THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 206

Record Number: 2018 16

Peart J.
Whelan J.
McGovern J.

BETWEEN:

LAURENCE KEARNEY

PLAINTIFF/APPELLANT

- AND -

BYRNE WALLACE

DEFENDANT/RESPONDENT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 23RD DAY OF JULY 2019

1. By his notice of motion dated 10th October 2017 the plaintiff/appellant sought certain interlocutory injunctions, including restraining the defendant firm from dismissing and/or implementing his purported dismissal from his position as a solicitor in the firm, and requiring the firm to continue to pay his salary, pending the determination of the substantive issues in the proceedings. His application was refused by order of the High Court dated 21st December 2017 (Baker J.) for the reasons explained in a written judgment delivered on 28th November 2017 ([2017] IEHC 713). The appellant now appeals to this Court by way of notice of expedited appeal filed on 15th January 2018.

2. Before setting out the trial judge's reasons for refusing the appellant's application, it would be helpful to provide some factual background.

3. The appellant qualified as a solicitor in 1996, and took up employment with the defendant in August 2006 as an associate solicitor at a salary of €90,000 per annum, which was increased in 2008 to €100,000 per annum.

4. Unfortunately, the appellant has had to endure certain health difficulties. In 1996 he was diagnosed with bipolar mood disorder. He informed the firm about this prior to his taking up employment there in 2006. His illness has forced him to be absent from work for various periods since his employment commenced. For example, he was absent from 27th July 2010 until his return on the 5th September 2011 – some 13 months. Upon his return he was informed that his salary was reduced to €60,000 per annum. The firm maintain that this reduction was in line with reductions made to salaries of other employees caused by the downturn in the economy since 2008. The appellant on the other hand maintains that the cuts made to others were not as great as the reduction of €40,000 made to his salary. He also referred to the fact that other employees' salaries have been restored in more recent times, whereas his remained essentially unchanged, save for a modest increase of €5,000 in April 2013.

5. In July 2013 the appellant was again absent from work until November 2015 – an absence of some 27 months. He continued to be paid during this period in accordance with the firm's sick pay policy, and his salary was not further reduced.

6. Following his return to work in November 2015 the appellant had an unpleasant disagreement with a superior staff member in relation to the apportionment of a fee for the presentation of a paper that he had prepared, and he accepts that he was rude to that person on that occasion.

7. The appellant took annual leave on 5th May 2016, and was given an additional period of unpaid leave until the 27th May 2016. It appears that during that period the firm requested that the appellant attend an independent medical practitioner for an assessment of his fitness for work. That assessment concluded that he was fit for work, and the appellant's own psychiatrist also agreed that he was fit for work.

8. The appellant requested on several occasions to be allowed to return to work, but he says that these requests were ignored. He engaged a firm of solicitors to write to the firm in relation to his request to return to their employment, and eventually the appellant instituted plenary proceedings (not the present proceedings) in which he sought, inter alia, a declaration that he is and continues to be a solicitor employed by the firm, and that the firm was required to provide them with work to do. Those proceedings also sought an order directing the firm to pay him at the same rate of remuneration as an appropriate comparator who, unlike him, does not suffer from a disability. Those earlier proceedings have proceeded to the extent that a statement of claim and defence have been delivered, but they have not been heard and determined.

9. The appellant experienced certain difficulties in obtaining certain payslips and a P60 for 2016 as averred by him in his affidavit sworn on the 29th September 2017. He engaged the assistance of the Workplace Relations Commission and also of his solicitors in relation to that difficulty, and in due course these documents were furnished by the firm on the 31st July 2017. There was also a difficulty about which he complained because his practising certificate was not renewed by the firm for the year 2017. Those difficulties are dealt with in the affidavits.

