THE HIGH COURT

2018 No. 301 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS COMMISSION ACT 2015

IN THE MATTER OF THE UNFAIR DISMISSALS ACT 1977 (AS AMENDED)

BETWEEN

THE BOARD OF MANAGEMENT OF MALAHIDE COMMUNITY SCHOOL

APPELLANT

AND

DAWN MARIE CONATY

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered on 5 July 2019.

SUMMARY

1. This matter comes before the High Court by way of a statutory appeal from the Labour Court. The appeal presents a short point of law as to the entitlement, if any, of an employer and employee to contract out of the statutory protections otherwise provided for under the Unfair Dismissals Act 1977 (as amended) ("*the Unfair Dismissals Act*").

2. The point arises in the following circumstances. The employee ("*the teacher*") had acquired rights under the Act by dint of her having had more than one year's continuous service as a teacher at Malahide Community School ("*the school*"). In October 2015, the school required the teacher to sign a written contract for the balance of the academic year 2015/2016. The written contract presented to the teacher purported to take the form of a "fixed term" contract for a period of approximately eleven months. The school contends that, by signing this contract, the teacher relinquished the statutory rights she had previously acquired under the Act. On the expiration of the term of the contract on 31 August 2016, the school purported to dismiss the teacher.

3. The teacher successfully challenged her dismissal before the Labour Court and has been reinstated. The school has since appealed the Labour Court's determination to the High Court.

4. The school's grounds of appeal are beguiling in their simplicity. It is said that "fixed term" contracts are expressly excluded from the application of the Unfair Dismissals Act by section 2(2)(b) thereof. This is subject only to the procedural requirements under that section having been satisfied. The procedural requirements are as follows:– the contract must be in writing; must be signed by or on behalf of the employer and by the employee; and must provide that the Act shall not apply to a dismissal consisting only of the expiry of the fixed term. These requirements are said to have been met. It is further submitted that there is no question of the parties having contracted out of the Act in circumstances where the legislation simply does not apply to "fixed term" contracts.

5. In truth, the protection afforded to employees under the Unfair Dismissals Act is more robust than the school's submission appears to suggest. Freedom of contract is severely restricted by section 13 of the Act. Any provision in an agreement which purports to exclude or limit the application of, or is inconsistent with, any provision of the Act is void. The contract of October 2015 falls foul of this section. A contractual provision which purports to deprive an employee of rights which they have already acquired under the Act can only be characterised as an agreement which purports to "exclude" or "limit" the application of the Act. But for the offending provision of the contract of October 2015, the teacher would have retained her status as a permanent employee entitled to the full protections of the Act. Therefore, the relevant provisions of the contract of October 2015 are void.

6. On its literal meaning, section 13 precludes an employee from ever contracting out of their rights. However, there is case law which suggests that—at least in the context of settlement agreements—an employee may be entitled to waive their rights on the basis of informed consent. The school cannot avail of this in its appeal. This is because it is common case that the teacher had not been informed that the contract of October 2015 would entail the loss of her acquired rights. Indeed, it appears that both the school and the teacher were labouring under the mistaken belief that the teacher did not have any acquired rights.

7. (The school principal had explained to the Labour Court that she had mistakenly thought that the teacher's employment for the school years 2013/2014 and 2014/2015 had been on the basis of "fixed term" contracts. In fact, there was no written contract in place for either year).

8. The reliance which the school seeks to place on the exception for fixed term contracts under section 2(2)(b) is misplaced. This exception requires a consideration of an employee's employment in the round, and the exception cannot apply where the employment had been on a permanent basis. Moreover, for the reasons explained at paragraph 60 *et seq*. below, the other requirements of section 2(2)(b) were not, in any event, satisfied by the contract of October 2015.

9. The school's appeal will, therefore, be dismissed.

PROCEDURAL HISTORY

10. Before turning to consider the substance of the statutory appeal, it is necessary first to say something about the procedural history whereby this appeal came on for hearing before the High Court. In particular, it is necessary to explain that this is, in fact, the second appeal to come before the High Court.

11. The contract of October 2015, the subject-matter of these proceedings, had a purported end date of 31 August 2016. The school did not renew the contract, and the teacher's employment terminated on 31 August 2016.

12. The teacher then submitted a complaint to the Workplace Relations Commission ("*WRC*"). The WRC Adjudication Officer rejected the complaint on the basis that the dismissal was excluded from the Unfair Dismissals Act under section 2(2)(b). The teacher appealed this decision to the Labour Court. The Labour Court made a determination in favour of the teacher, and made an order directing the school to re engage her in a teaching role from the commencement of the 2018/2019 school year. This determination is dated 22 November 2017. I will refer to this as "*the first determination*".

