

THE HIGH COURT**2011 2512 P****BETWEEN****SEAN O'DOMHNAILL****PLAINTIFF****AND****HEALTH SERVICE EXECUTIVE****DEFENDANT****JUDGMENT of Miss Justice Laffoy delivered on the 9th day of November, 2011****1. Factual background**

1.1 When these proceedings were initiated, the plaintiff had been employed by the defendant as a psychiatrist for almost six years. He had been employed in various positions on fixed-term contracts: as locum consultant psychiatrist; as temporary consultant (general adult) psychiatrist and as specialist Registrar. He held the positions at various locations: St. Loman's Hospital, Mullingar (St. Loman's Hospital); St. Vincent's Hospital, Fairview, Dublin; St. Luke's Hospital, Kilkenny; Our Lady's Hospital, Navan and St. James's Hospital, Dublin (St. James's Hospital). When the proceedings were initiated, he was employed at St. Loman's Hospital under a contract which he had obtained in the circumstances which I will outline.

1.2 St. Loman's Hospital is located in the Dublin Mid-Leinster area of the defendant's operations. In early 2010, a post of consultant psychiatrist at St. Loman's Hospital was vacant due to the retirement of the former incumbent. The post was filled on a temporary basis, and had been for some time, because the incumbent had been on secondment before he retired. In early March 2010, approval was sought from the relevant unit of the defendant for the appointment of a permanent consultant to replace the retired consultant. Prior to that, the temporary consultant psychiatrist had given notice on 25th January, 2010, of his intention to depart from St. Loman's Hospital. Accordingly, an application was made for the appointment of a temporary consultant to replace the temporary consultant who was leaving. In early March 2010, approval was given for the appointment of a "Temporary Consultant General Adult Psychiatrist". It was made clear that it was to be a temporary appointment, approved on a "Type A" basis under the Consultants' Contract 2008, pending a decision on the application to fill the permanent post and pending the permanent filling of that post. It was stipulated that to qualify for the temporary position, an applicant was required to be registered as a specialist in the Specialist Division of the Register of Medical Practitioners maintained by the Medical Council of Ireland in the speciality of psychiatry. The plaintiff fulfilled that requirement.

1.3 Having been alerted to the advertisement of the temporary position on a website of the defendant by a former colleague at St. Loman's Hospital, the plaintiff applied for the position. He was one of a number of candidates for the position. The interviews were held on 26th March, 2010. The interview panel comprised two consultant psychiatrists at St. Loman's Hospital, Dr. Mary O'Hanlon and Dr. Ciarán Corcoran and an administrator. The plaintiff was recommended by the interview panel to fill the position, as he had achieved the highest score at interview.

1.4 By letter dated 30th March, 2010, the plaintiff was offered what was described as the post of "Locum Consultant Psychiatrist" with Longford/Westmeath Health Services based in St. Loman's Hospital. The letter stated that the post was "to provide locum Consultant cover in the Mullingar Sector pending the permanent filling of this post". Certain documentation was sought from the plaintiff, which was duly furnished. The reference to "locum" in that letter was not, strictly speaking, correct, as the purpose of the appointment was not that the plaintiff would stand in temporarily for the holder of a position; the permanent position was vacant. However, I am of the view that the mistaken terminology does not bear on the outcome of these proceedings.

1.5 By letter dated 12th April, 2010, the plaintiff was sent what was described as a "Specified Purpose Contract" as a temporary consultant psychiatrist for execution, and he was told that the contract would be effective from 19th April, 2010, "to provide temporary Consultant cover in the Mullingar Sector pending the permanent filling of this post". The plaintiff signed the contract on 19th April, 2010, and it was also signed on behalf of the defendant. I will return to the terms of the contract (the 2010 Contract) later.

1.6 On 2nd April, 2010, the relevant unit of the defendant issued approval for the appointment of a "Consultant General Adult Psychiatrist" on a "Type A basis" to be based at St. Loman's Hospital and to serve the Mullingar Sector in replacement of the former permanent incumbent who had retired. Recruitment was to be through the Public Appointment Service (PAS) process. Eventually, around mid-November 2010, the position was advertised on the PAS website.

1.7 By letter dated 15th November, 2010, to the Local Health Manager of the defendant at Mullingar, the Irish Hospital Consultants' Association (IHCA), on behalf of the plaintiff, claimed that, in accordance with s. 9(2) and s. 9(3) of the Protection of Employees (Fixed-Term Work) Act 2003 (the Act of 2003), the plaintiff was employed on a contract of indefinite duration and sought confirmation of that fact. In support of that contention, it was stated in the letter that the plaintiff had held a total of thirteen contracts with the defendant since 2005, and there had been no lapse in his employment with the defendant since his commencement date. Subsequently, on 17th December, 2010, by e-mail to Ms. Mary Gorry, Assistant National Director of Human Resources of the defendant with responsibility for the Dublin Mid-Leinster Area, attaching the letter of 15th November, 2010, the IHCA sought confirmation that the recruitment process to fill the position in St. Loman's Hospital occupied by the plaintiff would not proceed any further and that the plaintiff would be confirmed in the position.

