THE HIGH COURT

[2006 No. 406 SP]

BETWEEN

SUNDAY NEWSPAPERS LIMITED

PLAINTIFF/APPELLANT

AND

STEPHEN KINSELLA AND LUKE BRADLEY

DEFENDANTS/RESPONDENTS

Judgment of Mr. Justice T.C. Smyth delivered on the 3rd day of October, 2007

This appeal comes before the Court pursuant to Section 15(6) of the Protection of Employees (Fixed-Term Work) Act, 2003 ("the 2003 Act"), which provides:

> "A party to proceedings before the Labour Court under this section may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive."

The background to the litigation is that on 25th October 2005 a Rights Commissioner heard complaints under the 2003 Act brought by the two Defendants ("the claimants"), both of whom are members of the Technical, Engineering and Electrical Union (T.E.E.U) ("the Union"). The Plaintiff company ("the company") submitted that both claimants had signed a severance agreement which, *inter alia*, stated as follows:-

> "Lump Sum
>
> This is in full and final settlement of any and all outstanding entitlements whether statutory or otherwise, e.g. Notice Pay, Collective Agreement Notice, Holidays, Statutory Redundancy, and any other discretionary payments/allowances. This is subject to the Parting Terms document."
>
> "Acknowledgement
>
> This agreement is based on any/all claims in relation to my employment with Sunday Newspapers Limited and/or Terenure Printers Limited, stated or as yet un-stated, being fully resolved (including, but not limited to all claims under the Unfair Dismissals Acts, the Minimum Notice and Terms of Employment Acts, the Protection of Employment Acts and the Redundancy Payments Acts and all or any employment legislation). I have read and understand the above agreement and by my signature below acknowledge and accept the terms in full and final settlement."

The Rights Commissioner having considered the submissions of the parties found that the claimants voluntarily, and with the benefit of the representation of their Union, accepted a severance package and signed a waiver that confirmed their acceptance of the terms "in full and final settlement" and accordingly, found against the claimants. That decision was appealed to the Labour Court pursuant to S.15 of the Act of 2003. The appeal was successful and it was determined that the complaints were well founded and that the claimants who had received €20,541.36 and €30,103.03 respectively on the signing in July 2006 "in full and final settlement of all claims and entitlements" were entitled to further monies of €27,752.08 and €40,483.85 respectively.

The decision of the Supreme Court in *Bates v- Medel Bakery Ltd* [1993]/IIR 359 in the context of an appeal from the Employment Appeals Tribunal under the Redundancy Payments Act, 1967 and of the High Court in *Ashford Castle Ltd v. Services Industrial Professional Technical Union* [2006]/ ELR 201 in the context of an appeal from the Labour Court under the Industrial Relations (Amendment) Act 2001 point to the desirability of the court expressly confining itself in its enquiries in an appeal on a point of law. These cases and *C & D Food Ltd. v. Cunnion* [1997] I.I.R, 147 and *O'Leary v. Minister for Transport* [1998] I.I.R, 558 and *Costal Line Container Terminal Ltd. v. Siptu* [2000] I.I.R 549 make it clear that it is not open to the High Court in its appellate function in the context of a determination on a point of law to seek to try anew or take into account facts put before the Court (in whatever procedural guise) which were not before the expert tribunal. However, the jurisdiction given to the Court by statute has been interpreted as including an entitlement to review the mixed questions of law and fact and in addition whether there was evidence to support any findings of fact made by the statutory body whose decision was under appeal (see *Mara (Inspector of Taxes) v. Hummingbird Ltd* [1982] 2 I.L.R.M 421 and *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1/1.R.34). In the course of his judgment in Denny's case Hamilton, C.J. said (at p.37/8) as follows:-

> "…the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based on an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected.".

More recently Gilligan, J, in *Electricity Supply Board v. Minister for Social, Community and Family Affairs* (The High Court: Unreported 26th February, 2006) observed:

> "Inferences of fact should not be disturbed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the court is satisfied that the conclusion arrived at adopts the wrong view of the law, then this conclusion should be set aside."

Much learned argument was put before the Court by counsel for the parties under ss. 6 and 12 of the 2003 Act. It is unnecessary to seek to resolve all the differences of interpretation of nice points of statute law. In the instant case there is as an undisputed fact, a written agreement signed by the parties on 13th July 2005. Section 12 of the 2003 Act provides:-

> "Save as expressly provided otherwise in this Act, a provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of the provision concerned of this Act) shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act."

