

-THE HIGH COURT

**[2022] IEHC 188
[2021 No. 76 MCA]**

BETWEEN:

DAVID McCORMACK

APPELLANT

– AND –

ASHFORD CASTLE HOTEL LIMITED

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 24th February 2022.

SUMMARY

This is an unsuccessful appeal against a decision of the Labour Court which upheld a decision of the Workplace Relations Commission that Mr McCormack was fairly dismissed from employment on the basis that he was incapable of carrying out the work that he was employed to do because of ill-health.

1. Mr McCormack commenced employment with Ashford Castle in 2003, becoming a concierge in 2011. Unfortunately, on 4th October 2017, Mr McCormack had to be dismissed from his employment on the grounds that he was incapable of carrying out his work because of continuing ill-health. By the date of his dismissal, Mr McCormack had been absent from work since 5th November, 2014, a period of almost three years. A summary chronology follows:

5 th Nov. 2014.	Mr McCormack absents himself from work on grounds of ill-health. (By the date of his dismissal of 4 th October 2017, he continued to remain absent from work).
Feb-May 2015.	Mr McCormack's solicitor indicates that Mr McCormack wishes to raise the Ashford Castle grievance procedure.
16 th Sept. 2015.	Mr McCormack requests formal meeting over alleged mistreatment and harassment.
12 th Oct. 2015.	Meeting between parties to consider Mr McCormack's complaints.
22 nd Oct. 2015.	Outcome of meeting issues. Mr McCormack indicates intention to appeal but does not do so.
Early-2016.	Exchange of correspondence regarding Mr McCormack's accommodation arrangements.
2 nd Sept. 2016.	Mr McCormack alleges bullying against Ashford Castle staff member.
21 st Nov. 2016.	Mr McCormack writes to Ashford Castle seeking meeting re. his grievances.
7 th Dec.2016.	Meeting between parties to consider grievances.
10 th Jan. 2017.	Ashford Castle issues letter re. the 48 grievances raised and indicates timeline for appeal. Thereafter, Mr McCormack commences appeal but does not attend appeal hearing.
Early-August 2017.	Ashford Castle writes to Mr McCormack re. his position as a staff member and his possible return to work.
14 th Sept. 2017.	Ashford Castle again writes seeking suggestions re. Mr McCormack's return to work. Thereafter, Mr McCormack makes no suggestions.
4 th Oct. 2017.	Mr McCormack dismissed but told of right to appeal decision to dismiss. Thereafter, he is invited to attend an appeal hearing but does not. Instead he later makes a complaint of unfair dismissal to the Workplace Relations Commission.
27 th February 2020.	Adjudication Officer holds complaint of unfair dismissal not well-founded. That decision was appealed to the Labour Court.
17 th February 2021,	Labour Court dismissed the appeal. Thereafter an appeal is lodged with this Court.

2. At the hearings before the High Court, Mr McCormack was self-represented. Ashford Castle was represented and provided notably helpful affidavit evidence from Mr Ronnie Lawless, a retired IBEC employee relations executive who represented Ashford Castle in the proceedings before the Labour Court.

3. The role of this Court in the within form of appeal is perhaps most clearly identified in *ESB v. Minister for Social Community and Family Affairs* [2006] IEHC 59 and the court has proceeded in accordance with same.

4. Mr McCormack was consistently polite and respectful towards both the court and counsel for Ashford Castle in advancing his case and the court is grateful to him for that; not everybody comports themselves so. However, the court respectfully does not see that Mr McCormack has ever identified a point of law on which his appeal could succeed. In truth, it was with some difficulty that some of the points treated with hereafter could be gleaned from Mr McCormack's documentation and/or fully understood. At the hearing before this Court, Mr McCormack's sole contribution, after repeatedly questioning me as to whether I have ever stayed at Ashford Castle Hotel – I have not – suggested that he had some material that Ashford Castle would find challenging were it produced before the court. He also claimed that Ashford Castle would not welcome any adverse publicity that might follow on the issuance of the within judgment. The material referred to by Mr McCormack was not produced, nor was its substance described, and counsel for Ashford Castle indicated that her client, far from being embarrassed as to how it has proceeded, is satisfied that it has proceeded correctly and properly vis-à-vis Mr McCormack (and the court sees nothing to suggest that it has not). In a bid to be as fair as possible, the court has gone through the pleadings/evidence and seeks hereafter to deal with the points that Mr McCormack appears/sought to have raised in as comprehensive a manner as possible, but this has not been an easy task.

