THE HIGH COURT

[2019 No. 1637 P.]

BETWEEN

MAURICE POWER

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 26th day of June, 2019

Introduction

1. This is an application for a variety of injunctions, described as orders in aid of the plaintiff being permitted to vindicate his right to an effective remedy, pending the determination by the Workplace Relations Commission, or any appeal therefrom, of a claim which has been made by the plaintiff to the Workplace Relations Commission pursuant to s. 9 of the Protection of Employees (Fixed-Term Work) Act, 2003.

2. The plaintiff has been employed by the defendant since October, 2014 on a series of fixed-term contracts, as interim Chief Executve Officer of the Saolta University Health Care Group. In his complaint to the WRC the plaintiff claims to be entitled, by operation of law, to a contract of indefinite duration in respect of the role of Chief Executive Officer.

3. By this application the plaintiff seeks to be kept in post, and on salary, and to prevent the defendant from appointing a replacement CEO, until his claim has been finally determined.

Background

4. Saolta University Health Care Group is a group of Health Service Executive hospitals in the West and North of Ireland.

5. The plaintiff is, and since 1999 has been, employed by the defendant in a number of roles. He was first of all employed as a management accountant, then as finance manager of University Hospital Galway, and then as Chief Financial Officer of the defendant's Galway-Roscommon Hospital Group.

6. Upon his appointment as Chief Financial Officer for HSE West on 9th January, 2012, the plaintiff signed a written contract of employment. Subject to successful completion of a period of probation (which the plaintiff successfully completed) the appointment was as a permanent member of staff.

7. In or about October, 2014 the plaintiff was asked by the defendant's National Director of Human Resources to fill in as interim group Chief Executive Officer. A letter dated 20th November, 2014 confirmed his appointment as such from 5th October, 2014 to 31st March, 2015, or until the role was filled on a permanent basis, whichever might be sooner. The letter spelled out that on cessation of his role as Chief Executive Officer the plaintiff's employment would revert to his substantive terms and conditions as a permanent employee of the HSE.

8. The plaintiff's appointment or assignment was continued from time to time, most recently by a letter dated 12th December, 2018 by which the defendant advised the plaintiff that his "*temporary reassignment to the position of Interim Chief Executive Officer at Saolta University Health Care Group*" had been renewed from 1st January, 2019. The assignment was said to be on a "*fixed term basis*" for the period required to complete the selection and appointment of a successful candidate for the CEO post or pending alternative arrangements.

9. In the series of standard form letters and terms and conditions provided to the plaintiff over the years, the role was sometimes described as interim Chief Executive Officer and sometimes hospital group Chief Executive or Chief Executive Officer of Saolta Hospital Group. It was repeatedly stated that the terms of the "*Fixed Term Work Act, 2004" (sic.)* as it related to successive contracts, did not apply to the plaintiff's assignment as he continued to hold a permanent contract at his substantive grade. The letters and terms and conditions variously indicated that on cessation of the plaintiff's role he would revert to his substantive terms and conditions as a permanent employee of the HSE, or would revert to his substantive permanent position on the same terms and conditions applicable to that position, or to an alternative permanent position at the same grade.

10. At the time of the plaintiff's initial assignment in October, 2014 it appears to have been envisaged (or at least the defendant's letter of 20th November, 2014 contemplated) that the position of the Chief Executive Officer of the group might be permanently filled before 31st March, 2015 but the competition for the post did not get underway until October, 2018.

11. By letter dated 14th November, 2018 the plaintiff was informed that his fixed term appointment in the role of Chief Executive Officer was due to expire on 30th December, 2018, which was prior to the expected completion date of the recruitment competition then underway by the Public Appointments Service to fill a number of hospital group Chief Executive Officer positions. It was said that the plaintiff's appointment would be extended from 31st December, 2018 "*on a fixed term whole-time basis for the purpose of providing cover for the duration of the time it takes [the Public Appointments Service] to complete the selection process and the successful candidate taking up the CEO position in Saolta University Health Care Group"*, which was what was done by the letter of 12th December, 2018, to which I have referred.

12. The plaintiff was well aware of the competition because he was a candidate in it. The competition had been advertised by the Public Appointments Service in September, 2018 with a closing date of 4th October, 2018. It is not apparent from the plaintiff's affidavit but it is from the replying affidavit of Ms. Rosarii Mannion, on behalf of the defendant, that the competition was for appointment for a five-year fixed term contract.

13. In his affidavit grounding this application the plaintiff disclosed that he had applied for the position, had been shortlisted, had attended a preliminary interview, had not been asked to attend a second interview, and had unsuccessfully appealed his non-selection for a second interview. The plaintiff's appeal against the failure to ask him to return for a second interview was by letter

dated 7th February, 2019 and the result of his appeal was made known to him by letter dated 19th February, 2019.

14. In his grounding affidavit the plaintiff deposed that in applying for what he characterised as his current role, he was in no sense accepting that the process was legitimate and he said that he had done so under protest, and had clearly communicated this to the defendant. I do not believe that this averment can withstand scrutiny. The plaintiff first asserted his entitlement to a contract of indefinite duration by e-mail of 14th January, 2019, which was about a week before his first interview. He lodged his complaint to the Workplace Relations Commission on 18th February, 2019 and on the same day instructed his solicitors to call upon the defendant to immediately suspend the competition. The plaintiff, by his solicitors' letter of 18th February, 2018, asserted that he had acquired four years' continuous service in the post of CEO on 4th October, 2018.

