Neutral Citation Number: [2008] IEHC 357

THE HIGH COURT

2008 No. 1906 P

BETWEEN

PATRICK REILLY

PLAINTIFF

AND
DROGHEDA BOROUGH COUNCIL

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 19th day of November, 2008

The claim
1. In these proceedings, the primary reliefs sought by the plaintiff are:-

(1) a declaration that pursuant to a contract of employment made between him and the defendant in or about the month of October, 1980 his retirement age is 65; and

(2) an injunction restraining the defendant from retiring the plaintiff at any time earlier than his 65th birthday.

2. The contract to which the proceedings relate is a contract under which in October 1980, the plaintiff was appointed as a retained firefighter with Drogheda Fire Brigade, which was administered by the defendant. That was a part-time position. At the time, the plaintiff was already in the employment of the defendant on a permanent pensionable basis as a general operative. Subsequently, in 1985, he was appointed to the full-time post of driver on a permanent pensionable basis with the defendant and he continues in that employment. In due course, when he retires from his full-time permanent position, he will be paid a pension.

3. The plaintiff was appointed to the post of retained firefighter following an interview. By letter dated 21st October, 1980, he was informed of his appointment in accordance with conditions of employment and a list of duties attached to the letter, subject to completing a training course satisfactorily and to a probationary period of one year, each of which conditions he fulfilled. The conditions of employment stipulated that the post was part-time. His remuneration would comprise an annual retainer together with "fire fees", that is to say, fees paid when he was called for duty as a firefighter.

4. At the time of the plaintiff's appointment, the retirement age for retained firefighters in the employment of the defendant was 65 years of age. It was the plaintiff's evidence that at the interview, in the context of advising him that the post was non-pensionable, he was informed by a person conducting the interview, whom I assume was the chairman of the interview panel, that the appointment was to age 65.

5. These proceedings arise from the fact that when the plaintiff reached the age of 58 years on 9th March, 2008, the defendant regarded him as having reached his retirement age and his employment as a retained fire-fighter having terminated. To understand why the defendant considered that the plaintiff was obliged to retire when he attained the age of 58 years, it is necessary to consider the history of industrial relations over almost two decades, between 1985 and 2003, between the trade unions which represented the retained firefighters, on the one hand, and the body for the time being representing the employers of retained firemen, on the other hand. That body was formerly known as the Local Government Staff Negotiations Board and is now known as the Local Government Management Services Board (the Board), which is made up of representatives of the local authorities which act as fire authorities under the Fire Brigades Act 1940 (the Act of 1940) throughout the State, and the Department of the Environment.

Industrial Relations History
6. The early history of retained part-time firefighters is recorded in Labour Court Recommendation No. 9605 of 12th March, 1985 (the 1985 Recommendation), which was made in a dispute between the Board and the trade unions. Retained part-time fire brigades had been established by local authorities around the country in response to the Act of 1940. By the mid-1960s, when the workers recruited in the 1940s started to retire from the service, a scheme of *ex-gratia* payments had been introduced under which a retained firefighter would be paid a gratuity on his retirement, which was based on a multiple of the retaining fee payable to him for his last year of service. The claim before the Labour Court in 1985 was made by the trade unions on behalf of approximately 2,000 part-time firemen for an increase in the *ex-gratia* payment. What the Labour Court recommended was that an offer made by the Board be accepted. That offer, broadly speaking, involved two elements: the phased introduction of compulsory retirement at 55 years over a period of two years from 1st January, 1984, and the introduction of a revised *ex-gratia* payments scheme which, *inter alia*, increased the maximum gratuity to a sum equal to two and a half times the retainer fee for the last year of service from twice the retainer fee. The offer was rejected by the trade unions. Nonetheless, the evidence shows that the compulsory retirement at 55 years of age was introduced in certain local authority areas, apparently on foot of a Circular from the Department of the Environment to local authorities in December 1985 (per judgment of Flood J. in *Donegal County Council v. Porter and Ors.* referred to later). That Circular was not put in evidence. In any event, the retirement age of 55 years was not introduced by the defendant.

7. The next stage in the process was a further claim by the trade unions on behalf of the part-time retained firefighters, which was the subject of Labour Court Recommendation No. 12292 dated 23rd February, 1989 (the 1989 Recommendation). The Labour Court recommended that the maximum retirement gratuity be increased to three times the inclusive annual allowance with proportionate increase payable down the existing range of entitlements. The recommendation was accepted by the Board and the trade unions. As a result, the Department of the Environment issued Circular Letter EL5/89 dated 12th June, 1989, in which it was stated that each fire authority might, if it so desired, introduce a revised scheme of retirement gratuities with effect from 1st March, 1989, in accordance with the recommendation. The scheme provided that all retained fire service personnel should retire on reaching 55 years of age. Once again, the defendant did not introduce a retirement age of 55 years.

