apposite because the finding in that case was based on an inference as to what the implied agreement of the parties was. On the basis of the information put before this Court in relation to the relationship of the defendant and her employer both before and after 22nd March, 2004, which is based on the facts recited and found in the

decision of the Rights Commissioner and the determination of the Labour Court, there is no basis for inferring that the parties impliedly agreed that from 22nd March, 2004 the defendant would hold under a contract of employment which would be terminable on reasonable notice. On the other hand, I am not satisfied that it has been established that there is a nexus between a breach of s. 8(2) on 22nd March, 2004 and the creation of a contract of indefinite duration by operation of s. 9(3) in the absence of evidence as to whether the plaintiff could have complied with the former provision, although admittedly it did not comply. The upshot of these observations is that, in my view, there has been no proper analysis of the defendant's actual contractual position between 22nd March, 2004 and 24th April, 2005, when the hearing before the Rights Commissioner took place.

43. Assuming for present purposes that, as of 24th April, 2005 and thereafter, the defendant was employed under a contract of indefinite duration by virtue of the operation of s. 9(3), I think the Labour Court erred in law in concluding that the defendant acquired security of tenure similar to the security of tenure enjoyed by the comparator she chose, namely, an established civil servant. The general propositions stated by the Labour Court in the passage from its determination which I have quoted above, with which counsel for the plaintiff did not disagree, in my view, are correct. Where the Labour Court fell into error in adopting the Rights Commissioner's formulation of the defendant's entitlement to security of tenure was in accepting the underlying assumption of that formulation that the defendant's condition as to duration or tenure of her employment must not be less favourable than that of her chosen comparator. That underlying assumption seems to be predicated on the requirements of s. 6(1). However, s. 6(1) only outlaws discrimination in relation to the fixed-term employee's "conditions of employment" as defined, which, as the Labour Court correctly recognised when dealing with the issue of the appropriate comparator in the context of s. 6, does not cover the duration of the contract.

44. Section 9(3) only impacts on one aspect of a contract of employment when it comes into play: its duration. In legislating for that impact, the Oireachtas provided that it is deemed to be "a contract of indefinite duration" utilising an expression used in the Framework Agreement, which in the Act has the same meaning as it has in the Framework Agreement. In my view, the meaning of the expression "contract of indefinite duration" in s. 9(3) involves ascertaining its meaning in the Framework Agreement under European Union law, which, although this argument was not advanced, may mean that it is to be interpreted in accordance with national law. As this is the court of final instance on the issues before it by virtue of s. 15(6) of the Act, the question as to the meaning of the expression is a question which the court must refer to the European Court of Justice if it is requested to do so. I will return to this aspect of the matter later.

Section 10: preclusion of defendant from applying for vacancy.

45. The lack of a proper analysis as to the status of the plaintiff's contract of employment on 7th October, 2004, when the permanent post in issue was advertised, and on 4th November, 2004, when the defendant was told that her application for the post was not admissible, confounds this issue. In its determination the Labour Court embarked on its consideration of this issue on the basis that on 7th October, 2004 the defendant had become entitled to a contract of indefinite duration by operation of s. 9(3) of the Act. The plaintiff's position in this court was that she had become entitled to a contract of indefinite duration but not by operation of s. 9(3). I have already outlined my understanding of the plaintiff's reasoning as to how it came about, which I find unconvincing. Be that as it may, I did not understand it to be the plaintiff's case either before the Labour Court or in this Court that the defendant was not entitled to information in accordance with s. 10(1). Further, the plaintiff accepted that the obligation in s. 10(1) to inform employees of vacancies carries a concomitant obligation to allow the employees to apply for such vacancies.

46. The plaintiff's contention that there had been no breach of s. 10 contained two strands. The first was that s. 10 does not pre-empt an employer from stipulating the necessary qualifications for an appointment. In this case, the plaintiff, in line with the criteria for civil service promotions agreed with the civil service trade unions, applied an established service qualification applicable to all staff regardless as to whether they were employed on a contract of indefinite duration or a fixed-term contract. Any difference in treatment between the defendant and her chosen comparator was not due to her fixed-term status, but to her status as an unestablished civil servant and was objectively justified. The second was that the post advertised involved promotion to a higher level and was not a "vacancy" within the meaning of that word as used in s. 10. The Labour Court rejected both strands.