The Medical Evidence Point

5. As the court understands Mr McCormack's contentions in this regard, he appears to object to how Ashford Castle, in its presentation of evidence to the Labour Court, referred to "*stress related work*", rather than "*work related stress*". Even if these words were wrongly juxtaposed by Ashford Castle, it was entirely clear what was meant by it and the Labour Court, in any

event, had all the relevant medical evidence before it and was entitled to reach such conclusions as it did. Even if there was some substance to the objection made (and, respectfully, there is not), courts as a whole tend in any event to focus on the overall justice of matters, rather than ‘hanging’ a party over some technicality, but again, as mentioned, there is, in any event, no substance to the perceived technical wrong raised by Mr McCormack.

The Donoghue v. Stevenson Point

6. Mr McCormack appears to claim that the Labour Court operated in breach of *Donoghue v. Stevenson* [1932] A.C. 562. However, that is, with respect, to misunderstand the nature of the legal architecture that supports and informs the operation of the Labour Court. The Court was established by the Industrial Relations Act 1946, primarily as an industrial relations body charged with preventing and resolving disputes. Since 1974 it has adjudicated on employment rights legislation and, following on the enactment of the Workplace Relations Act 2015, it has been the sole appellate body for employment rights disputes. Thus, as a body, its obligations and duties derive from statute, subject to its obligation to apply fair procedures and to observe the principles of natural justice. The evidence before this Court establishes that the Labour Court has discharged all of the foregoing obligations appropriately and properly in this case.

The Workplace Health and Safety Point

7. Mr McCormack appears to invoke s.8(2) of the Safety, Health and Welfare Work Act 2005 in support of his appeal. With every respect, the court does not see that that provision has any relevance to the proceedings at hand. As to the related point that Ashford Castle entrusted Mr McCormack’s dismissal process to a senior manager who was then in a probationary stage of his employment, respectfully, the court does not see that this choice of senior manager was anything other than appropriate; indeed his seniority suggests that Ashford Castle treated with the decision as to how to proceed with Mr McCormack as a staffing matter of importance (as indeed it was).

The Louth VEC Point

8. Mr McCormack appears to seek to rely on *Louth VEC v. Bernadette Martin* PTD051. Respectfully, that case is of no relevance to the case at hand.

The Accommodation Point

9. The issue of Mr McCormack's accommodation arrangements with Ashford Castle is not relevant to this appeal and Mr McCormack has not made out any basis on which it could be relevant.

The Capability Point

10. As the court understands matters, Mr McCormack contends that the Labour Court both misdirected itself and erred in determining that Ashford Castle honestly believed that the dismissal was effected on capability grounds. There is, with every respect, nothing in the Labour Court determination or the other evidence before the court which suggests, let alone establishes that it was anything other than fair and appropriate for the Labour Court to reach the decision it did. The court deals separately below with the complaint made as to the conduct of the Labour Court proceedings.

The Seal Point

11. Mr McCormack appears to challenge the authenticity of the Labour Court determination on the basis that it lacked a signature and/or a seal of the Labour Court.

12. The Labour Court determination before the court bears an embossed (physical) seal and the electronic signature (a typed name) of a Deputy Chairman of the Court.

13. Section 18 of the Industrial Relations Act 1946 provides as follows:

- “(1) The Court shall have an official seal which shall be judicially noticed.*
- (2) The seal of the Court shall, when affixed to any document, be authenticated by the signature of the chairman or the registrar of the Court or of a person authorised by the Court to authenticate it.*
- (3) Every document purporting to express an order, award or other decision of the Court and to be sealed with the seal of the Court authenticated in accordance with this section shall, unless the contrary is proved [the contrary*

has not been proved here], *be deemed to have been duly and lawfully so sealed and shall, unless as aforesaid, be received in evidence as such order, award or decision without further proof and, in particular, without proof of any signature affixed to such document for the purpose of such authentication and without proof of the office or authority of the person whose signature such signature purports to be.*”

14. It seems to the court that the physically sealed determination before the court satisfies the provisions of s.18(3) and that the contrary position referred to in s.18(3) (as indicated in the quoted text above) has not been proved.

