Neutral Citation Number: [2009] IEHC 15

THE HIGH COURT

2008 No. 10294 P

BETWEEN

PAUL NOLAN

PLAINTIFF

AND

EMO OIL SERVICES LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 21st day of January, 2009

On this application for an interlocutory injunction the plaintiff claims various orders, some prohibitory and some mandatory. The essence of the relief he claims is encapsulated in two of the orders he claims:-

> (a) an interlocutory injunction restraining the defendant from giving effect to his purported dismissal by reason of redundancy from the post of Credit Manager; and
>
> (b) an interlocutory injunction requiring the defendant to continue to pay his salary and associated emoluments and benefits currently owing and as they fall due.

While not so expressed in the notice of motion, the intention is that the orders shall regulate the relationship of the plaintiff and the defendant pending the hearing of the substantive action.

The plaintiff's employment with the defendant was regulated by a contract in writing under which the plaintiff was appointed as a permanent employee of the defendant as Credit Manager commencing on 1st November, 2001. The contract was a comprehensive document, which set out the conditions of employment including the entitlement of the defendant to terminate the employment on notice. Clause 7 provided that the period of notice which required to be given by the defendant to the plaintiff to terminate his employment should be determined according to the length of continuous service. In the case of service of between five and ten years the length of notice required was four weeks, which coincides with the requirement of the Minimum Notice and Terms of Employment Act 1973. It is common case that in September 2008 the plaintiff's employment was terminable by four weeks' notice in accordance with the contract.

At the beginning of 2008, the defendant, which is the supplier of oil products, had a work force of one hundred and sixty. Because of the economic downturn it introduced two redundancy schemes in 2008. Fifteen redundancies resulted from the first scheme, which was announced in February 2008, of which five were compulsory.

The second scheme, which resulted in a further nine redundancies, five of which were compulsory, was announced while the plaintiff was on annual leave in August 2008. On 15th August, 2008 the defendant announced a redundancy scheme under which, in the first instance, it invited applications for voluntary redundancy across all sections of the defendant. It was stated that in the absence of the required number of volunteers, the defendant would arrange to make redundancies on a compulsory basis. The ultimate deadline for acceptance of applications for voluntary redundancy was 2nd September, 2008. The plaintiff received notification of the redundancy scheme while on annual leave, but he did not wish to avail of it.

After the plaintiff returned from annual leave, he was called to a meeting with the Managing Director of the defendant, Mr. Gerry Wilson, on 3rd September, 2008. He was informed that his position of Credit Manager was being made redundant with effect from the end of September 2008 and that, in future, his work would be done by the Managing Director and the Financial Controller in addition to their existing duties. Subsequently at a meeting on 4th September, 2008, he was informed that his redundancy would be effective from 30th November, 2008. On the following day, 5th September, 2008, the plaintiff was furnished with form RP50, which was the notification of redundancy, which gave the date of the notice of termination of his employment as 5th September, 2008 and the proposed date of termination as 30th November, 2008. The form, which was the prescribed form under the Redundancy Payments Acts 1967 to 2003, incorporated a claim for statutory redundancy from the Social Insurance fund. In addition to the statutory redundancy, the defendant proffered to the plaintiff an *ex gratia* payment of €9,100.

It is not in dispute that the notice of termination given to the plaintiff was sufficient to terminate his employment in accordance with his contract of employment. The dispute which has given rise to these proceedings and this application is the plaintiff's contention, which was first raised at the beginning of November, 2008, that genuine *bona fide* redundancy does not exist in relation to the position of Credit Manager which was held by the plaintiff. Alternatively, the plaintiff contends that if a redundancy situation does exist, he has been unfairly selected for redundancy. In broad terms, the factual basis on which the plaintiff alleges that making him redundant was a contrivance is that his working relationship with Mr. Wilson deteriorated after late 2006 when he had made Mr. Wilson aware that he had been offered the position of Credit Manager by a competitor of the defendant, which he had declined. He alleges that thereafter he was sidelined and Mr. Wilson commenced dealing directly with a subordinate of the plaintiff who occupied the position of Senior Credit Controller with the objective of replacing the plaintiff with her. Mr. Wilson has categorically denied this allegation and has averred that the plaintiff's redundancy has arisen out of the current difficult economic conditions and not otherwise. The position of the defendant is that Mr. Wilson, as Managing Director, and the Financial Controller are going to take on the plaintiff's functions, while the Senior Credit Controller will be assigned "some of the more junior duties formerly performed by the plaintiff", although she will not receive any promotion or additional remuneration as a result of the decision to make the plaintiff's position redundant. I have stated the factual position in broad terms. However, there is a considerable body of detail on the affidavits, which gives rise to conflict. The Court cannot, and should not attempt to, resolve those conflicts on this application.

