Neutral Citation Number [2009] IEHC 58

THE HIGH COURT

2009 595 P

BETWEEN/

DR. ANN BUCKLEY

PLAINTIFF

AND

NATIONAL UNIVERSITY OF IRELAND, MAYNOOTH

DEFENDANT

Judgment of Mr. Justice Roderick Murphy, dated the 13th day of February, 2009

1. Background facts

This case arises out of the employment of the plaintiff on two successive fixed term contracts as a Research Fellow in the Department of Music at the National University of Ireland, Maynooth ("NUIM"). The plaintiff sought funding in 2002 for a research project from the Irish Research Council for the Humanities and Social Sciences ("IRCHSS), a state-run body providing research grants. It was a condition of the funding that the plaintiff be based at a third-level institution. The plaintiff approached NUIM to meet this condition, stating that "This requirement could be met simply by an agreement that I would be awarded a contract for the duration of the grant."

The defendant wrote to the IRCHSS stating its willingness to host the plaintiff's project at NUIM. Subject to the associated funding being made available by IRCHSS, the defendant stated that it would employ Dr. Buckley on a fixed term contract of employment for a three year period. This contract commenced on 1st October, 2003. The plaintiff's salary was paid from the grant provided by IRCHSS. She was provided with an office by the University. The plaintiff sought further funding from IRCHSS in 2006 for a new research project which was to commence on the expiration of the first project. Her application was successful and she was issued with a second fixed-term contract that commenced on 1st October, 2006. This contract was for a two year period and was thus to expire on 30th September, 2008.

On 23rd November, 2007, Dr. Buckley wrote to the Personnel Officer of NUIM, stating that she believed herself to be a permanent employee of the University pursuant to s. 9 of the Protection of Employees (Fixed-Term Work) Act of 2003. The University did not agree with her interpretation of the 2003 Act and refused to confirm that the plaintiff was now a permanent employee of the University.

The plaintiff brought a case to the Rights Commissioner pursuant to the statutory mechanism provided for in the 2003 Act. The Rights Commissioner upheld the plaintiff's claim in a decision of 8th August, 2008. The Rights Commissioner declared that the plaintiff was entitled to a contract of indefinite duration with the University and to receive compensation of €5,000.

The plaintiff's second fixed-term contract expired on 30th September, 2008. On 27th August, 2008, the University's Director of Human Resources informed the plaintiff that they were making her redundant from 30th September, 2008, and enclosing a statutory form of redundancy together with a copy of the University's appeal against the decision of the Rights Commissioner to the Labour Court. The appeal is a full *de novo* appeal pursuant to s. 15 of the 2003 Act. The decision of the Labour Court remains pending at the date hereof.

At the Labour Court hearing on 16th October, 2008, the defendant made a new case that the plaintiff was never an employee of the University. An adjournment was granted by the Labour Court so the plaintiff could consider the new case being made by the University. At this hearing, it is alleged that the University gave an undertaking to the Court that they would maintain the *status quo* in relation to the position of the plaintiff. Subsequent to the hearing, the plaintiff was asked by the University authorities to vacate the office which she had been provided with in the music department. Dr. Buckley received a letter from Brendan Baker, the Director of Human Resources in the University on 2nd December, 2008, in which he stated:-

> "The undertaking given to the Labour Court is in respect of your salary only and no other arrangements.
> You are therefore requested to vacate room 35 (the office) by Friday the 5th of December, 2008. Your co-operation in the matter is appreciated."

The Irish Federation of University Teachers (of which the plaintiff is a member) responded to this letter and wrote to Mr. Ray McGee, Deputy Chairman of the Labour Court on 4th December 2008. The Labour Court responded by letter of 5th December, 2008, to the IFUT General Secretary and Mr. Baker, stating as follows:-

> "The Court would wish to remind the parties that, on the day [of the hearing], the Court, in granting the adjournment, expressed a hope that such adjournment would be a short one of only a couple of weeks, but that on receipt of IFUT's legal submission, which were to be copied to the NUI Maynooth, a new date would be set.
> In the interim, the Court remarked to the parties that it would prefer that there be no change in the status quo regarding the claimant. The College's response as recorded was that it was willing to continue the arrangements, including payment.
> Obviously, the Court's only direct role in this matter is under the specific provisions of the Protection of Employees (Fixed-Term Work) Act, 2003.
> The Court would prefer that this be the only matter at issue on resumption of the case and is simply reminding the parties what occurred on the 16th October last."

