



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 207

Record No. 2016/3

**Finlay Geoghegan J.
Peart J.
Hogan J.**

BETWEEN/

HELEN EARLEY

PLAINTIFF /

APPELLANT

- AND -

HEALTH SERVICE EXECUTIVE (No.2)

DEFENDANT/

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 18th day of July 2017

1. In a judgment delivered on the 15th May 2017 ("the first judgment") this Court held that the re-assignment of the plaintiff, Ms. Helen Earley, from the operational and clinical nursing duties specified in her contract of employment to non-operational duties amounted to a breach of that contract of employment: see *Earley v. Health Service Executive* [2017] IECA 158. In November 2012 Ms. Earley had been appointed to a position as Area Director of Nursing, Mental Health Services for the Galway/Roscommon region. It is clear from the terms of the job description and the terms of the contract of employment that this was a senior post within the Health Service Executive ("HSE") which entailed both clinical and management responsibilities for some 60 facilities in these two counties.

2. While it is important to state that the re-assignment from the position she held to other non-clinical duties did not entail any loss of remuneration and (perhaps more arguably) any loss of reputation or status, this Court held that these considerations were fundamentally irrelevant to the question of whether there had been a breach of the terms of Ms. Earley's contract of employment. It is also important to observe that there have been no disciplinary findings against Ms. Earley and the HSE have repeatedly stated that the re-assignment was not part of a disciplinary process. The re-assignment was furthermore stated to be temporary in nature.

3. At the conclusion of the first judgment this Court simply granted a declaration that there had been a breach of the contract of employment. Concluding my judgment I stated at para. 39 of that first judgment as follows:

"I would accordingly allow the plaintiff's appeal and grant a declaration to the effect that the re-assignment of the plaintiff in July 2015 constituted a breach of her contract of employment. In the light of this finding and the granting of such relief, I would invite the parties to make such further submissions on the question of whether the grant of any further relief by this Court is necessary or appropriate."

4. No steps having been taken by the defendant to restore the plaintiff to her original position as Area Director of Nursing, Mental Health Services for the Galway/Roscommon area following the delivery of the first judgment, the question of what (if any) additional remedy should be granted was then put in for further hearing before this Court. While acknowledging and respecting the Court's decision, counsel for the HSE maintained at that subsequent hearing that the plaintiff's only remedy in the light of the Court's findings was an action for damages for breach of contract. Counsel for the plaintiff submitted that this would be a purely empty remedy, since Ms. Earley had suffered no financial loss by reason of the reason of the re-assignment. He submitted that in order for the plaintiff to obtain an appropriate and effective remedy it would be necessary for this Court to make an order restoring the plaintiff to her original post.

What further remedy (if any) should this Court grant the plaintiff?

5. The question now arises as to what further remedy, if any, the plaintiff should now obtain. There are several reasons why, on the specific and particular facts of this case, I am of opinion that this Court should indeed grant an order requiring the HSE to restore the plaintiff to her original position under the terms of her contract of employment. I reach this conclusion for the following reasons.

6. First, it must be stressed at the outset that the present proceedings do not involve an action for wrongful dismissal, where the traditional remedy remains that of an action for damages and where orders for the specific performance of contracts of employment remain exceptional. The plaintiff has neither been dismissed nor disciplined. Nor have there been any disciplinary findings against her and the HSE has assured the Court that the re-assignment is not for disciplinary reasons.

7. Second, a further consideration is that although the plaintiff cannot claim to be an office holder as such, she has nonetheless been appointed to a very specific post with very particular duties as specified in her contract of employment. This is reflected by the terms of the plaintiff's own highly particular contract of employment and job specification, the details of which have already been set out in greater detail in the first judgment. Her entitlement to perform the specific duties associated with the position may rightly be regarded as a fundamental aspect of that contract of employment. The job specification refers to her as "the post holder".

8. Third, the sequence of events leading up to Ms. Earley's re-assignment is also material. While the details of these events are set out in far greater detail in the first judgment, it may nonetheless be convenient to summarise these events as follows. On 1st July 2015 – now over two years ago – the plaintiff received a letter from Mr. Bernard Gloster, Chief Officer of the HSE Mid-West and

interim chief officer of the HSE West, to the effect that she was to be temporarily reassigned from her position as an Area Director of Nursing to the Programme Management Office of the National Mental Health Division of the HSE. This re-assignment took effect from the 6th July 2015. On that date a Mr. Brian O'Malley was appointed as Acting Area Director of Nursing.