10. The present proceedings were commenced on 2nd October 2017 some weeks after the appellant had received a letter from his employer dated 28th August 2017. This letter set out in some detail a history of relevant events, and concluded with the following

paragraph:

> "Having conducted a review in relation to your position, it is clear that your previous role is not available and in fact it no longer exists. We have examined other possibilities but unfortunately we are unable to identify another suitable role for you within the firm having regard to your expertise and experience. We therefore, and with regret, have no option but to regard your role as redundant with immediate effect. We will arrange to pay your statutory contractual entitlements together with a payment in lieu of two months' notice as per your contract of employment and will arrange for a member of our HR team to contact you to progress this."

11. The appellant disputes that a genuine redundancy situation existed, and considers that the work he was previously doing continues to be done at the firm, and has asserted in addition that the firm is actively recruiting as of the date of swearing of his said affidavit.

12. In his proceedings the appellant seeks a number of declarations, including that the termination of his employment is null and void; that he continues to be employed by the firm; and that they are obliged to provide him with work to carry out. He also seeks a declaration that his position as an associate solicitor is not redundant, and in addition, various injunctive reliefs, as well as damages under various headings including aggravated and/or exemplary damages for breach of contract, negligence, breach of duty and so forth.

13. As already stated, this application for interlocutory injunctive relief was directed towards obtaining an interlocutory injunction to restrain his purported dismissal pending the determination of the substantive proceedings and an order directing the firm to pay his salary, expenses, and bonuses as they fall due and pending the determination of the substantive issues.

The judgment appealed against

14. In her judgment the trial judge set forth an uncontroversial summary of the background facts, which reflect in large measure the summary which I have set forth above. She also referred to the contents of the statement of claim delivered by the appellant. In that regard she stated the following at paras. 9 and 10 of her judgment regarding the appellant's claims:

> "9. The present proceedings relate to the letter of the 28th August 2017, by which the defendant firm purported to terminate the employment of the plaintiff on account of redundancy. The statement of claim (at para. 21) pleads that the letter wrongly and in repudiatory breach of contract purported to declare the plaintiff's position to be redundant. It is pleaded that the actions of the defendant firm are "carefully contrived" and that the circumstances do not exist to justify his dismissal on the grounds of redundancy. Paragraph 25 of the statement of claim contains a plea that the functions and responsibilities with which he was formerly engaged continue to be performed in the firm in a manner similar to that performed by him and that the defendant firm continues to recruit solicitors, who hold similar or less impressive qualifications and experience than those of the plaintiff, to carry out that work.
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> 10. The claim is pleaded broadly that the termination is null and void and a declaration is sought that the position of the plaintiff in the defendant firm as an associate solicitor "is not redundant". Damages are sought for breach of contract, breach of warranty and/or breach of statutory duty."

15. The trial judge went on to state that the parties were in agreement that the relevant threshold test for the granting of an employment injunction, such as the plaintiff seeks is that stated by the Supreme Court (per Fennelly J.) in *Maha Lingam v. HSE* [2005] IESC 89 – *i.e.* that a party seeking injunctive relief that is mandatory in substance and form should make out a "strong and clear case".

16. At para. 15 of her judgment, the trial judge stated that she did not accept the appellant's argument that the factual basis for his submission that the redundancy is a sham had not been materially contradicted on affidavit. She stated that "the replying affidavits taken together do point to a factual dispute which cannot be resolved at the present stage, but the existence of which makes it more difficult for the plaintiff to establish a strong arguable case".

17. The trial judge went on to state that "the primary issue in the hearing was one of jurisdiction". In that regard she referred to the firm's argument that "no right of action exists at common law arising from an alleged unfair selection for redundancy and that the cause of action derives from the statutory redress scheme established by the Redundancy Payments Act 1967 (as amended) and the Unfair Dismissal Act 1977". She stated that "the defendant argues therefore that the claim is properly one to be determined in the forum designated by legislature, by reference to the legislative criteria and in the context of the legislative test".

