Neutral Citation Number: [2006] IEHC 308

THE HIGH COURT
DUBLIN
SUFFIN YAP

APPLICANT

AND
CHILDREN'S UNIVERSITY HOSPITAL TEMPLE STREET LIMITED

DEFENDANT

Judgment was Delivered as follows by Mr. Justice Clarke on Thursday, 1st June 2006:

1. Mr. Justice Clarke: There are two motions before the Court. In the first motion the Plaintiff seeks firstly an interlocutory injunction requiring that the Defendant hospital pay salary and associated benefits pending trial and also make relevant contributions into the Plaintiff's pension. The second order sought in that application, which is not controversial, seeks, in effect, case management to ensure an early trial of the hearing, and it would appear that all parties agree that that is a course that should be followed. When I finish delivering this judgment, I will discuss with the parties how that might best be achieved.

2. Therefore, so far as that motion is concerned, the issue in controversy is as to whether an injunction of the type sought be granted.

3. The second motion is one in which Dr. Eileen Treacy, who is the clinical director of the National Centre for Inherited Metabolic Disorders, seeks to be joined as a notice party in the proceedings on the basis of an interest in the proceedings which she contends for. That application is also controversial and is dealt with in this judgment. I propose dealing with the interlocutory application fist.

4. The Plaintiff is a consultant pediatrician with a special interest in metabolic diseases who is employed by the hospital as a consultant under what is known as the Consultants Common Contract. In the affidavits which have been filed to ground this application, she makes a large number of allegations regarding the manner in which the hospital has operated both, it would seem, at the administrative and clinical level.

5. It is impossible at this stage to reach any conclusion as to the validity or otherwise of the contentions which are made. It is important to note that, as in all interlocutory applications that are tried on affidavit, the Court is being asked to make an interim or interlocutory order pending a full trial, and it is only in cases where either the Plaintiff has made out no case, or indeed on some occasions where the Defendant has made out no defence, that the Court is entitled to make assumptions about how the ultimate proceedings will be resolved. I should therefore say that I can reach no conclusions on the affidavit evidence either to the effect that the Plaintiff will necessarily lose so far as her factual contentions are concerned or equally that she will necessarily win.

6. Suffice it to say that she has made out an arguable case as against the hospital, and if her evidence is accepted, clearly there might well be findings concerning the way in which aspects of the hospital was run so far as she was concerned, which would be favourable to her.

7. But it is also necessary at this stage to consider what the legal consequences of any such findings might be. Even if the Plaintiff at trial persuades the Court that, largely speaking, her allegations are true, the Court would be faced with very complex and difficult legal questions as to what the appropriate remedy would be. That she might well be entitled to damages would hardly be controversial in the event that she were to succeed. But in the course of these proceedings she seeks a whole range of declaratory and injunctive relief, and again without expressing any view as to whether any such relief could or could not be granted, there are certainly significant legal issues that would arise.

8. In substance the Courts have been reluctant to make orders which amount to specific performance of a contract of employment for very good reason. It is not the function of the Courts to deal with the day-to-day operation of contracts of employment, and the Courts would be required to almost act in an industrial relations role if the Courts were to make orders as to precisely how contracts of employment were to work. Therefore there are very limited circumstances in which the Court will intervene to force a continuation of a contract of the employment particularly where there is a serious controversy.

9. It seems to me that the limited circumstances in which the Courts have intervened in the past can in the main be grouped under a number of narrow headings. Firstly, there have been a small number of cases where the issue between the parties was what I might describe as technical rather than going to the relationship between employer and employee, such as redundancy and the like where the employer had no complaint against the employee and the employee had no complaint against the employer but there was a technical question as to how the employee should be treated so far as redundancy or allied matters was concerned.

10. In those circumstances there have been a limited number of cases where the Court has continued a contract of employment but clearly on the basis that there was no difficulty in implementing such order on either side.some of which referred to in argument before me in this case, which concern circumstances where persons may be entitled to be paid even though they are not working. As that is a key issue in this case, it seems to me it is a matter which I should address in some detail.

11. In the ordinary course of events, an entitlement to be paid flows from carrying out the duties of one's employment. There are, of course, some circumstances where, as a matter of the contract of employment between an employer and employee, the employee is entitled to be paid even though not working. Perhaps the simplest example is one which arises in a number of the cases referred to, and that is the case of sick pay. In the case of many contracts of employment, persons are entitled to be paid, subject to limitations, while they are sick and therefore are, as a matter of contract, entitled to be paid even though not actively working.

12. There are other circumstances which have again been the subject of some litigation. Many contracts of employment entitle an employer to suspend an employee with or without pay in the case of an investigation. I appreciate that this is not the circumstances of this case, but nonetheless it is of relevance to the overall principles. In some cases the contract may provide that suspension without pay can only arise where very severe accusations are being made which would justify that course of the action. There may well therefore be cases where, as a matter of contract, an employee who has been suspended would be entitled to be paid pending the resolution of whatever was being inquired into because the matter contended against them would not be sufficiently severe to warrant them being suspended without pay. There may be other similar cases.

