



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 158

Record No. 2016/3

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

HELEN EARLEY

PLAINTIFF /

APPELLANT

- AND -

HEALTH SERVICE EXECUTIVE

DEFENDANT/

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 15th day of May 2017

1. In November 2012 the plaintiff, Ms. Helen Earley, was appointed to her current position as Area Director of Nursing, Mental Health Services for the Galway/Roscommon area pursuant to a written contract of employment. It is clear from the terms of the job description for this position that this was a senior post within the Health Service Executive ("HSE") which entailed both clinical and management responsibilities. The evidence, indeed, was that the plaintiff had responsibility for some 60 facilities in these two counties. The plaintiff is now aged 57 and has been employed with the HSE since 1998. It is important to state that she has an unblemished employment history.

2. On 1st July 2015 the plaintiff received a letter from Mr. Bernard Gloster, Chief Officer of the HSE Mid-West and interim chief officer of the HSE West, to the effect that she was to be temporarily reassigned from her position as an Area Director of Nursing for Galway/Roscommon Mental Health Services as Area Director of Nursing in a specialised capacity to the Programme Management Office of the National Mental Health Division of the HSE. Ms. Earley's reporting obligations were also changed, as she was now required to report to the Head of Planning, Performance and Programme Management. This re-assignment took effect from the 6th July 2015. On that date a Mr. Brian O'Malley was appointed as Acting Area Director of Nursing. In that letter Mr. Gloster had explained that her "substantive post will be filled on a specific purpose contract pending further decision making."

3. It was this re-assignment which gave rise to the present proceedings. On 30th July 2015 Kennedy J. granted the plaintiff an interlocutory injunction which prevented the HSE giving effect to this re-assignment pending the trial of the action: see *Earley v. Health Service Executive* [2015] IEHC 520. The full hearing of the action in the High Court was heard by O'Connor J. in November 2015. In his reserved judgment delivered on 27th November 2015 O'Connor J. found that the re-assignment of the plaintiff was lawful and he refused to grant her any of the injunctive or declaratory relief which she had sought: see *Earley v. Health Service Executive* [2015] IEHC 841.

4. The plaintiff has now appealed against that decision, contending that the HSE breached the terms of her employment contract in re-assigning her in the way which it did. It is agreed that this re-assignment was not a disciplinary process. The only issue which this Court is now required to consider is whether the plaintiff's contract of employment permitted such a re-assignment.

5. As will presently become clear, for the purposes of this judgment I have only found it necessary to address the terms of the plaintiff's contract of employment and the relevant statutory provisions. I have not found it necessary to consider any of the other arguments relied on by the plaintiff. Before, however, considering the issue of the plaintiff's employment contract issue it is first necessary to set out the relevant background facts.

The background facts

6. In April and May 2015 the HSE received a series of anonymous complaints to the effect, first, that a number of incidents had occurred at HSE facilities in the Galway/Roscommon area and, second, that these had not been dealt with appropriately by senior staff. A protected disclosure detailing certain complaints was also made by an identified member of the HSE staff.

7. It was decided that an investigation would be conducted in relation to these alleged incidents and the manner in which they were handled. The plaintiff was originally asked by her direct line manager, Ms. Catherine Cunningham, on 21st May, 2015 as to whether she would be prepared to be re-assigned, but she declined to take this step. In view, however, of these allegations and the difficulties presented in the Roscommon area for mental health services, the HSE concluded that it was necessary that certain interim measures should be put in place so that it could be assured that the day to day care and management arrangements were also appropriate. Furthermore, such was the concern regarding the state of the Roscommon Mental Health services that the HSE decided to commission a review of all aspects of the service in that county, including workplace culture and governance.

8. The plaintiff ultimately received an email from Mr. Gloster on 29th June 2015 which sought to explain the reasons for the re-assignment. In that e-mail Mr. Gloster referred to the five incidents, the HSE decision to conduct a full review of the Roscommon Mental Health Service and an unspecified "protected disclosure". On the 1st July 2015, the plaintiff received a formal letter from Mr. Gloster informing her of the HSE's decision to reassign her temporarily without prejudice. It was stressed that this was not a disciplinary process or investigation.

9. A review body was also established consisting of three independent experts to review the provision of services in Roscommon.

10. It was also accepted that the re-assignment was made without the plaintiff's agreement, but it was nonetheless described as being in the nature of a protective and temporary measure, which was made on a without prejudice basis. What is not in doubt, however, is that the plaintiff was reassigned from a clinical role to a non-clinical role, albeit that her pay and other conditions were not otherwise affected. While Mr. Gloster was at pains to stress that this re-assignment did not reflect on the professional ability of the plaintiff, the plaintiff herself maintained that, as I have already indicated, given the nature and provenance of the allegations, the re-assignment did in fact reflect on her reputation and good name.