13. The school brought an appeal against the Labour Court's first determination to the High Court. The matter was duly heard by the

High Court (O'Regan J.), and, by reserved judgment dated 21 March 2018, the appeal was allowed. See *Board of Management of Malahide Community School v. Conaty (No. 1)* [2018] IEHC 144.

14. It seems from the judgment that the High Court took the view that the Labour Court's rationale was not evident from its determination. In particular, the High Court appears to have been concerned that there had been no express reference to section 13 of the Unfair Dismissals Act in the operative part of the first determination, and that the rationale for extending the case law in respect of "informed consent" from the context of settlement agreements to fixed term contracts had not been explained.

15. Rather than determine the points of law itself, the High Court instead remitted the matter to the Labour Court for reconsideration.

> "30. For the reasons above I cannot be satisfied that the correct principles of law were applied in the absence of:-
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> 1. an engagement with or consideration of the impact of s.2 (2)(b) on the circumstances before the labour court;
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> 2. some weighing in the balance of the provisions of s.2 (2)(b);
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> 3. an explanation of the perceived difference between exclusion and waiver identified by the labour court in its decision (see para. 19 and 20 (3) hereof) and why notwithstanding such difference the jurisprudence in respect of waiver was sufficient to address the critical/central issue between the parties.
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> In these circumstances, I am satisfied that it is appropriate to remit the matter to the labour court for reconsideration."

16. The Labour Court heard further submissions on the remitted appeal (but did not hear any further oral evidence) at a hearing on 12 June 2018. The Labour Court then issued its determination on 29 June 2018. The Labour Court again ruled in favour of the teacher. I will refer to this as "*the second determination*".

17. The (second) appeal to the High Court was instituted by way of an originating notice of motion dated 25 July 2018. On the same date, the school issued a separate motion seeking a stay on the implementation of the Labour Court's order directing the re engagement of the teacher. That application was refused by the High Court (Binchy J.) by order dated 30 July 2018. The substantive appeal subsequently came on for hearing on 9 May 2019.

18. There was some discussion at the hearing before me as to the implications of the High Court judgment on the first appeal. Counsel on behalf of the teacher submitted that certain issues had been determined conclusively by the High Court in its judgment of 21 March 2018, and that it was inappropriate for the school to seek to re-agitate these issues. It was said that these matters were *res judicata*. In particular, it was submitted that the High Court had made a finding that the Labour Court, in considering the previous employment history of the teacher as part of its first determination, had acted properly Reliance was placed in this regard on paragraphs 22 and 23 of the High Court judgment, and the reference to there having been "*no error of law*".

19. With respect, I think that this might be to read too much into the first High Court judgment. As noted above, the approach adopted by the High Court in March 2018 had been to remit the points of law to the Labour Court for further consideration in circumstances where O'Regan J. was not satisfied that the Labour Court's rationale was evident from its first determination. It does not appear to me that the judgment was intended to determine any of the points of law conclusively.

LABOUR COURT'S FINDINGS OF FACT

20. These originating notice of motion in these proceedings is headed up "In the matter of Section 46 of the Workplace Relations Commission Act 2015". Strictly speaking, however, it appears that the appeal is under section 10A of the Unfair Dismissals Act. Nothing turns on this distinction in that the form of appeal under the two sections is identical, i.e. an appeal on a point of law.

21. The parties to an appeal on a point of law will, generally, be bound by the findings of fact of the Labour Court. The High Court, on an appeal on a point of law, only has a very limited jurisdiction to look behind those findings of fact. See, for example, the judgment of the High Court (Noonan J.) in *Health Service Executive v. Doherty* [2015] IEHC 611, [29].

> "It is well settled that as a general rule, this court on appeal cannot revisit findings of fact made by the Labour Court, unless they can be shown to have been unsupported by any evidence or are irrational or unreasonable in the light of the evidence before the Labour Court."

22. See also the judgment of the Supreme Court in *National University of Ireland Cork v. Ahern* [2005] IESC 40; [2005] 2 I.R. 577, [9].

> "The respondents submit that the matters determined by the Labour Court were largely questions of fact and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by account by it in determining the facts, is clearly a question of law and can be considered on an appeal under s. 8(3)."

23. The first determination of the Labour Court contains a number of findings of fact which are at least potentially relevant to the application of the provisions of the Unfair Dismissals Act to the circumstances of the case. In particular, the Labour Court made findings of fact in respect of (i) the employment history of the teacher with the school prior to her signing the contract in October 2015; (ii) the school principal's understanding of the employment status of the teacher; and (iii) whether the teacher had been advised that, by entering into the contract, she would be relinquishing her acquired rights under the Act. The Labour Court subsequently relied upon these findings of fact for the purposes of reaching its second determination, i.e. the determination the subject-matter of this appeal.

24. One might have thought that the parties would accept that the appeal before the High Court must be determined by reference to these findings of fact. The parties would, of course, be entitled to make legal submissions to the High Court as to the interpretation and application of the statutory provisions to the factual circumstances as found by the Labour Court. For example, the school maintains that, as a matter of law, the previous employment history is largely irrelevant to the application of section 2(2)(b).

