Neutral Citation: [2016] IEHC 270

THE HIGH COURT

[2016 No. 2699 P]

BETWEEN

JOAN BUCKLEY

PLAINTIFF

AND

UNIVERSITY COLLEGE CORK

DEFENDANT

JUDGMENT of Ms. Justice O'Regan delivered on the 20th day of April, 2016

Introduction
1. This matter comes before the court on foot of a Notice of Motion of the 21st March, 2016, of the plaintiff wherein she seeks a total of eight injunctive reliefs, four of which are phrased as prohibitory orders and four of which are phrased as mandatory orders. Aside from the notice of motion and affidavits in support and affidavits in resisting the relief claimed, the only other current pleading is a Plenary Summons dated the 24th March, 2016, wherein the plaintiff seeks all the reliefs sought in the Notice of Motion aforesaid and in addition seeks two declaratory orders.

2. The matter was heard on affidavit on the 1st April, 2016, and resumed and concluded on the 5th April, 2016.

Background
3. In or about December, 2015 the defendant advertised 10 professorial appointments to Cork University Business School (CUBS) by way of a Candidate Information Booklet.

4. The closing date for applications was the 15th February, 2016. Although initially it appeared that two hundred and fifty two candidates applied, it transpired that in fact two hundred and sixty two candidates applied, some of whom applied for more than one position. Ultimately two candidates withdrew. Thirty six candidates have been shortlisted for interview, ten of whom are internal to UCC and the balance of whom are external candidates. The plaintiff was not shortlisted and was advised of this fact on the 15th March, 2016, and subsequently was advised as to the reasons why she was not shortlisted on the 21st March, 2016.

Evidence before the Court
5. The plaintiff has filed three separate affidavits in support of her application and the defendant, in resisting the application of the plaintiff, has filed two affidavits of Dr. Murphy, President of UCC, two affidavits of Prof. Kieran Murphy, two affidavits of Prof. Michael Ward, two affidavits of Susan O'Callaghan, one affidavit of Prof. Kilkelly, one affidavit of Caroline Fennell and one affidavit of Prof. Mulally.

6. The parties' respective positions might, in general terms, be summarised under the following respective paragraphs:

Position of the plaintiff
7. The plaintiff's position might be summarised as follows:-

i. Prof. Murphy has demonstrated a bias against the plaintiff and should not therefore have been involved in the selection committee.

ii. The plaintiff alluded to the possibility that Prof. Ward should not have been involved in the selection committee. However, this argument does not appear to have been developed other than identifying the fact that some candidates in Prof. Ward's department have been shortlisted.

iii. The plaintiff had been given various assurances over the years when taking up various posts that future promotional prospects would not be placed at risk.

iv. In written submissions the plaintiff suggests some contractual entitlement, however, this was not developed either in oral submissions or in affidavit, save as mentioned at para. 9(iv) hereof, and the plaintiff's contract of employment was not open to the Court.

v. The selection committee did not adhere to the relevant regulations.

vi. A failure to shortlist the plaintiff prima facie indicates that the process was flawed.

vii. The plaintiff has met the criteria and benchmark for appointment to the position of Professor (Scale II).

viii. By refusing to shortlist the plaintiff, the defendant has caused the plaintiff irreparable harm which cannot be compensated in monetary terms.

ix. The balance of convenience favours the granting of injunctive relief.

Position of the defendant
8. The defendant's position might be generally summarised as follows:-

i. By reason of a claim for mandatory injunctive relief, the threshold of proof required by the plaintiff to secure the relevant relief is far greater, although in any event it is asserted that the plaintiff has not achieved the threshold to secure either mandatory or prohibitive relief.

ii. The selection process was conducted in accordance with regulations.

iii. The selection process was conducted fairly and in an unbiased manner.

iv. To halt the selection process at this time would cause irreparable harm to the defendant including its reputation both nationally and internationally.

v. The balance of convenience favours the refusal of the relief sought.

Timeline

9. The following significant events occurred:

i. Between September 1998 and June 2003, and since February 2012 the plaintiff has been, and is the Head of the Department of Management and Marketing.

ii. In or about May 2011, on the encouragement of Prof. Lynch Fannon, the plaintiff applied for and secured the role of Director of the MBA Executive, notwithstanding that the plaintiff was concerned that the extra workload would preclude her from carrying out the level of research previously undertaken (see para.26 of the plaintiff's affidavit of 24th March 2016).

iii. In or about January 2013 (see para.21 of the plaintiff's affidavit of 24th March, 2016) the plaintiff became a member of the Business Restructure Implementation Group. At that time she felt that by being a member she was risking future promotional opportunities, however, she asserts that she was assured by Prof. Ward and Prof. Lynch Fanning that her concerns were unfounded.

iv. During the course of 2014, an internal promotional process within UCC for Professor (Scale II) was available to, but not pursued by, the plaintiff. By December 2014 (see para.21 of the affidavit aforesaid), heads of agreement were finalised by the group aforesaid, at which time the plaintiff became involved in negotiating rules for CUBS. In negotiating the rules the plaintiff felt that there was professional risk for her similar to the risks involved in her membership of the Business Restructure Implementation Group. However, she states that she put her interests, ambition and career objectives and research agenda secondary to the best interests of CUBS (see para. 22 of affidavit).

v. On 15th April 2014, regulations on the appointment to professorial posts were adopted by the governing body of UCC.

