[2020] IEHC 111

THE HIGH COURT

[2018 No. 291 MCA]

IN THE MATTER OF THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT, 2003 AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS ACT, 2015

BETWEEN

VALERIE COYLE

APPELLANT

AND

THE LABOUR COURT

RESPONDENT

AND

BLACKROCK COLLEGE

NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 11th day of February, 2020

Background

1. The appellant has been employed as the art teacher at the notice party (the college) since 1984. For much of that period she was the only art teacher working in the college and, thus, had the responsibility of preparing students for the Junior Certificate and Leaving Certificate examinations.

2. These proceedings concern the legal status of the appellant's employment. Over the 34 years, the appellant was employed on a series of fixed-term contracts, which were renewed at the start of the academic year and continued for the duration of that year for a period of some nine months. For the remaining three months, June, July and August, the appellant had to sign on for social welfare payments.

3. At the end of August, 2016, following discussions with the school principal of the college, the appellant consulted her Solicitor in relation to her employment status. The appellant maintained that, arising from her fixed-term employment status, she was entitled to redress pursuant to the terms of the Protection of Employees (Fixed-Term Work) Act, 2003 (the Act of 2003). The appellant maintained that she was entitled to a contract of indefinite duration.

4. The appellant's claim was resisted by the college, who maintained that she was a permanent employee notwithstanding the fact that she was not paid during the period of the school summer holidays. The position of the college was that the appellant was on a period of "*lay off*" during these months. It was common case between the parties that the appellant had to sign on for Job Seeker's Benefit for each summer for the months of June, July and August.

5. If the appellant is successful in establishing that she is entitled to a contract of indefinite duration, under the Act of 2003, this would result in significant benefits for her in the form of salary and working conditions.

6. The appellant's claim, in the first instance, was heard by an Adjudication Officer of the Workplace Relation Commission (WRC). The Adjudication Officer held that the appellant

was a "*fixed-term employee*", for the purposes of the Act of 2003. It was further found that the appellant had been treated in a less favourable manner than other teachers employed by the college. The Adjudication Officer directed that the college place the appellant on an annual salary covering the twelve months of the year, to be paid monthly. The appellant was also awarded compensation of €5,000 as the college was found to be in breach of s. 8 of the Act of 2003 in that it had failed to inform the appellant in writing of objective reasons governing the renewal of her fixed-term contract and the reasons why she was not being offered a contract of indefinite duration.

7. The college appealed the decision of the Adjudication Officer to the respondent. The respondent determined that the appeal should be conducted by way of preliminary hearing as to whether the appellant was or was not a *"fixed-term employee*" for the purposes of the Act of 2003. A "'*fixed-term employee' means a person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date …".*

8. In its decision of 5 June 2018, the respondent made a finding that at all times the appellant was a permanent employee of the college, did not come within the definition of a "*fixed-term employee*" and so was not entitled to rely on the provisions of the Act of 2003.

9. In the course of the proceedings, both before the respondent and before this Court, the appellant placed much reliance on the terms of a letter, dated 2 November 2017, written by the Solicitors instructed by the college during the hearing before the Adjudication Officer. This letter states, *inter alia*, the following: -

> "… our client acknowledges that your client is not employed by it during the summer months. It regards her as a permanent employee, however, as she has always had an expectation of returning to the school year after the summer holidays and, in fact, has always returned to the school …"

10. What is before this Court is an appeal against the determination of the respondent. This appeal is provided for in s. 46 of the Workplace Relations Act, 2015, which provides: -

> "A party to proceedings before the Labour Court under this Part may, not later than 42 days from the service on that party of notice of the decision of the Labour Court in those proceedings, appeal that decision to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive."

Jurisdiction of the High Court

11. As the appeal is on a point of law, this necessarily limits the jurisdiction of this Court. It is not a full appeal and this Court, if it was minded to do so, could not substitute its own decision for that of the respondent. However, the court is entitled to look at the procedures and processes followed by the respondent in making findings of fact. If these

are legally infirm then the appellant is entitled to succeed. I refer to the recent decision of the Supreme Court in *Nano Nagle School v. Marie Daly* [2019] IESC 63, where MacMenamin J. stated: -

> "109. But in the *Attorney General v. Davis*, The Supreme Court, 27th June, 2018 [2018] IESC 27, (O'Donnell J., McKechnie J., MacMenamin J., Dunne J., O'Malley J.), there is to be found a convenient summary of the present law, which is somewhat more nuanced than the judgment in *Henry Denny*. In a detailed judgment, McKechnie J., speaking for the Court, identified what may be regarded as issues of law which may be considered on a case stated. These included (i) findings of primary fact where there is no evidence to support them; (ii) findings of primary fact which no reasonable decision-making body could make; (iii) inferences or conclusions which are unsustainable by reason of any one or more of the matters listed above; or which could not follow or be deducible from the primary findings as made; or which were based on an incorrect interpretation of documents. (See para. 54). If not included in that category, I would add a determination which is *ultra vires*, where there is a failure of statutory duty. Undoubtedly, deference is due to an administrative tribunal acting within the scope of its duty. But, when there is a substantial failure of compliance with that statutory duty, a court must intervene. The determination did not comply with the statutory duty laid down in the Act."

