Neutral Citation Number: [2011] IEHC 414

THE HIGH COURT

2011 5598 P

BETWEEN

DAVID HOLLAND

PLAINTIFF

AND

ATHLONE INSTITUTE OF TECHNOLOGY

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 26th day of July, 2011

1. This application for an interlocutory injunction should really be read in conjunction with my earlier judgment in *McGrath v. Athlone Institute of Technology* [2011] IEHC 254. Both cases raises important issues concerning the operation of the Protection of Employees (Fixed Term Work) Act 2003 ("the 2003 Act") and the availability of effective remedies. The present case also raises what is, in essence, a new issue, namely, the enforceability in legal proceedings of the Public Service Agreement 2010/2014. This is commonly known as the Croke Park Agreement and I propose to use that familiar term in this judgment.

2. The present case arises in this way. The plaintiff, David Holland, has been employed as a lecturer in bricklaying in the Department of Trades since January, 2005. His initial employment was pursuant to a fixed term contract for one year and this was followed a further fixed term contract of two years' duration which expired on 31st December, 2007. This was then followed by a further fixed purpose contract which commenced on 1st January, 2008.

3. Clause 4 of the contract provided that:-

> "This is a fixed purpose contract between the Institute and the Lecturer. Subject to a satisfactory service, this contract will continue pending the continuation of apprentice courses in the Brickwork area."

4. There does not appear to be any real doubt but that the demand for such courses has completely dried up in the present economic climate. The Institute has decided to discontinue such courses and by letter dated 24th January, 2011, it gave the plaintiff notice that it intended to make him redundant with effect from the 20th June, 2011. On that day Irvine J. granted an interim injunction restraining the termination of the employment and that injunction has been continued pending this present decision.

5. There has been one development of importance since I first delivered judgment in *McGrath* on 14th June, 2011. At that time, a decision of the Labour Court was awaited in respect of the plaintiff's entitlement to a contract of indefinite duration. At the time a Rights Commissioner had ruled against the claim, but this was overturned by the Labour Court in its decision of 17th June, 2011. In that decision the Court found that the contract of January, 2008 was not in its own term a fixed term contract. The Court found in the alternative that there were no objective grounds justifying the renewal of the contract as a fixed term contract (assuming such it was), so that any attempt to do so was rendered void by s. 9(2). The contract accordingly became a contract of indefinite duration by virtue of s. 9(3) of the 2003 Act.

6. I do not overlook the fact that the Institute has appealed this decision to this Court pursuant to s. 15(6) of the 2003 Act. I propose nevertheless to assume for present purposes that the plaintiff has a contract of indefinite duration. While fully accepting that the decision of the Labour Court is of significance, it has also to be borne in mind that I made exactly the same assumption in favour of the plaintiff in *McGrath,* albeit that in the latter case the Labour Court had yet to render its decision.

The issue of effective remedies

7. A constant theme of the plaintiff's submissions was that this Court was obliged to fashion a remedy to ensure an effective remedy was always available. This was said to be especially so given that the 2003 Act is designed to transpose the provisions of Directive 1999/70EC into law and well known authorities such as Case C-213/89 *Factortame (No.2)* [1990] ECR I-2433 were prayed in aid for this purpose.

8. For my part, I am bound to say that this issue is really *nihil ad rem* so far as the present case is concerned. The question of effective remedies was fully discussed by me in *McGrath* where I observed that:-

> "If, nevertheless, the plaintiff were to be left with the decision of an administrative agency whose efficacy was otherwise wholly undermined if no interim relief could be given by this Court, then in such exceptional cases, this Court must be deemed to enjoy such a jurisdiction, not least by reason of the obligation placed on the judicial organ of the State by the terms of Article 40.3.1 of the Constitution to ensure that legal rights can be appropriately vindicated…"

9. I respectfully adhere to these views. Here there is, in fact, no question of the Court being required to grant an injunction in aid of an administrative tribunal. Unlike *McGrath*, the Labour Court has already given its decision and I am proceeding on the basis that this decision is correct and will ultimately govern Mr. Holland's case.

What is the effect of the Labour Court's decision?

10. It must be recalled that the Labour Court actually found that the contracts in question of Mr. Holland and his colleagues was "not fixed-term contracts within the meaning of the Act and that they were, by their own terms, contracts for indefinite duration". It was only by way of an alternative that the Court found that any restrictions on such contracts were void by reason of s. 9(2) so that they were converted into contracts of indefinite duration by operation of law: see s. 9(3).