25. As it happens, however, the *status* of the findings of fact is in dispute. The school is sharply critical of the Labour Court for relying on the findings of fact from the first determination for the purposes of its second determination. The gravamen of the criticism seems to be that once the matter had been remitted to the Labour Court pursuant to the High Court order of 23 March 2018, the Labour Court should have conducted a *de novo* hearing before a differently constituted division of the Labour Court. This, presumably, would have entailed the hearing of oral evidence—again—from the teacher and the school principal. (Both had given evidence at the first hearing).

26. With respect, there is nothing in the High Court order of 23 March 2018 which necessitated such an approach on the part of the Labour Court. Had the High Court intended to be prescriptive as to the form of remittal, then this would have been specified in the order. Indeed, it appears from the written legal submissions filed on behalf of the teacher that the school may have canvassed the possibility of including in the order a direction that the remitted appeal should be heard by a different division of the Labour Court, but that the High Court had refused to make such an order, saying that this should instead be left to the discretion of the Labour Court. This narrative has not been challenged by the school.

27. In the absence of a particular procedure having been prescribed by the order of 23 March 2018, the Labour Court had some flexibility as to the procedure which it adopted, subject always to the overarching obligation that the procedure be fair. There is nothing in the approach adopted by the Labour Court on the resumed hearing which could be characterised as failing to comply with fair procedures. The parties were entitled to make detailed oral and written submissions on the legal issues which had been identified in the High Court judgment.

28. If and insofar as the criticism is predicated on an argument that the findings of fact in the first determination of the Labour Court had been implicitly set aside by the High Court in its first judgment, such an argument is untenable. It is clear from the judgment of 21 March 2018 that the decision of the High Court was to the effect that the Labour Court had not as yet properly engaged with the legal issues arising. There is nothing in the High Court judgment which suggests that the findings of fact were incorrect. Indeed, the only express reference in the judgment to findings of fact is to the effect that the Labour Court had not erred in its consideration of the prior employment history of the teacher.

29. At all events, it is clear from the case law cited by the High Court earlier in its judgment that the court was fully aware that findings of fact are not generally amenable to being set aside on a statutory appeal limited to points of law.

30. One of the curious features of the school's objection is that none of the facts are actually in dispute. The school had conceded at the first hearing before the Labour Court that the teacher had acquired rights under the Unfair Dismissals Act. This concession was, entirely properly, repeated at the second hearing before the Labour Court. Further, there is no suggestion that the evidence which the school principal had given at the first hearing was incorrect or mistaken. It seems to be accepted, therefore, that the teacher was not advised at the time of entry into the contract in October 2015 that she was relinquishing rights under the Act. Rather, the position adopted by the school is that there was no legal obligation to provide such advice.

31. In summary, therefore, the objection to the Labour Court having had regard to the findings of fact from its first determination is untenable.

32. I have set out the relevant extract of the Labour Court's first determination which records its findings of fact as an Appendix to this judgment.

APPROACH OF THE LABOUR COURT

33. The approach adopted by the Labour Court in its second determination was to address the interpretation and application of section 2(2)(b) first, before turning to a consideration of section 13.

34. The Labour Court interpreted section 2(2)(b) as involving an implicit requirement that a "fixed term" contract must clearly stipulate in writing what is being waived. On this interpretation, it was not sufficient on the facts of the present case for the contract simply to record that the Unfair Dismissals Act did not apply. Rather, the written terms of the contract should, it is said, have reflected the fact that the teacher was waiving her acquired rights to permanent employment. See page 8 of the second determination as follows.

> "Section 2(2)(b) essentially allows an employee who wishes to accept a temporary employment arrangement from an employer to waive his or her rights to protection under the Act. In a situation where an employee is giving up what would otherwise be very valuable employment protection rights it is essential that the agreement clearly stipulates in writing what is being waived and that the parties indicate, through their signature, express agreement to it. These conditions must therefore be fully and completely satisfied.
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> It is clear on the evidence adduced that at the time the Complainant signed the fixed-term contract in issue she was already employed by the Respondent on a permanent contract of employment and she enjoyed the full protection of the Act against unfair dismissal. The purported effect of the impugned contract was to alter her tenure in employment from permanency to a fixed term and to extinguish her acquired entitlement to avail of the protection that the Act provides."

35. The Labour Court went on then to conclude that the first decision had made a finding that the teacher had not been aware that she was signing away her rights as a permanent employee.

> "Furthermore, for the reasons outlined in Determination UDD1752, the Court is satisfied that the Complainant was not aware that she was signing away her protection rights under the Act in October 2015. Nor was she cosignant that her employment status was changing from that of a permanent employee to that of a temporary fixed-term employee. Consequently, it was clear to the Court that the conditions necessary to render s.2(2)(b) of the Act effective were not satisfied. On that basis the exclusion which permits the non-application of the Act did not apply to the termination of the Complainant's employment."