18. The trial judge went on at para. 18 to describe the appellant's counter-argument as follows:

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

19. The trial judge then stated at paras. 19-20:

> "19. It is not my function at the present point in time to make a determination as to how the proceedings will evolve but, in order for the plaintiff to succeed in defeating the argument of the defendant that the injunction may not be granted because that plaintiff does not have a "strong" case, the plaintiff must establish to my satisfaction that he has a strong argument that the claim he seeks to bring is one recognised by the common law.
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> 20. The plaintiff essentially argues that a form of injunctive relief in support of his claim exists as a matter of law outside the statutory scheme operating in the employment context, under which proceedings are to be commenced in the more informal setting of the Workplace Relations Commission (WRC)."

20. The trial Judge then proceeded to consider a number of authorities to which she had been referred. She considered that the case that had the most similarity to the present case was *Nolan v. Emo Oil Services Ltd* [2009] IEHC 15 which, as the trial judge had noted, was "an application for an interlocutory injunction restraining the defendant from giving effect to his purported dismissal by reason of redundancy and requiring the defendant to continue to pay the salary and associated emoluments and benefits as they fell

due". She distinguished other cases to which she was referred by the appellant such as *Shortt v. Data Packaging Ltd* [1994] E.L.R 251; *Phelan v. BIC (Irl) Ltd & ors* [1997] 5 E.L.R. 208; *Burke v. Independent Colleges Ltd* [2010] IEHC 412; *Wallace v. Irish Aviation Authority* [2012] IEHC 178; *Brennan v. Irish Pride Bakeries* [2017] IECA 1207; and *Quigley v. HSE* [2017] IEHC 654, largely on the basis that, unlike Nolan, these cases relied upon a breach of a contractual term of the contract of employment, and that the argument in the present case is, as she refers at para. 36 of her judgment, that there is "an alleged unfair dismissal by reason of unfair selection for redundancy, either because no genuine circumstances exist within the firm to justify his dismissal or because he was selected for redundancy on account of his absence from work due to ill health".

21. With regard to *Nolan,* the trial judge stated as follows at paras. 24-26 of her judgment:

> "24. In [*Nolan*] Laffoy J. was hearing an application for an interlocutory injunction restraining the defendant from giving effect to his purported dismissal by reason of redundancy and requiring the defendant to continue to pay the salary and associated emoluments and benefits as they fell due.
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> 25. The plaintiff had argued that a judgment of Keane J. (as he then was), sitting in the High Court, in *Shortt v. Data Packaging Ltd* … was authority for the proposition that a mandatory injunction could be granted to restrain an employer from acting on a redundancy. Laffoy J. rejected the argument that *Shortt v. Data Packaging Ltd* was authority for that proposition and relied on, inter alia, the judgment of Fennelly J. in *Maha Lingam v. HSE* and the discussion therein of the English case of *Eastwood v. Magnox Electric plc* [2004] 3 All E.R. 991. She held, to borrow the language of Lord Nicholls at para. 14 of his judgment, that it was not for the "courts now to expand a common law principle into the same field" and produce an outcome inconsistent with that created by the statutory code.
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> 26. Laffoy J. considered that Mr Nolan's remedy arose under statute, and that he had not otherwise acquired a cause of action for breach of contract. Accordingly, she held that there was no remedy he could pursue in the courts and she rejected the argument that the court could "develop its common law jurisdiction by reference to the statutory concepts of redundancy and unfair dismissal" (p. 11). Having regard to the fact that the Oireachtas provided specific remedies for unfair dismissal and specific procedures for obtaining such remedies, the common law had no role to play, as it might "end up supplanting part of the code".

22. Considering that the circumstances of the present case where an analogous to those identified in *Nolan*, and having considered the reasoning of Laffoy J. therein and the case law already referred to, the trial judge was satisfied that the appellant had not made out "a strong case that would justify the granting of an injunction". In circumstances therefore where the first limb of the test for interlocutory relief had failed, the trial judge stated that there was no need for her to consider the balance of convenience, or whether damages would be an adequate remedy.