8. The evidence is that, following the 1985 Recommendation, 70% to 75% of the local authorities introduced a compulsory retirement age of 55 years and that the percentage was increased in consequence of the 1989 Recommendation. That led to the next claim by the trade unions on behalf of the retained firefighters, which was a claim for an increase in the retirement age and also an increase in the retirement annuity. That claim was the subject of Labour Court Recommendation No. 17223 dated 12th August, 2002 (the 2002 Recommendation) in which the Labour Court recommended that the Board and the trade unions establish an expert working group to carry out a review of the then current retirement age and that consideration of the retirement gratuity claim be deferred until the expert working group had reported. The trade unions did not accept the 2002 Recommendation and strike notice was served. However, the dispute was resolved in an agreement of 4th November, 2002 (the 2002 Collective Agreement) under which it was agreed between the Board, on the one hand, and the trade unions involved, SIPTU and ATGWU, on the other hand, that an expert

group would be appointed under the independent chairmanship of Ms. Janet Hughes to carry out a review of the retirement age for all grades of the retained fire service. The expert group, which, in addition to Ms. Hughes, was to comprise four members, was to report by 31st March, 2003. In addition, a trade union/management group was to be set up under the independent chairmanship of Ms. Hughes to consider the union's claim for an increase in the retirement gratuity. The findings of both groups were to be binding on the parties and to be accepted and implemented by both the Board and the trade unions. The agreement was expressed to constitute "a binding collective agreement between the parties".

9. The Report of the Expert Group was published on 16th April, 2003. It found as follows:-

> (1) The preferred retirement age for retained firefighters remained at 55, subject, however, to firefighters who were physically capable of working beyond the preferred age to have the option to continue working for a defined limited period subject to compulsory medical assessment measured against agreed standards.
>
> (2) The extended optional period would be to age 58.
>
> (3) As to the practical implementation of the foregoing, any firefighter who wished to exercise the option to remain in employment beyond the age of 55, would be required to inform his employer in writing of his intention, not later than six months before his birthday in each year from age 54 and, subject to being passed fit for duty at an occupational health test, he would remain in employment subject to completing the same process for each of the years of the extension period.
>
> (4) It was expressly stipulated that the foregoing terms would apply to all retained firefighters in all categories in the retained service in all local authorities "with the exception of those Retained Firefighters whose written contracts of employment specify a retirement age beyond age 55".

10. The second limb of the 2002 Collective Agreement, the trade unions' claim for an increase in the retirement gratuity, was dealt with in an Arbitration Report published by Ms. Hughes on 18th July, 2003. The Report followed an arbitration hearing between SIPTU and ATGWU, on the one hand, and the Board, on the other hand. The decision of Ms. Hughes was that the gratuity for the retained firefighters and related grades should be increased and that the increase should be limited to a multiple of 1: 8 years service with a maximum of four times the retainer as a gratuity.

11. The two Reports of 2003 were the subject of Circular Letter 19/03 dated 24th November, 2003, from the Department of the Environment, Heritage and Local Government to each local authority and each fire authority. The Circular stated that the findings in both Reports were binding on local authorities and on retained firefighters, but might be only implemented by those authorities where:-

> (a) the current Occupational Health Scheme for Retained Firefighters was fully in operation and,
>
> (b) all of the conditions attaching to the granting of an age extension beyond 55 outlined in the Report of the Expert Group have been fully complied with.

12. The Circular Letter stipulated that, "under no circumstances should any firefighter who does not have a written contract of employment with a higher retirement age be employed beyond age 58". The Circular Letter also gave guidance as to how the increased retirement gratuity was to be calculated.

13. At that juncture, late 2003, the defendant introduced the changes in relation to retirement age and the retirement gratuity in accordance with the Circular. No evidence was adduced by the defendant that in so doing it formally notified the retained firefighters affected by the changes.

14. It is necessary to consider now how that implementation impacted on the plaintiff.

Implementation of retirement age/retirement gratuity schemes in relation to the plaintiff

15. It was part of the plaintiff's case that he had never been informed that the retirement age for a retained firefighter in the service of the defendant was being reduced from age 65 years to age 55 with the option of an extension to age 58. He also contended that he never agreed to retire at age 58. Although he was a member of SIPTU, his evidence was that he never attended a union meeting in relation to the issue and he never voted on the issue. In cross-examination, his evidence was that he had not voted in the ballot on industrial action in 2002, which was subsequently withdrawn following the 2002 Collective Agreement.