15. In a supplemental affidavit sworn on 26th March, 2019 the plaintiff deposed for the first time that he had an expectation that he would continue in the role of CEO of Saolta until retirement or receiving further promotion. If he did, I cannot see that there was any basis for any such expectation but having regard to the relief now sought, it is not material.

16. By this application the plaintiff seeks High Court orders which will keep him in place and prevent the defendant from progressing the competition and filling the post, pending the determination of the complaint he has made to the Workplace Relations Commission.

Issues

17. The plaintiff's case is that he requires the relief sought in aid of his having an effective and meaningful opportunity to pursue a statutory claim. It is said that his temporary position as CEO of Saolta transmuted by operation of law in October, 2018 to one being held by him pursuant to a contract of indefinite duration. In practical terms, the plaintiff's object is to preserve his position and to block the appointment of any replacement.

18. The application is stoutly resisted by the defendant on a number of grounds.

19. First and foremost, it is submitted that the court has no jurisdiction to make the orders sought.

20. Further and alternatively, it is said, firstly, that it clearly was spelled out to the plaintiff, and that the plaintiff well understood, and agreed, that his appointments were on an interim basis. Secondly, it is said that the correct, and only, forum for asserting the rights asserted by the plaintiff is the WRC; where, it is said, the plaintiff is bound to fail. Thirdly, it is said that the plaintiff raised no issue as to his employment status until 14th January, 2019, by when the competition to fill the post was well underway. Fourthly, it was said that an order in the terms sought would amount to an unwarranted intrusion on the employment relationship and the operational activities of the HSE. Finally, it is said that the balance of convenience is overwhelmingly against the making of the orders sought.

Statutory framework

21. To understand the issues canvassed as to the jurisdiction of the court to make the orders sought, it is necessary to look at the statutory framework.

22. Section 2 of the Protection of Employees (Fixed-Term Work) Act, 2003 defines "*contract of employment*" as meaning a "*contract of service whether express or implied …*". "*Fixed-Term Employee*" is defined as "*a person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event …*". "*Permanent employee*" is defined as meaning "*an employee who is not a fixed-term employee*".

23. Section 8 of the Act of 2003 provides, insofar as is material:-

> *"8. - (1) Where an employee is employed on a fixed-term contract the fixed-term employee shall be informed in writing as soon as practicable by the employer of the objective condition determining the contract whether it is—*
>
> *(a) arriving at a specific date,*
>
> *(b) completing a specific task, or*
>
> *(c) the occurrence of a specific event.*
>
> *(2) Where an employer proposes to renew a fixed-term contract, the fixed-term employee shall be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration, at the latest by the date of the renewal."*

24. Section 9 provides, insofar as is material:-

> *"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 (1) or (2) that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration."*

25. Section 12 of the Act, save as expressly provided otherwise in the Act, makes void any provision in a contract that purports to exclude or limit the application of, or is inconsistent with, any provision of the Act.

26. Section 41 of the Workplace Relations Act, 2015, as amended, provides:-

> *"41. - (1) An employee (in this Act referred to as a 'complainant') …. may present a complaint to the Director General that the employee's employer has contravened a provision specified in Part 1 or 2 of Schedule 5 in relation to the employee and, where a complaint is so presented, the Director General shall, subject to section 39, refer the complaint for adjudication by an adjudication officer."*

27. The Protection of Employees (Fixed-Term Work) Act, 2003 is one of the enactments specified in Part 1 of Schedule 5 of the Act of 2015.

28. By s. 41(4) of the Act of 2015, an adjudication officer to whom a complaint is referred, is required to inquire into the complaint, give the parties an opportunity to be heard and to present evidence, make a decision in relation to the dispute in accordance with the relevant redress provision, and give the parties a copy of the decision in writing.

29. Part III of the Act of 2003 provides for enforcement. Section 14 provides that:-

> *"14. A decision of an adjudication officer under section 41 of the Workplace Relations Act, 2015 in relation to a complaint of a contravention of this Act shall do one or more of the following, namely –*
>
> *(a) declare whether the complaint was or was not well founded,*
>
> *(b) require the employer to comply with the relevant provision,*
>
> *(c) require the employer to re-instate or re-engage the employee (including on a contract of indefinite duration), or*
>
> *(d) require the employer to pay to the employee compensation of such amount (if any) as the adjudication officer considers just and equitable having regard to all the circumstances, but not exceeding 2 years' remuneration in respect of the employee's employment."*

30. Section 44 of the Act of 2015 provides, insofar as is material:-

> *"44. - (1) (a) A party to proceedings under section 41 may appeal a decision of an adjudication officer given in those proceedings to the Labour Court and, where the party does so, the Labour Court shall -*
>
> *(i) give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal,*
>
> *(ii) make a decision in relation to the appeal in accordance with the relevant redress provision, and*
>
> *(iii) give the parties to the appeal a copy of that decision in writing.*
>
> *(b) In this subsection 'relevant redress provision' means -*
>
> *(i) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a complaint under that section of a contravention of a provision of an enactment specified in Part 1 or 2 of Schedule 5, the provision of that enactment specified in Part 2 of Schedule 6, …"*

31. One of the relevant redress provisions specified in Part 2 of Schedule 6 of the Act of 2015 is s. 15 of the Protection of Employees (Fixed-Term Work) Act, 2003.