The resumed hearing before the Labour Court occurred on 16th December, 2008. By letter of 18th December from the defendant's solicitors, the plaintiff's representative was informed that the University would cease to pay the plaintiff with effect from 12th January, 2009. The letter stated:-

> "We are aware that, while an undertaking was mentioned at the Labour Court hearing, there was no undertaking given at the Labour Court.
> As you know, the University has continued to make certain payments to Dr. Buckley since the expiry of her fixed-term contract on 30th September, 2008. This was an *ex gratia* payment on the part of the University as a gesture of goodwill and in ease of Dr. Buckley until the hearing of the Appeal.
> Please note that, as the hearing of the Appeal has now taken place, the University will cease to pay your client with effect from 12th January, 2009. The University also requires your client to vacate her office on Monday, 5th January, 2009, due to accommodation needs.
> The University's position is that Dr. Buckley has no entitlement to ongoing pay in circumstances where the decision of the Rights Commissioner is under appeal and as Dr. Buckley has had no contract since 30th September. 2008. Furthermore, in the context of any remedy sought by your client, damages would be an adequate remedy."

On 22nd January, 2009, the plaintiff attended at her office in the University. She left the office at lunchtime. When she returned the

door locks on her office had been changed and she was unable to obtain access to the office.

2. Issues to be tried

The plaintiff alleges that as a result of the actions of the University she has been gravely injured in her reputation as an academic and that she has been greatly embarrassed and humiliated. She alleges that she is still an employee of the University and the actions of the University in taking her off the payroll and in locking her out of her office have been arbitrary, illegal and in breach of fair procedures.

The plaintiff is seeking an interlocutory injunction restraining the defendants from terminating the plaintiff's contract of employment; restraining the defendant from interfering with or reducing the remuneration of the plaintiff and directing payment to the plaintiff of the aforesaid remuneration; restraining the defendant from breaching the plaintiff's terms and conditions of employment; and an injunction restraining the defendant from interfering with the discharge by the plaintiff of her role and function as Senior Research Fellow with the defendant. The plaintiff argues that the actions of the University in discontinuing her salary and removing her from office were a unilateral decision which is prejudicial to the plaintiff's rights and which seeks to pre-empt the Labour Court's determination.

The defendant argues that its position of maintaining the status quo communicated to the Labour Court on 18th December, 2008, related only to salary and was clearly offered as a goodwill gesture on an *ex gratia* basis in circumstances where the Labour Court does not have the power to require a party to give a legally binding undertaking. The defendant argues that there is currently no continuing contract between the plaintiff and the defendant. Even if the plaintiff is successful before the Labour Court, the defendant argues that the redundancy as previously notified would operate to determine any such indefinite contract. The defendant submits that if the plaintiff is successful before the Labour Court, there is a separate statutory means of enforcement pursuant to s. 16 of the 2003 Act. In those circumstances, the defendant submits that there is no jurisdiction and/or no necessity for the High Court to intervene in the manner sought by the plaintiff.

3. The Legal Issues

The law relating to interlocutory injunctive relief in the context of employment disputes was helpfully summarised by Edwards J. in *Coffey v. Connolly* (Unreported High Court, 18th September, 2007), where he stated:-

> "The Supreme Court in *Campus Oil v. The Minister for Industry* (No. 2) [1983] 1 I.R. 88 identified the principles to be applied by a court in the granting or withholding of interlocutory injunctive relief. Firstly, the court must be satisfied that the strength of the plaintiff's case meets a certain minimum threshold. In the case of a prohibitory injunction the plaintiff is required to satisfy the Court that there is a fair issue to be tried. However, if the applicant is seeking a mandatory interlocutory injunction the threshold is higher. In the case of *Maha Lingham v. Health Service Executive* [2006] E.L.R. 137, Fennelly J. stated:-
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> > 'It is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed in the hearing of the action.'
> >
> > Secondly, the court must consider whether damages would be an adequate remedy for the party seeking the injunction, if he was successful at the trial of the action; and thirdly, whether the balance of convenience favours the grant or refusal of an injunction at the interlocutory stage."