15. The court notes that the lack of a seal (here there is no such lack) or the lack of a signature (here there is no such lack) does not render a determination of the Labour Court invalid nor does it invalidate its authenticity.

16. The court sees no difficulty to present in the fact that the signature of the Deputy Chairman is an electronic signature, which conclusion, the court notes in passing, appears consistent with the provisions of the Electronic Commerce Act 2000 (with s.9 seeming to the court to be the relevant provision, not s.16, where one is treating with an electronic signature accompanying/authenticating a physically applied seal – though this point was not argued).

The Labour Court Process Points

17. Mr McCormack contends that the Labour Court panel did not always comprise two ordinary members. The evidence before the court establishes that the contrary is so. Mr McCormack contends that (i) he was not allowed speak freely and (ii) he was somehow treated as less than equal by the Labour Court. Mr Lawless’ evidence (and he was at the hearing) establishes that Mr McCormack (i) was allowed to speak freely, and (ii) was not treated as less than equal. As one would instinctively expect, the evidence points to the Labour Court, which is long-used to proceedings of the type that were before it, took every care to be fair. Mr Lawless, who attended the hearing, avers, amongst other matters, that *“the Appellant was afforded very significant latitude by the Deputy Chair to advance his appeal....[I]t was my perception that the court was more lenient with the Appellant than it was with me or would have been in respect of any other professional representative”*. (Mr Lawless touches on an

important point in this regard. Courts too have a tendency to be more lenient with self-represented litigants than other litigants. However, a question does arise as to whether such systemic indulgence is always entirely fair to the parties who are not shown such indulgence. Justice has to be done in an even-handed manner; certainly, the extension of any indulgence in any one case has to be carefully weighed by a court, or other decision-making body minded to extend such indulgence, against any time and/or financial and/or other costs that it raises for the other side in proceedings, not least in ensuring that proceedings are brought to a conclusion in as timely a manner as justice allows).

The Labour Court Finding of Fact

18. The court has made reference above to the decision of the High Court in *ESB v. Minister for Social Community and Family Affairs* [2006] IEHC 59. In particular, the court recalls the following observation of Gilligan J., at para.87:

“[T]he approach of this Court to an appeal on a point of law is that findings of primary fact are not to be set aside by this Court unless there is no evidence whatsoever to support them. Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the Court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this Court has to be mindful that its own view of the particular decision arrived at is irrelevant. The Court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the Appeals Officer, to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision.”

19. The only finding of *fact* by the Labour Court to which Mr McCormack appears to have raised any objection in these proceedings is that whereby the Labour Court found Ashford Castle honestly to have believed that Mr McCormack was incapable by virtue of ill-health from carrying out the work that he was employed to do. But in fact there was substantial evidence in the form of multiple occupational health assessments before the Labour Court to justify such a finding. Bringing the above-quoted observations of Gilligan J. to bear, there is no basis for this Court now to upset this finding of fact.

The Decision in Bolger

20. Sections 6(1) and (4) of the Unfair Dismissals Acts 1977-2015 provide, amongst matters, as follows:

“(1) Subject to the provisions of this section, the dismissal of an employee shall be deemed, for the purposes of this Act, to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal....

(4) Without prejudice to the generality of subsection (1)...the dismissal of an employee shall be deemed for the purposes of this Act, not to be an unfair dismissal, if it results wholly or mainly from one or more of the following:
a. the capability, competence or qualifications of the employee for performing work of the kind which he was employed to do”.

21. The legal test in respect of capability was succinctly identified by Lardner J. in his *ex tempore* judgment in *Bolger v. Showerings (Ireland) Ltd* [1990] ELR 184, where he observed, at p.186, that in cases of ill-health yielding incapability, for an employer to show that the dismissal was unfair, it must show:

“(1) It was the ill-health which was the reason for his dismissal;
(2) That this was substantial reason;
(3) That the employer received fair notices that the question of his dismissal for incapacity was being considered and
(4) That the employee was afforded an opportunity of being heard.”

22. All of these criteria were met in this case. So there is no basis for upsetting the Labour Court findings in this regard either.