(a) At para.2 of these regulations the selection committee was defined as including the relevant Head of College or nominee and the relevant Head of School.

(b) At para.3.7 thereof it was provided that any approach to secure an unfair advantage or any other form of interference in the process by a candidate would lead to disqualification.

(c) In Appendix 3 thereof it was provided that members of the selection committee should declare, at the outset of the process, any conflict of interest that may exist irrespective of how small that conflict may appear to be, and where a committee member believed that their knowledge of an individual may influence their decision, they must withdraw from the committee.

vi. On 27th June 2014, the plaintiff received an email from Prof. Kilkelly which included the following:-

"To support you in your role of Head and to mitigate the continuing impact of it on your research career I propose that your appointment will carry with it pre-approval from me/Head of College of long sabbatical and some research assistance support. Unfortunately, it is not within my gift, nor would the University be likely to approve your promotion to Professor Scale II outside of the normal routes of external competition or internal promotion."

vii. In May 2015, a decision was taken to seek ten professorial appointments to CUBS (see para.40 of the affidavit of the plaintiff aforesaid).

viii. In October 2015, the membership of the selection committee was finalised (see para.5 of the affidavit of 27th March 2016 of Susan O'Callaghan).

ix. In December 2015, the defendant advertised ten professorial appointments to the Business School by way of a Candidate Information Booklet. In this Booklet the closing date for applications was expressed as the 15th February 2016.

x. The plaintiff applied for professorial appointment on 12th February 2016.

xi. On 15th March 2016, the plaintiff was notified that she was not selected as a shortlisted candidate.

xii. On 21st March 2016, the plaintiff was advised as to the basis why she was not selected, namely, that there was a field of extremely high calibre candidates and the required research output to warrant progression to the next stage of the selection process was not demonstrated.

xiii. On 24th March 2016, the within proceedings commenced.

Legal Principles

10. The defendant relies upon the case of *O'Higgins v. the Labour Court and University College Dublin* [2013] IEHC 508 to the effect

that the judgments as to the degree to which the applicants met or exceeded the standard required by each of the designated criteria were qualitative judgments delegated exclusively to the specialist appraisal of members of the committee. To this extent the defendant suggests that the plaintiff's view that she has met the criteria to be shortlisted cannot be substituted for the view of the selection committee.

11. The plaintiff acknowledges that the granting or withholding of injunctive relief will be assessed in accordance with the decision in *Campus Oil Ltd. v. Minister for Industry and Energy (No.2)* [1983] 1 I.R. 88, being a judgment of the Supreme Court. This judgment in turn applied the judgment of Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd*. [1975] A.C. 396. In the Campus Oil case, Keane J. in the High Court and subsequently Griffin J. in the Supreme Court felt that there was a fair question to be tried at the hearing of the action. Further, Griffin J. in his judgment expressed the view that various tests such as "a fair question raised to be decided at the trial", "a serious question of law arose", that "there is a substantial question to be tried" and that "there is a serious question to be tried" are essentially the same. Earlier in his judgment Griffin J. quoted, with approval, Lord Diplock in the American Cyanamid case including:-

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

12. The plaintiff refers to a number of judgments of Laffoy J. including *Pastor Properties v. Evans* [1999] IEHC 214 and *Crossplan Investments Ltd. v. McCann* [2013] IEHC 205 in support of the proposition that the threshold to be surmounted in an interlocutory type application such as the current application is very low. It is significant in my view that Laffoy J. applied the Campus Oil and in turn American Cyanamid case and did not suggest that the test applied in these earlier cases has been superceded.

13. In these events therefore I am of the view that the test to be applied is that unless the material now available fails to disclose that the plaintiff has any real prospect of succeeding in her claim for a permanent injunction at the trial I am obliged to proceed to consider the balance of convenience.

14. Insofar as the issue of balance of convenience is concerned the defendant refers to the case of AIB Plc. v. Diamond [2012] 3 I.R. 549 and the plaintiff refers to the case of Ashworth v. the Royal National Theatre [2014] EWHC 1176 and in my view both cases apply similar principles, namely Clarke J. in AIB Plc. suggesting that the test is focussed on the least risk of injustice and in the Ashworth case Cranston J. indicated that the court should take the course that seems to cause the least irremediable prejudice to one party or the other.

