

THE HIGH COURT

[2014 No. 519 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION (15)(6) OF THE PROTECTION OF EMPLOYEES (FIXED TERM WORK) ACT 2003

BETWEEN

BOARD OF MANAGEMENT OF ST. JOSEPH'S SCHOOL FOR DEAF BOYS

APPELLANT

AND

PHILLIP GREHAN

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 6th day of October, 2015.

Introduction

1. This matter comes before the court by way of appeal on a point of law from a determination of the Labour Court brought by the appellant ("The School") pursuant to s. 15(6) of the Protection of Employees (Fixed-Term Work) Act 2003 ("the Act") directing that the part of the Labour Court's determination of the 2nd October, 2014 which held that the School breached s. 9 of the Act and that the respondent ("Mr. Grehan") was thereby entitled to a contract of indefinite duration be set aside.

Facts

2. Mr. Grehan is a primary school deaf teacher who attained a BA in 1998 and MA in deaf education in 2001. He was employed by the School as a teacher for a number of years. His employment commenced in 2006 when he was employed for a period of some 120 days during the academic year. In June, 2007 he was interviewed for a temporary position. He was successful and was offered a twelve month contract from the 29th August, 2007. The contract was in written form and contained a clause which stated that the objective ground for Mr. Grehan's employment was the "absence of a permanent teacher on leave of absence". At the end of the school year in June, 2008, Mr. Grehan was offered a further year's employment covering for a teacher who was taking adoptive leave. On this occasion, he was given no written contract. In June, 2009, Mr. Grehan was again offered a further year's employment this time covering for a teacher who was taking a one year career break. Again there was no written contract.

3. In July, 2010, the School advertised for two temporary teaching positions. Mr. Grehan responded to this advertisement and was interviewed on the 6th August, 2010. The evidence of Mr. Grehan and his wife before the Labour Court was that later the same afternoon, he received a text from the School offering him a temporary position for the coming year which he accepted. The School wrote to Mr. Grehan on the 11th August, 2010 in the following terms:

"The Board of Management is happy to offer you the position of temporary teacher in St. Joseph's for the school year 2010-2011. In case you did not send the form Liz emailed you, please fill in the enclosed form and return it to the school as soon as possible; otherwise ignore the form."

4. Mr. Grehan's position throughout has been that he believed he had been successful in the application for the post for which he had interviewed and was never given to understand otherwise by the School. The School however claimed that Mr. Grehan had not in fact been successful at interview being ranked only third of the interviewees for the two posts and the two interviewees who ranked higher were offered and accepted the jobs.

5. In that regard, the School relied on a letter from the Department of Education and Science to the school dated the 19th July, 2010 which said:

"Dear Principal/Chairperson, I refer to the decision by your board to approve the secondment of Ms. Bernie Kiely to the PDST with effect from 1st September, 2010 in accordance with the terms of primary Circular 11/02.

The Department has agreed to fund the temporary appointment of a fully qualified teacher to replace the seconded teacher. This funding of the replacement teachers contract will cease on termination of the secondment of Ms. Kiely.

The Board of Management must include in the contract of the replacement teacher a statement to the effect that he/she is being appointed to replace a teacher on secondment. The Department will not be liable for any costs arising from errors or omissions by the Board in this regard.

With regards to posts of responsibility, your attention is drawn to Circular 0022/2009.

Yours sincerely etc."

6. It was the School's case that Mr. Grehan was in fact appointed to cover the temporary absence from the school of Ms. Kiely referred to in the Department's letter. Here again, no written contract was furnished to Mr. Grehan. However, he signed a document entitled "Primary Teacher appointment form 2010/2011 School Year" on the 17th August, 2010. This is a pro forma document with printed headings and tick boxes. Under the heading "origin of the post" the word "secondment" is written in. However, under the heading "name of the teacher(s) being replaced" the blank space is left empty.

7. At the end of the school year in Summer, 2011, Mr. Grehan's evidence was that he was informed by the School principal that she could offer him another year's work. He said that he was not told that he would be replacing anyone and in particular Ms. Kiely's name was not mentioned. Again no written contract was forthcoming but Mr. Grehan signed a document entitled "Notification of Primary

Teacher Appointment Form (PTAF 1)". As in the previous year's form, under the heading "origin of the post" the word "secondment" is written in. This time however, after the heading "name of teacher being replaced (if applicable)" the words "Bernadette Kiely" are written in. This form appears to have been signed by Mr. Grehan on the 4th July, 2011 and by the chairperson of the Board of Management of the school on the 17th August, 2011. Mr. Grehan's evidence to the Labour Court was that when he signed the form, Ms. Kiely's name was not on it.