36. In summary, the Labour Court determined that section 2(2)(b) was inapplicable for the following three reasons: (i) there was an absence of informed consent on the part of the teacher; (ii) the reference to the possibility of the contract being renewed meant that the requirement that the termination date be capable of being ascertained was not met; and (iii) the Labour Court was not satisfied that the contract was a *bona fide* contract as the date of commencement had already passed at the time the contract was signed.

37. The analysis in the second determination of section 13 is brief. The Labour Court found that in seeking agreement from the

teacher to exclude or limit the application of the Act, the contract of October 2015 was in breach of section 13 and therefore void.

38. The Labour Court concluded that the teacher had been unfairly dismissed when her contract was not renewed on 1 September 2016, and ordered the school to re-engage the teacher from the commencement of the 2018/2019 school year.

POSITION OF THE SCHOOL

39. The originating notice of motion sets out some thirty grounds of appeal. However, at the opening of the appeal, leading counsel for the school, Mr Mark Connaughton, SC, very helpfully summarised the school's appeal under three broad headings as follows.

> (i) The Labour Court erred in its interpretation of section 2(2)(b) of the Unfair Dismissals Act. If a contract satisfies the conditions set forth under the section, then the contract is excluded from Act. The Labour Court erred in introducing an *additional* condition, namely a requirement for "informed consent".
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> (ii) The Labour Court erred in relying on section 13. Section 13 is concerned only with waivers and has no relevance to the exclusionary provisions under section 2.
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> (iii) The purported finding that the contract of October 2015 was not a *bona fide* fixed term contract is incorrect. The fact that the employment had commenced prior to the contract being signed did not affect its validity. The reference to the possibility of the contract being renewed was merely aspirational, and did not mean that the contract was not for a fixed term.

POSITION OF THE TEACHER

40. Leading counsel for the teacher, Ms Marguerite Bolger, SC, commenced her submission by putting the Unfair Dismissals Act into its proper context, making reference to principles of Irish Constitutional law and of EU law. Counsel cited the Protection of Employees (Fixed-Term Work) Act 2003 (which gives effect to Directive 1999/70/EC), and the principle of EU law that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and employees.

41. Counsel then conducted a careful analysis of the Unfair Dismissals Act. Section 13 applies where an employee has *existing* rights under the Act. Every attempt to exclude or limit *existing* rights under the Act falls to be considered under section 13. This is subject to waiver on the basis of "informed consent".

42. It was submitted that the approach adopted by the Labour Court is consistent with the case law in relation to waivers. Whereas this case law is concerned primarily with settlement agreements on the termination of employment, it is said that the same principles apply to a waiver of rights arising as a result of the entering into of a "fixed term" contract. Counsel placed particular reliance on the judgment of the Circuit Court (Judge Buckley) in *Hurley v. Royal Yacht Club* [1997] E.L.R. 225; and the judgment of the High Court (Smyth J.) in *Sunday Newspapers Ltd v. Kinsella* [2008] 19 E.L.R. 53.

DISCUSSION

SECTION 13

43. The starting point for the analysis of this appeal must be section 13 of the Unfair Dismissals Act. The section reads as follows.

> "13. A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of this Act) shall be void in so far as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act."

44. The section imposes a significant restraint on the principle of freedom of contract in the context of employment contracts. The general rule, i.e. that parties of full capacity are free to agree such contractual terms as they wish, is displaced. The restraint is drafted is very broad terms: any purported *exclusion or limitation* of the application of the Unfair Dismissals Act is void. The focus is on the "agreement" and its purported effect. The section has *retrospective* effect, i.e. its application extends even to contracts which had been entered into *prior* to the commencement of the Unfair Dismissals Act. All of this reflects the importance which the Oireachtas has attached to the statutory protections against unfair dismissal.

45. The relevant provisions of the contract of October 2015 read as follows.

> "The temporary contract will commence on 30 August 201* 8th October 2015 and will terminate of 31 August 2016 subject to satisfactory service during the probationary period. The temporary contract may be renewed for a continued period in the event that the allocated hours as specified above continue to be available and the demand for these subjects continues. A contract of indefinite duration will not arise (see Circular 34/2009), if this post is not viable within a reasonable period.
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> The provisions of the Unfair Dismissals Acts 1977-1993 or any amendment thereto shall not apply to a dismissal consisting only of the expiry of the said term without it being renewed."
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> **The date of 30 August 2015 has been scored through in the original, and the date of 8 October 2015 inserted in manuscript.*

46. It may assist in understanding the effect of section 13 on the contract of October 2015 to take a step back, and to consider briefly what the legal position would have been had the contract of October 2015 baldly stated that the Unfair Dismissals Act would not apply to the continued employment of the teacher. It is obvious that such a contractual clause would have been void. This is because the teacher had already acquired rights under the Act by dint of her having had more than one year's continuous service as a teacher at the school. A contractual clause which purported to extinguish those rights would fall foul of section 13. It would self-evidently purport to "exclude" or "limit" the application of the Act.

