Neutral Citation: [2014] IEHC 298

THE HIGH COURT

[2013 No. 31 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 15(6) OF THE PROTECTION OF EMPLOYEES (FIXED-TERM) ACT 2003

BETWEEN

HEALTH SERVICE EXECUTIVE

APPELLANT

AND

ABDEL RAOUF SALLAM

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered the 9th day of May, 2014

Background

1. This is an appeal by the HSE from a determination of the Labour Court made on 17th January, 2013, that the respondent is entitled to a contract of indefinite duration pursuant to s. 9(3) of the Protection of Employees (Fixed-Term) Act 2003 ("Act of 2003"), and a consequential order for the re-engagement of the respondent in accordance with s. 14 of the Act.

Employment history of respondent

2. The respondent is a consultant obstetrician and gynaecologist. He commenced his employment with the appellant on 3rd June, 2003, and worked a under a series of the contracts that the respondent had with the appellant:-

Start Date	Finish Date	Location	Purpose of Contract
3rd June, 2003	2nd July, 2004	Wexford General Hospital	Temporary Consultant
3rd July, 2004	30th June, 2004	Wexford General Hospital	Temporary Consultant
1st July, 2007	30th April, 2007	Wexford General Hospital	Pending Permanent Filing of post
17th May, 2007	18th May, 2007	Portlaoise Hospital	Locum for named doctor
11th June, 2007	29th June, 2007	Cavan General Hospital	Locum for a number of named doctors
1st July, 2007		Sligo General Hospital	Locum for named doctor
1st June, 2010		Sligo General Hospital	Retirement of named doctor
16th August, 2011		Sligo General Hospital	Employment terminated on appointment of another doctor

3. The respondent's contract of employment at Sligo General Hospital commenced on 18th July, 2007, for the position of locum consultant obstetrician and gynaecologist at the hospital. Initially, the respondent was provided with a contract with an expected cessation date of 31st December, 2007, but upon expressing dissatisfaction with that provision, the respondent was provided with an "Amended Specific Purpose Contract (Temporary)" which did not provide a specific date of cessation and clause 3 whereof set out the purpose and termination of his employment as being "for the purpose of Locum Consultant Obstetrician Gynaecologist in the absence of Dr. Victor Moore". An earlier e-mail from the appellant to the respondent, dated 27th June, 2007, in response to a query from the respondent as to why he was not then been given a contract of indefinite duration, stated:-

> *You are being offered a Specified Purpose Contract as Locum Consultant to fill the post as Dr. Moore's Locum. You are not being offered a post of indefinite duration as this post is vacant on a temporary basis and the duration of such a post will cease on the return of Dr. Moore or until alternative arrangements are put in place.*

4. On 1st June, 2010, Dr. Moore, for whom the respondent was acting as locum, and the absence of whom formed the express specific purpose of the respondent's contract, retired from his employment. The respondent was not informed of Dr. Moore's retirement until October 2010. He continued to perform his duties of employment and to be paid at the agreed salary rate, and was not provided with another written contract of employment by the appellant. The appellant informed the respondent by letters dated 17th May, 2011, and 10th June, 2011, that a successful candidate had been appointed to replace Dr. Moore, commencing 26th July, 2011, and that the respondent's contract would expire on that date. The respondent was invited to meet the General Manager of Sligo General Hospital to discuss the termination of the respondent's employment, subsequent to which, by letter dated 6th July, 2011, the General Manager stated:-

> *Dr. Sallam was appointed to this position on 1st Jul y2007 on a specified purpose contract to cover the leave of absence of the permanent post holder Dr. Victor Moore. Following the retirement of Dr. Victor Moore in 2010, Dr. Sallam continued to cover the post in a temporary capacity pending the filing of the permanent vacancy through open competition through the Public Appointments Service. Dr. Sallam applied for the position but was unsuccessful at*

interview. Dr. Sallam continued to fill the post in a temporary capacity until the successful candidate was ready to take up the post pending medicallgarda clearances.

The formal termination of the respondent's contract occurred on 16th August, 2011.

5. The respondent challenged the termination of his contract of employment, arguing that he was continuously employed by the appellant on a series of successive fixed-term contracts from 3rd June, 2003, to 16th August, 2011, and that, once Dr. Moore retired, he was no longer acting as his locum but fulfilled the purpose of his contract through performance such that his continued employment was pursuant to a contract of indefinite duration.

6. In October 2011, the respondent lodged a number of complaints under the Act of 2003 with the Labour Relations Commission. A hearing of the Rights Commissioner was held on 14th February, 2012, followed by a decision on 2nd May, 2012, which found that the respondent's complaints were not well-founded. The respondent lodged an appeal to this decision, which was heard by the Labour Court on 9th January, 2013.

The legislative context

7. The Act of 2003 gives effect in this jurisdiction to Council Directive 1999/70/EC of 28th June, 1999, concerning the Framework Agreement on Fixed-Term Work ("the Directive") the recited aim of which was to prevent the abuse by employers of fixed-term contracts. The effect of the Act of 2003 is to deem certain such fixed-term contracts to be contracts of indefinite duration by operation of law if certain conditions are met. The Directive did not have direct effect and was incorporated into Irish law by the Act of 2003. The Directive itself gave a margin of appreciation to Member States, such that it was appropriate for Member States to determine the acceptable length of a fixed-term contract before a contract of indefinite duration could be said to arise as a matter of law. The Act of 2003 opted to fix this cut-off point at four years. Section 9 of the Act provides:-

> *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 (I) or (2) that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.*
>
> *(4) Subsections (I) 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.*

8. The appellant pleads that the various contracts under which the respondent was employed, and which ran for a total of seven years, were genuine fixed-term contracts, in each case entered into with the respondent for either a fixed period or a fixed purpose. Under the Act a fixed-term contract is defined either as a contract for a particular time or for a particular purpose. This judgment will use the expression fixed-term contract to refer to a fixed purpose contract or a contract for a fixed period of time, depending on the context.