8. On the 20th August, 2012, Mr. Grehan met with the School principal who told him that there would be no job for him in the next school year. Accordingly, his employment terminated on the 31st August, 2012. Mr. Grehan's union, the INTO, took up his case and wrote to the School in essence claiming that Mr. Grehan was entitled under the terms of the Act to a contract of indefinite duration. This was responded to by the School by letter of the 4th October, 2012. In this letter, the School stated that Mr. Grehan had not been successful at interview in August, 2010 for the temporary post that had been advertised. The school claimed that Mr. Grehan had been engaged for the two school years from September, 2010 specifically for the purpose of covering Ms. Kiely's absence on secondment. In fact, Ms. Kiely retired in February, 2012 to take advantage of certain pension arrangements. Mr. Grehan's case throughout has been that this letter was the first indication he received from the school that he had not in fact been successful in the competition over two years earlier.

Relevant Provisions of The Act

9. The following sections of the Act are relevant to the issues that arise in this case:

"7-(1) A ground shall not be regarded as an objective ground for the purposes of any provision of this Part unless it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose...

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.

(3) A written statement under *subsection* (1) or (2) is admissible as evidence in any proceedings under this Act.

(4) If it appears to a rights commissioner or the Labour Court in any proceedings under this Act-

- (a) that an employer omitted to provide a written statement, or
- (b) that a written statement is evasive or equivocal,

the rights commissioner or the Labour Court may draw any inference he or she or it consider just and equitable in the circumstances.

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.

(4) Subsections (1) to (3) shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal.

(5) The First Schedule to the Minimum Notice and Terms of Employment Acts 1973 to 2001 shall apply for the purpose of ascertaining the period of service of an employee and whether that service has been continuous."

10. Part 3 of the Act deals with enforcement measures and provides at s. 14 that complaints may be made to a Rights Commissioner by an employee or his union relating to alleged breaches by an employer of his duties under the Act. Section 15 provides for an appeal from the decision of a Rights Commissioner to the Labour Court and subs. (6) provides:

"(6) A party to proceedings before the Labour Court under this section may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive."

The Proceedings

11. Arising from the foregoing facts, Mr. Grehan's union brought a complaint before the Rights Commissioner which was unsuccessful, the Rights Commissioner holding that objective grounds were present that justified the use of fixed-term contracts during the relevant school years and accordingly Mr. Grehan was not entitled to a contract of indefinite duration. This decision was appealed to the Labour Court which conducted a de novo hearing of the matter and heard the evidence of the parties, both oral and written.

12. In its determination of the 2nd October, 2014, the Labour Court set out details of the relevant background facts and of the submissions of the parties. It then went on to set out in some detail the relevant law, both in terms of legislation and case law. At the conclusion of this part of the determination, the Labour Court referred to the provisions of s. 8 of the Act and went on to say:

"In *Dr. Mohammed Khan v. HSE North Eastern Region* [2006] ELR 313, this court said the following in relation to the effect of this section of the Act:-

"It seems to the court that the purpose of s. 8 is not just to ensure that a fixed term employee is informed of the reason why his/her contract is being renewed. On a reading of the section as a whole it is clear that it is intended to ensure that the employer definitively commits itself, at the point at which the contract is being renewed, to the grounds upon which it will rely if subsequently pleading a defence under s. 9(4). Thus, where an employer fails to provide a fixed term employee with a statement in writing, in accordance with s. 8(2), it is apt to infer, in accordance with s. 8(4) of the Act that the grounds subsequently relied upon were not the operative grounds for the impugned decision and it would be for the employer to prove the contrary.""

13. The Labour Court went on to hold that there had been a clear breach of s. 8 by the School and awarded a sum of €5,000 compensation to Mr. Grehan in respect of this breach.

14. At p. 12 of its determination, under the heading "Right to a contract of indefinite duration", the Labour Court said as follows:-

"In considering if the renewal of a fixed term contract gives rise to a contract of indefinite duration the court must look no further than the objective grounds relied upon for the contract that prima facie contravenes s. 9(2) of the Act. That appears to be the import of the decision of the High Court in *HSE v. Umar* [2011] E.L.R. 229. In this case the respondent contends that the reason why the complainant was employed on fixed term contracts from the 1st September, 2010 was for the purpose of replacing a named person, Ms. K, who was on approved scheme of leave of absence. However, no written contracts were furnished to the complainant...