Counsel for the plaintiff accepted that, as, in effect, the plaintiff is seeking a mandatory interlocutory injunction, the first hurdle he has to overcome is that he must "show at least that he has a strong case that he is likely to succeed at the hearing of the action" (*per* Fennelly J. in *Maha Lingham v. Health Service Executive* [2006] 17 E.L.R. 137). The plaintiff contended that he could meet that test. The defendant's primary answer was that he could not, because, it was submitted, both contentions advanced by the plaintiff,

that is to say, that the redundancy was not a valid redundancy or, alternatively, that he should not have been selected for redundancy, cannot be litigated in these proceedings and can only be pursued on a claim under the Unfair Dismissal Acts 1977 to 2008.

The defendant's argument raises a very basic point. For the reasons set out below, I think it is correct both in principle and in accordance with precedent.

Under Irish law, an employee has two potential avenues to secure redress for dismissal from employment which he contends is contrary to law. One is to bring an action at common law for wrongful dismissal where he contends that the dismissal was in breach of contract or in violation of his constitutional rights. The other is to pursue a claim for unfair dismissal under the Unfair Dismissal Acts 1977 to 2008. That the two avenues are mutually exclusive has been consistently recognised.

In the *Maha Lingham* case, Fennelly J. recognised the distinction, in outlining the first of a number of "quite obvious legal matters" raised by that case in the following passage:-

> "… that according to the ordinary law of employment a contract of employment may be terminated by an employer on 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 that notice so long as he complied with the contractual obligation of reasonable notice whether he has good reason or bad for doing it. That is the common law position and it is an entirely different matter as to whether a person has been unfairly dismissed and a different scheme of statutory remedy is available to any person dismissed whether with or without notice under the *Unfair Dismissal Act*, but this is not such an application. This is an action brought in common law for wrongful dismissal in the context of which an injunction was sought."

The distinction was reiterated by the Supreme Court in *Sheehy v. Ryan* [2008] I.E.S.C. 14 in which judgment was delivered by Geoghegan J. on 9th April, 2008. Referring to the decision of Carroll J. at first instance, Geoghegan J. stated:-

> "The judge in fact went on to point out that the appellant had chosen a common law remedy. She could have initiated proceedings under the Unfair Dismissals Act, 1967 or under the Redundancy Payments Act. 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."

In both the *Maha Lingham* case and the *Sheehy* case no period of notice for termination was stipulated in the relevant contract of employment. In this case, as I have said, it is common case that a period of notice is stipulated and that what was required in September 2008 was four weeks' notice. The defendant effectively gave the plaintiff three months' notice. Accordingly, according to what Fennelly J. described as "the traditional law", the plaintiff's contract of employment was lawfully terminated. No action for breach of contract arises, nor can any question of violation of the plaintiff's constitutional rights arise.

It is necessary to consider whether the "modern developments" to which Fennelly J. referred have a bearing on the plaintiff's entitlement to the relief he claims on this application.

A line of authority has developed in this jurisdiction from the decision of the High Court (Costello J.) in *Fennelly v. Assicurazioni Generali Spa*. [1985] 3 I.L.T.R. 73, on the basis of which an employee, who has been dismissed, may, in certain circumstances, be granted a mandatory injunction directing payment of his or her salary pending the determination of the substantive proceedings. Counsel for the plaintiff suggested that the decision of the High Court (Keane J.) in *Shortt v. Data Packaging Limited* [1994] E.L.R. 251, in that line, is authority for the proposition that the plaintiff should be granted a mandatory injunction in this case on the basis of his contention that his redundancy was not valid. A consideration of the judgment of Keane J. does not bear that out. The facts in that case were that in 1988 the plaintiff had been employed as a managing director of the defendant on a three-year fixed term contract which provided that any continuation after the fixed term was to be deemed to be employment of indefinite duration terminable by six months' notice. The plaintiff continued in employment in accordance with the terms of the contract following the expiration of the three-year term until 11th January, 1994, when he was informed that, owing to a re-structuring of the company, he was to be made redundant, and that the termination of his employment was to be of "immediate effect". The plaintiff sought an injunction restraining the defendant from appointing any person other than the plaintiff to the position of managing director of the defendant pending the trial and an order that the defendant continue to pay him all salary accruing from 11th January, 1994 and other benefits to the trial of the action. Keane J. in an *ex tempore* judgment indicated that he would make an order largely in the form of the order made by Costello J. in the *Fennelly* case on the basis that he was satisfied that the plaintiff had made out a fair issue to be tried as to the legality of the purported termination. He outlined the arguments which had been advanced on behalf of the plaintiff: that the power of immediate termination could only be exercised by the directors of the defendant and that there had been no decision of the directors, because the plaintiff, who was a director, would have been aware of it; that the plaintiff's removal was ineffective, in that it was in breach of the principles of natural justice; that the alleged redundancy was spurious and unsubstantiated and that the real reason for the purported removal lay in differences between the plaintiff and his employers; and that the statutory redundancy requirements had not been observed.