47. In relation to the first strand, the Labour Court reiterated the position it had adopted in *Aer Lingus v. A Group of Workers* [2005] 16 E.L.R. 261 in which it held that s. 10(1) did not provide for an unqualified and unconditional right to apply for a vacancy and admitting of no exceptions and not subject to a defence based on objective justification. However, the Labour Court did not accept the plaintiff's argument that the defendant's exclusion by reason of her status as an unestablished civil servant constituted an objective ground on which the treatment she complained of could be justified. The Labour Court's analysis was that, because of the stance adopted by the plaintiff in the letter of 4th November, 2004, that at the material time the defendant's status remained unchanged, the basis for the refusal to allow the plaintiff apply for the post flowed directly from her original status as a fixed-term employee. In this Court, it was submitted on behalf of the plaintiff that that was not so. In my view, the analysis of the defendant's position inherent in that finding is more in line with the reality of the situation as of 4th November, 2004 than the ex post facto position adopted by the plaintiff.

48. As regards the second strand, the plaintiff pointed to sub-s. (3) of s. 10 in support of the submission that sub-s. (1) does not cover promotion. Sub-s. (3) provides that, as far as practicable, an employer shall facilitate access by a fixed-term employee to appropriate training opportunities to enhance his or her skills, career development and occupational mobility. Section 10 replicates almost verbatim clause 6 of the Framework Agreement. It was submitted on behalf of the defendant that sub-s. (1) of s. 10 is framed in very broad terms. It is concerned with vacancies for permanent posts and it is not limited to vacancies for posts at the same level as the post occupied by the fixed-term employee. The Labour Court rejected the plaintiff's submission, finding that there was no meaningful distinction to be made in the context of s. 10 between vacancies at different levels within the employment. In my view, it did not take an erroneous view of the law in so doing.

49. A factor which appears to have influenced the decision of the Labour Court that there had been a breach of s. 10 was that, as is recorded in its determination, by a circular letter dated 2nd December, 2005, the plaintiff's department removed the restriction on established civil servants competing for promotional competitions and did so expressly in order to comply with the Act. The Labour Court commented that, if there was no justification for the restriction in December, 2005, it could not be seriously argued that there was a justification in 2004. The response to that comment on behalf of the plaintiff in this Court was that the type of vacancies to which s. 10(1) applies is a question of law in the resolution of which a change of policy is irrelevant. While, in their supplemental written submissions of March, 2006, which were put before the Labour Court after the hearing, counsel for the plaintiff dealt in some detail with changes in eligibility for promotion as evidenced in circulars issued by the plaintiff's department from July, 2005 and culminating with the circular letter of 2nd December, 2005, the thrust of the submissions appears to have been to put the changes into the context of the statutory requirements of the Public Service Management (Recruitment and Appointments) Act, 2004. I find that I am not in a position to assess whether the Labour Court's comments in relation to the circular letter of 2nd December, 2005, which is not before this Court, were justified. However, I am satisfied that the Labour Court did not take an erroneous view of the law in construing s. 10 and in applying it to the defendant's complaint and, in particular, in finding that there had been a breach of s. 10.

Compensation for breach of s. 10.
50. The error which the plaintiff asserts the Labour Court made in measuring the compensation to which the defendant is entitled for breach of s. 10 is the failure of both the Rights Commissioner and the Labour Court to hear any evidence on the financial loss which the defendant incurred by reason of the failure to allow her to participate in the competition. If compensation is to be greater than nominal, it was submitted that there should be an evidential basis for it. In general, one would not disagree with that proposition.

51. What the Labour Court stated in relation to the assessment of compensation was that, having regard to the defendant's qualifications and experience, she would have had a good prospect of being appointed to the promotional post had she been allowed to enter the competition. In those circumstances, the Labour Court found that the compensation awarded by the Rights Commissioner was just and equitable and there was no basis on which to interfere with the award.