The respondent relied upon the primary teacher appointment form to substantiate its position that the complainant was informed of the objective nature of his fixed term contract and that he was replacing Ms. K who was out on special approved leave. Having examined the form for the academic years 2010/2011 and 2011/2012 (albeit that they were for payroll purposes only), it is clear to the court that there was no mention in the former form of the reasons for the temporary nature of the contract, and while the latter form does include a reference to Ms. K as the person on secondment, the complainant told the court that when he signed it there was no reference to Ms. K or the temporary reasons cited on the forms.

Essentially the court is being asked not only to accept that the form constituted a written contract which is non-existent but to insert into that contract a clause which had not been identified to the complainant at the time. All of which was required both by the department Circular 0055/2008 and its letter dated the 19th July, 2010. In these circumstances it seems to the court that s. 8(4) of the Act comes into play. The purpose of s. 8 is not just to ensure that a fixed term employee is informed of the reason why his or her contract is being renewed. On a reading of the section as a whole it is clear that it is intended to ensure that the employer definitively commits itself, at the point of which the contract is being renewed, of the grounds upon which it will rely if subsequently pleading a defence under s. 9(4). Thus, where an employer fails to provide a fixed term employee with a statement in writing, in accordance with s. 8(2), it is apt to infer, in accordance with s. 8(4) of the Act, that the grounds subsequently relied upon were not the operative grounds for the impugned decision and it would be for the respondent to prove the contrary. Therefore, the court finds that there were no objective grounds justifying the renewal of the contract on 1st September, 2010 on a fixed term basis and the renewal is not covered by the provisions of s. 9(4).

Having considered the submissions of both sides the court is satisfied that the contract dated 1st September, 2010 gave rise to an entitlement to a contract of indefinite duration since it purported to extend the period of his fixed term employment beyond four years and hereby determines that it became one of indefinite duration on the same terms and condition as his fixed term contract, by operation of s. 9(3) of the Act with effect from 1st September, 2010."

15. It will be seen from the foregoing that in the penultimate paragraph above, the Labour Court replicated precisely the wording of the extract from its judgment in *Khan* previously referred to. By an originating notice of motion dated 22nd October, 2014, the School appealed to this court on a point of law pursuant to s. 15(6) of the Act. The central plank of the appeal is that the Labour Court's earlier decision in *Khan* had been expressly overruled by the High Court in *Umar* and consequently, its application by the Labour Court to the facts of this case constitutes a manifest error of law. The School contends that in any event, the Labour Court's interpretation of s. 8(4) as it applies to s. 9 is incorrect as a matter of law.

16. The School's notice of motion also included an appeal against the Labour Court's determination that the claim pursuant to s. 8 was within time but that has not been pursued.

The Arguments

17. Mr. Howard SC for the School contended that the decision of this court in *Umar* had clearly disapproved the purposive approach adopted by the Labour Court to its interpretation of the Act in *Khan*. In adopting the same approach in this case, the Labour Court had clearly acted in disregard of a binding precedent which amounted to a clear error of law. Reliance was also placed on the decision of Baker J. in *HSE v. Sallam* [2014] IEHC 294.

18. The School contended that the Labour Court's determination was entirely predicated on an erroneous interpretation of ss. 8 and 9 and absent such interpretation, was unsupported by any evidence. Reliance was placed on *Russell v. Mount Temple Comprehensive School* [2009] IEHC 533.

19. The School submitted that the evidence clearly established that at all material times, Mr. Grehan had been substituting for Ms. Kiely and there was ample evidence to support that conclusion which was entirely ignored by the Labour Court. That evidence established the existence of objective grounds justifying the renewal of Mr. Grehan's contract in 2010 and 2011. Counsel criticised the Labour Court for failing to engage with the facts and simply relying on an inference said to arise under s. 8(4) which could not arise in the absence of a consideration of those facts.

