

THE HIGH COURT

[2018 No. 10641 P.]

BETWEEN

JEAN-PHILIPPE GRENET

PLAINTIFF

AND
ELECTRONIC ARTS IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 21st day of December, 2018

Introduction

1. The manner by which the defendant has sought to terminate the plaintiff's employment and to avoid handling damage to the reputation of the plaintiff by virtue of actions taken ostensibly on its behalf has led to this application for interlocutory injunctive relief.

History

2. The plaintiff, who is a French national, has held senior managerial roles in Microsoft and Hewlett-Packard among other corporations. He is a graduate in Computer Science and Electronics from École Supérieure d'Électronique de l'Ouest in Angers, France. He conducts business with a reasonably good command of English whenever required.

Job Title

3. Under the heading "*Job Title and Duties*" in the Employment Agreement prepared by the defendant and "*made*" on Thursday, 28th June, 2018, ("*the contract*") the plaintiff was appointed:-

"Senior director of Global Service Delivery and EA Site Lead reporting to John Pompei ..."

Undisputed for this Application

4. The defendant has chosen not to dispute, for the purposes of this application at least, the account of the plaintiff relating to or leading to:-

(i) the motivation and integrity of Ms. Tracy Simmons (a director of Electronic Arts Inc ("EA") in Austin, Texas, USA, who had reported to the plaintiff) in making a complaint about an inappropriate comment of the plaintiff during her one-on-one video conference (slack) call on 9th November, 2018; and

(ii) the unapologetic, unexplained and unilateral withdrawal by the defendant on 10th December, 2018, of its investigatory, disciplinary and appeal process accompanied by its withdrawal of the termination letter dated 14th November, 2018.

Court Order, Friday, 6th December

5. On Friday, 6th December, 2018, Allen J., pursuant to the *ex parte* application of counsel for the plaintiff, restrained the defendant, until the hearing of the interlocutory injunction application, from:-

(i) taking any further step to implement the purported dismissal communicated to the plaintiff on 14th November, 2018; and

(ii) appointing any other person to the plaintiff's role as described above.

Monday, 10th December, 2018

6. Over the weekend something occurred for the defendant which may be reviewed at the plenary hearing of these proceedings. A letter dated 10th December, 2018, (which failed to identify the plaintiff as a director of the defendant when letters prior to the plaintiff's dismissal had so shown) was signed by Mr. Pompei. It was sent to the defendant at his family home in Galway which he had rented for two years upon the commencement of his employment in July 2018. The letter is worth quoting in full because it forms the basis of the "*cynical and unedifying*" criticism of the plaintiff in seeking to "*...have his good name, reputation, contractual and constitutional rights vindicated*" as alleged by solicitors for the plaintiff in their reply of 11th December, 2018:-

"Dear Mr. Grenet,

We refer to the letter of termination of employment dated 14th November, 2018, and the proceedings served on the company by your solicitors. We note the Orders made by Mr. Justice Allen on 6th instant, on foot of an ex parte application, restraining the company from taking any further steps to implement that dismissal or from appointing any other person to your role. In light of what follows, we respectfully request that both orders be vacated.

Please note that with immediate effect, this letter of termination is withdrawn. The company will not be proceeding further in respect of the matters dealt with therein and instead gives notice of termination in accordance with your contractual entitlements pursuant to Clauses 12 and 14 of your employment contract.

You have been reinstated to the payroll with effect from the date of termination and the company will discharge any salary and other emolument to you from the period of 14th November, 2018 to date. The company's solicitor have written separately to yours confirming our agreement also to discharge your legal costs (on a party and party basis) in the proceedings bearing record number 10461P 2018, same to be taxed in default of agreement.

The company does not require you to work your notice and accordingly has determined to pay you in lieu same.

Payment of the relevant sums will be made directly to your bank account on the next scheduled pay date but with immediate effect you have been restored to payroll.

Subject to agreement in respect of the continued protection of the company's confidential information it is prepared to waive its entitlement to rely on post termination restrictions.

Yours faithfully

John Pompei

Head of Player Experience Operations."

Changing Tack to No Fault Termination

7. Counsel for the defendant referred to the following cases in his submission that the defendant could abandon the earlier process and dismissal to opt for the no-fault dismissal provision in accordance with Clause 14 of the contract:-

- (i) *Orr v. Zomax Ltd* [2004] 1 I.R. 486 – High Court interlocutory injunction, Carroll J. ("Orr");
- (ii) *Maha Lingham v. Health Services Executive* [2006] 17 ELR 140 – Supreme Court appeal from interlocutory injunction refusal, Fennelly J. ("Maha Lingham");
- (iii) *Sheehy v. Ryan* [2008] 4 I.R. 258 – Supreme Court appeal from plenary hearing, Geoghegan J. ("Sheehy");
- (iv) *Carroll v. Bus Átha Cliath/Dublin Bus* [2005] 4 I.R. 184 – High Court interlocutory injunction, Clarke J. ("Carroll");
- (v) *Bradshaw v. Murphy* [2014] IEHC 146 – High Court interlocutory injunction, Finlay Geoghegan J. ("Bradshaw"); and
- (vi) *Hughes v. Mongoddb Limited* [2014] IEHC 335 – High Court interlocutory injunction, Keane J. ("Hughes");