Of course, before examining whether the plaintiff meets these thresholds in seeking interlocutory relief, it is necessary to identify the legal basis for the plaintiff's claim before this court. The defendant submits that the rights claimed by the plaintiff are wholly bound up with the successful resolution of her claim under the Protection of Employees (Fixed Term Work) Act, 2003. Counsel for the defendant argued that in this case, the 2003 Act provides the statutory scheme which the plaintiff must invoke to determine that dispute.

It is clear that the 2003 Act does provide for a specialised statutory regime for determination of claims and the enforcement thereof. Sections 14 and 15 of the Act provide that complaints under the Act may be made to the Rights Commissioner and thereafter appealed to the Labour Court. Section 16 provides the necessary enforcement mechanism:-

(1) If an employer fails to carry out in accordance with its terms a determination of the Labour Court in relation to a complaint under section 14 within 6 weeks from the date on which the determination is communicated to the parties, the Circuit Court shall, on application to it in that behalf by –
(a) the employee concerned,
(b) with the consent of the employee, any trade union of which the employee is a member, or
(c) the Minister, if the Minister considers it appropriate to make the application having regard to all the circumstances,

> without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the determination in accordance with its terms.

(2) The reference in subs.(1) to a determination of the Labour Court is a reference to such a determination in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought, or if such an appeal has been brought it has been abandoned and the references to the date on which the determination is communicated to the parties shall, in a case where such an appeal is abandoned, be read as a reference to the date of that abandonment."

The impact of the 2003 Act in proceedings before the courts was considered by the Supreme Court in *Maha Lingham v. Health Service Executive* [2006] E.L.R. 137 where Fennelly J. stated:-

> "In addition the plaintiff/appellant relies on the implementation in the Act of 2003, the Protection of Employees (Fixed-Term Work) Act 2003 implementing Council Directive 99/70 of June 28, 1999. However, having looked at that Act the court cannot see that it significantly alters the matter. It is unnecessary to go into it except that the general policy of the directive and the Act seems to be to protect employees who are employed on short-term fixed term contracts and who have been employed on such basis for a certain minimum number of years, either three or four years, and accepting for the sake of the purpose of the present case, that the plaintiff is employed under such a contract of employment, the question would be whether he could make out a case to justify the grant of an interlocutory injunction. There are two major obstacles in the place of the plaintiff/appellant in this context; first, that is that the implementing Act, the 2003 Act, contains, like the Unfair Dismissals Act, its own statutory scheme of enforcement and it does not appear to be envisaged by the Act that it was intended to confer independent rights at common law or to modify in general the terms of contracts of employment to be enforced by the common law courts; and the second is that in any event the general provisions and policy of the Act and of the directive seems to be to put persons who were in such short term contracts in the same position as if they were persons

> who were on fixed long term contracts but in neither event does it appear to interfere with the ordinary right and obligation of the employer to terminate the contract on the giving of reasonable notice and for that reason the matter comes back within the general ambit, therefore, of the sort of remedy that would be available to the plaintiff/appellant for the termination of the contract."

It is thus clear that the 2003 Act is not of direct impact in the within proceedings. Rather, the plaintiff's claim must be assessed by reference to the common law of wrongful dismissal. As noted above, the common law confers an obligation on the employer to terminate the contract on the giving of reasonable notice and in accordance with fair procedures.

3.1 Is there a subsisting contract of employment between the parties?

The first question that arises is whether there is a subsisting contract of employment between the parties. The fixed term contract expired on 30th September, 2008. On 8th August, 2008, the Rights Commissioner held that the plaintiff was entitled to a contract of indefinite duration, pursuant to the 2003 Act. The plaintiff was informed by the defendant on 27th August, 2008, that they were making the plaintiff redundant with effect from 30th September, 2008. The defendant also enclosed a copy of the University's appeal of the Rights Commissioner's decision. The defendant submits that, if the plaintiff is entitled to a contract of indefinite duration, this has been terminated by the statutory notice of redundancy.