20. Mr. Connaughton SC for Mr. Grehan submitted that the High Court's jurisdiction on appeal was confined to a point of law and the limitations on this jurisdiction were explained in a number of cases including *Henry Denny & Sons (Ireland) Limited v. Minister for*

Social Welfare [1998] 1 I.R. 34, *National University of Ireland, Cork v. Ahern* [2005] 2 I.R. 577, *O'Leary v. Minister for Transport* [1998] 1 I.R. 558 and *Minister for Agriculture and Food v. Barry* [2008] IEHC 216. Reliance was further placed on *Mulcahy v. The Minister for Justice, Equality and Law Reform* [2002] E.L.R. 12 and *Horan v. CWS-BOCO Ireland Limited* (Unreported, High Court, 7th November, 2012). These authorities together with *Sallam* were said to make clear that the function of the High Court on appeal is not to re-weigh the evidence or substitute its own decision for that of the Labour Court. It was argued that the school had fundamentally misconstrued the effect of the decisions in *Umar* and *Sallam*. Counsel also relied upon a number of decisions of the CJEU in cases such as *Adeneler v. Ellinikos Organismos Galaktos* [2006] I.R.L.R. 716 and *Alonso v. Osakidetza-Servicio* [2007] I.R.L.R. 911 which demonstrated the derivation of relevant sections of the Act. The need for close examination of the alleged objective justification was discussed in cases such as *Kucuk v. Land Nordrhein-Westfalen* (C-586/10, 26th January, 2012) and *Samohano v. Universitat Pompeu Fabra* (Case C-190/13).

21. The court's attention was also drawn to the decision of the CJEU in *Lommers v. Minister Van Landbouw, Natuurbeheer en Visserij* [2002] I.R.L.R. 430 as authority for the proposition that any derogation from the Framework Agreement embodied in Council Directive 1999/70/EC (28th June, 1999) underlying the Act must be strictly construed against the person seeking to rely on it.

22. It was argued on behalf of Mr. Grehan that it was clear from an examination of the Labour Court's determination that the s. 8(4) inference was not the sole basis for the decision but there was in fact a wealth of evidence available which supported it irrespective of whether it was expressly referred to in the decision itself. The Labour Court's findings of fact in that regard could not be interfered with by this court. The heavy burden of establishing an error on a point of law has not been discharged by the school.

23. It was submitted that on the evidence, the Labour Court was perfectly free to reach the conclusion that it did not accept the objective justification offered by the school, namely that Mr. Grehan was pegged to Ms. Kiely. This determination by the Labour Court is a finding of fact arrived at having heard all the evidence which cannot be interfered with by this court.

Discussion

24. In *Umar*, the respondent was employed by the applicant as a hospital consultant on successive fixed-term contracts. The objective reason for these contracts initially was that the applicant was awaiting the filling of a permanent post left vacant by the resignation of the consultant who previously occupied it. Subsequently, the objective reason became the temporary filling of a new post pending the holding of a competition to fill it with a permanent appointee. The respondent applied for the permanent post but was unsuccessful. His employment was terminated on the appointment of the successful candidate. The Labour Court felt that it was appropriate to adopt a purposive approach to the interpretation of s. 9, as it had in *Khan* in relation to s. 8. The Labour Court considered that this meant that it should adopt a proportionality test of the type considered in *Lommers* which in turn meant that it was entitled to consider whether or not the applicant should have offered a permanent contract to the respondent before the holding of an open competition to fill the post. Hedigan J. concluded that this approach was impermissible. He said (at para. 8.3):

"8.3 The Labour Court then however went on to broaden its approach. It noted, as it already had, that the complainant had been employed on successive contracts since August 2004. He had been on fixed term contracts all this time. The Labour Court considered, as it already had, that the objective of seeking the most suitable available person was a legitimate one. It further found in reliance on [*Lommers*] that they should consider the proportionality of what was proposed. The Court considered that the HSE ought to have balanced its needs and requirements with those of the complainant. In describing the needs of the HSE the Labour Court considered it to be for a suitable and qualified doctor to provide a consultancy in emergency medicine. It is to be noted that this was not what the HSE considered to be their need. Their stated need was for the 'best available person'. This was a different need and involved a criterion of excellence. The need identified by the Labour Court involves a criterion of acceptability. Balancing this need, as they perceived it, against the complainant's right to stable employment it noted his ability to fill the post satisfactorily; opening the post to competition might have resulted in his losing his employment. The Labour Court observed there was no evidence the HSE had given any or any adequate consideration to the rights of the complainant in not appointing him to the permanent post. It concluded that the decision was disproportionate and therefore inappropriate...

8.5 In coming to its decision, the Labour Court adopted a purposive approach to its interpretation of the statutory provision herein as it had done in [*Khan*] where it stated:-

"Moreover a purposive interpretation of section 9 indicates that a respondent must establish that the reason relied upon as constituting objective grounds was the operative reason for the failure to offer a contract of indefinite duration at the time the fixed-term contract was renewed."

