THE HIGH COURT

[2017 No. 393 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO S. 46(6) OF THE WORKPLACE RELATIONS COMMISSION ACT, 2015, AND 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 Ms. Justice O'Regan delivered on Wednesday the 21st day of March, 2018

Issues

1. The appellant's application is brought by way of notice of motion of the 22nd December 2017, pursuant to the provisions of O. 84C of the Rules of the Superior Courts and s. 46 of the Workplace Relations Commission Act, 2015, being an appeal, on a point of law, in respect of the labour court determination herein of the 22nd November 2017. The appellant seeks to have its appeal allowed and an order dismissing the claims of the respondent or in the alternative an order remitting the matters for reconsideration before the labour court.

2. There are sixteen enumerated grounds within the notice of motion, however at the hearing of the application before this Court, the 8th March, 2017, the appellant acknowledged that the basis of the appeal might be the subject matter of three separate grounds, namely: -

(i) The fixed term contract was valid and effective notwithstanding the contrary finding by the labour court.

(ii) The labour court was wrong to consider in the manner it did the prior contractual arrangement between the parties.

(iii) The jurisprudence on waiver of vested rights was inappropriately applied by the labour court including on the grounds that a far more careful analysis was required.

3. A statement of opposition bearing date 20th February, 2018 has been filed on the part of the respondent which essentially seeks to uphold the labour court decision and argue that there was no error of law.

Brief background

4. The respondent teacher began working for the appellant school in August 2013 without a written contract, this status continued for the school year of 2013/2014 and again from 2014 to 2015. The respondent continued under such arrangement until the commencement of the school year 2015 to 2016, however, attended an interview on the 2nd October, 2015 and was subsequently advised on the 7th October, 2015 that she was successful. On the 22nd October, 2015, she was furnished with a fixed term whole time teacher temporary contract to cover the period the 8th October, 2015 to the 31st August, 2016. This contract had been executed on the 20th October, 2015 by Patricia McDonagh, principal of the school, on behalf of the appellant. The respondent signed the contract on the 22nd October 2015.

5. The respondent attended a further interview to secure employment for the school year 2016 to 2017, however was unsuccessful as a consequence whereof the respondent maintained a claim that she was unfairly dismissed. The claim was resisted by the appellant on the basis that the unfair dismissal legislation did not apply by reason of s. 2 (2)(b) of the Unfair Dismissals Act, 1977. The appellant was successful in its argument before the adjudication officer who made a decision on the 24th May, 2017 and the within respondent subsequently appealed this decision by way of appeal on the 8th June, 2017. The labour court held a hearing in respect of the matter on the 25th October, 2017 and ultimately issued a decision on the 22nd November, 2017 when the labour court found that the exclusion provision in the fixed term contract (of the 20th October 2015) could not be relied upon to preclude the application of the Unfair Dismissals Act and therefore the respondent was unfairly dismissed when her contract was not renewed on the 1st September 2016.

Submissions of the parties

6. Both parties tendered written submissions which were supplemented by oral submissions before the court on the 8th March 2018.

7. As part of the respondent's submissions the respondent deals with the provisions of s. 13 of the 1977 Act to the effect that it is argued that s. 2 (2)(b) and s. 13 operate in perfect harmony provided that s. 2 (2)(b) is not sought to be used for the purpose of removing or extinguishing rights which have already been acquired. The respondent further argues that the jurisprudence on the waiver of such rights was properly applied.

8. Both parties accept that the relevant jurisprudence in respect of a waiver provision comprises: -

(i) *Hurley v. Royal Yacht Club* [1977] ELR 225 (a judgment of Buckley J. in the Circuit Court).

(ii) *Sunday Newspapers Limited v. Kinsella and Bradley* [2007] IEHC 324 (a judgment of Smyth J. in the High Court).

9. The respondent further argues that insofar as the appellant suggests that insufficient reasons were afforded by the labour court in arriving at its decision the claim before this Court is not a reasons based appeal and therefore this argument should be ignored.

10. The appellant counters the respondent's arguments aforesaid in particular in relation to the application of s. 13 of the 1977 Act or its interplay with s. 2 (2)(b) of that Act as the decision of the labour court was not based or did not refer to s. 13 of the 1977 Act at all. The appellant further argues that reasons, or a lack thereof, were incorporated within the claim of the appellant insofar as it was suggested that the labour court erred in law in determining that the jurisprudence generally governing the execution of waivers should be applied in relation to the interpretation and application of a statutory exclusory clause and further that the labour court erred in law in that it misdirected itself in law in relation to the meaning, affect and applicability of s. 2 (2)(b) of the 1977 Act.