There are two significant features which distinguish the *Shortt* case from the plaintiff's case. First, the plaintiff in the *Shortt* case was an office holder, as a director, as well as a contract employee. Secondly, the defendant purported to terminate his employment forthwith without giving him the notice to which he was entitled as a matter of contract. In my view, the *Shortt* case is not authority for the proposition that, in a case in which the plaintiff's employment has been terminated in accordance with his contract of employment, but on the grounds of redundancy, the High Court in a plenary action, has jurisdiction to consider whether the redundancy was a genuine redundancy and, if it finds that it was not, or that there is a strong case that it was not, to afford relief to the plaintiff either in the substantive action or by way of interlocutory injunction.

In the *Maha Lingham* case, Fennelly J. considered an argument made on behalf of the plaintiff that there has developed in parallel with the statutory scheme the tendency of the Courts to imply a term of good faith and mutual trust in contracts of employment. Fennelly J. made the following observations on that argument:-

> "There has been a discussion of course of the English case of *Eastwood v. Magnox Electric Plc*., [2004] 3 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 where 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 contracts 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 had 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."

Having made those remarks, Fennelly J. looked to the facts of the case before him. He reiterated that it was necessary for the plaintiff to establish a strong and clear case. He found that, so far as the defendant was concerned, the plaintiff's employment as a temporary orthopaedic surgeon was terminated for the simple straight forward reason that the employment was not authorised and was not funded and that there was no question of the dismissal being motivated by any suggestion of racial discrimination or racial slur.

Although not articulated in this way by counsel for the plaintiff, the plaintiff's case, as I understand it, is that it is an implied term of his contract of employment that, notwithstanding the express right to terminate his contract on notice, the plaintiff is entitled to litigate the fairness or otherwise of the termination of his contract on the grounds of redundancy by reference to the statutory code in plenary proceedings in this Court. I base that understanding on the submission of counsel for the plaintiff that the defendant, as his employer, owed a duty of good faith to the plaintiff, in consequence of which it was an implied term of the plaintiff's contract of employment that, if he was to be let go on the grounds of redundancy, there would have to be a valid redundancy.

In the *Eastwood* case referred to by the Supreme Court in the *Maha Lingham* case, the House of Lords considered its earlier decision in *Johnson v. Unisys Limited* [2003] 1 A.C. 58. Lord Nicholls in his speech representing the majority view observed (at para. 14):-

> "I recognise that, by establishing a statutory code for unfair dismissal, Parliament did not evince an intention to circumscribe an employee's rights in respect of wrongful dismissal. But Parliament has occupied the field relating to unfair dismissal. It is not for the courts now to expand a common law principle into the same field and produce an inconsistent outcome. To do so would, incidentally, have the ironic consequence that an implied term fashioned by the courts to enable employees to obtain redress under the statutory code would end up supplanting part of that code."

Later (at para. 27), Lord Nicholls identified the boundary line of what had come to be known as the "Johnson exclusion area", that is to say, the area within which relief cannot be pursued in the Courts, stating:-

> "Identifying the boundary of the '*Johnson* exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be *dismissed* unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition in law such a cause of action exists independently of the dismissal."

In this case, the plaintiff's employment with the defendant came to an end on 30th November, 2008 and his last day at work was the 28th November, 2008. In essence, what he is trying to achieve by these proceedings is to get his job back. He got the required notice under his contract of employment and his contract of employment was lawfully terminated. If, as he contends, his dismissal was unfair, then the remedy available to him is the remedy provided by statute. As a matter of fact, that is the only remedy he could pursue because, in my view, he had not acquired a cause of action for breach of contract or otherwise prior to his dismissal. In the circumstances, there is no remedy which he can pursue in this Court.

That conclusion is supported by the decisions of the Supreme Court in the *Maha Lingham* case and in the *Sheehy* case.

In my view, it is also correct in principle. There may be situations in which, on the reasoning of Lord Nicholls in the *Eastwood* case, a dismissed employee is entitled to maintain an action at common law, for example, where he has suffered financial loss from psychiatric or other illness as a result of pre-dismissal unfair treatment which would give rise to an action for damages. That scenario was signposted by Lord Steyn in the *Johnson* case and recognised in the *Eastwood* case. The plaintiff's situation here is entirely different. In effect, he 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 2008 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.

The defendant, without prejudice to its contention that the plaintiff could not pursue a remedy in this Court, argued that, in any event, the redundancy was a genuine redundancy. Further, it was contended that there was no question of selection of the plaintiff for redundancy from a pool of employees. He was the only one who held the position of Credit Manager and it was that position which was made redundant. Various authorities were relied on by counsel for the defendant in support of those contentions. I do not propose to express any view on those arguments, which, in my view, are for a different forum.

There will be an order dismissing the plaintiff's application.