9. The Act of 2003 does not deem all fixed-term contracts which have subsisted for a period of two years to be or become contracts of indefinite duration, but an employer may employ an employee under a series of fixed-term contracts, or one individual fixed term contract, for more than four years provided the employer can objectively justify the employment. The appellant argues that the fixed-term contracts entered into with the respondent were necessary for the proper management by the appellant of its service needs and was well within the margin of discretion granted to the Member State and to individual employers by the Directive.

The findings sought to be appealed

10. It is possible to identify four primary findings of fact in the decision of the Labour Court which are the subject of this appeal as follows:

> (i) Whether the service of the respondent in the various hospitals in which he worked was continuous, and whether *continuous service*, which is the test identified in the Act of 2003, is the same as *successive service* which is that identified in the Directive;
>
> (ii) whether the contract with Sligo General Hospital ("Sligo contract") was a single fixed-term contract limited to the provision of locum cover for the identified doctor;
>
> (iii) whether the Labour Court was correct in finding that the Sligo contract was properly broken up into two separate and distinct contracts, the first of which terminated on the retirement of Dr. Moore for whom the respondent was appointed as a locum, and the second of which arose by implication thereafter;
>
> (iv) whether the Labour Court was correct in finding that the respondent was employed under a contract of indefinite duration once Dr. Moore retired; and,
>
> (v) whether the finding of the Labour Court that the respondent was employed under a contract of indefinite duration once Dr. Moore retired has the effect that the respondent did not have standing to bring the matter to the Rights Commissioner, and on appeal to the Labour Court, as the contract under which he was employed at the relevant time was not one to which the Act of 2003 applied.

11. Essentially, the different approaches come down to this: Counsel for the appellant says that the Labour Court has fallen into error and that these are errors of law. Counsel for the respondent says that the Labour Court's findings are questions of fact which may not be overturned by this Court. She points to the judgment of the Supreme Court in *National University of Ireland Cork v. Ahern &*

Ors. [2005] IESC 40, [2005] 2 I.R. 577, where the court set a high bar for the setting aside of findings of fact by the Labour Court.

History of proceedings
12. The respondent made a complaint to the Rights Commissioner pursuant to the Act of 2003, on 11th August, 2011. His complaints were as follows:-

> (a) That his employer had breached s. 8(1) of the Act of 2003 and had not furnished him a written statement setting out the objective grounds justifying the renewal of his fixed-term contract;
>
> (b) that he was denied the opportunity of applying for a post which he filled on a temporary basis; and,
>
> (c) he was penalised contrary to s. 13(1)(d) of the Act of 2003 by being dismissed from his post.

The Rights Commissioner delivered a determination on 2nd May, 2012, in which he found that, *inter alia*, the claimant was in fact provided with a written statement that fully complied with s. 8(1) of the Act of 2003 and that as the claimant's fixed-term contract was not reviewed, the provisions of s. 8(2) of the Act of 2003 did not apply. The Rights Commissioner then went on to say that, as there was no renewal of a fixed-term contract, s. 9 of the Act of 2003 could not arise and, accordingly, he did not enter into consideration of the complaint under s. 13 of the Act of2003. The Rights Commissioner held that the claimant had not been dismissed in his employment wholly or partly for the avoidance of a fixed-term contract being deemed to be a contract of indefinite duration.

13. The respondent on 28th May, 2012, appealed to the Labour Court on the basis that the findings of the Rights Commissioner were wrong in law and in fact. The Labour Court gave its determination on 17th January, 2013, and from that determination, the appellant lodged an appeal to this Court by notice of motion dated 7th February, 2013.

Appeal on point of law
14. Section 15(6) of the Act of 2003 provides:-

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

15. Appeals on a point of law rarely come before the High Court. The leading case on the Act of 2003 is the judgment of Hedigan J. in *Health Service Executive Dublin North East v. Umar* [2011] IEHC 146, which condemned the Labour Court's interpretation of the Act of 2003 and which, in particular, said that the attempt by the Labour Court to add a further test, namely one of proportionality, to the tests expressly identified by statute was impermissible.

16. The power of the High Court in an appeal from a determination of the Labour Court was explained by McCracken J. in the Supreme Court in *National University of Ireland Cork v. Ahern & Ors.* [2005] IESC 40, [2005] 2 I.R. 577, where he stated as follows at para. 9:-

> *The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by account by it in determining the facts,*

17. This Court, then, may on appeal consider whether the Labour Court wrongly took into account or ignored a fact or a piece of evidence, incorrectly applied a legal test in coming to its conclusion, or erred in law in its interpretation of the law.

18. This Court must show appropriate curial deference to the Labour Court, but the question is what deference is due and in what circumstances. It is clearly the case, and not in dispute, that such deference to the Labour Court arises when it is engaged in industrial relations issues in which it has a particular expertise. However, this deference is not appropriate where questions of law are concerned. This is confirmed in various judgments of the High Court and most recently by Birmingham J. in *Dunnes Stores v. Doyle* (Unreported, High Court, 1st November, 2013).