32. Section 46 of the Act of 2015 provides for an appeal on a point of law from a decision of the Labour Court to the High Court.

The reliefs claimed

33. The first relief claimed in the general indorsement of claim is a declaration that the plaintiff continues to be the lawful incumbent of the position of CEO of Saolta University Heath Care Group and is entitled to discharge his duties and responsibilities without let or hindrance. The fourth relief is a declaration that the plaintiff enjoys an entitlement to a contract of indefinite duration in respect of his role as CEO of Saolta University Heath Care Group. Besides, the plaintiff claims a variety of injunctions, some of which are and some of which are not limited to such time as it may take for the determination of his claim under s. 9 of the Act of 2003.

34. Mr. Oisín Quinn S.C., for the plaintiff, in opening, made it clear that the court was not being asked to determine the substance of the plaintiff's claim to be entitled to a contract of indefinite duration as CEO, but rather was asked to preserve what he argued was the *status quo* pending the outcome of the statutory decision making process.

35. By the notice of motion now before the court, the plaintiff seeks a variety of orders retraining the defendant from terminating his employment as CEO of the Saolta University Health Care Group; restraining the defendant from appointing any other person to that role; requiring the defendant to permit the plaintiff to discharge his duties; and restraining the defendant from further proceeding with the recruitment competition for the position of CEO. In each case the order sought is pending the determination of the plaintiff's claim pursuant to s. 9 of the Act of 2003 by the statutory agencies and in accordance with the procedures prescribed by the Workplace Relations Act, 2015. Thus, the plaintiff asks the High Court to make what are characterised as interlocutory orders in a case in which it will not be asked to make final orders.

Jurisdiction

36. Mr. Brian Murray S.C., for the defendant, contests the jurisdiction of the court to entertain the application. It is submitted that the remedies, if any, to which the plaintiff may be entitled, as well as the right which he asserts, are matters that fall within the exclusive jurisdiction of the statutory agencies invested by the legislation with the power to decide claims.

37. On the issue as to whether the court has jurisdiction to make the orders sought, Mr. Quinn relies on two decisions of Hogan J., both decided in Trinity term 2011, both given on interlocutory applications, and both involving lecturers in bricklaying employed by Athlone Institute of Technology.

38. The first is a case of *McGrath v. Athlone Institute of Technology* [2011] IEHC 254, in which judgment was given on 14th June, 2011. The plaintiff, an assistant lecturer, sought to restrain his dismissal by reason of redundancy. He had been given notice of dismissal which would take effect on 20th June, 2011. He relied, first, on the fact that he had been employed on successive fixed-term contracts for more than four years, and secondly, on various representations said to have been made to him that he would have a permanent contract. The plaintiff had made a complaint under the then applicable procedures to a Rights Commissioner, which had been refused, and had appealed to the Labour Court which had heard the appeal but had not given its decision.

39. As to whether the High Court had any jurisdiction whatsoever in relation to the Act of 2003, Hogan J. observed that:-

> *"The structure of the 2003 Act necessarily excludes the jurisdiction of this court at first instance. It is quite clear that if a statutory jurisdiction of this kind is committed in the first instance to an administrative agency such as the Labour Court, then this court does not enjoy some parallel jurisdiction to grant declaratory relief in respect of the construction of the statute in question: see generally the judgment of Charleton J. in Doherty v. South Dublin County Council (No.2) [2007] IEHC 4, [2007] 2 I.R. 696 at 707."*

40. Hogan J. was quite clear that the court did not have jurisdiction to give the declaratory relief claimed as to the plaintiff's entitlements under the Act of 2003, and that the Labour Court had no jurisdiction to grant him any interim relief. At para. 15 he said:-

> *"15. Perhaps a better way of looking at the problem is as follows: let us assume that the Labour Court were ultimately to find for the plaintiff and the practical effect of such a ruling was that his employment could not be terminated at will. If that indeed were the situation, then it would follow that as the Labour Court has no jurisdiction to grant him interim relief, there might be a risk that a favourable decision with the consequence of precluding termination in the manner proposed would come too late to be of any practical benefit to the plaintiff, given that the termination is imminent. The real question is whether this court would enjoy a jurisdiction to grant an injunction in aid of the Labour Court in circumstances where the plaintiff's right to secure the benefit of that decision would otherwise be wholly undermined.*
>
> *16. In my judgment, in that situation this Court would enjoy such a jurisdiction, not least by reason of the inherent full original jurisdiction which this court enjoys to determine all questions of law and fact by virtue of Article 34.3.1 of the Constitution. …"*

41. Having examined a number of authorities on the question of locus standi, which the learned judge expressly acknowledged concerned the jurisdiction of the court to grant relief in respect of substantive civil actions which obviously raised justiciable issues, Hogan J., at para. 18, returned to what he had identified as the problem. He said:-

> *"… If, nevertheless, the plaintiff were to be left with the decision of an administrative agency whose efficacy was otherwise wholly undermined if no interim relief could be given by this court, then in such exceptional cases, this court must be deemed to enjoy such a jurisdiction, not least by reason of the obligation placed on the judicial organ of the State by the terms of Article 40.3.1 of the Constitution to ensure that legal rights can be appropriately vindicated: see, e.g., the decision of the Supreme Court in Grant v. Roche Products Ltd. [2008] IESC 35, [2008] 4 I.R. 679."*