16. What happened in the year leading up to the plaintiff's 55th birthday on 9th March, 2005, and in the succeeding three years was as follows:-

> (a) The plaintiff's evidence was that coming up to age 55, he was asked to do a medical and to fill in a form. The form in question was an undated letter addressed to the Senior Staff Officer of the defendant and signed by the plaintiff in which the plaintiff stated:-
>
> > "I wish to inform you that in six month's time, March 2005, I will reach the age of 55. As per the National Agreement, I wish to apply for an extension to the age of 58".
>
> The plaintiff was cross-examined about the reference to "an extension to age 58" in this letter. His evidence was that he was telephoned by a superior, Joe Lumsden, who told him he had to undergo a medical examination. As he understood it, it was a medical examination under the O.H.S. (Occupational Health Scheme), which all firefighters had to do. He thought the extension related to medical examinations. The undated letter was submitted by the plaintiff some time in September 2004.
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> (b) Before his 55th birthday, the plaintiff did a medical examination in January, 2005. For some reason, which was not an issue in the proceedings, he was called back for a further examination in July, 2005 and he passed that examination.
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> (c) He did not give six months notice prior to his 56th birthday. This was noted by Mr. Lumsden in May 2006, who submitted to his superiors that the plaintiff should be taken "off the run" with immediate effect and subsequently retired from the fire service. However, the plaintiff was scheduled to have another medical examination in July, 2006 and the decision was that, if he passed that medical test, which he did, he should remain in the service.

(d) By letter dated 11th September, 2006, approximately six months before his 57th birthday, the plaintiff informed the defendant that he wished "to apply for renewal of his contract as per agreement for retained firefighters who have a contract until 65 years of age". The plaintiff stated his date of birth. Some months later he was required to sign another letter. This was a letter dated 6th December, 2006, which was addressed to the Town Clerk of the defendant and which stated:-

> "I wish to inform you that I wish to exercise my option to remain in employment as a Retained Firefighter for a further year following my 57th birthday …"

(e) The plaintiff had a further medical examination on 18th May, 2007, following which he received a letter dated 25th May, 2007, which was sent on behalf of the defendant. In the letter, there was reference to his "recent Occupational Health Test" held on 18th May, and the fact that he had successfully passed the same. He was informed that he would be eligible to continue to serve as a retained firefighter until his fifty-eighth birthday. Under "the terms of the National Composite Agreement of 1999" and, in particular, "the agreed Occupational Health Scheme" he would retire on his 58th birthday, he was informed.

(f) At that stage, the plaintiff, through his solicitors, was already in correspondence with the defendant contending that his retirement age was 65. That correspondence opened with a letter dated 16th March, 2007, from the plaintiff's solicitors. The line taken on behalf of the defendant in subsequent correspondence was that, by virtue of the 2002 Collective Agreement, "all retained firefighters in all local authorities, with the exception of those retained firefighters whose written contracts of employment specified a retirement age beyond 55" were bound by the Report of the Expert Group. In a letter dated 19th November, 2007, to the plaintiff's solicitors, it was stated that, while the plaintiff might have had an expectation to remain in the service until age 65 on entry to the service, events in the intervening years had resulted in the dissolution of any such expectation. As the plaintiff did not advise at any time that he wished to be excluded from the 2002 Collective Agreement, he was covered by it and must retire on his 58th birthday.

(g) That approach was carried through in a letter of 7th February, 2008, in which the plaintiff was informed that he was required to retire from his position as a retained firefighter with the defendant on 10th March, 2008, and that a retirement gratuity based on his service was being calculated.

17. These proceedings were initiated by plenary summons which issued on 7th March, 2008. On the same day, the plaintiff was granted an interim injunction by this Court (Murphy J.) restraining the defendant from retiring the plaintiff. The interim injunction was subsequently discharged on the basis that the plenary hearing would be expedited.

The issues

18. In my view, the issues which fall to be decided by this Court on the pleadings and on the facts as proven are as follows:-

(1) Whether it was a term of the plaintiff's contract of retainer as a retained firefighter with the defendant, when he entered into it on October, 1980, that his retirement age would be 65?

(2) If it was, was the plaintiff bound by the outcome of the 2002 Collective Agreement and, consequently, the outcome of the Report of the Expert Group?