The question of continuous employment
19. The respondent was employed on a series of contracts with the appellant, the first contract commencing at Wexford General Hospital on 3rd June, 2003. The Labour Court found that the break of 15 days between the end of his final contract at Wexford General Hospital and the contract which commenced at Portlaoise General Hospital on 17th May, 2007, and the break of 21 days between the ending of the Portlaoise contract and the commencement of a contract at Cavan General Hospital on 11th June, 2007, were not periods which could "provide a sufficient basis" on which the appellant could argue that the respondent's employment was not continuous. In its determination, the Labour Court referred to the expression "continuous/successive", using both words in a manner that suggested they were interchangeable and closely allied in meaning. In the course of the hearing before me, some argument was had as to the consequence, if any, of the fact that the Act of 2003 refers to "continuous" employment and the Directive and Framework Agreement referred to "successive" periods of employment. The Labour Court itself, in its determination, noted the difference between the two concepts and suggested that there appeared *prima facie* at least to be a conflict between the language used in the Act of 2003 and that of the Directive. It explained the difficulty as follows:-

> *While s. 9 of the Act is directed at preventing the unlimited use of continuous fixed-term contracts, the objective of the Directive is to combat the abuse of successive fixed-term contracts. While the concept of successive periods of employment can include those which follow on from each other even if separated by time, the notion of continuous employment connotes broken service.*

20. This distinction is noted by this Court, and the Labour Court resolved what it considered to be an apparent conflict by applying what it described as "the well settled principle" of European law that national law must be interpreted, as far as possible, in the light of the wording and propose of the Directive so as to achieve the results envisaged by the Directive.

21. The exercise in which the Labour Court engaged in coming to the conclusion that the respondent was employed on a series of continuous contracts, while resulting in a finding of fact, it was one that resulted from an interpretation of the Irish legislative scheme and of European law. The interpretative process and the result of that process are matters of law to which appeal lies to this Court.

22. The Act of 2003 itself gives some assistance to the task of interpreting whether a contract could be described as continuous for

the purpose of that Act. Section 9(5) provides as follows:-

> *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.*

23. In my view, the Labour Court did not fall into error in expressing the view that any conflict of meaning between the words "continuous" and "successive" could be resolved by "ascribing a liberal and expansive meaning" to the term "layoff' and it followed the decisions referred to in its judgment in *Department of Foreign Affairs v. A Group of Workers* [2007] 18 E.L.R. 332 and *William Beary v. Revenue Commissioners* [2011] 22 E.L.R. 137, that a "liberal and expansive meaning" had to be given to the term layoff in order to interpret that concept in the context of the Framework Agreement and the Act of 2003. In *An Post v. McNeill* [1998] 9 E.L.R. 19, the High Court gave a wide interpretation to the concept of layoff and accepted that there was no temporal limitation on the concept. The Labour Court made no error of law in following these decided cases.

24. However, the matter does not end there and different words are used by the Directive and the Act of 2003 to describe the different terms and the Labour Court correctly identified a possible interpretative difficulty that might arise as a result. It is undoubtedly the case that the Act of 2003 was intended to transpose the Directive into Irish law but equally the Member States were given a margin of appreciation in how this was done in domestic law.

25. In *Adeneler & Ors. v. Ellinikos Organismos Galaktos* (Case C-212/04) [2006] I.R.L.R. 716, the Court of Justice of the European Union ("CJEU") held that clause 5 of the Council Directive 1999/70/EC must be interpreted as meaning that contracts of employment separated by less than 20 days are to be regarded as "successive" within the meaning of that clause. It is urged upon me in this appeal that the Labour Court was incorrect in applying merely a temporal question to the matter and that the length of the break periods between contracts is not of itself determinative of the matter. I accept that general proposition, and there are a number of factors which must be taken into account by a court in determining whether a contract has been continuous, including whether the actual period of time is objectively speaking wrong, and whether it could objectively be said that it was intended by the parties that the period of time separating the fixed-term contracts would not be permanent and that a new contract would shortly commence. Furthermore, I am persuaded by the argument advanced by the respondent's counsel that the fact that Dr. Sallam was employed in various locations was not a matter which was determinative of the question, although in certain instances I accept as a general proposition that it may be. The appellant was the relevant employer in all of the contracts. The Labour Court expressly applied that decision of the CJEU to the question of whether the respondent's various contracts of employment were to be regarded, as a matter of Irish law, as continuous or successive.

26. It is established law that a national court applying legislation to give effect to EU Directives must have regard to the purpose of the Directive. This is not to say that the national court must apply the language or purpose of the Directive if this conflicts with the domestic legislation. As it was said in *Criminal proceedings against Pupino (Case C-105/03)* [2005] E.C.R. I-05285, at para. 47, a provision with indirect effect "cannot serve as the basis for an interpretation of national law *contra legem*." Murray C.J. in *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] IESC 23, [2006] 3 I.R. 148, quoted this judgment with approval.

27. In *Eircom Ltd v. Commission for Communications Regulation* [2006] IEHC 138, [2007] 1 I.R. 1, it was said, at para. 35, that "national courts are required to have regard to the purpose of the directive so as to ensure that its objectives are fully effective within the national system, if that is interpretively achievable" (emphasis added). The purpose of the Framework Agreement in Council Directive 1999170!EC was to prevent the abuse of continuous fixed-term contracts. A court in applying a domestic statute which incorporates an EU Directive into domestic law may, and indeed must, have regard to the jurisprudence of the CJEU in interpreting the legislative provision. The Labour Court was correct, as a matter of law, in taking cognisance of the decision of the CJEU in *Adeneler & Ors. v. Ellinikos Organismos Galaktos* and equally correct in taking account of the decision of the High Court in *An Post v. McNeill* that the question of layoff was not merely one of temporal limitation. The Labour Court interpreted the requirement that a worker will have continuous service in light of the case law of the CJEU on the meaning of successive fixed-term contracts and took a broad view of the test.