42. Having so identified a jurisdiction to grant interim relief to ensure that the efficacy of a decision of an administrative agency could not be wholly undermined, Hogan J. moved to whether that was an appropriate case in which to grant relief. At para. 19, Hogan J identified the critical question as being:-

> *"…could the Institute terminate the plaintiff's employment in the manner which is proposed, even if the Labour Court were to hold that the plaintiff had a contract of indefinite duration?"*

43. Hogan J. started with the proposition that it is clear that at common law, an employer can dismiss an employee, even a permanent employee, for any or no reason, by giving reasonable notice. On the assumption, in the plaintiff's favour, that he would make out his case that he was a permanent employee – whether by reference to the representations relied on, or the Act of 2003 – his contract of employment would be subject to termination at will. Any issue as to the fairness of any such termination could only be adjudicated upon by the mechanism of the Unfair Dismissals Acts. Hogan J. held that the court had no jurisdiction to restrain the termination of employment in a case such as that, and declined the interlocutory injunction sought.

44. *Holland v. Athlone Institute of Technology* [2011] IEHC 414 was another application by a lecturer in bricklaying for an interlocutory injunction restraining his dismissal by reason of redundancy. Hogan J., at para. 8, recalled and repeated what he had said in *McGrath* as to the jurisdiction of the court to intervene where the efficacy of a decision of a statutory agency would be wholly undermined if interim relief was not granted. At the time of the decision in *McGrath*, there was a pending appeal to the Labour Court against a decision of a Rights Commissioner rejecting the plaintiff's complaint. In *Holland* however, the Labour Court had decided that the plaintiff's contract of employment was a contract of indefinite duration. That being so, said Hogan J., there was no question of the court being required to grant an injunction in aid of an administrative tribunal.

45. I confess that I have struggled to understand what Hogan J. had to say in *McGrath* and *Holland* as to the jurisdiction on the High Court to "*fashion a remedy to ensure that an effective remedy was always available*". No less, I have struggled, and in the end failed, to see how in either case it might have been apprehended that the efficacy of the decision of the Rights Commissioner or the Labour Court might have been wholly undermined if the relief claimed was not granted by the High Court. In each case, the plaintiffs claimed to have, or to be entitled to, contracts of indefinite duration. The issue as to whether they did was to be determined, under the legislation, by the statutory agency. If the plaintiffs were so entitled, and their rights had been infringed, the remedy was a matter for the statutory agency. I do not understand how or why it was thought that the jurisdiction of the Labour Court might have been ousted by the dismissal of the plaintiffs while their claims were pending. If, as was clearly the case, and Hogan J. went on to find, all that the plaintiff might have hoped to establish in the Labour Court was that he was entitled to a contract determinable at will at common law, it seems to me that the spectre of his being left with a decision the efficacy of which had been wholly undermined could not arise.

46. In both cases, Hogan J. expressly noted that one of the remedies potentially available to the plaintiffs, if they made out their cases, was reinstatement. In *Holland*, Hogan J. noted that it was nowhere suggested that the Oireachtas or the European Union legislature had ever intended that the position of employees on successive fixed-term contracts should be superior to that of

employees whose contracts of indefinite duration was never in doubt, and that, indeed, appears to be the *ratio* of the decisions. On the assumption that the plaintiffs would ultimately make out their entitlement to contracts of indefinite duration, the Institute was entitled to give them notice of dismissal for any or for no reason.

47. In *Holland* the plaintiff had failed before the Rights Commissioner but succeeded on appeal to the Labour Court. Because (by contrast with *McGrath*) the Labour Court had already given its decision, Hogan J. characterised the constant theme of the plaintiff's submissions that the court was obliged to fashion a remedy to ensure that an effective remedy would always be available as *nihil ad rem*. But in *Holland* Hogan J. assumed that the defendant's further appeal to the High Court would fail, as he had in *McGrath* assumed that the plaintiff would succeed before the Labour Court. With respect, if both cases were based on the same assumption (and I do not see that the nature of the assumption was different by reference to the stage to which the statutory process had progressed) I cannot see how *Holland* was distinguishable.

48. In any event, while Hogan J. contemplated that the High Court might have jurisdiction to intervene to secure for the plaintiff the benefit of a decision the efficacy of which might otherwise be wholly undermined, it is clear that neither *McGrath* nor *Holland* was such a case, so that what was said might be the position in such a case was *obiter*.

49. Mr. Murray submits that the court has no jurisdiction to entertain this application. He starts with first principles, tracing the jurisdiction to grant an interlocutory injunction back through O. 50, r. 6 of the Rules of the Superior Courts, to s. 28(8) of the Judicature (Ireland) Act, 1877. This provides that:-

> *"The court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do."*

50. Mr. Murray relies on a short passage from Keane Equity and the Law of Trusts in Ireland (3rd Edition) at para. 15.148, where it is said:-

> *"The right to obtain an interlocutory injunction, whether in Mareva or any other form, cannot provide a cause of action in itself: it is a form of ancillary and incidental relief which presupposes the existence of a cause of action."*

51. This statement of the law is based on the decision in *Caudron v. Air Zaire* [1985] 1 I.R. 716, in which the Supreme Court drew on the speech of Lord Diplock in *Siskins (Cargo Owners) v. Distos S.A.* [1977] 3 All E.R. 803, in which the House of Lords considered the English equivalent of s. 28(8) of the Act of 1877.