1.8 The first response to the correspondence from the IHCA was a letter of 25th February, 2011, from the Local Health Manager to the plaintiff. The author, Mr. Joseph Ruane, stated that he had discussed the issue with Ms. Gorry and that it was the view that the plaintiff was "not in a position to be awarded a contract of indefinite duration". That response prompted the involvement of lawyers

on behalf of the plaintiff. By letter dated 7th March, 2011, the plaintiff's solicitors wrote to Mr. Ruane asserting that the plaintiff was entitled to continue in the post he occupied pursuant to his existing contract, which, it was asserted, "must be deemed to continue as a contract of indefinite duration". Confirmation of that was sought and an undertaking was sought that the defendant would immediately desist in taking any further steps to fill the advertised position. The response to that letter came from Ms. Gorry to the plaintiff's solicitors and it was dated 11th March, 2011. The response was that the purpose of the plaintiff's employment as a temporary consultant psychiatrist was to provide cover in the Mullingar Sector pending the post being filled permanently, as was clearly stated in the plaintiff's contract of employment which he signed on 19th April, 2010. The letter stated that, while it was acknowledged that the plaintiff would have "4-years continuous service" with the defendant in April, 2011, the defendant relied on s. 9(4) of the Act of 2003. It was further stated that the plaintiff was at all times aware that his temporary appointment was for the purpose of providing cover, whilst the permanent competition was held by the PAS, and it was made clear that the defendant intended to proceed with the competition and select a permanent candidate for the permanent post in the normal manner.

1.9 Prior to that letter issuing, the plaintiff had submitted an application to a Rights Commissioner pursuant to the Act of 2003, which was dated 8th March, 2011, alleging that the defendant had breached the provisions of the Act of 2003, by the letter of 25th February, 2011. After these proceedings were initiated, by letter dated 3rd June, 2011, the plaintiff's solicitors sought an adjournment of a hearing scheduled before the Rights Commissioner on 14th June, 2011, because these proceedings were pending. As I understand it, the request was acceded to and the application to the Rights Commissioner has not proceeded, although it is still pending.

1.10 These proceedings were commenced by plenary summons which issued on 16th March, 2010.

2. The 2010 Contract

2.1 The 2010 Contract is in the form of the Consultants' Contract as of 25th July, 2008. It is a long, complex document which runs to 61 pages. The evidence adduced at the hearing was that the officials of the defendant are under strict instructions not to vary any provision of the contract other than Clause 2, which is under the heading: 'Appointment and Tenure'. Clause 2(a) in the 2010 Contract provides:

"This Contract is a contract of employment between HSE Dublin Mid-Leinster and [the plaintiff] The plaintiff is appointed to the post of Temporary Consultant Psychiatrist with Longford/Westmeath Mental Health Services and accepts the appointment from the 19th April, 2010. This post is to provide temporary Consultant cover in the Mullingar Sector pending the permanent filling of this post. The Contract is a Specified Purpose Contract."

se 2(c) states in that the qualifications required for the post were as set out in the defendant's "letter of approval, which is attached as Appendix 1". That letter, which was referred to by counsel for the plaintiff at the hearing, was dated 21st December, 2006, and gave approval for the appointment of a "Locum Consultant General Adult Psychiatrist". It would appear that the inclusion of "Locum" in the description of the position was apt at that juncture because it is clear that the former permanent incumbent was on secondment at the time. In any event, the letter of approval stated that the locum appointment was for a period of three years. As regards the required qualifications, it is clear on the evidence that the plaintiff possessed the qualifications when he applied for the position in March 2010. It is appropriate to record at this juncture that it was common case on the evidence that the plaintiff has performed the functions of the position to the satisfaction of the defendant. In reality, this case arises out of the manner in which the defendant fills Consultant posts and the legal complexities which flow from it, particularly having regard to the application of the Act of 2003.

2.2 No specific term or duration of employment is specified in Clause 2. However, Clause 2(f) provides that, if the consultant, meaning the plaintiff, wished to terminate the employment, he should provide the defendant with three months notice of his proposed termination date. Clause 2(g) provides that, except in cases of serious misconduct, the defendant will provide the Consultant with three months notice of the intention to terminate his employment.