28. To that extent, it seems to me that while the Labour Court was engaged in an exercise of interpretation, and this exercise is a matter of law which an appeal may be had to this Court, the Labour Court did not err in law in taking into account the jurisprudence of the CJEU. I see no error of law in its approach or its conclusion. Accordingly, it is my view that the finding of the Labour Court is not one that should be upset by this Court.

The treatment of the Sligo contract by the Labour Court: the interpretative process

29. The applicant commenced employment in Sligo General Hospital on 1st July, 2007, as a locum consultant obstetrician and gynaecologist. His written contract of employment is dated 15th October, 2007, although this employment in Sligo is acknowledged to have commenced on 1st July, 2007. The written contract expressly identifies the employment as being a locum type employment and the purpose of the contract is set out expressly in para. 3 of this document as follows:-

> *Your employment with the Health Service Executive shall be for the purpose of Locum Consultant Obstetrician Gynaecologist in the absence of Dr. Victor Moore.*
>
> *The Unfair Dismissals Act, 1977 - 2001 shall not apply to your dismissal consisting only of the cesser of the said purpose.*

30. Prior to the commencement of his employment a draft contract was prepared and negotiations were had between the respondent and Grainne McCann on behalf of the appellant in which certain queries and concerns raised by the respondent were addressed. One point replied to in an e-mail from Ms. McCann on 2ih June, 2007, prior to the date of the commencement of the contract, has particular relevance to the determination of the Labour Court and to the argument before me. This reads as follows:-

> *You are being offered a Specified Purpose Contract as Locum Consultant to fill the post as Dr. Moore's Locum. You are not being offered a post of indefinite duration as this post is vacant on a temporary basis and the duration of such a post will cease on the return of Dr. Moore or until alternative arrangements are put in place.*

31. Dr. Moore retired from his employment on 1st June, 2010, and the appellant went about the business of selecting a candidate to replace Dr. Moore on a permanent basis. The respondent was not successful in his application for the permanent position and was notified that another candidate had been appointed to the permanent post by a letter of 17th May, 2011. On 10th June, 2011, notice was given to the respondent that his contract of employment was terminated as of 29th July, 2011. The successful candidate appointed to replace Dr. Moore was drawn from a panel created as a result of a competition in 2009.

32. The respondent was employed on 1st July, 2007, on foot of a written contract which identifies the purpose of that contract being

as locum consultant obstetrician and gynaecologist in the absence of Dr. Victor Moore. The Labour Court considered his employment at Sligo General Hospital as locum for Dr. Moore terminated when Dr. Moore retired. The Labour Court determined that the fixed purpose locum contract expired "when its purpose was discharged on the retirement of the named doctor". This is a central part of the appeal to this Court and the appellant argues that this finding by the Labour Court is a finding of law amenable to such appeal. The respondent asserts that the finding was a finding of fact from which appeal does not lie.

33. In order to come to a conclusion as to the process of the Labour Court, I must look at the approach and analysis of the Labour Court to the documentary evidence before it. It took the view that there was a clear purpose recited in the contract and in this it was correct.

34. The Labour Court noted that the words "until alternative arrangements are put in place" did not appear in the written contract eventually executed by the parties and expressed some doubts to the precise meaning of that phrase. The Labour Court then went on to say that "any absence of clarity" in the e-mail of 27th June, 2007, must be resolved against the respondent and applied the *contra proferentum* rule of construction to the words in the email. It did this on a hypothetical basis as it expressed some doubt as to whether the e-mail could be read in conjunction with the signed contract. In my view, the Labour Court was engaged in an exercise of interpretation and application of legal principles in the exercise that it conducted, and accordingly, the decision by the Labour Court on the nature and true characterisation of the Sligo contract was a matter of law to which an appeal lies to this Court.

35. The first point I would make is that it is difficult to understand with precision whether the Labour Court did take the view that the e-mail of 27th June, 2007, did add to or vary the written contract. In my view, the Labour Court was incorrect as a matter of law in its analysis of the e-mail of 27th June, 2007, and insofar as it did use it as an interpretive tool, was wrong to do so. The contract between these parties was reduced to writing and was not amenable to variation by parol evidence in the absence of ambiguity. That this is so is clear as a matter of law and the parol evidence rule, although it admits various and many exceptions, is one well-established in our jurisprudence, for example in the Supreme Court decision of *Macklin & McDonald v. Greacen & Co*. [1983] I.R. 61.

36. The written contract executed between the parties, in my view, was perfectly clear and did not require any parol evidence to explain its circumstances or subject matter and in the circumstances, insofar as the Labour Court did enter upon this exercise of applying the *contra proferentum* rule, it was incorrect as a matter of law. In my view, the phrase "alternative arrangements" which was found to lack clarity by the Labour Court could not as a matter of law be used as an interpretive tool to explain, or more especially to vary, the written contract. Insofar as the Labour Court did read the e-mail of 2ih June, 2007, as having contractual effect, it was, in my view, wrong as a matter of law.

