THE HIGH COURT

[2017 No. 8798 P.]

BETWEEN

LAURENCE KEARNEY

PLAINTIFF

AND

BYRNE WALLACE

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 28th day of November, 2017.

1. The plaintiff is a solicitor and was employed as an associate solicitor in the defendant legal firm since 23rd August, 2006. He was absent from work due to ill health for periods of time until he was served with written notice dated the 28th August, 2017, by which the firm purported to make him redundant.

2. This judgment is given in an application by the plaintiff for an injunction restraining the defendant from dismissing and/or implementing the purported removal of him from his position as an associate solicitor and for an order that the defendant firm continue to pay his salary and other emoluments pending the trial of the action.

Material facts:

3. The plaintiff qualified as a solicitor in 1996 and has worked for Byrne Wallace, a firm of solicitors with offices in Dublin, since 2006, working at all times in its healthcare department. The terms and conditions of employment were set out in a written letter furnished to the plaintiff on the 23rd August, 2006, at the commencement of his employment.

4. The plaintiff suffers from bipolar mood disorder and, while he had successfully managed his condition, he has from time to time needed to take time off work as a result of ill health caused by the symptoms of the disorder and the side effects of his prescribed medication. His evidence is that, before he took up his employment with the defendant firm, he apprised them of the nature of his illness.

5. In late 2011, the plaintiff's basic salary was reduced from €100,000 per annum to €60,000 per annum. The plaintiff concedes that this happened at a time when the recessionary forces in the economy impacted on the firm and he knew that pay cuts were imposed on other associate solicitors at or around that time. The plaintiff complains however that, while the salary of his co-workers has been restored or substantially restored, the firm only agreed to a modest increase for him of €5,000 a year in April, 2013 and that his salary remains at a level that he argues is unjustified.

6. The plaintiff took a long period of sick leave from July, 2013 until November, 2015 and the firm continued to pay his salary during that period of absence in accordance with the firm's sick pay policy. The plaintiff had another short period of unpaid leave in May, 2016 and was later assessed by a doctor appointed by the defendant firm, who agreed that he was fit to return to work.

7. However, the plaintiff was not re-engaged at that time and he has since instituted proceedings bearing Record No. 2016/11077P, in which he seeks relief that, *inter alia*, the defendant firm permit the plaintiff to return to work as a solicitor at a rate of pay commensurate to that of other employees doing similar work and a declaration that he is and continues to be employed at the defendant firm and that he is entitled in that context to be provided with work to do.

8. That action has not yet come on for hearing and the plaintiff also seeks an order that the proceedings be heard together, simultaneously or sequentially.

9. The present proceedings relate to the letter of the 28th August, 2017, by which the defendant firm purported to terminate the employment of the plaintiff on account of redundancy. The statement of claim (at para. 21) pleads that the letter wrongly and in repudiatory breach of contract purported to declare the plaintiff's position to be redundant. It is pleaded that the actions of the defendant firm are "carefully contrived" and that circumstances do not exist to justify his dismissal on grounds of redundancy. Paragraph 25 of the statement of claim contains a plea that the functions and responsibilities with which he was formerly engaged continue to be performed in the firm in a manner similar to that performed by him and that the defendant firm continues to recruit solicitors, who hold similar or less impressive qualifications and experience than those of the plaintiff, to carry out that work.

10. The claim is pleaded broadly that the termination is null and void and a declaration is sought that the position of the plaintiff in the defendant firm as an associate solicitor "is not redundant". Damages are sought for breach of contract, breach of warranty and/or breach of statutory duty.

The issues

11. The plaintiff argues there is no genuine basis that would give rise to the redundancy that the defendant firm seeks to impose upon him. He argues that no denial is made that the plaintiff has a wide range of skills and expertise in diverse roles within the firm. The parties agree that the relevant threshold test for the making of a so-called "employment injunction" is that set out by the Supreme Court in *Maha Lingam v. HSE* [2005] IESC 89, which states that a party seeking injunctive relief that is mandatory in substance and form should have a "strong and clear case".

