

THE HIGH COURT

[2006 No. 890 J.R.]

BETWEEN

P.D.P.

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

ADDENDUM dated 19th day of February 2013 to [JUDGMENT of O'Neill J. delivered on the 21st day of December 2012](#)

1. At paragraph 285 of the judgment, the parties are agreed that the figure of €178,625 as loss of earnings to date be replaced by the sum of €227,439, and that the figure of €29,265 in respect of interest be replaced by the sum of €48,139.

2. The parties are also agreed that the sum of €30,358 in respect of pension loss and the sum of €10,645 in respect of diminution in gratuity in paragraph 290 are to be replaced, but the parties are not agreed on the amounts to replace these sums.

3. Evidence was given on this topic by two actuaries, Mr. Brendan Lynch for the applicant and Mr. Peter Byrne for the respondent. Mr. Lynch gave evidence of six figures which amounted in total to €103,110 and these are as follows:

Assistant Principal Pension €26,828

Assistant Principal Gratuity €9,371

Short Service Pension €40,948

Short Service Gratuity €14,492

"35 Years of Service" Pension €8,472

"35 Years of Service" Gratuity €2,999

4. Mr. Byrne's figure in respect of the same items comes to almost exactly the same. Thus, there is no disagreement between the actuaries as to the six figures mentioned.

5. Mr. Lynch, however, gave evidence of higher figures in respect of three of the items mentioned in the above list, namely:

Assistant Principal Pension €57,254

Short Service Pension €87,387

"35 Years of Service" Pension €18,080

6. The agreed figures as calculated by Mr. Lynch and Mr. Byrne were on the basis of a 3% rate of interest and the normal life mortality tables which give the applicant a life expectancy of 78/79 years.

7. Mr. Lynch for the applicant in evidence said if the applicant lived beyond 78 or 79 years, the lower figures which he gave evidence of, would not provide in respect of any pension beyond that time and the cost of purchasing an annuity from a commercial provider to cater for the years in addition to standard or normal life expectancy is reflected in the higher figures quoted above. His evidence, and there is no dispute on this, is that his pension as a teacher paid out of Exchequer funds would be for life regardless of how long that might be.

8. Mr. Byrne said in evidence that the lower figures were calculated in the standard way for assessing the capital value of a future pension loss, namely, 3% rate of interest and standard life mortality tables.

9. Secondly, he said that having regard to current trends and the fact that State pensions are currently funded from current tax income and have no fund to support them, it is likely that in the future that these pensions will be reduced.

10. I am satisfied that there is no evidence in the case which would warrant a departure from the standard approach to the assessment of a capital sum to compensate for future pension loss.

11. Neither is there any basis other than speculation for Mr. Byrne's apprehension of public sector pension reduction in the future.

12. Accordingly, I would assess the applicant's pension losses at the lower figures mentioned giving a total pension loss and gratuity loss of €103,110.

13. As that figure includes loss of gratuity as well as pension, that figure replaces the sums of €30,358 and €10,645 in paragraph 290 of the judgment.

14. This brings me, finally, to the submission of the respondent based on the evidence of Mr. Byrne that a credit should be allowed to the respondent on the basis that if the applicant was now to retire, he would receive a pension of €25,990 and a gratuity of €77,971.

15. The capital value of the pension from now to August 2017, the compulsory date of retirement of the applicant, is €95,890 net of taxation and it is this sum that the respondent claims as a credit.

16. Mr. Murphy S.C. argued that this sum should be taken into account as a reduction of the pension loss from August 2017 onwards. I would disagree with this on the basis that the calculation of the pension loss after that date is unaffected by whether the pension is taken now or from August 2017.

17. In reality, if this sum is to be taken into account, it could only be in respect of a mitigation of loss which the applicant was obliged to do.

18. Although the applicant was not challenged on this when giving his evidence and therefore there is no evidence on this topic, through his counsel it was asserted that he does not wish to retire now as still hopes to return to teaching.

19. Whilst this court has held that it probable that the applicant would not succeed in getting employment again as a teacher, nevertheless, it cannot force upon the applicant a retirement, which in these circumstances the applicant does not want.

20. Thus, I have come to the conclusion that the applicant is not failing to mitigate his loss of earnings between now and August 2017 by refusing to retire now. Therefore, the sum of €95,890 is not deductible from his damages.

21. In any event, at common law, it would seem to me that the receipt of this pension is not a deductible benefit in respect of which the respondent can claim a credit given that it would be replacing income lost by the applicant before retirement rather than replacing another pension.

22. One cannot also entirely overlook the fact that whilst the respondent in this case, the HSE, a State agency, would benefit from such a deduction, a corresponding loss would accrue to the State, namely, the pension which would be received by the applicant from the State from now to August 2017.

23. In all of these circumstances, I will not allow the deduction claimed.

24. Finally, in paragraph 303 of the judgment, the sum of €736,984 will be replaced by €866,777.