2.3 In Clause 5 it is provided that the contract is designated as a "Type A Contract", which is explained in Clause 21 and, in broad terms, limits the consultant to public practice exclusively. No issue has been raised by the plaintiff in these proceedings in relation to any term of the contract apart from Clause 3.

2.4 Clause 3 is entitled: "Probation". Paragraph (a) of Clause 3 provides that appointment "to a Consultant post" is dependant on satisfactory completion of a probationary period of twelve months, and provides for the extension of that period for a further six months. Paragraph (b) of Clause 3 provides that, at the end of the probationary period, the defendant shall either certify the Consultant's service as having been satisfactory and confirm the appointment on a permanent basis, or certify, with stated reasons, that the Consultant's service has not been satisfactory, in which case the Consultant shall cease his appointment. Further, paragraph (c) provides that, if the defendant should fail to certify in accordance with paragraph (b), "the Consultant shall be deemed to have been appointed on a permanent basis". The defendant, in its defence, pleads the effect of paragraph (f) of Clause 3 which provides:

"A Consultant will not be required to complete the probationary period where (s)he has for a period of not less than twelve months acted in the post pending its filling on a permanent basis."

2.5 It is the plaintiff's case that Clause 3 applied to him, that he completed twelve months in the post on 18th April, 2011, without the defendant having certified his service in accordance with Clause 3(b) and, that, accordingly, as a matter of contract, he is deemed to have been appointed on a permanent basis. The plaintiff is still in the post in St. Loman's Hospital which he took up on 19th April, 2010. Following applications for interim and interlocutory injunctions, the defendant undertook not to proceed with the recruitment process in relation to the permanent position through the PAS, as its counsel stated, adopting a "pragmatic" approach.

3. The case and the answer to it on the pleadings

3.1 There are three elements in the plaintiff's claim as pleaded in the statement of claim.

3.2 The first element is based on the doctrine of legitimate expectation. The plaintiff has pleaded that he was approached by the defendant's servants or agents, who have been identified as Dr. O'Hanlon and Dr. Corcoran, to "solicit" his application for the temporary post. It is further alleged that he was induced to apply for and take up the position by representations made by them by way of job advertisements and descriptions, and specifically, during the course of the interview. The alleged representations and inducements are particularised, but the only particular which it seems to me is relevant to the case made by the plaintiff is that it was represented to him that the temporary position he was applying for would offer security of tenure to him. The plaintiff's case is

that he relied on that representation, which induced him to leave the post he held in St. James's Hospital, in respect of which he had been offered a renewal of his contract in March 2010, and to accept the position offered to him in St. Loman's Hospital. The subsequent advertising of the permanent position evinced an intention on the part of the defendant to deprive him of his entitlement to continue in his position at St. Loman's Hospital on a permanent basis and of legitimate expectation. The defendant denies the representations and inducements alleged and further denies that the plaintiff had any legitimate expectation that the representations or inducements would be true and accurate or that he could rely on them. Specifically it is denied that any representation or inducement was made to the plaintiff that the position he was applying for would offer security of tenure to him.

3.3 A further element of the plaintiff's claim is that under the 2010 Contract he has obtained permanent status. This element of his claim is based on Clause 3 of the 2010 Contract. It is contended that, as the plaintiff has completed a twelve month period in employment at St. Loman's Hospital under the 2010 Contract, he was deemed to be appointed on a permanent basis as of 19th April, 2011. The defendant denies that the plaintiff is deemed to have been appointed on a permanent basis by reason of the operation of Clause 3 and refers to Clause 3(f) quoted earlier. The defendant asserts that the 2010 Contract provides for separate treatment of persons appointed to permanent posts subject to successful completion of the probationary period and persons acting in a post pending the completion of the competition for the permanent post. An alternative position which the defendant pleads is that Clause 3 does not reflect the agreement of the parties as set out in Clause 2(a) and, insofar as Clause 3 is inconsistent with Clause 2(a), it is in the 2010 Contract by virtue of a mutual mistake of fact and is not binding or enforceable as against the defendant. Alternatively, the defendant counterclaims for an order rectifying the 2010 Contract by the deletion of Clause 3.

3.4 The third element of the plaintiff's claim is that he contends that, pursuant to the Act of 2003, his contract with the defendant is deemed to be a contract of indefinite duration by operation of law following completion by him of in excess of four years of continuous, rolling fixed-term contracts. As regards this element of the plaintiff's claim, the defendant pleads a preliminary objection. It is that the proceedings are misconceived and that this Court is debarred from granting the plaintiff a declaration that he is employed on a contract of indefinite duration or any other relief pursuant to the provisions of the Act of 2003 on the ground that the Court lacks jurisdiction to grant the relief claimed, which must be pursued, in the first instance, by a complaint to a Rights Commissioner under the Act of 2003. Additionally, the defendant contends that the Act of 2003 does not confer independent rights at common law or modify the terms of a contract of employment to be enforced by the common law courts and that this Court has no jurisdiction to adjudicate on the plaintiff's claims under the Act of 2003. Further, it is contended that the plaintiff is estopped from claiming relief pursuant to the Act of 2003 because of the existence of the pending complaint to the Rights Commissioner. The final limb of the preliminary objection is that it would be neither just nor equitable for the Court to permit the plaintiff to pursue his claim under the Act of 2003 prior to a final adjudication on his complaint to the Rights Commissioner.

