

**THE HIGH COURT**

[2022] IEHC 487

**2022 No. 1176 P**

**BETWEEN:**

**JAMES LEONARD**

**PLAINTIFF**

**-AND-**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**JUDGMENT of Ms Justice Eileen Roberts delivered on 3<sup>rd</sup> August 2022**

**Introduction**

1. This is the plaintiff's application for an interlocutory injunction against the HSE. An interim injunction was granted by this Court on the 25 March 2022 in the following terms:

"..that the Defendant its servants or agents be restrained until after the 4 April 2022 or until further Order in the meantime from appointing any person to the position of Paramedic Supervisor at the National Ambulance Service Loughlinstown County Dublin save on terms that will preserve the Plaintiff's contractual entitlements in the event of the Plaintiff being successful herein."
2. The interim relief was continued by consent of the parties by Orders dated 12 May 2022 and 26 May 2022. The matter came before this Court for hearing on 26 July 2022.
3. The plaintiff issued his Notice of Motion on 28 March 2022 seeking the following interlocutory reliefs:
  1. An Injunction restraining the Defendant, its servants or agents from appointing any person to the position of Paramedic Supervisor at the National Ambulance Service Loughlinstown County Dublin save on terms that will preserve the Plaintiff's contractual entitlements in the event of the Plaintiff being successful herein;
  2. An Injunction directing the Defendant to pay to the plaintiff all salary and other benefits to which he is entitled under his contract of employment, until the trial of the action.
4. The relief at paragraph 1 above mirrors the relief granted by this Court on an interim basis. The relief claimed at paragraph 2 above is a new request made at this interlocutory stage.

## **Background**

5. There are a number of factual matters which are not in dispute between the parties including the following:

- The plaintiff was employed by the defendant since in and around 2000.
- With effect from 8 April 2019 (on the basis of an employment contract signed by the plaintiff on 29 March 2019 and signed by the HSE on 26 March 2019), the plaintiff was promoted to the position of Paramedic Supervisor (Leading EMT) within the National Ambulance Service ("NAS"), a division of the defendant. The contract confirmed in terms of "Location" that the plaintiff was employed in the HSE National Ambulance Service with "an initial assignment to NAS Area (North Leinster). You may be required to work in any Station or HUB of Stations as and when the need arises". This was a grade IV position.
- The plaintiff performed his role diligently and to the satisfaction of the defendant. It was confirmed by counsel for both parties that there is no suggestion of any breakdown in trust or confidence between the parties and no suggestion of any wrongdoing by the plaintiff.
- In or about November 2021 the plaintiff successfully applied for a promotional post of Business Continuity Manager with the defendant assigned to James Connolly Memorial Hospital Blanchardstown (JCMH). This was a grade VII post.
- The plaintiff notified the NAS that he was leaving his role to take up the new position. On the 21 January 2022 he completed and submitted a Form HR106 to the NAS which recorded his last day of pay as being the 6 February 2022. This Form HR106 is used where HSE employees are either leaving the HSE or where they are transferring to another position within another payroll division of the HSE.
- The plaintiff was issued with a new contract of employment in respect of the position of Business Continuity Manager and that contract was signed by the plaintiff on the 24 January 2022, with a commencement date of 7 February 2022.
- The plaintiff's last day of work in the NAS was on 4 February 2022 and he marked this with a celebration with colleagues who made a presentation to him to commemorate his service with the NAS.
- The plaintiff commenced his new role in JCMH on 7 February 2022.
- The plaintiff tendered his resignation from his role as Business Continuity Manager a mere 8 days later on the 15 February 2022.

6. What happened between the 7 and 15 February 2022 and immediately thereafter is central to the dispute which has arisen in this case. The parties are not agreed on the sequence of events (or the implications of them) during those periods.

