Neutral Citation Number: [2011] IEHC 254

THE HIGH COURT

2011 3666 P

BETWEEN

MICHAEL McGRATH

PLAINTIFF

AND

ATHLONE INSTITUTE OF TECHNOLOGY

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on 14th June, 2011

1. This application for an interlocutory injunction seeks to restrain the termination of the plaintiff's employment with the defendant Athlone Institute of Technology which is presently scheduled to take effect on 20th June, 2011. The plaintiff is currently employed as an Assistant Lecturer on the bricklaying course provided by the Institute. The defendant contends that by reason of the prevailing economic conditions, there is no longer any demand for the course and it proposes to make the plaintiff redundant. It is important to stress that there is no suggestion but that the plaintiff has not been a perfectly satisfactory and competent employee. There is, accordingly, no question of any disciplinary issues or of any imputations against the good name of the plaintiff. It is nevertheless perfectly clear that such termination would, unfortunately, have considerable financial implications for the plaintiff given that, in light of his age and the prevailing economic circumstances, he will not easily find other employment.

2. The plaintiff claims that by reason of the fact that he was employed pursuant to a series of fixed term contracts he is now a permanent employee by operation of law. Specifically, he contends that he is entitled to the benefit of a contract of indefinite duration by virtue of the provisions of s. 9 of the Protection of Employees (Fixed-Term Work) Act 2003 ("the 2003 Act") in that it is said that the plaintiff was supplied with fixed term contracts, the aggregate duration of which was greater than four years and in respect of which there was no objective grounds justifying a renewal on a fixed term basis. The Labour Court presently stands seised of the question of whether the plaintiff is entitled to such a contract, an issue to which I will later return.

3. The plaintiff further claims that various contractual representations were made to him on behalf of the Institute that if he, together with the various apprentices on the course, undertook certain significant construction projects on behalf of the Institute on the College campus that he would be given a permanent contract. It is not in dispute but that such works were carried out. The Institute maintains, however, that such work was done as part of the regular practical training of the employees. Thus, as the President on the Institute, Ciaran O'Cathain, explained in his affidavit:-

> "…all work undertaken by the plaintiff of a building nature on the campus was undertaken in circumstances where there was a training benefit to the employees and not otherwise. It goes without saying that brick and block laying apprentices will be required to build walls and the like and it seemed eminently sensible that they would build walls on the campus rather than building walls to be knocked down."

4. Various affidavits have also been filed on behalf of the defendant emphatically denying any suggestions of irregularity or that the plaintiff was promised a permanent contract if he engaged in such construction activities. However, before considering the employment injunction related issues, I must first digress to deal with an issue of privilege.

Privilege

5. An affidavit has been filed by another lecturer, Mr. David Holland, in support of the plaintiff. Mr. Holland maintains that a few months ago he accessed his personnel file with the Institute with a view to taking legal advice. He says that in the course of perusing his own file he came across legal advices obtained by the Institute pertaining to the position of the plaintiff. Mr. Holland contends that these advices were to the effect that the plaintiff was entitled to a contract of indefinite duration. The Institute for its part maintains that these letter of advices was placed on the wrong file in error and that it was later removed when the error came to light. It contends that no privilege has thereby been waived.

6. It is true that legal professional privilege can be waived where documents are handed over in error. In the nature of things, such errors generally arise during the course of the discovery process where privileged documents are handed over in error by one party's legal advisers to the other. The law on this topic was fully explored by Clarke J. in *Byrne v. Shannon Foynes Port Co.* [2008] 1 I.R. 814, [2007] IEHC 315. In this case Clarke J. approved the following statement from Matthews and Malek on *Disclosure*:-

> "Thus where such circumstances occur in the context of an inspection of documents, such as procuring inspection of the relevant document by fraud or realising the mistake on inspection but saying nothing, the court will in effect allow the mistake to be corrected, and refuse to permit the opposing party to use the privileged document. The test is in two stages:
>
> (1) Was it evident to the solicitor seeing privilege documents that a mistake had been made?
>
> (2) If not, would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of a mistake? If the answer to either is yes then…the court would normally restrain the solicitor if he did not give the documents back and might restrain him from acting further if he had read the documents and it was impossible for the advantage to be removed in any other way."

