THE HIGH COURT

[2011 No. 248MCA]

IN THE MATTER OF THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003 AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTIOIN 15(6) OF THAT ACT

BETWEEN

UNIVERSITY COLLEGE CORK

APPELLANT

AND

DR. NAOMI BUSHIN

RESPONDENT

JUDGMENT of Kearns P. delivered on the 17th day of February, 2012.

FACTS

University College, Cork (the "appellant") has brought this appeal pursuant to s. 15(6) of the Protection of Employees (Fixed-Term Work) Act 2003 (the "Act") against Determination FTC/10/42 of the Labour Court made on 20th July 2011 (the "determination").

The Labour Court determined that a complaint from Dr. Naomi Bushin (the "respondent") pursuant to the Act was well-founded, and directed the appellant to pay to the respondent an *ex gratia* redundancy

payment calculated on the basis of four weeks pay per year of service, in addition to her statutory redundancy entitlement.

The respondent was employed as a full-time researcher on an EU-funded Marie Curie Excellence Grant Project in the Department of Geography at UCC on a fixed-term contract from 1st April, 2006 until 30th September, 2009. When the contract came to an end, the respondent was made redundant and a statutory redundancy was paid to her by the appellant. The fact of redundancy and the respondent's entitlement to redundancy are not in dispute.

On 18th March, 2010 the respondent referred a claim under the Act to the Rights Commissioner, alleging that, contrary to s. 6(1), she had been treated less favourably than a comparable permanent employee in that she had not received the same *ex gratia* redundancy payment paid to several valid comparators as defined by s. 5 of the Act.

The Rights Commissioner issued a decision on 19th November, 2010, finding the respondent's claim to be well-founded.

By notice of appeal dated 30th December, 2010 the appellant appealed the decision of the Rights Commissioner to the Labour Court. A hearing took place on 11th May, 2011 and the Labour Court made its determination on 20th July, 2011.

The Labour Court directed the appellant to pay to the respondent an *ex gratia* redundancy payment calculated on the basis of four weeks

pay per year of service, in addition to her statutory redundancy entitlement.

In so doing, the Labour Court:-

(a) identified, as an appropriate comparable permanent employee, an employee within the sector of third level education rather than an employee of UCC itself, *i.e.* applied s. 5(1)(c) of the Act;

(b) found as a matter of fact that the comparator identified by the respondent had been treated in a more favourable manner in the same circumstances as the respondent;

(c) found as a matter of law that an *ex gratia* redundancy payment comes within the meaning of less favourable conditions of employment for the purpose of s. 6 of the Act; and

(d) rejected the appellant's submission that enhanced redundancy payments to permanent employees could be objectively justified under s. 7 of the Act.

At the hearing, the Labour Court paid considerable attention to the question of who would be an appropriate comparable permanent employee to the respondent in their consideration as to whether s. 5(1)(a) applied in this case. The Labour Court canvassed the views of both parties and sought supplemental submissions in relation to this issue. The

appellant gave evidence that they had not made a permanent employee redundant, and this was not disputed by the respondent.

ISSUES IN DISPUTE

The appellant asserts that the Labour Court erred in law in making its determination, namely that:-

(a) The Labour Court erred in its construction and/or application of s. 5 of the Act;

(b) The Labour Court erred in its construction and/or application of s. 6 of the Act; and

(c) The Labour Court erred in its construction and/or application of s. 7 of the Act.

LEGISLATION

Section 5 of the Act provides:-

> *"(1) For the purposes of this Part, an employee is a comparable permanent employee in relation to a fixed-term employee if:-*
>
> *(a) the permanent employee and the relevant fixed-term employee are employed by the same employer or associated employers and one of the conditions referred to in subsection (2) is satisfied in respect of those employees,*

(b) in case paragraph (a) does not apply (including a case where the relevant fixed-term employee is the sole employee of the employer), the permanent employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant fixed-term employee, to be a type of employee who is to be regarded for the purposes of this Part as a comparable permanent employee in relation to the relevant fixed-term employee, or

(c) in case neither paragraph (a) nor (b) applies, the employee is employed in the same industry or sector of employment as the relevant fixed-term employee and one of the conditions referred to in subsection (2) is satisfied in respect of those employees,

and references in this Part to a comparable permanent employee in relation to a fixed-term employee shall be read accordingly."

"*(2) The following are the conditions mentioned in subsection (1):-*

(a) both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,

(b) the work performed by one of the employees concerned is of the same or a similar nature to that performed by the other

and any differences between the work performed or the conditions under which it is performed by each, either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and

(c) the work performed by the relevant fixed-term employee is equal or greater in value to the work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions."

The relevant subsections of s. 6 of the Act provide:-

"*(1) Subject to subsections (2) and (5), a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable permanent employee.*

(2) If treating a fixed-term employee, in respect of a particular condition of employment, in a less favourable manner than a comparable permanent employee can be justified on objective grounds then that employee may, notwithstanding subsection (1), be so treated."

Section 7 of the Act provides:

"*(1) A ground shall not be regarded as an objective ground for the purposes of any provision of this Part unless it is based on*

considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose.

(2) Where, as regards any term of his or her contract, a fixed-term employee is treated by his or her employer in a less favourable manner than a comparable permanent employee, the treatment in question shall (for the purposes of section 6 (2)) be regarded as justified on objective grounds, if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment."