Conclusion

15. Insofar as the plaintiff suggests vague assurances it appears to this court that by June, 2014 following the e-mail she received from Prof. Kilkelly the plaintiff was aware that it was not within the privilege of any particular individual outside of the normal routes of external competition or internal promotion to afford the plaintiff any commitment as to promotion to Grade II Professorial Level. Indeed the views expressed by Prof. Kilkelly mirror the content of the regulations hereinbefore highlighted which provides that canvassing would lead to disqualification. If the plaintiff believed she had received a sufficiently clear and unambiguous assurance prior to June, 2014 then it is suggested that both the regulations and the e-mail from Prof. Kilkelly indicated to her that these assurances would not be relied upon, and therefore this was the time for the plaintiff to pursue relief rather than to allow the process to develop to the extent it had done so by the 22nd March 2016, the date of the plaintiff's solicitors letter.

16. There has been no material evidence available to this Court to support a contractual right to promotion or to be shortlisted, save the internal process referred to at para. 9(iv) hereof which the plaintiff chose not to persue.

17. Insofar as the asserted bias on the part of Prof. Murphy against the plaintiff is concerned, the evidence before this Court is to the effect that the two external members of the selection committee opined that the plaintiff should not be shortlisted and the other committee members, including Prof. Murphy, agreed without raising additional issues. There is no evidence therefore that any asserted bias on the part of Prof. Murphy influenced the decision making process of any other member of the selection committee.

18. Insofar as an assertion that there was a want of compliance with the relevant regulations by the selection committee the plaintiff complains that insufficient time was devoted to a critique of the applications, that she was unaware whether or not all members had the appropriate training and that effectively more detail than what was required was incorporated in the candidate information booklet. In this regard the plaintiff has been unable to counter the averments on behalf of the defendant that more time than what was asserted by the plaintiff was applied to a critique of the applications (see para. 6 of the affidavit of Susan O'Callaghan of 27th March, 2016 and para. 14 of the affidavit of Dr. Michael Murphy of 29th March, 2016) nor is she in a position to counter the assertion on the part of the defendants that all members had the appropriate training (see para. 15 of the affidavit of Dr. Michael Murphy aforesaid). Insofar as the plaintiff asserts that surplus information was included in the relevant literature it is suggested that her complaint in this regard should have been made following the publication of the candidate information booklet in December, 2015 rather than allowing the process to continue to the stage of development which it had achieved by 22nd March, 2016 when the plaintiff's solicitor first communicated with the defendant's solicitor. Furthermore and in any event in this regard no prejudice to the plaintiff has been asserted by virtue of superfluous information.

18(A). At para.4 of the plaintiff's affidavit of the 31st March 2016, the plaintiff suggests that her complaint is to the effect that she met the criteria and benchmark for appointment to Professor (Scale II). In response, at para.8 of the affidavit of Susan O'Callaghan of 1st April 2016, it is stated that just because the plaintiff has met the minimum criteria does not equate shortlisting. Presumably, some one or more of the two hundred and twenty three other disappointed applicants also met the said criteria. In the events, the Court believes that the plaintiff cannot succeed on this basis, having regard to the case of O'Higgins referred to at para.10 hereof, and the fact that it is the choice of the selection committee, and not of the plaintiff, as to which of the applicants who meet the minimum criteria should be shortlisted.

19. The remaining heading of claim on the part of the plaintiff is to be found at para. 62 of her principle affidavit to the effect that "failure to shortlist me is a prima facie indication that the process was flawed." In this regard it is undoubtedly the case that the plaintiff believes she was sufficiently qualified to be shortlisted. However the qualitative judgment as to who should be shortlisted was delegated exclusively to the members of the selection committee and this Court does not accept the proposition that because the selection committee views did not mirror the views of the plaintiff then by definition the process was flawed.

20. I am of the view that based upon the material available to this Court at this time same fails to disclose that the plaintiff has any real prospect of succeeding in her claim for permanent injunctions at the trial of the action.

21. Assuming however that I am incorrect in my view that the plaintiff has failed to pass the first portion of the test referred to at para. 13 hereof and therefore it is necessary to consider whether the balance of convenience lies with the granting or refusing of interlocutory relief, I believe that in assessing such balance in the context of the circumstances disclosed to the Court by virtue of the affidavits tendered, and in particular having regard to the advanced stage of the entire process which existed by 22nd March, 2016, namely:

a. that the positions were advertised since December, 2015 the course of least risk of injustice favours the refusal of the relief sought;

b. the process involved related to ten professorial appointments;

c. the plaintiff's claim, at its height, is to be shortlisted for Professor Scale II (otherwise, if the plaintiff believed she should have been appointed as Professor Scale II without external competition then December, 2015 was the time to seek injunctive relief as it was clear to the plaintiff at that time that she would have to apply in the like manner as all other applicants);

d. it is unknown at this time how many, if any, Professor Scale II appointments would be made to Marketing and Management;

e. thirty six candidates have been shortlisted and two hundred and twenty three others have not. At least some of the candidates have been advised of the position (see the affidavit of President Murphy of 29th March, 2016 at para. 29 thereof). Interviews had been scheduled for a number of candidates including some from outside the jurisdiction for dates commencing on 4th April, 2016;

the course of least risk of injustice favours the refusal of the relief sought.