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THE HIGH COURT

2008 176 MCA

IN THE MATTER OF THE PROTECTION OF EMPLOYEES

(FIXED TERM WORK) ACT 2003 AND

ORDER 80 4C OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

FERGUS RUSSELL

APPLICANT

AND

MOUNT TEMPLE COMPREHENSIVE SCHOOL

RESPONDENT

JUDGMENT of Mr. Justice Michael Hanna delivered on the 4th day of December, 2009

1. The applicant in this case is a teacher residing at 90, Larkhill Road, Whitehall, Dublin 9. He was employed by the respondent as a teacher of Engineering, Metalwork and Technical Drawing at Leaving and Junior Certificate level. The background facts are not seriously in dispute, at least in terms of what occurred over the five years during which the applicant worked for the respondent. He complains that he was forced unlawfully to leave that position on 31st August 2007.

2. The applicant claims entitlement to a permanent position in the teaching post in question, placing reliance on s. 9 of the Protection of Employees (Fixed Term Work) Act 2003, (hereafter "the Act"). He brought a challenge to the decision to terminate his services to a Rights Commissioner under s. 14 of the Act. He was successful in that application. The respondent appealed the aforesaid decision of the Rights Commissioner to the Labour Court pursuant to s. 14 of the Act. The Labour Court by a decision/determination dated 9th October, 2008 and notified subsequently to the applicant, reversed the finding of the Rights Commissioner.

3. The applicant complains that the decision of the Labour Court is erroneous in law and appeals that decision pursuant to s. 15(6) of the Act. That subsection provides as follows:

> "A party to proceedings before the Labour Court under this section may appeal to the High Court from the determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive."

4. Turning to the background facts, the applicant was employed by the respondent on a succession of fixed-term contracts commencing on 1st September, 2002, until 31st August, 2007, as a teacher of Engineering, Metalwork and Technical Drawing. The applicant took over the duties of a Mr. Vaughan who had departed on a career break. Notwithstanding the fact that the contract was renewed every year up to and including September 2006, only one formal, written contract was ever given to the applicant. This was the first contract and was effective from 1st September, 2004. Its material provision was as follows:

> "The Management Authority agrees to employ the Teacher as a temporary teacher of the School from the 1st day of September 2004 to the 31st day of August, 2005, extendable to termination at the career break of Mr Timothy Vaughan."

5. Subsequent to the renewal of the contract in September 2006 and during the course of the academic year, more specifically in the month of March 2007, Mr. Vaughan notified the respondent of this intention to resign from his post with effect from the commencement of the next school year i.e. September 2007. When the applicant became aware of this state of affairs, he wrote a letter dated 19th April 2007 to the principal of the respondent seeking clarity as to his position. He received no response to this. He enquired, again, by letter of 13th May 2007. In that letter he stated, *inter alia*, that in the absence of a response to his earlier letter he believed he could reasonably expect to be appointed to the vacant and permanent full-time post with effect from the following academic year.

6. This, too, failed to elicit a written response. However, the Principal of the respondent spoke to the applicant and advised him that he could not be appointed directly to the vacant post and that he would have to participate in a competition, in effect to apply for the job like any other applicant. The applicant asserted that he had a legally protected right but this did not alter the Principal's view.

7. Matters then proceeded to the advertising of the vacancy in the public press and the applicant, with some reluctance, applied. He was interviewed on 7th August, 2007. He was, alas, unsuccessful and, on the expiry of his fixed term contract on 31st of August, 2007, his employment with the respondent ceased and was never renewed. The position was awarded to the spouse of the Deputy Principal. During the course of the hearing before me, Mr. Horan S.C. during his concluding remarks made reference to "nepotism" in a somewhat heated moment in his eloquent presentation of the applicant's case. Such a complaint has never formed any part of the proceedings in this case to date. Accordingly, I disregard the remark and put it down to Mr. Horan's passionate commitment to his client's case.