11. Counsel for the respective parties helpfully agreed as to the application of the relevant jurisprudence to the hearing of the within matter including: -

(a) The appeal is confined to an appeal on a point of law

(b) The issue of curial deference to a professional body does not apply when dealing with the issue of whether the relevant body correctly applied the law.

(c) The court should be slow to interfere with the decisions of the instant type tribunal unless conclusions were based on an identifiable error of law or an unsustainable finding of fact – *Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34;

(d) The court should be slow to substitute its view for that of a specialist body – M. J. Gleeson Co. v Competition Authority [1999] 1 ILRM 401; Orange Ltd. v Director of Telecommunications [2000] 4 IR 136; Mulcahy v Minister for Justice and Waterford Leader Partnership Ltd. [2002] 13 ELR 12.

Relevant statutory provisions

12. The following provisions of the Unfair Dismissals Act, 1977 (As Amended) are relevant:

(1) Section 2 thereof contains several exceptions to the application of the Act including:

(a) Under s.2 (1)(a) an employee who is dismissed who at the date of his dismissal had less than one years continuous service with the employer who dismissed him;

(b) Section 2 (2)(b) excludes dismissal where the employment was under a contract of employment for a fixed term and the dismissal consisted only of the expiry of the term without its being renewed under the contract where such contract is in writing, signed by or on behalf of both the employer and employee and provides that the 1977 Act shall not apply to a dismissal consisting only of the expiry aforesaid

(2) Section 6 (1) provides that subject to the provisions of s.6 the dismissal of an employee shall be deemed, for the purposes of the Act, to be an unfair dismissal unless, having regard to all of the circumstances, there were substantial grounds justifying the dismissal;

(3) Section 13 of the Act provides that a provision in an agreement whether a contract of employment or not, shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provision of the Act.

Labour Court decision of the 22nd November, 2017

13. The impugned decision comprises a twelve page document the final page whereof deals with redress.

14. From p.1 to p.8 of the decision the background to the hearing is set forth together with the summary of each party's respective position.

15. In this regard the appellant argued that the dismissal was in accordance with s.2 (2)(b) of the 1977 Act and accordingly the provisions of the Act did not apply. It argued that the respondent fully understood the terms of the contract, was not a vulnerable person, freely entered into the contract and s.2 (2)(b) comprised an effective exception to the provisions of s.13 of the 1977 Act.

16. The respondent argued that the first time she saw the contract was the 22nd October, 2015 and there was no explanation as to the purpose and effect thereof. An argument was made that in or about an assessment of s.2 (2)(b) the entirety of the employment of the respondent should be taken into account and on that basis the s.2 (2)(b) exclusion should not apply. She argued that there was no proper consent for the effective waiver in the contract as per the jurisprudence of *Hurley* and *The Sunday Newspapers* aforesaid.

17. At page 8 of the decision under the heading of "discussion and decision of the court" it was indicated that the court was taking into account all written and verbal submissions (in this regard it had been noted by the court that neither respondent nor Ms. McDonagh at the time of execution of the contract in October 2015 was aware of the nature of the respondent's prior employment with the appellant or of the possible implications on the respondent in respect of any existing vested rights under the 1977 legislation by signing the contract).

18. Under the heading of "employment status" the court records that the appellant suggested that the respondent clearly abandoned her prior employment status on signing the fixed term contract and fully understood the contract which contained the necessary waiver.

19. At p.10 of the decision under the heading of "legal position" the meaning of a fixed term contract is discussed as is the need for full compliance with the provisions of s.2 (2)(b) which the court indicated was an exclusion rather than a waiver provision (other than reference to the party's respective submissions this is the only mention of s.2 (2)(b) in the decision).

20. In p.11 of the decision under the heading of "Courts Findings" the labour court found:

1. It could not accept that the respondent fully understood and freely entered into the contract of the 20th October, 2015.

2. The labour court accepted that if the respondent had not signed the fixed term contract her employment may have been in jeopardy.

3. The labour court indicated that the issue in the case could more properly be characterised as an exclusionary provision

rather than a waiver nevertheless the court accepted that the jurisprudence in respect of waiver should be applied in the circumstances.

4. The labour court found that the provision of the fixed term contract was ineffective where the import and implications on existing status was not explained nor advised to the respondent nor was she advised to secure independent legal advice.