Suggested Principles

8. Counsel for the defendant submitted that the following principles can be extrapolated from those cases:-

"(i) a contract of employment can be terminated lawfully as a matter of contract and common law by the giving of notice outside of the reason of stated misconduct;

(ii) no implied contractual terms undermine the foregoing;

(iii) an employer can lawfully terminate the employment post an earlier dismissal provided the terms of the contract are complied with by way of a no fault dismissal and the reason for the dismissal is not misconduct or justified by misconduct; and

(iv) an earlier adverse determination against an employee can be withdrawn or not relied upon in a no-fault dismissal by way of termination on contractual notice, is lawful and will not be restrained."

9. Counsel further stated that his client is "*being goaded into reopening*" the process and that there is no authority for the proposition that another party can compel performance of a contract to invoke the disciplinary process.

Plaintiff's Contractual Right

10. Counsel for the plaintiff emphasised the contractual right under Clause 21 of the contract to the grievance and disciplinary procedure. He submitted that the Court must conclude from the failure to give a reason for the termination that the no-fault termination was cloaked "*in new and relatively see-through clothes*".

11. Counsel explained how *Orr* related to redundancy, *Maha Lingham* related to a lack of funding, *Sheehy* related to an alleged job for life, *Carroll* concerned a dispute about alternative work, *Bradshaw* involved an alleged partnership and *Hughes* related to alleged poor performance. This is very much a summary but it allows one appreciate the distinguishing feature of the plaintiff's circumstances. Whatever about those summarised comparisons, it is this Court's impression that any plenary trial of these proceedings will indeed involve a set of circumstances that have not been addressed in those cited cases. Can an employer who alleges and acts upon harassment-type complaints to the point of termination of employment abandon same to avail of a termination provision with no protection of the reputation of the dismissed employee?

12. Counsel for the defendant submitted eloquently and forcefully that the Court should not restrain a no-fault termination which complies with the contractual notice period. There is no entitlement to fair procedures or to a right of prior consultation where misconduct is not the reason for dismissal according to this argument.

13. This Court is impressed by the cogent concentration by counsel for the plaintiff on the statement of Fennelly J. in *Maha Lingham* to the effect that a plaintiff with "*a strong and clear body of evidence that the defendant in the present case was motivated by a policy of racial discrimination...*" did leave open for an employee to challenge a no fault termination which is dressed up to avoid unlawful conduct such as a breach of contract or a breach of a constitutional right to vindicate one's good name. The "*see-through clothes*" argument persuades this Court, particularly having regard to the deliberate decision to gloss over the serious impact on the plaintiff's reputation, that there is a strong case in this regard. In other words, the state of the evidence at the moment is that the so-called no-fault termination is, on the balance of probabilities, a cynical contrivance.

14. The highlighting of the judgments and statements cited for the defendant have not really dealt with the defendant's "*utterly contrived ... affront to justice*" and the attack on "*the plaintiff's contractual rights and the principles of natural justice*". Those are phrases used by counsel for the plaintiff which the plaintiff now has to establish at the plenary hearing.

Conclusion

15. The authorities are replete with statements that any finding by a court at an interlocutory application cannot be conclusive or binding on the parties. As far as this Court is concerned, the plaintiff has established a *prima facie* case that his contractual rights for a proper investigatory, disciplinary and appeal process were compromised. Having said that, I also accept that the plenary hearing of these proceedings will have to grapple with whether the plaintiff is entitled to relief concerning an abandoned disciplinary process. Is an injunction futile given that the defendant may succeed in its claim that it can exercise the no-fault termination provision in the employment agreement? All that I can conclude at this stage is that there are serious issues to be tried.

Ostensible Authority

Facts

16. The offer dated 29th June, 2018, of the contract was signed by Mr. Molloy (then a director of the defendant) and Ms. Beth Ward. The plaintiff then signed the acceptance of that offer. Notwithstanding, the contract is dated 28th June, 2018, but the parties make no point about this small discrepancy in dates.

17. Mr. Pompei is neither an employer nor an officer of the defendant. He avers that he is the plaintiff's line manager and is employed by the ultimate parent corporation of the defendant. He somewhat arrogantly (I use that term advisedly because of his apparent ignorance of corporate governance for an Irish company which may be dispelled at a plenary hearing) takes upon himself the authority to act on behalf of the defendant without recognising that an ultimate parent corporation and a subsidiary company are separate legal entities. He does not express his understanding of the obligations of an Irish company. Further he does not refer to any resolution of the Board of the defendant nor any confirmation by an officer of the defendant as to his prior authorisation to terminate the employment of the plaintiff by the letter dated 10th December, 2018.

