Neutral Citation [2013] IEHC 41

THE HIGH COURT

[2012 No. 1504P]

BETWEEN

GARY TREACY

PLAINTIFF

AND

IRISH PACKAGING RECYCLING LIMITED

DEFENDANT

Judgment of Ms. Justice Laffoy delivered on 31st day of January, 2013.

Essential facts

1. The plaintiff, having been for approximately four years in the employment of Greenstar Recycling & Recovery, commenced employment with Greyhound Recycling & Recovery in September 2008. As is set out in the Statement of Main Terms of Employment dated 15th September, 2008 (the 2008 Contract) his employer at the time was Greyhound Waste Limited. That statement, having disclosed that his job title was "Business Manager" and that his employment began on 15th September, 2008, set out his remuneration and benefits as follows:

(a) a salary of €55,000 per annum payable monthly;

(b) €850 per month car allowance;

(c) a performance-related bonus of €25,000 per annum split every six months and paid one month in arrears; and

(d) a loyalty bonus of €10,000 per annum split every six months and paid one month in arrears.

The salary, the performance bonus and the loyalty bonus aggregated €90,000 per annum. Under that contract, the employer was entitled to terminate the contract on one month's notice when the employee had given more than thirteen weeks but less than ten years service to the employer.

2. The plaintiff continued in employment within the Greyhound Group under the foregoing terms until 1st August, 2011, when a new contract of employment was issued to him. That contract of employment was dated 1st August, 2011 (the 2011 Contract) and was executed by Cormac Sheils, Operations Director, on behalf of his new employer. His new employer was Greyhound Green Bin, which I understand to be an unlimited company within the Greyhound Group. The terms of the 2011 Contract which are relevant for present purposes were as follows:

(a) The plaintiff's position was described as "Recyclables Manager", and it was provided that he would report to the Managing Director.

(b) In Clause 2, under the heading "Commencement", it was provided as follows:

> "Your employment in this position will commence on the 1st August, 2011. Previous employment with Greyhound Recycling & Recovery from 15th September, 2008 will count as part of your continuous employment with the company. The Company Retirement age is sixty five and you will retire from the Company on your sixty fifth birthday.
>
> Your employment will be on a probationary basis for a period of six months from the date you commence employment under this contract. During this period the Company has the sole and absolute right of deciding on your suitability for continued employment. The Company shall be entitled to terminate your employment at any time during the probationary period by giving you one week's notice or pay in lieu of such notice. You have successfully completed your probationary period."
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> The second paragraph of that provision, excluding the last sentence, is wholly inconsistent with the first paragraph and with the last sentence of the second paragraph. It is inconsistent with the contract as a whole and in the context of the contract as a whole it is utterly incongruous.

(c) The plaintiff's place of work was stated to be at the Materials Recovery Facility (MRF) located in Ballymount, Dublin 24.

(d) The plaintiff's remuneration consisted of the following components:

(i) a fixed annual salary of €77,000;

(ii) a loyalty bonus of €10,000 per annum, fifty per cent of which was secured every six months from the commencement date and paid one month in arrears of the secured date; and

(iii) €5,400 per annum (€1,350 per quarter) payable in accordance with achievement of quarterly set objectives paid

out the first month following the closing month of the quarter.

Those components aggregated €92,400 per annum. The rationale of the departure from the scheme of payment provided for in the 2008 Contract is discernible in Clause 6.1 of the 2011 Contract, which provided that the plaintiff would have "a total earnings capacity of €92,400 per annum and pro rata for a lesser period of service", but, in accordance with his employer's remuneration model, his income would be split eighty five per cent fixed and fifteen per cent variable. On that basis his fixed annual salary was to amount to €77,000. He was also eligible to receive a pro rata performance-related variable income "based on one hundred per cent achievement of objectives", which variable income was then itemised as the loyalty bonus and the performance bonus.

(e) Provision was made for payment of a car allowance of €850 per month (Clause 8), which was to be claimed on a monthly basis.

