

THE HIGH COURT

CHANCERY

[2017 No. 1268P]

BETWEEN:

FIONA DUFFY

PLAINTIFF

-AND-

LIFFEY MEATS (CAVAN)

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 22nd day of February, 2017.

1. This is a case in which the plaintiff seeks, *inter alia*, an interlocutory injunction requiring the defendant to permit her to resume her function as Credit Controller within the defendant company and therefore she seeks in essence a mandatory injunction against her employer. In reaching its decision, this Court is mindful of the fact that in interlocutory hearings the Court should not make findings in relation to disputed facts and also that when dealing with mandatory injunctions, particularly in relation to employment contracts, there is a requirement upon the applicant to show that she has a strong case that is likely to succeed at the hearing of the action.

Background

2. Prior to her departure on maternity leave on 6th November, 2015, the plaintiff was the sole Credit Controller in the Company on a base salary of €26,000 per annum, which in addition to bonuses gave her an annual salary of some €40,000. The plaintiff returned to work after her maternity leave on the 9th of January, 2017. She claims that she was advised by Mr. McDermott, the Financial Director of the Company on that date that she would not be returning to the post of Credit Controller, which during the course of the year or so of her absence, was now being done by two other employees of the Company. The plaintiff was instead offered a position in sales, which the Company claims is not a lesser role in the Company since it says that both positions are subject to the same terms and conditions.

3. In the nine or so working days between the 9th January, 2017, and 20th January, 2017, when the plaintiff was back at work, she became very distressed by the fact that she would not be returning to her previous position and the fact that she was not assigned sufficient work to keep her occupied at this time. She was also distressed about the fact that she was given a verbal warning due to her taking a day off on Wednesday 11th January, for a medical appointment, without consent (even though she claims that she notified the Company of same). In addition, she was distressed by the fact that her weekly salary for her first week back at work was €510 gross, which was some €200 short of what she used to receive as a Credit Controller (although the Company claims that this shortfall is explained by the fact that it was too early for any bonus to be payable as she had only returned to work).

4. An email dated 12th January, 2017, from the plaintiff to Mr. McDermott and Mr. Lyons, the Human Resource Manager, was produced to the Court in which it was stated:

"Please note that I have no intention of applying a "wait-and-see" approach as to how things might pan out for me over the next few weeks, as canvassed by you in the course of our meeting Monday evening.

The purpose of this letter is to call upon you to reinstate me to my full role or similar position by Monday 22nd January. As suggested by you during our meeting Monday evening last that you required two weeks in order to consider my new role."

5. At the end of her first nine or so days of work, and as a result of the aforesaid distress, the plaintiff went to see her doctor on the 20th January, 2017. She was advised by her doctor not to return to work in the interests of her mental health and she has not returned to work in the Company since the 20th January, 2017, to the date of this hearing of this motion, which took place on the 21st February, 2017. There is no indication of when the plaintiff might be able to return to work.

6. It is also relevant to note that the plaintiff is not entitled to be paid when she is on sick leave, so she is not receiving any payment from the Company during her current absence. In this regard, she seeks in addition to an injunction '*requiring the defendant to permit the plaintiff to resume her function as Credit Controller*', an injunction directing the '*defendant to pay the plaintiff's salary*'.

7. For its part, the defendant provided this Court with terms of employment which it says it provided to the plaintiff, although it is to be noted that the plaintiff is described therein as an '*accounts receivable clerk*', rather than a credit controller. The document opened to this Court contains the following term:-

"It is an express condition of employment that you are prepared, whenever necessary, to transfer to alternative departments or duties within our business. This flexibility is essential as the type and volume of work is always subject to change, and it allows us to operate efficiently and gain maximum potential from our workforce."

8. On this basis, the Company claims that it was contractually entitled to assign the plaintiff to a different department when she returned to work. For her part, the plaintiff claims that she never received these terms of employment and she points out that this document is not signed by her, or on behalf of the Company and so she claims that the said condition is not a term of her employment.

9. There is therefore a factual dispute between the parties as to whether the plaintiff received these terms of employment, which factual dispute it is not possible to resolve at this interlocutory hearing.