18. The height of the defence of his position is contained in an affidavit of Mr. Derek Chan filed on 15th December, 2018. Mr. Chan is a Canadian who was appointed a director of the defendant on 17th May, 2017, according to the directors' report and financial statements of the defendant for the period ending 31st March, 2018. His affidavit refers to his address in Surrey, England and avers:-

"The Board of the defendant has no involvement in the day to day management of the employees of the defendant, including the plaintiff, and rather that is the role and duty of Mr. Pompei. In fact, I say that Mr. Pompei has ostensible delegated authority from the Board of the defendant to manage the majority of employees at the defendant's Galway site, including the power to terminate their employment. On this basis, I say that Mr. Pompei had ostensible delegated authority from the Board of the defendant to manage the employment relationship of the plaintiff, including his appointment and the termination of his employment. I am fully satisfied in my role as director that Mr. Pompei had the authority to terminate the employment of the plaintiff."

19. The plaintiff uses the word "*startling*" when he refers to the apparent lack of regard to the obligations of directors under Irish company law *vis-à-vis* their duties towards employees and the disclosure of Mr. Pompei's alleged unfettered power to hire and fire most of the 420 employees of the defendant in Galway and more particularly the plaintiff.

20. The submission that the defendant and its parent corporations in Holland and the US are "*part of a global business with a global management structure*" should in some way trump the obligations under Irish and European Union law is worrying if brought to its logical conclusion. The plaintiff is as entitled as the defendant or its US parent corporation to rely on the rule of law which applies in Ireland. EA decided to incorporate a subsidiary in Ireland and it must take the obligations of its directors with the privileges which such incorporation and carrying on of business in Ireland entails.

21. The description of the "*ostensible authority*" of Mr. Pompei relied upon by the defendant in this application to overcome the plaintiff's claim that Mr. Pompei has no authority to terminate is unappealing to say the least when one considers the obligations of the defendant's Board. I repeat that this Court at an interlocutory hearing cannot make any definitive finding about the propriety of the authority which seems to rest with Mr. Pompei according to the affidavits which have been exchanged. The defendant at a plenary hearing of these proceedings will have an opportunity to elaborate on the accountability of Mr. Pompei to the Board of the defendant in relation to his authority to manage the majority of employees at the defendant's Galway site.

The Law regarding Ostensible Authority

22. Both parties rely on the succinct judgment of Henchy J. in *Kett v. Shannon & English* [1987] ILRM 364 which concerned the loan of a car from the garage owner ("*the owner*") by a mechanic to another party who injured a pedestrian with the car. Henchy J. in allowing the appeal from a High Court jury finding that the mechanic was the agent of the owner stated:-

"In the law of agency a distinction is drawn between actual (or real) authority and ostensible (or apparent) authority. Actual authority exists when it is based on an actual agreement between the principal and the agent. In this case the uncontradicted evidence of both the vendor and the mechanic was that the vendor had never authorised the mechanic to lend a car to a customer. So it is clear that the mechanic was without actual authority to lend the Mini to the purchaser."

Ostensible authority, on the other hand, derives not from any consensual arrangement between the principal and the agent, but is founded on a representation made by the principal to the third party which is intended to convey, and does convey, to the third party that the arrangement entered into under the apparent authority of the agent will be binding on the principal. It is agency of this kind that is contended for by the plaintiff and the purchaser."

It is a contention which I fear cannot be sustained in the particular circumstances of this case. The essence of ostensible authority is that it is based on a representation by the principal (the vendor) to a third party (the purchaser) that the alleged agent (the mechanic) had authority to bind the principal by the transaction he entered into. Such a representation, however, was absent in this case."

23. Henchy J. continues on to quote from Robert Goff L.J. in *Armagas Limited v. Mundogas SA* [1985] 3 All E.R. 795:-

"It appears, from that judgment, that ostensible authority is created by a representation by the principal to the third party that the agent has the relevant authority, and that the representation, when acted on by the third party, operates as an estoppel, precluding the principal from asserting that he is not bound. The representation which creates ostensible authority may take a variety of forms, but the most common is a representation by conduct, by permitting the agent to act in some way in the conduct of the principal's business with other persons, and thereby representing that the agent has the authority which an agent so acting in the conduct of his principal's business usually has."