13. I emphasise those cases for the purses of stating that they are exceptions to the general rule. The general rule is that pay follows work, and the cases which were quoted in the course of argument where the Court directed that salary continued to be paid derive in the main from what one might call the sick-pay situation where there was a dispute between employer and employee as to just how long sick pay should last and where the Court directed that sick pay should continue to be paid up to the time when at the

height of the employee's case it should be paid notwithstanding that the employee was not working.

14. But it seems to me that none of those cases have any direct relevance to the facts of this case. This injunction must be considered as things stand today.

15. As things stand today the Plaintiff is, it is said, fit for work. The reason why she has not returned to work is that on her case, under a variety of headings, the circumstances in which she would be required to work, were she to return, are not proper. She may or may not ultimately be able to persuade a court that that is correct, but as of this stage I cannot obviously conclude that she is necessarily right.

16. The closest analogy it seems to me with the facts of this case is to be found in the case of *Mullarkey -v-Irish National Stud Company*(2004) IEHC, 116 in which Mr. Justice Kelly stated that he was satisfied that there was no legal right or even an arguable case to the effect that a person has a right to be paid a salary until the trial of the action for damages because of an illness which results in him being out of work where that illness is due to the employer's fault.

17. Clearly the initial absence of the Plaintiff was due to an illness which he contends is due to the employer's fault, but it seems to me Mullarkey is clear authority for the proposition that those issue are to be determined at trial and that one cannot get an order from the Court in those circumstances for payment of salary until the trial.

18. Similarly, there is something of an analogy with the decision which I made in the case of *Carroll -v- Bus Átha Cliath* (2005) IEHC.1 at the interlocutory stage. In that case there was controversy between the parties as to whether the way in which the employee concerned wished to go back to work, he having been on sick leave, was as to whether work of the type which he sought was in fact available. That case both at the interlocutory stage and at the trial is illustrative of the difficulties which the Courts face at an interlocutory stage. At trial it was possible after a full hearing to conclude that there was work, of the type which Mr. Carroll contended for, available and that he was entitled to be treated as being on the payroll and it was a matter for his employer whether it wished to allocate him that work. But such a conclusion could only be reached after there had been a full hearing of the case. At the interlocutory stage it was not possible to determine whether there was any work of the type that Mr. Carroll claimed to be entitled to, and in those circumstances I expressed the view that his entitlement to be paid pending trial, which he sought at the interlocutory stage, just as the Plaintiff does in this case, was the same as his entitlement to go back to work.

19. It seems to me that the same situation applies here. The Plaintiff would only be entitled to be paid if she is entitled to go back to work. She is clearly entitled in principle to go back to work, but the issue between her and her employer is as to the terms and conditions upon which she is entitled to go back to work or the circumstances to apply in the workplace both at a personal and at a professional level that are to apply in those circumstances. There is a huge controversy between the parties as to the position that should apply in the event that the Plaintiff goes back to work, and it seems to me therefore that the case is also very similar to the Carroll case in that until such time as that controversy had been resolved, it is not possible for the Court, at an interlocutory stage, to make an order that would entitle the Plaintiff to go back to work, as it were, on her terms. I use the phrase 'on her terms' not to in any way to deprecate those terms but simply to indicate that they are the terms which she says she is entitled to go back to work on. Her employer says that she is not entitled to go back to work on those terms. That is the issue of controversy that will need to be addressed at the trial. While it remains in controversy, it is not possible to make an order requiring her to go back to work, and for the reasons which I set out in Carroll, it seems to me that if it is not possible to require that she go back to work on agreed terms, then it is equally not possible to direct that she be paid in the intervening period.

20. I am strengthened in that view by the fact, as I touched on earlier, that even if the Plaintiff succeeds at trial, there will be very significant issues as to what form of order the Court can make in that there would be considerable questions to be raised as to whether the Plaintiff would be entitled to orders which would have the effect of directing the way in which her employment was to operate within the hospital. So that even if she is to establish at trial that much of the factual basis for the wrongdoing which she contends is in fact so, it does necessarily follow that she will be entitled to obtain from the Court orders which would necessarily allow her to go back to work on the terms which she asserts.

21. In all those circumstances it does not seem to me that this is one of the very limited types of cases where itis appropriate or possible for the Court to direct that there be payment pending trial. It is not a case where the Plaintiff's contract of employment would entitle her, in the ordinary way, to be paid pending trial without her working. It seems to me in those circumstances that I must refuse the interlocutory injunction which seeks payment pending trial.

