

THE HIGH COURT

[2005 No. 198S]

BETWEEN

SENAN HISTON

PLAINTIFF

AND

SHANNON FOYNES PORT COMPANY

DEFENDANT

Judgment of Ms. Justice Finlay Geoghegan delivered the 3rd day of October, 2006.**Present Application**

1. This is an application by the plaintiff for liberty to enter final judgment in the sum of €376,458.57 as a debt due and owing by the defendant to the plaintiff in respect of salary period 22nd September, 2001, to the 16th December, 2004 and interest pursuant to the Courts Act, 1981.

2. The motion seeking liberty to enter final judgment was issued on the 19th April, 2005 and came on for hearing before MacMenamin J. in the High Court on the 17th February, 2006. It appears that on such application, counsel for the defendant characterised the defence sought to be made as one of contributory negligence and an issue arose as to whether a matter of law contributory negligence was capable of being a defence to the plaintiff's claim in the summary proceedings. MacMenamin J. directed the trial of that question as a preliminary issue. No formal order was drawn pursuant to the directions of MacMenamin J. on the 17th February, 2006. However a motion was then issued seeking a determination of the issues pursuant to the direction of MacMenamin J. which came on for hearing before me and I delivered a judgment on the preliminary issue on the 15th June, 2006. On the preliminary issue I determined:

"Contributory negligence, as alleged in paragraphs 1 to 16 of the defendant's particulars dated the 26th April, 2006, is not, as a matter of law capable of being a defence to the plaintiff's claim."

3. A further motion was then issued by the plaintiff on the 22nd June, 2006, seeking directions regarding the further hearing of the plaintiff's motion for liberty to enter final judgment. On consent I made an order re-entering the motion seeking liberty to enter final judgment and on consent of the parties agreed to hear that motion on the 25th July, 2006. A further affidavit was filed on behalf of the defendant in the application for liberty to enter final judgment. The defendant now seeks to have the matter remitted to plenary hearing. It contends on the facts set out in the additional affidavit of Mr. Inverarity that it has a bona fide defence based on the following:

1. That the plaintiff did not work for the defendant during the period for which salary is claimed (22nd September, 2001 to 16th December, 2004), and that the plaintiff is not entitled to receive his salary in circumstances where he did not work.

2. That the plaintiff did not find alternative employment during the period in question and by not doing so failed to mitigate his alleged loss and therefore is not entitled to judgment for the debt alleged to be due and owing.

4. No objection is made on behalf of the plaintiff seeking to raise the above defences subsequent to the hearing of the motion before MacMenamin J. and the determination of the preliminary issue as directed by him. Rather, it is submitted on the plaintiff's behalf that neither potential defence is such as entitles the defendant to have the matter remitted to plenary hearing.

5. There is no dispute between the parties as to the principles to be applied by the court in determining whether or not the plaintiff is entitled to summary judgment or whether the matter should be remitted for plenary hearing. This court must determine that issue in accordance with the decision of the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607. In that case both McGuinness J. and Hardiman J. gave judgments with which Denham J. concurred. Both McGuinness J. and Hardiman J. approved of the earlier formulation of Murphy J. in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 where he cited with approval the test laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 in the following terms:-

"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendant's having a real or *bona fide* defence."

6. In the same decision, Hardiman J. considered that the above formulation was similar to a number of earlier formulations on applications for summary judgment. He referred amongst others to Sheppards, *Crawford v. Gillmor* (1891) L.R. Ir. 238 where Sir Peter O'Brien C.J. said at p. 245:-

"I think, however, that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises."

7. There are no relevant facts in dispute in this application. The background is more fully set out in the judgment I delivered on the preliminary application on the 15th June, 2006. The plaintiff is the former Harbour Master of the Foynes Port Company. He became the holder of an office in the employment of the defendant following the amalgamation of the former Harbours of Foynes Port Company and Shannon Estuary Port Company pursuant to the Harbours (Amendment) Act 2000. A dispute then ensued between the plaintiff and the Chief Executive of the defendant which culminated in the defendant purporting to dismiss the plaintiff on the 21st September, 2001. The plaintiff then commenced plenary proceedings against the defendant essentially challenging the validity of that purported dismissal and seeking declarations, injunctions and other consequential relief. In the High Court he was substantially unsuccessful and appealed that decision to the Supreme Court. In the Supreme Court, (Unreported, Supreme Court, 17th December, 2004) the appeal was allowed and so much of the judgment and order of the High Court as dismissed part of the plaintiff's claim was set aside and in lieu thereof the Supreme Court made a declaration:

"That the plaintiff has not been validly removed from office in the employment of the defendant."

8. The basis of that decision as appears from the judgment of Geoghegan J. at p. 8 was that having regard to the interpretation of s. 39 of the Harbours Act 1996 by the Court, the plaintiff continued to have officer status in the employment of the defendant and could not be dismissed without the sanction of the Minister for Marine. That sanction was not obtained prior to the purported

dismissal and accordingly Geoghegan J. stated at p.8:-

"It seems clear, therefore, that he had never been validly removed and is still in office."

9. On the present hearing before me it was common case that until the date of the purported dismissal on the 21st September, 2001, the plaintiff was paid a salary by the defendant in accordance with the amount claimed. Further it was common case that the defendant recommenced paying the plaintiff the said salary from the date of the Supreme Court judgment, the 17th December, 2004, and that in the subsequent period the plaintiff was not required to turn up for work with the defendant. There is no dispute between the parties that if the plaintiff is entitled to be paid a salary for the period between the 22nd September, 2001 and 16th December, 2004, that the salary due is in the amount claimed. Further, it is not disputed by the defendant that prior to the purported dismissal on the 21st September, 2001, the plaintiff was the holder of an office in the employment of the defendant in respect of which he was entitled to be paid a salary in the amount claimed.