52. Reliance was also placed on behalf of the defendant on the decision of the High Court in *Allied Irish Banks plc v. Diamond* [2012] 3 I.R. 549 where Clarke J. said, at p. 558:-

> *"Most interlocutory injunctions seek to preserve the position of the parties pending a full hearing at which the court is likely to consider whether the plaintiff is entitled to a permanent injunction in much the same terms as the interlocutory injunction which is sought. While there may, for practical reasons and on the facts of individual cases, be some difference between the nature of the order sought at the interlocutory stage and those which might, if the plaintiff be successful, be granted after a full trial, nonetheless there is ordinarily a close connection between the temporary or interlocutory order sought and the permanent order which the plaintiff might be entitled to in the event that the plaintiff succeeds at trial."*

53. The jurisdictional difficulties with this application are implicitly recognised by Mr. Quinn. It is said, variously, that "*this is not a conventional employment injunction*" and that the fact that the High Court cannot determine the substantive claim is a "*unique legal backdrop".* Mr. Quinn, quite rightly, recognises the conceptual difficulty of the High Court properly attaching any weight to the strength or weakness of a case which it will not be asked to decide and which it has no jurisdiction to decide. While it is recognised that the orders sought are in the nature of mandatory orders, it is acknowledged that the *Maha Lingham* test as to whether the plaintiff has made out a strong case of likelihood of success at trial cannot be the applicable test in this case. It is suggested instead that the test might be whether the plaintiff has made out a fair case, or, possibly, a strong case, that the intervention of the court is necessary to protect the plaintiff's right to an effective remedy. Mr. Quinn refers back to *McGrath* and *Holland* where Hogan J. was prepared to deal with the injunction applications on the basis of assumptions that the plaintiffs would succeed, rather than by reference to any assessment of the strength of their cases.

54. In a case which can never come to trial in the High Court, the plaintiff's need to avoid the *Maha Lingham* test is obvious, but I do not see how that can be achieved by trying to shift the focus away from the merits of the claim to the effectiveness of the remedy. It seems to me that the remedy follows the right, so that any assessment of the necessity of the court to intervene must entail, in the first place, an assessment of the likelihood of the plaintiff succeeding in establishing the right contended for, then an assessment of what the remedy is likely to be, and then an assessment as to whether, or the extent to which, the right might be undermined or the remedy rendered ineffective without the intervention of the court.

55. Mr. Murray submits, and I accept, that a plaintiff, on an interlocutory application, must identify first a cause of action which would justify a claim for substantive injunctive relief, and then an identifiable relationship between the interlocutory relief sought and the permanent relief which will, or would, be sought at trial.

56. The practical reality in this case is that the decision on the interlocutory application will effectively dispose of the action, but that is something which is not infrequently encountered. The parties in this case have not, but in principle there is no reason why they might not have, agreed to treat the hearing of the motion before the court as the trial of the action. Similarly, in theory, this action might be tried before the plaintiff's complaint to the Workplace Relations Commission could otherwise be heard. Approaching the case as the defendant submits I should, the first issue is whether a cause of action lies for an injunction in aid of an effective and meaningful opportunity to pursue a statutory claim.

57. Mr. Quinn, as I have said, relies on the decisions of Hogan J. in *McGrath* and *Holland* as well as a decision of Laffoy J. in *Kirwan v. Mental Health Tribunal* [2012] IEHC 217, from which it is said to be obviously implicit that the court has the power contended for, and to which I will return.

58. Mr. Murray relies on a line of authority which is said to establish the relationship between the courts and specialised statutory agencies operating in a variety of areas of administration, mostly employment, and to make clear that the High Court has no inherent jurisdiction to supplement or to supplant the exclusive statutory jurisdiction of the administrative agencies.

59. *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137 famously established the threshold test for the grant of an interlocutory injunction restraining the dismissal of an employee as being that the plaintiff had to show that he had a strong case that he was likely to succeed at the hearing of the action. Besides challenging the lawfulness of the defendant's decision to dismiss him, Dr. *Maha Lingham*, who had been employed on a series of fixed-term contracts, relied on the Protection of Employees (Fixed-Term Work) Act, 2003. Fennelly J., for the court, said:-

> *"[H]aving looked at [the Act of 2003] the court cannot see that it significantly alters the matter. It is unnecessary to go into it except that the general policy of [Council Directive 99/70] and the Act seems to be to protect employees who are employed on short 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 path 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."*

60. *Doherty v. South Dublin County Council* [2007] IEHC 4 was a case in which the applicants challenged by way of judicial review the failure of the respondent to provide caravan accommodation under the Housing Acts, 1966 to 2005. One of the applicants' grounds was an alleged breach by the respondent of the Equal Status Act, 2000 and the Equality Act, 2004. The respondent's answer to that much of the case was that the rights and obligations created by the legislation were part of a statutory scheme which had been created and was to be administered under the Acts and did not create justiciable rights.