8. It might be useful at this point to set out the relevant sections of the statutory framework with which we are here concerned. The Act of 2003 was enacted with a view to implementing Directive Number 1999/70/EC. That Directive concerned itself with addressing the issue of employment conditions of workers retained under a fixed-term contract of employment, to put it very briefly. Sections 8 and 9 are the most immediately relevant provisions. Section 8 identifies three different types of fixed-term contract namely one that is temporal in nature, another that is specifically task related and, thirdly, one that determines on the happening of a specific event. An employer is required to write to the employee setting out the specific objective reasons for renewing the fixed-term contract. If an employer fails to do so there does not appear to be any direct sanction. However, in the event of proceedings being brought under the Act, a Rights Commissioner or the Labour Court are then entitled to draw any inference from such default as appears to either to be just and equitable in the circumstances. The text of section 8 is as follows:

> "8(1) Where an employee is employed on a fixed-term contract the fixed-term employee shall be informed in writing as soon as practicable by the employer of the objective condition determining the contract whether it is –
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> (a) arriving at a specific date,
>
> (b) completing a specific task, or
>
> (c) the occurrence of a specific event.
>
> (2) Where an employer proposes to renew a fixed-term contract, the fixed-term employee shall be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration, at the latest by the date of the renewal.
>
> (3) A written statement under subsection (1) or (2) is admissible as evidence in any proceedings under this Act.
>
> (4) If it appears to a rights commissioner or the Labour Court in any proceedings under this Act -
>
> (a) that an employer omitted to provide a written statement, or
>
> (b) that a written statement is evasive or equivocal,
>
> the rights commissioner or the Labour Court may draw any inference he or she or it consider just and equitable in the circumstances."

9. Section 9 provides, in the first instance, that after an employee has been engaged in a fixed-term contract for three years continuous employment, the fixed-term contract may be renewed for no more than a period of one year. The section goes on to make provision with regards to contracts entered into after the passing of the Act, a situation which does not obtain here. Importantly, where there is a contravention by the employer of any of the provisions of this section, the contract is deemed to be a contract of indefinite duration. There is, however, a saver for the employer where the renewal of the fixed-term contract is justified on objective grounds. The text of section 9 is as follows:

> "9(1) Subject to subsection (4), where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year.
>
> (2) Subject to subsection (4), where after the passing of this Act a fixed-term employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts and the date of the first such contract is subsequent to the date on which this Act is passed, the aggregate duration of such contracts shall not exceed 4 years.
>
> (3) Where any term of a fixed-term contract purports to contravene subsection (1) or (2) that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.
>
> (4) Subsections (1) to (3) shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal.
>
> (5) The First Schedule to the Minimum Notice and Terms of Employment Acts 1973 to 2001 shall apply for the purpose of ascertaining the period of service of an employee and whether that service has been continuous."

10. The Act does offer some guidance as to what should be taken into account in assessing what constitutes objective grounds. Section 7 (1) provides:

> "A ground shall not be regarded as an objective ground for the purposes of any provision of this Part unless it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose."

11. For the applicant, it was argued before the Rights Commissioner and the Labour Court that once the objective grounds for the renewal of his contract on a fixed-term basis ceased to exist, the applicant then became entitled to a contract of indefinite duration. As of March 2007 the objective grounds for renewing the fixed-term contract, namely the leave of absence being enjoyed by Mr. Vaughan, ceased to exist with the latter's resignation from his post. The applicant argued that he should then have been appointed to the full-time permanent post of Teacher of Engineering, Metalwork and Technical Drawing with Effect from September 2007. The applicant sought reinstatement. Although reinstatement or re-engagement are reliefs which the applicant is entitled to seek under the Act, Mr. Horan S.C. limited the relief sought from me to referral back to the Labour Court should I take the view that the Labour Court had erred in law.