(3) If he was, did the plaintiff come within the exemption provided for in the Report of the Expert Group?

Term of Contract?

19. The defendant has not controverted the plaintiff's evidence that when he was appointed to the post of retained firefighter in October 1980, the then current retirement age for persons occupying that post was 65 years of age. Neither has the defendant controverted the plaintiff's evidence that he was told at the interview that the retirement age was 65 years, although the defendant sought to cast doubt on the plaintiff's recollection of an event 28 years ago when he was only 30 years of age. It was submitted on behalf of the defendant that, even if the plaintiff was so advised, that went no further than advising the plaintiff of the then prevailing retirement age which was capable of being changed and, in fact, has been changed. That submission cannot be correct, in my view. Further, it was submitted on behalf of the defendant, albeit not too forcibly, that, by analogy to the decision of the Supreme Court in *O Cearbhaill v. Bord Telecom Éireann* [1994] E.L.R. 54, the retirement age was not a condition of service in the individual contract between the defendant and the plaintiff. In my view, retirement age in a contract of employment, to which entitlement to continue in employment and pension rights or entitlement to a gratuity are linked, is not at all analogous to a term dealing with an employee's prospect of promotion, which was in issue in the *O Cearbhaill* case.

20. I find, as a fact, that when the plaintiff joined the retained fire service administered by the defendant in 1980, the retirement age of the category of retained firefighter which he joined was 65 years of age. Whether his recollection of the interview was accurate or not, the retirement age applicable to the post became a term of his service. The retirement age could only be varied by consensus and not unilaterally by the defendant. Flood J. reached the same conclusion in *Donegal County Council v. Porter and Ors.* (High Court, 23rd March, 1993, Unreported), which concerned claims by retained firefighters whom Donegal County Council purported to retire at age 55, which were brought under the Unfair Dismissals Act 1977.

21. I think it is important to emphasise that one of the conditions of employment stipulated in the attachment to the letter of 21st October, 1980, was that the appointee be free from "all defects or disease which would render him/her unsuitable to hold the post and be in a state of health such as would indicate a reasonable prospect of ability to render regular and efficient service". It was also stipulated that a candidate might be required to undergo a medical examination. The plaintiff has accepted that he is subject to the more formalised Occupational Health Scheme now in force.

Bound by 2002 Collective Agreement?

22. The leading authority on the effect of a collective agreement on an individual worker is a decision of the Supreme Court in *Goulding Chemicals v. Bolger* [1977] I.R. 211. That case arose out of the decision of the plaintiffs to close its chemical plant in Dublin where 345 people, who were represented by twelve trade unions, were employed. The plaintiffs reached agreement with the trade unions in regard to the manner of closure and the amounts of the redundancy payments which the plaintiffs were prepared to pay to their employees on termination of their contracts of service, which exceeded statutory redundancy payments. The majority of the members of each union supported the plaintiffs' proposals. The plaintiffs terminated the contracts of all employees in accordance with

the agreement and closed the Dublin plant. The defendants were former employees of the plaintiffs at the Dublin plant and they were members of an authorised union which had a negotiation licence. The defendants had always objected to the closure of the Dublin plant and refused to accept the redundancy payments offered to them. They picketed the Dublin plant without the authority of their trade union. In the context of the plaintiffs' action for an injunction to restrain the picketing, two issues were addressed, which, in my view, arise in this case. The first was whether the six-point proposal or statement from the plaintiffs, which was accepted by the unions, gave rise to a legally binding agreement. In his judgment, O' Higgins C.J., (at p. 231) stated that it "had all the appearances of being intended to create legal relations" between the unions and the plaintiffs. He continued:-

> "I would regard the agreement resulting from the acceptance of those proposals as being similar in effect to that dealt with in *Edwards v. Skyways Limited* [[1964] 1 W.L.R. 369] and, there being nothing to suggest the contrary, in my view a valid contract was thereby created between these unions and the plaintiffs".

23. However, that was not the crucial point. O'Higgins C.J. went on to identify the crucial point, the second issue, in the following passage:-

> "The plaintiffs' contention is that this valid enforceable agreement has the effect of binding the defendants who are all members of one of the unions involved. This submission must be considered in the light of the evidence, which was uncontradicted, that the defendants at all times opposed the conclusion of any agreement with regard to the closing of the plant and made it abundantly clear, both inside the union and to the plaintiffs, that they would not accept any agreement to this effect. I find it hard to accept that in such circumstances the defendants can be bound by an agreement which they have expressly repudiated and opposed. It seems to me that to hold them bound would be contrary to all principle. The only basis put forward for suggesting that they should be bound was that they did not resign and continued to be members of their union. The rules of the union were not put in evidence but I would find it very difficult to accept that the membership of an association like a union could bind all members individually in respect of union contracts merely because such had been made by the union".

