ARTHUR COX

Group Briefing
August 2019

Employment Injunctions: *Courts will not "entertain" an injunction where legislation covers the employee's claim, available remedies and means of redress*

In welcome decisions for employers, the High Court in *Power v Health Service Executive* and Court of Appeal in *Kearney v Byrne Wallace* have confirmed that an employment injunction cannot be granted where the main claim is governed by statute, and should be heard and considered by the Workplace Relations Commission ("WRC")[1].

Given the majority of employment rights fall under this bracket, Irish employers may breathe a (small) sigh of relief.

The employment injunction, or threat of an injunction, is unquestionably one of the most useful tools that Irish employees possess when in dispute with their employer. The ability to prevent an employer from taking disciplinary action or conducting a dismissal due to a failure to follow a contractual process or provide implied fundamental rights (such as following fair procedures / protection of good name), can have enormous implications for each party. It also tends to come as a huge surprise to most international employers.

The rule of thumb is that an individual[2] employment injunction can only be obtained as an interim measure before a breach of contract claim is heard. However, employees have tried to push the boundaries of when an injunction may be granted to encompass preventing dismissal for redundancy, or from a specific role under a fixed term contract. Happily for employers, the Courts have pushed back and will not grant an injunction where the Oireachtas has provided specific remedies and means of redress in legislation.

Let's take a closer look at these cases.

INJUNCTION BASICS

In simple terms an interlocutory injunction is a court order either prohibiting a person from doing something, or requiring a person to do

1 The notable statutoy exception to this is that an injunction may be sought where the dismissal is as a result of making a protected disclosure.

2 Collective injunctions fall beyond the scope of this article.

something, so as to protect an existing common law right pending a full trial in relation to an infringement of that right. Within an employment context the existing rights that may be protected arise from the employment contract.

The tests which an employee must meet to obtain an injunction are:

» The employee must demonstrate a *strong case* that they are likely to succeed at the hearing of the main claim;

» Damages are not an adequate remedy e.g. due to reputational impact, destitution by reason of loss of income or harm caused as the employee's self-worth and emotional well-being is bound to their role; and

» The balance of convenience, when weighing up the potential harm and interests of the parties, favours the granting of an injunction.

POWER V HEALTH SERVICE EXECUTIVE

Background

Mr Power, a HSE employer, had a permanent role as CFO for the Health Service Executive West. In 2014 he was asked to fill in as CEO of the Saolta University Health Care Group on a fixed-term assignment. The fixed-term assignment was then renewed on a number of occasions, until in December 2018 it was renewed to specifically allow for the selection process and appointment of a permanent CEO. The renewal letter made clear that Mr Power's employment would revert to his prior role, or an equivalent, at the end of the assignment. Mr Power applied for the role of CEO but was unsuccessful. He subsequently made a claim to the WRC under section 9 of the Protection of Employees (Fixed-Term Work) Act 2003 (the "**Fixed Term Work Act**") that his position as CEO had been turned into a contract of indefinite duration after four years performing the role. A claim arising from a breach of the Fixed Term Work Act has to be made to the WRC under section 41 of the Workplace Relations Act 2015.

Mr Power then sought an injunction from the High Court pending a decision by the WRC which would: prevent the HSE from terminating his employment as CEO; prevent the appointment of any other person to the role of CEO; restrain the continuation of the recruitment process; and require the HSE to allow him to discharge his duties as CEO.

High Court decision

Mr Justice Allen held the High Court had no jurisdiction to entertain Mr Power's application for an injunction for the following reasons:

» The High Court has no jurisdiction to decide upon the merits of Mr Power's claim under the Fixed Term Work Act (which falls squarely upon the WRC under the legislation).

» The High Court also has no jurisdiction to express a view on the likely outcome of the claim before the WRC, and it follows cannot apply the first limb of the necessary tests for an injunction i.e. does the claimant have a strong case.

» The High Court has no jurisdiction to grant an interlocutory injunction in cases in which it has no jurisdiction to decide the substance of the dispute. It also has no jurisdiction to supplement the remedies the Oireachtas has made available under the Fixed Term Work Act – "*The plaintiff's right to pursue his claim is not in any way ineffective or less meaningful because the available remedy may not be all that he might wish, or might be different to the remedy available to the courts in dealing with common law claims, or other administrative agencies in dealing with other statutory claims.*"

» If the Court assumed Mr Power would make out his substantive case (as requested by Mr Power) and granted the injunctions sought, the Court would be shaping and deciding the remedy for the claim. It is not for the High Court to decide the remedy that the WRC may order.

KEARNEY V BYRNE WALLACE

Background

Mr Kearney was employed as a solicitor by Byrne Wallace. Mr Kearney was absent from work due to ill health for a number of periods during his employment, before being made redundant and paid in lieu of notice. Mr Kearney disputed that a genuine redundancy situation existed and sought an interlocutory injunction to restrain his dismissal and require continued payment until the determination of his various claims.