(f) The provision in relation to notice of termination by the employer (Clause 12) provided as follows:

"Your employment may be terminated at any time by the Company giving you not less than six months notice in writing except during the probationary period where notice of termination shall be one month. The Company reserves the right to give you pay in lieu of any period of notice which you are . . . entitled to receive."

There was also provision for summary termination for gross misconduct, but that is of no relevance. Once again it seems to me that there is an inconsistency between Clause 12 and Clause 2, because Clause 2 provided for "one week's notice or pay in lieu" during the probationary period, whereas Clause 12 provided that notice of termination during the probationary period should be one month.

On 1st August, 2011 the plaintiff signed the form of acceptance of employment on the terms and subject to the conditions set out, which was endorsed on the 2011 Contract.

3. At the beginning of January 2012 there were major changes in relation to the arrangements for collection and disposal of waste in the Greater Dublin area. Among the changes which took place was a change in the licensing arrangements in relation to the MRF at Ballymount, which had been previously operated by the Greyhound Group. Through December 2011 and into January 2012 there was apparently a tendering process in being. The contenders were, or were perceived by the defendant's officers as being, Greyhound, Greenstar and the defendant, which is part of the Panda Group. Apparently, Greyhound did not tender. The defendant put in its initial bid on 6th January, 2012, but it was told on 9th January, 2012 that it was unsuccessful. However, it got word on 12th January, 2012 that Greenstar had "pulled out". By Friday, 13th January, 2012, the defendant had negotiated and on that day it entered into a licence agreement (the Licence Agreement) in relation to the MRF at Ballymount with Dublin City Council (acting for the four Regional Authorities in the City and County of Dublin). Part of the agreement between the parties was that the employees of the Greyhound Group who had been employed in connection with the MRF would be transferred to the defendant pursuant to the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. There were seventy seven employees in all transferred across from Greyhound to the defendant, including the plaintiff.

4. By Monday, 16th January, 2012, the defendant was in a position to commence operating the MRF at Ballymount, following a weekend of preparation, including consultation with trade unions and suchlike. The defendant had been furnished with a list of the seventy seven employees it would be taking on when it executed the Licence Agreement. The plaintiff was included on that list. It is reasonable to infer that the defendant did not carry out a due diligence which extended to considering the terms of employment and the roles and functions of the employees on that list before becoming contractually bound to Dublin City Council. However, there was a mechanism in the Licence Agreement for addressing any problem which might arise in relation to the transfer of employees, in that Clause 3.17 thereof provided as follows:

"The Licensee will accept and take on all MRF staff previously notified to the Licensee, in good faith, pending the outcome of an independent assessment as to whether they are wholly or mainly engaged in the activities that are subject to transfer.

An independent assessor will conduct an examination of the facts within two weeks of the date of transfer to determine whether they are wholly or mainly engaged in the work that is being transferred. If staff are deemed ineligible to transfer then they [will] be advised [to] pursue their claim for continuous employment with their original employer."

5. The plaintiff continued working in his position as Recyclables Manager at the MRF at Ballymount from Monday, 16th January, 2012 as an employee of the defendant. Towards the end of the second week of his employment with the defendant, on Thursday, 26th January, 2012, after 5.15pm he was called to a meeting of senior executives of the defendant and he was told he was being made redundant. Understandably, the plaintiff was shocked and upset. A second meeting was held on the following day, Friday, 27th January, 2012, at which it was confirmed that the plaintiff was being made redundant and that he was to get one month's notice. At that meeting the plaintiff informed his employer's representatives that he was entitled to six month's notice under his contract. Eventually, on the following Tuesday, 31st January, 2012, the defendant wrote to the plaintiff, referring to the meetings, and informing him that his role was redundant and that his role was being terminated with immediate effect. It was expressly stated that the decision of the defendant was no reflection on either the plaintiff or his work. It was stated that the defendant would pay his statutory entitlements and his one month's notice and any other entitlements, for example, holidays and suchlike. It was stated that he would not be required to work out his notice. He was asked to return the phone and laptop computer which had been supplied to him when he became an employee of the defendant. The evidence establishes that the letter of 31st January, 2012 was delivered by hand to the plaintiff's home after 5pm on 31st January, 2012, the plaintiff having been out on sick leave on that day. It is reasonable to assume that the defendant was trying to effect service of the notice on the plaintiff within six months of 1st August, 2011.