7. It is perfectly clear that such disclosure as there was took place in error. While I appreciate that Mr. Holland is not a solicitor, if one applies the test of whether it would have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of a mistake, then there can be only one answer to that question. The Institute plainly never intended that disclosure of such advices should take place and, hence, there can be absolutely no question of waiver of privilege.

8. In any event, even if the Institute did receive advice along these lines, this would be quite irrelevant to any issue I had to decide. The question of whether the plaintiff is so entitled to a contract of indefinite duration is a matter committed to the adjudicative process and, hence, is a matter for either this Court or - perhaps it would be more correct to say - the Labour Court to decide. As the Supreme Court pointed out in *Mannix v. Pluck* [1975] I.R. 169 mutuality is a key feature of the admissibility of evidence. In that case O Dalaigh C.J. held that a litigant's opinion as to the strength of his case were irrelevant, since this was a matter for the court. By a parity of reasoning, the views of a litigant's legal advisers as to the strength (or otherwise) of their client's case are equally irrelevant.

9. Having reached this conclusion, it is unnecessary for me to consider at any length the argument advanced by Ms. Walley SC to the effect that the court enjoyed some residual jurisdiction to override the privilege where the interests of justice so required. It is true that there is an exception of long standing to the effect that the privilege cannot be used to mask a crime (*R. v. Cox and Railton* (1884) 14 QBD 153), but beyond this any further exceptions would gnaw at the core and essence of the right to take legal advice. In a free and democratic society based on the rule of law, the right of the citizen to take such advice is, of course, fundamental. If the court enjoyed a free ranging jurisdiction to override such advice, this would be tantamount, as the US Supreme Court has observed, to "a prohibition upon professional advice and assistance": see *Mutual Insurance Company v. Schaefer* 94 U.S. 467 (1877).

10. In any event, as I have just indicated, I take the view that the legal advice in question is irrelevant to any issue which I have to decide. For what it is worth, however, I cannot accept that this Court could carve another wide-ranging exception to the scope of legal professional privilege without undermining the fundamental right to seek legal advice itself.

The appropriate test for an interlocutory injunction in employment matters

11. In the special circumstances of this application, I consider that the fairest thing is to assume in the plaintiff's favour that he would be able to show at the full hearing that he was a permanent employee, whether by virtue of the operation of the 2003 Act or by reason of contractual representations which were made to him by others who had the power to bind the Institute. Starting from this working hypothesis, we may next examine the circumstances in which this Court might be prepared to grant injunctive relief.

12. So far as the 2003 Act is concerned, the plaintiff commenced a claim (along with three other members of staff) in November 2009, the details of which were submitted to a Rights Commissioner for adjudication under s.14 of the 2003 Act. This claim was rejected in September 2009 and the claimants duly appealed to the Labour Court pursuant to s. 15(1) of the 2003 Act. That Court held a hearing earlier this month and a ruling is awaited. Since the Labour Court stands seised of this dispute, I should make it absolutely clear that nothing in this judgment should be understood as expressing any view whatever on the merits of the claim.

13. The defendant objects that this Court has no jurisdiction whatever in relation to the 2003 Act. It is true that by virtue of ss. 13 and 14, the claimant must first apply to the Rights Commissioner and to the Labour Court and that the only jurisdiction of this Court under the 2003 Act is to entertain an appeal from the Labour Court on a point of law pursuant to s. 15(6). The structure of the 2003 Act necessarily excludes the jurisdiction of this Court at first instance. It is quite clear that if a statutory jurisdiction of this kind is committed in the first instance to an administrative agency such as the Labour Court, then this Court does not enjoy some parallel jurisdiction to grant declaratory relief in respect of the construction of the statute in question: see generally the judgment of Charleton J. in *Doherty v. South Dublin County Council (No.2)* [2007] IEHC 4, [2007] 2 I.R. 696 at 707.

