Neutral Citation: [2014] IEHC 335

THE HIGH COURT

CHANCERY

[2014 No. 4440 P]

BETWEEN

OWEN HUGHES

APPLICANT

AND

MONGODB LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Keane delivered on the 6th June 2014

Introduction

1. This is an application for a number of injunctions arising from the termination of the plaintiff's employment by the defendant on the 8th May 2014. The applicant issued proceedings on the 14th May 2014 in which he seeks a declaration that he remains employed by the defendant; various injunctions requiring the respondent to acknowledge and maintain the position as such; and damages for breach of contract, breach of duty, breach of the plaintiff's constitutional right to fair procedures, and the intentional infliction of emotional suffering. The relevant injunctions are now sought as interlocutory relief in an application brought by notice of motion also issued on the 14th May 2014. The Court heard the application on the 28th May 2014.

Background

2. The applicant commenced employment with the respondent in September 2013, pursuant to the terms of a letter of offer dated the 3rd July 2013, to which the applicant signed his acceptance on the 6th July 2013. His position was that of technical director for the respondent's operations in Europe, the Middle East and Africa ("EMEA") in the company's Ireland office. The respondent is a start-up technology company based in California with 30 employees in its Ireland office and a total of 55 employees based in offices throughout the EMEA.

3. The letter of offer stated that a full contract of employment would be presented to the applicant on acceptance of the offer, but that did not occur. The letter itself was quite detailed. It set out various terms of the employment contract between the parties, including a term that the applicant's employment would be subject to a six-month probationary period, and another term that the notice period related to that employment would be one month for either party, with the respondent reserving the right to furnish pay in lieu of notice. The letter does not refer to, or describe, any disciplinary process applicable to the plaintiff in the course of his employment.

4. On the 8th May 2014, as he was returning from a business trip, the plaintiff was informed on the telephone by his immediate superior that a decision had been made to terminate his employment. On the same day, the defendant sent a letter to the plaintiff by e-mail confirming that his employment was terminated and that the last day of his employment with the defendant was to be that day, the 8th May 2014. The letter acknowledged the plaintiff's entitlement to one month's prior notice of termination under his employment contract, for which one month's salary was to be paid in lieu. The letter stated that the defendant would provide the plaintiff with a standard reference.

5. On the 9th May 2014, the plaintiff's solicitors wrote to the defendant asserting that the termination of the plaintiff's contract of employment was a serious breach of his employment law rights and, in particular, his right to fair procedures. It was further alleged to have been seriously damaging to the plaintiff's good name.

6. The defendant's solicitors replied by letter dated the 12th May 2014. They asserted that the plaintiff's employment was terminated with notice paid in lieu on the 8th May 2014 in compliance with his terms and conditions of employment. The letter goes on to state that the plaintiff's employment had been terminated because the defendant felt that the plaintiff was not a good fit for the company. It further states that the plaintiff had not been dismissed by reason of being found guilty of any misconduct or poor performance.

7. The plaintiff's solicitors wrote in response on the 13th May 2014, disputing the defendant's position that the termination of the plaintiff' s contract of employment was a no-fault dismissal. They referred to a number of matters that had been discussed in the telephone call between the plaintiff and his immediate manager on the 8th May 2014, which they stated were clearly "performance related issues." They appeared to contrast this with the defendant's assertion that the plaintiff was dismissed because he was not a "good fit" for the company. The letter noted that the plaintiff had not been placed on a performance improvement plan; nor provided with any support or mentoring to address the alleged performance issues; nor made subject to any disciplinary procedure in relation to those issues. The claim was repeated that the manner of the plaintiff's dismissal was hugely damaging to his good name and reputation.

8. The defendant's solicitors wrote once more on the 14th May 2014. They stated that they were at a loss to understand why the plaintiff's solicitors would wish to characterise the plaintiff's dismissal as being by reason of poor performance. They continued that, if the plaintiff's concern was that any member of the senior management of the defendant was explaining that the plaintiff had been dismissed for poor performance, they could assure him that that was not the case. They further stated that, in addition to a standard written reference, the defendant was willing to provide the plaintiff with an undertaking to the effect that it would remind senior management that the plaintiff was dismissed on a no-fault basis and not by reason of poor performance or misconduct and that no one should state otherwise to any third party.

9. As already noted above, the plaintiff issued proceedings on the same date.

The test

10. The plaintiff accepts – correctly, in my view – that the test for an employment injunction of the kind at issue is that set out by the Supreme Court (*per* Fennelly J.) in *Maha Lingam v Health Service Executive* [2006] 17 E.L.R. 137, whereby it is necessary for the applicant to show at least that he has a strong case and that he is likely to succeed at the hearing of the action.