47. The fact that the actual wording of the contract of October 2015 uses language which appears to echo the waiver for "fixed term" contracts under section 2(2)(b) tends to obscure the purported effect of the contract. It is less immediately apparent that acquired statutory rights are being extinguished. Yet this is precisely the purported effect of the contract of October 2015: the teacher is being switched from a permanent contract to a fixed term contract, with the attendant loss of the protection against unfair dismissal. But for the offending provision of the contract of October 2015, the teacher would have retained her status as a

permanent employee entitled to the full protections of the Act. Therefore, the relevant provisions of the contract of October 2015 are void. An agreement which purports to deprive an employee of rights which they have already acquired under the Act can only be characterised as an agreement which purports to "exclude" or "limit" the application of the Act.

48. The proposition can be tested this way. Suppose that instead of echoing the language of the waiver under section 2(2)(b), the contract had stated as follows.

> "The Unfair Dismissals Acts shall not apply to the dismissal of the employee if, at the date of her dismissal, the employee has less than one year's continuous service with the school under this contract of employment. This is subject to section 2(4) of the Act."

49. This form of wording broadly reflects one of the exceptions provided for under section 2(1). It could not, however, be effective against the teacher precisely because she had already achieved more than one year's continuous service before the contract was entered into. If the school sought to argue that the period of employment should be reckoned from the 22 October 2015, such an argument would be rejected on the basis that it ignores the overall employment history. It would be unreal to treat the employment under the contract of October 2015 as a new employment. Put otherwise, the mere fact that the wording of a contractual provision appears to echo a statutory exception or waiver under section 2 is not proof against that contractual provision being voided under section 13. The contractual clause will be invalid if it does not reflect the true employment history.

IS WAIVER OF STATUTORY RIGHTS POSSIBLE?

50. On a literal interpretation, section 13 of the Unfair Dismissals Act would appear to preclude the possibility of an employee ever waiving their rights under the legislation. Such an inflexible rule could present difficulties in practice. This is especially so in the context of the settlement of claims for alleged unfair dismissal. An employer who is making a financial payment in accordance with a settlement agreement will wish to ensure that the agreement is in full and final settlement of all claims which the former employee may have arising out of the termination of their employment. A "full and final settlement" clause is standard in most types of settlement agreement, not just those in respect of employment law disputes. If the correct interpretation of section 13 is that a settlement agreement would be ineffective because it would involve the former employee waiving his or her statutory rights, then this would impact on the ability of parties to compromise claims for unfair dismissal. Rather than settle or compromise claims, the parties would have to pursue legal proceedings to conclusion. This would be so even in circumstances where the employee had the benefit of independent legal advice. This would be contrary to the public interest in that it might overwhelm the Labour Court, and would result in the incurring of unnecessary legal fees.

51. Precisely because of this practical difficulty, the courts have taken a pragmatic approach to the interpretation of section 13. Notwithstanding what appears to be the literal interpretation of section 13, the case law indicates that it is permissible for an employee to make an informed waiver of his or her statutory rights.

52. The Circuit Court (Judge Buckley) addressed the issue as follows in *Hurley v. Royal Yacht Club* [1997] 8 E.L.R. 225. On the facts of that case, an employee had entered into an agreement with his former employer accepting certain payments in full discharge of all claims against it. It seems that subsequently the employee sought to pursue proceedings before the Employment Appeals Tribunal. The issue before the Circuit Court was whether the agreement was void by reference to the provisions of section 13 of the Unfair Dismissals Act.

53. The Circuit Court accepted that, notwithstanding the literal meaning of section 13, it cannot have been the intention of the legislature to prevent employers and employees from compromising claims under the Unfair Dismissals Act. The Circuit Court went on to hold that, as with any consent by a person to waive a legal right, the consent must be an informed consent. The judgment goes on to suggest that in order for an agreement to be valid (i) the agreement must identify the employment protection legislation which is being waived, and (ii) the employee should have been advised in writing that he should take appropriate advice as to his rights.

> "I am satisfied that the applicant was entitled to be advised of his entitlements under the employment protection legislation and that any agreement or compromise should have listed the various Acts which were applicable, or at least made it clear that they had been taken into account by the applicant. I am also satisfied that the applicant should have been advised in writing that he should take appropriate advice as to his rights, which presumably in his case would have been legal advice. In the absence of such advice I find the agreement to be void. My finding that the agreement was void, should not be taken as an indication that the officers of the club behaved improperly, or that they- unfairly pressurised the applicant. I am satisfied that they genuinely believed it was in the interests of the club, once a decision to dismiss the applicant had been taken, to ensure a speedy agreed settlement with the applicant."