The Plaintiff's Position

24. Although the plaintiff reported to Mr. Pompei and may have been interviewed for the position by Mr. Pompei, the contract was executed without any reference to the authority of Mr. Pompei to terminate the contract. The plaintiff is entitled to fix the defendant with the obligation under the agreement for the company to exercise its rights in accordance with the contract. The retrospective endorsement of Mr. Pompei's actions by Mr. Chan does not undermine the point relied upon by the plaintiff. It remains for the defendant to establish that the plaintiff knew and acknowledged Mr. Pompei's right to terminate the contract on behalf of the defendant. There is considerable force in the submission made by counsel for the plaintiff that there is a difference between ostensible authority relied upon by a customer or an employee of a company to bind the company and the ostensible authority relied upon by a company to bind a customer or an employee to a term which it foists through someone having ostensible authority for the company. In other words, a company may be estopped from denying the binding effect of someone having ostensible authority on its part but it cannot thrust obligations onto others through the ostensible authority of an agent where it does not establish the consent or agreement of those others. This issue of ostensible authority to foist new conditions will clearly be a serious issue at the plenary hearing.

25. I reiterate that this Court cannot make a binding determination at this stage that the plaintiff has not agreed or consented to the ostensible authority of Mr. Pompei to terminate the contract. Nevertheless, I am satisfied that on the evidence before the court at this stage, the plaintiff did not agree that the contract could be terminated by anyone other than by the company acting in accordance with its constitution and in compliance with the Companies Act 2014.

Directorship

26. The plaintiff remains a director of the defendant and it has emerged during the hearing of this application that no step has been taken to remove the plaintiff as a director of the defendant. While not undertaking not to commence that process, it appears to the court that the plaintiff will have an opportunity to exercise all of his rights under the Companies Act 2014, before any removal of the plaintiff can occur. The order which this Court will make will include provision for the plaintiff to apply to this Court if the necessity arises after the commencement of any such process before the determination of the plaintiff's claim after a plenary hearing.

Least Risk of Injustice

27. The defendant submits that damages will be an adequate remedy to the plaintiff if the interlocutory reliefs are refused. It cautiously questions the ability of the plaintiff to comply with his undertaking as to damages. The defendant singularly does not allege specific damage which will be caused by the granting of the refined reliefs now sought. More significantly, it does not allege that it has lost confidence or trust in the plaintiff.

28. On the other hand, the plaintiff moved his family to Galway where his son is in national school. He is the primary, if not the only, source of income for his family and has entered into a two-year tenancy following the commencement of his employment pursuant to the contract.

29. The plaintiff's reputation may be irreparably damaged if he succeeds in establishing that the purported no-fault termination by letter dated 10th December, 2018, has been interpreted by employees of the defendant and prospective employers as equivalent to a disciplinary measure for misconduct alleged by Ms. Simmons.

30. Finlay Geoghegan J. in *Brennan v. Irish Pride (In Receivership)* [2017] IECA 107 for the Court of Appeal, in the context of considering the balance of convenience, quoted Laffoy J. in *Giblin v. Irish Life & Permanent Plc.* [2010] 21 ELR 173:-

"As a general proposition in the context of employment injunctions the jurisprudence of the court has developed over the last quarter century so that it is generally considered that the prospect of an award of damages following the trial of the action is not an adequate remedy for a successful plaintiff who has been deprived of his salary pending the trial of the action. In relation to where the balance of convenience lies because of the nature of the employers/employee relationship that issue must be determined having regard to the precise form of relief sought by the plaintiff and will bear in the type of relief the court is prepared to grant."

31. I also agree with the submission that the judgment of Laffoy J. in *Burke v. Independent Colleges Limited* [2010] IEHC 412, neatly overlays the circumstances presenting in this application. Laffoy J. concluded at para. 7.5:-

"Given the impact that the loss of his employment will have on the personal, family and professional life of the plaintiff, as disposed to in his affidavit, I am of the view that the defendant has not established that the damages are an adequate remedy for the plaintiff."

32. Less important at this stage, but the Court notes the admission by Mr. Pompei at para. 10 of his affidavit sworn on the 12th December, 2018, that *"an employee must be employed on the 15th January of any particular year to be eligible for bonus payment in June of that year."*

Orders

33. For all of those reasons, the court will make the following orders:-

(i) an interlocutory order requiring the defendant to pay the plaintiff's salary and emoluments as they fall due pending further order at the trial of the within proceedings;

(ii) an interlocutory injunction restraining the defendant from recruiting or hiring or appointing any person to replace the plaintiff or to fill the role of senior director, global service delivery and EA Ireland Site Lead pending further order at the trial of the within proceedings;

(iii) an order directing the plaintiff to deliver the statement of claim within such time as I will hear counsel now about and for the defendant to deliver its defence;

(iv) an order giving liberty to the parties to apply upon 48 hours' notice sent by email, confirmed by telephone message and sent by letter to the Court in respect of any further interlocutory relief as may be necessary prior to the determination of the plaintiff's claim at a plenary hearing.