3.5 Without prejudice to the preliminary objection to the plaintiff's statutory claim being pursued in this Court, the defendant pleads that there are objective grounds on the basis of which the plaintiff's contract with the defendant cannot be deemed to be a contract of indefinite duration, namely, the defendant's need to appoint the best available candidate to the permanent position of consultant psychiatrist at St. Loman's Hospital and its need to provide appropriate services on a temporary basis pending the completion of the competition for the permanent post. The defendant pleads that the plaintiff's employment with the defendant at St. Loman's Hospital was known and accepted by both parties to be on the basis of a "Specific Purpose Contract" to fill the post of consultant to provide temporary consultant cover pending the permanent filling of the post and that all other provisions of the 2010 Contract must be subject to that contractual provision.

3.6 The plaintiff has taken issue with all of the matters pleaded by the defendant and has denied that the plaintiff is entitled to rectification.

3.7 The primary relief claimed by the plaintiff is declaratory relief – that his employment "is deemed to be permanent employment". There is also a claim for damages on various bases: breach of statutory duty; breach of contract; breach of Council Directive 1999/70/EC to which effect was given in the 2003 Act; breach of legitimate and reasonable expectation and so forth. At the hearing, it was made clear that the plaintiff is not pursuing a claim for damages for personal injuries.

4. The issues

4.1 The issues which arise on the pleadings and the order in which I propose dealing with them are as follows:

- (a) Does the plaintiff have a claim based on legitimate expectation on the basis pleaded to a permanent position as a consultant psychiatrist at St. Loman's Hospital?
- (b) Has the plaintiff become entitled to permanent employment with the defendant on the basis of the application of Clause 3 of the 2010 Contract?
- (c) Is the Court precluded from determining whether, on the facts, the plaintiff should be deemed to be entitled to a contract of indefinite duration by virtue of the operation of the Act of 2003?
- (d) If the Court is entitled to make a determination as to whether the plaintiff should be deemed to have a contract of indefinite duration under the Act of 2003, what determination should the Court make?

4.2 The Court has had the benefit of comprehensive written submissions from counsel for both parties, to which I will refer as appropriate.

5. Legitimate expectation

5.1 Despite the manner in which the plaintiff's case is pleaded, the plaintiff acknowledged in cross-examination that the advertisement of the temporary position on its own did not represent that the plaintiff would have security of tenure. In my view, that was a prudent concession for the plaintiff to have made. Similarly, the plaintiff acknowledged that, during the interview, there was no representation or discussion of the position which was the subject of the interview being other than temporary. Therefore, this element of the plaintiff's claim is limited to the representations alleged to have been made by Dr. O'Hanlon and Dr. Corcoran prior to the interview.

5.2 There is a conflict of evidence between the plaintiff, on the one hand, and Dr. O'Hanlon, on the other hand, as to what transpired between them. While I think that Dr. O'Hanlon's version of her discussions with the plaintiff, specifically in relation to his participation in the competition for the temporary position in St. Loman's Hospital the subject of the interview on 26th March, 2010 is to be preferred, I am satisfied that the plaintiff honestly believed that his recollection was accurate. From mid-2005 to mid-2006, when the