54. The principles set out by the Circuit Court in *Hurley v. Royal Yacht Club* appear to have been endorsed subsequently by High Court (Smyth J.) in *Sunday Newspapers Ltd v. Kinsella* [2008] 19 E.L.R. 53.

55. It appears that, as a matter of practice, these principles are applied on a regular basis by parties to employment law disputes. It also seems that the approach in both *Hurley* and *Sunday Newspapers Ltd* is followed by the Labour Court.

56. The approach had also been endorsed in the leading textbook on dismissal law, Ryan, Redmond on Dismissal Law (Bloomsbury, 3rd edition, 2018).

> "[25.54] Section 13 of the 1977 Act renders void any provision in an agreement, whether a contract of employment or not, and whether made before or after the commencement of the Act, to the extent that it purports to exclude or limit the application of, or is inconsistent with, any provision of the Act. This may be relevant where a settlement has been negotiated between an employer and employee. It will not apply, however, where the complainant has had independent advice. An agreement should be regarded as valid where it is entered into by a complainant with full knowledge of the legal position, where statutory entitlements are discussed in the negotiations leading up to the making of the agreement and the compromised settlement can be objectively described as adequate. Apart from a s 13 argument, a settlement arrived at on termination of employment may be the result of duress. If an employee feels that he or she has been forced to sign an agreement, he or she should make a contemporaneous note recording all relevant details."
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> *Footnotes omitted.

57. The principle underlying this case law, namely that a person cannot be taken to have waived a statutory right unless they make an informed decision to do so, would appear to apply equally to the advance waiver of rights under section 2(2)(b).

58. It is not, strictly speaking, necessary for the purposes of determining this appeal for this court to make a finding as to whether this line of case law is correct or not. This is because even if one accepts that it is, in principle, open to an employee, such as the teacher in this case, to waive her rights, it could only be done on the basis of informed consent. There was no informed consent on the part of the teacher. It is common case that the teacher in this case was not put on notice by the school that she was relinquishing her statutory rights. Indeed, it appears that at the time the contract was entered into in October 2015, both the school and the teacher were labouring under the misapprehension that she had not acquired a right to permanent employment under the Unfair Dismissals Act.

59. However, given the importance attached to this line of case law in the practice of the Labour Court, it would be remiss of this court not to raise any concerns which it might have as to correctness of same. Happily, I am in broad agreement with the approach taken in the case law. In particular, I agree that it is open in principle to an employee in the context of the settlement of proceedings for unfair dismissal to confirm that the agreement is in full and final settlement of all claims under the Unfair Dismissals Act. This is subject always to compliance with the requirements identified in *Hurley v. Royal Yacht Club.* Whereas a "full and final settlement" clause would appear to offend against the literal wording of section 13, I am satisfied that, on a purposive interpretation, it is open to employee to waive their right to pursue further proceedings under the Act if this waiver is given on the basis of "informed consent". I say this for two reasons. First, the public interest in ensuring that parties are able to resolve disputes without having to pursue legal proceedings to a conclusion is best advanced by this interpretation. Secondly, an agreement to accept a particular amount in full and final settlement of a claim for unfair dismissal, on the basis of informed consent, in a sense represents a vindication of the employee's rights under the legislation. The purpose of the legislation is to provide redress in the case of unfair dismissal. If an employee can obtain proper redress without having to pursue legal proceedings to their conclusion, such an outcome is not necessarily inconsistent with the purpose of the legislation.

SECTION 2(2)(b)

60. Section 2(2)(b) of the Unfair Dismissal Act provides as follows.

> "(2) Subject to subsection (2A), this Act shall not apply in relation to—
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> > (b) dismissal where the employment was under a contract of employment for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment) and the dismissal consisted only of the expiry of the term without its being renewed under the said contract or the cesser of the purpose and the contract is in writing, was signed by or on behalf of the employer and by the employee and provides that this Act shall not apply to a dismissal consisting only of the expiry or cesser aforesaid."

61. Section 2(2)(b) allows for the possibility of an employee, *at the commencement of their employment*, making an informed decision to waive their statutory rights. This waiver must be confirmed by the employee signing a written contract which states that the Unfair Dismissals Act shall not apply to a dismissal consisting only of the expiry of the fixed term. The provisions of subsection 2(2)(b) carve out an exception to the general rights under the Unfair Dismissals Act. As such, same fall to be interpreted strictly.