**The plaintiff's position.**

7. The plaintiff maintains that very shortly following commencing his new role he "came to the realisation that I had made a mistake and should not take up the new position" (para. 8 of the plaintiff's grounding affidavit). He says that his partner spoke to the plaintiff's line manager in the NAS, Mr Murray, on the 8 February 2022 indicating that the plaintiff wanted to change his mind. The plaintiff himself spoke to Mr Murray the following day, 9 February 2022, and enquired whether he could go back to his old job. Mr Murray said he would make enquiries. Mr Murray contacted the Chief Ambulance Officer Paul Gallen and he confirmed this contact by text message to the plaintiff on the 9 February 2022 and indicated that Mr Gallen was "waiting for Collete to ring back..". The "Collete" in question was Colette Walsh, the Assistant National Director, Human Resources for the defendant and the deponent of the defendant's affidavits in these proceedings.
8. On 10 February 2022 the plaintiff emailed Mr Paul Gallen to "request your help". The email stated that the plaintiff had "made the biggest mistake of my career and my life by leaving the ambulance service". He enquired "if there is any way for me to return to my position as it stood on Sunday 6th February I would be forever thankful". He also asked "can I please plea that my HR106 is retracted or reversed and I can return to duty as soon as possible as I was".
9. The plaintiff avers in his grounding affidavit that on the 14 February 2022 in a phone call from Mr Murray the plaintiff was granted approval to resume his position as Paramedic Supervisor in Loughlinstown Ambulance Station, subject to release from his contract with JCMH. There is no affidavit from Mr Murray or other direct evidence to corroborate this averment. However, on the following day, 15 February, the plaintiff terminated his contract with JCMH with immediate effect and sent an email in those terms to Doreen Powell which referred to an earlier conversation that day between the two of them. She responded to his email in the following terms:

"Dear Jim,  
I acknowledge receipt of your email and am sorry that the timing of the job was not right for you. I wish you all the best for the future in returning to your previous role at NAS"
10. This chain of emails was forwarded by the plaintiff to Mr Gallen at 18.03 on the 15 February and the plaintiff indicated that he looked forward to engaging with Mr Gallen in terms of returning to his role. At precisely the same time of 18.03 on the 15 February the plaintiff emailed the defendant's Breda Carroll to request "that my HR106 form and process be withdrawn". She confirmed almost immediately by email at 18.06 on the 15 February that "Your HR106 is withdrawn". The plaintiff then emailed Mr Gallen at 18.08 thanking him for his support and understanding. The plaintiff stated that he looked forward to returning to work as soon as possible and continuing to work with the National

Ambulance Service management team and colleagues. At 18.10 the plaintiff texted Mr Murray to say "All sorted, thanks, I also got a call from Breda so everything is just perfect, I can't thank you enough".

11. The plaintiff avers that it was agreed that he would use his accumulated time off in lieu (TOIL) from 7 February 2022 to 6 March 2022 and that he would report for duty on 7 March with his service preserved. It is not entirely clear to this Court precisely how this was agreed but it appears that the plaintiff did in fact submit timesheets on that basis to the defendant's Mr John Shevlin with effect from Monday 7 February 2022 (although the plaintiff was on that day actually working in JCMH). Timesheets continued to be sent to Mr Shevlin on this basis up to at least 20 March 2022.
12. News of the plaintiff's expected return to work became known to some of his colleagues as early as 18 February and text messages to that effect were exhibited by the plaintiff. On the 18 February the plaintiff had a call with Mr Murray to discuss operational matters and claims that he was then assigned tasks for completion on 7 March 2022. He also states that in a later call on 21 February with Mr Murray and Ms Kathrina Murray it was reiterated to the plaintiff that he was resuming the position of Paramedic Supervisor based in Loughlinstown Ambulance Station on his rostered line, with no break in service, and that he would be on duty on 7 March 2022.
13. Matters then appear to have taken an adverse turn from the plaintiff's perspective on 24 February 2022. On that date the plaintiff received an email from Breda Carroll confirming that as the plaintiff had been set up on the East Payroll with effect from 7 February for his JCMH post and as he could not be paid by two different payrolls for the same time period, "we have no option but to process your HR106 with an effective date of 06.02.2022". The plaintiff avers that this caused him concern which he immediately escalated to management. On the evening of the 24 February the plaintiff emailed Mr Carroll, copying Mr Murray and Mr Gallen, confirming that on the 4 February 2022 "prior to the finishing date on the form" he had requested through his line manager to withdraw his HR106. This Court notes that in fact on the evidence presented at the interlocutory hearing the plaintiff's request in these terms appears to have been made orally on the 9 February and in writing on the 10 February as set out above.
14. The Plaintiff referred in this email of 24 February to the previous confirmation he had received from Ms Carroll that his HR106 had been withdrawn. He referred to being advised by his line manager that his position was still in situ as his HR106 withdrawal "was confirmed and accepted". He specifically requested that his HR106 not be processed and confirmed that if an error or delay had caused a payment to be processed by the East payroll he would return this payment straight away – but that he had not received any payment up to that date. The plaintiff requested an update by text from Ms Murray on the 28 February wondering if she had any update on his payment situation. She replied confirming that she "was speaking with paul and he is happy ur job is fine and that HR will sort this out ..its all down to paper work".