10. The defendant in its approach to the payment of salary to the plaintiff subsequent to the Supreme Court decision has sought to distinguish the plaintiff's position prior to and subsequent to the judgment of the Court. Notwithstanding, no submission was made on behalf of the defendant, correctly in my view, that the decision of the Supreme Court in any way altered the legal relationship between the plaintiff and the defendant. The judgment and order of the Supreme Court of December, 2004, is simply declaratory of the plaintiff's position. The Supreme Court declared that the plaintiff had not been validly removed from office in the employment of the defendant. Accordingly at all material times between the 21st September, 2004 and the 16th December, 2004 and prior to and subsequent to the said period the plaintiff was in office in the employment of the defendant. Whilst it is relevant to note this position, it does not necessarily determine the present application.

Potential Defences

11. The first defence sought to be made is that as the claim made by the plaintiff is for a debt due in respect of arrears of unpaid salary, and whilst the defendant accepts that the plaintiff was at all material times the holder of an office to which the salary claimed was attributable, it is contended that the payment of salary connotes a reward for services rendered and that the corollary is that if full services are not rendered, then full payment is not due. Reliance was placed in particular upon the analysis of the House of Lords in *Myles v. Wakefield Metropolitan District Council* [1987] A.C. 539.

12. The plaintiff asserts that this potential defence is unstateable in law by reason of s. 5 of the Payment of Wages Act, 1991 which governs the obligations of the defendant in relation to the payment of salary to the plaintiff. Section 5 of the Payment of Wages Act, 1991 provides that "an employer shall not make a deduction from the wages of an employee" unless certain conditions set out in s. 5 are fulfilled. Counsel for the defendant did not submit that on the facts herein any of the conditions which would potentially justify a deduction under s. 5 applied. Rather it was submitted that s. 5 of the Act of 1991 did not apply to the present situation as the defendant was not making a deduction from salary but was rather failing to pay 100% of the salary.

13. The plaintiff is an employee as defined in s. 1 of the Act of 1991. The defendant is an employer as defined in the same section and the salary claimed are wages as defined in the same section. The purpose of s. 5 is to preclude an employer from making deductions from the wages of an employee unless certain specified conditions are met. Section 5(2) is expressly directed to a prohibition against an employer making any deduction from wages in respect of "any act or omission of the employee" unless certain specified conditions are met. As already indicated it is not suggested that any of such conditions were met by the defendant herein. It does not appear to me arguable that a failure to pay to the plaintiff any part of his salary is not a deduction from his salary within the meaning of s. 5 of the Act of 1991. It is a deduction of 100%. Further the 100% deduction is being made in respect of an alleged omission by the employee i.e. the failure to turn up for work. Such a deduction is expressly prohibited by s. 5(2) of the Act of 1991.

14. Insofar as the defendant sought to rely on the decision in *Myles v. Wakefield Metropolitan District Council* it appears to me that the reasoning in that case which applies to the common law position is not applicable by reason of the express statutory prohibition in s. 5 of the Act of 1991 which applies to the obligations of the defendant to the plaintiff herein.

15. The second defence sought to be made is that notwithstanding the decision on the preliminary issue, there exists a duty on the plaintiff to mitigate the loss which the plaintiff alleges he suffered in his claim in these proceedings. The plaintiff in response asserts that the obligation on a plaintiff to mitigate his loss does not apply to a claim for a debt due regardless of whether the claim is a debt due pursuant to contract or a payment due under statute. If this is properly a payment due under statute (which is disputed by the defendant) then the plaintiff relies upon the statement in McGregor on *Damages*, 17th Ed. (2003) at p.216 (para 7-002):-

"[t]he principal meaning of the term 'mitigation' ... concerns the avoiding of the consequence of a wrong, whether tort or breach of contract, and forms probably the only exact use of the term."

16. Those authors add at p.7 (para 1-010):-

"Actions claiming money under statutes, where the claim is made independently of a wrong which is a tort or breach of contract, are not actions for damages. Actions in respect of benefits under the Social Security Acts provide an excellent illustration; further examples are provided in the sphere of employment by claims for unfair dismissal and claims for redundancy payments, both of which are now provided for under the Employment Rights Act, 1996"

17. The plaintiff also relies upon a further statement in the same edition of McGregor at para 1-005 in relation to the distinction between actions for a debt, such as the present claim and actions for damages:-

"(1) Actions claiming money payable by the terms of a contract are for money which the defendant has promised by the contract to pay and therefore are not actions for damages. Illustrations are provided by actions for the price of goods sold and delivered, actions for salary or wages for services rendered, actions for rent, actions for freight and actions to recover moneys are payable under insurance policies. In tradition terminology the contrast is between actions of debt and actions for damages. Actions of debt are to be distinguished from actions for damages for breach of a contract and are outside the scope of this textbook."

18. I accept the distinction made by the plaintiff. It does not appear to me arguable that the principles applicable to a plaintiff's obligation to mitigate his or her loss are relevant to a claim for a debt due pursuant to contract or pursuant to statute. Those principles apply to claims for loss and damage suffered by reason of an alleged wrong (whether in contract or tort).

19. Accordingly I have concluded that the defendant has not satisfied the court that there is a fair or reasonable probability of the defendant having a real or bona fide defence to the plaintiff's claim herein. Accordingly I have concluded that the plaintiff is entitled

to summary judgment as claimed in the summary summons herein.