Conclusion

23. I know from my own past experience as an in-house counsel that cases in which someone has to be let go from employment because of ill-health can be very challenging cases for all

concerned, both the party affected by ill-health and also their employers. When it comes to employers, they typically want to do right by an employee because (a) that is the right thing to do, (b) when it comes to health issues there is always the sense of, to use a colloquialism, ‘There, but for the grace of God, go I’, and (c) it is good for wider staff morale if all employees get the sense that if they encounter some personal misfortune in life they will be treated with ethically, sympathetically and, of course, in accordance with law. Fundamentally, however, most businesses are ‘for profit’ enterprises (or seek to be) and there may come a point where, however unfortunate (and these cases tend to be most unfortunate), an employee has to be dismissed in circumstances where ill-health yields the incapability contemplated by s.6(4) of the Unfair Dismissals Acts 1977-2015. Mr McCormack has the sympathy of the court that he found himself dismissed as he was. However, there is nothing in the evidence before the court which establishes, on the balance of probabilities, that there were any errors of law made by the Labour Court in his case (and none identified by Mr McCormack). Moreover, the evidence before the court points to there having been substantial evidence supporting the findings of fact made by the Labour Court. There is, therefore, no basis, on which the court could or will overturn the Labour Court determination of 17th February 2021 (Determination No. UDD2115).

Repeated Postponements

24. The court notes that this matter came on before it in the Michaelmas term. Mr McCormack felt too unwell to deal with matters at that time and the court adjourned matters to the Hilary term but on a peremptory basis, *i.e.* it indicated that out of fairness to Ashford Castle matters would have to come on for hearing at that later point. When the matter was called on earlier this term, Mr McCormack indicated that he continued to feel unwell. Counsel for Ashford Castle submitted that her client had turned up on each occasion and that, however unfortunate the circumstances, there has to come a point when proceedings proceed to hearing (not least as her client was paying for legal representation each time it turned up in court). Counsel noted too that the letter from Mr McCormack’s doctor did not indicate that he could not attend at court or participate in these proceedings.

25. As the court indicated at the hearing of this matter, it agreed with the submissions made by counsel for Ashford Castle in this regard: the court had extended the indulgence of postponing matters from the Michaelmas Term to the Hilary Term, essentially on Mr

McCormack's 'say-so'; his doctor's note, as produced at the Hilary Term hearing, did not indicate that he could not attend at court or participate in these proceedings; it would be costly and in any event just plain unfair to ask Ashford Castle to turn up yet again at some future date with no assurance that matters would then be heard; and the court has to approach matters with a view to doing justice to both sides (so postponing the Michaelmas hearing to give Mr McCormack more time but proceeding with the hearing in the Hilary term because Ashford Castle could not be asked to wait forever for matters to reach a conclusion – and at some point court proceedings have to proceed if they are not to become a never-ending process). All the foregoing being so, the court proceeded with this term's hearing and has reached the conclusions described above.

Costs

It became the practice during the Covid lockdowns for the court in its principal judgment also to offer a provisional view as to how costs should be ordered. In this case, Mr McCormack has brought his appeal, failed (completely) in his appeal, and the court respectfully sees no reason why costs should not be ordered against him. Should either party disagree with this provisional conclusion as to costs, they should let the registrar know within 21 days of the date of this judgment and the court will schedule a brief costs hearing thereafter. If there is to be such a hearing, the parties might note that an order as to the costs of that hearing will also fall to be made.

**TO MR McCORMACK:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Mr McCormack

In the previous few pages I have set out in 'lawyer's language' what I have decided in these proceedings. However, I am always concerned that an employee should be told in plain language what I have decided in a judgment that affects them. That is why I have added this 'plain English' note to you. Everyone else in the case will get to read it, but really it is written for you. The lawyers for Ashford Castle are well-used to legal language and so will be well able to understand my judgment without any need for 'translation' into plain English.

Because lawyers like to argue over things, I should add that this note, though a part of my judgment, is not a substitute for the detailed text of my judgment in the previous few pages. It seeks merely to help you understand what I have decided in what is your appeal.

I am afraid that I do not see that you have ever identified a point of law on which to ground a successful appeal. I have gone through the papers, sought to filter from them such points of law as I can, and addressed those points of law in my judgment. Having done so, I do not see any errors of to have been made by the Labour Court in your case (nor were any identified by you). There was, in fact, substantial evidence supporting the findings of fact made by the Labour Court. There is, therefore, no basis, on which I could or will overturn the Labour Court determination of 17th February 2021 (Determination No. UDD2115).

I am sorry that you appear to continue to suffer from ill-health and wish you every good fortune in the future.

Yours sincerely

Max Barrett (Judge)