On behalf of the appellant, Mr. Mark Connaughton, S.C. contended that there were employees of a comparable permanent nature within UCC and that in those circumstances an assessment under s. 5(1)(a) was appropriate in the circumstances of this case. He contended that the Labour Court was in error insofar as it considered for the purpose of the statutory exercise employees within the higher education of the sector

generally. The Labour Court had also found that UCC afforded less favourable treatment to the respondent, but as UCC had never made a redundancy payment to a comparable permanent employee, there could be no issue of less favourable treatment. He contended that the Labour Court further erred in holding that enhanced redundancy terms constitute "conditions of employment". He further contended that the Labour Court erred in failing to recognise that enhanced redundancy terms for permanent employees could be objectively justified.

In response Ms. Katherine Mahon B.L. accepted that, in construing s. 5 (1) of the Act, consideration must first be given to section 5 (1)(a). If no appropriate comparator exists within the category set out at s. 5(1)(a), consideration must then be given to section 5(1)(b). If no appropriate comparator exists within s. 5(1)(b), consideration must then be given to section 5 (1)(c). Ms. Mahon contended that this was precisely what the Labour Court had done and had expressly stated as follows at p. 8 of its determination:-

> "*Section 5 of the Act provides that in choosing a comparator the complainant must under s. 5 (1)(a) first examine their own employer and any associate employer for a valid comparator. If unsuccessful then the complainant must proceed under s. 5(1)(b) to examine any employees employed under a collective agreement, which agreement*

also affects them. If not successful under either of the above then under s. 5(1)(c) the complainant may seek a comparator in the same industry or sector of employment with a proviso that the selected comparator must be engaged in the same or similar work of equal or greater value."

She contended that at no point during the Labour Court hearing or in its determination did the Labour Court reject the appellant's assertion that it had never made a permanent employee redundant. However, in accepting the appellant's evidence on this point, the Labour Court concluded that as no appropriate comparator could be identified within UCC this effectively answered the question as to whether s. 5 (1)(a) was applicable to the respondent. It had certainly not gone about its task on the basis of completely ignoring that statutory provision.

DECISION

I am satisfied, contrary to the submissions of the appellant, that the Labour Court did consider s. 5 (1)(a) and its possible application to the respondent in relation to several categories of permanent employees. Those considered included staff and employees of St. Catherine's College of Education for Home Economics, employees of the Royal College of Surgeons, catering staff in the National University of Ireland in Maynooth and an employee in Wexford VEC.

The Labour Court decided that none of these employees fell within the category described at s. 5(1)(a) before proceeding to consider whether an appropriate comparator existed for the purposes of section 5(1)(b).

Having conducted that secondary exercise, the Labour Court then moved on to consider section 5(1)(c).

Given that no permanent employees employed by the appellant have been made redundant, I cannot see how any such permanent employee would be an appropriate comparator, either for the purposes of the statute or for the purposes of Council Directive 1999/70/EC of 28th June 1999 concerning the Framework Agreement on Fixed Term Work concluded by ETUC, UNICE and CEEP. Clause 1 of the Framework Agreement describes the purpose of the Directive as being, *inter alia*, to improve the quality of fixed term work by ensuring the application of the principle of non discrimination and to establish a framework to prevent abuse arising from the use of successive fixed term employment contracts or relationships.

While the appellant did contend that the Labour Court had failed to properly consider s. 5 (1)(a) I am satisfied that this submission is based on an incorrect premise. There is an inherent artificiality in arguing that no issue of discrimination can arise because no permanent employees employed by the appellant have been made redundant. It seems clear to me that to classify such permanent employees as appropriate comparators

would, contrary to the purposes of the Directive, foster discrimination by encouraging employers to select fixed term employees for redundancy ahead of permanent employees, thereby avoiding the creation of any form of precedent of enhanced redundancy payments against which fixed term employees could measure their own payments.

I am also satisfied that the Labour Court was correct in law in finding that an *ex gratia* redundancy payment represented a "*condition of employment*" within the meaning of the Act. In so finding, the Labour Court relied upon the decision of the European Court of Justice in case C 262/88 *Barber v. Royal Exchange* [1990] ICR 616, in which the ECJ stated at para 16:-

> "*A redundancy payment made by the employer, such as that which is at issue, cannot cease to constitute a form of pay on the sole ground that, rather than deriving from the contract of employment, it is a statutory or ex gratia payment.*"

A similar view was taken in the High Court (Smyth J.) in *Sunday Newspapers Ltd. v. Kinsella* [2007] IEHC 324 at 18.

I am further satisfied that the two decisions cited by the appellant in relation to "*conditions of employment*" namely, *O' Cearbhaill v. Bord Telecom Éireann* [1994] ELR 54 and *Rafferty v. National Bus and Rail Union* [1997] 2IR 424 can be distinguished on the basis that both decisions have been superseded by the Act of 2003.

In relation to the submissions made by the appellant in relation to s. 7, I am satisfied that in view of my conclusion that the Labour Court did not err in law in finding that the respondent was treated less favourably than appropriate comparators, it was correct to consider the issue of objective justification under section 7.

The respondent was denied an *ex gratia* payment on the basis she was a fixed term employee. *Ex gratia* payments were made to valid comparators. There was thus no possibility of her receiving some different, but no less favourable treatment. The contention advanced by the appellants is predicated entirely on the status of the respondent as the fixed term employee and as such is, in my view, precluded by s. 7(1) of the Act.

Overall, I am satisfied from a perusal of the determination of the Labour Court that it gave every aspect of this matter careful and comprehensive consideration.

Bodies such as the Labour Court are, in my view, entitled to a significant degree of curial deference with regard to the way in which they conduct their business. I would exercise that discretion in the instant case in favour of non-intervention to grant the relief sought by the appellant in this appeal.