The Labour Court noted that this provision is in similar terms in other employment rights statutes (e.g. s.13 of the Unfair Dismissals Act, 1977, s.11 of the Payment of Wages Act, 1991 and s.14 of the Protection of Employment (Part-time Work) Act, 2001. In *Hurley v. Royal Yacht Club* [1997] E.L.R. 225 Judge Buckley in the Circuit Court considered "under what circumstances can claims be legitimately compromised"? In the context of s.13 of the Unfair Dismissals Act, 1997, and stated:

> "In several areas of the law the Supreme Court has held that any consent by a person to waive a legal right which that

person has, must be an informed consent. This doctrine must surely apply to contracting out provisions and to section 13 in particular.".

(The judge then having reviewed various determinations of the Employment Appeals Tribunal) continued as follows:-

> "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 this had been taken into account by the employee. 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."

Mr Kerr, B.L, for the claimants accepted that the important aspect of advice was that it be, as stated by the Circuit Judge "appropriate advice". It is not imperative that it be professional legal advice in writing. In the instant case it is undisputed that at all material times prior to 13th July 2005 an issue existed between the parties as to whether the claimants (fixed term employees or workers) were being treated in a less favourable manner than comparable permanent employees of the company. While the status and skill of the relevant trade union officials representing the claimants differed such was not an issue of moment in the Labour Court determination.

Even if, as determined by the Labour Court, the form of agreement was of a stereotype and even if as determined

> "The claimants were called into the office and presented with the waiver and asked to sign it so as to obtain the payment which they had been offered. As a result of the advice which the claimants had obtained from the Department of Enterprise Trade and Employment, and the subsequent advice from their Union, they believed that they could not contract out of their rights and that any document which they signed would not prevent them from pursuing a claim under the Protection of Employees (Fixed-Term Work) Act, 2003."

altogether from any question of an absence of good faith and straight dealing, if such was the belief of the claimants, there is in point of law the difficulty that the Labour Court in an earlier part of its determination held (referring to the Defendants) "They were advised as to the provisions of the Protection of Employees (Fixed-Term Work) Act, 2003". If the claimants believed as determined by the Labour Court they could not credibly or at all sign "in full and final settlement". If the claimants or either of them signed the Severance Agreement in the form in which they did with the intention of taking further action in the matter - they so deceived the company (Appellant employer), that makes a sham and a mockery of seeking to conclusively resolve an employment dispute. In my judgment the Labour Court erred in law in allowing the claimants to consider as void the Severance Agreement because they mistakenly believed they had been advised that s.12 of the 2003 Act meant that the severance agreements would not preclude them from bringing claims pursuant to the 2003 Act. The section does not preclude severance agreements, settlement agreements or other compromises of claims or potential claims pursuant to employment legislation (*Talbot v. The Minister for Labour* (The High Court, Barron, J. Unreported 12th December, 1984); *PMPA Insurance Company Limited v. Keenan & Others* [1985] ILRM 173; *Minister for Labour v- O'Connor and Irish Dunlop Ltd*. (The High Court, Kenny, J. Unreported 6th March 1973).

It was submitted on behalf of the Claimants that the Court should follow the decision of the Supreme Court in *PMPA v- Keenan* [1985] ILRM 173, but in my judgment that case is clearly distinguishable from the instant case. In *Keenan's* case there was no evidence that the Defendant's claim was included in the settlement which covered their claims. In the instant case the very claim made subsequent to the Severance Agreement was in fact made before the Severance Agreement was arrived at and signed and its all claims provision clearly states such to be in the context of severally enumerated Acts and "all or any employment legislation".

I accept the submissions of Mr Connaughton, S.C., on behalf of the company that the decided cases indicate that a party may enter into an agreement in relation to his or her statutory rights and the question of whether or not such rights have been compromised is a matter for the proper construction of the agreement itself. In the instant case the agreement is expressly stated to be in full and final settlement and that means what it says. It says so in express terms referable to enumerated Acts and all or any employment legislation in respect of any and all outstanding entitlements whether statutory or otherwise stated or as yet unstated.

In the instant case there was some meaningful discussion and negotiation (which is not to be equated with interminable talks, documents and meetings) and professional advice of an appropriate character before the agreement was signed. The fact that the written document proffered for signature was prepared by one party for signature by another after discussion and negotiation however one might view such "negotiation" - which is "to confer for the purposes of an arrangement or some matter by mutual agreement or to discuss a matter with a view to a settlement or compromise" (per the Shorter Oxford English Dictionary) does not make the agreement void. In my judgment the instant case is clearly distinguishable from that of *Fitzgerald v. Pat the Baker* [1999] E.L.R 227 cited by Mr Kerr in support of his arguments under s.12 of the 2003 Act.

The submissions referable to s.6 of the 2003 Act may be summarised as follows:-

1. For the claimants

   (a) They had been in full time employment with the company from about March 2003. The company acknowledged that the claimants had two years permanent service (in the document setting out the details of the company's severance package). The package made to permanent employees provides for a minimum payment of one year's salary.