15. The plaintiff was called to a meeting on 2 March 2022 at which he was informed that he had been removed from the roster for 7 March and was not to report for duty that day but that he should continue to submit timesheets recording his hours as TOIL. The plaintiff was not paid on foot of those timesheets.
16. The plaintiff's concerns were further heightened when he received an email from Mr Murray on Sunday 6 March. Mr Murray stated that he was "still awaiting an update in relation to the process and your return to work date." He recommended that the plaintiff "try and retract your HR106 from Blanchardstown Hospital until we get a decision from HR". The Plaintiff then received a letter dated 8 March 2022 relating to his superannuation contributions stating that his employment had ceased on 7 February 2022. He followed up in writing with Mr Gallen by email dated 11 March. In that email the plaintiff reiterated that he was assured on numerous occasions that he was returning to work in his post as Paramedic Supervisor in Loughlinstown on the 7 March. He stated that "it was confirmed that the contract of employment with Connolly Hospital was terminated which is what I was told to do when it was approved that I can continue my service with NAS." He said the uncertainty caused when he was told not to report for duty on 7 March was causing great distress to him and his family. A follow up email issued by the plaintiff both to Mr Gallen and Ms Murray on 16 March but no response was received.
17. On 22 March the plaintiff discovered that applications had been invited for his roster in Loughlinstown. He sought undertakings from the HSE through his solicitors which undertakings were not provided as requested. This led to the plaintiff's ex parte application to this Court for interim relief on 25 March which was granted in the terms set out above. It is now accepted by the plaintiff that the notice in question may not have been an advertisement of his job but rather his roster. However, the defendant maintains that it should be free to appoint a new Paramedic Supervisor in Loughlinstown station in circumstances where the plaintiff is no longer employed by the HSE.
18. The plaintiff denies that he resigned from his employment. He argues that the conduct of the defendant between 7 February and 24 March 2022 and in particular the acceptance of the withdrawal of the HR106 form on 15 February, the arrangements made for his return to work and rostering him for duty on 7 March 2022 is inconsistent with the proposition that he resigned his employment and/or has not been employed by the defendant since 7 February 2022. The plaintiff also contends that he would not have terminated his contract of employment as Business Continuity Manager with JCMH but for the many assurances from his former manager and others in the NAS that he could return to his previous position of Paramedic Supervisor in Loughlinstown and that the steps he took in that regard were on the instruction of the defendant to give effect to the arrangement for him to resume his duties in the NAS. He says that if there was any resignation by completing the HR106 form (which he does not accept) then that resignation was withdrawn and the withdrawal was accepted by the defendant when the HR106 form was confirmed by them to be withdrawn on 15 February. The plaintiff argues that in those circumstances he has a legitimate expectation that his contract persists without a break in service.

### **The defendant's position**

19. The defendant argues that as a matter of fact and law the plaintiff's contract of employment as Paramedic Supervisor terminated on 6 February 2022. The defendant states that it can only fill that position in strict compliance with the provisions of the Public Service Management (Recruitment and Appointments) Act 2004 (the 2004 Act) and that it is a condition of its recruitment licence under the 2004 Act that any appointment of employees is conducted in accordance with codes of practice issued by the Commission for Public Service Appointments (CPSA). The defendant states that one of the crucial practical consequences of the recruitment principles with which it must comply is that members of management do not have any discretion to appoint individuals to posts – and this includes a person who has resigned and seeks to return to their previous post.
  
20. The defendant states that the plaintiff would have to comply with the procedures that have been specified for recruitment to his previous position and that there are a large number of other individuals who have already satisfied those procedures and are awaiting appointment to new vacancies. There is an ongoing recruitment campaign for advanced paramedics and a shortage of qualified candidates. The defendant admits that the plaintiff is highly qualified and it has suggested that the plaintiff should apply for one of those open positions as advanced paramedic. The position of Paramedic Supervisor is an internal promotion for paramedics and advanced paramedics and there are many more qualified candidates for the number of Paramedic Supervisor roles than available positions. A panel of candidates exists who are ranked in order of merit and vacancies as they arise must be offered only to candidates who are on this panel with offers made in order of ranked merit. The plaintiff is not on the current panel which came into effect on 24 September 2021 as, of course, he held a Paramedic Supervisor post at that time.
  