62. There seems to have been much debate between the parties both before the Labour Court and before the High Court on the first statutory appeal as to whether section 2(2)(b) should be characterised as involving an "exclusion" from the provisions of the Unfair Dismissals Act, or, alternatively, as involving a form of "waiver". I am satisfied that it should be characterised as a "waiver". This is because in order for the exception—to use a neutral term—to be effective, the contract must record the disapplication of the Unfair Dismissals Act, and the employee's agreement to same must be confirmed by their signing the written agreement. The exception is not, therefore, automatic, but rather necessitates an informed decision by the employee. Thus, the position can be distinguished from that in respect of the exclusions provided for under section 2(1) of the Act. These exclusions are triggered by the nature of the identity of the employee, e.g. a person in employment as a member of the Defence Forces, or a person who is employed by a close relative. The exclusions are thus automatic and are not contingent on some step on the part of the employee.

63. The relationship between section 2(2)(b) and section 13 can be summarised as follows. The former allows for the waiver, in advance of the commencement of employment, of rights which would otherwise have accrued under the Unfair Dismissals Act. The latter, by contrast, protects rights which have already been acquired.

64. The contract of October 2015 did not satisfy the requirements of section 2(2)(b) for the following reasons.

(i) Term of contract not certain

65. The first and most obvious respect in which the contract of October 2015 fails to satisfy the requirements of section 2(2)(b) is that the requirement that the contract be for a "fixed term" is not met. Leaving aside the provision made separately for a contract for a "specified purpose", which has not been relied upon in this case, the exception under subsection 2(2)(b) is only available where a contract of employment is for a "fixed term". This necessitates that the termination date of the contract must be ascertainable from the outset.

66. Whereas the contract of October 2015 has a nominal termination date of 31 August 2016, this is contingent on future events.

> "The temporary contract will commence on 30 August 2015* 8th October 2015 and will terminate of 31 August 2016 subject to satisfactory service during the probationary period. The temporary contract may be renewed for a continued period in the event that the allocated hours as specified above continue to be available and the demand for these subjects continues."
>
> *The date of 30 August 2015 has been scored through in the original, and the date of 8 October 2015 inserted in manuscript.

67. As appears, the contract may be renewed if certain objective conditions are met, i.e. the allocated hours continue to be available, and the demand for the two relevant subjects, namely English and Religion, continues. The fact that it could not be known at the time that the contract was entered into whether these contingencies would occur has the legal consequence that the contract cannot be regarded as being for a "fixed term".

68. The submission on behalf of the school that this clause of the contract is "aspirational" only, and should be disregarded for the purposes of determining whether the contract qualifies as a fixed term contract, cannot be accepted. The statutory requirements that the contract be in writing and signed by the employee emphasise the importance which the Oireachtas attaches to ensuring that an employee must be on notice of the legal effect of the contract. The language of a contract must be unequivocal in order to come

within the exemption. The reference to the contingency of the contract being renewed is not something which a reasonable person would discount as merely "aspirational", and, accordingly, of no legal effect.

69. There is a further difficulty with the contract. The contract was not signed until the *after* the nominated commencement date of 8 October 2015. (The teacher did not sign the contract until 22 October 2015). Section 2(2)(b) only allows for the possibility of an employee, *at the commencement of their employment*, making an informed decision to waive their statutory rights. This timing point is of crucial importance. A procedure whereby an employee might be requested to waive their rights during the course of employment would be open to the risk of abuse.

(ii) "Employment" not under fixed term contract

70. The exception under section 2(2)(b) only applies where the "employment" had been under a contract of employment for a fixed term. This requires an assessment of the contractual arrangements between the parties in the round. This approach to interpretation is consistent with the provisions in respect of consecutive fixed term contracts set out at section 2(2A). For example, where there has been a temporary break in employment (of less than three months), then it is the totality of the employment arrangements that are looked at.

71. Where, as in this case, there is a history of employment, then regard must be had to same in order to determine whether the "employment" is pursuant to a fixed term contract. On the facts of this case, the teacher's initial employment had been on the basis of a permanent contract. It cannot be said therefore that her "employment" was under a contract of employment for a fixed term. Rather, the "employment" is properly characterised as one under a permanent contract. Section 2(2)(b) is only available in the case of a first-time employment, or, perhaps, employment pursuant to series of fixed term contracts.

72. The school appears to say that it is only legitimate to have regard to the future employment of the employee. If this future employment is to be under a fixed term contract, then the employer is entitled to avail of the exception. On this interpretation, an employee who had been employed on a permanent basis for a number of years could be moved onto a fixed term contract with an immediate loss of their acquired rights. Such an interpretation would, self-evidently, be open to potential abuse. The approach contended for by the school is artificial, and would undermine the effectiveness of the legislation.