12. The plaintiff says that he meets this test, that the test in *Maha Lingam* is not intended to be prohibitively difficult and that the characterisation of the threshold by the defendant is unduly onerous.

13. Further, he argues that he is a fully qualified and experienced solicitor, and that the defendant has not denied that he has general legal skills which could be deployed elsewhere within the firm.

14. The defendant argues that the plaintiff has not been unfairly selected for redundancy, nor is the redundancy contrived or a sham.

15. I do not accept the argument of the plaintiff that the factual basis for his submission that the redundancy is a sham have not been materially contradicted in the affidavit evidence, and the replying affidavits taken together do point to a factual dispute which

cannot be resolved at the present stage, but the existence of which makes it more difficult for the plaintiff to establish a strong, arguable case.

16. The primary issue in the hearing was one of jurisdiction. The defendant argues that no right of action exists at common law arising from an alleged unfair selection for redundancy and that the cause of action derives from the statutory redress scheme established by the Redundancy Payments Act 1967 (as amended) and the Unfair Dismissal Act 1977. The defendant argues therefore that the claim is properly one to be determined in the forum designated by legislature, by reference to the legislative criteria and in the context of the legislative test.

17. The defendant points to the fact that no express clause in the written contract of employment is alleged to have been breached by the firm.

18. The plaintiff denies that the claim is properly characterised as a claim for unfair dismissal or a claim for damages or reinstatement under the Unfair Dismissal Act or the Redundancy Payments Act and that the pleaded claims invoke the original jurisdiction of the High Court because it seeks declarative and mandatory relief and that the claim is not a claim that the plaintiff was unfairly selected for redundancy, but rather that the defendant was obliged to observe fairness of procedures before terminating the employment of the plaintiff, such that the failure to do so constitutes a breach of contract.

19. It is not my function at the present point in time to make a determination as to how the proceedings will evolve but, in order for the plaintiff to succeed in defeating the argument of the defendant that the injunction may not be granted because that plaintiff does not have a "strong" case, the plaintiff must establish to my satisfaction that he has a strong argument that the claim he seeks to bring is one recognised by the common law.

20. The plaintiff essentially argues that a form of injunctive relief in support of his claim exists as a matter of law outside the statutory scheme operating in the employment context, under which proceedings are to be commenced in the more informal setting of the Workplace Relations Commissions (WRC).

21. I turn now to consider the authorities relied on by the parties in regard to the jurisdictional issue.

The authorities

22. Fennelly J., giving the judgment of the Court in *Maha Lingam v. HSE* considered whether an interlocutory injunction could be granted when the plaintiff was seeking relief more properly characterised as deriving from the Protection of Employees' Fixed Term Work Act 2003. He considered that a separate jurisdiction did not exist at common law when the law derived from rights of a statutory origin. At p. 7, he said:-

> "…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;…"

23. *Maha Lingam v. HSE* has been followed in a number of judgments, including two judgments of Laffoy J., directly relevant to the issues in the present case. I purpose considering these two judgments in some detail.

24. In *Nolan v. Emo Oil Services Ltd* [2009] IEHC 15, Laffoy J. was hearing an application for an interlocutory injunction restraining the defendant from giving effect to his purported dismissal by reason of redundancy and requiring the defendant to continue to pay the salary and associated emoluments and benefits as they fell due.

25. The plaintiff had argued that a judgment of Keane J. (as he then was), sitting in the High Court, in *Shortt v. Data Packaging Ltd*. [1994] E.L.R. 251 was authority for the proposition that a mandatory injunction could be granted to restrain an employer from acting on a redundancy. Laffoy J. rejected the argument that *Shortt v. Data Packaging Ltd* was authority for that proposition and relied on, *inter alia*, the judgment of Fennelly J. in *Maha Lingam v. HSE* and the discussion therein of the English case of *Eastwood v. Magnox Electric plc*. [2004] 3 All E.R. 991. She held, to borrow the language of Lord Nicholls at para. 14 of his judgment, that it was not for the "courts now to expand a common law principle into the same field" and produce an outcome inconsistent with that created by the statutory code.