14. Contrary to the submissions of the defendant, however, that is not quite the issue here. Insofar as plaintiff in his pleadings seeks declaratory relief from this Court regarding his entitlements under the 2003 Act, he invokes a first instance jurisdiction which, as have just seen, this Court does not enjoy. Rather, the only jurisdiction of this Court under the 2003 Act is simply an appellate one under s. 15(6). But insofar as the injunction is concerned, the plaintiff seeks that order in aid of what he hopes will be a favourable Labour Court decision and because the Labour Court enjoys no jurisdiction to grant him interim or interlocutory relief.

15. Perhaps a better way of looking at the problem is as follows: let us assume that the Labour Court were ultimately to find for the plaintiff and that the practical effect of such a ruling was that his employment could not be terminated at will. If that were indeed the situation, then it would follow that as the Labour Court has no jurisdiction to grant him interim relief, there might be a risk that a favourable decision with the consequence of precluding termination in the manner presently proposed would come too late to be of any practical benefit to the plaintiff, given that the termination is imminent. The real question is whether this Court would enjoy a jurisdiction to grant an injunction in aid of the Labour Court in circumstances where the plaintiff's right to secure the benefit of that decision would otherwise have been wholly undermined.

16. In my judgment, in that situation this Court would enjoy such a jurisdiction, not least by reason of the inherent full original jurisdiction which this Court enjoys to determine all questions of law and fact by virtue of Article 34.3.1 of the Constitution. It may be recalled that in *Pierse v. Dublin Cemeteries Committee (No.1)* [2009] IESC 47, [2010] 1 I.L.R.M. 349 the Supreme Court held that a plaintiff had standing to pursue a claim for damages for alleged breaches of constitutional rights in respect of the operation of a private Act of the Oireachtas by a statutory body in circumstances where that was the only real remedy open to him. It is (at least) necessarily implicit in the judgment of Macken J. that such a plaintiff must be afforded such a right, as otherwise he would have been left without an effective remedy.

17. I reached the same conclusion with my own judgment in *Albion Properties Ltd. v. Moonblast Ltd.* [2011] IEHC 107, albeit in a very different context. Here the question was whether this Court had the jurisdiction to grant a mandatory interlocutory injunction to require a commercial tenant - who was manifestly and persistently in default with regard to rental payments - to yield up possession. I rejected the argument that there could be any such jurisdictional bar, saying:-

> "Any supposed jurisdictional bar which prevented the court from granting injunctive relief in an appropriate case to require a defaulting tenant to yield up possession of a commercial tenancy would be at odds with duty imposed on the courts by Article 40.3.2 of the Constitution to ensure that the property rights of the plaintiff landlord are appropriately vindicated in the case of injustice done. The courts are under a clear constitutional duty to ensure that the remedies available to protect and vindicate these rights are real and effective: see, *e.g.,* the comments of Kingsmill Moore J. in *The State (Vozza) v. O'Floinn* [1957] I.R. 227 at 250; those of Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 and the authorities set out in my own judgment in *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31."

18. It must be acknowledged that those cases concerned issues of standing and the jurisdiction to grant relief in respect of substantive civil actions which obviously raised justiciable issues. If, nevertheless, the plaintiff were to be left with the decision of an administrative agency whose efficacy was otherwise wholly undermined if no interim relief could be given by this Court, then in such exceptional cases, this Court must be deemed to enjoy such a jurisdiction, not least by reason of the obligation placed on the judicial organ of the State by the terms of Article 40.3.1 of the Constitution to ensure that legal rights can be appropriately vindicated: see,

e.g., the decision of the Supreme Court in *Grant v. Roche Products Ltd.* [2008] IESC 35, [2008] 4 I.R. 679.

Is this an appropriate case in which to grant relief?
19. It is at this juncture that we arrive at the critical question, namely, could the Institute terminate the plaintiff's employment in the manner which is proposed, even if the Labour Court were to hold that the plaintiff had a contract of indefinite duration?