21. In addition, the NAS collectively agreed with the recognised trade union (SIPTU) a policy and procedure that regulates transfers of employees between ambulance stations. This policy is called the Workforce Support Policy Staff Transfers (the Transfer Policy) The defendant states that no provision of the Transfer Policy facilitates a person who was formerly a paramedical employee of the NAS to be reassigned to his formerly assigned ambulance station when there are existing employees of the NAS who have requested transfer to that station and who are qualified to transfer to that station further to the provisions of the Transfer Policy. The defendant says there are at present three paramedic supervisors on the Transfer Panel who have indicated their desire to transfer to Loughlinstown Station. The defendant states that it has compelling industrial relations reasons to assign locations of work to paramedical employees in accordance with the Transfer Policy and that members of management are not authorised to assign paramedical employees to roles where such assignment would result in a contravention of the Transfer Policy.
  
22. Ms Colette Walsh on behalf of the defendant averred that she had no conversation with Mr Murray or Mr Gallen on or before 9 February about the plaintiff. She received an email from Mr Gallen at 10.55 on her return from leave on 14 February advising her that a Paramedic Supervisor regretted his decision to leave the NAS and has requested that his

resignation does not proceed. The email stated that his "leaving HR forms have not been processed to date". Mr Gallen proffered the suggestion that "we should support his request not to proceed with the resignation and enable his continued employment with NAS.". This evidence appears to support the plaintiff's evidence that his request to withdraw his resignation was generally positively received by Mr Gallen.

23. This email was the first notification to Ms Walsh that the plaintiff wished to return to work in the NAS. She checked with Ms Carroll regarding payroll and Ms Carroll was not aware at that time that the plaintiff had been set up on the payroll for JCMH. Ms Walsh avers in her first affidavit that "if the plaintiff had not been set up on the payroll for JCMH, it would have been possible for the plaintiff to withdraw his resignation from the NAS because the resignation form HR106 had not been processed". Ms Walsh responded to Mr Gallen by email on 14 February at 16.44 confirming that she had checked "and the paperwork has not been processed, however the staff member will need to withdraw his own resignation". This communication back to Mr Gallen appears to be what led to the plaintiff formally requesting that his HR106 form be withdrawn on the 15 February and Ms Carroll's confirmation that this was withdrawn. At no point up to this was the plaintiff advised that he could not revert to his previous role because of the requirements of the 2004 Act or relevant codes or policies.
24. Ms Walsh now avers that had she been made aware that the plaintiff had not just resigned but had taken up and commenced working in his contractual position and was set up on payroll with a new employer number with effect from the 7 February 2022, her reply would have been different. She does not however set out what her reply would have been. This Court will need to consider the consequences of the response actually communicated to the plaintiff and assess the relevance of this to the application for interlocutory relief.
25. When Ms Carroll learned that the plaintiff had been set up on the JCMH payroll she then wrote to the plaintiff on 24 February confirming that as he could not be paid by two different payrolls for the same time period "we have no option but to process your HR106 with an effective date of 06.02.2022".
26. On that same date, 24 February 2022, Ms Walsh and Mr Robert Morton who is the National Director of the NAS and several other SIPTU representatives received an email from SIPTU Ambulance Sector President and the SIPTU Shop Steward which confirmed that over the previous 12 hours they had received a number of what they described as concerning emails and phone calls from staff "in relation to a matter that is alleged to be developing within the Wicklow Hub, primarily Loughlinstown Station". The emails from staff expressed concern that a staff member who has resigned from the NAS was now rumoured to be returning to his previous post within the NAS following a meeting with Ambulance Management on the 21 February. The writer stated that based on previous precedents this "CANNOT be allowed to happen. There is a Recruitment Process in the HSE for the National Ambulance Service and should this be allowed to happen will severely breach and grossly undermine this system".

27. There is a dispute between the parties as to the interplay between the SIPTU contact and the decision by the defendant to process the HR106 having previously stated that it was withdrawn.
28. Ms Walsh states that she only learned on 1 March 2022 that the plaintiff had also resigned from JCMH. She avers that she “formed the view that the NAS could not restore to the NAS payroll a person who had resigned from NAS and who had not gone through a formal recruitment process to return to the NAS.” The plaintiff argues that his presence or not on a particular payroll is an administrative detail and that his employment status should not be determined by payroll arrangements. In response, the defendant states that there cannot be any credible suggestion that the plaintiff’s contract of employment as Paramedic Supervisor with the NAS subsisted in circumstances where the plaintiff had not only accepted a new contractual position elsewhere but had taken up and commenced working in that new position and was set up on payroll with JCMH from the 7 February 2022 and prior to the plaintiff’s email to Mr Gallen on the 10 February 2022 seeking to “withdraw” his resignation with the NAS.
29. The defendant admits that it had taken preliminary steps to replace the plaintiff with another paramedic supervisor. These steps included completion of an “Approval to Hire Form B”. This happened on 14 March 2022 but had not been approved by the 25 March when the interim order was made by this Court and so it has not been advanced further. The evidence was that once such a form is approved by the appropriate level of higher management the next step would normally be to offer the approved role to a qualified person from the transfer panel in accordance with the application of the Transfer Policy. If no-one was available on the transfer panel then the role would be filled by a new appointment from the recruitment panel.