11. It was originally envisaged that the re-assignment would simply last for a matter of months pending the national review of the Roscommon mental health services which had been commissioned at the same time. As of the date of the hearing of this appeal (April 2017) the review body still had not, however, reported, albeit that counsel for the HSE, Mr. Ward S.C., informed us that a report was understood to be imminent and that the time frame for the delivery of the report had itself been extended. All of this meant that the plaintiff continued to be re-assigned to these other duties and this re-assignment has now lasted since July 2015, with the exception of the period from 30th July 2015 to 27th November 2015 when the plaintiff had obtained an interlocutory injunction from the High Court keeping her in her original post.

The plaintiff's employment terms

12. The plaintiff's contract of employment contained the following terms:

"1. Title: You are employed as Area Director of Nursing, Mental Health Service, Galway and Roscommon Mental Health Services....

4. Location: You will be employed in Galway and Roscommon Mental Health Services. Your initial assignment will be to Galway and Roscommon Mental Health Services. You may be required to work in any service area within the vicinity as the need arises.

5. Reporting Relationship: You will report to the area manager or other nominated manager.

6. Duties: The main duties of your position are set out in the job specification already supplied. In addition to your normal duties, you may be required to undertake other duties appropriate to your position as may be assigned to you, including deputising as appropriate....

16. Grievance Procedure: You have the right to seek redress in respect of any aspect of your terms and conditions of employment under the HSE Western Area's Grievance Procedure, copy of which is attached. Should you have a grievance you should follow this procedure.....

25. Agreement: Your terms and conditions may be revised in accordance with agreements reached between the union representing your grade and the HSE Western Area."

13. The elaborate job specification in respect of this post referred to in clause 6 of the contract of employment identified the plaintiff as a member of the multi-disciplinary management team preparing a local "vision for change implementation" for the area and included a particular section concerning "quality assurance". This specification also stated:

".....the above job description is not intended to be a comprehensive list of all duties involved and consequently, the post holder may be required to perform other duties as appropriate to the post which may be assigned to him/her from time to time and contribute to the development of the post while in office."

14. The purpose of the post was also described by the job specification in the following terms:

"The Area Director of Mental Health Nursing will be Head of Nursing and the budget holder for nursing and associated services within the Mental Health Services."

The judgment of the High Court

15. In his judgment O'Connor J. noted that counsel for the plaintiff had urged the Court to follow the views which had been expressed by Kelly J. in *Rafferty v. Bus Éireann* [1997] 2 I.R. 424, 442 where he said that "at common law an employee is not required to do a fundamentally different job from that contracted for". But O'Connor J. did not accept that this is what had occurred in the present case:

"The Court has already mentioned that the re-assignment of the plaintiff did not constitute a fundamentally different job. By way of explanation for that finding, the Court observes that the plaintiff was temporarily moved to a position of clinical lead in the programme management office which is the office that is driving reform of mental health services in this country. As counsel for the defendant mentioned, the plaintiff was not assigned to administering the catering in a hospital or to carrying out some duties that were unrelated to the plaintiff's qualifications, experience or status. In fact, none of the witnesses expressed a view that the temporary re-assignment was in any way inferior and Mr. Gloster expressed the belief that it offered some degree of prestige.

There is no need to give an excursus of what is or is not a condition of service as the effect of clauses 4 and 6 in particular of the plaintiff's contract obliges the plaintiff to work "in any service area". Furthermore she is required to "undertake duties appropriate to [her] position". Clause 1 of the contract refers to a title which could be changed in any re-organisation if she was promoted or moved as indeed the plaintiff acknowledged could be the case and will probably be the case with a reorganisation due next year."

16. O'Connor J. went on to state that he could not construe the terms of the contract "such that the plaintiff has a contractual right to preserve some right to remain as Area Director of Nursing until she otherwise agrees". He continued thus:

"The reference to revising terms and conditions in clause 25 of her contract in accordance with trade unions representing her grade and "the HSE Western Area" copper-fastens the Court's view that the plaintiff had a contractual right to a grade which could only be altered by agreement. Neither the plaintiff nor a union representing her grade could veto a temporary re-assignment as a result of the written contract between the parties."