12. An alternative claim advanced before the Labour Court was to the effect that the non-renewal of the applicant's fixed term contract was for the purpose of avoiding it being deemed to be one of indefinite duration, contrary to section 13 of the Act. That section provides as follows:

> "(1) An employer shall not penalise an employee –
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> (a) for invoking any right of the employee to be treated, in respect of the employee's conditions of employment, in the manner provided for by this Part,
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> (b) for having in good faith opposed by lawful means an act which is unlawful under this Act,
>
> (c) for giving in any proceeding under this Act or for giving notice of his or her intention to do so or to do any other thing referred to in paragraph (a) or (b), or
>
> (d) by dismissing the employee from his or her employment if the dismissal is wholly or partly for or connected with the purpose of the avoidance of a fixed-term contract being deemed to be a contract of indefinite duration under section 9(3).
>
> (2) For the purposes of this section, an employee is penalised if he or she –
>
> (a) is dismissed or suffers any unfavourable change in his or her conditions of employment or any unfair treatment (including selection for redundancy), or
>
> (b) is the subject of any other action prejudicial to his or her employment?

Particular reliance was placed by the applicant on section 13(1)(d).

13. When the matter was opened before me, and to the objection of Mr. Callanan S.C. for the respondent, Mr. Horan appeared to depart from the case that was made before the Labour Court and, indeed, the Rights Commissioner. He sought to assert that the contract under which the applicant was engaged was a contract for a defined purpose, namely for that period of time during which Mr. Vaughan absented himself on his career break. Once the latter resigned, the applicant thereafter became entitled to a contract of indefinite duration by operation of the Act.

14. For the respondent, Mr. Callanan S.C. objected to Mr. Horan seeking, as Mr. Callanan asserted, to put a different legal construction on the contractual relationship which existed between the applicant and the respondent. The case had not been made before and this court should not now entertain it.

15. Before this court and before the Rights Commissioner and the Labour Court, it was argued that the applicant was engaged by the respondent on a succession of one year fixed term contracts. This state of affairs was a clear and unassailable fact. On the occasion of each renewal, objective grounds existed for the entering into a fresh one year contract with the applicant and this was both known and acknowledged by him. In such circumstances, it was lawful for the parties to enter into such an arrangement.

16. The status of the applicant's contract could not be altered by subsequent external events. Its substance could not be retro-changed by the fact that Mr. Vaughan resigned from his post. To hold otherwise would offend against the principle of legal certainty.

17. The applicant, it was contended, in no way was treated in the manner envisaged by s. 13 of the Act. It was entirely lawful for the respondent to advertise and hold interviews for candidates for the post, including the applicant, and to engage the successful candidate.

18. In arriving at its conclusion, the Labour Court stated that, pursuant to s. 9(1) of the Act when the applicant had completed his third year of fixed term employment on 31st August 2005, the respondent was entitled to a renewal of his contract on one further occasion for a period not exceeding one year. The following year, this was again renewed. The Labour Court concluded that the subsequent renewal was saved by section 9(4) of the Act because there were objective grounds justifying the renewal. The Labour Court went on to say that had they accepted that where a fixed term contract was renewed in contravention of subsections (1) and (2) of s. 9 of the Act, the offending term is severed and the contract becomes one of indefinite duration by operation of law. However, the Labour Court could not accept the contention advanced on behalf of the applicant that where the objective grounds cease to exist during the currency of the fixed term contract then subsection (3) would come into effect. Section 9(1) and (2) of the Act clearly operate at the time of the renewal. At that point, if the provisions of subsection (3) is rendered inoperative by virtue of subsection (4) and then the renewal of the contract is perfectly lawful and cannot retrospectively be rendered unlawful by the occurrence of a future unforeseen event. Had the legislators intended that a fixed term contract saved by subsection (4) could be converted into one of indefinite duration during its currency where the grounds originally relied upon for its renewal cease to exist then they would have so provided in the legislation. They did not do so.