11. Quite apart from setting the bar for the present application, the decision of the Supreme Court in *Maha Lingam* also identifies certain other discrete obstacles that a person in the position of the present plaintiff must surmount in order to succeed. Fennelly J. described one of them in the following terms (at pp. 140-1):

> "[I]n particular, the courts have been slow to grant interlocutory injunctions to enforce contracts of employment. None of this is to deny that there had been developments in the law in recent years and it is necessary to refer very briefly to the nature of these developments. The first is that, in this jurisdiction the development can be traced to the judgment of Costello J. in a case of *Fennelly v Assiuanazioni Generali* (1985) 3 I.L.T.R. 73 in which an injunction was granted directing an employer to continue payment to the plaintiff, in that case pending the hearing of the action, and that type of jurisdiction was exercised in a number of subsequent cases. It is fair to say however, that there is a very strong trend in those cases to the effect that where a person has a clear right to either a particular period of notice or a reasonable notice or has a fixed period of employment, a summary dismissal or a dismissal without notice or without any adequate notice is a first step in establishing the ground for an injunction in those sort of cases."

12. Fennelly J. had already noted earlier in his judgment in *Maha Lingam* (at p. 140 of the report) that, according to the ordinary law of employment, a contract of employment can be terminated by an employer on the giving of reasonable notice of termination and that, according to the traditional law at any rate, though perhaps modified to some extent in light of modern developments, according to the traditional interpretation, the employer was entitled to give notice so long as he complied with the contractual obligation of reasonable notice whether he had good reason or bad for doing it.

13. Fennelly J. went on (at page 141 of the report):

> "A second element in cases of that sort is that, where a dismissal is by reason of an allegation of misconduct by the employee, the courts have in a number of cases at any rate imported an obligation to comply with the rules of natural justice and give fair notice and a fair opportunity to reply. This does not apply in the present case either. The defendant is not making any allegation of improper conduct so it is not the case and it is not contended that the results of natural justice apply."

14. In this case, the plaintiff received the payment in lieu of notice to which he was entitled under his contract of employment. That provision is evidenced by the defendant's letter of offer, dated the 3rd July 2013, which the plaintiff signed on the 6th July 2013. It is perhaps important to emphasise, as Laffoy J. did in *Burke v Independent Colleges Ltd* [2010] IEHC 412, that I am endeavouring to extrapolate the essential elements only of the plaintiff's claim and of the defendant's answer to it from the affidavits that have been exchanged in the context of the present application and from the written and oral submissions made on behalf of the parties. It is perhaps also prudent to follow the practice of Laffoy J. by entering a caveat at this stage by quoting the following passage from the speech of Lord Diplock in *American Cyanamid v Ethicon Ltd* [1975] A.C. 396, which was quoted by the Supreme Court with approval in *Campus Oil v Minister for Industry (No. 2)* [1983] I.R. 88:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

15. The plaintiff appears to be making the case that modern developments have modified the law to the extent that the defendant here was not entitled to give notice in accordance with the relevant term of the contract between the parties if his reason for doing so was bad. The next plank of the plaintiff's case is that the "no fault" reason given for terminating the contract of employment – *i.e.* bad fit between the plaintiff and defendant – must be rejected in favour of the plaintiff's assertion that it was a "poor performance", and not a "no fault", termination. Next, the plaintiff contends that "poor performance" was a bad reason for termination because a term must be implied into the contract of employment at issue - in the absence of any such express term - to the effect that any termination of the plaintiff's contract of employment based on poor performance (quite apart from improper conduct) can only occur subject to the operation of a disciplinary process that applies all of the relevant rules of fair procedures and of natural justice.

16. As a preliminary argument on behalf of the plaintiff, it appears to be suggested that the Court should consider a "diluted approach" to the test in *Maha Lingam* based on the decision of Hogan J. in *Wallace v Irish Aviation Authority* [2012] IEHC 178. In that case, the applicant sought an interlocutory injunction to restrain her suspension on full pay by her employer pending the determination of her appeal against a decision to dismiss her. In dealing with the proposition that the court will but rarely grant exceptional relief amounting to the specific performance of an employment contract, Hogan J stated:

> "It is, however, also necessary to look at the matter from the standpoint of [the] plaintiff. If an injunction were to be refused by reason of the special factors that have just been mentioned, it would mean that she was denied the benefit of a key contractual protection just at the time when such protection was vitally necessary to protect her interests. Can it be the case that under such circumstances the court must shut its eyes to the underlying merits of the claim and helplessly wash its hands of the claim for interlocutory relief simply because to do so would involve the grant of mandatory relief at the interlocutory stage or because this would involve the specific enforcement of a contract of employment?"