plaintiff worked in St. Loman's Hospital, he worked to Dr. O'Hanlon, who was the Clinical Director. After he left St. Loman's Hospital, he communicated with Dr. O'Hanlon fairly regularly to obtain references when he was seeking new employment and the references were always forthcoming. The plaintiff's evidence was that he discussed with Dr. O'Hanlon in the summer of 2009 that he had been advised by the IHCA that he was entitled to a contract of indefinite duration under the Act of 2003. However, Dr. O'Hanlon's evidence was that she could not recall anything about that, but the conversation may have taken place and, if it did, it did not impinge on her. The plaintiff's evidence was that he had spoken with Dr. O'Hanlon about the temporary position shortly before the post was advertised and after it was advertised but before the interview, and that she had stated that he would be in a stronger or more secure situation in St. Loman's Hospital, than in St. James's Hospital, if he were to submit an application for recognition of a contract of indefinite duration. Dr. O'Hanlon's evidence was that in December 2009, prior to the placing of the advertisement seeking applicants for the temporary position, she contacted the plaintiff by telephone and told him to watch out for advertisements which were likely to appear for vacancies in St. Loman's Hospital. Her evidence was that, because, at the time, it appeared that there were likely to be three or four vacancies for consultant psychiatrists in St. Loman's Hospital, she phoned ten possible candidates to advise them of the position. Her evidence was that, she said the same thing to each of the persons with whom she communicated. It was the plaintiff's evidence that his understanding was that he was being singled out for preferment for the temporary vacancy in St. Loman's Hospital. However, while I accept that such was his perception, I am satisfied that it was an incorrect perception. Dr. O'Hanlon's objective was to ensure that likely candidates were aware of the temporary vacancy which would be advertised in the near future. In particular, I am satisfied that Dr. O'Hanlon did not give the plaintiff any assurance that the temporary appointment at St. Loman's Hospital would become permanent or that it would facilitate his establishing an entitlement to a contract of indefinite duration under the Act of 2003.

5.3 There is also a conflict of evidence between the plaintiff, on the one hand, and Dr. Corcoran, on the other hand. Dr. Corcoran's recollection was that he had two conversations with the plaintiff prior to the interview on 26th March, 2010. The first was on 12th March, 2010 when he telephoned the plaintiff to apprise him of the vacancy in St. Loman's Hospital, which had been advertised. He described the telephone conversation, which lasted about fifty minutes, as a casual conversation between two colleagues. He acknowledged that they had a discussion in relation to the "contract of indefinite duration issue". However, he did not give any specific advice to the plaintiff, as he did not understand the complexity of that issue and he was aware that the plaintiff had been in discussion with the IHCA. Neither did he encourage the plaintiff to apply for the vacancy in St. Loman's Hospital. The second telephone conversation was with the plaintiff on 18th March, 2010, to alert him of the deadline in relation to the closing date for applications for the position, which was the following day.

5.4 While the plaintiff's case, based on alleged representations or inducements on the part of Dr. O'Hanlon and Dr. Corcoran, is premised on the representations and inducements in question giving rise to a legitimate expectation on the part of the defendant which the defendant could not resile from, there is no analysis of the doctrine of legitimate expectation in the submissions made on behalf of the plaintiff. The locus classicus on the law on the doctrine in this jurisdiction is the decision of Fennelly J. in the Supreme Court in *Glencar Exploration Plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84. Fennelly J. stated (at p. 162):

"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

5.5 The plaintiff falls at the first hurdle in the application of that test, because, in my view, the plaintiff has failed to establish that the defendant as a public authority, made a statement or adopted a position amounting to a promise or representation that, if the plaintiff took up the temporary position at St. Loman's Hospital, he would have security of tenure. I am satisfied on the evidence that no such representation was made by either Dr. O'Hanlon or Dr. Corcoran. In any event, neither Dr. O'Hanlon nor Dr. Corcoran had any authority to make any such representation. The plaintiff accepted, in cross-examination, that the only route to a permanent position as a consultant with the defendant is either via a permanent appointment made by the PAS or the establishment of an entitlement to a contract of indefinite duration pursuant to the Act of 2003, which is a matter of the proper application of that Act. The only authority which Dr. O'Hanlon and Dr. Corcoran had was to interview the applicants for the temporary position in conjunction with the third member of the interview panel and to place the applicants in order of merit. Neither could have bound the defendant to any commitment to the plaintiff or to any other candidate to give him or her security of tenure.

5.6 In their written submissions, counsel for the plaintiff relied on the decision of the High Court (Gilligan J.) in *Carey v. Independent Newspapers Ltd.* [2004] 3 I.R. 52. That authority has no application to the facts of this case. In opening the case for the plaintiff, counsel for the plaintiff applied to amend the statement of claim to plead misrepresentation on the part of the defendant. The application was refused. Apart from that, I am satisfied on the evidence that there was no misrepresentation on the part of Dr. O'Hanlon or Dr. Corcoran.

5.7 Accordingly, the first element of the plaintiff's case fails.

6. Application of Clause 3 of the 2010 Contract

6.1 Whether Clause 3(c) of the 2010 Contract has the effect contended for by the plaintiff in deeming the plaintiff to have been appointed on a permanent basis to the position in St. Loman's Hospital is a matter of construction of Clause 3 in the context of the contract as a whole. The principles applicable to the construction of a contract are well settled, having been stated by the Supreme Court in *Analog Devices BV v. Zurich Insurance Co.* [2005] 1 I.R. 274, and re-stated more recently by the Supreme Court in *Emo Oil Ltd. v. Sun Alliance & London Insurance Plc* [2009] IESC 2.