37. Even if I am incorrect in this, I take the view that the Labour Court was wrong as a matter of law in applying the *contra proferentum* rule to the content of the e-mail. The Labour Court took the view that the language used in the e-mail is capable of various meanings and that it was the responsibility of the appellant to express its contractual intentions in clear terms. In *Analog Devices B.V. v. Zurich Insurance Company* [2005] IESC 12, [2005] 1 I.R. 274, the Supreme Court considered the *contra proferentum* rule and took the general view that it applied only when a contractual provision was ambiguous or capable of more than one interpretation. That rule does not assist in the interpretation of the vague and uncertain term "alternative arrangements". Even if it had contractual import it was not capable of being made less vague or uncertain by this rule of construction.

38. The Labour Court took a view that the contract stated a "clear purpose" and a single purpose. It then engaged upon a hypothetical and unnecessary exercise of construing the e-mail of 2ih June, 2007, and in doing so incorrectly asked the question whether that e mail did in fact vary the express and clear contract. The e-mail itself, to my mind, and as a matter of true construction, was an attempt not to add to or vary the written contract, or add to or vary the specific locum purpose for which it was entered into, but to explain to the respondent why he was not being offered a post of indefinite duration. The explanation proffered was that the post of consultant was not vacant or was vacant on a temporary basis only and that the temporary post would cease on the return of Dr. Moore or when alternative arrangements were put in place. This is perfectly clear from the first sentence of the e-mail where the terms of the offer of employment were described as a specific purpose contract as locum consultant to fill the post as Dr. Moore's locum. The e-mail to my mind was never intended by the parties to express a contractual term but merely was an explanation as to why the contract offered to the respondent, who at that stage had worked for the appellant in various locum contracts for almost four years, was not a permanent post. As stated by Laffoy J. in *UPM Kymmene Corporation & Ors. v. BGW Limited* (Unreported, High Court, Laffoy J., 11th June, 1999):-

> *"The Court's task is to ascertain the intention of the parties and that intention must be ascertained from the language they have used considered in the light of the surrounding circumstances and the object of the contract. "*

The Sligo contract was divisible

39. The Labour Court held that the post offered to the respondent, which he accepted, was as a locum for Dr. Moore. The objective condition which determined that contract was clearly set out, and that condition was the filling of Dr. Moore's post as locum. The end of the respondent's contract was determined by this objective condition as explained by Laffoy J. in *Nerney v. Thomas Crosbie Holdings Limited* [2013] IEHC 127. The respondent's contract was a locum contract and the Labour Court found that it came to an end once the locum function ceased.

40. The Labour Court distinguished the decision of Hanna J. in *Russell v. Mount Temple Comprehensive School* [2009] IEHC 533. In that case, the applicant took over the duties of a teacher who was on a career break. His written contract was in each case for a full year from 1st September to 31st August. A written contract was provided for the first period from September 2004 to August 2005 and the contract was orally renewed in September 2005 and September 2006. After the renewal in 2006, the teacher who had taken the career break resigned and it was argued by the claimant that the objective justification for the series of fixed-term contracts, namely to cover the career break of the identified teacher, had ceased to have effect and that, as a result, he was entitled as a matter of law to a contract of indefinite duration. The Labour Court and High Court on appeal held against him on that argument.

41. In the instant case, the Labour Court distinguished *Russell v. Mount Temple Comprehensive School* and it was correct in so doing. The applicant in *Russell* had fixed term contracts, in each case limited by time and not by purpose. The High Court held that the contract could not be changed during its currency so limited in time. In the instant case, the contract was not limited by time but by purpose and the Labour Court held that that purpose became exhausted on the retirement of Dr. Moore. The Labour Court then went on to hold that a second contract came into existence immediately upon Dr. Moore's retirement, and it was that second contract which the Labour Court held was a contract of indefinite duration which arose by operation of law, pursuant to s. 9(3) of the Act of 2003, following the retirement of Dr. Moore for whom the respondent had acted as locum.

42. It is argued by the respondent's counsel that this is a finding of fact by the Labour Court which may not be upset on appeal to

this Court. The appellant argues that the Labour Court erred in law in coming to this conclusion, namely the conclusion that the Sligo contract was divisible, and that the second Sligo contract came into effect on 1st June, 2010. In my view, this decision by the Labour Court is not a finding of fact but a finding of law and one amenable to appeal. However, I am of the view that as a matter of law the Labour Court, once it had decided on the true meaning of the contract as a locum contract to replace Dr. Moore only, was correct in its view that the Sligo contract was divisible, and that the first Sligo contract ended on the retirement of Dr Moore.

The meaning of a contract of indefinite duration

43. The Labour Court then went on to analyse the second Sligo contract and found that the second contract was a contract of indefinite duration which had arisen by operation of section 9(3) of the Act of 2003. Section 9(3) of the Act of 2003 deems a fixed-term contract which purports to contravene either s. 9(1) or s. 9(2) of that Act to be a contract of indefinite duration. It is narrow in scope and the deeming provision can arise as a matter of statute only if the fixed-term contract purports to contravene either of the subsections. Both subsections relate to the renewal of either one, in the case of subs. (1), or two or more, in the case of subs. (2), continuous fixed-term contracts when the aggregate duration of the contracts is more than four years. The sole deeming provision transforms a purported fixed-term contract into a contract of indefinite duration when an employer breaches the Act of 2003 by purporting to offer successive fixed-term contracts outside the four year period. This is consistent with the purpose of the Act and the Framework Agreement to prevent the abuse of fixed-term contractual arrangements.