17. O'Connor J. further stressed that "the plaintiff has not been accused of wrongdoing and is not the subject of a disciplinary process" and nor had she established any "loss of reputation or status due to the re-assignment decision". O'Connor J. finally rejected the plaintiff's argument that the re-assignment was in breach of her conditions of employment:

"In summary, despite the rigorous cross examination of both Mr. Gloster and Ms. O'Connor, no bad faith, conspiracy or failure to recognise the rights of the plaintiff has been established. The particular union officer who threatened the plaintiff's position and prospects has been told in no uncertain terms by the defendant that the defendant will not tolerate any such activity. Moreover, the Court accepts that the appeasement of that union or its members did not motivate Mr. Gloster's decision of 1st July 2015. The decision communicated to the plaintiff on 1st July 2015, was not made with a view to investigating the plaintiff's conduct or to starting disciplinary proceedings against the plaintiff personally. The decisions to initiate a national review and screening of the anonymous complaints were made by the defendant, and it was considered prudent to reassign the plaintiff while those processes were ongoing. There was and is no obligation on Mr. Gloster to justify his decision other than in the way that he did."

18. In essence, therefore, O'Connor J. appears to have proceeded on the basis that the HSE had at least an implied entitlement to re-assign the plaintiff in circumstances where there were serious concerns about the functioning of the service and that such decision could only be challenged where something akin to bad faith had been established.

19. Against that background I now turn to the legal issues which now arise.

Whether there was any legal basis for the re-assignment of the plaintiff?

20. At the core of the plaintiff's case is her contention that the re-assignment amounted to a clear breach of her contract of employment, irrespective of whether the re-assignment was regarded as permanent or temporary. The HSE argued that there was an express power to re-assign the plaintiff having regard to the provisions of clauses 4, 6 and 25 of the contract. It was alternatively claimed that there was an implied power to effect such a re-assignment.

21. Contrary to the views expressed by O'Connor J. on this issue of construction, I find myself obliged to hold that when this particular contract of employment is viewed in conjunction with the job specification (in the manner required by clause 6 of the contract document itself), there is simply no basis by which the plaintiff could lawfully have been re-assigned from her position. I reach this conclusion for the following reasons.

22. It is clear, first, that the plaintiff was appointed to the particular post of Area Director of Nursing in the Galway and Roscommon Mental Health Service. It is also clear from the job description that this was a post with clinical as well as managerial responsibility. The post also included being "Head of Nursing" for the mental health services in the area.

23. Second, clause 4 of the contract envisages that the plaintiff would be employed in the Galway and Roscommon Mental Health Services. It is true that this clause also expressly required the plaintiff "to work in any service area within the vicinity as the need arises", but when viewed in its proper context all that this provision really means is that the plaintiff could be required to work in adjoining service areas in a similar capacity. In other words, while the *geographical* location of her post might be changed, this did not enable the HSE to change the *nature* of the post.

24. Third, this conclusion is re-inforced by a consideration of clause 6 which stipulates that the plaintiff would undertake the duties set out in the job specification. This further specifies that the plaintiff might be assigned further duties "appropriate to your position", including "deputising as appropriate". But clause 6 did not entitle the HSE to re-assign the plaintiff from her existing post to a quite different position.

25. It is accordingly clear that this was a very particular contractual position which entailed a mix of clinical and managerial responsibilities in the Galway and Roscommon Mental Health Service area. While the plaintiff could be assigned further duties (including performing duties outside of that area as occasion might require), these additional duties were required to be "appropriate" to her position. It followed that any additional responsibilities which the plaintiff might have to perform would have to be consistent with her position as Area Director of Nursing.

26. It followed, therefore, that in these circumstances, save for the provisions of clause 25, the plaintiff's contract of employment did not permit her to be re-assigned from her existing contractual position with clinical and management responsibility in a designated service area to the Programme Management Office of the National Mental Health Service of the HSE, even if this did not entail any loss of remuneration or status and prestige. She was, in effect, changed from a clinical and operational role to a non-operational role, so that in substance the nature of her job specification had been changed in a material fashion. In these circumstances, it is hard to see how the plaintiff could not properly invoke the test articulated by Kelly J. in *Rafferty* inasmuch she was now required to perform a fundamentally different job from that contracted for.

27. In expressing this conclusion I have not overlooked Mr. Ward S.C.'s forceful argument to the effect that the contract of employment contained an implied term permitting the HSE to re-assign the plaintiff to other non-operation and non-clinical duties where the exigencies of the situation – such as the nature of the complaints and the general crisis in the provision of mental health services in Roscommon – so required. The most straightforward answer to this contention is that contained in *Sweeney v. Duggan* [1997] 2 I.L.R.M. 211, 217, a case where the Supreme Court outlined the tests for the importation of implied terms into a contract. Delivering the judgment of the Court, Murphy J. emphasised the requirement of necessity before a Court would imply a term in a contract:

"Whether a term is implied pursuant to the presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely reasonable but also necessary. Clearly it cannot be implied if it is inconsistent with the express wording of the contract and furthermore it may be difficult to infer a term where it cannot be formulated with reasonable precision."