9. It was this re-assignment which gave rise to the present proceedings. On the 30th July 2015 Kennedy J. granted the plaintiff an interlocutory injunction which prevented the HSE giving effect to this re-assignment pending the trial of the action: see *Earley v. Health Service Executive* [2015] IEHC 520. The plaintiff accordingly remained in position pending the full hearing of the action in the High Court which was heard by O'Connor J. in November 2015. In a reserved judgment delivered on the 27th November 2015 O'Connor J. found that the re-assignment of the plaintiff was lawful and he refused to grant her any of the injunctive or declaratory relief which she had sought: see *Earley v. Health Service Executive* [2015] IEHC 841. The re-assignment of the plaintiff took effect shortly thereafter once the interlocutory injunction which had been granted a few months earlier in July 2015 thereby lapsed following the delivery of the High Court judgment.

10. For the reasons set out in the first judgment this Court has already concluded that O'Connor J. was in error insofar as he found that there had been no breach of the plaintiff's contract of employment. It is inherent in this Court's appellate role from decisions of the High Court that this Court would normally seek to ascertain what the factual position which obtained immediately prior to the High Court judgment actually was.

11. In this context one may observe that it is necessarily implicit in this Court's first judgment that it was of the view that the interlocutory injunction restraining the unilateral re-assignment of the plaintiff which had been granted by Kennedy J. in July 2015 should have been made permanent in November 2015.

12. It is true that the plaintiff has now been assigned to other duties since November 2015 and slightly more than eighteen months have now passed since she was so re-assigned. Yet it would be strange if the plaintiff's ability to secure an effective remedy should be now compromised by reason of the fact that the High Court fell into error by failing to grant this order in November 2015 and by the subsequent delays which have necessarily ensued in ensuring that her appeal was heard by this Court, unless, of course, there had been other developments in the meantime which now rendered this course of action impossible or otherwise inappropriate. Certainly in the absence of any disciplinary action, no tangible evidence has been placed before this Court to suggest that the re-instatement of the plaintiff to her original post would now be impossible or inappropriate.

13. Fourth, any other conclusion would effectively render the plaintiff's victory a purely pyrrhic one. Even though this Court has held that the HSE had breached her contract of employment she would in these circumstances have secured a declaratory order to this effect only. While one would ordinarily have expected that in a democratic State governed by the rule of law a public body - such as the present employer - would unhesitatingly respect the logical implications of a court order, it seems that absent the grant of a further and more coercive order the declaratory order granted to the plaintiff in the present case is destined to remain little more than a thing writ in water.

14. In *Wallace v. Irish Aviation Authority* [2012] IEHC 178, [2012] 2 I.L.R.M. 345 I was required when a judge of the High Court to consider the situation of an employee who had been placed on administrative leave despite an express contract commitment that she would be allowed to work pending the outcome of an appellate process against an adverse disciplinary decision. I rejected the argument that I could not - or, at least, should not - grant a mandatory interlocutory injunction requiring the Authority to permit the plaintiff to work pending the outcome of the appeal, saying ([2012] 2 I.L.R.M. 345, 355):

"But it would be unfair to Ms. Wallace if the Authority were to be allowed to resile from what would appear to be its contractual obligation simply because the unyielding application of specialist sub-rules relating to the grant of interlocutory injunctions in employment cases (such as a traditional unwillingness to refuse to countenance the grant of mandatory interlocutory injunctions specifically enforcing aspects of a contract of employment) rendered it effectively unenforceable just at the time when that guarantee might be of the most value to her. In those circumstances, the courts would have failed in their constitutional duty [in Article 40.3.2 of the Constitution] to vindicate these contractual obligations by providing real and effective relief to remedy the injustice done which would then have been done to her.

It was, after all, the Authority which decided to agree to give its employees the express contractual commitment that they would remain *in situ* pending an appeal against an adverse disciplinary decision. The Authority can hardly feign surprise or look askance if this Court merely holds it to its own word."

15. There are, of course, differences between the two cases. Ms. Wallace's position involved the discharge of routine administrative duties and it was not a senior clinical and management position such as the present one. That case, moreover, concerned the grant of a short-term interlocutory injunction and which did not involve a final order such as that at issue in the present case.

16. The underlying principle is, however, nevertheless the same, namely, that the courts should ensure, where possible, that an effective - and not simply a theoretical - remedy should be available in employment cases where a clear breach of contract has been established. For all the reasons just stated, unless this Court intervenes and goes further, the plaintiff will simply be left with what amounts in the circumstances to be a purely theoretical remedy which the employer seems otherwise determined to ignore.

17. Just as in *Wallace* it was, moreover, the employer in the present case who decided to give Ms. Earley a specific contractual position which was shrouded with a range of specific commitments which excluded unilateral action of the kind which was subsequently taken by the self same employer in the present case. Again, just as I put the matter in *Wallace*, the HSE "can hardly feign surprise or look askance if this Court merely holds it to its own word."

Conclusions

18. In summary, therefore, for all the reasons stated, I would grant an injunction directing the HSE to restore the plaintiff to her contractual position as Area Director of Nursing, Mental Health Services for the Galway/Roscommon region. Once the plaintiff is restored to that post her tenure there is, of course, subject to the terms of her contract of employment.