44. Section 9(1) and (2) of the Act of 2003, however, apply only where there is a renewal of a fixed-term contract and the Labour Court was, in my view, incorrect as a matter of law in its finding that, on the retirement of Dr. Moore, there was a renewal of a fixed-term contract with the respondent. I find an internal inconsistency in the Labour Court's determination where it on the one hand finds that, as a matter of fact, on the retirement of Dr. Moore an implied contract came into existence, and on the other hand holds that a contract of indefinite duration arose at that date by operation of s. 9(3) of the Act of 2003. The express finding of fact of the Labour Court was that after the retirement of Dr. Moore, the respondent continued to discharge his duties and the appellant continued to pay him on what "must be regarded as an implied contract". By this expression, I understand the Labour Court to mean that an oral contract can be implied between the parties arising from their conduct. Insofar as the Labour Court held this implied contract to be a contract of indefinite duration which arose as a matter of statute, it was, in my view, incorrect. It was an incorrect and unnecessary inference from the express findings of fact that it made that the contract arose as a result of the interplay between the continuation of the respondent in employment and the continuation of the payment of his agreed remuneration by the appellant. The second Sligo contract arose from the conduct of the parties, the fact of the continued performance by the respondent of his duties, the continued payment by the appellant of his agreed remuneration and not by statute.

45. A contract of indefinite duration is a term of art to describe a contract which arises by operation of the provisions of s. 9(3) of the Act of 2003. It is deemed to arise following a breach of s. 9(1) or (2) of the Act of 2003, and the Labour Court identified no breach of either subsection which might have given rise to a finding under s. 9(3) of the Act. Its finding was expressly made on the basis of the continued performance of the contractual obligations by both the respondent and the appellant, not from any renewal of the respondent's contract of employment. There not having been a renewal, the finding that a contract arose by operation of the statutory provisions is incorrect.

46. I can find no breach of either s. 9(1) or s. 9(2) of the Act of 2003 which the Labour Court identified as giving rise to a necessary implication under s. 9(3) of the Act and, accordingly, it was wrong as a matter of law to come to the view that s. 9(3) of the Act had the effect that it deemed a contract of indefinite duration to arise.

Does the respondent have standing?

47. This point of appeal is listed at para. 23 of the notice of motion/grounds of appeal. While initially it had the appearance of being merely a procedural or jurisdictional point, it came to have significance as the case progressed. The Labour Court found that the respondent was employed in Sligo on two separate and identifiable contracts. The first of these contracts was the contract to act as locum for Dr. Moore and the Labour Court found that this came to an end on the resignation of Dr. Moore. The Labour Court then found that the respondent had an implied contract, deemed to be a contract of indefinite duration pursuant to the statute. This class of implied contract arises by operation of law under the Act of 2003 and it cannot arise by any other means. The appellant says that on the date of the respondent's termination he was employed under a contract of indefinite duration and, accordingly, the Act of 2003 did not apply to him. He did, in those circumstances, have the right to make an application to the Employment Appeals Tribunal, under the Unfair Dismissals Acts 1977-2007, and he has done so. The appellant says that once it is determined by the Labour Court that he did have a contract of indefinite duration, the Act of 2003 no longer applied.

48. Some controversy arose in the course of the case as to whether this is what the Labour Court found. Counsel for the respondent suggested that the Labour Court found that on the conclusion of the locum contract, the respondent came as a matter of law to have a contract of indefinite duration. She states that such a contract is governed by the dicta of Laffoy J. in *Minister for Finance v. McArdle* [2007] IEHC 98, [2007] 2 I.L.R.M. 438, and that an employer may not seek to avoid the Act of 2003 merely on account of the fact that the Act has the effect of creating a contract of indefinite duration, the existence of which contract is incompatible with a fixed-term contract and an application under the Act of2003.

49. Counsel for the appellant argues that an applicant under the Act of 2003 must identify the fixed-term contract which he says brings him within section 9(3) of the Act.

50. In *Ahmed v. Health Service Executive* [2006] IEHC 245, [2007] 2 I.R. 106, Laffoy J. considered the question of the jurisdiction of a Rights Commissioner and, on appeal, the Labour Court under the Act of 2003. She explained this jurisdiction as follows at para. 30:-

> *"The jurisdiction conferred on a rights commissioner and on the Labour Court on appeal by the Act of 2003 is to adjudicate on an employee's complaint that his employer has contravened one or more of the provisions of the Act of 2003 and to deal with the complaint in the manner stipulated in ss. 14(2) or 15(J)(b), as the case may be."*

51. In that case the agreed impact of the Act of 2003 was that the plaintiff's contract was deemed to be one of indefinite duration by operation of law and the court held that the Rights Commissioner and, on appeal, the Labour Court did have jurisdiction to adjudicate on the question of the status of the plaintiff's contract of employment. Laffoy J. noted that the existence of a contract of indefinite duration was acknowledged for the first time by the defendant only after the initiation of the complaint itself.

52. In *Minister for Finance v. McArdle*, it was submitted to Laffoy J. that the defendant had no *locus standi* to rely on the Directive or the Act of 2003 because a concession had been made that she was employed on a fixed-term contract. The court held that it was "reasonable to infer that it was the complaint which provoked the concession", and the concession was only formally made two days before the hearing before the Rights Commissioner commenced. While Laffoy J. refused to deal with that argument because it had not been made before the Rights Commissioner or the Labour Court, she did categorically state that "there can be no question but that

the Rights Commissioner had jurisdiction to entertain the complaint as of 10th January, 2005."