24. The same two issues were considered by Kenny J. in his judgment. He also concluded that the six point agreement was intended to create legal relations and was intended to be a contract between the plaintiffs and the unions engaged in negotiations. He found that the six point statement and its acceptance created a valid and enforceable contract. However, he went on to state (at p. 237) as follows:-

> "The plaintiffs then argued that if the six-point statement and its acceptance by the unions created a contract the defendants, as members of the union, were bound by it because the majority of their co-members had accepted it. No authority to support this argument was cited and the rules of the union, which would show the authority of the majority, were not referred to or proved. I think that the contention is wrong in principle and that all reported cases on this matter are against it. Membership of a corporate body or of an association does not have the consequence that every agreement made by that corporate body or association binds every member of it. None of the defendants are parties to the agreement and as they consistently opposed it, no question of their being bound by acquiescence can arise. In addition, there is the negative evidence against the contention provided by a section in the Industrial Relations Act, 1946".

25. Kenny J. dealt with "the negative argument" at page 238, stating that the Oireachtas assumed in 1946 in enacting section 30(1) of the Act of 1946, that an employment agreement to which a trade union was a party did not bind the individual members of it. The provision in question provides that a registered employment agreement shall, so long as it continues to be registered, apply for the purposes of Section 30, to every worker of the class, type or group to which it is expressed to apply, and his employer, notwithstanding that such worker or employer is not a party to the agreement or would not, apart from subs. (1), be thereby bound.

26. Applying the principles set out in judgments of the Supreme Court to the situation which arises here, the first point to be noted is that it is common case that the 2002 Collective Agreement was not registered under the Act of 1946. Secondly, I have absolutely no doubt but that it created a binding contract between the Board and the two trade unions with which it was negotiated, SIPTU and ATGWU. It stated expressly that it constituted a binding collective agreement between the parties. The crucial question, however, is whether the plaintiff, as a member of one of the unions involved, was bound by the agreement.

27. This case is not as clear cut on the facts as the Goulding case, in which the defendants had at all times made it clear that they would not be bound by an agreement entered into by the unions. In this case, the plaintiff's evidence was that he did not engage in discussions with others about the retirement age issue and that, insofar as he was aware of the agreement, he did not think it involved him. It was only later, when he had a discussion with a firefighter from another station that he thought it might apply to him. He did not vote in the 2002 ballot. Aside from that, the evidence indicates that the matter, on which a ballot was taken in 2002, was the proposed industrial action. There was no evidence adduced that a ballot was taken in 2002 on the unions entering into the 2002 Collective Agreement on the basis that it would be binding on all of the relevant members of the union. Nor was evidence adduced that the members whom SIPTU represented in the negotiations with the Board, including the plaintiff, were given any notice of, or an opportunity to express a view on, the terms of the 2002 Collective Agreement. Moreover, as was the case in Goulding, no evidence has been put before the Court to show that under the Rules of SIPTU, the plaintiff could be bound by the 2002 Collective Agreement.

28. It is, perhaps, worth recording that the only evidence led by the defendant was the evidence of two witnesses. The first was Mr. Edward O'Connor, who has no connection with the defendant or Louth County Council but was a member of the Board, and gave very helpful evidence as to the history of the dealings between the Board and the trade unions at national level over the two decades prior to the Report of the Expert Group in 2003, of which he was a member. The second was Mr. Joseph McGuinness, who is the Director of Corporate Services of Louth County Council, which provides the human resources services for the defendant. He has only been involved in human resources issues in relation to the defendant's retained firefighters since 2004.

29. That leaves the question whether it can be inferred from the evidence that the plaintiff acquiesced in the agreement. The undated letter of September 2004, on its own, points towards acquiescence. The plaintiff's explanation of the reference to "an extension to age 58" was not wholly convincing. However, the correspondence which emanated from the defendant after the plaintiff's solicitors got involved suggests to me that there was very considerable confusion on the part of the defendant's administrators as to the source of the varied retirement age requirement, as the references to "the National Composite Agreement of 1999" and "the Occupational Health Scheme" indicate. In relation to the letter of September 2006, it was put to the plaintiff in cross-examination that he was "trying to have it both ways". What is clear from that letter is that the plaintiff was contending that he had a contract until age 65. In relation to the letter of 6th December, 2006, it was suggested by his counsel that the plaintiff signed that letter under "duress". Taking all of the relevant evidence into account, I do not think it would be proper to conclude that the plaintiff acquiesced in the 2002 Collective Agreement to the extent that he can be regarded as having agreed to the variation of his

retirement age from 65 to 55 with an option to extend to 58.

