Neutral Citation [2013] IEHC 173

THE HIGH COURT

2010/8048P

BETWEEN

EDWARD KINGSTON

Plaintiff

-and-

ACC BANK PLC

Defendant

Judgment of Ms. Justice Iseult O'Malley delivered the 19th March, 2013.

Introduction

1. This is a claim for specific performance of a severance agreement ("the agreement") entered into between the parties on the 6th July, 2009.

2. In 2009 the defendant bank embarked on a radical restructuring of its operations with a view to cutting its costs by 30%. As part of this process the plaintiff's position as Head of Strategy, Marketing and Communications was abolished and he was therefore made redundant. The terms upon which this took place are set out in the agreement. This dispute concerns the provision made in the agreement in relation to his pension entitlement.

The Agreement with the plaintiff

3. The plaintiff was born on the 21st May, 1961 and at the date of the agreement was forty-eight years old.

4. The severance agreement contains a number of standard provisions to be expected in a contract of this nature, relating to, for example, waiver by the plaintiff of any other claims or causes of action, the rights of the defendant in relation to items of property, confidentiality and so on. There are specific provisions in relation to the plaintiffs life cover, membership of the group VHI scheme and home loan and mortgage insurance.

5. By Clause 3.1 the defendant agreed to pay to the plaintiff the gross sum of €280,000 to include statutory redundancy plus a termination bonus of €125,000. The court was informed by counsel for the defendant that, as a matter of fact, the sum of €280,000 represents seven weeks pay per year of the plaintiff's service. The plaintiff contends that as this fact is not referred to in the agreement it cannot be taken into account by the court.

6. By clause 3.4 the plaintiff agreed to waive his entitlement to a tax free pension lump sum for the defendant's defined benefit pension scheme and his attaching AVC policy.

7. Clause 9.5 is headed "Severance Options" and reads as follows:

> *If employees of the Bank (who are defined benefit pension scheme members) are offered early pension or other benefits by way of individual or bank wide agreement over and above those which are offered to [the plaintiff] prior to his deferred pension commencing at age 60, and [sic] it is agreed that, those benefits will accrue to [the plaintiff]. For clarity, early pension means pension payable to any employee up to and including age 56. In those circumstances [the plaintiffs} pension will become payable from the date [the plaintiff] attains the relevant age. Relevant age being the age at which any other employee of the bank who is a defined benefit pension scheme member, is entitled to receive pension benefit up to and including age 56. The ACCBank HR records...and the records of any other pension administrators who may be appointed will be noted accordingly and the Bank will undertake to advise [the plaintiff] of any such offers as outlined above...*

8. Clause 10 is headed "Entire Understanding" and provides that

> *This Agreement contains the whole agreement between the parties hereto relating to the transactions provided for in this agreement and supersedes all previous agreements (if any) between such parties in respect of such matters and each of the parties to this Agreement acknowledges that in agreeing to enter into this Agreement it has not relied on any representations or warranties except those contained in this Agreement.*

9. Clause 11 records that the plaintiff acknowledged having taken legal advice on and understood the effect and implications of the agreement and every part thereof.

The offer made to other employees

10. As mentioned above, the plaintiff's redundancy was part of a wider cost-cutting exercise by the bank, which involved negotiations with the trade unions representing the wider workforce. These negotiations did not succeed at local level and ultimately the issue was referred to the Labour Court. On the 6thAugust, 2009, one month after the plaintiff had concluded his agreement with the bank, the Labour Court issued its recommendation.

11. The relevant part of the recommendation, under the heading "The Severance Package" reads as follows:

> • *Employees leaving the Bank under the terms of the restructuring scheme (other than by way of voluntary early retirement) should be paid eight weeks pay for each completed year of service (inclusive of statutory terms). This should be subject to a maximum of 156 weeks pay.*

• *Staff aged 55 years or more should have the option of an immediate non discounted pension plus a lump sum calculated on the basis of four weeks pay for every completed year of service (inclusive of statutory terms), uncapped.*

• *In either case the total amount of lump sum should not exceed the total potential earnings of the employee up to age 65.*

12. The recommendation, which also provided for the payment of a lump sum in respect of Towards 2016, was accepted by the defendant and the trade unions.

The offer made to the plaintiff
13. In accordance with the undertaking given in the agreement, the defendant's head of Human Resources wrote to the plaintiff on the 11th September, 2009 to inform him of the developments in relation to the Labour Court recommendation. At that time, the bank's view was that the plaintiff was entitled to an uplift in his severance amount to give him eight weeks pay per year plus the T2016 payment. It was considered that as he was aged under 55 there was no change in his pension entitlement. The plaintiff disagreed and argued that clause 9.5 meant that he would become entitled to pension at the same age and terms as offered to any other defined benefit scheme member.

14. The defendant has since shifted position somewhat and says that the plaintiff can choose between the options set out in the Labour Court recommendation - *either* eight weeks pay per year plus the T2016 payment *or* a non-discounted pension at age 55 plus four weeks pay per year. They say that they have given him this latter option while not conceding that he is necessarily entitled to it, on the basis that the Labour Court deal does not oblige them to offer it to anyone under 55.