**The matters in dispute**

30. It is not part of the Court’s function at the interlocutory stage to try and resolve conflicts of evidence on affidavit (see for example, *Tejo Ventures International Ltd v. O’Callaghan* [2009] IEHC 410; *Earley v. HSE* [2015] IEHC 520). However, in order to ascertain whether there is a basis to grant interlocutory relief as claimed, this Court needs to consider the extent of the issues in dispute between the parties (without deciding the outcome of those disputes) – to ascertain if there is a fair issue to be tried or a strong likelihood of success, as appropriate.
31. There is an over-arching dispute regarding whether the plaintiff is employed in the position of Paramedic Supervisor at the NAS at Loughlinstown Station on foot of his contract of employment dated March 2019, whether by contract, equity and/or legitimate expectation.
32. There is a dispute regarding the application of the relevant legislation and procedures to the circumstances of the plaintiff’s claim. The defendant says that the 2004 Act applies and that it is simply not within the gift of any manager to bypass the provisions of the 2004 Act and the Code of Practice. Accordingly, the plaintiff could have no expectation, legitimate or otherwise, that the defendant would make an appointment to a vacant



paramedic supervisor position other than in accordance with the 2004 Act and associated procedures as the defendant cannot act ultra vires its statutory obligations. The plaintiff disputes that the 2004 Act and the Code of Practice have any applicability to the facts of this case as it is not a case of recruitment or promotion or management awarding a position in the defendant under the said provisions. The plaintiff says that these provisions do not constitute an impediment to the agreed withdrawal of the plaintiff's resignation.

33. There is a dispute regarding the representations made by the defendant's agents and whether they were in breach of the authority of the individuals who made them and ultra vires the HSE. This issue also concerns whether the plaintiff can have any basis for a legitimate expectation against the defendant.
34. The defendant relies on the decision of the Labour Court in the case of *Millett v Shinkwin* [2004] 15 ELR 319 as a case relevant to the question as to whether a resignation can be withdrawn by an employee. It was determined in that case that "a resignation is a unilateral act which, if expressed in unambiguous and unconditional terms, brings a contract of employment to an end. The contract cannot be reconstructed by the subsequent unilateral withdrawal of the resignation". While I do not disagree with that statement as a general proposition, the Millett case can be distinguished from the present case as in Millett there was no suggestion at all that the employer in that case had in any way accepted the resignation was withdrawn. Where an employee freely and deliberately decides to resign and subsequently changes his mind, the employer may be under no obligation to accede to an offer to withdraw a resignation or to even consider such an offer. However, in the present case the defendant did engage with the plaintiff on the withdrawal of his resignation and this distinguishes the Millett case from the present one.
35. Reliance was also placed by the defendant on the judgment of Fennelly J. in *Glencar Exploration Plc v Mayo County Council (No. 2)* [2001] IESC 64, [2002] IR 84 outlining that in order to succeed in a claim based on the failure of a public authority to respect legitimate expectations one had to establish a representation addressed to an identifiable person affected by it or who acts on it and it must create an expectation by that person that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.
36. The defendant also relies on commentary in Hogan, Morgan & Daly, "Administrative Law in Ireland" 5th ed, at paragraph 21.83: "It is a fundamental principle of our public law that a public authority cannot give itself a jurisdiction it does not possess. It cannot do this by a mistaken conclusion as to the extent of its own powers and neither can it do so by creating an estoppel or legitimate expectation. There can thus be no legitimate expectation which is contrary to law. "
37. The defendant says that the plaintiff in seeking to enforce by mandatory injunction the representation allegedly made to him by his former manager in the NAS that he could withdraw his resignation (despite the termination of the applicable contract having factually and legally taken effect) and be reappointed to his former position which had

been vacated by him, otherwise than in accordance with the 2004 Act would be to extend the power of the defendant by creating an estoppel. The plaintiff does not believe the 2004 Act applies in the circumstances of this case and says in any event that the defendant has not established that it would be acting ultra vires in confirming the continuation of the plaintiff's employment.