6. On receipt of the notice, the plaintiff sought legal advice. His solicitors, John Sherlock & Co., wrote to the defendant on 6th February, 2012 requesting that the defendant withdraw the "purported Redundancy Notice dated 31st January" and that the plaintiff be allowed to return to work. High Court proceedings were threatened if an undertaking to that effect was not forthcoming. These proceedings were initiated on 15th February, 2012 prior to receipt of a response from the defendant. On the same day the Court gave the plaintiff leave to bring an application for an interlocutory injunction returnable on 20th January, 2012.

7. Despite the fact that the proceedings were in being, by letter dated 22nd February, 2012 the defendant wrote directly to the plaintiff enclosing:

(a) a cheque for €4,788 representing his statutory redundancy payment together with a Form RP50 for signature;

(b) a Revenue Form P45 together with a payslip which indicated that there would be lodged to his bank account the sum of €5,725.40 representing one month's wages in lieu of notice (€6,416.66) and payment in respect of holiday entitlements, but subject to deductions, which I assume covered income tax, PRSI contributions and suchlike. It is clear that the figure of €6,416.66 was based on the plaintiff's fixed annual salary of €77,000 as provided for in the 2011 Contract.

The proceedings

8. The interlocutory injunction application was not required to be determined by the Court. Eventually, by order of the Court (Murphy J.) made on 20th April, 2012 the action was adjourned for plenary hearing by consent of the parties and a procedural schedule was set out. The costs of and incidental to the application and the order on both sides were reserved.

9. This judgment is concerned with the substantive proceedings.

10. Various reliefs were sought in the prayer in the statement of claim, which was delivered on 30th April, 2012, which were not pursued at the hearing. These included declarations that the plaintiff continues to be employed by the defendant and that his purported dismissal was null and void and without efficacy and that the defendant is in breach of the provisions of the Redundancy Payments Act 1967 (the Act of 1967). It was accepted by counsel for the plaintiff that the issue as to whether the making of the plaintiff redundant was valid at law is not a matter to be determined by the Court in these proceedings. In consequence, what these proceedings are about are the plaintiff's contractual entitlements under his contract of employment, that is to say, the 2011 Contract. Therefore, the issues to be determined are –

(a) whether the defendant is liable for breach of contract having regard to the manner in which the plaintiff was dismissed from his employment; and

(b) if so, the damages to which the plaintiff is entitled.

In the statement of claim there was also a claim for damages for negligence and for reckless or negligent infliction of emotional suffering and for damage to the plaintiff's good name and reputation. While there was evidence that the plaintiff was upset by the manner in which he was treated at the meeting on 26th January, 2012 and, in particular, by the behaviour of the person who delivered the letter of 22nd February, 2012 to his home, which was disputed, in my view, no case has been made out for general damages on any basis. Therefore, the core issue which remains on liability turns on whether the plaintiff's contract of employment was properly terminated by the defendant.

11. The position of the defendant on the liability issue which remains to be determined, as pleaded by it, is that, pursuant to the express terms of the plaintiff's contract of employment, he was on a six month probation period during which the defendant was entitled to terminate his contract "on either one week or one month's notice". In circumstances where the plaintiff had been given payment in lieu of one month's notice, the termination was in accordance with law and with the express or implied terms of his contract of employment.

12. Accordingly, the only issue which the Court has to determine on liability turns on the construction of the contract dated 1st August, 2011.