It is clear that there is only a subsisting contract of employment between the plaintiff and the defendant if the plaintiff is successful in her appeal to the Labour Court. The Rights Commissioner has held that the plaintiff is entitled to a contract of indefinite duration. The defendant is not bound by that ruling until the statutory right of appeal is exhausted. This can be reasonably inferred from s.15(8) of the Act, which provides:-

> "Where a decision of a rights commissioner in relation to a complaint under this Act has not been carried out by the employer concerned in accordance with its terms, the time for bringing an appeal against the decision has expired and no such appeal has been brought, the employee concerned may bring the complaint before the Labour Court and the Labour Court shall, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the decision."

This determination of the Labour Court can then be enforced pursuant to s. 16 of the Act. It is clear, therefore, that the decision of the Rights Commissioner cannot be enforced until any appeal thereof has been heard and determined, or where the statutory period for the bringing of an appeal has expired without any appeal being brought.

3.2 What is the status of the undertaking given by the Defendant?

The court then must consider the status of the alleged undertaking by the defendant. The Court heard evidence that the defendant gave an undertaking on the first hearing at the Labour Court on 16th October, 2008, to maintain the status quo in relation to the plaintiff. The defendant continued to pay the plaintiff, though she was requested in December, 2008, to vacate her office, the defendant maintaining that the undertaking related to salary only. On hearing of this development, the Labour Court reminded the parties that it would prefer that there would be no change in the status quo regarding the claimant. However, it stated that *"the Court's only direct role in this matter is under the specific provisions of the Protection of Employees (Fixed Term Work) Act, 2003."* Following the resumed hearing on 16th December, 2008, the plaintiff was informed by the defendant that it would cease paying her salary with effect from 12th January, 2009.

Counsel for the defendant submitted that there can be no enforceable undertaking in circumstances where the 2003 Act does not make provision for the Labour Court to request an undertaking from the parties. It is clear from the statutory scheme of the 2003 Act that no provision is made for the giving of undertakings in the course of proceedings under that Act. Thus the defendant maintains that it made an offer to make an *ex gratia* payment of salary to the plaintiff, which it has now resiled from. I am inclined to agree with the defendant that this Court can play no role in enforcing a promise in circumstances where it would not be enforceable by the Labour Court, to whom it was allegedly given, as a matter of law.

3.3 Has the plaintiff made out a strong case?

The matter now falls back within the ambit of the remedies that would be available to the plaintiff at common law for the termination of the contract. The first leg of the test requires the plaintiff to show that she has a strong case that she is likely to succeed in the trial of the action.

Counsel for the plaintiff sought to rely upon the implied term of mutual trust and confidence in contracts of employment. This implied term was addressed in the context of dismissal by the Supreme Court in *Maha Lingham v. Health Service Executive* [2006] E.L.R. 137 where Fennelly J. stated:-

> "The argument developed by Mr. O'Reilly in particular on behalf of the plaintiff/appellant is that there has developed in parallel with the statutory scheme of things the tendency of the courts to imply a term of good faith and mutual trust into contracts of employment. That implies, as far as the employee is concerned that he will work faithfully and respect the employment obligations that he has towards his employer and that is he should act in good faith towards his employer, but by purity of reasoning, therefore, the employer is equally bound not to act so as to undermine the contract of employment but to act also in good faith on the basis that there is a relationship of mutual trust between the parties.
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> This is a development which is perhaps at its early stages and it is not contested, in the present case, by Mr. O'Reilly that he needs to develop that law further in order to bring it to bear in the present case and to secure the injunction that he seeks. There has been a discussion of course of the English case of *Eastwood v. Magnox Electric plc* [2004] 3 All E.R. 991 decided this year and referred to in the judgment of Carroll J. and in particular in the majority speech in the House of Lords in that case where Lord Nicholls, as cited by Carroll J., took the view that because of the statutory code relating to unfair dismissal, in effect that it was not for the courts to extend further into the common law, the implied term regarding mutual trust in such a way as to upset the balance set by the legislature. In other words that the principle that there is an implied term of mutual trust and good faith in contracts of employment does not extend so as to prevent the employer terminating a contract of employment by giving proper notice and, having already said that it is not contested that proper period of notice was given in this case, the question is whether the plaintiff has made out the sort of case that would be necessary to show that the contract of employment had been undermined to such an extent by the employer in this case that the employer was deprived of the right to give a proper period of notice of termination.
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> For reasons already given it would appear necessary for the plaintiff to establish a strong and clear case that this was so in the present case. For reasons already mentioned in the summary of the evidence there is a very significant gap indeed. So far as the defendant is concerned the employment was terminated for the simple