Notice of Appeal

12. The notice of appeal in this matter lists some fourteen grounds. I will not set them out in full, but the central grounds appear to me to be as follows: -

(i) The respondent erred in law in determining that the appellant herein was a permanent employee and was not a fixed-term worker pursuant to the provisions of the Act of 2003;

(ii) The respondent erred in law in failing to determine the applicant's employment status on the basis of the actual contractual documents and the agreement that existed between the parties, which determined the applicant's employment status;

(iii) The respondent erred in law in incorrectly finding that the appellant had been placed on lay off during the months of June, July and August for the period of this claim, when it was the case that the appellant was signing on for Job Seeker's Allowance with no guarantee of being reemployed when the school holidays came to an end; and

(iv) The respondent erred in law in refusing to allow the appellant to give direct evidence in the course of the Labour Court hearing in relation to the nature of her employment relationship with the college and, specifically, in relation to the college's involvement in her application for social welfare and Job Seeker's

Allowance at the conclusion of each academic year during the period of the claim.

The determination of the respondent

13. The respondent determined whether or not the appellant met the definition of a "*fixed-term employee*" under the Act of 2003. The respondent in its decision states: -

> "The Court (the respondent) has given careful consideration to the evidence adduced in the written submissions and in the extensive oral submissions in the course of the hearing into this matter.
>
> Based on the evidence before it the court finds as follows:
>
> (1) The complainant (the appellant) was initially employed on a series of fixed term contracts of employment until she was employed on a permanent contract of employment in 2004/2005.
> (2) She was subsequently employed on a further fixed term contract of employment in 2005/2006. Thereafter she received no further written contracts of employment of any type.
> (3) …
> (4) The court attaches no significance to the arrangement that was in place whereby the complainant signed on for unemployment benefits each summer. There are many permanent seasonal contracts of employment in place in the economy. The fact that they are seasonal does not detract from the fact that they are permanent contracts of employment.
> (5) The court finds that the complainant (the appellant) is employed on a permanent annual 39-week contract of employment. She is laid off in June of each year and resumes work in September. …"

14. The respondent decided that the appellant is not a fixed-term worker within the meaning of the Act of 2003 and, thus, cannot maintain a complaint or receive redress under the Act. The appeal was allowed and the decision of the Adjudication Officer was set aside.

Consideration of grounds of appeal

15. In reaching its decision, the respondent made a finding of fact that the appellant's contract of employment did not end at the end of each academic year. On this, it would follow that there was a finding by the respondent that the appellant had a legal entitlement to continue her employment with the college at the beginning of each school year.

16. As a matter of law, to make such a finding the respondent would have had to have been satisfied that during the summer months, June, July and August, each year that the appellant continued to be employed under contract. This, in turn, necessitated a finding that there was "*mutuality of obligation*" between the appellant and the college during the summer months. However, the appellant was on a 39-week contract of employment and the matter was confirmed by her P35, which shows 39 weeks' insurable employment. The appellant was never paid for the summer months.

17. In reaching its finding that the appellant was employed on a permanent contract, the respondent does not appear to have had any regard to the letter from the college's Solicitor, the relevant part of which is quoted at para. 9 above. Two matters are unambiguously stated in this letter: -

> "(i) Our client acknowledges that your client is not employed by it during the summer months; and
>
> (ii) It regards her as a permanent employee, however, as she has always had an expectation of returning to the school each year after the summer holidays … ."

18. It cannot be doubted but that an "*expectation*" of returning to work falls short of a legal entitlement, as would be the case for a permanent employee. I cannot see how the respondent could have made the finding of fact it did in light of this clear admission in open correspondence from the Solicitors to the college. The contents of this letter are confirmed by the P35s already referred to. From this, it follows that the finding of primary fact, that the appellant was a permanent employee of the college, was one "*which no reasonable decision-making body could make".*

19. There is another issue concerning the appellant's hearing before the respondent which is unsatisfactory. In her appeal and the affidavit grounding it, sworn by her Solicitor, it is stated: -

> "On two occasions counsel on the appellant's behalf requested that she be allowed to address the court (the respondent) in respect of disputed matters which had arisen in the course of the hearing, however the court refused to hear evidence from the appellant. On the second occasion counsel, on the appellant's behalf informed the court that these matters were particularly serious from her point of view as any preliminary finding could be dispositive of the case and therefore could potentially result in her losing a very significant award had been made to her by the WRC adjudicator. However, again the Labour Court refused to allow the appellant to give direct evidence …"

20. This is contradicted in an affidavit sworn by the Solicitor for the college. She deposes: -

> "… there was no application for the appellant to give evidence and rather it was merely suggested that she was available should the Labour Court require to hear evidence from her …"

21. In turn, in a further affidavit from the Solicitor for the appellant, it is deposed: -

> "21. … where counsel proposed that the appellant be heard. It was at least partly the failure of the Labour Court (the respondent) to allow her to give evidence to clarify the circumstances of the determination of her employment each June that contributed to it falling into the errors …"

22. The conflict on the affidavits on a fundamental point, as to whether or not the appellant was denied an opportunity to give evidence, can only be resolved by either a transcript of the hearing before the respondent, which is not available, or by cross-examination of the deponents. Clearly, if the appellant was refused an opportunity to give evidence, this would amount to a departure from fair procedures and legally undermine the determination of the respondent.

Conclusion

23. Referring, once again, to the decision of the Supreme Court in *Nano Nagle School v. Marie Daly*, I refer to another passage from the judgment of MacMenamin J., where he states: -

> "111. The question of remedy is constrained by the fact that the approach adopted in each earlier legal forum was erroneous. The Court is faced with a series of invidious choices. But this does not mean that the situation is entirely beyond remedy. While the Labour Court determination did not comply with the statute, what occurred can, in fact, and in law, be addressed. But, to my mind, it can only be remedied by remitting the appeal to the legal forum charged under the statute with evaluating the evidence in accordance with law – and applying the law to the facts. …"

24. I also have to take into account that the decision of this Court, in relation to an appeal on a point of law, "*shall be final and conclusive".* I therefore will allow the appeal and remit the matter back to the respondent for rehearing.