Construction of the contract

13. The parties did not make any submissions as to the legal principles which govern the construction of a contract. In any event, the relevant principles are well settled and have been reiterated time and again by the Supreme Court in recent years. I propose only referring to the succinct statement of Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43, which was endorsed by the Supreme Court in *Igote Ltd. v. Badsey Ltd.* [2001] 4 I.R. 511, where Keane J. stated (at p. 55):

> "In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."

14. The context in which the 2011 Contract was executed was that the plaintiff's employer was being changed from one company within the Greyhound Group to another company within the Greyhound Group at a time when the plaintiff had been almost three years in the employment of the former company. This was expressly recognised in the 2011 Contract, in that it was expressly provided that the plaintiff's previous employment would count as part of his continuous employment with his new employer. That being the case, the inclusion of a probation clause was ludicrous. It cannot be doubted that the Greyhound Group was satisfied as to the suitability of the plaintiff to perform the functions of Recyclable Manager, given that he had been with the Greyhound Group for almost three years at that stage. Why the second paragraph of Clause 2, other than the last sentence, was included in the contract is incomprehensible. However, its effect was clearly negatived by the last sentence, which stated that the plaintiff had successfully completed his probationary period. Accordingly, I am satisfied that it was not the intention of the parties that the plaintiff would be deemed to be on probation from 1st August, 2011 to 31st January, 2012 or that during that period his employment could be terminated by either one week's notice (Clause 2) or one month's notice (Clause 12). I am satisfied that the intention of the parties was that the plaintiff would be entitled to not less than six month's notice, if the employer wished to terminate his contract of employment.

Liability

15. It is clear that the defendant could have invoked Clause 3.17 of the Licence Agreement to obtain a determination whether the plaintiff had been wholly or mainly engaged in the activities which were subject to transfer to the defendant, so that, if the plaintiff was not eligible for transfer, he could have been advised to pursue his claim for continuous employment with the Greyhound Group. The defendant did not invoke that provision. It is clear from the evidence that it did not do so because it did not want to get involved in a contentious situation with the Greyhound Group, with which it does business. Instead it decided to terminate the plaintiff's contract of employment. It was entitled to do so provided it gave the plaintiff the notice to which he was entitled under the 2011 contract. It did not do so because, as I have found, the plaintiff was entitled to not less than six month's notice in writing under the 2011 contract. Therefore, the defendant was in breach of contract and the plaintiff is entitled to damages for wrongful dismissal.

Measure of damages

16. As is pointed out in Redmond on *Dismissal Law in Ireland* (2nd Ed.) at para. 11.04, where an employee is wrongfully dismissed he is entitled, subject to the rules of mitigation, to compensation for loss of remuneration during notice or on an unexpired fixed period of

contractual employment, the former circumstance applying in this case. This means that a dismissed employee is awarded a sum equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. There may also be benefits-in-kind, luncheon vouchers and benefits under pension schemes being given as examples, which must be taken into account. Entitlement to payment of commission must also be taken into account.

17. In the statement of claim the plaintiff particularised his loss by reference to the components of his remuneration, that is to say:

(a) loss of salary at the rate of €6,416.67 per month;

(b) loss of loyalty bonus, which was stated to be "€5,000 each six months"; and

(c) loss of performance bonus at €5,400 per annum.

He also claimed €850 per month in respect of loss of car allowance. In replies dated 22nd January, 2013, which were delivered rather late in the day, to a notice for particulars raised by the defendant on 6th June, 2012, the plaintiff's losses were particularised as follows:

"Five months salary (at €6,416.67 €32,083.00

Loss of loyalty Bonus (every 6 months and due

during Notice period) €5,000.00

Loss of performance bonus (€5400.00 p.a.) €2,700.00

Car loans €5,100.00

Holiday pay €3,000.00

€47,883.00"

At the hearing counsel for the plaintiff corrected that table by stating that the second last item should be "car allowance" and that the last item should be "food allowance".