17. A number of observations must be made concerning the passage just quoted. First, in *Wallace*, Hogan J. was presented with what he described as a net issue of construction concerning the express use of the term "*[d]isciplinary action will not be taken pending the outcome of the appeal*" in a collective agreement that it was agreed by the parties governed the employment relationship between them. It was that particular net issue of construction to which Hogan J. felt it would be wrong for the court to shut its eyes, in circumstances where the court was satisfied that the plaintiff had very strong grounds for the case that she was making on that point. Second, in that context it is not at all clear to me that the effect of the decision in *Wallace* is to dilute the test in *Maha Lingam* in any way, nor of course could it do so as a matter of *stare decisis*. I do not understand *Maha Lingam* as authority for the proposition that the court should inflexibly refuse (or "wash its hands of") any claim for a mandatory injunction to specifically enforce a contract of employment. Rather, I view is as authority for the principle that such mandatory injunctions are exceptional and that applicants must satisfy a strong or clear case test, instead of the *prima facie* case test normally applicable as part of the *Campus Oil* principles.

18. It is submitted on behalf of the plaintiff that he has "a key contractual entitlement to a fair and *bona fide* consideration of any performance issues the defendant may have had with him prior to any termination of his employment on grounds of performance." It seems to me that the Court would have to be satisfied that the plaintiff has a strong basis in fact or law for that proposition before the interlocutory relief that he is now seeking could be granted.

19. A further fundamental plank of the plaintiff's application is that the termination of his contract of employment was for reasons of "poor performance", rather than "bad fit". The plaintiff has adduced evidence of matters raised with him in the context of a performance review in February 2014 by his immediate superior and which were raised with him again in response to his request for reasons for his dismissal during the telephone call on the 8th May 2014. The plaintiff argues that these matters establish that his dismissal was based on some imputed fault or finding of poor performance rather than on "bad fit" or mutual incompatibility.

20. The proposition that his dismissal was fault based is important to the plaintiff's case for several reasons. First, it gives him standing to make the legal argument that the traditional common law position has been reversed such that an employer is no longer entitled to terminate a contract of employment in accordance with the relevant notice provision if his reason for termination can be established and can be shown to be bad. Second, it allows him to make the argument that the reason for the termination of his employment contract was bad, when considered in conjunction with the assertion that there is an implied term in his contract of employment that any fault based dismissal can only be effected in accordance with a disciplinary procedure conducted in accordance with the requirements of natural and constitutional justice. Third, it allows him to claim reputational damage arising from his dismissal (particularly in the context of the balance of convenience, should it arise).

21. The difficulty with the first of the arguments just described is that there does not appear to be any authority for it. Indeed, the decision of Finlay Geoghegan J. in *Bradshaw v Murphy* [2014] IEHC 146 provides strong authority to the contrary. In that case, the plaintiff claimed that he had been dismissed on grounds of misconduct in the face of a requirement for fair procedures. The defendants opposed the plaintiff's application for an injunction restraining his dismissal on the discrete ground that they could not be inhibited, pending the trial of the action, from exercising their common law entitlement to terminate the plaintiff's employment in accordance with the applicable contractual provisions concerning reasonable notice, whatever might be the outcome of his claim that his original dismissal was wrongful. Finlay Geoghegan J. accepted that argument and, having noted the defendants' undertaking not to dismiss the plaintiff on grounds of misconduct, refused the plaintiff's application for an interlocutory injunction restraining his dismissal pending trial.

22. A problem with the second argument, leaving aside for one moment the potentially vexed question of whether a fixed boundary can ever be drawn between "mutual incompatibility" and "individual fault" in any area of unsuccessful human interaction, is that the plaintiff faces the more fundamental difficulty that the defendant does not attempt to stand over the dismissal at issue as fault based in the smallest degree. Apart from the plaintiff's partially disputed evidence concerning the substance of his telephone conversation with his immediate superior on the 8th May 2014, there is no evidence that the defendant, or any of its servants or agents, has represented to the plaintiff or to any other person whosoever that the plaintiff's dismissal was fault based. Indeed, the defendant has adduced evidence that it is willing to provide the plaintiff with a written reference that confirms the defendant's confidence in the plaintiff's abilities, and has confirmed that it will reiterate (in so far as the plaintiff feels it is necessary) to whom it may concern that his termination did not arise from any fault, misconduct or poor performance on his part.

23. In this respect, the defendant relies on the following passage from the judgment of Clarke J. *Carroll v Bus Atha Cliath/Dublin Bus* [2005] 4 I.R. 184 (at 209):

> "If the stated reason for seeking to dismiss an employee is an allegation of misconduct then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such a dismissal. That does not alter the fact that an employer may still, if he is contractually free to do so, dismiss an employee for no reason. It simply means that where an employer is obliged to rely upon stated misconduct for a dismissal or, where not so obliged chooses to rely upon stated misconduct, the employer concerned is obliged to conduct the process leading to a determination as to whether there was such misconduct in accordance with many of the principles of natural justice."