15. The plaintiff contends that the pension issue cannot be linked to the lump sum in this way. He too seems to have changed his stance to a degree. In replies to the defendant's notice for particulars he claimed that he was entitled to eight weeks per year plus a pension at age 55. At the hearing and in his written submissions he has argued that the lump sum entitlement could not be affected one way or the other by the Labour Court recommendation, while maintaining his right to a pension at age 55.

16. It may be noted that the plaintiff was in fact sent a cheque, which he apparently lodged, representing the eight weeks per year calculation. However, the parties both say that this should not be taken as determinative of the issue. The case will, therefore, be decided on the basis that no option has been exercised by the plaintiff.

Submissions
17. The plaintiff's core argument is that he is entitled to an early pension in the event that any other employee is offered one at any point before his 60th birthday. He says that this entitlement does not depend on the terms upon which the offer is made to such other employee and that the defendant is attempting to rewrite the agreement by reference to the Labour Court recommendation. He argues that the amount of the termination payment provided in the agreement is not expressed to be calculated by reference to his pay and that the manner of calculation is therefore inadmissible as an aid to construction. There is no provision for a decrease in that payment in the event that the plaintiff was to be offered an early pension in accordance with clause 9.5.

18. It is contended on behalf of the plaintiff that the defendant was the dominant party in drafting the agreement and that if there is any ambiguity it should be construed *contra proferentem*. It is further argued that construction of the clause as permitting a variation or claw-back of any portion of the lump sum would not meet the business efficacy or officious bystander tests.

19. The defendant argues that the point of the clause was to allow the plaintiff to take advantage of any offer of an early pension made to other employees over and above the arrangement entered into by him. The agreement reached with employees aged 55 or over was that they could opt for either the first or second bullet point above, but not for both. The plaintiff is now seeking a benefit in excess of that offered to anyone else.

20. The defendant also denies the applicability of the *contra proferentem* rule as argued for by the plaintiff, since, it says, the drafting of this particular clause came from him.

Principles governing the construction of the agreement
21. The leading authority is the judgment of Geoghegan J. in the case of *Analog Devices B.V. v Zurich Insurance Company* [2005] 1 IR 274. At p. 280 *et seq*. he cites with approval the "*modern principles*" as set out by Lord Hoffman in *I.C.S. v West Bromwich B.S.* [1998] 1 W.L.R. 896 which are the following:

1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

2) The background was famously referred to by Lord Wilberforce as the "matrix of fact" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything that would have affected the way in which the language of the document would have been understood by a reasonable man.

3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see Mannai Ltd. v. Eagle Star Ass. Co. Ltd. [1997} A.C. 749.

5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the

law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in AntaiosCompania S.A. v. Salen A.B. [1985] A.C. 191,201.

> *'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'."*

Conclusions

22. Applying these principles to this case, the court should not consider the correspondence relating to the drafting of the agreement but I am of the view that a partial exception may arise in the particular circumstances of this case. I do not believe that an exclusionary rule may be utilised by a litigant to advance a proposition that is at variance with the true facts of the case. In this instance, that means that a party may not seek to set up a *contra proferentem* argument based on the allegedly dominant position of the other party if he in fact drafted, or was largely responsible for, the provision in question. Having regard to the content of the pre-agreement emails, that appears to have been the case here.

23. As regards the background circumstances, or "matrix of fact" surrounding the agreement, I am satisfied that the most salient fact is that the defendant was seeking the departure of a third of its workforce and was engaged in negotiations to that end. The plaintiff was aware of this and wished to ensure that he did not agree to something that would leave him at a comparative disadvantage when those negotiations were concluded. The point of the clause, therefore, is to ensure that if, at any time before he reaches the age of 60 (which would otherwise be the age at which he becomes entitled to a pension) an offer of an early pension is made to anyone else he will be given the same offer.

24. In my view the operation of the clause was indeed triggered by the offer of an early pension to employees aged 55 and over, since they were, as described in the clause, employees of the bank who were members of the scheme and who were "offered early pension by way of a bank wide agreement". The only relevance of the plaintiff's age in relation to this is that it will not be payable until he "attains the relevant age"; that is, when he reaches 55.

25. The plaintiff cannot get an earlier pension than that offered to others. Nor can he expect a better offer than anyone else - that is not provided for. The choice given to the other staff was between a lump sum of eight weeks per year or a pension at age 55 with a lump sum of four weeks per year. The latter is the offer to which the plaintiff is contractually entitled. Whether the court is entitled or not to know that the lump sum originally offered to the plaintiff represented seven weeks per year it is clear from the very existence of the dispute that the four weeks would be a diminution but, equally, that is in consideration of the early pension.

26. I do not consider that this interpretation falls foul of the officious bystander or business efficacy tests. In my view it fulfils the purpose for which the clause was inserted - it ensures that the plaintiff is not left at a disadvantage compared to other employees. There is nothing to suggest that it was intended that he could or should gain a benefit not offered to them. The plaintiff claims that this amounts to a "claw-back" of his lump sum but that is not necessarily so. If the plaintiff accepted the offer his choice would more properly be characterised as the forgoing of part of the lump sum in return for early pension. That is what was offered to the other employees.