5. The earlier contract should prevail where the earlier contract and the contract of the 20th October, 2015 were inconsistent.

21. Thereafter, the labour court indicated that based on the findings above the exclusion in the fixed term contract could not be relied upon to preclude the application of the Act and therefore the respondent was unfairly dismissed when her contract was not renewed on the 1st September, 2016.

Decision
22. I do not accept that there was any error of law on the part of the labour court in dealing with the totality of the matter rather than making an initial determination as to whether or not s.2 (2)(b) applied so that the labour court had no jurisdiction. No jurisprudence is raised on behalf of the appellant to suggest that once the reliance upon s.2 (2)(b) of the Act was raised by the appellant as a preliminary point the labour court was obliged to first consider this point in the absence of consideration of the entirety of the matter before the labour court.

23. Following on from the matters in the next proceeding paragraph, in my view, there was no error of law in the consideration of the respondent's prior employment status with the appellant prior to the execution of the contract of the 20th October, 2015. Although the appellant correctly complains that the labour court recorded erroneously, that by reason of the respondent's permanent employment status with the appellant prior to the execution of the contract of the 20th October, 2015 the continuity of her employment is not in dispute, this in my view is not sufficiently material to vitiate the decision of the labour court as p.11 of the decision under the heading of "Courts Findings" the court accepted that had the respondent not signed the contract her employment may have been in jeopardy.

24. Although the respondent's arguments as to the interplay between the various sections of the 1977 Act and in particular s.2 (2)(b) and s.13 may well be considered to be arguments well made as to the interplay between these sections nevertheless it is clear from a reading of the decision that the labour court, from p.10 onwards of the decision under the heading of "Courts Findings" did not refer at all to s.13, nor indeed did it specifically refer to s.2 (2)(b) accordingly such argument now made on behalf of the respondent can not be imputed into the decision of the labour court.

25. In *Donal Hurley v. Royal Yacht Club*, aforesaid, a decision of the Circuit Court of 1997 the court was dealing with an appeal from a determination of the Employment Appeals Tribunal which held that the claimant was precluded from pursuing proceedings before the Tribunal because he had signed an agreement accepting certain payments in full discharge of all claims against the respondent. The court held that it could not have been the intention of the legislature to prevent employers and employees from compromising claims under the Act and the doctrine of informed consent applied to contracting out provisions and to s.13. To this end the appellant was entitled to be advised of his entitlements and the agreement of compromise should have listed the various acts which were applicable or made it clear that they had been taken into account by the appellant and the appellant should have been advised in writing that he should take appropriate advice as to his rights. In the circumstances of that case the court found that the agreement was void.

26. The issue before the court in *Sunday Newspapers Ltd v. Steven Kinsella and Luke Bradley* was a severance agreement and whether employees under fixed term contracts were treated less favourably than comparable permanent employees. That matter came before Smyth J. in the High Court in October 2007. The decision of Buckley J. in *Hurley v. Royal Yacht Club* was open to Smyth J. Both parties accept that Smyth J. apparently accepted the views adopted by Buckley J. in *Hurley v. Royal Yacht Club.*

27. Significantly, in my view, neither of the judgments aforesaid dealt with s.2 (2)(b) of the 1977 Act (or any similar such statutory exception) which was clearly the cornerstone of the appellant's defence to the respondent's unfair dismissals application.

28. In the circumstances, it is not evident from the decision of the labour court of the 22nd November, 2017 as to how the jurisprudence aforesaid in respect of waiver provisions could be deemed to appropriately and comprehensively address the arguments raised by both parties as to the limited (from the respondent's point of view) or unlimited (from the appellant's point of view) application of the exclusion comprised in s.2 (2)(b).

29. Given that the appellants were relying upon a statutory exclusion provision in s.2 (2)(b) the limited jurisprudence on the application of waiver provisions in a contract which did not deal with in any manner whatsoever with the statutory exclusion provision of s.2 (2)(b) are not, on a stand alone basis, which was the position in the labour court's finding of the 22nd November, 2017, without further deliberation or comment as to the implications of s.2 (2)(b) capable of comprising a correct application of the law.

Conclusion
30. For the reasons above I cannot be satisfied that the correct principles of law were applied in the absence of :-

1. an engagement with or consideration of the impact of s.2 (2)(b) on the circumstances before the labour court;

2. some weighing in the balance of the provisions of s.2 (2)(b);

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.

In these circumstances, I am satisfied that it is appropriate to remit the matter to the labour court for reconsideration.