19. The non-renewal of the applicant's contract did not amount to a penalisation because the clear evidence in the case was that his employment came to an end in circumstances in which his contract expired and was not renewed because a vacancy for which he was providing cover had been filled by another teacher. Although not penalised, the applicant was treated unfavourably and in a manner which may be viewed as unfair. The above is a somewhat truncated description of the findings of the Labour Court. The decision is fully reported at [2009] E.L.R. 81.

20. I now turn to the decision of the Labour Court. The first matter to be addressed is the identification of the principles which should inform my approach. In *Mara (Inspector of Taxes) v. Hummingbird Ltd.* [1982] I.L.R.M. 421, the Supreme Court through the judgment of Kenny J. dealing with the case stated in a revenue matter said that conclusions, in this instance by the Appeal Commissioner, should not be set aside unless based on a mistaken view of the law or a wrong interpretation of documents unless inferences drawn were ones that no reasonable decision maker could draw. Kenny J. states at page 426:

> "A case stated consists in part of findings on questions of primary fact, e.g. with what intention did the taxpayer purchase the Baggot Street premises. These findings on primary facts should not be set aside by the courts unless

there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusion or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are correct for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw. The ways of conducting business have become very complex and the answer to the question whether a transaction was an adventure in the nature of the trade nearly always depends on the importance which the judge or commissioner attaches to some facts. He will have evidence some of which supports the conclusion that the transaction under investigation was an adventure in the nature of trade and he will have some which points to the opposite conclusion. These are essentially matters of degree and his conclusions should be disturbed (even if the court does not agree with them, or we are not retrying the case) unless they are such that a reasonable commissioner could not draw them or they are based on a mistaken view of the law."

21. In a comprehensive review of relevant case law, including *Mara v. Hummingbird* as cited above Gilligan J says as follows in *Electricity Supply Board v. The Minister for Social Community and Family Affairs and Others* [2006] I.E.H.C. 59, firstly at p. 5:

"In *Deely v. Information Commissioner* (Unreported, High Court, 11th May, 2001) McKechnie J. noted at p. 17 that the remit of the Court in an appeal on a point of law encompassed the following:

(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings,

(b) it ought not set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw,

(c) it can however reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect, and finally,

(d) if the conclusion reached by such bodies' shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision. See for example *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] I.L.R.M. 421, *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 and *Premier Periclase v. Valuation Tribunal* HC 24th June, 1999 U/R.

Budd J. in *Brides v. Minister for Agriculture* [1998] 4 I.R. 250, dealt with the position of the examining role of the High Court in an appeal such as this wherein he stated at pp. 274 - 275:

'Since this is an appeal on a point of law, it is not a rehearing. Accordingly, the facts as found by the Labour Court are binding on this court where those facts are supported by credible evidence and this court should be slow to disregard the inferences drawn by the Labour Court from its findings of fact unless the inferences drawn are wholly unwarranted on the findings of fact made. The role of this court has been explained by Kenny J. in the Supreme Court in *Mara (Insp. of Taxes) v. Hummingbird* [1982] I.L.R.M. 421 at p. 426 in a case stated where the Income Tax Appeal Commissioners found, as a fact, that Hummingbird purchased premises in Baggot Street, Dublin, as an investment and so its sale was not in the course of trade. . . .'

Hamilton C.J. in his judgment in *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1998] 1 I.R. 34 at p. 37 dealt with the role of the court in an appeal such as this and succinctly stated at pp. 37 - 38 of the judgment:-

'…I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review.'"

22. In setting out his own conclusions in the case, Gilligan J. says at p. 11:

"I take the view that the approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the Court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officer, to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision.

I take the view that the issue which the Appeals Officer had to decide in this case is to be approached on the basis that the written agreement existing between the parties is of considerable importance and has to be given due consideration but is not conclusive in its own right and therefore, following Keane J. in *Henry Denny & Sons (Ireland) Limited t/a Kerry Foods v. Minister for Social Welfare* [1998] 1 I.R. 34, the particular facts and circumstances of the case have to be considered."