61. Charleton J. summarised the purpose of the Equal Status Acts and the provision for enforcement in Part 3 of the Act of 2000, which was by way of an application to the Equality Authority, followed by an appeal to the Circuit Court, followed by an appeal on a point of law to the High Court. At para. 12 of his judgment, Charleton J. found that the Equal Status Acts had created new legal norms which were not justiciable outside the framework of compliance established by the Acts. Starting at para. 14, he said:-

> *"Where, however, an Act creates an entirely new legal norm and provides for a new mechanism for enforcement under its provisions, its purpose is not to oust the jurisdiction of the High Court but, instead, to establish new norms for the disposal of controversies connected to those legal norms, In such an instance, administrative norms, and not judicial ones, are set: the means of disposal is also administrative and not within the judicial sphere unless it is invoked under the legislative scheme. In the case of the Planning Acts, in employment rights matters and, I would hold, under the Equal Status Acts, 2000 – 2004, these new legal norms and a new means of disposal through tribunal are created. This expressly bypasses the courts in dealing with these matters. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness and enjoy outcomes that do not fly in the face of fundamental reason and common sense."*

62. Charleton J. said that he was fortified in the conclusion he had come to as to the justiciability of disputes in relation to the operation of the Equal Status Acts by the passage quoted above from the decision of the Supreme Court in *Maha Lingham*.

63. *Nolan v. Emo Oil Ltd*. [2009] IEHC 15 was a case in which the plaintiff sought to restrain his dismissal on the grounds of redundancy, on the basis that he had been unfairly selected for redundancy. The plaintiff's case was that it was an implied term of his contract of employment, flowing from the employer's duty of good faith, that he would not be dismissed on the ground of redundancy, unless there was as genuine redundancy. This, is was argued, entitled the plaintiff to litigate the fairness of his dismissal in proceedings before the High Court.

64. Laffoy J. refused the application. On the authority of *Maha Lingham*, the decisions of the *House of Lords in Johnson v. Unisys Limited* [2003] 1 A.C. 518 and *Eastwood v. Magnox Electric plc* [2004] 3 All E.R. 991, and in principle, Laffoy J. held that the Unfair Dismissals Act had introduced a new concept of unfair dismissal, with specific procedures for obtaining remedies in alternative forums, and that for the courts to expand their common law jurisdiction in parallel to the statutory code would be to supplant the statutory code. The case appears to have been argued on the issue as to whether the plaintiff could meet the *Maha Lingham* threshold for a mandatory interlocutory injunction but as I understand the judgment, it was decided on the basis that the court had no jurisdiction to entertain the action.

65. In *O'Domhnaill v. Health Service Executive* [2011] IEHC 421, the plaintiff sought to enforce against the HSE a claimed entitlement to be appointed as a consultant psychiatrist on a number of grounds, including the provisions of the Act of 2003. Laffoy J., having reviewed the rights created by s. 9 and the enforcement provisions in s. 14 of the Act, said:-

> *"7.10 [T]he conferral of specific statutory rights on an employee, such as the right to a contract of indefinite duration under s. 9(3) of the Act of 2003, does not give rise to a parallel right which may be enforced at common law. That was the basis of two decisions of the High Court on applications for interlocutory injunctions: the decision of Carroll J. in Orr v. Zomax Ltd. [2004] 1 I.R. 486; and the decision of Laffoy J. in Nolan v. Emo Oil Services Ltd. [2009] 20 ELR 122. As I stated in the latter case (at p. 130):*
>
> > *'In effect, [the plaintiff] is inviting the Court to develop its common law jurisdiction by reference to the statutory concepts of redundancy and unfair dismissal. Specifically, the Court was invited by counsel for the plaintiff to have regard to the statutory definition of 'redundancy' in s. 7 of the Redundancy Payments Act, 1967 as amended. The Oireachtas in enacting the Unfair Dismissal Acts 1977 to 2007 and in introducing the concept of unfair dismissal provided for specific remedies for unfair dismissal and specific procedures for obtaining such remedies in specific forums, before a Rights Commissioner or the Employment Appeals Tribunal. For the court to expand its common law jurisdiction in parallel to the statutory code in relation to unfair dismissal and redundancy would, to adopt Lord Nicholls's terminology, end up supplanting part of the code.'"*

66. Later in her judgment Laffoy J. said:

> *"7.12 To recapitulate, the plaintiff's claim based on the Act of 2003 is that the plaintiff's contract of employment is deemed to be one of indefinite duration and that the defendant has purported to act in breach of the Act of 2003 by evincing an intention to deprive the plaintiff of his right to a contract of indefinite duration. The defendant's answer is that, because there were objective grounds justifying the renewal of the plaintiff's contract of employment, the 2010 contract cannot be deemed to be a contract of indefinite duration having regard to the provisions of s. 9(4) of the Act of 2003. Therefore, as regards the element of the plaintiff's claim which is based on the Act of 2003, the plaintiff is claiming that he has a statutory right to a contract of indefinite duration by operation of s. 9(3) of the Act of 2003. The only issue which arises, accordingly, is whether the plaintiff is correct in claiming that he has such a right, notwithstanding the contention of the defendant that he does not, having regard to the application of s. 9(4). That issue turns entirely on the application of the provisions of the Act of 2003, and it falls to be resolved by the invocation of the process provided for in Part 3 of the Act of 2003. Although in framing the relief to which the plaintiff claims he is entitled, apart from seeking damages for, inter alia, breach of statutory duty and breach of the Directive, counsel for the plaintiff did not seek relief by reference to the Act of 2003, the reality of the situation is that, on the third element of the plaintiff's claim, that is what the plaintiff is seeking. In other words, although a declaration that the plaintiff's employment is deemed to be permanent is sought, on this element of his claim what the plaintiff is claiming entitlement to is a contract of indefinite duration by virtue of s. 9(3) of the Act of 2003. Given that his claim is disputed in reliance on the terms of the Act of 2003 itself, the plaintiff may only have the issue resolved under the Act of 2003. If he wishes to have it resolved, the plaintiff must pursue his claim to the Rights Commissioner, which is pending."*
>
> *7.12 Accordingly, I am satisfied that the Court does not have jurisdiction to determine the statutory element of the plaintiff's claim."*