The High Court held Mr Kearney had not on the evidence made out a strong case in relation to whether the redundancy was a sham, which justified the granting of an injunction. It also held, following the High Court decision of *Nolan v Elmo Oil Services Limited*, that there was no jurisdiction to grant an injunction where there is no contractual basis for Mr Kearney's underlying claim. The Court has no role to play where the Oireachtas has provided specific remedies for unfair dismissal. It held the correct forum for Mr Kearney's claims was the WRC as set out in the Unfair Dismissals Acts and Redundancy Payments Acts.

Court of Appeal decision

Mr Kearney argued at the Court of Appeal that there had been a breach of the implied terms of his employment contract, namely: the firm had failed to act towards him with good faith and fidelity; the firm had disregarded its obligation to provide him with work; and the decision to dismiss for redundancy was capricious and arbitrary.

Mr Kearney argued that "redundancy" was a label incorrectly applied to the dismissal and also urged the Court of Appeal to find that *Nolan* was wrongly decided.

The Court of Appeal held:

» The *Nolan* case is "*embedded in the jurisprudence on this area*" and presented an "*insuperable obstacle*" to Mr Kearney's injunction application.

» Mr Kearney had not made out a strong case as a matter of law to meet the first test of obtaining an injunction, and the High Court was

correct to conclude as they had done so.

- Mr Kearney's remedies lie within the statutory framework provided by the Unfair Dismissals Act and Redundancy Payments Act.
- Under common law, an employer is entitled terminate a contract of employment upon proper notice, and they had done so in this case, by providing a payment in lieu of notice.

Of note, the Court of Appeal held it may be possible for implied terms to amount to a breach of contract suitable for granting injunctive relief provided the term met the basic legal principle that it should be implied into the contract to give it "business efficacy", or in other words, as it is necessary to do so.

The Court of Appeal did not "*reject out of hand*" the argument that there could be a breach of the implied term of mutual trust and good faith which could found an injunction but reached no definitive conclusion. In any event, in this case, the Court held Mr Kearney had not made clear what actions or facts he considered were a breach of the implied term of trust and good faith – furthermore it had not been established that Byrne Wallace acted in bad faith in reaching a decision to dismiss on the terms of redundancy.

WHAT DO THESE CASES MEAN FOR EMPLOYERS?

These cases make clear:

1. Courts will not grant an employment injunction where the claim arises squarely under legislation which requires the claim to be brought and heard at the WRC.
2. Employers can proceed with decisions with regard to the termination of employment provided they do not breach employees' employment contracts e.g. redundancies cannot be stalled and selections challenged in Court. However employers must still adhere to a fair process otherwise they are likely to lose any subsequent unfair dismissal claim, and as it is the right thing to do!
3. The door has been left open for the grant of an employment injunction on the basis of breach of the implied contractual term of trust and good faith. We will have to wait and see whether any employees take up the challenge of obtaining an employment injunction on this basis.

KEY CONTACTS

LOUISE O'BYRNE
PARTNER
+353 1 920 1185
louise.obyrne@arthurcox.com

HELEN WEBB
ASSOCIATE
+353 1 920 2038
helen.webb@arthurcox.com

OUR TEAM

SEAMUS GIVEN
HEAD OF EMPLOYMENT GROUP
+353 1 920 1210
seamus.given@arthurcox.com

KEVIN LANGFORD
PARTNER
+353 1 920 1226
kevin.langford@arthurcox.com

CIAN BEECHER
PARTNER
+353 1 920 1193
cian.beecher@arthurcox.com

LOUISE O'BYRNE
PARTNER
+353 1 920 1185
louise.obyrne@arthurcox.com

DEBORAH DELAHUNT
ASSOCIATE
+353 1 920 1085
deborah.delahunt@arthurcox.com

GRACE GANNON
ASSOCIATE
+353 1 920 1077
grace.gannon@arthurcox.com

SARAH LAWN
ASSOCIATE
+353 1 920 1769
sarah.lawn@arthurcox.com

SALLY DOYLE
ASSOCIATE
+353 1 920 1785
sally.doyle@arthurcox.com

NIAMH FENNELLY
PROFESSIONAL SUPPORT LAWYER
+353 1 920 1392
niamh.fennelly@arthurcox.com

RACHEL BARRY
ASSOCIATE
+353 1 920 1281
rachel.barry@arthurcox.com

JOHN CASEY
ASSOCIATE
+353 1 920 1268
john.casey@arthurcox.com

SHANE MCCARTHY
ASSOCIATE
+353 1 920 1263
shane.mccarthy@arthurcox.com

MAILLE BRADY BATES
ASSOCIATE
+353 1 920 1351
maille.brady.bates@arthurcox.com

SARAH FAULKNER
ASSOCIATE
+353 1 920 1296
sarah.faulkner@arthurcox.com

HANNAH O'FARRELL
ASSOCIATE
+353 1 920 1293
hannah.ofarrell@arthurcox.com

DECLAN MACQUILLAN
ASSOCIATE
+353 1 920 1308
declan.macquillan@arthurcox.com

HELEN WEBB
ASSOCIATE
+353 1 920 2038
helen.webb@arthurcox.com