CONCLUSIONS

23. It seems to me that the first matter which I should consider is whether or not the case that the applicant now seeks to make as to the nature of the contract he was employed under, which is that it was a contract of a very specific purpose, was advanced before either the Rights Commissioner or the Labour Court. In my view, it was not. The applicant's case, at all times, was that he was engaged on the basis of a series of one year fixed term contracts. His stall, as it were, was set out on his behalf by letter of 23rd August, 2007 from Ms. Annette Dolan, Assistant General Secretary of

the Teachers Union of Ireland. In the second paragraph of that letter she writes:

> "Mr Fergus Russell was employed on a fixed term contract to teach engineering, metalwork and technical drawing in Mount Temple Comprehensive School as the person who held the prominent post was on a career break. Mr. Russell duly took over the position by virtue of contracts of a Fixed Term nature. As the end of the academic year 2007 the permanent post holder resigned. At this stage Mr Russell was entitled pursuant to the Protection of Employees (Fixed Term Work) Act 2003 to redeem his contract of employment as a contract of indefinite duration."

24. A letter dated 31st August, 2007 and written by the same author to an official in the Department of Education and Science similarly classified the nature of the applicant's contractual engagement with the respondent.

A form entitled "Notice of Complaint to Rights Commissioner" similarly describes the nature of the applicant's employment. Appended to that document is a statement signed in typescript by the applicant in which, *inter alia*, he states the following:

> "I commenced employment in September 2002 in Mount Temple Comprehensive School on a fixed term contract as a teacher of engineering, metalwork and technical drawing, as the person who held the contract was on a career break. My contract was renewed for the 2003/04, 2004/05, 2005/06 and 2006/07 school years."

25. I accept Mr. Callanan's contention that no case was made before the Labour Court, from whose findings the appeal lies to this court, to the effect that the applicant was engaged on a contract for a specific purpose. The appeal is on a point of law from the Labour Court's determination. Save in the most exceptional circumstances, it seems to me that I would be exceeding my remit were I to entertain arguments and give consideration to a point which had not been taken in the Labour Court and in respect of which the respondent had not been given an opportunity to rebut.

26. Even where all the evidence was squarely before the Labour Court, which is, after all, a tribunal possessed of formidable experience and expertise, the courts have traditionally been slow to interfere with its findings. Where a new case or evidence is introduced on appeal against a decision of the Labour Court, the position is even starker from the appellant's perspective.

27. In *Bates and Others v. Modern Bakery Ltd. and Another* [1993] 1 I.R. 359, with reference to, in effect, identical appellate provisions under the Redundancy Payments legislation concerning the Employment Appeals Tribunal, the Supreme Court held that an appeal lying to this court on a point of law from a decision of the relevant Tribunal was a determination of a question of law based on a consideration of the primary facts, in that case found by the Employment Appeals Tribunal, and on the relevant statutory provisions and legal principles. At page 364 Finlay C.J. says:

> It is of importance to point out, however, that having regard to the clear terms of the two sections providing for a final and conclusive decision by the Tribunal, subject only to an appeal to the High Court on a question of law, that what would appear to be the appropriate procedure is the summons as provided for in O. 105, which should state the decision being appealed against, the question of law which it is suggested was in error, and the grounds of the appeal, and that it should be supported only by an affidavit or affidavits exhibiting the determination of the Employment Appeals Tribunal, including any findings of fact or recital of evidence made by it, and, in effect, identifying the parties and the grounds on which the aggrieved party seeks a determination of a question of law. There does not appear to be any room, however, in the procedure, having regard to the terms of the two sections involved, for repeating and, in particular, for adding to or supplementing evidence which was given before the Employment Appeals Tribunal concerning the circumstances of the dispute which had been referred to that Tribunal."