67. The last case in this line of authority to which I was referred was *Kearney v. Byrne Wallace* [2017] IEHC 713. The plaintiff, a solicitor, sought an interlocutory injunction restraining his dismissal by reason of what he argued was a contrived redundancy, which he contended was a breach of an implied term of his contract of employment. While the relief sought as framed in terms of a declaration and an injunction, Baker J. was firm in her conclusion that the claim was in substance a claim for unfair dismissal by reason of unfair selection for redundancy. At paras. 37 and 38 she said:-

> *"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."*

68. Finally, I was referred to the decision in *G.McG. v. D.W. (No. 2) (Joinder of Attorney General)* [2000] 4 I.R. 1 in which the Supreme Court cautioned against the creation, or arrogation, of a parallel jurisdiction to a jurisdiction defined by the Oireachtas. Murray J. (as he then was) said at p. 27 of the report:-

> *"Where the jurisdiction of the courts is expressly and completely delineated by statute law, it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would be to undermine the normative value of the law and create uncertainty concerning the scope of judicial function and the finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."*

69. By contrast to the redress available generally under Unfair Dismissals Acts, the Equal Status Acts, and the Protection of Employees (Fixed-Term Work) Act, 2003, Mr. Murray points to s. 11 of the Protected Disclosures Act, 2014 which allows the Circuit Court to grant interim relief pending the determination of a claim for unfair dismissal by reason of the employee having made a protected disclosure.

70. It is absolutely clear from the authorities to which I have referred that the High Court has no jurisdiction to decide the substance of the plaintiff's claim under s. 9 of the Act of 2003. That being so, the court can have no role in deciding or hypothesising what the appropriate remedy might be if the plaintiff, at the conclusion of the process prescribed by the Oireachtas for the adjudication of the right which he claims, were to be successful.

71. In *Kirwan v. Mental Health Commission* [2012] IEHC 217, Laffoy J., applying *Maha Lingham*, refused an interlocutory injunction to a number of workers who had claims pending before, at the time, a Rights Commissioner, that they were entitled to contracts of employment of indefinite duration. Emphasising that if the plaintiffs were to succeed in their claim in that forum, the remedies to which they would be entitled would be one or more of the statutory remedies provided for in s. 14 of the Act of 2003, she said:-

> *"This Court will have no role in relation to the awarding or enforcement of such remedies.*
>
> *It is neither necessary nor appropriate for the court to express a view on the strength of the plaintiffs' case on the first element of their claim, namely, that they are employees, not independent contractors, because to do so would be expressing a view on the likely outcome of the claim before the Rights Commissioner, who has exclusive seisin of the matter by virtue of the act of 2003."*

72. On one view, any consideration of the basis upon which the court should exercise the jurisdiction for which the plaintiff contends must come after the decision as to whether the jurisdiction exists, but I think that it is useful to contemplate hypothetically the nature of the jurisdiction contended for. Mr. Quinn accepts, as he must in the face of overwhelming authority, that the court had no jurisdiction to entertain the substantive statutory claim. He accepts, also, that it is neither necessary nor appropriate that the court should express a view on the likely outcome of the claim before the Workplace Relations Commission. That being so, the argument goes, it would not be appropriate for the court to apply the *Maha Lingham* test. It seems to me that that is so. It would not be appropriate for the court to provisionally pre-empt or prejudge the determination of an issue which it has no jurisdiction to decide by finding that the plaintiff has a strong case. It seems to me that the principle that the court ought not to express a view as to the strength of the plaintiff's case in another forum applies equally to embarking on any analysis as to whether the plaintiff has established a fair issue to be tried before that other forum. For that reason, Mr. Quinn is thrown back on an argument that the court should assume that the plaintiff will make out his case. In this case, the assumption that the court is invited to make goes beyond

the right to the remedy. Of the range of remedies available to the WRC (in the awarding or enforcement of which the court has no role) the court is asked to assume that the only appropriate remedy could be a declaration that the plaintiff is entitled to a contract of indefinite duration as CEO of the Saolta University Health Care Group, and that such a remedy would be wholly undermined unless the plaintiff is kept in post and the defendant is prevented from appointing any other person to the position.

73. It seems to me that if it is objectionable in principle that the court should attempt to make any assessment of the merit of the claim, or the possible or likely remedy, it must be a fortiori wrong that it should act on the basis of assumptions. To do that would be to interfere with the defendant's rights and obligations without allowing it to be heard.

74. The plaintiff in this case apprehends, for good and sufficient reason, that unless restrained by the court the defendant will proceed with the recruitment process for a new CEO and will fill the position. It seems to me that it does not follow from the fact that the position may have been filled by the time the plaintiff's case has been determined through the appropriate procedures, that his rights will have been wholly undermined or that such remedy as may be crafted will be ineffective. I can see that if the plaintiff is removed, and someone else is appointed, as CEO of Saolta, difficulties might arise in implementing an award that he should be reinstated but that does not mean that the decision would be of no practical benefit to the plaintiff or that any such decision would have been wholly undermined.