18. Notwithstanding that the one month's wages in lieu of notice paid by the defendant into the plaintiff's bank account, as set out in the letter of 22nd February, 2012, was based on a rate of €6,416.67 per month, the defendant took issue with the plaintiff's entitlement to a monthly salary at the rate of €6,416.67. The defendant, presumably on the basis of non-party discovery made by the Greyhound Group, proved that, in respect of each month from August 2011 to December 2011 inclusive, the gross monthly payment made to the plaintiff by his then employer in respect of salary, as per the relevant payslip, was €4,354.16, which was the gross monthly rate at which he had been paid throughout the early part of 2011 and up to 1st August, 2011. The plaintiff gave a plausible explanation for his gross monthly salary not having been adjusted upwards after the execution of the 2011 Contract, in that his evidence was that adjustment had to be made for the bonus payments which had been made to him in the first half of 2011(€5,000 on 31st March, 2011 and €12,500 on 31st May, 2011), which on an annual basis exceeded his entitlement under the 2011 Contract. Without delving in detail into the mathematical connotations of that explanation, I am prepared to accept it and I am prepared to accept that the plaintiff should be compensated on the basis of a gross monthly rate of €6,416.67 in respect of salary from 1st January, 2012 for six months. I am also satisfied that the plaintiff should be compensated by reference to the loyalty bonus he would have received during the first half of 2012 (€5,000), and also the performance bonus, which on the evidence I think it is reasonable to infer he would have become entitled to, during the first half of 2012 (€2,700).

19. The foregoing figures represent remuneration which would have been taxable and subject to deductions such as the deductions which the defendant made from the one month's pay in lieu of notice given to, and accepted by, the plaintiff in respect of January 2012. No submissions were made by either party as to how the taxation position should be dealt with. In my view, the plaintiff is entitled to the net amount after the usual deductions from his remuneration. At this juncture, the simplest course would seem to be, and I propose directing, that the defendant assesses the net amount due to the plaintiff and pay the same to the plaintiff within three weeks.

20. I am satisfied that, in accordance with the 2011 Contract, the plaintiff is entitled to a car allowance of €850 for six months (€5,100). I think it is reasonable to infer that the sum of €850 per month reflected depreciation and the cost of insurance and motor taxation, as well as fuel. If there is any taxation implication of payment of that allowance, it should also be addressed by the defendant within three weeks.

21. There is no reference to the plaintiff being entitled to a food allowance in the 2011 Contract. While there is provision for reimbursement of out of pocket expenses incurred by the plaintiff in the execution of his duties in the 2011 Contract, that is subject to production of satisfactory receipts and compliance with the Company's expenses policy. The food allowance claimed cannot be vouched on that basis. Therefore, I do not propose to allow that element of the claim.

22. Finally, I am satisfied that no issue arises that the plaintiff failed to mitigate his loss.

Redundancy payment

23. The plaintiff's cause of action in these proceedings is at common law for wrongful dismissal. This Court has no function at first instance in relation to any claim for redundancy payment to which the plaintiff is entitled or any issue under the Act of 1967, as amended, in relation to his dismissal by reason of redundancy. Similarly, this Court has no function at first instance in relation to any claim a person may have under the Unfair Dismissals Act 1977 (the Act of 1977), as amended, for compensation for unfair dismissal and, in particular, the Court has no function in determining whether the dismissal of the plaintiff as an employee should be deemed, for the purposes of the Act of 1977, not to be an unfair dismissal, if it results wholly or mainly from the redundancy of the employee (s. 6(4)(c)). I make those observations for the purposes of emphasising that the Court, in the substantive proceedings, had no jurisdiction to deal with the issues in relation to redundancy which were raised in the statement of claim and which were not pursued at the hearing. In particular, it would be inappropriate for the Court to take cognisance of the payment proffered by the defendant to the plaintiff as a statutory redundancy payment in February 2012.

Going forward

24. The proceedings will be adjourned until 22nd February, 2013. If necessary, an order will be made on that day giving judgment to the plaintiff for the appropriate amount of the losses which have been allowed, following submissions, if there is a lack of consensus between the parties on the quantum issue.