26. Laffoy J. considered that Mr. Nolan's remedy arose under statute and that he had not otherwise acquired a cause of action for breach of contract. Accordingly, she held that there was no remedy he could pursue in the courts and she rejected the argument that the court could "develop its common law jurisdiction by reference to the statutory concepts of redundancy and unfair dismissal" (p. 11). Having regard to the fact that the Oireachtas provided specific remedies for unfair dismissal and specific procedures for obtaining such remedies, the common law had no role to play, as it might "end up supplanting part of the code".

27. Laffoy J. refused to grant the injunction.

28. In a later judgment of *Burke v. Independent Colleges Ltd*. [2010] IEHC 412, Laffoy J. returned to the argument and the judgment of Keane J. in *Shortt v. Data Packaging Ltd*.She distinguished that judgment on the grounds that Mr. Shortt, a director of the defendant company, was an office holder and that the argument accepted by Keane J. was that the plaintiff's employment had not been terminated in accordance with his contract of employment. It seems from the head note that the defendant had acknowledged that it would honour its obligations to Mr. Shortt pursuant to the Redundancy Payments Acts, it having failed to do so up until that point. Keane J. granted the injunction to protect common law rather than statutory rights.

29. Another decision that was considered by Laffoy J. was the judgment of Costello P. in *Phelan v. BIC (Irl) Ltd & Ors [*1997] 5 ELR 208, where again an injunction had been granted. Costello P. regarded the fact that there had been no redundancy notice, no redundancy certificate and no offer of a lump sum as being capable of amounting to a complete disregard and breach of the terms of the Act, and that the termination was arguably illegal and invalid on that account.

30. Laffoy J. granted an injunction in *Burke v. Independent Colleges* because she considered that the plaintiff had a strong argument that his employment had not been terminated in a manner calculated in accordance with the time limits in his contract or in the articles of association of the company, as a period of two weeks' notice had been given, instead of the agreed six weeks. Because there was an arguable lack of authority to terminate the employment of the plaintiff, he was held to have a strong case on which a court could grant injunctive relief. It was the existence of that argument from contract that enabled the plaintiff to succeed, as he was therefore "not so constrained as regards to pursuing relief outside of the statutory redundancy code".

31. The judgment of Hogan J. in *Wallace v. Irish Aviation Authority* [2012] IEHC 178 is not authority for the proposition for which the plaintiff contends that departure from the approach of Laffoy J. in *Nolan v. Emo Oil Services* has been recognised and is the preferred approach. In that case, an interlocutory injunction was granted in what Hogan J. described as "the very special circumstances of the case", where refusal of interlocutory relief would have effectively determined the main proceedings.

32. In *Brennan v. Irish Pride Bakeries*, Gilligan J. held that the plaintiff had a valid contract of employment which provided for a three month notice of termination, save for special circumstances which did not apply, and that the facts of the case were sufficiently close to those operating in *Burke v. Independent Colleges*. At para. 48, he stated:-

> "Mr. Brennan is not challenging the validity of his redundancy on this application; he is merely suing for breach of his contractual terms. I take the view that the present facts are distinguishable from both the Nolan and Burke decisions as opened to the Court. In Nolan the plaintiff had been given the requisite notice and was merely challenging his redundancy, a challenge which could not be litigated on that application, whereas in Burke the central issue was as to whether the sender of the letter had the proper authority to issue the redundancy, which the Court found it did not. The submissions on the defendant's behalf relating to unsecured creditors and preferential treatment is, in my view, a secondary issue to the plaintiff's claim for breach of his contractual terms."

Gilligan J. therefore held that the plaintiff had made out a strong case for interlocutory relief, having regard to his contractual entitlements. The two judgments of Laffoy J. were expressly discussed. The Court of Appeal [2017] IECA 107 upheld that decision.