22. Having taken that view, that, it seems to me, makes it even more important that there be an early trial because as I have indicated, the real way in which the issues between the parties as to the facts and, if the Plaintiff succeeds on the facts, as to what remedies she is entitled to, are matters which need to be resolved at the earliest possible time in that if the Plaintiff is entitled to appropriate relief, it is important that she obtain that relief as quickly as possible. When I have dealt with the judgment in respect of the second motion, I propose discussing with the parties how a trial can be arranged at the earliest possible time.

23. The second application concerns the desire of the clinical director to become involved in the proceedings. It was accepted by Mr. McGrath S.C. that there are a number of authorities which lean against allowing a party to be joined as a party against the will of the Plaintiff in civil proceedings, and I suppose particular regard has to be had to the decision of the Supreme Court in *Barlow and Ors -v-Fanning and University College Cork*(2002) IESC 53. It is important to note that, while not identical, that case involved matters which are not dissimilar to the matters that arise in this case. Professor Fanning was head of the department within the university in respect of whom allegations were made. It was clear that the actions of Professor Fanning would arise in the course of the hearing, and it was clear that it was possible, depending on the view the Court took of the facts, that Professor Fanning might be the subject of an adverse finding which would reflect obviously on him as well as the defendant, University College Cork. Notwithstanding that, the Supreme Court was not prepared to join Professor Fanning in the proceedings.

24. Reliance was also placed upon the recent decision of the Supreme Court in *BUPA -v- The Health Insurance Authority and Ors* (2005) IESC 80 in which case the Court was concerned with judicial review proceedings and held that the Voluntary Health Insurance, which was an affected party by the contentions which BUPA sought to raise, was entitled to be heard in the proceedings. The Court took the view that there was a distinction between public law proceedings on the one hand and private proceedings between parties on the other hand.

25. In argument in this case, Mr. McGrath sought to raise, as it were, a public aspect to the issues which might arise in this case having regard to the funding of the National Centre. But it seems to me that that is not the sort of public law issue that was involved in the *BUPA* case. The reason why VHI were joined and were able to remain being joined in the *BUPA* case was in part because what BUPA were seeking to do was to set aside the exercise of a statutory regime in respect of risk equalisation which would, in practice,

have had the effect of significantly affecting the funding of the VHI. Therefore VHI were directly affected by any order that might be made by the Court. I think that is where the distinction lies between public law proceedings and private law proceedings. The court order in public law proceedings can directly affect the interests of parties other than those before the court.

26. For example if a regulatory authority makes a decision in proceedings between two entities, and one of those entities challenges the decision because it was unfavourable, if the Court is persuaded that the determination of the regulatory authority should be upset, then that decision has a direct effect upon the party who had secured the favourable decision in the first place and therefore that party must be joined as a notice party because the order itself (rather than collateral matters such as the reasoning of the Court or comments which the Court might make on the facts) affects the interests of that party.

27. In passing it might also be noted that the Court in such public law proceedings might also pass comments on the facts that might be unfavourable to some individual who was involved in the process, but that would not entitle that individual to be involved in the proceedings. The reason why notice parties are allowed in challenges to decisions of tribunals, lower courts and other bodies is because their orders directly affect other parties and those other parties are entitled to be heard.

28. The order which the Court could make in these proceedings would be directed towards either the payment of damages by the hospital or requiring the hospital, if the Court were persuaded that it was open to it so to do, to do certain things in relation to the Plaintiff's employment. Such orders do not, of themselves, affect the clinical director even though there might be some knock-on effect in the way in which the hospital worked. But it seems to me that it is not possible to distinguish in any material way the facts of this case from the facts in Barlow -v- Fanning, and while I have much sympathy with the position of the clinical director in that it does seem on reading the affidavits that her actions and position will be of no little significance in the course of the hearing and are likely to be ventilated to some significant extent, nonetheless it seems me that the Supreme Court have given a clear and definitive ruling to the effect that any such considerations are outweighed by the obligation on the Courts to keep private proceedings down to the parties whom the Plaintiff chooses, and in those circumstances I would not propose acceding to the application to join the clinical director.

29. Therefore in summary I propose refusing the interlocutory injunction, refusing the application of the clinical director to be joined in the proceedings -- sorry, I should have noted one final point in that latter regard. Some play was made by Mr. McGrath of the fact that what was sought in this case was that Dr. Treacy be joined as a notice party rather than as a defendant. It does not seem to me that makes any material difference to the matter. At the end of the day while it may be procedurally more appropriate that someone against whom relief was not being sought should be a notice party rather than a defendant, nonetheless is seems to me that the overriding principle is as set out in Barlow, and that is to the effect that persons, even though they may be involved in the sense that the evidence will deal with their actions and they might be criticised in the course of that evidence, are not entitled to be involved in the proceedings.

30. Therefore having ruled in that way in respect of the two controversial matters, I would also propose dealing with how best to ensure that this action is ready for hearing in the shortest possible time. Am I right in thinking that a statement of claim has not been filed yet.