

THE HIGH COURT

[2014 No. 543 S.]

BETWEEN

PRINCE ADEKOYA

PLAINTIFF

AND

IBM INTERNATIONAL HOLDINGS IRELAND

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 12th day of July, 2018

Introduction

1. The plaintiff commenced these proceedings by way of summary summons on 14 February 2014. By Order of the High Court (Eagar J.), it was ordered that the action be remitted for plenary hearing with the plaintiff to deliver points of claim and the defendant to deliver points of defence. The plaintiff's claim, as set out in the points of claim (titled "statement of claim" by the plaintiff), is:

"10. The defendant breached my contract that my salary or wages will be regularly paid into my bank account every 23rd of every month but stopped my salary since April, 2004 without any legitimate or legal excuse. I beg to refer to the offer of the contract of employment dated 30 June, 1999.

11. The defendant breached my contract for failure to give me the minimum period of notice agreed to in the terms and conditions of my contract of employment dated 30 June, 1999 in the event of termination of contract. I beg to refer to s. 2 (7) of my permanent employee handbook.

12. The defendant breached my contract for failure to provide me with a continuing source of income until retirement age as I am disabled through sickness or accident and unable to undertake my normal occupation. I beg to refer to s. 4 (6) of my permanent employee handbook."

2. Paragraph 12 above has to be seen in the context of the following paragraph and the special endorsement of claim to the plenary summons:

"The onus to prove on a balance of probabilities rested on me that the defendant provided me with an unsafe work system and the unsafe work tasks is the cause of my disability arising from the accident at work on 27th September, 2001."

3. The plaintiff has calculated his loss of salary as being in the sum of €247,776.00, that being the loss of salary from April 2004 to April 2014.

Background

4. The proceedings before this Court, which have already been the subject of two judgments of the Court of Appeal, have to be seen against the background of two other sets of proceedings:

(i) Proceedings before the Employment Appeals Tribunal (EAT)

(ii) Personal injuries proceedings

5. (i) EAT proceedings:

By form T1-A, the plaintiff brought a claim for unfair dismissal. In the form the plaintiff stated that his employment with the defendant ended on 23 March 2004. The plaintiff's claim was for constructive dismissal and the remedy sought was financial compensation. Further, there was no claim under the Minimum Notice and Terms of Employment Acts 1973-2001.

6. By letter dated 20 June 2016, the EAT informed the plaintiff that his claim would be heard on 14 July 2016. There was no appearance by or on behalf of the plaintiff on that date and the EAT dismissed the claim. This was confirmed by notice in writing to the plaintiff dated 22 July 2016. The plaintiff did not appeal or seek to upset this order.

7. (ii) Personal injuries action:

The plaintiff's claim for personal injuries in respect of events commencing in or about the months of August/September 2001 was initiated by way of Civil Bill in the Circuit Court. The action was subsequently transferred to the High Court and was heard by Cross J. over four days commencing 17 April 2012. In an *ex tempore* judgment, delivered on 20 April 2012, the learned trial judge assessed the damages and awarded the plaintiff the sum of €25,000.

8. In the course of his judgment Cross J., stated:

"He claimed that he was unable to work, he is certified as being sick by his general practitioner, is in receipt of disability and claims he will never work again and also claims he is entitled to his loss of earnings to date and into the future. The Court does not accept there is reality to that claim"

9. The judgment of Cross J. was appealed to the Supreme Court. The judgment of the Supreme Court was delivered by Murray J. (as he then was) wherein the court dismissed the appeal and affirmed the order of the High Court.

Instant Proceedings

10. As stated, these proceedings were commenced by way of summary summons and remitted for a plenary hearing. By order of the High Court (White J.), 3 March 2015, the proceedings were dismissed as being an abuse of process. This order was appealed to the Court of Appeal. In allowing the appeal, Ryan P., in an *ex tempore* judgment delivered on 18 December 2015, stated:

"13. It seems to me that we in this Court have to ask ourselves the following questions:

(i) Should the plaintiff, Mr. Adekoya, have included in his personal injuries action a claim for long-term disability under the IBM employee scheme?

(ii) Does this summary summons proceeding constitute or amount to a common law action for unfair dismissal?

The second question can be answered simply and clearly in the negative. The claim is in contract based on the scheme that IBM has in place for employees. Mr. Adekoya is either entitled to claim this benefit or he is not.