28. I cannot, therefore, hear by way of appeal that which was not in issue in the court below. My determination must be kept within the parameters of that body of material and evidence which was before the Labour Court. On such evidence, the Labour Court found that the applicant had been engaged by way of a series of fixed term contracts. No one disputed that fact before it. In my opinion, I cannot now proceed to consider this appeal other than in the light of the finding of fact with regard to the applicant's employment status by the Labour Court.

29. As pointed out above, the case advanced before the Labour Court was so advanced on the basis of the applicant having been engaged by the respondent under a succession of one year contracts. That being the case, and such case being supported by objective evidence, this Court cannot interfere with the factual findings of the Labour Court. The Labour Court was entitled to come to the conclusion which it did. This may well have come to a different conclusion had a different case been advanced before it. Alternatively, had the applicant's case been significantly hampered or unfairly undermined before the Labour Court to the extent that his case was not adequately put, one might consider remitting the matter if only for clarification purposes. However, as is clear from the report, the applicant was represented (as was the respondent). The respondent was represented by counsel and the applicant by his trade union. It is very much within the area of competence of the Labour Court that it should determine its own procedures. This Court must respect the right of that expert body to do so.

30. With regard to any purported complaint being made by the applicant before the Labour Court on foot of s. 8 of the Act, as is apparent from the judgment, the Labour Court came to the conclusion that no such complaint had properly been advanced before it. It was entitled to come to that view in my opinion. It is noteworthy, on perusal of the determination, however, that the Labour Court did engage with s. 8 and considered the failure on the part of the respondent to comply with its provisions. To recapitulate, s. 8 of the Act is limited in any sanction which it imposes upon an errant employer to enabling the Labour Court to draw such inference as it considers just and equitable in the circumstances where no written statement is provided by an employer or where that statement is evasive or equivocal. Notwithstanding its ruling later on in the determination with regard to s. 8, the following extract from the Labour Court's judgment to be found at p. 82 of the report demonstrates that, in effect, s. 8 was considered and an appropriate inference was drawn.

> The contract was, in fact, renewed on September 1st, 2006, until August 31st, 2007. While issues were raised in

relation to the respondent's failure to provide the claimant with a written statement of the objective grounds justifying this renewal the court is satisfied that it was grounded on the continued absence of Mr. Vaughan on a career break. The court is further satisfied that the claimant understood and accepted this to be the case."

Accordingly, notwithstanding the fact that the Labour Court ruled that s. 8 of the Act had not properly been canvassed before either the Rights Commissioner or itself, the decision sufficiently addressed any complaint the applicant might have, in my opinion, and drew an appropriate inference or inferences on the evidence available to it.

31. The Labour Court was, in my view, entitled therefore to focus upon s. 9 of the Act as being the central "plank" of the applicant's claim. The manner in which the Labour Court dealt with this aspect of the case merits repetition in full. At pp. 86 and 87 of its decision, the Labour Court ruled as follows:

"Section 9 of the Act is intended to give effect to clause 5 of the Framework Agreement on Fixed-Term Work concluded between ETUC, UNICE, and CEEP, annexed to Directive 99/70. That provision in the Framework Agreement requires Member States to introduce measures to prevent the abuse of successive fixed-term contracts. It provides:-

'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partner, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

(a) objective reasons justifying the renewal of such contracts or relationships;

(b) the maximum total duration of successive fixed-term employment contracts or relationships;

(c) the number of renewals of such contracts or relationships.'

It seems clear from the wording of s. 9 as a whole that it directed as regulating the circumstances in which fixed term contracts can be renewed. This appears to comport fully with the requirements of clause 5 of the Framework Agreement, just quoted, which is also focused on the successive renewal of fixed-term contracts.

Where a fixed-term contract is renewed in contravention of ss. 9(1) or 9(2) subsection (3) of that section provides, in effect, that the offending term is severed and the contract becomes one of indefinite duration by operation of law. This Court so held in *State Laboratory v. McArdle Labour Court Determination* (April 4th, 2006), a decision upheld on appeal by Laffoy J. in *Minister for Finance v. McArdle* [2007] E.L.R. 165.