Appellant's legal submissions

23. The question at the heart of this appeal is whether, as found by the trial judge, the High Court has no jurisdiction to grant an injunction such as is sought in these proceedings where the appellant has been dismissed on the basis of an asserted redundancy, and where the he asserts that the redundancy relied upon by the firm is a "sham". In so far as *Nolan* is relied upon by the trial judge for her conclusion that absent some contractual basis for the employee's claim the Court has no jurisdiction, and that the claim being advanced must be pursued through the statutory scheme provided for by the Oireachtas, the appellant submits firstly that what has occurred in the present case is a breach of an *implied term of his contract* of employment – that implied term being one of mutual trust and good faith – and therefore that *Nolan* ought to be distinguished; and secondly, if necessary, that *Nolan* was wrongly decided. It is submitted that the mere fact that the claim being advanced is on the basis of "several flagrant breaches by [the firm] of their contractual obligations to [the appellant" as opposed to breaches of one or more express terms should not deprive him of his right at common law to obtain injunctive relief in the form which he seeks.

24. Specifically, the appellant relies on his contention that the respondent firm has breached three fundamental and implied terms of his contract of employment:

> (i) the firm has failed to act towards him with all good faith and fidelity;
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> (ii) the firm has disregarded its obligation to provide him with work to do; and
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> (iii) the decision by the firm to dismiss him was capricious and arbitrary, since his position is, demonstrably, not redundant.

25. The appellant has submitted that simply because the respondent firm has described the dismissal as one based on a redundancy does not mean that this is correct, and that the Court should not be influenced by the label attached to the dismissal by the firm. It is submitted that the appellant's rights and entitlements, including his constitutional right of access to the courts should not be curtailed or interfered with because the firm has labelled the dismissal as a redundancy, and that this Court should look at the substance of the dismissal and not the label attached to it.

26. It has been submitted that the judgment of Laffoy J. in *Nolan* has had a radical impact in terms of depriving an employee of his/her common law and equitable remedies, and that this should not be countenanced in the absence of specific and express statutory provision. This Court is urged to not follow *Nolan* and to find that it was wrongly decided.

Respondent's legal submissions

27. Counsel for the respondent resists any invitation to this Court to revisit and/or not follow the decision of Laffoy J, in *Nolan*, and submits that not only has it been accepted as correct and followed in subsequent cases, but that it is correct in principle.

28. Counsel has referred to the position that pertained at common law prior to the enactment of the Unfair Dismissals Act, 1977 when the basis for any claim for wrongful dismissal was confined to where the employer had failed to give proper notice of dismissal. Counsel has referred in the present case to the undoubted fact which is not in controversy between the parties that the firm terminated the appellant's employment by its letter dated 28th August 2017 and gave the notice that it was required to give under the terms of the contract of employment.

29. It has been submitted that in so far as the appellant seeks to claim an entitlement to injunctive relief on the basis of a claim in the substantive proceedings that the redundancy is a 'sham' and therefore that his dismissal is null and void, this is an issue that he must under the statutory scheme introduced by the Oireachtas for that very purpose pursue such claims before the Workplace Relations Commission, and not through the courts. He refers also to the fact that there is a clear conflict on the affidavit evidence

adduced on the interlocutory application in relation to the allegations behind the assertion by the appellant that the alleged redundancy is a sham, contrived to avoid compliance by the firm of its obligations to the appellant. Counsel has referred to the relevant provisions of the Unfair Dismissals Act, 1977 which at s.1 provides a definition of "dismissal" for the purposes of the Act as including "(a) the termination by his employer of the employee's contract of employment with the employer, whether prior notice of the termination was or was not given to the employee". The Court was referred also to s.6(4) of the Act which provides:

> "(4) Without prejudice to the generality of subsection (1) of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:
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> (a) the capability, competence or qualifications of the employee for performing work of the kind which she was employed by the employer to do;
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> (b) the conduct of the employee;
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> (c) *the redundancy of the employee*; and
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> (d) the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a duty or restriction imposed by or under any statutory instrument made under statute." [Emphasis provided]

30. It is accepted on behalf of the firm that by virtue of the provisions of s. 6(6) of the Act, the onus is upon the employer to show that the dismissal resulted wholly or mainly from one or more of the matters set forth in subs. (4) above.