25. At para. 8.6 of the judgment, Hedigan J. set out the terms of s. 9 of the Act and then continued:-

"... It is clear that a court must be faced with some obscurity or ambiguity that requires resolution before it can give a purposive interpretation. If there is no such obscurity or ambiguity then it must apply the law as the Oireachtas provided. To do otherwise is to amend the statute by imposing something which is not there. It seems to me that there is no ambiguity or uncertainty identified by the Labour Court which might require it to purposively interpret the s.9. The legislative intent seems clear.

8.7 [*Lommers*], upon which the respondent relies, deals with individual rights and states that when seeking to derogate therefrom, due regard must be had to proportionality which requires such derogation must be appropriate and necessary. This it seems to me is exactly what the 2003 Act seeks to do when it provides for an exception where there are objective grounds justifying a renewal of a fixed term contract. I can find no obscurity or ambiguity in this provision. It is not therefore in my view permissible to import into the statute something which is not there by way of applying a purposive interpretation. The requirement to consider the respondent for the permanent post without an open competition seems to do just that. The purposive interpretation made in *Khan* and applied here is in my view an impermissible attempt to amend the statute. In this regard it appears to me that the Labour Court fell into error when it found on the basis of this impermissible interpretation of the statutory provision that the late Dr Umar's contract had become, by operation of law, pursuant to [s. 9], a contract of indefinite duration..."

26. It is clear therefore that what Hedigan J. was concerned with in *Umar* was the correct interpretation of s. 9. He held that it was not permissible to adopt a purposive approach to the interpretation of this section. Accordingly, I do not take *Umar* as authority for the proposition that the determination of the Labour Court in *Khan* with regard to the proper interpretation of s. 8 was overruled by *Umar*. The argument of the School that this is the effect of *Umar* is not in my view well founded. However, in *Sallam*, s. 8 was directly in issue. This also involved a hospital consultant who was engaged on a specified purpose contract during the absence on leave of a permanent consultant and after that consultant's retirement, pending the filling of the permanent post. In the course of her

judgment, Baker J. considered the affect of s. 8(4):-

"58. The Labour Court relied on s. 8(4) of the Act of 2003, in coming to a conclusion that the specified purpose, namely the replacement of Dr. Moore's position by a permanent post, had not been stated before the second contract was entered into, and did in fact, draw an inference that reasons were not "in contemplation of the respondent at the material times", namely at the time when the second contract was created. This is a finding of fact with which I cannot interfere but, as a matter of law, it seems to me that a failure by an employer to comply with the requirements of s. 8 of the Act of 2003 does not of itself mean that no objective justification exists, and each case must be decided on its own facts. Insofar as the Labour Court did extrapolate from the failure of the appellant to furnish in writing a statement to the respondent of the objective condition determining the contract, the Labour Court was wrong in law. The inference may not be drawn as an inevitable conclusion from the failure to furnish notice under s. 8, but a failure to give notice is one factor that may be taken into account in coming to a determination as to whether the objective condition did, as a matter of fact, exist at the date of renewal. This is clear from the terms of s. 8 of the Act itself which gives the Labour Court an entitlement to draw an inference when it is "just and equitable in the circumstances" to do so. This means that the Labour Court must engage in the exercise of considering the circumstances and the equity and justice between the individual parties before it comes to a conclusion or draws an inference from a failure under s. 8 of the Act of 2003.

59. Insofar as the Labour Court took the view that it is "apt to infer" that the objective conditions were not in contemplation of the appellant at the time of the renewal of the second Sligo contract, such inference is a matter of law and is one that may be reviewed by the High Court on appeal. I accept the argument by counsel for the appellant that all the evidence in this case points to the fact that the appellant did intend to, and did in fact, fill the post left vacant by Dr. Moore's retirement and that this of itself, following the decision of Hedigan J. in [*Umar*], would be an objective condition justifying the creation of a further fixed-term contract. Accordingly, it is possible to infer that the need was operative in the minds of the appellant at the time the respondent commenced working in Sligo. In the circumstances I find that the question of justification was not one correctly dealt with by the Labour Court, but that finding was one which was made on a hypothetical basis by that Court and did not form a basis for its decision."