10. Apart from its rights under the alleged terms of the employment contract, the Company claims it was entitled, in accordance with ss. 26 and 27 of the Maternity Protection Act 1994, to offer the plaintiff a different position to that held by her prior to her maternity leave, where it is not reasonably practicable to offer her the same position, provided that the alternative position is a suitable alternative. In this regard, the Company claims a reorganisation of the Credit Control Department in the Company took place almost a full year prior to the return to work of the plaintiff and as a result of this reorganisation, the Credit Control Department now consists

of two employees. The Company also claims that there were complaints and dissatisfaction regarding the plaintiff's work in the Credit Control Department and this was a factor in the decision to re-organise the Department during her absence on maternity leave. The Company also claims that the plaintiff presented difficulties regarding how credit control operated and this was why she was offered an alternative position.

11. In all of these circumstances the Company claims that it was not reasonably practicable for the plaintiff to return to work in the same position. It believes that it has complied with the Maternity Protection Acts by providing the plaintiff with a position, namely a sales position, which is a suitable alternative to her previous position

The Law

12. The plenary summons issued in this case seeks injunctions in similar terms to those now being sought pursuant to the plaintiff's motion in these interlocutory proceedings. It seems clear to this Court that the injunctions sought amount to mandatory injunctions, since they require the Company to employ the plaintiff as a Credit Controller with immediate effect. When dealing with a mandatory injunction, such as the one in this case, it is clear from the judgement of Fennelly J. in *Maha Lingham v HSE* [2006] 17 ELR 137 at p. 140 that:-

"it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action. So it is not sufficient for him simply to show a *prima facie* case, and in particular the courts have been slow to grant interlocutory injunctions to enforce contracts of employment."

It is also relevant to refer to *Earley v HSE* [2015] IEHC 520 where Kennedy J. noted at paragraph 30 that:-

"All the authorities make it abundantly clear, that the court should not seek to resolve contested issues of fact in an application for an interlocutory injunction".

Conclusion

13. This Court has referred earlier to several of the factual disputes between the parties in this case, which are clearly of significance to the chances of success of the plaintiff at the hearing of this action. For the reasons stated by Kennedy J., this Court does not propose to make any findings in relation to these factual disputes.

14. In these circumstances, and bearing in mind the reluctance of the Courts to grant mandatory injunctions to enforce contracts of employment, the plaintiff has failed to convince this Court that she has a sufficiently strong case that she is likely to succeed at the hearing of the action, such that she should be entitled at interlocutory stage to an order forcing her employer to employ her in the Credit Control Department, rather than where she is currently employed.

15. In addition, this Court takes the view that when the plenary proceedings are heard, and if the plaintiff were to be successful, and presuming that she is then fit to return to work, she could at that stage be appointed to the position of Credit Controller. For this reason this Court is of the view that damages will be an adequate remedy for any loss suffered by her, to take account of any alleged difference in her earnings arising from working for the Company, but not in the Credit Control Department.

16. While not determinative of this issue, this Court is also cognisant of the following when assessing the balance of convenience in this case:-

(i) The essence of the plaintiff's claim is that she is seeking a mandatory injunction to force her employer to return her to the position of Credit Controller and pay her salary, which she would otherwise not be entitled to, even though she is currently absent and has given no indication of when she might be in a position to return to work.

(ii) The plaintiff also seeks an injunction restraining the Company from appointing or assigning any person, other than the plaintiff, to the role of Credit Controller. If granted, this would mean that the Company would effectively be subject to an Order from the High Court, and all that this entails, obliging it to forthwith re-organise its Credit Control Department (and presumably re-assign one or both of the current employees therein to some other position) in the hope that the plaintiff would be able to resume her work at some stage in the future.

17. Finally, it would seem to this Court that the substance of the plaintiff's complaint is that the Company has failed in its obligations under ss. 26 and 27 of the Maternity Protection Act, 1994. For this reason, it seems to this Court that the more appropriate forum for the resolution of this matter is the Workplace Relations Commission, particularly when one considers that the costs, for both parties, of a Workplace Relations action are considerably less than High Court litigation, combined of course with the fact that under s. 39 of the Workplace Relations Act, 2015, mediation may be offered to the parties, which would increase the chances of an even cheaper resolution of this dispute, at a fraction of High Court litigation costs.