31. It is accepted also that by virtue of s. 6(3) of the Act, a selection for redundancy that is found to be unfair, a dismissal on the basis of such a redundancy is deemed for the purposes of the Act to be an unfair dismissal.

32. Counsel is referred also to the Redundancy Payments Act 1967 and submits that the statutory regimes in relation to both redundancy and unfair dismissals are stand-alone regimes set up by the Oireachtas for the purpose of dealing with all disputes relating to redundancy, including a challenge such as brought by the appellant herein on the basis that his purported redundancy is a sham.

33. It is submitted that claims for wrongful dismissal under common law must now be seen as being confined to those cases where a dismissal is claimed to be wrongful because of a breach of some express contractual obligation in the employee's contract of employment, such as the failure to give the required notice, or perhaps where an agreed disciplinary procedure has not been adhered to, and the dismissal has been found to be void *ab initio*. None of these features exist in the present case.

34. It is submitted that the attempt by the appellant to contend that there is some contractual breach based upon some implied term of trust and good faith is contrived, and ought not to be considered sufficient to bring the present came within the now restricted ambit of the common law in employment matters. It is submitted that if such an argument was to be accepted, it would open the floodgates to many applications for injunctions of the kind being sought herein, and that it would be to ignore the express and clear intention of the Oireachtas that such disputes should be dealt under the unfair dismissals statutory code, and specifically at the Workplace Relations Commission, and not in the courts.

35. In so far as the appellant has urged that the effect of the decision in *Nolan* is to deprive the appellant and persons in his position of his constitutional right of access to the courts, the respondent argues that this is not the case, and points out that the appellant is not deprived by the Act of his right of access to the courts in the case of a wrongful dismissal, and that by s. 15 of the Act it is simply the case that where a person seeks to recover damages for wrongful dismissal at common law, he is precluded from also seeking redress under the Act in respect of the dismissal to which the court proceedings relate.

36. It is submitted that in the present case, the appellant was dismissed by letter dated 28th August 2017; that this dismissal complied with the terms of the contract of employment as to the period of notice required to be given, and that the reason was explained namely that it was on the grounds of redundancy.

Conclusions

37. Firstly, I would not decline to follow the decision in *Nolan* and that line of authority, as invited, still less find that it was wrongly decided. Quite apart from being entirely satisfied that it is correct in the light of the statutory code that has been provided by the Oireachtas for dealing with the type of issues that the appellant seeks to raise, it would be entirely inappropriate to do so on an interlocutory application, notwithstanding that *Nolan* itself was an application for an interlocutory injunction of the kind now being sought by the appellant. In my view *Nolan* is by now firmly embedded in the jurisprudence in this area, notwithstanding that it is a decision by Laffoy J. given when she was a judge of the High Court.

38. The decision in *Nolan* presents as an insuperable obstacle to the appellant obtaining an interlocutory injunction to restrain his dismissal, and to have his salary paid, pending the determination of these proceedings. For the same reasons that are clearly stated by the trial judge I cannot be satisfied that the appellant has demonstrated that he has a "strong case" to be tried. Overlooking altogether the unresolved dispute on the facts, as a matter of law the appellant's case cannot be seen as being a "strong one", and therefore the trial judge was in my view perfectly correct to conclude as she did.

39. I would not reject out of hand the general idea that a term of mutual trust and good faith might be implied into the contract of employment, such that an asserted breach of that term might be considered a breach of the contractual terms for the purpose of bringing the case outside the decision in *Nolan* and that jurisprudence. But facts must be established in order to determine the basis on which it sought to invoke the implied term of mutual trust and good faith. The implied term could not in my view be such as would deprive the employer of the right to terminate the contract of employment with proper notice and for example where it is based on a redundancy as in the present case.