6.2 Applying the relevant principles, the intention of the plaintiff and the defendant as to the meaning and application of Clause 3 is easily discernible, having regard to the language used in the 2010 Contract, and considering it against the surrounding circumstances and its object. It is clear from Clause 2(a) that the appointment made by the defendant and accepted by the plaintiff was an appointment to a temporary post. The object of the appointment to the temporary post was to provide temporary consultant cover in St. Loman's Hospital pending the permanent filling of the post. The duration of the post was not temporally circumscribed, save that either side could give three months notice (Clause 2(f) and (g)). While the word "Consultant" in Clause 3(a) is not expressly qualified by the epithet "permanent", on the basis of commonsense, it is implicit that the requirement of satisfactory completion of a probationary period of twelve months applies to a permanent consultant, not to a temporary consultant, who is being appointed on the terms of the standard Consultants' Contract as of 25th July, 2008. The duration of the plaintiff's appointment under Clause 2(a)

being indefinite, there was no definitive intention that it should last for a period of twelve months, although that was a possibility. The default position in Clause 3(c) cannot have been intended to apply, given that the clear stated object of the appointment was to provide temporary cover pending the permanent filling of a consultant's post, which, it must be inferred, was intended to be filled in accordance with the prescribed PAS process. Finally, it is implicit in Clause 3(f) that an appointee, in order to be regarded as being appointed on a permanent basis, is absolved from the probationary process if he has already acted in the post pending its filling on a permanent basis, that is to say, that he has already acted on a temporary basis for a period of not less than twelve months. That is wholly consistent with the probation requirement in Clause 3 not applying to temporary appointees.

6.3 While it would have added clarity to the contractual relationship of the plaintiff and the defendant if the epithet "permanent" had been inserted before the word "Consultant" in Clause 3(a), notwithstanding its absence, I consider that the intention of the parties is quite clear. It was not intended that Clause 3(c) would apply to the plaintiff.

6.4 Accordingly, in my view, rectification does not arise. However, I would comment that, if rectification was necessary, the solution proposed by the defendant of deleting Clause 3 would not give effect to the intention of the parties. The plaintiff, if he were appointed to the permanent position following the competitive process advertised by PAS, would be entitled to rely on Clause 3(f), assuming the process continued beyond 18th April, 2011. It would seem prudent for the defendant to adopt a "belt and braces" approach in future and to indicate in Clause 2, for the avoidance of doubt, that Clause 3, other than paragraph (f) thereof, does not apply to the appointment of a temporary consultant.

6.5 Accordingly, in my view, the plaintiff has not established an entitlement to a permanent appointment by virtue of the operation of Clause 3 of the 2010 Contract.

7. Statutory claim: jurisdiction of the Court having regard to the provisions of the Act of 2003

7.1 The provision of the Act of 2003 on which the plaintiff relies in support of his statutory claim to a contract of indefinite duration is s. 9. Sub-section (2) of s. 9 provides:

"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."

The Act of 2003 was enacted on 14th July, 2003. Sub-section (3) of s. 9 contains the provision which gives redress for a purported contravention of subs.(2) in that it provides:

"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."

However, subs. (4) of s. 9, on which the defendant relies in contending that the plaintiff is not deemed to be employed by it on a contract of indefinite duration, provides:

"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."

7.2 Section 9 is one of the provisions of Part 2 of the Act of 2003 which confers statutory rights on a fixed-term employee in the implementation by the State of Directive of 28th June, 1999. Other provisions of Part 2 confer other statutory rights on a fixed-term employee, for example, the right not to be treated in a less favourable manner than a comparable permanent employee (s. 6), the right to a written statement as soon as practicable by the employer of the objective condition determining the contract (s. 8), and the right to information in relation to vacancies (s. 10). Part 3 of the Act of 2003 deals with the manner in which those rights may be enforced.

7.3 In very broad outline, the manner of enforcement of the statutory rights conferred by the Act of 2003 provided for in Part 3 thereof is as follows:

(a) Section 14(1) provides that an employee may present a complaint to a rights commissioner that his employer has contravened any provision of the Act. Where such a complaint is made a rights commissioner is empowered to –

- (i) declare whether the complaint was or was not well founded,
- (ii) require the employer to comply with the relevant provision,
- (iii) require the employer to reinstate or re-engage the employee (including on a contract of indefinite duration), and/or
- (iv) require the employer to pay the employee compensation.

An employee who is the victim of a contravention of the Act of 2003 by his employer may or may not decide to seek redress. However, if he does, the statutory route provided by the Oireachtas to initiate his claim to be entitled to redress is a complaint made in accordance with s. 14.