52. In suggesting that that conclusion was correct, counsel for the defendant pointed to the fact that both the Rights Commissioner and the Labour Court are expert bodies. While neither had sworn evidence, they had evidence in the form of the circular advertising the vacant post and they had the defendant's contract and, on the basis of those documents, they were in a position to quantify in monetary terms her loss of opportunity. It was also suggested that, given that the State had accepted the award of €4,000 for the technical breach (a characterisation with which counsel for the plaintiff took issue) of s. 8(2), a figure of €10,000 did not appear disproportionate to compensate the defendant for the actual loss of opportunity.

53. Having regard to the material before this Court, there is no basis on which one can conclude that the compensation awarded by the Rights Commissioner was not just and equitable, which is the requirement of s. 14(2)(d) of the Act. I see no point in remitting the matter to the Labour Court to hear evidence on the issue of the plaintiff's loss.

Objective justification
54. Taking an overview of this matter, the defendant was treated less favourably than her chosen comparator in relation to eligibility for the position of chemist and the plaintiff did not accept that as a fixed term employee she was entitled to no less favourable treatment than her chosen comparator in relation to pension and access to career breaks. The plaintiff contended that there was an objective ground for that difference in treatment which was based on the difference between established and unestablished posts in the Civil Service. It is implicit in the conclusions I have already reached in relation to the pension and access to career breaks and vacancy issues that the difference of treatment was not objectively justified.

55. In its determination the Labour Court considered the issue of objective justification by reference to the submissions made in the 91 Claimants case, although it did point out that, having regard to the view it had taken, that a fixed-term employee is entitled to select an established civil servant with whom he or she is engaged in like work as a comparator for the purposes of the Act, the issues arising on the broad question of objective justification in the context of established and unestablished civil servants may be academic. The issues in the 91 Claimants case are not before the court and, as I have already stated, the submissions put before the Labour Court in that case are not before the court. In the circumstances I consider that it would not be appropriate to express any view on the broad question of objective justification.

Form of orders
56. For the reasons to which I have already adverted, I have found the process of these proceedings to be very unsatisfactory. First, the special summons procedure, as it was implemented, even though it may have followed the usual practice, lacked precision as to the points of law for determination by this Court and the grounds on which it was asserted the Labour Court erred. Secondly, the attempt to raise issues as to the jurisdiction of the Rights Commissioner and the Labour Court, which I am not satisfied were raised before either the Rights Commissioner or the Labour Court at all, and not merely without sufficient clarity as was suggested in this Court, tended to distract from what should have been the real issues before this Court. Thirdly, the "Banquo's ghost" like presence of the 91 Claimants case was a further source of distraction. Finally, the lack of a proper analysis of the defendant's contractual position at the material time, that is to say, before she presented her complaint on 10th January, 2005, as distinct from the *ex post facto* rationalisation advanced by the plaintiff when it acknowledged that it had been in breach of s. 8(2), prompts the rhetorical question whether this case is the proper vehicle for exploring the difficult questions of law which the application of the Act to the Civil Service raises. All of those concerns are heightened by the fact that the decision of this Court is final and conclusive.

57. On the basis of the conclusions set out earlier there will be an order finding that the Labour Court did not err in law in concluding that –

> (a) the defendant was entitled to rely on an established civil servant with whom she was engaged on like work as a comparator for the purposes of s. 6 of the Act,
>
> (b) the defendant was entitled to the same conditions of employment, including pension entitlements and access to a career break, but excluding tenure, as an established civil servant,
>
> (c) the defendant was subject to less favourable treatment in being denied the opportunity to participate in the competition for appointment as chemist and that, in consequence, the defendant was entitled to the sum of €10,000 as just and equitable compensation for the breach of s. 10 of the Act.

58. I will adjourn this matter so that the parties have an opportunity to consider whether they wish this court to refer the question of the meaning of "contract of indefinite duration" to the European Court of Justice.