27. In the present case, it is clear that the Labour Court placed significant reliance on the above referred to passage from its own judgment in *Khan* to the extent of incorporating it verbatim in its determination. It is somewhat surprising that the Labour Court's determination makes no reference to this court's judgment in *Sallam* and had it done so, it may well have arrived at a different conclusion concerning the passage from *Khan* relied upon.

28. The interpretation of s. 8(4) adopted by the Labour Court in *Khan* and repeated in the instant case in effect creates the presumption that where an employer fails to furnish to the employee in writing a statement of the objective condition determining the fixed-term contract, the grounds subsequently relied upon are not in fact the operative grounds for the creation of the contract. In my view, this is plainly wrong. There is no warrant in s. 8 for the adoption of such an interpretation, purposive or otherwise, and whether the presumption is rebuttable or not. This is quite clear from the judgment in *Sallam* with which I respectfully agree.

29. Section 8(4) empowers a Rights Commissioner or the Labour Court on appeal to draw inferences from the employer's failure to provide a written statement or the provision of one that is considered to be evasive or equivocal. An inference cannot however be drawn in a vacuum and must have regard to the evidence and the facts which such evidence establishes in a given case. The drawing of inferences is part and parcel of virtually every decision maker's task where disputed issues of fact arise that must be resolved. Such inferences must of course be drawn having regard to the factual matrix as a whole and not in the teeth of established facts. Thus viewed, it might be said that s. 8(4) is little more than declaratory of the position that would otherwise obtain. However, it places an important emphasis on the established European jurisprudence in relation to the Framework Agreement that having regard to the general right of an employee to a contract of indefinite duration, the burden of proving objective justification for a derogation from such right lies upon the employer and any such purported derogation must be carefully scrutinised by the relevant decision maker.

30. Whilst the subsection on its face suggests that in the circumstances contemplated, any inference may be drawn by the decision maker that he, she or it considers just and equitable in the circumstances, this cannot be viewed as a purely subjective and unfettered discretion. Whilst a measure of discretion is accorded the decision maker in having regard to the justice and equity of the circumstances, and in the normal way the drawing of any such inference under the section is not a matter amenable to review by this court on appeal, nonetheless, findings of fact, whether based on inferences or otherwise, may be amenable to review where such findings are shown to have been arrived at on an erroneous legal basis. This is clear from the judgment of the Supreme Court in *National University of Ireland, Cork v. Ahern and Others* [2005] 2 I.R. 577 cited by Baker J. in *Sallam* at para. 16:-

"16. The power of the High Court in an appeal from a determination of the Labour Court was explained by McCracken J. in the Supreme Court in *National University of Ireland Cork v. Ahern & Ors.* [2005] IESC 40, [2005] 2 I.R. 577, where he stated as follows at para. 9:-

"The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by account by it in determining the facts, is a question of law. In particular, the question of whether certain matters ought or ought not have been considered by the Labour Court and ought or ought not to have been taken into account by it and determining the facts, is clearly a question of law..."

17. This Court, then, may on appeal consider whether the Labour Court wrongly took into account or ignored a fact or a piece of evidence, incorrectly applied a legal test in coming to its conclusion, or erred in law in its interpretation of the law.

18. This Court must show appropriate curial deference to the Labour Court, but the question is what deference is due and in what circumstances. It is clearly the case, and not in dispute, that such deference to the Labour Court arises when it is engaged in industrial relations issues in which it has a particular expertise. However, this deference is not appropriate where questions of law are concerned. This is confirmed in various judgments of the High Court and most recently by Birmingham J. in *Dunnes Stores v. Doyle* (Unreported, High Court, 1st November, 2013)."

Conclusions

31. Having regard to the foregoing, I am satisfied that the Labour Court in this case fell into error in its approach to construing s. 8(4) and applying that construction to its determination under s. 9. However, that is not to say that it must necessarily follow that on the facts of this case, a different determination ought to have been arrived at. Had the Labour Court applied s. 8(4) in the correct manner, it may well have come to the conclusion having heard all the evidence that it was appropriate to infer that the alleged objective condition underlying the renewal of Mr. Grehan's contract in 2010 was not in fact the true justification for such renewal. It seems to me that there was certainly evidence before the Labour Court which might have justified coming to such a conclusion had it correctly applied its mind to it. However, it is not possible for this court to divine what view may have been taken of that evidence absent the erroneous application of s. 8(4).

32. In the light of that, in my view the appropriate course is to set aside the determination in this case and remit the matter to the Labour Court to enable it to consider the case afresh in the light of the principles discussed above.