40. The legal principles which guide the courts in determining whether a particular term ought to be implied into a contract in order to give it business efficacy (*e.g. The Moorcock* [1889] 14 P.D. 64) have not been addressed on the present appeal. But in the area of employment law I would say there are undoubtedly terms that may readily be implied into a contract of employment. An obvious such term, overlooking any statutory regulation that might so require, would be that the employer would provide a safe place of work. In the absence of a specific clause regarding the period of notice to be given before termination of the employment, it is clear that a term requiring reasonable notice will be implied in order to give it business efficacy (see *e.g. per* Barron J. in *Royal Trust Company of Canada (Ireland) Ltd v. Kelly & ors,* Unreported, High Court, 27 February, 1989). Similarly, there has been found to be an implied term obliging the employee to serve his employer faithfully, so that if he "moonlights" by taking on work for a rival business he will be found

to be in breach of his contract of employment. One can think of other terms that might be reasonably or necessarily implied. It is not clear at all what the appellant in the present case considers is encapsulated by the implied term of mutual trust and good faith which he seeks to rely upon in order to escape the clutches of the decision in Nolan and that line of authority. It cannot in my view include an obligation that he would not be dismissed on the grounds of a redundancy. It has not been established that the firm acted in bad faith in reaching a decision to terminate his employment on the basis of a redundancy. I would reject the arguments advanced on the basis of the unspecific term sought to be implied of mutual trust and good faith. No facts are established that could bring such an implied term into play, even if it is to be accepted (and I reach no definitive conclusion in that regard in this case) that there is an implied term of mutual trust and good faith in all contracts of employment.

41. In *Maha Lingam*, Fennelly J. referred to the development in recent times of the notion of an implied term of mutual trust and good faith in contracts of employment. In that regard he stated:

> "The argument developed by Mr O'Reilly in particular on behalf of the plaintiff/appellant is that there has developed in parallel with the statutory scheme of things the tendency of the courts to imply a term of good faith and mutual trust into contracts of employment. That implies, as far as the employee is concerned, that he will work faithfully and respect the employment obligations that he has towards his employer but by purity of reasoning, therefore, the employer is equally bound not to act so as to undermine the contract of employment but to act also in good faith on the basis that there is a relationship of mutual trust between the parties.
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> This is a development which is perhaps at its early stages and it is not contested, in the present case, by Mr O'Reilly that he needs to develop that law further in order to bring it to bear in the present case and to secure the injunction that he seeks. There has been a discussion of course in the English case of *Eastwood v. Magnox Electric Plc* [2004] 2 All ER 991 decided this year and referred to in the judgment of Carroll J. and in particular the majority speech in the House of Lords in that case were Lord Nicholls, as cited by Carroll J., took the view that because of the statutory code relating to unfair dismissal, in effect that it was not for the courts to extend further into the common law the implied term regarding mutual trust in such a way as to upset the balance set by the legislature. In other words that the principle that there is an implied term of mutual trust and good faith in contract of employment does not extend so as to prevent the employer terminating a contract of employment by giving proper notice and, having already said that it is not contested that proper period of notice was given in this case, the question is whether the plaintiff has made out the sort of case that would be necessary to show that the contract of employment has been undermined to such an extent by the employer in this case that the employer was deprived of the right to give a proper period of notice of termination."

42. I am not satisfied that the appellant has made out a strong case upon which he might succeed at trial, and such that the Court is required to proceed to a consideration of the other factors that the Court would have to consider in order to grant the kind of injunction that the appellant seeks, such as the adequacy of damages and the balance of convenience. The more arguable case is, as submitted by the respondent, that the appellant's remedy on the facts of this case lies within the statutory framework provided by the Unfair Dismissals Act, 1977 and the Redundancy Payments Act, 1967.

43. I agree with the reasoning and conclusions of the trial judge, and I would dismiss this appeal.