33. Finlay Geoghegan J. at para. 27 said the following:-

> "It is important to recall that whilst the term "redundancy" or "making a person redundant" is used, that is a short term label and it is more correctly the dismissal of an employee by reason of redundancy or the termination of a contract of employment by reason of redundancy, see, for example, s. 7(1) of the Redundancy Payments Act 1967 (as amended)…. However, the respondent established before the High Court that in reliance on clause 18 of his contract of employment, he had a strong case that redundancy was not a reason which permitted the appellant to depart from the 3-month notice provision. At the time of application for the interlocutory injunction, the appellant had not given three months' notice. By only giving one week's notice, there was a strong case that it had not validly terminated the contract of employment and therefore the respondent's contract of employment subsisted. He was entitled, in accordance with his contract of employment, to remain in employment. Insofar as the giving of a one-week notice may be considered to have been a repudiation of the contract of employment, it is well established that unless the repudiation is accepted by the innocent party, it does not bring the contract to an end."

34. A recent judgment of Gilligan J. in *Quigley v. HSE* [2017] IEHC 654 is also on point. An injunction was granted to the plaintiff, a medical doctor, who contended that the defendant was not entitled to terminate his employment on the day of his 65th birthday on the basis of retirement. Again, the argument and evidence was that the contract of employment did not permit a mandatory retirement at that age. Gilligan J. was satisfied that that plaintiff had the benefit of a contract for an indefinite period and that the contractual circumstances did not entitle the defendant to require that the plaintiff retire at age 65.

35. The basic distinction identified by Laffoy J. in *Burke v. Independent Colleges* is between those cases where a plaintiff makes out a strong case that the contractual terms governing the termination of a contract were not observed, even when circumstances of a redundancy did exist, and cases where an employer had properly engaged the contractual provisions in terminating a person's employment by way of redundancy, notwithstanding the selection for redundancy might be unfair, as defined in the statutory code. An injunction would not be granted in aid of a claim founded on the latter class of action.

Application to the present case

36. In the present case, while the statement of claim does plead in general that the dismissal of the plaintiff is not in accordance with basic fairness, the primary relief sought is a declaration that the plaintiff was wrongly selected for redundancy and that there were no circumstances existing which genuinely permitted redundancy. The plaintiff does not point to a breach of a condition providing for an agreed notice period, as in *Burke v. Independent Colleges* and *Brennan v. Irish Pride Bakeries*. He cannot argue that the defendant did not have a contractual basis on which to dismiss him, as was the case in *Quigley v. HSE*. His claim is squarely founded on an argument regarding, and in the factual and legal context of, an alleged unfair dismissal by reason of unfair selection for redundancy, either because no genuine circumstances exist in the firm to justify his dismissal or because he was selected for redundancy on account of his absence from work due to ill health.

37. While some pleas are made relating to the fairness of the process engaged by the firm, the substance of the claim has a statutory source. The common law has no separate jurisdiction to grant an injunction in aid of such a claim, in regard to which the Oireachtas has provided a different means of redress.

38. For these reasons I consider that the claim as pleaded is in substance a claim properly characterised as one within the statutory scheme, and essentially statutory in origin. The declaratory relief sought and the claims regarding alleged breach of fairness are ancillary to that primary relief. The requirement to establish a strong case cannot be satisfied by the ancillary reliefs and must bear on the substance of the claim.

39. The circumstances are, I consider, more closely analogous to those identified by Laffoy J. in *Nolan v. Emo Oil Services* and that judgment is binding on me. Having regard to the reasoning of Laffoy J. and the caselaw analysed above, the plaintiff does not make out a strong case that would justify the granting of an injunction.

40. That is not to say that I do not have considerable sympathy for the plaintiff. He has displayed courage in bringing this application and disclosing personal medical information of a most sensitive nature. He was aware of this and said so in his affidavit evidence. However, the legal position is as I have outlined

41. I do not in the circumstances need to consider where the justice of the matter lies and what solution would, to echo the words of Hogan J., produce "the least injustice". As the plaintiff's case has failed the first limb of the test for interlocutory relief, there is no need to consider where the balance of convenience lies or whether damages would be an adequate remedy. I am not satisfied that the plaintiff has met the threshold test required and, therefore, I refuse the relief sought.

42. However, having regard to the financial circumstances in which the plaintiff finds himself and the fact that the present proceedings and the other proceedings referred to above bear on similar and overlapping facts and claims, I consider that an order should be made that the two proceedings be heard together, but not consolidated. Further directions will be made in the light of the

arguments of counsel.