(b) Section 15 provides for an appeal by either the employee or the employer to the Labour Court from a decision of a Rights Commissioner under s. 14. Where an appeal is brought, the jurisdiction of the Labour Court is either to affirm, vary or set aside the decision.

(c) There are two routes for an issue on an appeal to the Labour Court to come before the High Court. Sub-section (5) of s. 15 provides for the referral of a question of law to the High Court for determination. Sub-section (6) provides for an appeal to the High Court from a determination to the Labour Court on a point of law. In both circumstances, it is provided that the determination of the High Court shall be final and conclusive.

(d) Section 16 provides the mechanism for enforcement of a determination of the Labour Court in the case of non-compliance by the employer, which is an application to the Circuit Court for an order. Where such an application is made, the Court is only concerned with evidence that the employer had failed to comply with the determination and the merits are not re-opened.

Accordingly, there is a specific statutory scheme provided for in the Act of 2003 for adjudication of complaints of infringement of an employee's statutory rights conferred by the Act of 2003, which makes provision for the involvement of the High Court only on questions or points of law, and which provides a mechanism for obtaining a court order which can be executed to enforce a determination of the Labour Court.

7.4 It was submitted on behalf of the defendant that, given that the Act of 2003 provides a self-contained legal mechanism to enforce the rights thereby granted, it was the intention of the Oireachtas that a claim by an employee of breach of an entitlement under the Act of 2003 may only be initiated by following the procedure outlined in s. 14 and availing of the appeal mechanisms provided for thereafter. It was submitted that this Court has no jurisdiction to determine the plaintiff's claim to an entitlement to a contract of indefinite duration under the Act of 2003. In support of that submission, counsel for the defendant relied on the following decisions:

(a) the decision of this Court (Charleton J.) in *Doherty v. South Dublin County Council (No. 2)* [2007] 2 I.R. 696, which related to a claim of discrimination under the Equal Status Act 2000 and the Equality Act 2004;

(b) the decision of the Supreme Court in *Maha Lingam v. Health Service Executive* [2006] 17 ELR 137, which related to an application for an interlocutory injunction, on the basis, *inter alia*, that the plaintiff was entitled to a contract of indefinite duration by virtue of the provisions of the Act of 2003; and

(c) the decision of this Court (Hogan J.) in *McGrath v. Athlone Institute of Technology* [2011] IEHC 254, in which the plaintiff's claim for an interlocutory injunction was also based on an alleged entitlement to a contract of indefinite duration under the Act of 2003.

7.5 In the *Doherty* case, an issue arose at the substantive hearing as to whether the plaintiffs could initiate a claim of infringement of their rights under the Equal Status Act 2000, and the Equality Act 2004, in the High Court rather than engaging in the process specifically provided for in those Acts, which involved initiation by an application to the Director of the Equality Authority, with a possibility of an appeal to the Circuit Court and an appeal on a point of law to the High Court. Finding that it was not the function of the High Court at first instance to adjudicate on whether there had been an infringement of the plaintiffs' rights, Charleton J. stated (at p. 706):

"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 means for the disposal of controversies connected with 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 to 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."

7.6 While I agree in principle with those observations, their application to the Act of 2003, as invoked in these proceedings, requires some amplification.

7.7 First, it is important to emphasise that it is a complaint of infringement of a statutory right conferred by the Act of 2003 which must be initiated in accordance with the procedure laid down in s. 14 of the Act of 2003. An employee is not required to litigate a breach of a common law right, for example, a contractual right, in respect of which the employee seeks a common law remedy, by following the process laid down in s. 14 and the succeeding sections of the Act of 2003, because pursuit of the common law remedy in the courts is not precluded by the Act of 2003. This point is well illustrated by reference to the decision of the Supreme Court in *Parsons v. Iarnród Éireann* [1997] 2 I. R. 523. That decision concerned the application of s. 15 of the Unfair Dismissals Act 1977, the first two sub-sections of which, at the material time pre-dating the amendment of s. 15 by the Unfair Dismissals (Amendment) Act 1993, provided as follows:

"(1) Nothing in this Act, apart from this section, shall prejudice the right of a person to recover damages at common law for wrongful dismissal.

(2) Where an employee gives a notice in writing under s. 8(2) of this Act in respect of a dismissal to a rights commissioner or the Tribunal, he shall not be entitled to recover damages at common law for wrongful dismissal in respect of that dismissal."