11. The real point here, however, is that a finding of this nature does not place such an employee in a superior position to that of an ordinary employee whose status as the holder of a contract of indefinite duration was never in doubt. It is plain from the context of the 2003 Act that the Oireachtas wished to improve the position of fixed-term workers and, perhaps, approximating that status (within recognized limits) to that of ordinary employees who held contracts of indefinite duration. That is underscored by recital 14 to the 1999 Directive which provides that the signatory parties (which include representatives of industry and the trade unions) to the framework agreement on which the Directive is based:-

> "….wished to conclude a framework agreement on fixed-term work setting out the general principles and minimum requirements for fixed-term employment contracts and employment relationships; they have demonstrated their desire to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships."

12. Laudable as this goal is, it is nowhere suggested that either the Oireachtas or, for that matter, the Union legislature had ever intended that the position of such employees should actually be *superior* to that of an employee whose contract of indefinite duration was never in doubt. It follows, accordingly, that Mr. Holland's employment status should be treated for the purposes of this application is if his status as the holder of a contract of indefinite duration was never in doubt.

The Supreme Court's decision in *Sheehy v. Ryan*

13. At this juncture we return essentially to the same question which was at issue in *McGrath,* namely, whether, so far as the common law is concerned, an employer is free to terminate the employment of the holder of a contract of indefinite duration. The Supreme Court confirmed in *Sheehy v. Ryan* [2008] IESC 14, [2008] 4 I.R. 258 that, absent a contractual stipulation to the contrary, an employer remains free so to act. If I may venture to repeat what I said on this point in *McGrath*:-

> "The starting point, of course, is that it is clear that at common law, subject to appropriate contractual terms to the contrary, an employer can dismiss for any reason or no reason on giving reasonable notice, even in the case of a permanent employee. Any lingering doubts on this point were dispelled by the Supreme Court's decisions in both *Maha Lingham v. Health Service Executive* [2005] IESC 89, [2006] 17 E.L.R. 137 and *Sheehy v. Ryan* [2008] IESC 14, [2008] 4 I.R. 258. Some may think that this situation is unsatisfactory, but if so, change in this area is a matter for the Oireachtas. Indeed, it may be observed that the Oireachtas did legislate in this general area via the Unfair Dismissals Acts 1977-2005, but in so doing it was careful to leave unchanged the common law in relation to the termination of employment contracts. It was, moreover, for this very reason that in *Nolan v. Emo Oil Services Ltd.* [2009] IEHC 15 Laffoy J. expressed her unwillingness to extend the common law "in parallel to the statutory code in relation to unfair dismissal and redundancy [as this would] end up supplanting part of the code".
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> 21. Thus, therefore, even if the various agents of the Institute did make representations to the plaintiff of the kind alleged in respect of the building work and even if it were held that he was thereby entitled to a permanent position as a result of such representations, the Supreme Court's decision in *Sheehy v. Ryan* confirms that such employment can be terminated by the employer absent an express clause to the contrary in the actual contract. In the present case, therefore, *Sheehy v. Ryan*, therefore, rules out any possibility of an injunction insofar as it concerns a contractual claim, not least given that no issue has been taken regarding the adequacy of the notice.
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> 22. By a parity of reasoning, therefore, it follows that this Court has no jurisdiction to restrain the termination of employment in a case such as the present, unless the plaintiff can point to something in the 2003 Act which impliedly precludes termination for redundancy in the event that he is deemed to have a contract of indefinite duration and where the plaintiff would otherwise suffer irremediable loss. While the remedial provisions of the 2003 Act are, perhaps, somewhat obscure in places, the Rights Commissioner (and, on appeal, the Labour Court) could in principle order re-instatement in the same manner as if the employee had been unfairly dismissed for the purposes of the Unfair Dismissals Acts 1977-2005: see s. 14(2)(c) of the 2003 Act.
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> 23. The object of this provision would appear to be to give the Labour Court the power to place the employee who had previously simply been given a fixed term contract in the same position as if he were now or, indeed, always had been on a permanent contract since the relevant date: see, e.g., the comments of Fennelly J. to this effect in *Maha Lingham*. But, as we have seen from *Sheehy v. Ryan*, so far as the common law is concerned, that in itself is no impediment to termination and there is nothing in the 2003 Act to suggest that the employment of such a re-instated employee could not be terminated in the future. If that were to happen, then such an employee must then elect as between pursuing the common law remedy of wrongful dismissal and relief under the Unfair Dismissals Acts.
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> 24. If, therefore, the Labour Court were to decide in the plaintiff's favour and hold that he did enjoy a contract of indefinite duration, this would simply place him in the same situation as if he were a permanent employee. But absent an express contractual stipulation to the contrary, *Sheehy v. Ryan* makes it plain that such an employee's contract of employment can be terminated at will in a case such as the present one. If the *fairness* of that dismissal is to be adjudicated, this can only be done through the mechanism of the Unfair Dismissals Acts."