20. The starting point, of course, is that it is clear that at common law, subject to appropriate contractual terms to the contrary, an employer can dismiss for any reason or no reason on giving reasonable notice, even in the case of a permanent employee. Any lingering doubts on this point were dispelled by the Supreme Court's decisions in both *Maha Lingham v. Health Service Executive* [2005] IESC 89, [2006] 17 E.L.R. 137 and *Sheehy v. Ryan* [2008] IESC 14, [2008] 4 I.R. 258. Some may think that this situation is unsatisfactory, but if so, change in this area is a matter for the Oireachtas. Indeed, it may be observed that the Oireachtas did legislate in this general area via the Unfair Dismissals Acts 1977-2005, but in so doing it was careful to leave unchanged the common law in relation to the termination of employment contracts. It was, moreover, for this very reason that in *Nolan v. Emo Oil Services Ltd.* [2009] IEHC 15 Laffoy J. expressed her unwillingness to extend the common law "in parallel to the statutory code in relation to unfair dismissal and redundancy [as this would] und up supplanting part of the code".

21. Thus, therefore, even if the various agents of the Institute did make representations to the plaintiff of the kind alleged in respect of the building work and even if it were held that he was thereby entitled to a permanent position as a result of such representations, the Supreme Court's decision in *Sheehy v. Ryan* confirms that such employment can be terminated by the employer absent an express clause to the contrary in the actual contract. In the present case, therefore, *Sheehy v. Ryan*, therefore, rules out any possibility of an injunction insofar as it concerns a contractual claim, not least given that no issue has been taken regarding the adequacy of the notice.

22. By a parity of reasoning, therefore, it follows that this Court has no jurisdiction to restrain the termination of employment in a case such as the present, unless the plaintiff can point to something in the 2003 Act which impliedly precludes termination for redundancy in the event that he is deemed to have a contract of indefinite duration and where the plaintiff would otherwise suffer irremediable loss. While the remedial provisions of the 2003 Act are, perhaps, somewhat obscure in places, the Rights Commissioner (and, on appeal, the Labour Court) could in principle order re-instatement in the same manner as if the employee had been unfairly dismissed for the purposes of the Unfair Dismissals Acts 1977-2005: see s. 14(2)(c) of the 2003 Act.

23. The object of this provision would appear to be to give the Labour Court the power to place the employee who had previously simply been given a fixed term contract in the same position as if he were now or, indeed, always had been on a permanent contract since the relevant date: see, *e.g.,* the comments of Fennelly J. to this effect in *Maha Lingham*. But, as we have seen from *Sheehy v. Ryan*, so far as the common law is concerned, that in itself is no impediment to termination and there is nothing in the 2003 Act to suggest that the employment of such a re-instated employee could not be terminated in the future. If that were to happen, then such an employee must then elect as between pursuing the common law remedy of wrongful dismissal and relief under the Unfair Dismissals Acts.

24. If, therefore, the Labour Court were to decide in the plaintiff's favour and hold that he did enjoy a contract of indefinite duration, this would simply place him in the same situation as if he were a permanent employee. But absent an express contractual stipulation to the contrary, *Sheehy v. Ryan* makes it plain that such an employee's contract of employment can be terminated at will in a case such as the present one. If the *fairness* of that dismissal is to be adjudicated, this can only be done through the mechanism of the Unfair Dismissals Acts.

Conclusions
25. I am, accordingly, coerced to the conclusion that even if the Labour Court's decision were favourable to the plaintiff, this would not in practice significantly ameliorate his position so far as right to seek an injunction is concerned. Even if the Labour Court had already declared that the plaintiff enjoyed permanent employee status, this would not entitle him to an injunction in present circumstances. Of course, if the termination goes ahead the plaintiff may well be entitled to relief under the Unfair Dismissals Acts, but should this occur, that will be a matter for the Employment Appeals Tribunal and not for this Court.

26. It follows, therefore, that for the reasons stated, I must decline to grant the interlocutory injunction sought.