> straightforward reason that the employment was not authorised and was not funded and that there was no question of the dismissal being motivated by any suggestion of racial discrimination or racial slur. It is not necessary, it seems to the court, to decide on the full ambit of such an implied term. No doubt, if the plaintiff/appellant had been able to produce a strong and clear body of evidence that the defendant in the present case was motivated by a policy of racial discrimination, the matter would be entirely different but, so far as the court can see, the evidence does not measure up to anything like to that extent and accordingly in the view of the court the plaintiff/appellant has not made out a case such as satisfies the test that could be posited on the basis of a development of the principle of the implied term of mutual trust."

It is clear, therefore, that this implied term of mutual trust and confidence may avail the plaintiff in the context of a dismissal in very limited circumstances, where it is shown that the employer undermined the contract of employment to such an extent that the employer was deprived of the right to terminate the contract upon reasonable notice. As noted above, the decision of the Rights Commissioner that the plaintiff is entitled to a contract of indefinite duration is unenforceable until the statutory right of appeal has been exhausted. However, the defendant has attempted to pre-empt any decision of the Labour Court in the plaintiff's favour by issuing the plaintiff with statutory notice of redundancy on 27th August, 2008. The defendant argues that even if the plaintiff were to succeed before the Labour Court, this statutory notice of redundancy operates to terminate any contract of employment of indefinite duration. While it is not for this Court to adjudicate on the validity or otherwise of the purported redundancy, it is evident that the actions of the defendant are motivated by a desire to thwart the plaintiff's claim that she is entitled to a contract of indefinite duration.
However, I am not persuaded that the common law can be of assistance to the plaintiff in this regard. She may be protected by the statutory law of unfair dismissals or redundancy, but that is a matter for the specialist tribunals which have statutory jurisdiction over those matters. In this regard, I am guided by the remarks of Carroll J. in *Orr v. Zomax Ltd.* [2004] I.R. 486. There the plaintiff claimed that he was unfairly dismissed as there was no valid redundancy and he was really dismissed because of criticisms made about him. It was claimed that there must be an implied term in the contract that the employer must act reasonably and fairly. Carroll J. stated the following:-

> "*In Johnson v. Unisys Limited* [2001] UKHL 13, [2003] 1 A.C. 518, the House of Lords, dealing with the statutory regime of unfair dismissal introduced in its original form by the Industrial Relations Act 1971 and subsequently in force under the Employment Rights Act 1996, held that an employee had no right of action at common law to recover financial loss arising from the unfair manner of his dismissal. A conclusion to the contrary would be inconsistent with the statutory system for dealing with unfair dismissals established by parliament in 1971 to remedy deficiencies in the laws that then stood. The remedy adopted by parliament was not to build on the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith leaving the courts to give a remedy on general principles of contractual damage. Instead, it set up an entirely new system outside the ordinary courts at which tribunals applied new statutory concepts and offered statutory remedies. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be contrary to the evident intention of parliament that there should be such a remedy but it should be limited in application and extent….
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> It has therefore been held by the Supreme Court that the common law claim for damages for wrongful dismissal and the statutory claim for unfair dismissal are mutually exclusive. The House of Lords decision in *Johnson v. Unisys Limited* [2001] UKHL 13, [2003] 1 A.C. 518 underlines this. What the plaintiff is seeking to do is to introduce a new obligation under the common law on the employer to act reasonably and fairly in the case of dismissal. As the law stands, at common law an employer can terminate employment for any reason or no reason provided adequate notice is given. In cases involving dismissal for misconduct, the principles of natural justice also apply, but that does not arise here."

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Here there is no allegation that the period of notice given to terminate the plaintiff's contract was inadequate. In light of the Supreme Court decision in *Maha Lingham v. Health Service Executive* [2006] E.L.R. 137, I am not inclined to agree with counsel for the plaintiff that the implied term of mutual trust and confidence avails the plaintiff in the present case.

4. Conclusion
For the above reasons, I find that the plaintiff is not entitled to the interlocutory reliefs sought. The alleged undertaking given to the Labour Court is unenforceable as a matter of law and the plaintiff has failed to establish a strong case that she is likely to succeed at the trial of the action.