14. It is only proper to record that the plaintiff's competence and integrity are not at issue here, so the special case of a disciplinary hearing does not arise. Nor is there any suggestion that that there is anything in the plaintiff's contract of employment of 1st January, 2008, which would suggest that there is anything in that contract to negative the operation of *Sheehy v. Ryan.*

15. It is true that departmental circular IT 15/05 provided sample contracts which strongly suggested that the Department of Education was of the view that not only that a contract of indefinite duration should be offered to any qualified lecturer with more than four years of service, but clause 4 of the sample contract further provided that:-

> "A person who has a contract of indefinite duration has an expectation that, subject to the normal date of retirement in the employment, she or he will be retained in the employment and will not be dismissed without there being good reason such as misconduct or unfitness, or other compelling or unavoidable circumstances…."

16. Clause 2.1 of Circular 93/007 provides that:-

> "A person [who holds a contract of indefinite duration] has an expectation that, subject to the normal date of retirement in the employment, she or he will be retained in the employment and will not be dismissed without there being any good reason such as misconduct or unfitness for their position, or other compelling or unavoidable

> circumstances. Any dismissal shall be achieved by the application of agreed termination arrangement for the particular sector or the application of the relevant statute, as the case may be."

17. However, the stark fact remains that there is no evidence to suggest that these terms were ever incorporated into the plaintiff's contract. I agree that, as we shall presently see, such circulars might create a legitimate expectation on the part of the staff of an Institute such as the defendant that their job security was to be enhanced in this manner.

18. For these reasons, I cannot accept that these circulars confer any contractual rights on the plaintiff.

19. In these circumstances, it is plain that, subject to the question of the operation of the Croke Park Agreement and Circulars IT15/05 and 93/2007, the Institute is entitled to terminate the plaintiff's contract of employment. Of course, the plaintiff may well have remedies available to him under the Unfair Dismissals Acts, but this is not a matter for this Court in these proceedings.

The justiciability of the Croke Park Agreement

20. It seems to be widely acknowledged that some element of public sector reform is a necessary element of structural changes designed to restore national economic competitiveness. This is reflected in the terms of the Croke Park Agreement itself which acknowledges the need for such reform.

21. Paragraph 1.6 of the Agreement provides that:-

> "The Government gives a commitment that compulsory redundancy will not apply within the public service, save where existing exit provisions apply. This commitment is subject to compliance with the terms of this Agreement and, in particular, to the agreed flexibility on redeployment being delivered. To that end, the redeployment arrangements referred to below will include opportunities for re-skilling and re-assignment as a key method to retain and secure employment in comparable roles in the public service."

22. Two fundamental issues arise at this point. First, was there an intention to create legal relations? Second, even if there was not such an intention, is the Croke Park Agreement capable of creating an enforceable legitimate expectation which this plaintiff can enforce? We can proceed to consider these issues in turn.

Was there an intention to create legal relations via the Croke Park Agreement?

23. While the question of whether a collective agreement between employers and employees is legally enforceable remains something of a vexed one, in my view there is no *a priori* rule in the matter. At most, there is a loose presumption that, having regard to the subject matter of such agreements, that they are designed to operate *in the sphere of industrial relations only*. This point was well made by Geoffrey Lane J. in *Ford Motor Company v Amalgamated Union of Engineering Workers* [1969] 2 Q.B. 303 where he observed that:-

> "Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are, in my judgment, not contracts in the legal sense and are not enforceable at law. Without clear and express provisions making them amendable to legal action, they remain in the realm of undertakings binding in honour. None of the authorities cited by counsel for Fords dissuades me from this view. In my judgment, the parties, neither of them, had the intention to make these agreements binding at law."

24. It may thus be said that such agreement will only be binding if there is an intention to make the agreements binding in law between the parties, or it is apparent from the face of the agreement that it is to be so binding: see generally the judgment of O'Hanlon J. in *Kenny v An Post* [1988] I.R. 285 and the earlier judgment of O'Higgins C.J. in *Goulding Chemicals Ltd. v Bolger* [1977] I.R. 211.

25. In this regard, it may be noted that I invited both the Attorney General and the Irish Congress of Trade Unions to intervene in these proceedings should they wish to offer any views on this question. Congress declined the invitation, but its General Secretary, Mr. David Begg, nonetheless instead sent a letter to the Registrar of this Court - which was made available to the parties - which indicated that Congress considered that the Croke Park Agreement was binding merely at a political and industrial relations level and that it was not intended to create justiciable rights enforceable at law. Mr. Begg also noted that that the parties to the Croke Park Agreement have agreed mechanisms to implement the Agreement (paragraphs 1.18 to 1.22) and procedures to resolve disputes that may arise on any matter under the terms of the Agreement (paragraph 1.24 of the Agreement).