In explaining the application of that provision, Barrington J., with whom the other two Judges of the Supreme Court agreed, stated as follows (at pp. 529):

"This is not a case of the ouster of the jurisdiction of the High Court. The jurisdiction of the High Court remains the same. What the Unfair Dismissals Act, 1977, does is to give to the worker, who feels that he has been unfairly dismissed, an additional remedy which may carry with it the very far-reaching relief of reinstatement in his previous employment. It does not limit the worker's rights; it extends them. At the same time, s. 15 of the Unfair Dismissals Act, 1977, provides that the worker must choose between suing for damages at common law and claiming relief under the new act. Sub-section (2) accordingly provides that if he claims relief under the Act of 1977, he is not entitled to recover damages at common law; while sub-s. (3) provides that where proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of an employee the employee shall not be entitled to redress under the Unfair Dismissals Act, 1977, in respect of the same dismissal."

The effect of s. 15, as applied by the Supreme Court, is that an employee who may have an action at common law for wrongful dismissal, as well as a statutory right to relief under the Unfair Dismissals Acts 1977 to 2007 for unfair dismissal, must elect whether to pursue his statutory entitlement or his common law entitlement. As was pointed out in *Ahmed v. Health Service Executive* [2007] 2 I.R. 106 (at p. 123), the Act of 2003 does not contain a provision similar to s. 15 of the Unfair Dismissals Act 1977, in its original or amended form.

7.8 Secondly, although the Act of 2003 does not put the employee on election as to whether to pursue his statutory rights under that Act, or such common law rights arising out of his contractual position as he contends have been breached, the distinction between statutory rights and common law rights, which is of paramount importance, may require careful analysis. The basis on which

a similar argument to the argument advanced by the defendant as to the jurisdiction of the Court in this case was rejected in the *Ahmed* case was that the plaintiff in that case was pursuing his common law rights before the Court. Having regard to the reliance placed on the Ahmed decision by counsel for the plaintiff, it is necessary to illustrate how it is distinguishable from the plaintiff's case.

7.9 While the initial stage of the dispute between Dr. Ahmed and the defendant centred on whether he was entitled to a contract of indefinite duration by virtue of the operation of the Act of 2003, essentially, that issue had been resolved before the proceedings before this Court came to hearing. Indeed, on the hearing of these proceedings, counsel for the defendant acknowledged that Dr. Ahmed's entitlement to a contract of indefinite duration was ultimately conceded by the defendant. The timeline in the Ahmed case was that in excess of four years into his employment as a consultant, by notice dated 22nd October, 2004, the defendant purported to terminate Dr. Ahmed's employment with effect from 14th December, 2004. Following intervention by Dr. Ahmed's solicitor, the defendant intimated that Dr. Ahmed's position would not be terminated on 14th December, and he would be employed by the defendant as a consultant surgeon on an ongoing basis, but the location of his employment would be a matter for discussion. Dr. Ahmed brought a complaint to a Rights Commissioner on 26th January, 2005, and got a finding in his favour, one aspect of which was appealed by Dr. Ahmed to the Labour Court. The appeal was still pending when the plenary proceedings in this Court were initiated on 23rd November, 2005. Against that background, the dispute which the Court had to resolve in the Ahmed case arose out of the fact that the defendant had adopted the position that the terms of Dr. Ahmed's contract of indefinite duration were the terms of what was then known as the Consultants' Common Contract under which he was employed in the defendant's North Eastern Area, which position was reflected in the ruling of the Rights Commissioner. The issues on liability which had to be determined by the Court were what were the terms of the plaintiff's contract of employment, apart from the duration of the contract, which was governed by s. 9(3) of the Act of 2003, and the application of which to the plaintiff the defendant had conceded, and had there been a breach by the defendant of any of those terms. In other words, what the Court was adjudicating on was Dr. Ahmed's contractual rights at common law, not his statutory right to a contract of indefinite duration under the Act of 2003.

7.10 Thirdly, the 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 courts 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."

7.11 Finally, the last sentence in the passage from the judgment of Charleton J. in the *Doherty* case quoted above points towards the judicial review jurisdiction of the High Court. While it does not arise in this case, an issue may arise in a situation where the employer is a public body, such as the defendant, as to whether an employee is entitled to seek a public law remedy, for example, an order of certiorari quashing a decision of his public body employer to terminate his employment. As has been outlined in the Ahmed case, that issue was addressed by the Supreme Court in *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483. In that case, the Supreme Court did not rule out the possibility that proceedings by way of judicial review might be a more appropriate remedy than pursuing an appeal on the merits to the relevant statutory tribunal, provided the employee had not gone too far down one road to be estopped from pursuing the other route.

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.

8. Application of the Act of 2003

8.1 Having determined that the jurisdiction to determine whether the plaintiff is entitled to a contract of indefinite duration, in the first instance, lies with the Rights Commissioner, it would be inappropriate to express any view on this aspect of the plaintiff's claim.

9. Order

9.1 There will be an order dismissing the plaintiff's claim. I will hear submissions from the parties as to the implications of the Court's decision on the undertakings which were given by the defendant to the Court at the interlocutory stage.