53. I adopt this clear statement of the object of the Act of 2003, and it seems to me to be undoubtedly the case that the respondent here did have a right to institute the proceedings before the Rights Commissioner and that the appeal by the appellant before this Court is one that may properly be determined under the Act of 2003. I reject the argument by counsel for the appellant that the respondent had no standing to commence those proceedings because at that time, the respondent was by operation of law deemed to be employed under a contract of indefinite duration. The appellant, at all material times throughout the hearing before the Rights Commissioner, the Labour Court and on appeal to this Court, has maintained the position that the respondent was employed under a fixed-term contract, and has sought to argue that the fixed-term contract or contracts are objectively justified. The respondent had a right to litigate the question of his correct employment status under the Act of2003 and had standing so to do.

Justification

54. The Labour Court then went on to engage in what, in my view, was an unnecessary and incorrect exercise, namely the analysis of the factual nexus to determine whether there was actually operating in the mind of the appellant an objective condition which justified the renewal of the respondent's contract. It took the view that no statement of objective justification for the purposes of s. 8(1) of the Act of 2003 had been furnished to the respondent at the time of, or before, the contract. It noted that, in a letter of 6th July, 2011, after the permanent post had been filled, the appellant purported to identify the objective justification for the fixed-term contract, namely that the post would be filled in a temporary capacity pending the filling of the permanent vacancy through open competition. In the events, the vacancy was filled from a panel and not through a new open competition. It is not clear to me whether the Labour Court regarded this as significant, and whether it took the view that the stated objective justification did not in fact exist, insofar as it was stated to be the filling of a post from a new open competition. The Labour Court stated that the objective grounds relied on for the proposes of justifying continuous fixed-term contracts must be operating on the mind of the respondent at the time the contract is concluded and followed *St. Catherine's College for Home Economics & Anor v. Maloney & Anor* [2009] 20 E.L.R. 143 for that purpose, and held that this requirement was not satisfied.

55. While I have difficulty in understanding precisely how the Labour Court made the transition from its finding that a second Sligo contract arose by behaviour following the retirement of Dr Moore to coming to consider the provisions of s. 9(4) of the Act, I consider it proper to review its findings that no objective justification existed as a matter of fact. The objective justification offered by the appellant may broadly be stated as the need for the appellant to fill the post of consultant obstetrician and gynaecologist at Sligo General Hospital, pending the filling of the post on a permanent basis. The Local Authorities (Officer and Employees) Act 1926 ("Act of 1926") governs the appointment of persons to certain positions, including the position of consultant. The Act of 1926 provides, under s. 6(1), that, where applicable, the appellant cannot appoint a person to a permanent post without a recommendation from the Public Appointments Service. It is also permissible to form a panel, following competition through the Public Appointments Service, on which recommended candidates are placed and which remains in operation for a specified period. The respondent had applied several times for positions through the Pubic Appointments Service but had not been successful in securing a permanent post. The candidate that filled the permanent vacancy following the retirement of Dr. Moore in 2010 was drawn from a panel which had been formed following the retirement of another doctor in 2009. The respondent had applied for that permanent position but was not placed on the panel following the public appointments process. It is not in issue that it was not open to the appellant to replace Dr. Moore without obtaining prior approval from the HSE Consultants Appointments Unit, approval of which was notified to the appellant on 27th September 20 I 0. This seems to me to be correct and to offer an objective justifying reason for the offering of fixed-term contracts to the respondent or another person to fill the temporary vacancy.

56. In *Health Service Executive Dublin North East v. Umar*, Hedigan J. held that the recruitment of a consultant pending the filling of a post by open competition was objectively justified under the Act of 2003. The Labour Court found in this case, however, that *Health Service Executive Dublin North East v. Uma*r was not applicable to the facts in issue because the contract offered to Dr. Umar stated at its inception that it was for that purpose. The Labour Court considered the second Sligo contract to have come into existence on the retirement of Dr. Moore, and was never identified by the appellant as one to cover the post in a temporary capacity pending the filling of the permanent position. The Labour Court took a view as a matter of fact that the e-mail of 27th June, 2007, and the reference there to "alternative arrangements being put in place" was not a statement of objective justification within the meaning of s. 8 of the Act of 2003, nor could it be regarded as disclosing justification based on objective and transparent criteria as envisaged by the CJEU in *Del Cerro Alonso v. Osakidetza-Servicio Vasco de Salud (Case C-307/05)* [2007] E.C.R I-7109. It made this finding on a hypothetical basis, and commenced its statement with regard to that e-mail on that basis.

57. It seems to me that what the Labour Court did was take a general view that the implied contract, which it held had arisen on the retirement of Dr. Moore, was a renewal and in that it must have regarded the extension of the respondent's contract, or the continuation of it, to be a renewal to which s. 9 of the Act of 2003 applied. The renewal in that case must be seen as an implied renewal and I am of the view, in principle at least, that a renewal of a contract can be held to have been implied from the conduct of the parties. I am not convinced, however, that the Labour Court did make a finding of fact that the second Sligo contract was a renewal of the first Sligo contract and, it seems to me that the Labour Court took the opposite view and regarded the second Sligo contract as having arisen as a matter of implied contract by the behaviour of the parties rather than as a renewal of the first contract which it held had ended on the retirement.