26. The Attorney submitted helpful written submissions through counsel at the suggestion of the Court. She took the view that the enforceability of the Agreement could not be determined in the abstract, but that it should not be taken as conferring legal rights on third parties such as the plaintiff. She also stressed that the Agreement was intended principally to operate at the level of a political and industrial relations commitment and not that it conferred legal rights *per se*.

27. For my part, I do not consider that the Agreement can be taken to have created enforceable legal rights which are justiciable in law at the hands of an individual public sector employee. The commitment given by the Government with regard to public sector redundancies in paragraph 1.6 thus applies in the sphere of political and industrial relations sphere, but not the legal sphere. The proviso to that commitment ("This commitment is subject to compliance with the terms of this Agreement and, in particular, to the agreed flexibility on redeployment being delivered…") would seem to be at odds with the idea of an enforceable legal right, since it would be extremely difficult for a court to apply legal standards to determine whether, for example, the public sector unions had been sufficiently flexible on redeployment issues. This would seem to be a matter of judgment for either politicians or industrial relations specialists. This in itself demonstrates that the parties never intended thereby to create legal rights, or, at least, that the Agreement was not intended to be enforceable at the hands of third parties such as the plaintiff.

28. For this reason, I do not think that the plaintiff has raised a fair case with regard to the enforceability of the Agreement in legal proceedings.

The Croke Park Agreement, the Circulars and Legitimate Expectations

29. There is no doubt but that a formal commitment given by or on behalf of the executive branch in relation to employment matters is capable of giving rise to a legitimate expectation. A good example of the application of this principle is supplied by the decision of Dunne J. in *Curran v. Minister for Education* [2009] IEHC 378, [2009] 4 I.R. 300. In that case Dunne J. held that secondary teachers who acted on foot of representations made by the Minister in a formal circular regarding early retirement had acquired a legitimate expectation in that regard. As it happens, the applicants did not ultimately succeed, but this was because Dunne J. also held that the

Minister was entitled to revoke the circular with immediate effect having regard to the sharp and sudden deterioration in the public finances.

30. Of course, the doctrine of legitimate expectations applies only in the sphere of public law. Given, however, that the Institute is an entity governed by statute, it would seem that in the light of cases such as *Curran* that a plaintiff can invoke this doctrine. It presupposes, however, that the circular or other similar document gave rise to an expectation and that that expectation is, in fact, a legitimate one.

31. I cannot accept that paragraph 1.6 of the Croke Park Agreement can give rise to a legitimate expectation that no person working in the public sector would be subject to redundancy. The language used is too imprecise, conditional and aspirational to permit of this.

32. It is otherwise so far as Circular 93/2007 is concerned. This clearly conveys the view of the Department of Education that those lecturers who hold a contract of indefinite duration should enjoy a permanency in their employment status akin to that of academics with full tenure. Unlike paragraph 1.6 of the Croke Park Agreement, the terms of this Circular appear to be sufficiently precise and unconditional as to give rise to the type of "unqualified assurance" of which Finlay C.J. spoke in *Webb v. Ireland* [1988] I.R. 353, 384 as giving rise to the legitimate expectation in that case. It is at least sufficient to say that the plaintiff has here raised a substantial issue.

33. For completeness, I should add that the existence of these Circulars and their possible import so far as a potential legitimate expectation is concerned was not before the Court in *McGrath.*

Conclusions
34. It is probably unnecessary here to examine afresh the actual test to be applied with regard to the grant of an interlocutory injunction in employment matters, because this is not a conventional employment injunction case. It is plain from this judgment that, with great respect, I cannot accept that the plaintiff has established any arguable point so far as the private law or contractual dimension of the case.

35. The plaintiff's prospects of success rather depend entirely on the potential application of a public law doctrine - legitimate expectations - to the circumstances of his case in the manner which I have just described. In view of this special fact, I consider that the plaintiff can establish - but on this ground alone – that, in the words of Fennelly J. in *Maha Lingam v. Health Service Executive* [2005] IESC 89, he has "a strong case that he is likely to succeed at the hearing of the action". This is not to suggest that the plaintiff will in fact succeed. It may transpire, for example, that the Circulars do not apply to the plaintiff's case or that they have been overtaken by events or that it is even inappropriate to apply the doctrine of legitimate expectations to a body such as the Institute which was the merely the recipient of the Circular.

36. Nevertheless, without offering any view on the ultimate merits, given that the plaintiff has satisfied the *Maha Lingam* test in this one respect, I propose to grant an interlocutory injunction restraining his dismissal pending the trial of this action. If necessary, I will give directions to ensure that this case comes to trial in very early course.