24. In this case the defendant insists that it has relied on its contractual entitlement to dismiss the plaintiff subject to the appropriate payment in lieu of notice and that it has not sought, and certainly is not now seeking, to rely on poor performance, much less misconduct, as the reason for the termination of the plaintiff's employment contract.

25. Even if it were assumed, for the purpose of argument, that the defendant is (as the plaintiff appears to suggest) being disingenuous in the reason it gives for the termination of the plaintiff's employment, I do not believe that there is any authority, and certainly none has been produced to me, for the proposition that a bad reason that informs, but which is not relied upon to justify, the termination of an employment contract in accordance with its terms, renders that dismissal wrong in law.

26. In evident reliance upon the proposition that a strong case can be established that the reason relied upon for the plaintiff's dismissal was his alleged poor performance, the plaintiff cites the following passage from the judgment of Geoghegan J. (*nem. diss*.) in the Supreme Court decision of *Sheehy v Ryan* [2008] 4 I.R. 258 (at 265):

> "The trial judge then said that the position at common law is that an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice. I would slightly qualify that by saying that it does depend on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal, that clearly is the position."

27. The plaintiff submits that, once it is accepted that the reason for the plaintiff's dismissal was his perceived poor performance, a strong and clear case is also made out that the plaintiff's contract contains a clear, unambiguous and unequivocal term that he can only be dismissed for that reason subject to a disciplinary process conducted in accordance with the requirements of natural and constitutional justice. But there is no express term to that effect in the letter of offer that evidences the plaintiff's contract of employment with the defendant. That means that the Court would have to be satisfied that a provision in general terms to that effect is to be implied, or read into, that contract.

28. In support of that argument, the plaintiff relies upon the decision of the High Court in *Naujoks v Institute of Bioresearch* [2007] ELR 25, which, in effect, the plaintiff invokes as authority for the proposition that dismissals based on allegations of poor performance attract the same requirement for disciplinary procedures conducted in accordance with natural and constitutional justice as dismissals based on misconduct. However, it seems to me that *Naujoks* is a decision based very much upon its own facts. The case arose from the termination of the plaintiff's contract as Chief Executive Officer ("CEO") of the defendant company. The terms of the relevant

contract provided for two forms of termination of employment: termination on notice and summary termination. The former could not occur without six months prior notice in writing. The latter could occur with immediate effect by written notice but only in one of a limited number of specified circumstances. Those circumstances included breach of the plaintiff's obligations under the agreement; failure to discharge his duties properly; incapacity; dishonesty, and so forth.

29. In other words, it was the specific terms of the contract of employment at issue in *Naujoks* that made "failure to properly discharge duties" (or, arguably, "poor performance") directly equivalent to dishonesty (*i.e.* "misconduct") in that case, because, in either event, the plaintiff was deprived of the six months notice in writing of termination of his employment to which he would otherwise be entitled. Evidence was adduced on behalf of the defendant that the plaintiff's management style and communications with staff had led to "serious human resource issues" arising. Laffoy J. concluded (at pp. 33-4):

> "It seems to me that it is not far removed from making a judgment that there was a failure on the part of the plaintiff to properly discharge his duties as CEO, which would entitle the defendants to summarily dismiss the plaintiff, but subject to affording him fair procedures. On this point, I could put the matter no further than that, having regard to the facts disclosed in the affidavits before the court, it is not an answer to the plaintiff's contention that he should have been, but was not, afforded fair procedures that it is the defendant's stated position that his contract was not terminated on the grounds of misconduct."

30. It seems to me that the decision of the High Court in *Naujoks* was based very firmly on the draughtsmanship of the contract at issue whereby "failure to properly discharge duties" was treated with the same gravity – and made subject to the same procedural consequences - as "dishonesty", thereby leading to the conclusion that the invocation of the particular form of dismissal under the relevant term of the employment contract applicable to both circumstances should attract the requirements of fair procedures in either case. It does not seem to me that the case is authority for the much broader proposition that a dismissal on grounds of performance is to be treated as equivalent to a dismissal on grounds of misconduct in every case thereby attracting an entitlement to fair procedures in either case that is to be implied into every contract of employment.

Conclusion

31. For the reasons set out above, I have come to the conclusion that the plaintiff has not made out a case for the grant of an interlocutory injunction because he has not met the first leg of the test by showing that he has a strong case and is likely to succeed at the hearing of the action and, for that reason, it is not necessary for the court to go on to consider either the adequacy of damages or the balance of convenience.

32. The application is refused.