   (b) The 2003 Act provides that a fixed term employee should not, in respect of his conditions of employment, be treated in a less favourable manner to a comparable permanent employee.

   (c) The severance agreement signed in July 2005 was signed under duress and without the benefit of legal advice and the claimants were denied natural justice.

2. For the company

   (a) The claimants freely and voluntarily entered into the Severance agreement with appropriate advice after discussion or negotiation of the very issue subsequently raised before the Rights Commissioner, the Labour Court and this Court and no intimation was either conveyed to the Company or contained in the Severance Agreement of reservation of their position or without prejudice acceptance to bringing a further claim. The 'all claims' were clearly

referable to the claimants claim made before (now pursued) post signature of the Severance Agreement and no other and the facts are wholly distinguishable from those adverted to by Carroll, J. In the case of *PMPA v- Keenan*. Mr Oisin Quinn, B.L., in making the final reply for the company correctly drew the Court's attention to the fact that the Labour Court expressed no concluded view on a number of points (including adequacy of consideration) and made no finding as to duress.

(b) The payments made to the claimants did not constitute remuneration within the meaning of the 2003 Act. The payments that were made (including the enhanced amount of €5,000) were made in consideration of both claimants entering into severance agreements. They were made separate from and in complete distinction from the severance packages given to permanent employees. The company took the view that the totality of the loss that would be claimed by either claimant was their earnings until the expiration of their fixed term contracts. In response to the claim being made by reference to the 2003 Act in the discussions or negotiations, it is not ad rem from whom the suggestion of the figure may have come.

(c) If there is a difference in the treatment between the claimants and the permanent employees not due to retire within a year, such is permissible pursuant to s.6 (2) of the 2003 Act. It is clear that before the Labour Court the ground relied upon by the company was not simply that the claimants were fixed term employees (although they were such) but rather that their entitlement to work with the company was due to expire in a period of less than a year from the date of the closure of the plant. It was on that basis that the argument rested that it would be manifestly unreasonable for the claimants to be paid a lump sum for a period in excess of that.

(d) There was no legal basis for the Labour Court concluding that if the claimants made a claim (that in fact was never made because the circumstance never arose) that on the conclusion of the fixed term contract upon which they were engaged it was "satisfied that there is a high probability that whether by operation of Section 9 of the Act or otherwise, the claimants could have become entitled to a contract of indefinite duration".

Determination

1. In my judgment in law the "Parting Terms" document (being Appendix 1 in the Trade Union Submissions to the Labour Court) is not an acknowledgement that the claimants had two years permanent service. It is the whole or part of a stereotype document which was circulated to persons: The claimants did receive a copy of this document at some time. There is no sustainable credible evidence that those terms were offered to the claimants: What was offered to the claimants was that they would be retained in employment for the balance of their fixed-term contracts. The Parting Terms document contains a separate formula for permanent staff and another for casual staff. Each formula concludes as follows:-

> "In all cases, where the above formula, i.e. 1.1, 1.2 & 1.3 combined, does not amount to one year's gross basic salary only, a minimum all inclusive amount equivalent to one year's gross basic salary only will apply."
>
> [Note the word "only" does not occur in the formula conclusion referable to casual staff].

The conditions attached to the Parting Terms document provided (*inter alia*) the following:-

> "2.5 The combined gross amounts of clauses 1.1, 1.2 & 1.3 may not exceed, in any circumstances, the normal expected gross amount that otherwise may have been earned to age 65.
>
> 2.6 The company reserves the right to decide in all circumstances who may avail of parting terms, and at what time, regardless of offers, whether written or oral, being made to any individual.
>
> 2.7 The company reserves the right to withdraw or amend the parting terms without notice being given to any party."

As a matter of legal construction clause 2.5 is clearly designed to ensure ("in any circumstances") that a permanent employee who was due to retire in less than a year from the date of the announcement, would not 'earn' more as a result of the closure of the plant and the severance package being offered to permanent employees, than they would have earned had they simply continued to work in the plant until their normal retirement date.

It is this very approach that was taken by the company in its original separate and specific offers made to both claimants, i.e. that they would be offered an equivalent to pay that they would have earned had they continued until the expiry of their fixed term contracts.