28. Applying that principle in the present case, it is sufficient to state that an implied term of the kind now claimed by the HSE would be inconsistent with the express wording of the contract of employment. It would be tantamount to saying that even though the post entailed operational and clinical responsibility, combined with a guarantee that any further assigned responsibilities would be "appropriate" to that position, the HSE was nonetheless free by reason of an implied term to act in a manner which contradicted these contractual commitments and thereby assign the plaintiff to non-operational duties. There is, accordingly, no basis for the contention that there was an implied term of the kind relied on by the HSE.

29. It follows, therefore, that the assignment of the plaintiff to these non-operational duties amounted to a plain breach of her

contract of employment. I would further reject the argument that the HSE was nonetheless free to take this course of action by reason of some supposed implied term.

Clause 25 of the Contract of Employment

30. Clause 25 of the contract of employment provides that the plaintiff's terms and conditions "may be revised in accordance with agreements reached between the union representing your grade and the HSE Western Area". For my part, however, I do not think that this clause is any direct relevance to the present case because there was no suggestion that there had in fact been an agreement between the union and the HSE pertinent to the present case such as might have triggered a revision of these terms and conditions.

31. It follows, therefore, that clause 25 could not be invoked to justify the re-assignment of the plaintiff from a position with clinical and operational responsibilities to a posting with no such duties.

Section 22 of the Health Act 2004

32. The HSE also seeks to rely on s. 22 of the Health Act 2004 ("the 2004 Act"), which it is contended provides an express statutory power to determine the duties of employees. The defendant also seeks to rely on an implied statutory power to manage its affairs in an appropriate manner.

33. Section 22(1) of the 2004 Act provides:

"The Executive may, subject to subsections (2) to (5), appoint persons to be its employees and may determine their duties."

34. Section 22(4) provides:

"The Executive shall, with the approval of the Minister given with the consent of the Minister for Finance, determine:

(a) the terms and conditions of employment (including terms and conditions relating to remuneration and allowances) of employees appointed under this section, and

(b) the grades of the employees of the Executive and the numbers of employees in each grade."

35. I cannot think that these statutory provisions are of any assistance to the respondent. They are simply standard provisions which enable the HSE to appoint persons to be employees and to determine their duties. So far as the plaintiff is concerned, the HSE has, in fact, appointed her to this post and has determined her duties in her written contract of employment which also identifies in clause 25 how the terms and conditions of that contract may be revised. The present proceedings are simply the means whereby the plaintiff seeks to give effect to these agreed conditions of employment. It would, of course, have been open to the HSE to have stipulated different terms and conditions in that contract of employment prior to the appointment of Ms. Earley to her position in November 2012.

36. Nor can I agree that the HSE enjoys an implied power of the kind claimed. The Supreme Court has made it clear that the courts will imply such a power where this is "incidental or consequential" in the context of the statutory provision at issue: see, *e.g.*, *Keane v. An Bord Pleanála* [1997] 1 I.R. 184; *McCarron v. Kearney* [2010] IESC 28, [2010] 3 I.R. 302. But a power to re-assign employees in this fashion could not be regarded as "incidental" or "consequential" in this sense. If the HSE's argument were correct, it would mean that it could depart almost at will from the terms of any contract of employment, so that, for example, a clinician might be assigned to purely non-clinical duties remote from her field of expertise or a nurse might find herself assigned to purely administrative duties.

37. The existence of such a power would, moreover, be inconsistent with the structure of s. 22 of the 2004 Act itself. It would mean, in effect, that the HSE's express power found in s.22(1) to appoint employees and to determine their duties in the context of a contract of employment could be overridden by an implied power which enabled the HSE unilaterally to vary these duties, perhaps in far-reaching fashion. If the Oireachtas had ever intended that the HSE should enjoy such a power, one would have expected this to have been stated in clear and express terms and that it was not one which arose simply by implication.

Conclusions

38. It follows, therefore, that, for the reasons stated, I must conclude that the trial judge fell into error in concluding that the HSE had not breached the plaintiff's contract of employment by re-assigning her from the operational and clinical duties specified in that contract (and which are also specified in the accompanying job description for that post) to non-operational duties. This conclusion is unaffected by the fact that the plaintiff's remuneration was unaffected by this change or that the re-assignment was expressed to be a temporary one or even that it was expressed to be on a without prejudice basis.

39. I would accordingly allow the plaintiff's appeal and grant a declaration to the effect that the re-assignment of the plaintiff in July 2015 constituted a breach of her contract of employment. In the light of this finding and the granting of such relief, I would invite the parties to make such further submissions on the question of whether the grant of any further relief by this Court is necessary or appropriate.