The claimant contends that s. 9 should be construed as also providing that where objective grounds existed at the time at which a fixed-term contract was renewed beyond what is normally permissible by ss. 9(1) or (2), but those grounds subsequently cease to exist, subs. (3) should, at that point, become operative. It was submitted that in such circumstances the contract should be deemed to be one of indefinite duration from the point at which the objective grounds no longer apply.

The court cannot accept that submission. Subsections (1) and (2) of s. 9 clearly operate at the time of the renewal of a fixed-term contract. Subsection (4) of s. 9 provides that subs. (3) shall not apply to the renewal of a fixed-term contract where there are objective grounds justifying such renewal. Hence where the renewal of a fixed-term contract beyond the time specified in s. 9(1) or s. 9(2) is saved by s. 9(4) that renewal is perfectly lawful and it cannot be retrospectively rendered unlawful by the occurrence of a future unforeseen event.

Had the Oireachtas intended to provide that a lawfully concluded fixed-term contract would become one of indefinite duration where the objective grounds originally relied upon for its renewal cease to exist during its currency, it could have easily made a provision to that effect. No such provision was made and in the court's view the section cannot be read as importing such a provision.

Accordingly, the court cannot hold that Mr. Vaughan's resignation, and the resultant vacancy which it created, entitle the claimant to a contract of indefinite duration by virtue of s. 9 of the Act."

I find myself in agreement with the above extract. Section 9 must be seen in terms of the commencement of the contractual term which, I have already stated, was for a fixed period of twelve months. I accept that it would offend against the fundamental principle of certainty in contract if, in such cases, external circumstances could operate effectively to eradicate the contractual relationship entered into between the parties. Although Mr. Callanan S.C. opened authority from the European Court of Justice I find it unnecessary to repeat that here. In my view, s. 9 is clear and the principle of certainty coercive. I find no fault with the logic of the decision advanced by the Labour Court. In my opinion it cannot be criticised to the extent of being interfered with as permitted by the law.

32. Turning finally to the provisions of s. 13, the Labour Court took the view that, whereas the treatment afforded to the applicant could be described as "unfavourable", it did not, however, amount to penalisation since, the Labour Court concluded, it was not in retaliation for any of the matters referred to at sub-paras. 1(a) to (d) of s. 13. I must confess I am a bit uncomfortable with the use of the word "unfavourable" and, later, "unfair", nevertheless, having regard to what I have already said and to the case which was advanced before the Labour Court, it was entitled to come to the view that the cessation of the applicant's employment did not arise by way of any penalisation but by the expiry of the contractual term under which he was engaged. Again, one might have come to a different conclusion. One cannot say, however, in my view, that the Labour Court was not entitled to come to the conclusion that it did.

33. The Labour Court went on to deal with matters involving the Education Act 1998, with which we are not presently concerned.

34. This Court shares the Labour Court's sympathy with the applicant in his plight. Perhaps if the case had been run upon the lines advanced by Mr. Horan S.C. before this Court, a different outcome may have been had. The law, however, does

not entitle me to refer matters back for a reconsideration on grounds that were not argued before the deciding court. There may, of course, be exceptional circumstances where this can happen. However, where, as in this case, the applicant was professionally represented in accordance with the practice and procedures of the Labour Court as determined by that court, I cannot conceive circumstances in this case where, on an appeal from a point of law, I can afford the applicant a further "bite of the cherry". Apart altogether from considerations of certainty and finality, such an approach could wreak grave injustice upon any party (applicant or respondent) who succeeded before the deciding tribunal.

35. Having said all of the foregoing and in that I am not persuaded that any findings as to fact made by the Labour Court were based on a mistake in law or the drawing of inferences so unreasonable that no reasonable decision maker would have arrived at that decision, I must refuse the application.