In the decision of the Labour Court it is stated (in reference to clause 2.5) "manifestly this clause can have no application". "It is true that the clause is contained in the General Conditions and does not seek to address any specific category of employee it is a clause of general application and in my judgment as a matter of law includes all employees. There is no exclusion of any category of employee and therefore as a matter of law it does apply to the claimants. The provision limits the amount payable. It is not at all manifest to me on a true construction of the conditions that they can have no application to the claimants. The Labour Court was correct in stating "Patently the claimants are not seeking an amount in excess of their potential up to age 65". Sixty five was clearly the age at which permanent staff would cease to work with the company: for those on a fixed-term contract their ceasing to work with the company would occur by efflux ion of time irrespective of their age at or before 65. The argument in decision by the Labour Court under ss.6 (2) and 7 (1) of the 2003 Act is logical, on a point of law decision it is irrelevant as to whether factually I agree on what is stated. Regretfully on a mixed point of law and fact I am unable to agree with the conclusion drawn from the argument as correct. In my judgment there is "an unsustainable finding of fact" (as identified by Hamilton CJ in *Denny's* case) as to the requirements of the claimants.

2. In my judgment the claimants as fixed term employees were treated differently but in no less favourable a manner to a comparable employee. It was open to both the claimants and the company to put before the Labour Court such "comparables/comparators" as each wished that Court to consider it was then for that Court to consider and decide in the specific circumstances of the case which was the relevant genuine comparable. The Labour Court determined that -

> "The claimants are entitled to the same minimum payments under the Respondent's parting terms as were guaranteed to comparable employees."

As the entitlement found is related to the company's Parting Terms which are referable to comparable employees of the company then the appropriate comparable is such person or persons as were doing the same or like work as permanent employees, in the absence of

such person or persons then the appropriate comparable is the person or persons who were doing the same or like work who were not employees of the company.

In the specific circumstances of this case I hold that as a matter of law there is an error in the decision of the Labour Court, not that they considered the prime consideration was the nature of the work, but rather than the person or persons to be first considered as the appropriate comparable was to be first sought amongst the permanent employees failing such person, then only does one look elsewhere.

3. On the question of remuneration it was in my judgment open to the Labour Court as a matter of fact to construe the additional payment of €5,000 as remuneration relying on the judgment in *Barber v. Guardian Exchange Assurance* [1990] ECR [1889] paragraph 13, as a payment [not as contended for by the Company as enhanced consideration … on the claimants entering into severance agreements…]. By citing and relying on Barber's case the Labour Court accepted that the sum/sums…

> "… which is paid to him upon termination of the employment relationship, which makes it possible to facilitate his adjustment to the new circumstances resulting from the loss of his employment and which provides him with a source of income during the period in which he is seeking new employment."

Yet, the court notwithstanding having doubts as to whether the claimants would have willingly compromised such rights as they, post signing the Severance Agreements, alleged under the 2003 Act which they did not reserve from the Severance Agreement would do so for €5,000, failed to reach any concluded view on the point.

4. In reaching its decision on the question of the waiver there is no evidence in the decision of the Labour Court that it had examined the course of negotiations between the parties so as to ascertain what was intended, yet concluded they were fully satisfied that the claimants did not enter into a binding and enforceable agreement to settle their claim under the 2003 Act. This is not a supportable position in point of law.

In its submission to the Labour Court the claimant's Union stated:

> "This Union made representations to the company at the highest level and expressed the view that these members in question [the claimants] had the protection of the Protection of Employees (Fixed-Term Work) Act, 2003 and therefore were entitled to a minimum of one years gross salary, as contained in the Company's document entitled "Parting Terms" (Appendix 1). The company rebuked the Union on each occasion and stated that if we were unhappy with their decision we could take it elsewhere.
>
> In mid July 2005, each individual was asked to sign a document accepting what the company were offering, the alternative to signing was that they would not receive anything. Under duress, and without the benefit of legal advice, both members individually signed a severance agreement (Appendix 2 is a copy of one). This document, especially the section titled "acknowledgement" literally asks the individual to sign away all their rights under any employment legislation".

The inference drawn from primary facts but not the finding of facts themselves, may be, in point of law, disturbed on appeal. The issue that stalled the conclusion of the discussions was solely referable to their having fixed-term contracts and the rights they contended for under the 2003 Act. I accept as correct Mr. Connaughton's submission that the *PMPA v. Keenan* case is wholly distinguishable and inapplicable to the instant case. The Severance Agreement was in respect of all claims "stated and unstated" if as appears to have been inferentially accepted by the Labour Court the claimants "signed the form with the intention of taking further action in the matter" the conflict between what is signed up to in the Severance Agreement and the details of the claimant's case as set out in the letters of 1st October 2005 (which goes to the credibility of the witnesses and the integrity of reliable fact) was not analysed or determined.

One can have considerable sympathy with the Labour Court who clearly went to very considerable research and trouble in their finding but I am nonetheless unable to accept as sustainable their conclusion for the reasons hereinbefore referred to. Accordingly I uphold the appeal of the company.