Exemption from Report of Expert Group?
30. As I have held that the plaintiff is not bound by the 2002 Collective Agreement it is, strictly speaking, not necessary to deal with the issue as to whether the plaintiff comes within the exempted category of retained firefighters to whom the Report of the Expert Group does not apply. However, as the point was argued I will deal with it. *Prima facie*, he does not, because his written contract of employment which is constituted by the letter of 21st October, 1980, does not "specify a retirement age beyond age 55".

31. It was submitted on the plaintiff's behalf that the provisions of section 9 of the Minimum Notice and Terms of Employment Act 1973 (the Act of 1973), which was in force when the plaintiff was appointed, applied to him. It was ultimately conceded on behalf of the defendant (properly, having regard to the decision of Kenny J. in *Limerick Health Authority v. Ryan* [1969] I.R. 194) that section 9 did apply to the plaintiff when he was appointed notwithstanding the part-time nature of his appointment. As I understand, the argument advanced on behalf of the plaintiff based on the Act of 1973, was that the defendant, as his employer, was obliged to furnish him with a written statement containing particulars of the terms of his employment, including his retirement age. The defendant was in breach of that statutory obligation. The defendant cannot rely on that breach in support of its contention that the plaintiff does not come within the exemption provided for in the Report of the Expert Group. In other words, as counsel for the defendant interpreted the plaintiff's argument, it was that he should be treated as having had a written contract of employment which specified a retirement age beyond 55 because of the alleged breach by the defendant of its statutory duty.

32. In my view, the plaintiff's argument based on an alleged failure of compliance with the Act of 1973 is misconceived. What section 9 of the Act of 1973 provided was that an employee might require his employer to furnish him with a written statement containing particulars in relation to certain matters stipulated in subs. (1) of section 9. Retirement age was not expressly stipulated in subs. (1), although at para. (e) "any terms or conditions relating to – (iii) pensions and pension schemes" were specified. Of course, in this case, the plaintiff's appointment as a retained firefighter was non-pensionable, as the plaintiff acknowledged he was aware. Sub-section (3) of section 9 required the employer to furnish a written statement to the employee within one month after it has been sought. Section 10 of the Act of 1973 rendered non-compliance with s. 9 an offence. In this case, there is no evidence that the plaintiff sought a written statement of the type specified in s. 9 while that provision was in force, so there is no evidence of a breach of section 9.

33. Sections 9 and 10 of the Act of 1973 were repealed by s. 13 of the Terms of Employment (Information) Act 1994 (the Act of 1994), which implemented Council Directive 91/533/EEC. The plaintiff's reliance on the Act of 1994 is also misconceived. Section 6 of the Act of 1994 related to existing contracts of employment, that is to say, contracts which had been entered into before the commencement of that Act. Where an employee under an existing contract sought a statement in writing containing particulars of the terms of the employee's employment in accordance with s. 3, the employer was obliged to furnish the statement within two months. However, there is no evidence that at any time after the coming into operation of the Act of 1994, the plaintiff requested a statement under s. 3 of that Act. Section 5 of the Act of 1994, which imposes an obligation on an employer to notify an employee of a change in any of the particulars of the statement furnished by the employer under, *inter alia*, section 6, has had no application to the plaintiff because he never invoked section 6.

34. In view of the conclusion I have reached that the Report of the Expert Group was not effective to vary the term of the plaintiff's contract of employment that he should retire at age 65, it is unnecessary to express any view on the acknowledged arbitrariness of the exemption and whether that is outweighed by the fact that it enables empirical objective verification of firefighters who came within the exemption, as counsel for the defendant submitted.

Order
35. The plaintiff is entitled to the primary reliefs claimed. However, in my view, the declaration and the injunction to be granted to the plaintiff should, by their terms, incorporate the condition as to the health and fitness of the plaintiff to fulfil the role of retained firefighter which was conditioned into the agreement of 21st October, 1980, and which the plaintiff acknowledges is now governed by the Occupational Health Scheme for Retained Firefighters. I will hear further submissions as to the precise terms of the declaration and the injunction to be granted.