38. This court fully accepts that a public body cannot lawfully act ultra vires and that it cannot extend its powers by creating an estoppel (this principle is well established for example by decisions of the Supreme Court in *Morris v Garvey* [1983] IR 319 and *Dublin Corporation v McGrath* [1978] ILRM 208). There is a real dispute at this interlocutory stage however (which this court cannot determine) as to whether the defendant would in fact be acting ultra vires its powers in the particular circumstances that arise in the present case if it were to be held to its representations to the plaintiff. Relevant to this is the question as to whether in fact the 2004 Act and related policies and procedures apply to the plaintiff in the circumstances of this case and, if they do, whether this is a vires issue for the defendant or rather an issue between the defendant and the CPSA as the principal regulator of recruitment and selection in the Irish public service.

**Burden of proof to be applied**

39. The defendant says there is no issue to be tried and certainly no strong case that the plaintiff's contract dated March 2019 continued to subsist beyond the date when the plaintiff had actually started work on foot of his new contract with JCMH Hospital on 7 February. While the plaintiff accepts that he did tender his resignation and take up employment with JMCH he argues that pursuant to the accepted withdrawal of his HR106 his resignation from the NAS was withdrawn before any vacancy for his previous post arose (the relevant HR106 form not having been processed at that time). The plaintiff says he relied and acted on the assurances and representations of the defendant and that if he had been told that by resigning from JMCH he would be resigning from the HSE then he would not have done so. His central argument is that his resignation was accepted as withdrawn by the defendant and that he resigned his position in JCMH in reliance on being told that his resignation from the NAS could be withdrawn and that he could resume his employment there and that the defendant itself initially acted in full compliance with that representation by withdrawing the HR106 and rostering him for duty to commence on 7 March.
40. The defendant argues that the plaintiff must make out a strong case rather than simply a fair issue to be tried, having regard to the mandatory relief sought. Reliance in that regard is placed on the Supreme Court decision in *Maha Lingham v Health Service Executive* [2006] 17 ELR 137. This Court accepts that the relief sought at paragraph 2 of the Notice of Motion is, in effect, a type of mandatory relief requiring the payment of all salary and benefits to the plaintiff until the trial of the action and so agrees with the defendant in that regard. The plaintiff says he has a strong case that he is likely to succeed at the hearing of the action.
41. If the plaintiff's case was simply that he did not resign from his position he would not satisfy this strong case test in my view. However, the plaintiff's case is that his

resignation was tendered but then withdrawn and accepted as such by the defendant and that he relied on that express representation and acted to his detriment as a result of such reliance. He claims he has a legitimate expectation that the defendant would comply with its representation. The evidence shows a clear representation was made to the plaintiff that he could withdraw his resignation and return to his previous position. There is no evidence from Mr Murray to contradict what the plaintiff says he was told on the 14 February call. Internal HSE emails refer to not proceeding with the resignation and enabling the plaintiff's continued employment with the NAS. Ms Walsh accepts in her affidavit that if the plaintiff had not been set up on payroll in JCMH it would have been possible for the plaintiff to withdraw his resignation from the NAS because his resignation form HR106 had not been processed. The plaintiff was advised he would need to withdraw his resignation, which he did, and that withdrawal was then confirmed by the defendant. The plaintiff relied on the representation in resigning his new position. I am not expressing any view on the ultimate merits of the matters in dispute beyond to say that in my opinion the plaintiff has established not only a fair question for trial but also a strong case that he is likely to succeed at the hearing of the action based on those express representations made to him. This is not to suggest that the plaintiff will in fact succeed and new evidence and arguments may of course emerge at the trial. Because the defendant is a public body there will need to be an assessment as to whether the defendant's representations were ultra vires and, if so, the plaintiff would not succeed in enforcing them against the defendant for that reason. That issue will require detailed evidence and analysis at trial and is not a matter this court can determine at this stage – there was a clear disagreement between the parties on this point. I believe however that in light of the express representations made to him the plaintiff meets the strong case test (even where the vires issues remain to be determined and may cause the plaintiff to be unsuccessful). I therefore now move to consider the balance of convenience including the adequacy of damages.