(iii) No informed consent

73. It is an express requirement of section 2(2)(b) that the contract be signed by the employee, and that the contract provide that the Unfair Dismissals Act shall not apply to a dismissal consisting only of the expiry of the fixed term. The purpose of these procedural requirements is, self-evidently, to ensure (i) that the employee is on notice that protections which would otherwise arise under the Act are being waived, (ii) that the employee's consent is confirmed by their signature. The principle of "informed consent" as set out in the judgements in *Hurley v. Royal Yacht Club and Sunday Newspapers Ltd. v. Kinsella* (discussed above) apply by analogy. A person can only be said to have waived a statutory right if they do so on an informed basis. If one assumes for the moment that—contrary to my finding under the previous headings—it is competent for an employee to waive their right of permanent employment by entering into a fixed term contract under section 2(2)(b), it is nevertheless necessary that that waiver be given on the basis of informed consent. There is an implicit obligation on an employer to put an employee on notice that the entering into of a particular contract will entail the loss of statutory rights previously acquired by the employee. A bald statement in the contract to the effect that the Unfair Dismissals Act does not apply to dismissal consisting only of the expiry of the fixed term would not be sufficient. Rather, the contract would have to include an express acknowledgement to the effect that the employee was relinquishing their acquired right to the protection of the Act. The formula of words used in the contract of October 2015 is deficient in this regard. It did not put the teacher on notice of the loss of her statutory rights.

74. Further, it is common case that the teacher was not informed verbally of the loss of her statutory rights. Indeed, both the teacher and the school appear to have been labouring under the misapprehension that the teacher had not acquired rights under the Act. The school principal had explained to the Labour Court that she had mistakenly thought that the teacher's employment for the school years 2013/2014 and 2014/2015 had been on the basis of "fixed term" contracts. In fact, there was *no written contract* in place for either year, and thus reliance could be placed on section 2(2)(b).

75. The signing by the teacher of the contract in October 2015 was not sufficient to waive her statutory rights in the absence of informed consent.

76. Alternatively, lest I be incorrect in my interpretation of section 2(2)(b), I am satisfied that, as a matter of contract law, an employer who requests an employee to agree to inferior terms and conditions, *which involve the loss of statutory rights*, is required to explain the precise legal effect of those changes to the employee. This implied term is part of the implied obligation of mutual trust and confidence between an employer and employee. It is also necessary to reflect the unequal bargaining power between an employer and employee.

Summary

77. In summary, a reasonable person reading the contract of October 2015 would not understand same as entailing the loss of statutory rights, nor, indeed, as being for a fixed term only.

PROPOSED ORDER

78. The appeal by the Appellant, the Board of Management of Malahide Community School, is dismissed. The determination of the Labour Court dated 29 June 2018, bearing the Reference "UDD1837", is affirmed.

APPENDIX: EXTRACT FROM LABOUR COURT'S FIRST DETERMINATION

> "Court's findings
>
> On the evidence it is clear that the Complainant's prior employment with the Respondent was under a permanent contract of employment. That was admitted on behalf of the Respondent in the course of the hearing of this appeal. Moreover, it is clear that the Complainant resumed working for the Respondent in August 2015. At that point her employment was not pursuant to a fixed-term contract and it was undoubtably permanent in nature. What is now contended for by the Respondent is that on or about 22nd October 2015, at which point the Complainant was employed on a permanent contract, she freely and knowingly entered into a contract to retrospectively alter the fundamental nature of her employment from that of permanence to fixed-term. It is further contended that, at a point at which she had the full protection of the Act, she intentionally agreed to forgo that protection.
>
> Having considered the submissions of both parties, the Court is of the view that as the Complainant was on a permanent

contract prior to signing the fixed-term contract, and indeed had already commenced a new school year on that basis at the end of August 2015, the change in employment status in October of that year is very significant and needs to be examined.

The Court must examine whether there was any discussion or consideration given to the Complainant relinquishing her employment status as a permanent employee and returning on less favourable terms in respect to tenure, thereby and placing her outside the protection of the Acts.

It is not disputed that this change in status was ever brought to her attention, indeed the Respondent themselves were not even aware of her employment status at the time and therefore were not in a position to ensure the Complainant gave informed consent. The Court is of the view that it is particularly significant that the position as advertised in September 2015 made no reference whatsoever to its fixed-term status and the Complainant's letter of application similarly makes no such reference, (both were presented to the Court at the hearing).

The Court cannot accept the Respondent's contention that she fully understood the nature of the contract or that she freely entered into it, knowing that it may not be renewed. In any event the contract states that *'the temporary nature may be renewed for a continued period in the event that the allocated hours as specified above continue to be available and the demand for these subjects continues'*. The subjects she was teaching were English and religion, it was within the bounds of possibility that the demand for such subjects was likely to continue. However, she was not successful and another teacher with shorter service was successful.

The Complainant told the Court that she did not have an opportunity to examine the contract and was simply presented with it and asked to sign it. On that basis it is difficult to see how the Complainant could have freely entered into such a contract having had full knowledge of its implications. Had she not signed the contract at the time her employment may have been in jeopardy. The Court accepts that evidence."