75. The problem, or perceived problem, identified by Hogan J. in *McGrath* was the inability of the Labour Court to grant interim relief. It seems to me, with respect, that the availability of interim relief is a matter of remedy and that the substance of the plaintiff's case is that the High Court should fill that perceived lacuna. That, it seems to me, is precisely what the Supreme Court in *G.McG. v. D.W. (No. 2) (Joinder of Attorney General)* said the courts should not be tempted to do. The rights created by the Act of 2003 are statutory rights. Those rights are to be established by the statutory procedures and vindicated by the statutory remedies.

76. To date, because of an undertaking given by the defendant pending the determination of this application, no move has been made to remove the plaintiff from the position which he occupies. If, as he contends, the plaintiff is entitled to a contract of indefinite duration, that contract may be terminated at common law by reasonable notice. On the authority of *McGrath* and *Holland*, which are the foundation of the plaintiff's case, the plaintiff, as a complainant that he is entitled to a contract of indefinite duration, is in no better position than an employee whose entitlement to such a contract was never in doubt. On the same authority, if any issue arises as to the fairness of any dismissal or reassignment, that can be adjudicated upon through the mechanism of the Workplace Relations Act.

Conclusions as to jurisdiction

77. The High Court has no jurisdiction to adjudicate either upon the merits of the plaintiff's claim under the Act of 2003 or what the appropriate remedy might be if he were to succeed before the bodies empowered by law to determine the dispute.

78. The High Court has no jurisdiction to make interim or interlocutory orders in cases in which it has no jurisdiction to decide the substance of the dispute.

79. The High Court has no inherent jurisdiction to supplement the statutory remedies made available by the Oireachtas to administrative tribunals for the enforcement of statutory rights.

80. The plaintiff has the right to pursue his statutory claim. The body charged with adjudicating that claim is the body charged with deciding, if appropriate, which of the statutory remedies is appropriate. The plaintiff's right to pursue his claim is not in any way ineffective or less meaningful because the available remedy may not be all that he might wish, or might be different to the remedy available to the courts in dealing with common law claims, or other administrative agencies in dealing with other statutory claims.

81. In my view, the orders sought by the plaintiff are not orders in aid of his statutory claim but orders directed to attempting to shape the remedy which might be ordered in the event that his claim were to succeed. Apart altogether from anything else, to accede to such an application would be to put the plaintiff in a better position than any of his colleagues whose right to a contract of indefinite duration was never in doubt.

82. For these reasons I accept the submission on behalf of the defendant that the court does not have jurisdiction to entertain this application.

Alternative arguments

83. Besides the question of jurisdiction, Mr. Murray offered a number of arguments based on the construction of the Act, the previous decisions of the Labour Court on claims under the Act, and the jurisprudence of the Court of Justice of the European Union, each and any one of which was said to show that the plaintiff's complaint to the LRC was bound to fail. On the view I have taken as to jurisdiction, it is inappropriate that I should express any view on those arguments.

84. Further, it was submitted that even if the plaintiff were to succeed in his action, or in his claim, damages would be an adequate remedy. I think that the defendant has the better end of that argument, also. The plaintiff is not under threat of dismissal, rather what is proposed is that he will revert to his position as Chief Financial Officer, or, perhaps, an alternative position at the same grade. The job of Chief Financial Officer is less well paid than the job of CEO, but it is nevertheless a well-paid position. If the plaintiff succeeds in his complaint, one of the remedies available will be reinstatement. If he is awarded that remedy, the result of the refusal of the orders sought will be that the plaintiff was temporarily paid a lower salary, but any shortfall would be made good by an order for reinstatement.

85. By contrast, if the orders sought were to be made, the progress of the competition for the position of CEO, which had got past the second round of interviews before it was stalled by this application, would at best be further stalled, and would be at risk of collapsing altogether. That would substantially interfere with the operational activities of the HSE and, in terms, compel the defendant to continue to employ the plaintiff in a position in which it does not wish to employ him. I accept that there has been no complaint over the years as to the plaintiff's performance as CEO, but the objective fact of the matter is that the plaintiff did not come through the Public Appointments Service selection process and the Defendant does not wish him to continue in the role of CEO. As far as the defendant is concerned, I am satisfied that it could not have been adequately compensated in damages for the loss it would have incurred if the interlocutory orders sought were made and the plaintiff's action were ultimately to fail.

86. Whether expressed in terms of the balance of convenience or the necessity to ensure the least risk of injustice, I am satisfied that, if the issue had arisen, the balance would have been overwhelmingly against the making of the orders sought.

87. Finally, it was submitted that the delay on the part of the plaintiff in bringing this application ought to disentitle him to an interlocutory injunction. Reference was made to the well-known dictum of Keane J. (as he then was) in *Nolan Transport v Halligan* (Unreported, High Court, Keane J., 22nd March, 1994). It seems to me that there is substance to this argument. The plaintiff's case is that he became entitled to a contract of indefinite duration as CEO on 4th October, 2018 but he first asserted this in an e-mail of 14th January, 2019 and did not issue his plenary summons and notice of motion until 27th February, 2019. The plaintiff did not, as he has asserted, participate in the competition conducted by the Public Appointments Service under protest. Rather, he acquiesced in it for three and a half months, and did not move to attempt to stop it for five months after the date on which he now claims that is was unlawful. Again, if the issue had arisen, the delay would have disentitled the plaintiff to the orders claimed.

Conclusion

88. For the reasons given, I am satisfied that the court does not have jurisdiction to entertain this application and it must be refused.