14. I think the answer to the first question is also known. This arises for a variety of reasons. My view is that although this claim may look tenuous, highly improbable of success or generally dubious, I do not think it was included or ought to have been included or had to be included in the previous proceedings for personal injuries. It is obviously not claimable under the EAT unfair dismissal regime. It seems to me to represent a separate claim by way of contract under which Mr. Adekoya claims that he is a qualifying person within the meaning of the permanent health insurance or benefit scheme IBM."

and,

"16. Another way of looking at this is that, as I discussed with Ms. McKenna, Counsel for IBM, Mr. Adekoya has claimed in the EAT proceedings for financial compensation. He could claim and could now seek to claim by way of amendment re-engagement or reinstatement. IBM is a big enough employer that it could accommodate one or other of those claims at least. We are dealing here in theory.

17. Assuming Mr. Adekoya succeeded in his claim, and it is worth bearing in mind that the onus of proof is on IBM to justify dismissal because the presumption is that it was unfair, then he could claim reinstatement. On that basis, he would still be an employee of IBM and would have to be paid his arrears of wages or whatever other benefits he would have been entitled to, but the essential point is that he would still be an employee. In that capacity, he would at least qualify for consideration for disability benefit long term on the assumption that he would satisfy the trustees or medical referees or whatever test he had to satisfy. Alternatively, assuming that he did in fact leave his employment in March 2004, and assuming that he was unfairly dismissed, which is at least a possibility given the proceedings are still extant, I do not think there is enough material in the papers that we have to justify a conclusion that the claim under this heading is bound to fail."

It should, of course, be noted that the plaintiff made no attempt to claim reinstatement or reengagement in the EAT proceedings. Rather, he failed to attend on the date of the hearing despite being on notice of and having knowledge of same.

11. Rather than seeking reinstatement or reengagement in his EAT proceedings, which was the basis upon which the Court of Appeal reversed the decision of White J., the plaintiff sought to amend the instant proceedings to include such a claim. This application was refused by Stewart J. on 17 October 2016. This order was appealed to the Court of Appeal, which affirmed the order of the High Court.

The Plaintiff's Claim

12. The plaintiff's claim for loss of earnings depends upon there being a contract of employment between the plaintiff and defendant for the period claimed. It is clear, however, that there is no such contract. The Court reaches this conclusion on a number of grounds:-

(i) In his claim to the EAT the plaintiff stated his employment ended in March 2004. The end of his employment ended his contract of employment.

(ii) To maintain such a claim for loss of earnings, it would have been necessary for the plaintiff to have sought the remedy of reinstatement or reengagement during the EAT proceedings. The plaintiff failed to make any such application to the EAT and those proceedings were dismissed for non-appearance.

(iii) Rather than pursue the matter in the EAT, the plaintiff sought to amend the instant proceedings to include a claim for reinstatement or reengagement. The High Court refused such an amendment, a decision subsequently upheld by the Court of Appeal.

13. The plaintiff's claim for benefits available under a Long-Term Disability Plan put in place by the defendant is also dependent upon the plaintiff being an employee of the defendant. However, for reasons stated in previous paragraphs, the plaintiff does not have a contract of employment with the defendant. Thus the plaintiff cannot claim the benefits he seeks.

14. There is a further problem for the plaintiff in that the defendant's "permanent employee handbook" provides:

"Long-Term Disability

The Long-Term Disability Plan will come into operation if, before your Normal Retirement Date you become disabled through sickness or accident and are unable to undertake your normal occupation, and are not undertaking any other occupation for profit or reward. This Plan will provide you with a continuing source of income until you reach retirement age."

15. I refer again to the passage from the judgment of Cross J. in the plaintiff's personal injuries proceedings, set out at para 8 above, where the High Court judge rejected the claim that the plaintiff was under a disability and was precluded from working again. As already referred to, the decision of the High Court was affirmed by the Supreme Court. Thus it is clear, given the findings of the High Court, that even if the plaintiff could establish that he was an employee of the defendant at the relevant time he could not qualify for the benefits he seeks.

16. As for the claim made under the Minimum Notice and Terms of Employment Acts 1973 – 2001, no such claim was made in the EAT proceedings. Further, as the claim in the EAT was for constructive dismissal and as those proceedings were dismissed in July 2016 it follows that the plaintiff, in fact, resigned from his position of employment with the defendant on 23 March 2004 and thus is not entitled to maintain any such claim.

17. On other matters, it should be noted that, in any event, the plaintiff's claims in the instant proceedings are statute barred by the provisions of s. 11 of the Statute of Limitations Act 1957 which provides for a limitation period of six years within which to commence such proceedings. Further, any claim for "wrongful dismissal" on the part of the plaintiff is precluded by the provisions of s. 15 (2) of the Unfair Dismissals Act 1977.

Conclusion

18. By reason of the foregoing, I dismiss the plaintiff's claim.