58. The Labour Court relied on s. 8(4) of the Act of 2003, in coming to a conclusion that the specified purpose, namely the replacement of Dr. Moore's position by a permanent post, had not been stated before the second contract was entered into, and did in fact, draw an inference that reasons were not "in contemplation of the respondent at the material times", namely at the time when the second contract was created. This is a finding of fact with which I cannot interfere but, as a matter of law, it seems to me that a failure by an employer to comply with the requirements of s. 8 of the Act of 2003 does not of itself mean that no objective justification exists, and each case must be decided on its own facts. Insofar as the Labour Court did extrapolate from the failure of the appellant to furnish in writing a statement to the respondent of the objective condition determining the contract, the Labour Court was wrong in law. The inference may not be drawn as an inevitable conclusion from the failure to furnish notice under s. 8, but a failure to give notice is one factor that may be taken into account in coming to a determination as to whether the objective condition did, as a matter of fact, exist at the date of renewal. This is clear from the terms of s. 8 of the Act itself which gives the Labour Court an entitlement to draw an inference when it is 'just and equitable in the circumstances" to do so. This means that the Labour Court must engage in the exercise of considering the circumstances and the equity and justice between the individual parties before it comes to a conclusion or draws an inference from a failure under s. 8 of the Act of2003.

59. Insofar as the Labour Court took the view that it is "apt to infer" that the objective conditions were not in contemplation of the appellant at the time of the renewal of the second Sligo contract, such inference is a matter of law and is one that may be reviewed by the High Court on appeal. I accept the argument by counsel for the appellant that all the evidence in this case points to the fact that the appellant did intend to, and did in fact, fill the post left vacant by Dr. Moore's retirement and that this of itself, following the decision of Hedigan J. in *Health Service Executive Dublin North East v. Umar*, would be an objective condition justifying the creation

of a further fixed-term contract. Accordingly, it is possible to infer that the need was operative in the minds of the appellant at the time the respondent commenced working in Sligo. In the circumstances I find that the question of justification was not one correctly dealt with by the Labour Court, but that finding was one which was made on a hypothetical basis by that Court and did not form a basis for its decision.

Conclusion

60. Accordingly, I am of the view that:-

(a) The Labour Court did not err in law in finding that the respondent was continuously employed by a series of fixed-term contracts since his first contract with the appellant in 2003. This Court did have jurisdiction to determine the appeal of the appellant with regard to this finding, which is a finding of law, but I can find no error in the conclusion made by the Labour Court.

(b) The Labour Court was incorrect in law in applying the *contra proferentum* rule as a tool of interpretation of the Sligo contract. The Sligo contract was a contract which was reduced to writing and was unambiguous and clear in its terms. The Labour Court was correct in holding that the Sligo contract was one for a fixed purpose, namely as a locum contract to cover the absence of Dr. Moore and it did not need to engage in the exercise of applying the *contra proferentum* rule to exclude the e-mail of 27th June, 2007 for the purposes of its interpretive exercise. In the circumstances, I find no error in the conclusion reached by the Labour Court although I find that it made an error in the way in which it applied the canon of construction of contractual terms.

(c) The Labour Court finding that there existed two Sligo contracts is a finding of fact which flows from its finding that the single purpose of the Sligo contract was to fill the locum post for Dr. Moore while he was absent on leave. I find no error of law in the finding of the Labour Court that the respondent came to be employed on a separate and distinct contract by the appellant following the determination of the locum contract. The finding of fact which follows from this is not one with which this Court can interfere and it was a finding made on the basis of the view the Labour Court took of the conduct and behaviour of the parties. This contract is an oral contract that arose by implication from the conduct of the parties.

(d) The Labour Court was wrong in law in finding that the second Sligo contract was a contract of indefinite duration which was deemed to come into existence by the operation of s. 9(3) of the Act of 2003. The contract is not one that can be termed a "contract of indefinite duration" which is a term of art applicable to the class of contract deemed to come into existence under the Act of 2003.

(e) The Labour Court did not identify the contract which might have been a renewal to which s. 9(1) or (2) of the Act of2003 might have applied, and in the absence of any finding that the second Sligo contract was such a renewal, the provisions of s. 9(3) of the Act of2003 do not apply.

(f) If I am wrong in this, and if the Labour Court did take the view that the second Sligo contract was in fact a renewal of the first Sligo contract, and that the word "*renewal*" in the Act of 2003 includes a continuation of a contractual relationship, the Labour Court erred in law insofar as it purported to say that the absence of a written notification for the purposes of s. 8(1) of the Act of 2003, of itself, meant that it was entitled to draw an inference that no objective condition justifying the offering of a fixed-term contract actually existed.

(g) The Labour Court's finding that there existed no justifying reason for the creation of a fixed-term contract in regard to the second Sligo contract, insofar as it was based merely on an analysis of the correspondence, is a finding of fact with which this Court cannot interfere. This finding seems to me to have been made on a hypothetical basis, and not to have formed the basis of its decision on the facts.

(h) The final conclusion drawn by the Labour Court namely that a contract of indefinite duration exists as between the respondent and the applicant is incorrect. The Labour Court took the view, and it was entitled to take this view, that a second contract of employment came to exist between the respondent and the applicant following the retirement of Dr. Moore and this contract arose as a matter of implication from the conduct of the parties. This is not a contract to which the provisions of the Act of 2003 applied and the Labour Court erred in law, insofar as it made a declaration under s. 9(3) of the Act of2003.

61. Accordingly, I find that the appellant succeeds to some extent in the appeal.

62. Following the delivery of this judgment the parties agreed that an order was to be made on consent setting aside the determination of the Labour Court, and I so order.