#### **Adequacy of Damages**

42. The plaintiff says that damages are not an adequate remedy for him. He states that if someone else is appointed to his position before these proceedings come on for hearing then, if he is successful in these proceedings, he would not be able to get his position back. The appointment of any other individual to his post would also confer upon that individual their own contractual rights which would have to be taken into account.
43. The plaintiff says he remains committed to his position within the defendant and wishes to return to work as soon as possible. He says he is currently without income and in the absence of other resources will be caused significant financial hardship if the defendant continues to fail to comply with the terms of the plaintiff's contract of employment. This averment is relevant to the second relief sought by the plaintiff in this application.
44. The defendant responds to this matter by arguing that it is reasonable to expect the plaintiff to mitigate his loss by taking up the role of advanced paramedic which is available to him to immediately apply for and secure. The defendant states that there is a very modest salary difference and that the supervisory role predominantly involves

carrying out the duties of advanced paramedic, with the minority of duties being additional supervisory duties. There is however some inconsistency in the defendant's affidavit in this regard where it is also averred by Ms Walsh that "the position of paramedic supervisor is entirely different to that of advanced paramedic".

45. The plaintiff says that if he applies for employment as an advanced paramedic, as the defendant has suggested, then he will have no entitlement for appointment to the role of Paramedic Supervisor. He says that his self-worth and emotional well-being are bound to his role. He also says that if he were to apply for the position of advanced paramedic he would lose his rank and rostered position as well as possibly losing out on promotional roles and pay including any pension or lump sum on retirement. This Court accepts that while the plaintiff could recover damages for estimated loss of earnings and other pecuniary losses claimed, damages alone would not address the plaintiff's stress and disappointment at losing his position as Paramedic Supervisor in Loughlinstown Station were that role to be unavailable to him although successful at trial.

**Balance of convenience**

46. It is of considerable significance in this case that the parties agree there is no issue of a break down of trust and confidence between the parties and this fact gives a higher level of comfort to this Court in making an interlocutory Order than would otherwise exist in personal service contracts of this nature. There are no statutory employment remedies available to the plaintiff in this case such as for example, unfair dismissal, which might more appropriately be dealt with elsewhere.
47. The evidence confirms that there are a large number of candidates interested in promotion to Paramedic Supervisor so there is no reality in that position being available to the plaintiff if it were to be filled by another person now.
48. The evidence also confirms a serious resource issue for the defendant and the need to have skilled employees available to it within the NAS.
49. The defendant says that the plaintiff's contract with the NAS did not entitle him to remain in Loughlinstown but that he could be moved elsewhere as needed. The defendant says that the interim Order made by this Court which is specific to a Paramedic Supervisor position in Loughlinstown Station goes beyond any contractual entitlement the plaintiff previously had prior to his resignation from the NAS. While I believe on a literal reading of the contract that is indeed correct, the defendant has admitted that the Transfer Policy applies and so it is not only the terms of the individual contract which govern the employment relationship. The plaintiff claims that the effect of the Transfer Policy would be to preserve his entitlement to remain in Loughlinstown Station regardless of the flexibility in the wording of his employment contract in respect of "Location".
50. The defendant claims that any filling of the post of paramedic supervisor in Loughlinstown ambulance station in contravention of the collectively-agreed Transfer Policy has the potential to cause significant industrial relations problems (and possibly legal problems)

for the NAS – although the precise nature of those legal problems was not expanded upon.

51. The defendant urges this court to consider the potential industrial relations problems it believes it would encounter if an Order is granted by this Court on the terms requested. The plaintiff argues that this case concerns contractual issues and not industrial relations issues which may fall within the jurisdiction of the Workplace Relations Commission and/or the Labour Court. The defendant has certainly presented strong evidence of a concern on the part of SIPTU as to how matters were evolving in relation to the plaintiff's return to work. However, there is no evidence of any threat of industrial action. Even if such industrial relations issues were relevant to the Court's considerations in this case (and I make no such finding), I do not believe that a reputable trade union such as SIPTU would initiate or support any action against an employer who was acting so as to ensure compliance with an Order of this Court on an interlocutory basis.
52. The defendant also urges this Court to consider that the grant of an Order on an interlocutory basis would be unfair to relevant people on the Transfer Panel. In my view all that an interlocutory order in this case will do in relation to those individuals is to preserve the status quo pending a full hearing. Persons could still be appointed to the role of Paramedic Supervisor in Loughlinstown on a temporary basis or, in the event of more than one vacancy, on a permanent basis, so long as the plaintiff's contractual entitlements are preserved pending the trial of this action. No rights are taken away from those persons who are on the Transfer Panel. No vacancy would in any event arise if the plaintiff succeeds at trial – if the plaintiff does not succeed then the next available person will be appointed to the role of Paramedic Supervisor in the ordinary course. All of the rights of persons on the Transfer Panel are preserved – they have no entitlement to or expectation of a promotion save insofar as a vacancy actually arises and they have the priority status to be offered it.
53. The plaintiff, in seeking the relief at paragraph 2 of his motion that the defendant should pay him all salary and other benefits to which he is entitled under his contract of employment until the trial of the action, has averred that he will have no salary and income to live on if that order is not granted. In the case of *James J. Fennelly v Assicurazioni Generali S.P.A and General Underwriting Agencies Ireland Ltd* Costello J. in an ex tempore judgment dated 12 March 1985 stated that:

“..it is quite clear it will be some considerable time before [this matter] comes to hearing. In the meantime the plaintiff will be left without a salary and nothing to live on. The situation in which he finds himself would be little short of disastrous. It seems to me in that situation that the balance of convenience is in the plaintiff's favour. He should not be left in the situation between now and the action in which he would be virtually destitute with a prospect of damages at the action. That seems an unjust situation”.
54. Here, as in the Fennelly case cited above, there are no trust and confidence issues that might otherwise persuade a Court to refuse an injunction of this nature. Furthermore,

there is, on the defendant's own admission, a shortage of trained paramedics to meet current demand. In Fennelly the Court accepted an undertaking that the plaintiff would be prepared to carry out such duties as the defendant asked of him until the trial. It was a matter for the defendant in that case as to what duties they wished to assign, if any.

55. In the present case the plaintiff, through his counsel at the interlocutory hearing, confirmed that the plaintiff would be willing to perform all duties of a Paramedic Supervisor in Loughlinstown Station in support of an Order under paragraph 2 of the Notice of Motion. The evidence from the defendant is that Paramedic Supervisors are paramedics or advanced paramedics who also have supervisory responsibilities. The majority of the work of Paramedic Supervisors is stated to be clinical although they also have supervisory responsibilities. Insofar as there are clinical duties there would seem to be a very high degree of overlap between the duties of an advanced paramedic and a Paramedic Supervisor.
56. I do not believe this Court should make any order which requires the plaintiff to apply for a job he does not want to apply for and which he feels would prejudice his position long term. However, if the plaintiff wants to continue to receive his salary and benefits I believe he should be prepared to provide some services for that, particularly where the defendant is a public body with budgetary constraints and is in need of additional paramedic resources. There are clearly large areas of overlap between the duties of an advanced paramedic and a Paramedic Supervisor and it is these areas of overlap that may provide a basis for the possible provision of services pending the trial of this action. Without requiring the plaintiff to reapply for a position of advanced paramedic and without the defendant having to assign him supervisory duties consistent only with the status of a Paramedic Supervisor pending the trial of this action, I believe that the parties should be able to work together so that the plaintiff can provide services of value to the defendant at Loughlinstown Station pending the trial of this action and in return receive his full salary and benefits. The plaintiff would therefore have the salary of a Paramedic Supervisor but might not be assigned all the duties of a Paramedic Supervisor, at the discretion of the defendant. The defendant may decide not to assign any tasks to the plaintiff but it has the opportunity to do so. The performance by the plaintiff of such tasks as are reasonably assigned to him is without prejudice to the determination of the plaintiff's employment status at the trial of this action.
57. I am satisfied that the balance of convenience rests in favour of granting an interlocutory injunction in the terms set out below.

**Order of this Court**

58. The Order of this Court will be to grant on an interlocutory basis the relief sought by the plaintiff in the terms of paragraphs 1 and 2 of this Notice of Motion, namely:

1. An Injunction restraining the Defendant, its servants or agents from appointing any person to the position of Paramedic Supervisor at the National Ambulance Service Loughlinstown County Dublin save on terms that will preserve the Plaintiff's contractual entitlements in the event of the Plaintiff being successful herein;

2. An Injunction directing the Defendant to pay to the plaintiff all salary and other benefits to which he is entitled under his contract of employment, until the trial of the action.

59. The relief at paragraph 2 will be subject to the plaintiff's undertaking to this Court that the plaintiff will carry out such Paramedic Supervisor tasks as are assigned to him by the defendant in Loughlinstown Station - but such tasks may at the defendant's discretion be limited to those aspects of a Paramedic Supervisor role that are normally also carried out by an advanced paramedic.
60. The plaintiff's undertaking as to damages in accordance with the terms of the interim injunction will continue to apply until further Order.